been given to her, and that suspension of her family allowance was supported by s.168(1) of the *Social Security Act*.

Formal decision

The AAT set aside the decision of the SSAT and reinstated the DSS decision that family allowance was not payable to Dossis from 28 December 1989 to 22 May 1990.

[P.H.]

Sickness benefit: backdating

SECRETARY TO DSS and DODSON
(No. A90/62)
Decided: 28 November 1990 by K.L. Beddoe.

The DSS asked the AAT to review a decision of the SSAT that Dodson be paid sickness benefit from 31 October 1989, being 4 weeks prior to the lodging of her claim for benefit.

The facts

On 14 October 1989 Dodson was injured by a horse on her property on the south coast of New South Wales. This resulted in fractures to her left leg. She was severely limited in her movement over the next month, staying first with her parents in Canberra for 2 weeks before returning to the home she shared with her spouse. She returned to Canberra for treatment in the middle of November. She was suffering considerable pain throughout this time.

Dodson had and contacted the DSS in Canberra City in the second half of October to request the claim form for sickness benefit. These forms were never received. When she returned to her home at the end of October she contacted the DSS office at Nowra to request the forms. When she did not receive them she contacted the Nowra office again and was told that she should contact the Bega office of the DSS.

An officer of the DSS at the Bega office undertook to send the forms and also explained to Dodson the time limits under s.125 of the Act. This occurred on or about 9 November 1989. The forms arrived after Dodson had returned to Canberra for treatment but her spouse took them to Canberra and they were completed on 18 November 1989. However, the necessary medical certificate was not obtained until 21 November and, although the form could have been lodged prior to that certificate being obtained, the forms were not lodged until 28 November 1989 with the DSS visiting service at Bateman's Bay. The 5-week period within which the forms should have been lodged under s.125 ended on 20 November 1989.

Of the failure to lodge the documents earlier the AAT commented:

> 'The evidence of [the officer of the DSS at Bega] established that although there is not a normal office of the DSS in Bateman's Bay there is a visiting service which attends Bateman's Bay each Tuesday and Wednesday, closing at 12 noon on Wednesday. The respondent and/or [her spouse] must have been aware of this visiting service because on Wednesday 22 November 1989 [her spouse] attempted to lodge the claim with the visiting service at Bateman's Bay. He failed to do so because the office had closed prior to his attendance. The reason he was late in attending is that he had driven the respondent in their truck from Canberra; the respondent was suffering severe pain because of the rough ride in the truck and he took her directly to [their home] without stopping at Bateman's Bay. Having driven the respondent to [their home], he then returned to Bateman's Bay for the purpose of lodging the claim only to find that the office was closed. It was sought to suggest to me that the office had in fact closed early on 22 November but there is no evidence before the Tribunal which would allow me to make any finding as to when the office closed or as to when [the spouse] in fact attended upon the office.'

(Reasons, p.5)

The AAT could only speculate as to why Dodson had failed to lodge her claim by 20 November or to post it to the Bega office before that date. It seemed, said the Tribunal, that parts of the DSS considered it necessary for claimants to deal with particular offices of the DSS on a geographical basis and that Dodson had accepted this view.

The legislation

Section 125(3) of the *Social Security Act* provides that sickness benefit is payable 7 days after the day on which the person became incapacitated where the claim is lodged within 5 weeks after the day on which the person became incapacitated. Section 125(4) provides that, where a claim for sickness benefit is not lodged within 5 weeks, the benefit is payable from the date of the lodging of the claim unless the sole or dominant cause of the failure to lodge is the person's incapacity. In those circumstances the benefit is payable from the date the Secretary considers reasonable in the circumstances, provided it is a date not earlier than 4 weeks before the date of the lodging of the claim.

Was delay in lodging due to incapacity?

The only issue in this case was whether the sole or dominant cause of the respondent's failure to lodge the claim for sickness benefit was her incapacity. The AAT said:

> 'The facts of this case reveal an unfortunate and avoidable breakdown in public administration in circumstances where the claimant was unable, due to her injury, to attend to her affairs and in particular to her claim for benefit. It seems to me to be most unfair that the respondent was required to make four telephone calls before she was fortunate enough to make contact with [the officer of the Bega DSS] . . . In a situation where the relevant claim forms are an essential prerequisite to the making of an application and, as I understand it, can only be obtained from an office of the DSS, the Department should endeavour to ensure that telephone requests for such forms are in fact met and are met punctually . . . It should be accepted without demur, that claimants are required to rely on the postal service by the sheer fact of their circumstances and they should not be prejudiced by excessive delay caused by bureaucratic inaction in meeting the most simple of requests to be provided with the necessary forms . . .'

(Reasons, p.6)

The Tribunal accepted that one of the reasons why Dodson could not obtain the forms was her inability, due to her incapacity, to attend the DSS office in person. However, while the AAT was prepared to find that the incapacity of the respondent was the sole or dominant cause of her failure to lodge the claim by 20 November, it was not prepared to come to the same conclusion for the period after that date. It appeared that the respondent was by that time frustrated by the inaction of the DSS and this might have led her to adopt 'a cavalier approach to the actual lodgment of the claim'.

Exercise of the discretion under s.125(4)

The AAT said that the discretion under s.125(4) could only be exercised if the sole or dominant cause of the failure to lodge the claim within 5 weeks of the date of incapacity was the incapacity. The failure of the DSS to supply the forms had therefore to be ignored as a relevant consideration. The Tribunal then concluded that the discretion could be exercised – it was clear that the incapacity of the respondent had prevented her from personally approaching the DSS office and that this was the dominant cause of her failure to lodge the claim in time.

In exercising the discretion, the AAT took account of the failure of the respondent to lodge the claim soon after 20 November. This unexplained delay of 1 week made it reasonable to commence payment of benefit 3 weeks before the day on which the claim was lodged.

Formal decision

The AAT set aside the decision under review and substituted a decision

that the respondent be paid sickness benefit from and including 7 November 1989.

[B.S.]

Family allowance supplement: backdating

HATCHER and SECRETARY TO DSS
(No. 6389)
Decided: 14 November 1990 by P.W. Johnston.

Jane Hatcher arrived in Australia from England in September 1988. On her arrival, she went with her husband to the DSS and applied for family allowance. She did not complete those parts of the form which related to 'income details for family allowance supplement'. She told the officer of the DSS that the family was in financial difficulties pending the arrival of finance from the United Kingdom. However, she later told the AAT, she was not told about the existence of family allowance supplement and advised to only complete those parts of the form that related to family allowance.

On learning of the existence of family allowance supplement in November 1989, Hatcher lodged a claim for it. She subsequently discovered that she could have claimed the supplement from the date of her arrival and in January 1990 she applied for backdating of the payment to the date of her arrival. She claimed that the misleading information had prevented her from making the claim.

The DSS refused to accept her claim for back payment and the SSAT subsequently affirmed this decision. Hatcher then asked the AAT to review the decision.

The legislation

Section 76 of the *Social Security Act* provides:

> 'Subject to this Part, where a claim by a person for an allowance is granted, the allowance shall be paid during the period starting on the day when the claim was lodged and ending on the next 31 December, and shall start to be paid from the first allowance pay day after the day before the day on which the claim was lodged.'

Section 158(1)(c) provides that the payment of the allowance 'shall not be made except upon the making of a claim for [the allowance]'.

Section 159(1) requires the claim to be in writing in accordance with a form approved by the Secretary and lodged with the DSS.

No payment prior to claim

The AAT referred to the decision of the Full Federal Court in *Formosa* (1988) 45 *SSR* 586, where in similar circumstances the lodging of a claim was regarded as a precondition for payment, and arrears prior to the date of the claim were not payable. This approach had been followed in *Fry* (1990) 56 *SSR* 753 and *Rockley* (1990) 58 *SSR* 787.

The AAT thus concluded:

> '... there is no legal basis on which the family allowance supplement can be paid in the present circumstances. This is so irrespective of what happened or did not happen when the applicant spoke to the respondent's officer on 8 September 1988. In this respect there is no difference between lodging a claim partly filled out, leaving the relevant part blank, and not lodging a claim form at all.'

(Reasons, p.3)

Claim for a payment 'similar in character'

The Tribunal also referred to s.159(5) of the Act, which allows a claim for a payment under the Act to be regarded as a claim for another payment which is 'similar in character' to that claimed. This is allowed in circumstances where a claim for the second type of payment might properly have been made.

In the present situation the AAT considered that s.159(5) could not apply. The Tribunal commented:

> 'In its terms, it [s.159(5)] could be read in an appropriate case to allow the respondent to characterise family allowance supplement as a benefit "similar to" family allowance. Whilst s.159(5) would normally be concerned with pensions and the like which are near alternatives, it could be read to include another benefit that is cumulative upon the other. Such a case might be where, for instance, in the body of the claim form relating to family allowance, some financial details were included that would advert the respondent to the fact that supplement is also being sought. In the present circumstances, however, there is nothing elsewhere in the claim form that could satisfactorily overcome the fact that part of the claim form relating to family allowance supplement is entirely blank. That part clearly relates to what is a distinct and discrete claim, and failure to fill in any part of it must be treated as a failure to make the claim as required by s.159 of the Act.'

(Reasons, p.5)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Assets test: mortgage over NZ property

SECRETARY TO DSS and ROBINSON
(No. W90/107)
Decided: 14 December 1990 by T.E. Barnett.

This was an application by the DSS for review of a decision of the SSAT which determined that the value of Paul Robinson's property in New Zealand should not be included as property for the purposes of determining his entitlements to a rehabilitation allowance under the assets test.

The facts

Robinson was the beneficiary under his father's will of a third share of a farm in New Zealand. His father had died in 1982. It was a term of the will that Robinson's brother had 6 months after the death of the father to exercise an option to buy out the shares of Robinson and his sister.

To facilitate the purchase by the brother of the total interest in the farm, the father's will provided that the trustees of the father's estate could advance loans to the respondent's brother out of the share of the estate belonging to the respondent and his sister.

Within 6 months of the father's death, Robinson's brother exercised this option and executed a second mortgage over the property to the trustees to secure the loan advanced from the share of the estate beneficially belonging to the respondent and his sister. The terms of the mortgage provided that repayment was postponed for 10 years, i.e. until 1992.

Robinson's brother ran into financial difficulty and in 1986 had to refinance. This involved, *inter alia*, discharging the mortgage to the trustees and executing a new mortgage directly to Robinson and his sister. This mortgage was executed on 19 April 1987. This mortgage was redeemable on 1 June 1992.

In 1988 Robinson and his sister made a gift to their brother by way of forgiving part of the debts secured by their mortgages.

Robinson commenced receiving the rehabilitation allowance on a date not stated in the AAT's Reasons. The issue arose as to whether the value of Robinson's share in the mortgage over the New Zealand farm should be included in his assets for assets testing purposes and, if so, what was the ap-