

... 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.]

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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.]

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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

its finding that any overpayment resulted from innocent mistake. The AAT referred to the Federal Court's decision in *Hales* (1983) 13 SSR 136, where the Court stated that an important factor to the exercise of the discretion was the way in which the overpayment occurred.

The Tribunal reinforced this view by stating that, since Salvona could not be convicted of an offence under s.174 of the Act (for 'knowingly or recklessly [making] a false or misleading statement') without a finding of *mens rea*, 'there is thus further ground for exercising the discretion to waive any debt which is found to exist' under s.186.

The AAT directed that there was no debt due to the Commonwealth or alternatively, if there was any debt, it decided that the right of the Commonwealth to recover any part of the existing debt should be waived.

[R.G.]

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Separation under the one roof

MALAJEW and SECRETARY TO DSS

(No. V87/826)

Decided: 19 July by J.R. Dwyer.

Olga Malajew asked the AAT to review a DSS decision that she ceased to be entitled to age pension on 12 November 1987 if she continued to live in the same house as Mr Malajew, because of the effect of s.3(8) of the *Social Security Act*.

The legislation

Section 3(8), in force from 14 May 1987, provides that 'a person who would, apart from this sub-section, be an unmarried person' and was formerly a married person, 'shall be treated as a married person' where-

(b) the person is living in his or her former matrimonial home; and

(c) the person's former spouse is also living in the same home;

after 26 weeks, or, if either party has begun property proceedings in relation to the former matrimonial home, after 52 weeks.

The facts

Prior to May 14 1987, Mrs Malajew was receiving age pension as an 'unmarried person' under s.3(1) of the

Act, though she was legally married to her husband and was living in the same house as him. Malajew submitted that s.3(8) did not apply to her as it applied only to legally divorced people who continued to live in the 'former matrimonial home'.

'Formerly married': s.3(8)

The AAT agreed with the Tribunal's decision in *Clarkson* (1988) 44 SSR 561 that, where s.3(8) applies, it is mandatory. Apart from s.3(8), it was accepted that Mrs Malajew would be an unmarried person under s.3(1). The Tribunal could find no indication in s.3(8) that the words 'married person' and 'unmarried person' are not intended to bear the meaning given in s.3(1):

'[I]t is difficult to understand what the objective of [s.3(8)] could be, if it discriminated against spouses who had been divorced, and continued to live in the former matrimonial home, but allowed spouses who live separately and apart under the one roof, to continue to receive benefit or pension at an unmarried rate indefinitely, so long as they have not been divorced.'

(Reasons, para.11).

The Tribunal held that s.3(8) applied to Mrs Malajew.

'Not a married person': s.3(1)(b)

Section 3(1)(b) excludes from the definition of 'married person', 'a person who, for any special reason in any particular case, the Secretary decides should not be treated as a married person'. Malajew submitted that she was entitled to be excluded under that provision.

The AAT referred to the earlier conflicting decisions on this provision (*Trail* (1986) 30 SSR 377 and *Fague* (1986) 31 SSR 392) and preferred 'not to add to that confusion' as it was not necessary to express a view on the matter.

The Tribunal decided that 'for any special reason in any particular case' must have a similar meaning to 'in the special circumstances of the case', a phrase used in other parts of the Act, such as s.156. Section 156's predecessor was considered in *Ivovic* (1981) 3 SSR 25. A related provision, concerning backdating of Handicapped Child's Allowance was also considered in *Beadle* (1985) 26 SSR 321 (Federal Court). And in *Reid* (1981) 3 SSR 31, a case considering a provision identical to s.3(1)(b), the AAT had held that 'there must be some factor or factors in the circumstances of the particular case which take it outside the common run of cases'.

'[E]ven if the Tribunal has a discretion as to which I express no concluded view, I do not consider that there is any special reason

outside the common run of cases why Mrs Malajew should not be treated as a 'married person' under sub-s.3(8) of the Act. I do not consider that there is any factor which justifies the making of an exception to the principles established in sub-s.3(8); namely that people may only be treated as separated under the one roof for a limited period.'

The Tribunal found no severe financial hardship, i.e. hardship more severe than in the usual sort of case considered under the Act. Mr Malajew paid all household accounts, and gave Mrs Malajew \$110 per week for food. 'She is at least as well off as a single age pensioner', the AAT said. Nor did the AAT consider domestic discord and occasional violence 'unusual, unique, special or uncommon in the context of married persons who are living separately and apart under the one roof'.

Formal decision

The AAT affirmed the decision under review.

[R.G.]

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Family allowance: prohibited non-citizen

TOLI and SECRETARY TO DSS
(No. N88/467)

Decided: 13 September 1988 by A.P. Renouf.

Toli and her husband arrived in Australia on 19 December 1981 on a 3 month visitor visa. This expired but she remained in Australia and her daughter Salome was born here on 13 May 1982. An application for family allowance was filled in by a relative. It stated that Toli had been in Australia for all of the previous 12 months. This was untrue but Toli later said that telling the truth would have revealed her status as a prohibited non-citizen.

Another 3 children were born between 1983 and 1985 and family allowance was sought and obtained for them. On 2 of the claim forms, Toli falsely represented herself as being an Australian citizen.

In 1987, the DSS discovered Toli was a prohibited non-citizen. By this time \$4881 family allowance had been paid and the DSS decided to recover this amount from Toli.

On 20 November 1984 Toli and her husband voluntarily revealed their status to the Department of