

... I must conclude that during the relevant period the applicant was not in a *bona fide* domestic relationship with R.'

(Reasons, paras 31-35).

**Formal decision**

The Tribunal affirmed the decision under review.

[J.M.]



**SJK and SECRETARY OF DSS (No. Q88/118)**

Decided: 23 August 1988 by D.P. Breen.

SJK asked the AAT to review a DSS decision that from 26 January 1984 to 13 November 1986 she was living with E as his wife on a *bona fide* domestic basis and had therefore been overpaid \$20 992.80 in supporting parent's benefit for which she was not eligible.

**The facts**

SJK had separated from her husband in June 1983. Shortly thereafter, she and her children had commenced sharing accommodation with E and another woman, O. Shortly thereafter O moved out. At some stage (though the evidence was not clear) SJK's former husband also lived with them at that address.

The AAT dated the commencement of the *de facto* relationship, (January 26 1984) as the date on which SJK, her children and E moved together to new accommodation. They shared three different addresses from that time to 27 November 1986 when the relationship ended.

**Assessment of the evidence**

The AAT determined that SJK was living in a *de facto* relationship with E during that time. The Tribunal found that they presented themselves to real estate agents as a married couple, 'they presented to the eye of an objective beholder the appearance of husband and wife', and they had a sexual relationship which, at least on the part of the applicant, was exclusive. They pooled financial resources and had a measure of a joint social life.

The Tribunal rejected SJK and E's subjective assessment, which denied the existence of a *de facto* relationship.

'The principles enunciated by the case law rightly relegate the subjective evidence of the parties to such a relationship to a position well down the ladder of merit in an exercise of assessing whether or not in fact that relationship is that of man and wife, though not legally married. Testimony which swears to the issue is at best to be paid minimal regard, a fortiori, when it comes from people who acknowledge . . . a sustained pattern of lies and falsehoods for a prolonged period of time.'

(Reasons, para 22).

The AAT stated that in assessing the evidence (much of which was described as 'less than truthful', 'at best a filtered version of the truth', and evidence which 'simply cannot be believed' (para. 17)), it followed the principles enunciated by the Federal Court in *Lambe* (1981) 4 SSR 43, requiring 'all facets of the interpersonal relationship' to be taken into account.

The AAT agreed with the DSS decision that there had been an overpayment of supporting parent's benefit, but decided that the relevant period should be extended to 27 November 1986, the day E assisted SJK in her move to her new accommodation.

The Tribunal rejected a further DSS submission that SJK was not eligible for supporting parent's benefit for the period during which she resumed cohabitation with her husband, as the evidence was unclear as to the relevant dates.

**Discretion to waive under s.186**

The AAT was not satisfied that SJK's circumstances provided any justification for waiving recovery of the amount of overpayment, noting that in addition to her pension, she received an amount of extra income derived from a cleaning job. However, had SJK and E notified the DSS of their actual relationship, the amount of unemployment benefit paid to E would have been increased to include additional payments for the two children (and, presumably, SJK).

**Formal decision**

The AAT *set aside* the decision under review, and substituted a decision that SJK was living with E as his wife on a *bona fide* domestic basis from 26 January 1984 to 27 November 1986. It was not appropriate to waive recovery, but an amount of \$2662 (the additional unemployment benefit for the two children that would have been payable to E) should be deducted from the overpayment.

[R.G.]



**SALVONA and SECRETARY TO DSS**

(No. W88/56)

Decided: 29 July 1988 by R.C. Jennings.

The AAT *set aside* a DSS decision to raise and recover an overpayment of unemployment benefit of \$13 522, on the grounds that there has not been a failure to comply with any provision of the *Social Security Act*. In the alternative, the AAT considered that if there was a debt due, it should be written off or waived.

**The facts**

Salvona first claimed unemployment benefit in August 1983. Though he described himself as single on his claim form, he was in fact sharing accommodation with a Mrs J and her daughter. The AAT concluded that Salvona and Mrs J were living together on a *bonafide* domestic basis, though an earlier sexual relationship between them had ceased about two years before and had not resumed.

**No failure to comply with the Act**

The DSS had sought recovery of the unemployment benefit paid from August 1983 to January 1987 under s.181(1) 'in consequence of a false statement or representation, or in consequence of a failure or omission to comply with a provision of this Act'.

According to the DSS, Salvona's false statement had been made when he applied for unemployment benefits. The AAT said that, because Salvona had honestly believed that he was a single person at the time, he had not made a false statement or representation. And his repeated failure to inform the DSS that he was living with a woman on a *bona fide* domestic basis was not a failure to comply with s.163(1), which requires a person to inform the DSS of any change in the person's circumstances: Salvona's circumstances had not changed; and Salvona had 'never abandoned the genuine belief that a sexual association was necessary to constitute [a *de facto* relationship]'. The Tribunal accepted Salvona's evidence that he honestly believed that a sexual relationship was the determining factor as to the existence of a *de facto* relationship and decided that no overpayment had occurred.

**A discretion to waive the debt?**

In the event that there had been a recoverable overpayment, the AAT considered that it should be waived. It reached this conclusion by reference to