Cohabitation

SHADBOLT and SECRETARY TO DSS
(No T85/23)
Decided: 7 March 1986 by J.C. Jennings.

Stephen Shadbolt and his fiancee, C, became engaged to marry in November 1984 after they had been living together for 6 months. They continued to live together until March 1985, when they moved into the home of S's parents, where they remained until June 1985. At about that time, Shadbolt applied to the DSS for unemployment benefit. His claim was rejected because the DSS treated C's income as Shadbolt's income, on the basis that they were living together as husband and wife. Shadbolt asked the AAT to review that decision so far as it related to the 3 month period when he and C were living with his parents.

The legislation

Section 114(1) of the *Social Security Act* provides that the rate of unemployment benefit paid to a person is to be reduced by reference to that person's income. According to s.114(3), a person's income is to include the income of the person's spouse.

Section 106(1) defines 'married person' and 'spouse' as including a '*de facto* spouse'. Section 6(1) defines '*de facto* spouse' as meaning -

> 'A person who is 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 person'.

A continuing relationship

Shadbolt conceded that, both before and after he and C had lived with his parents, they had been living as if they were married. But he said that, while living with his parents, he had been living as an unmarried person.

Both Shadbolt and C told the Tribunal that, from the time when they first lived together in 1984, their relationship had been an exclusive one and that it had consistently appeared to be permanent in nature. However, during the 3 months when they lived with Shadbolt's parents, they had occupied separate rooms, had not pooled their financial resources nor consistently shared expenses and they had only engaged in sexual activity when they were away from his parents' home.

The AAT concluded that Shadbolt and C had still been living as if they were married during the 3 months in question:

> '[I]n my opinion the continuance of some sexual activity, the undoubted quality of permanence in their relationship to the exclusion of others, and the sharing of such social life as they had are all factors which outweigh the temporary interruption of what had become a total quasi-marital relationship.
>
> If two people who are engaged to be married live alone, but together, under the same roof, there is an almost inescapable inference that they are cohabiting as man and wife on a *bona fide* domestic basis. The fact that they should then temporarily occupy separate bedrooms as boarders in a family situation cannot destroy the fundamental quality of cohabitation.
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> . . .
>
> [A] man who commences and continues sexual cohabitation with his fiancee for a noticeable period has a very heavy burden to discharge to establish that that relationship has ceased if he continues to occupy the same abode as she does albeit in company with others.'

(Reasons, pp.6, 7)

Formal decision

The AAT affirmed the decision under review.

Overpayment: not recoverable

DOLLEY and SECRETARY TO DSS
(No.Q85/103)
Decided: 27 May 1986 by J.B.K. Williams, W.A. De Maria and H.M. Pavlin.

Arthur Dolley had been granted a disability pension under the *Repatriation Act* 1920. In 1981, he claimed an age pension from the DSS. He completed a form on which he answered a number of questions relating to his income.

In answer to the question whether he received 'a service pension' he answered 'no'.

The form also asked whether he received income from 'superannuation; compensation; war pension; overseas pension; maintenance; annuities; life interest or other income from the estate of a deceased person'. In answer to this question, Dolley disclosed income of $44 a week from the State Superannuation Board.

In answer to the question, 'Do you receive any other income?' Dolley answered 'No'.

The DSS calculated the rate of Dolley's age pension by taking account of his superannuation income. When the DSS subsequently discovered that Dolley was in receipt of a disability pension it calculated that he had been overpaid $964 and demanded that he repay this amount.

Dolley asked the AAT to review this decision.

The legislation

Section 140(1) of the *Social Security Act* provides that, where an amount of pension has been paid following a false statement or representation, the amount so paid is a debt due to the Commonwealth.

Section 140(2) provides that where an amount of pension has been paid which should not have been paid for any reason, and the person who received the payment is still receiving a pension, then the amount of the overpayment is to be deducted from that person's pension.

No false statement

The AAT decided that, when completing the application form, Dolley had not made a false statement:

> 'The literal answer given by the applicant related to the superannuation only. The question, insofar as it related to moneys from other sources referred to therein, remains unanswered. This might indicate the difficulties inherent in grouping a number of questions together rather than posing each question separately. We have difficulty in seeing that the question, insofar as it related to war pension, was answered falsely, as it was not, except possibly by inference, answered at all.'

(Reasons, p.12).

So far as the answer to the other question was concerned, the AAT took the view that the phrase 'other income' must refer to income of a type not specified elsewhere in the form. Accordingly,

> 'the receipt of a war pension specified in the earlier question would [be] excluded from the general question. In this circumstance, it does not appear to us that the answer given to the general question was false.'

(Reasons, p.12).

Accordingly, it was not possible for the DSS to recover any overpayment made to Dolley under s.140(1). However, recovery under s.140(2) might be possible, as recovery under this provision did not depend upon any default on the part of the pensioner.

On the other hand, there might be grounds for the Secretary to the DSS to exercise the discretion in s.146 of the *Social Security Act* - a discretion to write off, or waive or defer recovery of, any debt under the Act. This provision, the AAT said, appeared to

express the discretions not to recover overpayments which had been discussed by the Federal Court in *Hangan* (1982) 11 SSR 115, and *Hales* (1983) 13 SSR 136.

Formal decision
The AAT set aside the decision under review and remitted the matter to the Secretary for reconsideration of the question whether recovery should be pursued under s.140(2).

Family allowance: late claim

ASHNEY and SECRETARY TO DSS (No.Q85/194)
Decided: 22 July 1986 by J.B.K. Williams, W.A. DeMaria and H.M. Pavlin.

Margaret Ashney appealed against a decision of the DSS to refuse backpayment of family allowance for her son, B, for some 7 years. B was born in February 1977 and Ashney claimed for family allowance in February 1984.

The legislation
Backpayment of family allownce beyond 6 months of the date of claim can only occur if 'special circumstances' can be made out at the appropriate time: s.102(1)(a) of the *Social Security Act*.

The evidence
Ashney had thought that she was receiving family allowance for B. She discovered that the allowance had not been paid when she examined her bank passbook after moving her account from a bank to a building society. Ashney's husband stated that, though he could not specifically remember filing a claim for family allowance, he was sure he had done so at the time of registering B's birth and presumed the claim had been lost in the mail.

No 'special circumstances'
The Tribunal applied the Federal Court decision in *Beadle and others* (1986) 26 *SSR* 371. It noted that the claim here was for backdating for some 7 years; that Ashney was receiving family allowance for 5 other children and she could not be said to be 'ignorant of her entitlement'; and that both the applicant and her husband were literate.

> 'It seems to us that the real explanation of the delay in making the claim arose through inadvertence on the part of the applicant to the fact that the allowance was not being paid with respect to B, a state of affairs which continued for some seven years.'

(Reasons, p.6)

The Tribunal contrasted the facts here with those in *Johns (No 2)* (1986) 27 *SSR* 388. It concluded that 'special circumstances' had not been made out.

Formal decision
The Tribunal affirmed the decision under review.

LUBKE and SECRETARY TO DSS (No.Q85/136)
Decided: 2 July 1986 by J.B.K. Williams, N.C. Davis and W.A. DeMaria.

Margaret Lubke appealed against a decision of the DSS to refuse backpayment of child endowment/family allowance for 2 student dchildren. She had claimed in 1984, some 8 and 6 years after eligibility arose for each of her children.

The legislation
Section 103(1) of the *Social Security Act* provided, at the time of the decision under review, that child endowment ceased to be payable if a child attained the age of 16 years, unless the Director-General was satisfied before the expiration of 3 months after the child attained that age that the child became a student child on attainment of that age. Section 102(1)(a) allows backdating in 'special circumstances'.

The facts
The applicant's husband said that no claims had been lodged because he and his wife did not know of their entitlement to student family allowance until they received forms for their third son when he turned 16.

Lubke suggested that stress arising from her husband's ill health (he had suffered a severe heart attack in 1979) had caused the delay in making the claim.

No 'special circumstances'
The AAT quoted from the Federal Court decision in *Beadle and others* (1986) 26 *SSR* 371 (a handicapped child's allowance case), asserting that the Federal Court's comments were equally relevant to the backpayment of family allowance.

The AAT noted: 'The applicant and her husband at all material times were resident in a city environment. He is by profession an engineer. No problem of isolation or illiteracy exists in this case': Reasons, p.8. It contrasted these facts with those in *Johns* and *Corbett*. The Tribunal concluded that special circumstances did not exist.

Formal decison
The Tribuanl affirmed the decision under review.