

been made under s.70 of the *Workers' Compensation Act* (SA), it would be impossible for the Secretary to be satisfied of this because an assessment under that section excluded any payment for a period of incapacity prior to the assessment:

'Unless there is a legislative amendment to [s.115B], a lump sum settlement pursuant to s.70 of the *South Australian Workers' Compensation Act* will usually present a situation whereby recovery of sickness benefits cannot be made.'

Formal decision

The AAT set aside the decision under review and substituted a decision that the sum of \$878 was not recoverable by the Secretary under s.115B(3).

Cohabitation

FLANNERY and SECRETARY TO DSS (No.V84/87)

Decided: 10 October 1985 by J.R.Dwyer, H.Trinick and L.Rodopoulos.

Ruby Flannery asked the AAT to review a DSS decision that her age pension should be suspended until the DSS received information on the income of her former husband, with whom the DSS believed that she was living 'as his wife on a *bona fide* domestic basis although not legally married to him'.

The legislation

At the time of the decision under review, s.28 of the *Social Security Act* provided for a pensioner's pension to be reduced by reference to her income. According to s.29(2), the income of the pensioner included half the income of the pensioner's spouse. Section 18 defined 'wife' in such a way as to include a woman who was living with a man (referred to as her husband) as his wife on a *bona fide* domestic basis although not legally married to him.

The evidence

Mr and Mrs Flannery had married in April 1942 and were divorced in February 1973. Despite their divorce, they continued to live under the same roof. They claimed that they had independent finances, no sexual relationship and that they did not provide each other with society or support. However, the AAT said that it was important to treat the 'subjective evidence' given by the applicant with caution and that objective factors were more persuasive. This was particularly so because various statements made by Flannery as to her living arrangements and her earnings from employment had been shown to be false.

A continuing relationship

The AAT said that the fact that Flannery and her ex-husband continued to live under the same roof after their divorce 'allows an inference to be drawn that there is a continuing commitment between them': Reasons, para.21. That inference was supported by the fact that, since the DSS had decided to suspend Flannery's pension, neither she nor her ex-husband had attempted to sell the house which they jointly owned.

The AAT accepted that Flannery and her ex-husband did not have a sexual relationship but concluded that there was more companionship than Flannery and her ex-husband had indicated and that they 'must derive some comfort and support from living together.' The AAT also found that Flannery and her ex-husband shared household expenses on a random basis (with the bulk of the expenses being met by the ex-husband) and that her ex-husband met all the mortgage payments on their jointly owned house. In some ways, the AAT said, the financial arrangements

between Flannery and her ex-husband amounted to an effective pooling of resources.

The AAT also accepted that Flannery and her ex-husband did not have an exclusive relationship: each of them had a relationship with other people. But this situation had continued for many years and it did not appear to be generating any tension between Flannery and her ex-husband. The AAT also found that there was a substantial degree of permanence in the relationship between Flannery and her ex-husband. The AAT concluded:

'On the whole the evidence seems to indicate that Mr and Mrs Flannery have decided to ignore the divorce and to continue to live as man and wife for at least another 2 years in a relationship which allows for each party to have another companion. Although the circumstances are unusual we find that they are not significantly different from the circumstances when Mr and Mrs Flannery were married ... Neither Mr or Mrs Flannery appears to have a strong desire to bring the situation to what might be considered a logical conclusion. Since their divorce more than 12 years ago they seem to have decided that they were better off living together in spite of the difficulties in their marriage rather than living apart.'

(Reasons, para.45, 46)

Formal decision

The AAT affirmed the decision under review.

DAY and SECRETARY TO DSS (No. N84/198)

Decided: 5 August 1985 by A. P. Renouf.

The AAT affirmed a DSS decision to reduce the rate of invalid pension paid to a woman by taking into account the income of a man with whom she was living as his wife on a *bona fide* domestic basis although not legally married to him.

On the basis of the evidence presented to it, the Tribunal found that the man, R, had moved into Day's house as a boarder in 1978; but that there had been more to the relationship than that of landlady and boarder because Day saw R as her protection against harassment by her husband, from whom she was separated.

Day and R continued to live together until 1984. Over that period, Day adopted R's surname, assisted R in running his business and lent him \$10 500 without security. When Day was ill, R cared for her and her children. When R's business declined, Day supported him entirely.

Over this period, both Day and R claimed in official documents that they were living in a *de facto* relationship; but they insisted to the Tribunal that they had never had a sexual relationship.

The AAT said that, despite the absence of a sexual relationship, the lack of a common social life and the lack of evidence as to how their acquaintances regarded the relationship, the evidence established,

on the balance of probabilities, that at the relevant time, the applicant and R were living together as man and wife on a *bona fide* domestic basis while not being legally married.

(Reasons, para. 59)

SCHAEFER and SECRETARY TO DSS (No.Q85/4)

Decided: 13 September 1985 by R.Balmford Lyell Schaefer appealed against a DSS decision to treat him as a married person for the purposes of calculating his rate of age pension. The DSS had decided that he was living with Mrs Brennan as her spouse on a *bona fide* domestic basis. (See now s.6(1) of the *Social Security Act*.)

A marriage-like relationship?

The Tribunal looked at past Tribunal and Federal Court decisions (*Waterford* (1981) 1 SSR 1, *Lambe* (1981) 4 SSR 43) and suggested that the matters to consider were -

'dwelling under the same roof, permanence, exclusiveness, sexual intercourse, mutual society and protection, the existence of a household, relationships within that household and whether those relationships show the *indicia* of a family unit, the way in which the relationship is presented to the outside world, financial support, the nurture and support of the children of the relationship.'

(Reasons, para.11)



Mr Schaefer and Mrs Brennan purchased a house together (under the names of Mr and Mrs Schaefer, in order to obtain a loan), had lived in the house together since 1977 and had separate bedrooms. They had known each other for 20 years and had a brief sexual relationship in the 1960s. They shared household expenses and responsibilities. Schaefer had helped care for 2 of Mrs Brennan's sons when they were ill. They had separate social lives.

The Tribunal concluded:

'It is apparent that from time to time Mr Schaefer and Mrs Brennan have described their relationship in the manner appropriate to entitle them to a benefit which they sought at the time, whether a housing loan or a full pension. People who have shown themselves prepared to equivocate in this way cannot be surprised if their statements as to facts which would tend towards their being entitled to a benefit are treated with a degree of scepticism. I regard as inherently improbable, in all the circumstances, Mr Schaefer's evidence that he cooks his own meals and cleans his own room.'

Formal decision

The Tribunal affirmed the decision under review.

INNS and SECRETARY TO DSS (No.S84/84)

Decided: 4 September 1985 by J.A.Kiosoglous.

The AAT affirmed a DSS decision that Carolyn Inns had been living with a man, P, as his wife on a *bona fide* domestic basis although not legally married to him, between June and September 1981; and that she had, accordingly, been overpaid \$1367 by way of supporting parent's benefit.

According to Inns' evidence, P had moved into her rented house in June 1981. He had contributed to the rent and paid board which covered food and her work on washing, ironing and cooking. P stayed in the house until September 1981, when he left at her request because of a strained relationship between P and one of her children.

During that period, she and P had regularly slept together and shared a common social life. Inns described P as 'just a boy friend' and 'a boarder'. She said that she relied on P emotionally but not financially and that they lived together for friendship and companionship.

Inns also told the Tribunal that she and P had resumed living together for short periods in 1982 and 1983 and that, eventually, their relationship had broken down because of P's violence. At that time, P had threatened to 'make trouble for her with social security'. P subsequently wrote to the DSS, claiming that there had been a long-standing *de facto* relationship between him and Inns.

The AAT concluded, on the basis of the evidence given by Inns (no evidence was taken from P) that she had been living with P as his wife on a *bona fide* domestic basis although not legally married to him between June and September 1981; and

that, accordingly, she had not been entitled to receive a supporting parent's benefit in that period and had been overpaid. The AAT said that P had been more than a boarder during that period. He -

'was living with her in a *de facto* relationship providing friendship, intimacy, companionship and support in a manner similar to many married couples. In short they lived during the relevant period in a 'marriage-like relationship' and not merely a 'household of convenience'.'

(Reasons, para.12)

KINGSTON and SECRETARY TO DSS (No.T85/19)

Decided: 31 October 1985 by R.C.Jennings.

Vivian Kingston, who was 80 years of age, held an age pension. He shared a flat with a woman, N, who was aged 75 and who also received the age pension.

Since 1971, the DSS had treated Kingston and N as if they were married (and, accordingly, paid them their pensions at the married rate). In October 1984, Kingston applied to the DSS for a full pension and when this application was rejected, he asked the AAT to review that decision.

The legislation

The central question before the AAT was whether Kingston was 'an unmarried person' within s.28(1A) of the *Social Security Act*. According to s.6(1), he would be 'an unmarried person' if he was not 'living with another person of the opposite sex as the spouse of that person on a *bona fide* domestic basis although not legally married to that other person'.

The evidence - a longstanding relationship

The only evidence given to the Tribunal was that of Kingston which the Tribunal accepted 'without hesitation'. It appeared that N and her adult son moved into Kingston's house in 1965 when N's husband (whom Kingston had known since 1926) had to enter hospital. In 1974, Kingston, N and her son moved to a home unit, which was rented by Kingston, and in the following year N's son moved out. Kingston and N had remained in the unit since then.

It appeared that, originally, Kingston paid the rent and other expenses while N provided and cooked the household's food as well as undertaking housekeeping duties. However, following the DSS decision to reduce Kingston's pension, N had assumed responsibility for paying the telephone and power bills. Over recent years, N had become seriously ill and Kingston now took responsibility for more of the household duties.

Over the 20 years that Kingston and N had lived together, N had occupied her own bedroom, there had been no sexual relationship between Kingston and N and they had never 'held themselves out as married'.

However, the DSS pointed to a statement signed by N in 1970 that she had lived with Kingston 'as man and wife' since 1965 and to the fact that Kingston had not objected to letters received from the DSS in 1975, referring to N as 'your spouse'. The AAT said that neither N's 1970 statement nor Kingston's failure to comment on the 1975 letters should be construed against Kingston, in the face of his 'unequivocal sworn evidence before the Tribunal'.

The DSS also raised Kingston's 1969 income tax return, in which he claimed a deduction for N as a dependent spouse. Kingston told the AAT that this was a mistake on his part, as he had usually claimed a reduction for N as his housekeeper (the two deductions being equivalent at that time). The AAT said that, even if that explanation was rejected, the deduction claim did not establish that there was a *de facto* relationship between Kingston and N: at worst, it was an attempt to deceive the Taxation Department.

The final point raised by the DSS was that, because of the 'undoubted quality of permanence' in the relationship between Kingston and N, they should be regarded as living in a marriage-like relationship. The AAT commented:

'Whilst there may be "housekeeping" contracts or arrangements which develop into a man and wife relationship it certainly does not follow that all such arrangements acquire that quality merely by reason of their comparative permanence or the strength of the friendship developed. Before such a relationship is converted there must be, as the Tribunal recently observed, some kind of "spark to ignite the tinder of cohabitation to the fire of a quasi marriage relationship": *Smith* (1985) 26 SSR 314.

In the present case an arrangement which began as one of financial convenience has now developed into an arrangement for mutual support to the best of the physical and financial abilities of each party, but there is no evidence to justify a conclusion that there is a quasi marriage relationship.'

(Reasons, pp.7-8)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Kingston be granted an age pension at the unmarried rate from the date of his application, October 1984.