

**Were there 'special circumstances'?**

As no claim had been lodged within the required period the question then was whether there were special circumstances allowing the period of lodgement to be extended, as set out in s.102(1)(a) of the Act. (The legislation is set out in *Geidans*, this issue.)

The AAT could find no special circumstances in this case. The fact that Coin had little time to check whether or not she was receiving the allowance due to

extra attention required by her child or that she had posted the claim did not constitute special circumstances.

**Reform**

The AAT commented once again on the narrowness of s.102 (see *Manzini* (1983) 14 SSR 138).

There is undoubtedly a need for a provision to restrict claims where a number of possible applicants are to be considered eligible for the payment of family allowance for a child, for example, where a child is cared for exclusively in the home of a person

other than its parent, or where a child spends periods of time in the care of different persons and/or institutions. It is however hard to see why the Act should be drawn so as to operate to restrict the payment of family allowance where the child has remained in a stable situation and there are not a number of competing claimants for the allowance.

(Reasons, para. 14)

**Formal decision**

The AAT affirmed the decision under review.

## Sickness benefit: recovery from compensation

**EVAGREW and DIRECTOR-GENERAL OF SOCIAL SECURITY**

(No. V83/80)

Decided: 28 October 1983 by J.O. Ballard, H.W. Garlick and H.E. Hallowes.

In February 1973, Christopher Evagrew was injured at work. He received worker's compensation payments until August 1974. In September 1973 he was involved in a motor car accident. This led to civil proceedings which resulted in him being awarded \$59,200 compensation in August 1979. He had been in receipt of sickness benefit since September 1973.

The DSS wrote to his solicitors in October 1974 advising them that under s.115 sickness benefit was recoverable after an award of damages and asking them to advise the Department of any award, and to the State Motor Car Insurance Commissioner advising of the *intention* by the DSS to recover 'the whole or some part' of sickness benefit paid in respect of the incapacity suffered in the car accident and also stating that a notice under s.115(6) specifying the amount would be sent in due course. No notice under this section was ever sent.

On 28 September 1979 the State Insurance Office sent to the DSS a cheque for \$14,394.43, this sum being the amount of sickness benefit paid to Evagrew. It appears that the DSS decided to retain \$7,908.57 as the amount re-

covered under s.115. The applicant applied to the AAT for review of the decision to retain this amount.

**The legislation**

As the relevant legislation was that at the time of the payment by way of compensation and at the time of the various decisions by the DSS the AAT could not take account of the 1979 amendments to the Act.

Section 115(1) then provided that the rate of sickness benefit payable to a person is to be reduced by the amount of compensation the person is receiving or entitled to receive, so long as the sickness benefit and the compensation cover the same period and the same incapacity.

If sickness benefit is paid without any deduction (where compensation comes after the payment of sickness benefit) the DSS may recover an amount equivalent to the overpaid sickness benefit under either sub-section (4) or sub-section (6).

Under sub-section (4), the DSS may recover the overpaid sickness benefit from the person who received the benefit and the compensation payment. Sub-section (4A) gives the Director-General a discretion to release the person from the liability created by sub-section (4) if the Director-General is satisfied that 'special circumstances exist'.

Under sub-section (6), the DSS can recover the overpaid sickness benefit from the person liable to pay compen-

sation to the sickness beneficiary.

**No authority to retain money**

The Tribunal took the view that as the applicant had not received a payment of compensation s.115(4) was inapplicable and therefore the discretion to waive recovery in s.115(4) could not be invoked.

However, no notice had been served on the insurer as required under s.115(6). This meant the DSS could not retain the money.

In the result [the DSS] has no authority to retain the monies lawfully awarded to the applicant pursuant to the judgment in the civil proceedings. On that basis the whole sum should be paid to the applicant as monies of his wrongly held by the respondent.

(Reasons, para. 15)

Even if Evagrew had received the compensation payment recovery should be waived, thought the AAT:

In our view special circumstances exist having regard, inter alia, to the high medical costs met by the applicant, his continuing need for medical treatment, his legal expenses and having regard to the period during which the applicant was paid no benefit and had to borrow to live.

(Reasons, para. 16)

**Formal decision**

The AAT set aside the decision under review and substituted a decision that the Director-General refund to the applicant the amount of \$7,908.57.

## Special benefit: overpayment

**WEINBERG and DIRECTOR-GENERAL OF SOCIAL SECURITY**

(No. V82/7)

Decided: 11 November 1983 by R. Balmford, H.W. Garlick and R.A. Sinclair.

The applicant applied to the AAT for review of a DSS decision to recover from her an overpayment of \$1,987.98 in special benefit.

**The facts**

Mrs Weinberg was granted special benefit from 19 January 1978. She was divorced with two young children. She claimed the benefit because she intended to take leave without pay from her job in December and January to look after her children.

However, she found someone to look after her children and returned to work.

The DSS commenced to send her payments of special benefit and, despite repeated attempts by the applicant to clarify the situation, did not discontinue payment. Finally the DSS made the demand for a refund.

**The legislation**

Section 124(1) of the *Social Security Act* then read:

The Director-General may, in his discretion, grant a special benefit under this Division to a person —

...  
(c) with respect to whom the Director-General is satisfied that, by reason of age, physical or mental disability or

domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

Section 130A read —

A beneficiary who —

(a) commences to engage in paid employment (including casual employment) with an employer;

...

shall, immediately upon so commencing to engage in paid employment ... notify a Registrar accordingly.

**Recovery of overpayment**

There was no issue of the DSS recovering the overpayment under s.140(1) as it did not arise from a false statement or declaration, failure or omission to comply

with the Act on Mrs Weinberg's part. However, she was in receipt of a part widow's pension at the time and so s.140(2) may apply.

The relevant parts of s.140(2) read:

... where, for any reason, an amount has been paid by way of pension, allowance, endowment or benefit which should not have been paid, and the person to whom that amount was paid is receiving, or entitled to receive, a pension, allowance or benefit under this Act . . . that amount may, if the Director-General in his discretion so determines, be deducted from that pension, allowance or benefit.

Having regard to s.124(1)(c) the benefit should not have been paid when Mrs

Weinberg returned to work. This gave the Director-General the opportunity to exercise his discretion in s.140(2) to deduct the amount from her widow's pension.

#### Exercise of discretion to recover

The Tribunal thought that the discretion should be exercised against recovery. *Buhagiar* (1981) 4 SSR 34, *Forbes* (1982) 5 SSR 50, *Gee* (1981) 2 SSR 11 and the Federal Court decision in *Hales* (1983) 13 SSR 136 were referred to by the AAT for the considerations relevant in the exercise of that discretion. In particular these decisions refer to the hardship caused to the applicant.

In this case the applicant had been inappropriately handled by the DSS. A DSS social worker told her to forget about the overpayment, she immediately told the DSS when she returned to work and had been told to stop annoying the Department when she queried the receipt by her of cheques

#### Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a recommendation that no further action for recovery be taken.

## Invalid pension: permanent incapacity for work

### PARKINSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. W82/64)

Decided: 28 July 1983 by J.O. Ballard, I.A. Wilkins and J.G. Billings.

The AAT affirmed a DSS refusal to grant an invalid pension to a 55-year-old man who suffered from back problems.

The Tribunal formed the view that while the applicant had some degree of incapacity (assessed at 25 and 30 per cent by two orthopaedic surgeons but at 85 per cent by a rehabilitation specialist) the true view of the case was one of 'an inability to exploit a capacity for work due to depressed job opportunities together with a lack of genuine interest in obtaining paid employment'.

(These factors, it was assumed, made up the difference between the assessments of the orthopaedic surgeons and the rehabilitation specialist.)

### YUCESAZ and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/260)

Decided: 20 June 1983 by I.R. Thompson.

The AAT set aside a DSS decision to cancel an invalid pension held by a woman who had migrated from Turkey in 1978.

The DSS had formed the view that she was totally incapacitated for work on arrival in Australia. Section 25 of the Act reads:

- (1) An invalid pension shall not be granted to a person -
- (b) . . . unless he became permanently incapacitated for work or permanently blind -
  - (i) while in Australia or during temporary absence from Australia.

The Tribunal accepted medical evidence that left no doubt that the applicant had diabetes, hypertension and ischaemic heart disease when she arrived in Australia. However, this did not preclude her from receiving invalid pension as her condition did not incapacitate her for work until some two to three years after her arrival.

### DRAGOJLOVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V82/48)

Decided: 3 August 1983 by J.O. Ballard.

The Tribunal affirmed a DSS decision to cancel the invalid pension of a 52-year-old former labourer who suffered from a 'bad back'.

The applicant refused to undergo an operation on his back. The Tribunal referred to *Razlic v Milingimbi Community Inc.* 38 ALR 424 for the principles applicable in assessing the reasonableness of such refusal. That case, said the AAT,

... is authority for the proposition that whether judged in the light of the medical advice given to the worker at the time and all the circumstances known to him and affecting him, his refusal was unreasonable.

(Reasons, para. 11)

The AAT concluded that in this case such refusal to undergo an operation was unreasonable. (The medical advice given to the applicant was that he would not be worse off, and it appeared that some improvement would be expected.)

The pension was thus refused under s.135M of the Act.

### BISHOP and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/186)

Decided: 25 July 1983 by E. Smith, L.G. Oxby and G.D. Grant.

The AAT set aside a DSS decision to cancel the invalid pension of a 44-year-old man who suffered from alcohol addiction and a cervical spine injury.

The only question, according to the Tribunal, was whether the incapacity was 'permanent'. The AAT referred to *Panke* (1981) 2 SSR 9 and *Tiknaz* (1982) 5 SSR 45 and concluded that on the balance of probabilities the incapacity was permanent within the principles of those cases.

When the applicant's long history of alcoholism is looked at in the cold light of reality, as distinct from optimism and hope, it is difficult to resist the conclusion that, regrettably, it is more probable than not that his efforts [at recovery] will not succeed except in the short run.

(Reasons, para. 21)

