Unemployment benefit: work test

BROUGH and SECRETARY TO DSS

No. 5356

Decided: 8 September 1989 by S.A. Forgie.

Ronald Brough appealed to the AAT against a SSAT decision affirming a DSS decision that he was ineligible for unemployment benefit. The SSAT had found that in the relevant period, 4 May –1 August 1988, Brough was employed, albeit earning a very low wage.

The issue

The central question in this case was whether Brough met the requirements of s.116(1) of the *Social Security Act* during the period in question — in particular, whether he had been 'unemployed' within s.116(1)(c).

Brough had worked as a casual employee at various shows and rallies around Australia. Over a period of 92 days, between 1 May and 31 July 1988, the Tribunal found that he had only worked for 14 days at shows and rallies, earning $627.

The AAT found that he was not working as a sub-contractor, and he did not receive any retainer in the periods between shows, but was re-engaged for each show. It also found that Brough had looked for work, both through the CES and by writing to various employers.

'Unemployed'

The AAT concluded that Brough was eligible for unemployment benefit. The Tribunal noted the discussion of the Federal Court in *Thompson* where the Court considered the meaning of 'unemployed', stating that —

> 'the possibility must be recognized that activities being pursued by a person without paid work may be so fundamentally incompatible with the person's being regarded as unemployed that no further inquiry is necessary.'

The AAT noted that the *Social Security Act* contemplates that those in receipt of unemployment benefit are able to earn some income. It contrasted Brough's position with that in *Waller* (1985) 27 *SSR* 326, where the applicant had been engaged in his employment as a salesperson on a relatively full-time basis; and, though Waller had argued he was underpaid for the work, the AAT had found he was not unemployed. In Brough's case —

> 'It is apparent that the applicant worked for only two comparatively longer periods in July . . . [3 and 4 days]. . . [T]here is nothing to suggest that these two periods should be considered as altering the nature of his work. They would seem to represent his work at two of the more major shows in the Territory. Viewed overall, the periods of his work were short and irregular. It would be stretching the ordinary meaning of the language to say that the applicant was employed for the whole period from 4 May 1988 to 1 August 1988 when his 'employment' actually extended only for very brief periods. I am, therefore, satisfied that he was an unemployed person undertaking casual work from time to time while actively seeking full-time paid employment.'

(Reasons, para. 18)

Formal decision

The AAT set aside the decision of the SSAT and substituted for it a decision that Brough was eligible for unemployment benefit from 4 May 1988 to 1 August 1988.

[J.M.]

Child disability allowance

SECRETARY TO DSS and BOSWORTH

(No. W89/42)

Decided: 15 September 1989 by G.L. McDonald, J.G. Billings, and N. Marinovich.

Glenda Bosworth gave birth to her daughter, N, in April 1985. In May 1987, N was diagnosed as suffering from coeliac disease, which required the elimination of gluten from her diet.

Bosworth claimed a child disability allowance and, when the DSS rejected that claim, she appealed to the SSAT, who decided that the allowance should be granted.

The Secretary then asked the AAT to review that decision.

The legislation

Section 102 of the *Social Security Act* provides that a person who provides daily care and attention to a disabled child in a private home is qualified to receive child disability allowance.

Section 101 defines 'disabled child' as a child with a disability who needs daily care and attention 'that is substantially more than the care and attention needed by a child of the same age who does not have such a disability'.

Departmental instructions

The DSS defended its decision not to grant child disability allowance to Bosworth by referring to a Departmental handbook relating to eligibility for the allowance. The handbook said that children with coeliac disease 'will not generally be classified as "disabled".' However, the handbook acknowledged that there might be special or unusual factors, so that the need for a parent to care for a child was 'demonstrably greater than would usually be anticipated for a child with coeliac disease' and in that situation, the child could be classified as 'disabled'.

The DSS argued that the AAT should approach the Departmental handbook along the lines which had been outlined, in *Drake (No. 2)* (1979) 2 ALD 634, by the then President of the Tribunal, Brennan J. In that case, the President had said that the AAT should apply ministerial policy unless cogent reasons could be shown against the application of that policy. Brennan J had emphasised the political status of the policy (coming from the Minister for Immigration) and the fact that the policy had been exposed to parliamentary scrutiny.

However, the AAT pointed out that, in the present case, the Departmental handbook did not have the status of ministerial policy nor was there any suggestion that the guidelines in the handbook had been exposed to parliamentary scrutiny. The AAT acknowledged that it was desirable for it to conform to departmental policy but, as had been pointed out in *Drake's Case*, any policy had to be consistent with the legislation and should not prevent the consideration of the merits of individual cases.

The present instructions relating to coeliac disease, as contained in the Departmental handbook, revealed two flaws, the AAT said: first, the instructions went close to excluding children with coeliac disease from qualifying as disabled - that is, they limited the consideration of individual cases; but, secondly, and more seriously, the policy appeared to be in conflict with s.101 of the *Social Security Act*.

This conflict arose from the fact that the instructions measured the 'substantially more care and attention'

given to a child suffering from coeliac disease against the care and attention normally given to a child suffering from that disease; whereas s.101 required that 'substantially more care and attention' be measured against the care and attention given to a child who did not suffer from the disease.

Accordingly, the AAT decided to approach this case without regard to the Departmental instructions. After considering the evidence given about the level of care and attention provided by Bosworth to her child and measuring that care and attention against the care and attention required by a child free of such disability, the AAT concluded that the child met the requirements of s.101 and was a 'disabled child'; and that Bosworth was qualified for child disability allowance.

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Cohabitation

SJOBERG and SECRETARY TO DSS

(No. 5256)

Decided: 25 July 1989 by D.W. Muller.

Carolina Sjoberg was granted a widow's pension in 1968, after the death of her husband. In 1984, she transferred to an age pension, when she reached the age of 60.

Over the years, Sjoberg took in a number of boarders, one of whom was a man, F. In 1975, F was injured and granted an invalid pension. On medical advice, he decided to move to Queensland.

Because of his serious disabilities, F needed help and he asked Sjoberg to move to Queensland and be his housekeeper. They agreed that Sjoberg would undertake this role in return for F transferring a half-interest in F's house to her.

In 1978, the DSS decided that Sjoberg and F were living in a *de facto* relationship and re-assesed their pensions at the married rates. An SSAT appeal was unsuccessful.

In 1988, Sjoberg asked the DSS to review the 1978 decision. When the DSS affirmed its earlier decision, she appealed to the AAT.

The legislation

Section 3(1) of the *Social Security Act* defines a 'married person' as including a 'de facto spouse'. The latter term is defined to mean —

> 'a person who is living with another person of the opposite sex as the spouse of that other person on a *bona fide* domestic basis although not legally married to that other person . . .'

The DSS decision

The evidence on which the DSS had based its decision was that Sjoberg and F had lived in the same house for more than 11 years; they were 'joint tenants 'of that house; they had made wills, leaving their shares in the house to each other (unnecessarily, as they were joint tenants); and they shared household expenses and chores.

On the other hand, they had separate social and recreation interests, had never had a sexual relationship nor shared a bed-room, and saw their relationship as employer/employee.

On that evidence, the DSS had decided that they were 'residing together in a situation similar to many married persons'; and the SSAT had said that their relationship was 'similar to that of a married couple'.

The AAT decision

The AAT said that the DSS and the SSAT had adopted the wrong approach. It was 'quite unfair' to compare their relationship with a 'burnt out' marriage:

> 'There are no doubt many hundreds of married couples in Australia who live together without a sexual relationship, without even any affection for each other, but such relationships are usually only the sad result of the ravages of the years. It would be a rare marriage in which the participants had never had a sexual relationship with each other and even rarer in which they had occupied separate bedrooms from the beginning of the marriage.'

(Reasons, para. 6)

The AAT said that to use 'marriages which are in their death throes' as the basis for assessing relationships between men and women involved 'a too cynical view of the institution of marriage'.

Rather, the relationship between Sjoberg and F should be compared to those elderly or infirm people who come together for mutual assistance. These were often relationships between siblings, parents and children or people of the same gender:

> 'In such relationships there is no possibility that the parties are living together on any bona fide domestic basis.'

(Reasons, para. 7)

Formal decision

The AAT set aside the decision under review, decided that Sjoberg had never been the de facto spouse of F, and remitted the matter to the Secretary 'for further consideration'.

[P.H.]

GREAVES AND SECRETARY TO DSS

(No. 5317)

Decided: 22 August 1989 by D.W. Muller.

The AAT *affirmed* a DSS decision to cancel Christine Greaves' widow's pension for the period January 1987 to June 1988, on the basis that she was living in a marriage-like relationship with a man, D.

Greaves was a divorced woman with 2 children. D lived in Greaves' house in South Australia for 6 months in early 1987. In June 1987, Greaves decided to move to Brisbane ('to see Expo', she said), and she and D travelled there together. Greaves bought a house in Brisbane and she, her children and D moved into the house. Throughout this period, D was receiving unemployment benefits at the single rate.

In July 1988, Greaves sold the Brisbane house. She and her children returned to Adelaide and D stayed in Brisbane.

D paid a part of the household expenses, but did not pay rent or board. He had a separate bedroom, but there was a sexual relationship between Greaves and D, which they described as casual and not similar to a marriage relationship.

The AAT concluded that there was 'a de facto family unit' comprising D, Greaves and her 2 children:

> 'The relationship between Greaves and D may well have been different to that which each had experienced in former matrimonial life but new partners and greater maturity create new situations and changed relationships.'

(Reasons, para. 7)

Greaves and D had planned, the AAT said, to holiday in Queensland together, over the time when Expo was operating, and 'they intended that the Commonwealth Government should fund the holiday by way of social security benefits': Reasons, para. 6.

[P.H.]