

## Cohabitation

### H and SECRETARY TO DSS (No. 5099)

**Decided:** 23 May 1989 by R.K. Todd  
The applicant (who used the surname, H) was a woman. She had begun to live with a man (also known as H) in 1977. They lived in the same house until 1984, when they moved to another house, where they continued to live until October 1986.

In July 1984, the applicant claimed unemployment benefit, giving as her surname 'B'. She was granted an unemployment benefit, which was paid on the basis that she was a single person. The applicant continued to receive that benefit until October 1986, when the DSS decided that she had been a 'married person' throughout the relevant period and that she had been overpaid unemployment benefit to the extent of \$10 170. The DSS decided to recover that amount by withholding from her current unemployment benefit.

After an unsuccessful appeal to the SSAT, the applicant asked the AAT to review the DSS decision.

#### The legislation

Throughout the period from 1984 to 1986, s.114 of the *Social Security Act* [now s.122] provided that the rate of benefit payable to a 'married person' should be calculated by reference to the income of that person's spouse.

The former s.6(1) [now numbered s.3(1)] defined a 'married person' to include a 'de facto spouse', which term was defined 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 other person'.

#### The evidence

During the period when she had lived with the man, he had given the applicant most of his weekly wages to cover household expenses. The applicant did all the housework, including the shopping, cleaning and cooking.

At first, they had a sexual relationship but this stopped in about November 1984, after another woman (D) moved into the house and a sexual relationship developed between the applicant and D.

D was imprisoned in 1986 for about 4 months. During that time, the applicant attempted to resume her relationship with the man but, on D's

release from prison in October 1986, the applicant and D moved out of the house occupied by the man, and obtained a domestic violence order against the man. This order was made as the result of the man's violence towards both women.

Throughout most of this period, that is from some time shortly after beginning to live with H in 1977, the applicant was known as Mrs H, and the man regularly claimed her as his dependent spouse for income tax purposes.

During the nine years when the applicant shared accommodation with the man she regularly suffered violence at his hand.

#### The AAT's decision

The AAT observed that the relationship between the applicant and the man had many of the aspects of a marriage relationship, including a sexual relationship, a degree of financial dependence and public recognition that there was a marriage-like relationship.

The AAT accepted that the sexual relationship between the applicant and the man had been replaced by a relationship between her and D; but, the AAT said, this did not displace the marriage type relationship between the applicant and the man:

'It is not to make any moral judgment of such a relationship [that is the relationship between the applicant and D] to say that it never could have constituted a marriage-type relationship of the type contemplated by the legislation.'

(Reasons, para. 31)

Having decided that the relationship, similar to a marriage, had existed between the applicant and the man until October 1986, the AAT concluded that there had been an overpayment of unemployment benefits to the applicant because of her failure to disclose that marriage-like relationship to the DSS when she claimed unemployment benefits in 1984. The resulting overpayment, the AAT said, should be recovered from the applicant, although the AAT was 'sure that she acted out of desperation':

'The applicant has had a pretty difficult life. [The man's] drinking habits and the hard time he gave the applicant would no doubt lead many to say that she should have left him earlier. But she had no-one else, and she apparently decided to battle it out with him. Had he given her the affection that she ultimately had to find with D, and had he not spent so much on drink, she would have had a better time of it. She appears to have decided that resort to social security would give her that independence which she lacked. To seek it at the unmarried rate was not right. . . . but in the classic words of defence counsel "she

has suffered a great deal already" from her relationship with [the man], and from the social milieu in which life placed her. I say this only to emphasise what I am sure will be the position anyway, namely that the deductions from her present entitlement, made to recover the overpayment, should not be punitive and should enable her to live as decently as possible.'

(Reasons, para. 38)

#### Formal decision

The AAT affirmed the decision under review.

[P.H.]



### APPLETON and SECRETARY TO DSS

(No. 5158)

**Decided:** 13 June 1989 by K.J. Lynch.  
The AAT affirmed a decision of DSS that Sheryl Appleton repay \$3738 supporting parent's benefit paid to her for the period March 1987 to August 1987. Appleton had argued that during the relevant period she was living separately and apart from her husband. The DSS had maintained she was married.

#### The facts

Appleton and her husband, G, lived in a town (C) in Queensland. In January 1987 they signed a lease together for a house in another town (K) from February 1987. Three weeks later, they signed a contract for the purchase of the property in K subject to the sale of their property in C.

In February 1987, Appleton decided to leave her husband and she moved without him to the K property taking the children and most of the furniture. She lodged a claim for supporting parent's benefit and this was granted from March 1987.

Her husband spent a considerable amount of time at the K house between late March and August 1987. He did not contribute to the maintenance of Appleton nor the children but this was not a change from his previous conduct. His income went to support his drug addiction, and he arranged to have drugs delivered to him at the K property. A police raid in late August 1987 resulted in charges against him and her husband then left her.

#### 'Separately and apart'

To be eligible for a supporting parent's benefit a person must be an 'unmarried person' with a dependent child. The *Social Security Act*,

s.83AAA(1) [renumbered s.53(1)] defined 'unmarried person' as 'a married person who is living separately and apart from his or her spouse'.

The AAT examined the question: when is a woman living separately and apart from her spouse? It referred to the old *Matrimonial Causes Act* and the High Court decision in *Main v Main* 78 CLR 636 at p.641, where Latham C.J., Rich and Dixon, JJ. considered that physical separation was necessary and said it was not enough that there had been a destruction of the matrimonial relationship while the spouses dwelt under the same roof.

In finding that the DSS correctly decided Appleton was not 'unmarried' at the relevant time, the AAT took into account the fact that to those around them Appleton and her husband appeared to live in a matrimonial relationship, despite the fact that her husband was not always there. It continued:

'It is, furthermore, obvious that the parties are not to be regarded as living "separately and apart" unless one of them, at least, has done with the marriage for good. Spouses who have separated temporarily for a number of reasons, whether for the good of the marriage, or for business reasons or otherwise are not living separately and apart. According to evidence in this matter, there was no intention to terminate the marriage at the relevant time. There has not been a repudiation of the matrimonial relationship by one or other of the spouses or the abandonment by mutual agreement. While it is possible for reconciliation to occur after spouses have been living separately and apart, the status of an unmarried person is not a transitory one nor does it arise, as the applicant thinks, whenever there is an absence of full commitment to the marriage by the other spouse.'

(Reasons, para. 10)

#### Waiver

The AAT accepted the reasoning in the decision of *Taylor* (1984) 21 SSR 238 that the raising and recovery of overpayments were separate decisions and that the AAT should consider all the circumstances, including those surrounding the overpayment and 'all relevant circumstances' as set out in *Ward* (1985) 24 SSR 289.

#### Hardship

Although the SSAT had conducted its own inquiry into hardship and recommended that recovery of the overpayment be waived, the DSS did not accept this because it considered it was impossible to determine that hardship was established, as there had been no mention of the present family income.

There were no submissions made to the AAT about the decision to recoup

the overpayment by deductions, nor was there evidence to establish that recovery would cause hardship.

[B.W.]

## Stay order

**BISHOP and SECRETARY TO DSS (No. S89/130)**

**Section 41(2) application decided:**

13 June 1989 by W.J.F. Purcell.

Mervyn Bishop received a lump sum compensation award of \$135 000 in December 1988. When he applied for an invalid pension in February 1989 and sickness benefits in May 1989, the DSS decided that the compensation part of the lump sum was \$17 500 and that Bishop was precluded from receiving pension (including sickness benefits) until August 1989.

The SSAT affirmed that decision and Bishop appealed to the AAT.

Pending the hearing of the appeal, Bishop applied under s.41(2) of the *AAT Act* for an order staying the decision of the SSAT.

#### The legislation

Section 41(2) of the *AAT Act* authorises the AAT to make an order 'staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates... for the purpose of securing the effectiveness of the hearing and determination of the application for review'.

Bishop argued that the s.41(2) power should be exercised in his favour because he was suffering financial hardship as a result of the decision under review, because he had a prospect of succeeding in his application for review and because the DSS would probably be able to recover any moneys paid to him if his application for review was ultimately unsuccessful.

#### Effect of a stay order

The AAT assumed that the decision, which it could stay under s.41(2), was the SSAT decision. The Tribunal apparently accepted the argument of the DSS that, if the SSAT decision was stayed, Bishop's position would not be improved because the original DSS decision would then be revived and that decision would continue to preclude payment of pension to Bishop until August 1989.

The AAT accepted that submission, observing that it could 'see no purpose in making an order staying the operation of the SSAT decision if such order might be of no effect': Reasons, p.3.

#### The AAT's solution

However, the AAT said that, it could make an order 'affecting the operation of [the] decision [under review]' which would provide Bishop with income, which could be recoverable by the DSS.

The AAT said that, if it ordered that Bishop be entitled to receive sickness benefits until the date of the AAT's determination of his application for review or until August 1989 (whichever was the earlier), those payments of benefit would be recoverable by the DSS if the AAT ultimately affirmed the decision under review. The AAT concluded with the following order:

'Being satisfied that it is desirable to do so for the purpose of securing the effectiveness of the hearing and determination of the application under review, it is ordered, pursuant to s.41(2) of the *AAT Act*, that the applicant be entitled to receive sickness benefit payments from the date hereof until the determination of his application for review by this Tribunal on 22 August 1989, whichever is the earlier'.

(Reasons, p.4)

[P.H.]

**WEBBER and SECRETARY TO DSS**

(No. 5192)

**Section 41(2) application decided:**

12 May 1989 by S.A. Forgie.

William Webber had appealed to the SSAT against a DSS decision to reduce his invalid pension to the married rate, on the basis that he was living in a *de facto* relationship with a woman. The SSAT affirmed the DSS decision and Webber appealed to the AAT.

In the meantime, the DSS had acted on the SSAT decision and made two payments of invalid pension to Webber at the reduced, married, rate.

Webber then applied to the AAT under s.41(2) of the *AAT Act* for an order staying the implementation of the SSAT decision.

#### Decision already implemented?

On behalf of the DSS, it was argued that the s.41(2) application was now too