

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-