Compensation payment: recovery of sickness benefits

VENABLES and SECRETARY TO DSS
(No.W87/223)
Decided: 6 May 1988 by R.D. Nicholson, J.G. Billings and P.A. Staer.

Venables was injured at work in March 1984 and was paid $8,859.88 sickness benefits by the DSS between July 1984 and August 1985.

In February 1987, Venables settled a common law action against his employer for $45 257. The DSS recovered the full amount of sickness benefits from the insurer involved in the claim, and Venables asked the AAT to review that recovery.

The legislation

At the time of the decision under review, s.115D of the *Social Security Act* [now replaced by s.155] authorised the Secretary to recover, from an insurer liable to make a compensation payment to a person for an incapacity for which the person had also received sickness benefit, an amount equivalent to the sickness benefit paid to that person.

Section 115E [see now s.156] authorised the Secretary to treat the whole or part of any payment by way of compensation as not having been made if the Secretary considered that 'in the special circumstances of the case' it was appropriate to do so.

The evidence

When Venables claimed sickness benefit, his wife completed a questionnaire, which recorded that a firm of solicitors, LS, was acting for Venables in relation to his claim for damages for his injury. However, neither Venables nor his wife had contacted those solicitors.

The DSS claimed to have written to Venables in August 1984 advising him that the sickness benefit might have to be refunded if he received compensation or damages. Both Venables and his wife denied that this letter had been received, and the DSS file had been lost between Perth and Canberra.

Also in August 1984, the respondent served notice on the insurer involved in Venables' claim that the Commonwealth might recover from the insurer the whole or part of the sickness benefit paid to Venables; and a copy of that notice was sent to the firm of solicitors, LS. The firm of solicitors advised the DSS that it had not been instructed by Venables and was not acting in the matter.

Up to the time when the action was settled, neither Venables' legal advisers nor the insurance company had raised with him the question of refunding of sickness benefits out of settlement. Within a few days, the DSS required the insurer to pay the amount of $8859.88 to it, which the insurer paid out of the settlement amount.

Venables had 4 children, and owed various debts, including a mortgage on his residence, amounting to $41 200. Venables' family income amounted to $329 a week and his estimated weekly expenses to $333.

The discretion to forego recovery

The AAT first rejected an argument by the DSS that the s.115E discretion could not be used in a case where the DSS had taken action to recover sickness benefits from an insurer, rather than the recipient of the sickness benefits. The sickness benefits recovered by the respondent comprised a fund from which adjustments could be made in favour of the applicant in the event that the respondent or the AAT was satisfied that the requirements of s.115E were met.

The AAT then decided that there were sufficient 'special circumstances' in the present case to justify an exercise of the s.115E discretion. The circumstances of the present case, the Tribunal said, made it 'unjust, unreasonable or inappropriate not to exercise the discretion' in s.115E. This was consistent with the approach in earlier AAT decisions, such as *Ivovic* 3 *SSR* (1981) 25; *Beadle* 20 *SSR* (1984) 210; *Fulcomer* 24 *SSR* (1985) 289.

The factors which supported the exercise of the discretion in s.115E included Venables' ignorance, at the time of the settlement of his compensation claim, that there was a prospect of the DSS recovering sickness benefit; the failure of the DSS to follow up the advice from the solicitors, that they had not been instructed to act for Venables; the financial hardship which recovery of the full amount of sickness benefit would impose on Venables; and the loss, by the DSS of its file.

Formal decision

The AAT set aside the decision under review and decided that the discretion in s.115E should be exercised so as to disregard that part of the compensation payment which would result in only half the sickness benefit being recovered by the DSS.

[P.H.]

Family allowance 'temporary absence'?

HELAS and SECRETARY TO DSS
(No. S87/20)
Decided: 30 March 1988 by J.A. Kiosoglous.

The AAT *affirmed* a DSS decision not to pay family allowance to Mrs Helas for her 2 children during the period 1974 to 1986, when the Helas family was absent from Australia.

The relevant section of the *Social Security Act* was s.104(1)(e) [now repealed] which preserved the entitlement to family allowance where a parent and child were 'temporarily absent from Australia'.

Mrs Helas migrated to Australia in 1966. She married in 1967 and two children, Maria and Vicky, were born in Australia. A third child, Spiros, was born later in Greece. In January 1971 Mrs and Mr Helas applied for Australian citizenship. However, on the day their interview was to be held illness prevented Mrs Helas attending, and only Mr Helas became an Australian citizen. A second application and interview for citizenship failed when Mrs Helas was prevented from attending because of her daughter's hospitalisation.

Vicky Helas was born with a cleft palate and difffculties with her vocal chords and teeth. Vicky had at least three operations in Australia before her parents took their first trip to Greece in April 1972. The reason for the trip was primarily for a holiday, but an underlying reason was to seek medical advice for Vicky.

The Greek doctors told them that the doctors in Australia should have done a better job in operating on Vicky. On this trip medical opinion only was sought, and no further treatment undertaken. The family returned to Australia in August 1972.

Between the date of the family's return to Australia and May 1974, Vicky had at least 2 more operations. The parents were not entirely satisfied with the results and began thinking of returning to Greece where it would be easier for them to communicate with the doctors.

The applicant and her husband sold the family home because, they said, they needed money to make the trip to Greece. They said they always intended returning to Australia. Some personal belongings were left with a family friend who gave evidence supporting the family. Vicky underwent 3