

SOCIAL SECURITY

Reporter

Number 1 June 1981

Administrative Appeals Tribunal decisions

Widow's pension: cohabitation

WATERFORD and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. N80/87)

Decided: 23 December 1980 by R. K. Todd, L. G. Oxby and M. S. McLelland.

On 17 June 1978, Doris Waterford separated from her husband. The circumstances of the separation could be described as 'constructive desertion' by the husband (an idea developed in family law to describe the situation where one party to a marriage makes life so intolerable for the other party that the other party leaves the marriage home: in that situation, the first party is said to have 'constructively deserted' the second party).

At the time, the husband was being paid an invalid pension and Waterford was being paid a wife's pension.

In December 1978, Waterford applied to an office of the Department of Social Security (DSS) for a widow's pension. (She had been deserted or, at least, 'constructively deserted' by her husband on 17 June 1978; and, accordingly, would have become eligible for a widow's pension on the expiry of six months: old s.59(1) *Social Services Act*).

On tendering a completed application form, Waterford was told (she later testified) 'to take the form home with me and there would be someone call on me and I was to hand it to him'. In July 1979, Waterford wrote to the DSS in the following terms:

I came to you in December to apply for a deserted wife's pension and to cancel the pension I was getting [wife's pension], you told me you would send someone to see me, which you haven't done.

I have written to you twice since then but have had no reply.

Would you please do something for me.

She enclosed the application form (first tendered to the DSS in December 1978) with this letter. The form was marked by

DSS as having been received on 3 July 1979.

On 30 August 1979 the DSS decided to reject the claim for a widow's pension presumably because the DSS believed she was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him' and so excluded from the definition of 'widow' in s.59(1) of the *Social Services Act*:

'widow' includes—
(b) a deserted wife;

* * * * *

but does not include a woman who is living with a man as his wife on a *bona fide* domestic basis although not legally married to him.

Waterford appealed to a Social Security Appeals Tribunal (SSAT) which recommended that the appeal be upheld. However, the Director-General of Social Services did not accept that recommendation and confirmed the earlier rejection of her claim for widow's pension. She then applied to the Administrative Appeals Tribunal (AAT) for a review of the Director-General's decision. (The Reasons for Decision do not identify the dates of any of these events.)

Two issues

Before the AAT two issues were raised. Firstly, was Waterford disqualified from receiving a widow's pension because she was living with a man as his wife on a *bona fide* domestic basis, although not married (the cohabitation issue) to him? Secondly, from what date should her qualification for a widow's pension run—from December 1978 or July 1979 (assuming that she was found not to be disqualified)?

It was accepted that Waterford could properly be regarded as a deserted wife within the definition of 'widow' in s.59(1): Reasons for Decision, para. 14.

The evidence on the cohabitation issue

The evidence before the AAT came from two sources: the applicant gave evidence on



oath at the hearing of her appeal; and the AAT had before it the DSS file which included reports by a field officer and written statements by several people (including the applicant and the man—Mr I—with whom she was allegedly cohabiting). The AAT described most of this material as 'largely comprised of hearsay and conjecture, and [given the applicant's sworn evidence] of no weight'. The statement of Mr I (referred to below) was not dismissed on this basis but because Mr I had not attended the AAT hearing to give evidence, and because Waterford's sworn evidence contradicted the damaging parts of that statement.

According to Waterford's evidence, she separated from her husband in June 1978 and, with two of her children and her 78-year-old mother, moved into a caravan owned by Mr I, parked in the backyard of Mr P's house. Waterford paid Mr I \$12 a week for the use of the van, and did some house cleaning for Mr P. Waterford and her family slept in the caravan, Mr I slept in a caravan annexe and Mr P slept in the house.

The **Social Security Reporter** is published four times a year by the Legal Service Bulletin Co-operative Ltd, and is supplied free to all subscribers to the Legal Service Bulletin. **Separate subscriptions** are available at \$7.50 a year (one copy), \$11.50 a year (two copies) or \$15.00 a year (three copies).

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Over a period of a few months, Waterford and Mr I began to share the cost of buying food, which the appellant cooked for her family and Mr I. After about one year of this arrangement, Mr I moved into P's house and he and Waterford abandoned the cost sharing and cooking arrangement.

At various times Waterford and Mr I went away together to greyhound meetings in country towns, when they shared a motel room and sometimes a bed. On these occasions, Mr I had booked rooms in the names of 'Mr and Mrs I'; but Waterford told the AAT that she had not authorized this, that she did not use Mr I's name and corrected anyone who addressed her as Mrs I. While they were on friendly terms, there was no sexual relationship (according to Waterford, whose evidence was accepted by the AAT).

A written statement signed by Mr I (in February 1980) confirmed these facts, but it did claim that Mr I had supported the appellant 'fully, for the past two months or so'. The AAT said that, while it received the statement, it would not give the statement any weight against the clear evidence of the appellant:

... the non-attendance of Mr I to give evidence must greatly detract from the weight that can be given to it. When in factual cases the Tribunal has had the benefit of the sworn evidence of a witness who has appeared before it and been subjected to cross-examination, its reliance upon written statements by persons who have not so appeared and the circumstances of the preparation of which are not known, will be of minimal weight.

(Reasons for Decision, para. 11).

The meaning of the 'cohabitation rule'

The AAT then turned to the excluding clause in the s.59(1) definition of 'widow': could it be said that Waterford was 'living with [Mr I] as his wife on a *bona fide* domestic basis although not legally married to him'?

[T]he proper approach, we consider, is to regard the phrase as a whole and not to break it up into individual words. So doing, it must be seen as a legislative expression of a view that a woman whose relationship with a man has all the *indicia* of marriage save only that it lacks a legal bond shall not obtain the advantage of a widow's pension which she would otherwise obtain by reason of her having come to fall within the general description of 'widow' or within the extended descriptions provided for by one or other of paragraphs (a) to (e) of the definition. A widow in fact, or by application of the extended definitions, no longer has a man to support her. But if she replaces the lost relationship which had formerly afforded her that support with another relationship that is the equivalent of marriage and which should therefore in theory return her to a situation in which she is supported, then her status as a widow within the definition is lost notwithstanding that the new relationship is not supported by a legal bond. She is to be treated as if she had remarried, an action which would have destroyed her status as a widow in the ordinary way had she been such.

(Reasons for Decision, para. 15)

The AAT then observed that judicial decisions in matrimonial law (on the question whether a marriage relationship had

ended despite the husband and wife continuing to live under the one roof) 'must be approached with great caution' in answering the cohabitation issue. Amongst the reasons offered by the AAT were the following:

(iii). . . [T]he absence of financial support following an alleged breakdown of the marriage may not indicate a destruction of *consortium vitae* where the parties were formerly, and contentedly, financially independent. But when we are considering the reverse situation, we are looking at a case where no prior situation existed between the particular parties. We have therefore to make assumptions as to what are the *indicia* of a marriage relationship, having regard to the age and circumstances of those parties and decide whether enough of those *indicia* may be identified as having come into existence for the marriage relationship to be deemed to have commenced. There is a traditional and legal obligation placed upon a husband to support his wife. It would be difficult to assume, unless other *indicia* were overwhelming, the existence of a marriage relationship where the man does not support the woman but simply contributes the cost of his own maintenance.

(iv) Finally, matrimonial law deals with the whole spectrum of relations within marriage. Here however, we are dealing with legislation the whole purpose of which is related to financial support, and while we are not inclined to agree, without the matter being fully argued, with those who contend that financial support is the sole determinative factor in these cases (see the very helpful article by M. J. Mossman 'The Baxter Case: De Facto Marriage and Social Welfare Policy' (1977) 2 UNSW Law Jo. 1) the answer to the question whether financial support is provided by the man with whom an applicant for a pension is alleged to be living on a *bona fide* domestic basis must be of very great significance. How can there be a real and genuine domestic basis to such a life unless such a basic feature of domestic life be present?

(Reasons for Decision, para. 16)

The AAT then concluded that there was little in the evidence to support the view that Waterford was living with Mr I as his wife on a *bona fide* domestic basis. Even if there had been a sexual relationship, the AAT 'might still not in today's world have been very quick to conclude from what may have occurred there that the two persons in question had embarked on a marriage relationship'—'an affectionate companionship', perhaps, but that did not amount to living together as husband and wife:

What is important is that even when they were living nominally under the one roof, in the caravan, there was apparently no recognition of any willingness on the part of Mr I, nor any expectation on the part of the applicant, that she should be financially supported by him. There was simply a mutual willingness to share the shelter which he, and the housekeeping capacities which she, could provide. The case is undoubtedly close to the line, but in all the circumstances, and emphasising the need to view closely all of the circumstances of each particular case, we have come to the conclusion that the applicant was not at the relevant time living with Mr I as his wife on a *bona fide* domestic basis.

The commencement date issue

Waterford gave evidence that she had handed in a completed application form at the local DSS office in late 1978, but that a person in the office told her to keep the form and wait for 'someone to call on me'.

The AAT accepted this evidence, and also accepted that Waterford waited in vain until July 1979 when she wrote to the Department enclosing the seven-month-old application form.

The Tribunal decided that Waterford had lodged her application form on 17 December 1978 and, by reason of s.68 of the *Social Services Act 1947*, her entitlement to a widow's pension should start on that date:

68. (1) Where a widow's pension is granted, it shall be paid from a date determined by the Director-General, but the date so determined shall not, subject to his section, be prior to the date on which the claim for the pension was lodged or later than the first pension pay day occurring after the date on which the claim was lodged, except where the determination of the claim has been delayed by neglect or default on the part of the claimant, in which case the Director-General shall fix such later date of commencement as he considers reasonable in the circumstances.

The Tribunal said:

We do not consider that the date of commencement of the applicant's entitlement, which is governed by the provisions of s.68 of the Act, can be affected by the fact that the officer at the counter, quite wrongly in our opinion, handed the application form back to the applicant.

(Reasons for Decision, para. 20.)

Procedure—a question of time

In the course of their Reasons for Decision, the AAT considered what was 'the appropriate time to which attention should be directed for the purpose of ascertaining the applicant's rights to a pension'. The AAT said that s.68 (quoted above) emphasized the date when the claim for pension was lodged:

Therefore attention should be concentrated upon the facts in existence at the date of lodgment of the claim. Such was the duty of the officer who made the decision that has eventually made its way along various paths to this Tribunal. It seems to us that the effect of these provisions, but particularly of s.68, is that the applicant's rights are to be determined in the light of the factual situation existing at the date of lodgment of the claim. On the other hand later occurring facts may be relevant for the purpose of evaluating the evidence given of the facts existing at the relevant time, and for the purpose of drawing any necessary inferences from them. It would not be proper to restrict our reception of evidence in any narrow way to evidence of the originally existing facts . . .

13. If what we have said does represent the correct approach it will be essential that all necessary steps requisite for bringing applications for review on for hearing be taken promptly. Further, all unsuccessful claimants should be advised that if an appeal is contemplated or even if it has already been initiated, any change in circumstances should be made the subject of a fresh application to the Department for a pension. This will enable the fullest consideration of the matter by this Tribunal.

(Reasons for Decision, paras 12-13).