Tribunal refused to follow the approach taken in *Teller* (1985) 25 *SSR* 298.

**'Moneys' or 'allowance'**

The AAT said that the restitution pensions received by Kolodziej and his wife could only be described as 'income' if they were 'moneys . . . received . . . by any means' or 'a periodic payment or benefit by way of . . . allowance'.

The word 'moneys' in the definition could have a very wide application, the AAT said. But that word was 'flanked by the words "personal earnings . . . valuable consideration or profits"'. It had to be read in its context. That context indicated that it referred to 'moneys, payable by way of reward or for some personal exertion or as consideration for some services rendered' as the AAT had decided in *Flanagan* (1984) 22 *SSR* 256 and *Artwinska* (1985) 24 *SSR* 287.

The word 'allowance' also took its meaning from the context in which it appeared and, as the AAT had said in *Artwinska* (above), it should be taken as referring to a payment to an employee for additional services rendered. It did not refer to a restitution or compensation payment, such as that received by Kolodziej and his wife under the West German *Federal Restitution Act*. The contrary decision of the AAT in *Teller* (above) was, this Tribunal said, incorrect.

Accordingly, the level of Kolodziej's invalid pension should be determined without regard to the restitution pensions being paid to him and his wife.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that none of the restitution pension paid to Kolodziej should be taken into account in determining his income for the purposes of his invalid pension entitlement.

# Sickness benefit: tertiary student

**O'CONNOR and SECRETARY TO DSS**
**(No. Q84/143)**

**Decided:** 14 June 1985 by J. R. Dwyer, W. A. Maria and H. M. Pavlin.

Bernard O'Connor was enrolled as a full-time tertiary student in 1983 and receiving a TEAS allowance of $40.75 a week and wages from part-time employment of $39.76 a week.

At the end of February 1983 he was obliged to give up his course and his employment because of illness and he was granted sickness benefit on 1 March 1983. Payment of this benefit continued until 29 April 1983, when O'Connor was granted unemployment benefit. Although O'Connor's TEAS allowance was cancelled from 1 April 1983, the DSS decided that the maximum amount of sickness benefit which could be paid was $39.76 a week.

O'Connor asked the AAT to review that decision.

**The legislation**

Section 108(1) of the *Social Security Act* provides that a person is qualified to receive sickness benefit if the person meets age and residence requirements and the requirements of para. (c), that is if the person—

> (i) satisfies the Secretary that throughout the relevant period he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered loss of salary, wages or other income . . .

(An alternative qualification is provided in sub-para. (ii), which was not relevant to the matter, the AAT concluded.)

Section 112 fixes the rate of sickness benefit to be paid to a beneficiary; and the maximum rate payable to O'Connor would have been $77.25 a week.

Section 113(a) provides that the rate of sickness benefit payable to a person who has qualified under s.108(1)(c)(i)—

> shall not exceed the rate of salary, wages or other income per week that, in the opinion of the Secretary, that person has lost by reason of his incapacity . . .

'Income' is defined in s.106(1) as meaning, unless the contrary intention appears—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

**'Income . . . lost'**

The AAT said that the TEAS allowance lost by O'Connor from 1 April 1983 should be included in the 'salary, wages or other income . . . lost by reason of his incapacity'. The argument put by the DSS, that 'income' in s.113(a) should be read as referring to a payment analogous to wages, should be rejected. The word 'income' should carry the meaning given to it by the definition section, s.106(1).

There was, in s.113, the AAT said, no indication of a contrary intention sufficient to displace the meaning given to 'income' in s.106(1). In coming to this conclusion, the AAT cast considerable doubt on the earlier Tribunal decision in *Wood* (1984) 18 *SSR* 185, where 'income' in s.108(1) and s.113(a) had been read as not including a training allowance paid under the NEAT scheme. The AAT suggested that there was an alternative basis for the decision in *Wood* and that that decision should not be regarded as establishing that the word 'income' in the various sickness benefit provisions had a narrower meaning than the statutory definition in s.106(1). The AAT supported its view as follows:

> 22. We are of the opinion that the interpretation of 'income' in sub-section 106(1) is that which should be used in sections 108 and 113. We note that if this was not so the very strange situation would be reached where the application of the definition of 'income' in s.106 which is the definition section for Part VII would be as follows:
>
> s.106 — definition section
> s.106A — not relevant
> s.107 — not relevant
> s.108 — narrower definition preferred
> s.109 — not relevant
> s.110 — repealed
> s.111 — repealed
> s.112 — not relevant
> s.112A — definition relevant for the purpose of reducing rate of supplementary allowance payable to a person
> s.113 — narrower definition preferred
> s.114 — definition relevant for purpose of applying income test
>
> Thus the statutory definition of 'income' in s.106(1) would apply only to two sections and only for the purpose of calculating the income of a beneficiary so as to reduce the rate at which benefit should be paid. In other cases where the wide statutory definition would have the effect of operating in favour of a beneficiary to show entitlement to the maximum rate of sickness benefit, a narrower definition would be preferred. We cannot believe that this is a correct interpretation of the Act.

**'Incapacity for work'**

Moreover, the AAT said, O'Connor should be treated as having lost his TEAS allowance 'by reason of his incapacity' within s.113(a). The incapacity referred to in that provision was the 'incapacity for work' referred to s.108(1)(c). And the reason why O'Connor had lost his TEAS allowance was that he was unable to continue in his enrolled course of study, that is, unable to undertake the work of that approved course.

The regulations dealing with payment of TEAS allowances provided that a student was qualified for the allowance while he undertook 'such work of his approved course' as amounted to the prescribed 'rate of work' for that course. The AAT noted that an earlier Tribunal decision, *Nelson* (1984) 19 *SSR* 203 had assumed that neither undergraduate study nor postgraduate research could be described as 'work' within s.108(1)(c). The AAT observed:

> The Tribunal there did not clearly explain why it decided that the applicant's research project could not be regarded as work. In fact the Tribunal adverted to the paucity of material before it on which it had to decide the issue. We regard the facts in the case before us as very different from those in *re Nelson*.

(Reasons, para. 30)

**Law reform**

The AAT then discussed the general question of the eligibility of tertiary students for sickness benefit once they had been forced to withdraw from a course because of illness. The AAT said that there were significant difficulties in applying the several provisions of the Act to these students; and these difficulties, combined with the fact that the various provisions had received different interpretations in several decisions of the AAT, indicated that there was a need for amendment of the *Social Security Act* to clarify the provisions.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that O'Connor was entitled to sickness benefit during the period under review at a rate which took account of his loss of wages and his loss of TEAS allowance.