Supporting mother's benefit: wrong advice

O'ROURKE and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. V81/87)

Decided: 11 September 1981 by R.K. Todd.

Florence O'Rourke separated from her husband in August 1975. She had the custody and care of her two young children.

In February 1976, when she was in financial difficulties, she went to a regional office of the DSS and was told by an employee of the Department that she was not entitled to anything.

In August 1976 she went again to the same DSS office and was told, by another DSS employee, that she had no entitlement. She later told the AAT 'that she thought she was being refused benefit because she owned a house'.

In February 1977 she returned to the same office and was again told that she was not entitled to anything. (On none of these three occasions did O'Rourke complete an application form.)

She then consulted a firm of solicitors and, on their advice, went to a different regional office of the DSS where she applied in writing, on the appropriate form, for supporting mother's benefit. This was granted with effect from 3 March 1977.

However, the DSS refused to back-date payment of this benefit. She appealed against that refusal (presumably through an SSAT) to the AAT.

The issue before the AAT

Before the AAT, the DSS conceded that O'Rourke had been eligible for supporting mother's benefit during the whole of the period from February 1976 to 3 March 1977. And the AAT accepted that O'Rourke had attempted on three occasions, to claim the appropriate benefit. The Tribunal said:

> Having seen and heard the applicant at the hearing, I am quite sure that her diffident personality and gentle bearing led to a situation at the counter in which she flinched from pressing her point and in which the officers in question failed to identify that there was before them a person with a real problem and definite rights.

(Reasons for Decision, para. 10.)

Until November 1977, the commencement date for supporting mother's benefit was controlled by s.68(1) of the *Social Services Act*. The benefit was to be paid from a date 'not . . . prior to the date on which the claim for the [benefit] was lodged'. (Section 83AAF, which came into operation on 10 November 1977, imposes the same restriction on the payment of supporting parent's benefit.)

Section 66 of the Act specifies the requirements for a claim for widow's pension. (That section was made applicable to supporting mother's benefit by the then s.883AAF(1); and is now made applicable to supporting parent's benefit by s.83AAG.)

> 66. A claim for a widow's pension —
> (a) shall be made in writing in accordance with a form approved by the Director-General;

The AAT's decision

There was no evidence that O'Rourke had lodged a claim, in the prescribed form, before February 1977:

> This being so I am compelled to say that there being no claim, and no power to back-date the payment of benefit, the decision . . . must be affirmed. Having said this however I am most clearly of the view, for reasons which follow, that I should make the very strongest recommendation for the making of an *ex gratia* payment in respect of the period between 1 March 1976 (the exact date of the first approach in February 1976 not being known) and 2 March 1977.

(Reasons for Decision, para. 9.)

Footnote: During the hearing, the AAT was told by the DSS that it had discovered that O'Rourke had been underpaid by some $3000 in respect of the period from March 1977 to the date of the hearing. But the DSS assured the AAT that it would correct this underpayment.

Invalid pension: wife's income disregarded

REID and DIRECTOR-GENERAL OF SOCIAL SERVICES No. V81/27

Decided: 17 September 1981, by A.N. Hall, J.G. Billings, and W.S. Tickle.

On 14 March 1980, Lawrence Reid lodged with the DSS a claim for an invalid pension (at the unmarried rate). He was certified to be permanently incapacitated for work (within ss. 23 and 24 of the *Social Services Act*); but the DSS rejected his claim on the basis that he shared a house with his wife and they received 'the same financial benefits . . . as a married couple'.

Reid appealed to an SSAT which recommended that an invalid pension be granted to him and that his wife's income ($8348 in the year to 14 March 1980) be taken into account in calculating the level of pension. On 13 August 1980 the DSS granted Reid an invalid pension of $51.30 a fortnight from 27 March 1980.

After representations from Reid, that decision was affirmed by a delegate of the Director-General on 5 December 1980. Reid then applied to the AAT for review of this decision.

The issue

The DSS had, in reducing Reid's pension, applied s.29(2) of the *Social Services Act* and treated half of his wife's income as his income. Reid claimed that there was a 'special reason' why his wife's income should be ignored. Section 29(2) reads as follows:

> (2) For the purposes of this Part, unless the contrary intention appears, the income of a husband or wife shall —
> (a) except where they are living apart in pursuance of a separation agreement in writing or of a decree, judgment or order of a court; or
> (b) unless, for any special reason, in any particular case, the Director-General otherwise determines,
> be deemed to be half the total income of both.

The 'special reason' for disregarding Reid's wife's income was that they should be treated as separated, although living under the same roof.

The evidence

Evidence was given by Reid, his wife and their adult daughter. This evidence showed that Reid and his wife were married in 1943. Their marriage began to deteriorate from about 1953. In about 1970 they agreed that the marriage was at an end and that each of them would lead a separate life. Neither of them could afford to move out of the house, so they agreed to live under the one roof. They had separate bedrooms, cooked, ate and washed their clothes separately. They did not share a social life and their close friends understood they were living separate lives.

They contributed equally towards household expenses — groceries, local rates, fuel bills etc. A joint bank account was maintained in case Mrs Reid needed cash if Mr Reid died suddenly; they also maintained family health insurance (because it was the cheaper option); and they owned the house in which they lived as joint tenants.

In 1979 they sold their house in one Melbourne suburb for $30000 and purchased one in another suburb for $40000 (contributing the extra $10000 out of their separate savings). While they could, theoretically, have gone their separate ways, neither of them could expect to purchase a house for $20000: they still needed to pool their resources. The new house was purchased in joint tenancy because each had contributed equally to its purchase and they believed that the survivor 'was entitled to the house'.

In 1976, Reid sought legal advice about a divorce but he was advised that there were substantial death duty advantages to remaining married and the idea was abandoned.

In mid-1979 the first symptoms of Reid's disease appeared. By the end of 1979 he was declared completely unfit for work and told he had a limited life expectancy. (At the time of the AAT hearing, he was expected to die by March 1982.) Despite having only a small invalid pension income, he continued to contribute his share of household expenses, using about $20 a week from his savings. He also sold a number of personal effects to suppplement his finances.

From the end of 1980 his condition deteriorated rapidly and his wife and adult daughter began to care for him intensively. Reid described his position: 'In general they looked after me as they would a child'. When asked whether she was caring for and supporting Reid because he was her husband, Reid's wife replied: 'I am showing support and devotion because he is a man who is ill.'

The decision

The AAT pointed out that the discretion in s.29(2)(b) (to disregard a spouse's income) was to be exercised where there was a

'special reason'. This meant

> that there must be some factor or factors in the circumstances of the particular case which takes it outside the common run of cases . . . [W]hile keeping the general rule laid down by s.29(2) in mind, the decision maker must nevertheless be prepared to respond to the circumstances of a particular case if for any special reason the application of the general rule would be unjust, unreasonable or otherwise inappropriate having regard to the scope and object of the Act.

(Reasons for Decision, para. 35.)

A proper case for the exercise of the discretion was where the parties were living apart, although still under the one roof. There was difficulty in distinguishing between a 'subsisting marriage and one which can be seen to have utterly broken down', but family law cases would 'provide some useful guidance'; and the AAT referred to *Pavey* (1976) 10 ALR 259 and *Falk* (1977) 15 ALR 189: Reasons for Decision, paras. 36–7.

The AAT decided that, from 1970 onwards, Reid and his wife were two separate individuals leading separate lives; that their marriage had irretrievably broken down. The nursing and housekeeping services provided by Mrs Reid since December 1980 should not 'be seen as involving the resumption of a marriage relationship which was long dead but rather as the provision of services by Mrs Reid out of a sense of compassion for a man who she regards in all but a legal sense as her former husband': Reasons for Decision, para. 42. The AAT concluded:

> 43. We are satisfied therefore that the applicant and his wife have, at all material times, been living separate and apart although under the one roof and that, for the purposes of the Act, they should be regarded as if they were no longer married. We are further satisfied that the applicant has not, at any stage since the date of their separation, had access to or been supported in any respect by his wife out of her own separate income. In our view, the facts as we have found them provide a special reason which takes this case out of the ordinary run of cases involving a husband and wife. We therefore determine that Mrs Reid's income should be disregarded in calculating the rate of Mr Reid's pension and direct that Mr Reid's pension should be recalculated and paid accordingly with effect from 27 March 1980.

Unemployment benefit: 'voluntary' unemployment

MEASEY and DIRECTOR-GENERAL OF SOCIAL SERVICES (No. Q81/39)

Decided: 14 September 1981 by J.B.K. Williams.

Kenneth Measey (aged 46 years) had been employed as a motor mechanic in Sydney. In February 1981 he left this job and moved, with his wife and two young children, to Queensland. At the same time he sold his home in the NSW country town of Parkes (which the family had left about a year earlier).

On arrival in Queensland, Measey claimed unemployment benefit. The DSS decided that payment of benefit should be postponed, under s.120(1)(a) of the *Social Services Act*, for six weeks. He appealed, unsuccessfully, to an SSAT and then applied to the AAT for review of the postponement decision.

Section 120 gives the Director-General a discretion to postpone payment of unemployment benefit. The relevant parts of that section are as follows:

> 120. (1) The Director-General may postpone for such period as he thinks fit the date from which an unemployment benefit shall be payable to a person, or may cancel the payment of an unemployment benefit to a person, as the case requires —
> (a) if that person's unemployment is due, either directly or indirectly, to his voluntary act which, in the opinion of the Director-General, was without good and sufficient reason;

(Subsection (2) declares that the period of postponement 'shall be not less than six weeks or more than 12 weeks'.)

The DSS had taken the view that Measey had been earning 'at least average wages' in Sydney and had left his job to move to Queensland because housing was cheaper there. This was not a 'good and sufficient reason' for his voluntary unemployment. A DSS memorandum had commented that 'unemployment benefit should not be paid to assist him to take advantage of an inequable [*sic*] real estate situation.'

However, the AAT was told that Measey had been paid significantly below award wages in his Sydney job — in the ten weeks before he had left that job he had averaged $152 a week, whereas he was now being paid the appropriate award of $219 a week. (He had found a job shortly before the AAT hearing.)

The AAT was also told, in a letter from Measey and by his wife, who appeared for him, that the family had moved to Queensland because it was a healthier environment for his children. The AAT accepted this evidence and concluded that the desire to improve his children's lot and prospects in life by moving from a metropolitan to a more rural atmosphere was not at all unreasonable; and his Sydney employment was unsatisfactory — nothing more than a 'stop-gap'.

The AAT decided that the applicant had acted reasonably and had 'shown good and sufficient reason for his unemployment within the meaning of that phrase in Section 120(1)(a) of the Act': Reasons for Decision, para. 13.

The AAT set aside the decision under review and substituted a decision that no postponement be imposed.

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