

Prosecution action was commenced under s.138 [now s.174] of the Act. Byrne then appealed to the SSAT, stating that she had been confused when she admitted living in a de facto relationship. She claimed that she had agreed to the recovery of the overpayment as a result of intimidation and harassment. However, before the SSAT was able to consider the matter, Byrne had been convicted. Notwithstanding the conviction, the SSAT recommended that the appeal be upheld, a recommendation which was rejected by the DSS. An appeal against conviction was dismissed.

The major evidence against Byrne, aside from her own disputed admissions, was the existence of a number of credit accounts and loan applications in the names of Margaret and Ingo Golab. These were explained by Byrne as having been necessitated by previous credit problems which would have precluded her from securing credit in her own name.

She claimed to have moved into a flatette in the garage at the rear of the house as a housekeeper in 1977. Shortly thereafter, she had a brief and transitory sexual relationship with Golab, resulting in the birth of the son Troy. However, her evidence was that the parties were financially independent and lived totally separate lives.

The AAT heard and rejected evidence from two social workers to the effect that Byrne is unassertive and deferred to persons in authority. One of them stated that Byrne's 'home environment had not been one where she was encouraged to express honest thoughts, feelings and beliefs about herself' and concluded that the relationship between the parties was that of employee and employer (para 26).

The Tribunal did, however, concede that the report of the NSW Anti-Discrimination Board on Women and Credit 'lends some support ... to the applicant's assertion that to get credit, she had to resort to the use of Mr Golab's name' (para 30).

Was there a de facto relationship?

At the relevant time, s.59(1) [now s.43] of the Act defined a 'widow' as not including 'a woman who is living with a man as his wife on a bona fide domestic basis although not legally married to him'.

The AAT considered that of the many indicia of a de facto relationship, the following were relevant. Byrne lived at the premises owned and occupied by Golab; the relationship was longstanding; the parties had a child; Byrne used the name Golab freely and her children attended school under that name; Golab allowed Byrne to pose as his spouse for the purpose of obtaining credit and he had nominated her and her children as beneficiaries under his su-

perannuation, describing her as his wife (para 40). Although evidence of a shared social life was lacking, these facts were sufficient in the AAT's view to warrant a conclusion that a de facto relationship existed.

The AAT went on to state:

'I am reinforced in the above view by the fact that the District Court of NSW has found the applicant guilty of giving false and misleading information to the respondent ... being such as to conceal that she had a de facto relationship with Mr Golab. *Rimmer* (1984) 20 SSR 224 and *Letts* (1984) 23 SSR 269 are authority for the view that I should take account of what went on in the District Court, while not regarding the result of proceedings there as conclusive.'

(Reasons, para 42).

The discretion to recover the overpayment

The AAT stated that because the applicant was not honest with the Department, and because it could not fault the respondent's conduct toward the applicant, the only matter relevant to whether the debt should be written off or waived under s.146 [now s.186] was financial hardship. Despite holding that the 'applicant is, financially, on the borderline', the AAT was unable to find that the applicant was being treated unjustly by the DSS. It continued:

'As regards the amount of the deduction [\$32.50 per fortnight, out of a total income of \$524.55], there is the other point that there seems to be no reason why Mrs Byrne should not supplement her income by work, such as child-minding or making crafts each of which she has done before, or otherwise.'

(Reasons, para 47)

Formal decision

The AAT affirmed the decision under review.

[R.G.]

Cohabitation rule

HODGSON & WRIGHT and SECRETARY TO DSS

(Nos N86/841 & 842)

Decided: 11 March 1988 by R.A. Hayes.

Valerie Hodgson was receiving a supporting parent's benefit and Eric Wright was receiving unemployment benefit at the single rate in September 1985.

The DSS decided that they were living together as de facto husband and wife. The DSS cancelled Hodgson's benefit, and decided to pay Wright's unemployment benefit at the married rate. They asked the AAT to review those decisions.

Hodgson and Wright had lived as part of various communal households in

the same accommodation between 1973 and 1987. They had purchased two of the premises in which they lived as joint tenants. They told the AAT that they had bought the properties for experiments in communal living with other people.

Hodgson gave birth to a child while she was sharing accommodation with Wright; but she claimed that she did not know who was the child's father. Both of them denied there was a sexual relationship between them.

A burden of proof

The AAT noted that there were several factors to consider when deciding whether a man and woman were living as husband and wife: these included their financial relations, whether there was a common household, their sexual relationship, social factors and the degree of commitment between them. The AAT observed:

'One does not categorise a relationship by reference to a "tick-off list", with a particular points tally in mind. The adumbrated factors are signposts to a goal for which the decision-maker is searching, that goal being the isolation of some exquisite quality in a relationship between two people which distinguishes it from the others built up in the course of their lives.'

(Reasons, p.5)

The AAT said that, at the end of the day, it could not come to a conclusion on the essential question, and 'was in the state of uncertainty alluded to by Woodward J. in *McDonald*' - (1984) 18 SSR 188. Because the Secretary was cancelling 'benefits granted on a particular basis ... because it was being asserted that circumstances had changed'. The Tribunal said it -

'had no alternative but to resolve the very real uncertainty that I felt existed on the material before me in favour of the applicants. I could not find that they were in a de facto relationship at the relevant time. But equally, I could not find that they were not.'

(Reasons, p.9)

Formal decision

The AAT set aside the decisions under review and remitted the matters to the Secretary with directions that they were not living in de facto relationships at the relevant time; and that the benefits payable to them were to be recalculated.

[P.H.]