Administration

SICKNESS BENEFIT—'LOSS OF INCOME'

New guidelines, issued by the DSS in July, have restricted the grant of sickness benefits to cases where the claimant can show (in the words of the Department) 'an *actual* loss of income . . . It is no longer possible to grant sickness benefit on the basis that there is a *potential* loss of income . . .'

According to the guidelines, this approach is demanded by s.108(1)(c) which lays down the qualifications for sickness benefit. An internal memorandum of the Department (reference 82/1696) reads:

> 3. A claimant for sickness benefit is required by paragraph 108(1)(c) of the Act to satisfy the Director-General that he has suffered a loss of salary, wages or other income and that the loss occurred as a result of a temporary incapacity for work caused by sickness or accident. Recent legal opinion indicates that there is no loss of income in terms of paragraph 108(1)(c) unless—
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> • the claimant was in receipt of such income at the time of or immediately before the sickness or accident (this can include casual or part-time earnings); or
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> • he would have received such income had the sickness or accident not occurred.
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> The mere possibility that, but for the sickness or accident the person may have obtained paid work or been granted unemployment benefit if he had lodged a claim, is not sufficient for the purposes of paragraph 108(1)(c). Situations in which loss of income may be accepted at the time of claim where a person was not in receipt of income when the sickness or accident occurred are dealt with later in this memorandum.
>
> **Rate of sickness benefit**
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> 4 Section 113 provides that the weekly rate of sickness benefit (including any supplementary allowance) payable to a person shall not exceed the rate of salary, wages or other income which, in the opinion of the Director-General, the person lost by reason of his incapacity for work. Legal opinion confirms that the upper limit will depend upon the facts of each particular case. Where benefit is being paid at a reduced rate, periodical adjustments may be made in recognition of wage increases which would have been paid, but for the incapacity—perhaps under an industrial award. Similarly, if the person had formerly received unemployment benefit, indexation increases in the rate of that benefit will constitute an additional loss of income which may result in increases in the rate of sickness benefit.

The memorandum goes on to offer examples of the application of this new approach:

• A person who becomes incapacitated for work and then claims and is refused unemployment benefit (because of that incapacity) should not be accepted for sickness benefit: para. 8.

• A student who, because of illness, 'gives up study and ceases to qualify for a TEAS allowance' cannot qualify for sickness benefit unless the student has also abandoned a part-time job: par. 9.

• A person, whose supporting parent's benefit has been cancelled (for example, on the person's child reaching the age of 16 years) and who then falls sick, cannot be paid sickness benefit unless that person had held a job or claimed unemployment benefit before falling sick: para. 13.

• A person who falls sick during the three month period in which invalid pension is continued after the pensioner is found to be no longer 85% permanently incapacitated for work, cannot qualify for sickness benefit: para. 13.

The memorandum points out that a person denied sickness benefit may, if that person's income is inadequate, be granted special benefit, at a rate equivalent to 'the appropriate rate of sickness benefit': paras. 16, 17.

[Comment: Starting with the last point, the memorandum fails to make the point that special benefit is less valuable than sickness benefit: special benefit does not include a supplementary rent allowance and the fringe benefits are less generous than those for sickness benefits.

Turning to the substance of the memorandum, it claims to be based on a legal opinion, the content of which has not been made public. However, it can be assumed that this opinion would focus on the definition of 'income' in s.106(1)—of income 'earned derived or received' rather than income which could possibly be 'earned derived or received'.

There are several responses to that type of argument:

(1) If the definition of 'income' in s.106(1) concentrates on income 'earned, derived or received', that definition only applies to (for example) s.108 'unless the contrary intention appears' in s.108. A contrary intention could be found in s.108(1)(c), by treating it as part of a piece of benevolent legislation and interpreting it in a way which provides access to income security.

(2) Even if that definition from s.106(1) does apply to s.108(1)(c), there is nothing to indicate that the loss of capacity or *potential* to earn or receive income is excluded from s.108(1)(c). It is clear that the applicant must 'suffer a loss of income'. But for most applicants, including those who qualify under memorandum 82/1696, there must be a degree of the hypothetical about the loss suffered: even the person, whose incapacity causes her to take six weeks leave without pay from her job, might (if she had stayed at work) have been laid off because of a downturn in production. That is, the loss of income must be, in large part, hypothetical or potential.

(3) The approach taken in the memorandum is in conflict with the AAT decision in *S. B.* (1981) 4 *SSR* 40, where a strong Tribunal (Todd, Prowse and McLelland) decided that a woman, who had fallen ill and become incapacitated for work while a full-time student, qualified for sickness benefit some four months after she fell ill because, by then, she had been obliged to give up her studies and would, but for the sickness, have tried to enter the workforce.

The AAT concluded that, when S. B. had finally been forced, because of illness, to give up her studies, she then could also be said to have 'suffered a loss of income' by reason of that illness. The Tribunal said:

> The position cannot of course be that, having become too sick to be a student, and being unable to enter the workforce either, her characterization as a person who 'has . . . suffered a loss of income through being incapacitated for work by reason of sickness' became indefinitely postponed. [para 13]

This view is directly contrary to the line pursued in memorandum 82/1696.]

[Postcript: Social Security Minister Chaney announced on 2 December 1982 that the *Social Services Act* will be amended to remove the restriction based on the 'loss of income' requirement. This legislation should be passed before the end of 1982. It is unlikely to be retrospective—that is, people denied sickness benefit since July 1982 must rely on the July policy being overturned (by the AAT, for example) in order to secure back-payment of sickness benefits.]

MAINTENANCE PROCEEDINGS BY WIDOW PENSIONERS AND SUPPORTING PARENT BENEFICIARIES

The DSS has 're-activated' the requirements, stated in ss.62(3) and 83 AAD of the *Social Security Act*, that claimants take 'reasonable' action to recover maintenance from the other parent of a dependent child before being granted a widow's pension or a supporting parent's benefit.

That requirement had not been enforced by the DSS since January 1976, when the *Family Law Act* came into operation. The 're-activation' of the requirement was apparently a political decision—it was announced as part of the Budget measures by Social Security Minister Chaney.

The new procedure: As from 18 August 1982, the circumstances of all new claimants for widow's pension or supporting parent's benefit will be assessed to see if the claimant is required to take maintenance action. The details of the new procedure are spelt out in a new chapter 29 of the *Pensions Manual*.

Maintenance action not required: That requirement will be regarded as already met if the claimant has already taken court proceedings: para 29.502.

Maintenance action will not be required if the other parent cannot be located; if there is legal advice that a court would be unlikely to order maintenance; if the other parent is a pensioner; or if the identity of the other parent is unknown: para. 29.503.

Undertaking to take maintenance action: Where the DSS decides that maintenance action is required, the claimant will be asked to sign a written undertaking that he or she will obtain legal advice on the prospects of court proceedings; seek voluntary payment of maintenance; or take court proceedings.

If this undertaking is not signed, payment of pension or benefit 'should be refused': para 29.505.

Review after three months: If no maintenance action has been taken within three months of the grant of pension or benefit, the grant is to be reviewed and cancelled unless the person has received legal advice that maintenance action would be futile or unless the other parent is not in a financial position to pay maintenance. The *Pensions Manual* explains how the financial position of the other parent is to be assessed:

29.509 Where the other person's estimated gross income exceeds the current maximum amount of pension which would be paid to that person (and any dependants he may currently have) if he were eligible for pension, together with the amount of permissible income applicable, as a general rule he will be regarded *prima facie* as being in a position to pay maintenance.

29.510 Thus a man living with another woman and supporting two children may be regarded as capable of paying maintenance if his income exceeds $190.10 per week (after 4 November 1982 the figure will be $210.00 per week). If his new 'wife', is in employment, the amount may be assessed on the basis of the standard rate of pension and permissible income together with amounts in respect of children.

29.511 It is emphasised that these limits are to be seen as no more than guidelines. Thus if a new 'wife's' earnings are strictly limited, it may be appropriate to have regard to a figure in between the suggested limits when determining whether it is responsible that action to obtain maintenance be taken.

Agreement to pay maintenance: A maintenance agreement between two parents is to be scrutinised by the DSS to see whether it meets the requirements of reasonable action to obtain maintenance (unless the agreement has been formally adopted by a court): para 29.513.

The Manual does not spell out the factors to be taken into account in this evaluation; but it does indicate that the value of benefits other than money payments (e.g. provision of a home) are to be taken into account: para. 29.514.

Continuing reviews: The Manual directs that a grant may be reviewed at any time if circumstances change—where the other parent has been located: para. 29.515; or where the other parent's financial circumstances have improved: para. 29.516.

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