

Cohabitation

LITTLE and SECRETARY TO DSS (No. S84/98)

Decided: 1 July 1985 by J. A. Kiosoglous, F. A. Pascoe and B. C. Lock.

Shirley Little had been granted an invalid pension from April 1983. At about the same time she separated from her husband. In July 1983, she commenced to live with F (as a housekeeper, according to evidence which she and F later gave to the AAT). In October 1983, the DSS decided that Little was living with F as his wife on a *bona fide* domestic basis although not legally married to him and that, accordingly, half of his income should be taken into account in assessing the rate of her invalid pension. Little asked the AAT to review that decision.

The legislation

At the time of the decision under review, s.29(2) provided that the income of a married pensioner should include half the income of that pensioner's spouse. Section 18 defined 'spouse' so as to include a woman who was living with a man as his wife on a permanent and *bona fide* domestic basis although not legally married to him.

The evidence

Evidence given to the Tribunal established that Little and F had lived in the same house from July 1983 until the hearing of this matter. The house which they presently occupied was rented in Little's name, with both Little and F contributing to the rent and F making all payments for food and general house expenses. Some of the furniture was owned by Little and other items of furniture were owned by F. Little and F operated a joint bank account, out of which some household expenses were paid, as well as individual banking accounts. Although they had separate social circles, they shared some common social life. They told the Tribunal that, on those occasions when Little's children lived in the house shared by Little and F, F had provided some financial support to the children. Finally, they said that they did not regard their relationship as any closer than friendship nor did they intend to marry, although they had had an occasional sexual relationship.

'A permanent and exclusive relationship'

On the basis of this evidence, the Tribunal concluded that Little should be treated as living with F as his wife on a permanent and *bona fide* domestic basis although not legally married to him. The AAT referred to the earlier decision in *Tang* (1981) 2 SSR 15, and to the factors referred to in that decision as relevant to deciding whether a *de facto* marriage relationship existed.

In the present case, the AAT said, there was a degree of permanence in the relationship between Little and F, some pooling of financial resources and household expenses and occasional common social activities. On the other hand, they did not have an exclusive sexual relationship and they (and their friends) did not regard them as married, although other acquaintances would have had the impression that they were living together as a married couple. They were not the joint parents of any child, but F had on occasions supported Little's children.

Finally, each of them had separate circles of friends.

The Tribunal said that the existence or non-existence of a sexual relationship was not conclusive, nor was the fact that Little and F had separate friends. And, even though Little and F did not treat their relationship as equivalent to a marriage, the AAT believed that 'the objective indicia of their relationship, as recounted by them, pointed overwhelmingly to a different conclusion'. The Tribunal said that all the evidence given to it established that there was a relationship of domestic co-operation and emotional interdependence between F and Little; and that it was, accordingly, satisfied that Little was living with F as his wife on a permanent and *bona fide* domestic basis although not legally married to him.

Formal decision

The AAT affirmed the decision under review.

JACOBY-CROFT and SECRETARY TO DSS (No. N83/511)

Decided: 10 July 1985 by R. A. Hayes, H. D. Browne and G. P. Nicholls.

Michael Jacoby-Croft had been granted an invalid pension in 1975. In December 1978, L and her two children began to live in Jacoby-Croft's house. L then adopted his surname and continued to live in the house until October 1983, when Jacoby-Croft sold the house.

In June 1981, the DSS decided that L was living with Jacoby-Croft as his wife on a *bona fide* domestic basis although not legally married to him and that, accordingly, half of her income should be taken into account in determining the rate of invalid pension payable to Jacoby-Croft. On 31 October 1981, Jacoby-Croft (who had travelled to England in June 1981) asked the DSS to restore his invalid pension with effect from the date of his departure from Australia. The DSS did not act upon this request. On 6 June 1983, the DSS reviewed and affirmed the original decision to take account of half of L's income, although, at that time, Jacoby-Croft had been absent from Australia for 8 months. However, after J's return to Australia in July 1983, the DSS decided that Jacoby-Croft should be treated as a single person from 11 August 1983.

Jacoby-Croft asked the AAT to review the 2 DSS decisions (of June 1981 and June 1983) to treat half of L's income as his income.

The legislation

Section 28(2) of the *Social Security Act* provides that the rate of invalid pension is to be reduced by taking account of the pensioner's income.

At the time of the decision under review, s.29(2) provided that 'the income of a husband or wife shall . . . be deemed to be half the total income of both'.

Section 18 defined 'wife' so as to include a woman who was 'living with a man . . . as his wife on a *bona fide* domestic basis although not legally married to him'.

The evidence

The evidence before the Tribunal showed that, although L had continued to live in Jacoby-Croft's house from December 1978 to October 1983 (when the house was sold), Jacoby-Croft had been absent from the house for substantial periods. He made 4 visits to England between 1979 and 1983, for periods varying from 2 to 9 months.

During almost all of the periods when he was in Australia, he lived in the house with L, where they shared a bed. The one exception was the period after Jacoby-Croft's return to Australia in July 1983, when Jacoby-Croft lived in another house.

During the periods when Jacoby-Croft and L lived in the same house, they had a common social life, were financially interdependent, and were regarded by persons with whom they had contact as living in a marriage-like relationship. However, it was clear that, from the time of Jacoby-Croft's return to Australia in 1983, the relationship had changed: Jacoby-Croft did not return to the house in which L was living; he took steps to sell that house; and L then commenced to pay him rent.

The AAT's findings

The AAT said that, on the basis of all this evidence, the DSS could not have treated the relationship between Jacoby-Croft and L as over by October 1981. But, given Jacoby-Croft's substantial absences from Australia, the DSS should have concluded on 6 June 1983 (when it reviewed and affirmed the earlier decision) that the relationship had come to an end:

[T]he Tribunal is of the opinion that the decision of 10 June 1981 ought not to have been affirmed on 6 June 1983, because by that time, the applicant was in the 8th month of a second lengthy stay in England within the space of 2 years, with only a 3 month period in Australia staying in the same house with Ms Jacoby-Croft, between them . . . While, in the Tribunal's opinion these subsequent developments did not provide cause to reflect upon the wisdom of the original conclusion that a *de facto* relationship at that earlier time existed, they should have raised a real doubt in the delegate's mind about whether that *de facto* relationship could have been sustained during these lengthy periods of absence from Australia . . . While there is no 'onus of proof' in these matters (*McDonald* (1984) 18 SSR 188) the delegate (and this Tribunal), to paraphrase the words used by the Federal Court of Australia in *McDonald*, would have found itself quite able on the evidence available in June 1983 to decide a particular question of fact in the affirmative, namely, whether a pre-existing *de facto* relationship would have come to an end due to the continuing separation over a lengthy period of time of the parties to that relationship.

(Reasons, pp.15-16)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that, from 6 June 1983, L was not living with Jacoby-Croft as his wife on a *bona fide* domestic basis although not legally married to him and that, therefore, half of her income should not be taken into account from that date in determining the rate of his invalid pension.

GORDON and SECRETARY TO DSS (No. N85/2)

Decided: 23 August 1985 by R. A. Hayes, G. D. Grant and G. P. Nicholl.

Ronald Gordon had been granted unemployment benefit in February 1982, at a time when he was separated from his wife. Payment of that benefit continued until June 1983, when Gordon returned to work.

In January 1984, Gordon again applied for unemployment benefit and indicated that he was married and living with his wife. The DSS then decided that Gordon's wife's income should be taken into account in setting the level of his benefit; and that, accordingly, he was not entitled to any unemployment benefit. Gordon asked the AAT to review that decision.

The legislation

Section 114(1) of the *Social Security Act* provides that the rate of unemployment benefit payable to a person is to be reduced by reference to that person's income.

Section 114(3) provides that the income of a married person shall include the income of that person's spouse unless they are living apart—

- (a) in pursuance of a separation agreement in writing or of a decree, judgment or order of a Court; or

(b) in such circumstances that the Secretary is satisfied that the separation is likely to be permanent.

Section 6(1) defines a 'married person' as excluding a person who is living separately and apart from his spouse on a permanent basis and excluding a person who, for any special reason, the Secretary decides should not be treated as a married person.

The evidence

Gordon was 56 years of age. He had married his wife in 1970 and they had lived together for 7 years in her house. In 1977 they had separated because they had found that they were incompatible. However, when Gordon became unemployed at the beginning of 1984, he and his wife had decided that he should move back into her house so that he would be able to cover his living costs.

According to Gordon and his wife, he paid no rent to his wife but he had contributed \$3000 towards the cost of renovations to the house. He also paid for the installation and running of a telephone, and contributed to food purchases. On the other hand, his wife bore the cost of electricity and rates.

Gordon said that his primary loyalty was to his wife and the marriage, because they were not divorced. Indeed, he had a

religious objection to divorce. He also said that he and his wife did not live completely separately in the house and provided each other with some emotional support. However, they did not have a sexual relationship, nor did they have a common social life.

The AAT's assessment

The Tribunal referred to a number of earlier decisions which had examined the question whether a husband and wife living under the one roof could be described as 'living separately and apart'. Amongst those decisions was *Johnstone* (1984) 21 SSR 243 and *O'Brien* (1984) 18 SSR 204. The AAT said that the issue in the present case was virtually the same as the issue in *O'Brien*: here the family had been reintegrated by the return to the matrimonial home of the applicant and, thereafter Gordon and his wife had both lived 'as integral members of the family': reasons, p.17.

It was not inequitable, the AAT said, that the amount of unemployment benefit payable to Gordon should be the same as that payable to a happily married couple.

Formal decision

The AAT affirmed the decision under review.

Legislation

1985 BUDGET AND TAX REFORM CHANGES IN SOCIAL SECURITY

The 1985 Budget (announced on 20 August) and the Tax Reform Package (announced on 19 September) carry significant changes in the levels of pension and benefit and in income tests. These changes are scheduled for introduction over the next year.

November 1985

- Pensions and supporting parent's benefit will rise under the indexation system to \$97.90 (single) and \$163.30 (couple) a week.
- The fringe benefits income test limits will rise to \$65 (single) and \$106 (couple) a week.
- New weekly rates of unemployment benefit will be:
 - under 18 and single—\$50
 - 18-21 and single—\$88.50 [a new category]
 - 21+ and single—\$91.45
 - Single with dependants—\$97.90
 - Married—\$163.30 (couple)
- New weekly rates of sickness benefit will be:
 - Under 18 and single—\$50
 - 18+ and single—\$97.90
 - Married—\$163.30 (couple)
- Additional pension or benefit for each dependent child will rise to \$16 a week.
- Family income supplement will rise to \$16 a week for each child (subject to the family income test).
- A new carer's pension, for any person providing constant care and attention for an incapacitated spouse or close relative, will be paid at the married pension rate. It will replace the spouse carer's pension now paid only to men caring for incapacitated wives.
- Handicapped child's allowance will re-

main payable for up to 28 days a year while the child is absent from the family home.

May 1986

- Mother's and guardian's allowance (paid to any pensioner or beneficiary without a partner caring for a dependent child) will rise to \$12 a week.
- For the first time, rent assistance will be extended to some unemployment beneficiaries.
- The income test for unemployment and sickness beneficiaries will be relaxed by increasing the allowable income to \$30 a week.
- Indexed pensions and benefits (which covers all pensions and benefits, except unemployment benefit for those without dependants and sickness benefit for those under 18) will be adjusted in line with CPI movements.

November 1986

- The income test for pensioners and supporting parent beneficiaries will be relaxed by increasing the allowable weekly income to \$40 (single) and \$7 (married).
- The separate and stringent income test for rent assistance will be abolished, and rent assistance (for those who pay private rent) added to pension or benefit payments, subject to the standard pension and benefit income tests.
- The income test for pensioners and supporting parent beneficiaries with children will be relaxed by increasing the allowable income for each child to \$12 a week.
- Indexed pensions and benefits (which covers all pensions and benefits, except unemployment benefit for those without dependants and sickness benefit for those under 18) will be adjusted in line with CPI movements.

Background

Special benefit—the alternative educational allowance?

The decision of the AAT in *Spoooner* (1985) 26 SSR 320 is a watershed in the interpretation of the special benefit provisions of the *Social Security Act*.

That case raised the question whether full-time students and persons under 16 could qualify for special benefit. It also made important comments on the discretion to grant special benefit.

The legislation

Under section 124(1) of the *Social Security Act* the Secretary to the DSS has a discretion to grant a special benefit to a person who is not receiving a pension or qualified to receive another benefit under the Act, if the Secretary—

is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependants (if any).

Thus, there are two steps in the process of qualifying for special benefit. First, the person must be 'unable to earn a sufficient livelihood'. Second, there must be a favourable exercise of the Secretary's discretion to grant the special benefit.

'Unable to earn a sufficient livelihood': persons under 16

In *Spoooner* the applicant was 15 years old and had left home due to friction between himself and his parents. He was a full-time student in year 10 at a secondary school.

The DSS relied in part upon the argument that Spoooner could take legal pro-