

Administrative Appeals Tribunal decisions

Overpayment: discretion to waive

SECRETARY TO DSS and DAVEY
(No. 5777)

Decided: 27 February 1990 by
D.W. Muller, W.A. De Maria, and
A.M. Brennan.

The Secretary sought review of a decision by the Social Security Appeals Tribunal which had varied a DSS decision to recover \$14 707 by waiving the right of the Commonwealth to recover \$9287 of that sum.

The SSAT had made this decision by determining not to recover the money paid to Davey for the period when the overpayment was incurred as a result of the operation of s.3(8) of the *Social Security Act*.

The facts

Davey had been living in a *de facto* relationship with a Mr Munro from 16 November 1985 to 15 September 1986. The relationship ended at that time but the couple had continued residing under the same roof until 16 December 1988.

From 14 November 1987, as a result of s.3(8) (now repealed), Davey was deemed to be living as the spouse of Munro for pension purposes. During the period from 14 November 1987 to 16 December 1988 Davey was paid \$9287. This was the amount which the Social Security Appeals Tribunal had decided should not be recovered.

The discretion to waive

The AAT noted that the -

'discretion cannot be exercised in an arbitrary manner . . . Of paramount importance is the fact that Government money was paid to Mrs Davey in circumstances in which she was not entitled to it. It is now a debt owing to the Commonwealth and *prima facie* it should be repaid.'

The Tribunal noted that there were no special circumstances; that Davey had received money from a marriage settlement enabling her to build a house and that there was a very real prospect of recovery. She had made false statements on her review forms concerning her living arrangements which had given rise to the overpayment. 'The fact that Mrs Davey practised a deception for such a long period mitigates against a discretion being exercised in her favour.'

Formal decision

The AAT set aside that part of the SSAT decision which would have waived the right of the Commonwealth to recover \$9287 overpaid to Davey and ordered that the amount of \$14 707 be recovered by fortnightly instalments of \$50 each for a period of at least two years.

[R.G.]

Cohabitation

SECRETARY TO DSS and CURTIS
(No. 5906)

Decided: 17 May 1990 by T.E. Barnett.

The Secretary appealed against an SSAT decision to set aside a decision of the DSS that Ms Curtis was living in a *de facto* relationship.

The DSS had cancelled Curtis' widow's pension from February 1987 and in March 1989 had raised an overpayment of some \$28 000 on the basis that Curtis had been living in a *de facto* relationship with a man, Barrett, between December 1982 and February 1987. The SSAT found, by contrast, that she was entitled at all relevant times to the pension.

The evidence

Curtis commenced receiving a widow's pension on 13 September 1979. She told the AAT that Barrett had moved into the house she was renting in December 1982 and that they had commenced a sexual relationship almost immediately. In most other respects they continued to lead separate lives.

Curtis said she ran her household as she had always done: she cooked meals for herself and her children, purchased food, clothing etc for herself and her children out of her own money, ran her own car and used her own furniture. She had a separate bank account and maintained the lease of the house in her own name. Barrett paid half the rent and half the cost of utilities.

Curtis said that Barrett used the house as a base. He owned very little and what he owned he kept in his station wagon. He did his own washing at the laundromat and usually ate take-away food, although he would occasionally eat a meal that Curtis cooked,

particularly if he had purchased the ingredients.

Barrett received unemployment benefit in his own right which he was fraudulently receiving at the married rate, having invented a fictitious *de facto* wife. Barrett got on well with Curtis' children, who called him by his first name, and although he did not discipline them or buy them gifts, he would sometimes look after them after school if Curtis was unavailable.

Curtis said Barrett was very independent and spent most days and evenings out with his friends. He would go away for long periods, without saying when or whether he would return. Between September 1982 and December 1987, he was absent for periods of 6 weeks, 3 months and 4 months, together with many shorter periods.

In September 1983, Curtis gave birth to a daughter, S., and, although Barrett was the father, she falsely declared another man as the father on the birth certificate, as she feared Barrett might try to gain custody of her.

In April 1985, Curtis and her children had gone to Queensland with Barrett and another couple and they had lived together in a series of houses and caravans on the same domestic basis as before. On most occasions, she had rented places in her own name, although on one occasion the lease had been taken out in the names of Keryn and Alan Barrett. Curtis said that the landlord had made an error, but the AAT noted that the electricity connection had been made in the same names; Curtis said she had done this so the names would match the rent document.

The AAT said that Curtis had never told the DSS about Barrett and, when on one occasion she had told the DSS of Barrett's presence, she had given him a false name. She had not told the DSS of her move to Queensland until long after the move, and indicated she had moved there much later than she in fact had.

In February 1987, Curtis was interviewed by DSS officers, and they prepared a statement which she read and signed. This stated that she had been living with Barrett since 12 December 1982 'in a relationship the same as a married person'. It also stated that they had separated from April 1984 to April 1985 when they had reconciled