15 times since November 1979, believed that, because of his 'emotional state', he was 'unable to work at the moment and that situation could persist for an indefinite period'.

Bradley's general practitioner, who had treated him for six years, said that, because of the combined effect of his back and psychiatric problems, Bradley was not 'capable of holding down a job at this stage or in the foreseeable future'. Even his capacity for light work was very restricted, because of his inability to concentrate for more than two hours.

Bradley had been examined for the DSS by two specialists. The first of these, an orthopaedic surgeon, had seen Bradley for 25 minutes and concluded that his back disability would not prevent him from doing 'many types of lighter work'. But he conceded that he took no account of any psychiatric problems which Bradley might have had.

A psychiatrist also examined Bradley for the DSS. She, too, had seen Bradley only for a short period — no more than 45 minutes. She concluded that, while Bradley had an incapacity, it was not permanent. But her recollection of her interview with Bradley was 'somewhat vague' (the AAT said) and she had kept no notes of the interview. The AAT reported this exchange during the psychiatrist's evidence:

> When asked whether one visit for one-half or three-quarters of an hour was an adequate basis for a proper assessment of a person's psychiatric state, Dr Taylor answered: 'It leaves something to be desired but that is what I have to do.' She agreed that [Bradley's psychiatrist] would be in the best position to give an opinion about the progress of the applicant's condition.

(Reasons for Decision, para. 19.)

The AAT said that the extent and the weight of the medical evidence,

> particularly of the 'treating' doctors and specialists . . . lead inexorably to the one conclusion . . . [T]he applicant is at present, and was when he applied for invalid pension, incapacitated for work to a degree not less than 85%. We are satisfied on the evidence that he is, and then was, unemployable.

(Reasons for Decision, para. 38.)

(This case did not, the AAT said, raise the same difficulties as *Panke* had: see *Social Security Reporter*, no. 2, p.9; but the AAT expressed agreement 'with what is said in the Reasons for Decision given in that case'.)

The AAT went on to conclude that Bradley's incapacity was permanent in the sense used in *Panke's* case — that is, it was likely to last indefinitely, rather than likely to last only for a time:

> Fluctuations in his psychiatric disorder might conceivably reduce his disability, but it cannot be predicted with any confidence that such an event will occur in the foreseeable future.

(Reasons for Decision, para. 38.)

The AAT accordingly set aside the decision under review and remitted the matter to the Director-General with direction that the invalid pension be granted to Bradley.

Widow's pension: 'cohabitation'

R.C. and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. N80/35)
Decided: 16 July 1981 by J.D. Davies J, E. Smith, M.S. McLelland.

R.E. (as the applicant was then known) had been granted a widow's pension in July 1972. The pension was cancelled in January 1978 (on the ground that she was living with a man as his wife) but re-granted in September 1978.

On 26 February 1979, the pension was suspended by the DSS on the ground that R.C. (as she was then known) was living with a man, K.C., as his wife. R.C. appealed to an SSAT which recommended that the appeal be upheld but, on 7 December 1979, a delegate of the Director-General affirmed the suspension. On 23 January 1980, the DSS cancelled R.C.'s pension.

On 14 April 1980, the Director-General, after re-considering the matter, confirmed the earlier suspension and cancellation of R.C.'s pension. R.C. then applied to the AAT for review of the Director-General's decision.

This application for review centred on the 'cohabitation rule' – that is, on s. 59(1) of the *Social Services Act* which denies a widow's pension to 'a woman who is living with a man as his wife on a *bona fide* domestic basis, although not legally married to him'.

However, the application raised a number of minor issues:

1. Jurisdiction

The AAT decided (as it had in *Gee:* see 2 *SSR* 11) that the AAT did have jurisdiction to review a DSS decision (rejecting an SSAT recommendation) made before 1 April 1980, if that earlier decision had been reconsidered and affirmed by the DSS after 1 April 1980. This question is unlikely to arise in more than a handful of cases: an increasing proportion of applications for review relate to DSS decisions made after 9 September 1980 – for these the only jurisdictional problem is that the DSS decision must have been preceded by an SSAT recommendation (favourable or unfavourable).

2. Stay order

The AAT held that it could make an order, under s. 41 of the *AAT Act,* suspending the operation of the decision under review; and that, although the decision under review was technically the decision confirming the earlier suspension, cancellation, *etc.* decision, the substantial effect of the 'stay order' was to suspend the operation of that earlier suspension, cancellation, *etc.* order.

This is an important decision: it means that the technical form in which the AAT is given its social services jurisdiction does not prevent it from making an effective stay order.

3. Family Court documents

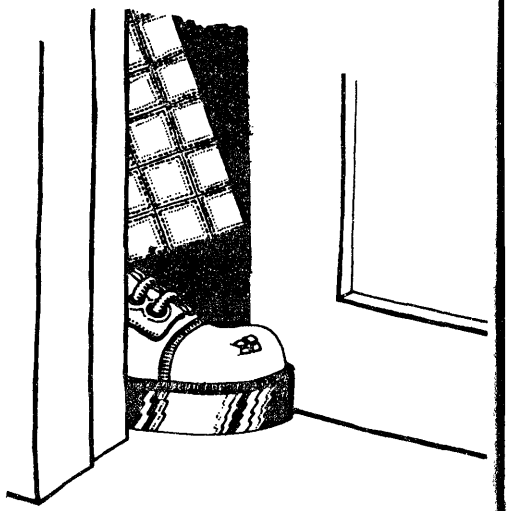
Section 121 of the *Family Law Act* prevents the publication of any account of evidence given in Family Court proceedings except in 'any court proceedings'. The AAT held that, as the AAT was not a court (it 'is an administrative body which exercises powers of the Executive'), the DSS could not use in evidence any documents which had been lodged with the Family Court.

4. The cohabitation issue

A large part of the Reasons for Decision is taken up with a detailed review and criticism of the evidence given by the applicant, R.C., and the person with whom, according to the DSS, she was living and whose surname she had adopted, K.C. The AAT concluded that their evidence was unreliable and based most of its findings on evidence given by other witnesses.

The AAT found that R.C., a divorced woman with a nine-year-old daughter, had started sharing accommodation with K.C. in April 1977. At the same time, she and her daughter had assumed his surname. In February 1978 she gave birth to a child fathered by K.C. Between February and October 1978, R.C. and K.C. did not live together: this separation, the AAT found, had been undertaken because the DSS had cancelled R.C.'s widow's pension in February 1978. The pension was re-granted in October 1978 and, in that month, R.C. and K.C. had resumed living together. (They were still living together at the time of the AAT hearing.) In February 1979 the DSS suspended R.C.'s widow's pension and it was this suspension which the AAT was asked to review.

The AAT rejected evidence given by R.C. and K.C. that they had separate arrangements for buying and cooking food and for household chores, and that they did not sleep together. The Tribunal said that it could not 'come to any conclusions favourable to the applicant on this aspect of the case'. The Tribunal was 'left with the impression . . . that the applicant and K.C. both used their incomes for the welfare of the family unit': Reasons for Decision, p. 35.



The AAT then reviewed the meaning of the cohabitation rule. Section 59(1) of the *Social Services Act* says that a 'widow' (that is, a person qualified under s. 60 to receive a widow's pension) 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.

This test was undoubtedly difficult to apply – it had become 'difficult to generalise about distinctive elements that characterise [marriage-like] relationships'. the AAT said. But the Act required this test to be used. The test had two distinct elements, both of which had to be present:

> a woman may live with a man on a *bona fide* domestic basis without living as his wife. A woman may live with a man as his wife without living with him on a *bona fide* domestic basis.

(Reasons for Decision, p. 36)

The first element – the marriage-like relationship – could not be assessed by applying specific criteria: there was an 'infinite variety of circumstances in which husbands and wives live together'. But there were factors which could be used as guides. In *Pavey*, (1976) 10 ALR 259, the Family Court referred to elements, some or all of which might be present in a particular marriage. These included

> dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationships [and] the nurture and support of the children of the marriage.

To these elements the AAT added 'the taking by the woman of the name of the man with whom she is living . . . ordinarily a statement to the world and a recognition by the parties of the existence of a marriage-like relationship': Reasons for Decision, p. 38.

The AAT rejected the argument that economic support (of the woman by the man) was the most significant factor. The Tribunal said this was a significant factor and, 'if that element is not found, that is a strong guide to the conclusion that the specified relationship is not satisfied'. But the *Social Services Act* did not treat the economic relationship as decisive: it looked (in s. 59(1)) 'not to economic circumstances but to the replacement of the earlier relationship with a new marriage-like relationship': Reasons for Decision, p. 39.

[In rejecting this argument, the AAT followed, although it did not mention, earlier AAT decisions in *Lambe* (1 *SSR* 5) and *Tang* (2 *SSR* 15). And its view has now been reinforced by the Federal Court in *Lambe*, noted in this issue of the *Reporter*.]

The second element – living on a *bona fide* domesitic basis, required that the woman live with a man 'in a common household'. This notion, said the AAT, was 'adequately clarified in *Furmage v Social Security Commission* (1980) 2 NZAR 75'.

[In *Furmage*. The New Zealand Supreme Court said that the phrase 'on a domestic basis' in the NZ *Social Security Act* 1964 required 'a living together under the same roof on a basis of some permanence': 2 NZAR, p. 79]

Reviewing the evidence in this case, the AAT said: 'all the significant indicia of a marriage-like relationship are present'; The Tribunal referred to the 'close relationship since March or April 1977' between R.C. and K.C.; their living together for most of the time; the birth of their child; the formation of a family unit with R.C.'s first child and their child; their adoption of the surname 'C'; the probable pooling of incomes for the family unit, the strong and affectionate bond between R.C. and K.C.; and the appearance, presented to the outside world, of an ordinary household. The AAT concluded:

> We think they have had a caring relationship, a common household and, with the children, a family unit. They gave the appearance of being a married couple. In these circumstances, we are of the view that, on 26 February 1979 and thereafter, the applicant lived with K.C. as his wife on a *bona fide* domestic basis though she was not lawfully married to him.
>
> We would therefore affirm the decision under review.

(Reasons for Decision, p.43).

Unemployment benefit: work test

WEEKES and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. T81/9)
Decided: 1 October 1981 by Ewart Smith, M.J. Cusack, J.G. Billings.

On 5 August 1980, Ronald Weekes lodged a claim for unemployment benefit. He declared that he intended to start a tanning business but would be available for full time alternative work. An officer of the DSS discussed the claim with Weekes and recorded the discussion. The record included the following note:

> I have advised Mr. Weekes that benefit would be paid subject to income for a period of 3 months and then his situation would have to be reviewed.

Unemployment benefit was granted from 5 August 1980. On 24 November 1980 Weekes advised the DSS that 'Full-time Tannery operations commenced on 11-11-80'. The DSS then terminated the benefit.

On 15 January 1981, Weekes again applied for unemployment benefit and stated:

> From August I have been fully involved in setting up a small Tannery at La Trobe. All indications are that this will be a viable operation when fully operational. A small shop is also being operated in Devonport as a local outlet for items tanned at La-Trobe.

On 21 January 1981, the DSS rejected the application for unemployment benefit on the ground that Weekes was not 'unemployed'. He appealed to an SSAT but, on 20 March 1981, a delegate of the Director-General affirmed the decision to reject his claim.

Weekes then applied to the AAT for review of this decision.

Section 107(1) provides that a person is qualified to recieve unemployment benefits if

> (c) the person satisfies the Director-General that–
>
> (i) throughout the relevant period he was unemployed and was willing to undertake, paid work that, in the opinion of the Director-General, was suitable to be undertaken by the person; and
>
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

Weekes told the AAT that, in January 1981, he spent the bulk of his time at the tannery and some time at the shop; but he could have 'dropped them both' at any time. He was, however, under financial pressure to continue because of the large debts which he had accumulated.

The AAT agreed with the observations made by the Tribunal in *McKenna* (2 *SSR* 13): in particular, that 'unemployment' meant not engaged in remunerative work; but this was to be modified to include 'special cases where a person is not engaged in work of a remunerative nature but whose commitment to some activity . . . demonstrates a preference for that activity rather than employment'.

The AAT agreed that a self-employed person would be engaged in remunerative work, even where outgoings exceeded income:

> There are many self-employed businesses, including professional business, which would not be 'profitable' in this sense in the early stages of their establishment. But it could not be said, in our view, that it followed that the persons involved were 'unemployed' within the meaning of s.107.

(Reasons for Decision, para. 24.)

On this basis, the AAT said, Weekes was not unemployed when his benefit was terminated in November 1980, nor when he applied for benefit in January 1981, even though his tannery and shop were not profitable.

The AAT also observed that, given the financial pressures on Weekes to continue his tanning operations, the Tribunal would have had difficulty in concluding that he was willing to accept full-time employment or was taking steps to obtain employment in January and February 1981: Reasons for Decision, para. 29.

Finally, the AAT noted that Weekes had not at any time sought a special benefit (unlike the applicant in *Te Velde* 3 *SSR* 23.)

WHYTE and DIRECTOR-GENERAL OF SOCIAL SERVICES
(No. Q81/21)
Decided: 4 August 1981 by J.B.K. Williams.

Whyte, a 21-year-old man, had been paid unemployment benefit between June