Federal Court decisions

Cohabitation

SECRETARY TO DSS v HILTON
(Federal Court of Australia)
Decided: 18 April 1991 by Davies J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Hilton* (1990) 60 *SSR* 825.

A majority of the AAT had decided that Hilton was not living in a *de facto* relationship with the man with whom she had shared a house for some 4 years. The DSS attacked that decision in this appeal as perverse, in the sense that no reasonable decision-maker could have come to that conclusion.

During the period in question, Hilton and the man had lived in the same house, as had 2 children of whom they were registered as the parents; Hilton had adopted the man's surname; they had been registered (with the same surname) as joint tenants of a property; and they were known to Hilton's parents as a married couple.

The majority of the AAT had described Hilton's evidence as 'inconsistent'; the dissenting member (who would have found a *de facto* relationship) described her as not credible; and all AAT members noted that the man in question had proved a poor witness because of memory loss.

However, the majority had found that the relationship between the respondent and the man was that of friendship; their sexual relationship had not been exclusive; they had separate social lives; and they kept separate households.

In the Federal Court, Davies J indicated that, even on the findings made by the majority of the AAT, he would have found the existence of a marriage-like relationship.

However, although the AAT's decision was not one which the judge would have reached, there was evidence before the AAT (Davies J said) on which it was entitled to make its findings of fact; and neither those findings nor the conclusion drawn from them were so fanciful and perverse that no reasonable tribunal could have come to them.

Davies J observed that one of the tribunal's findings of fact was open to criticism: this was the finding that the man, although registered as the father of 2 of the respondent's children, was not their biological father. Such a finding, Davies J said, was inappropriate in the absence of appearance on behalf of the children. However, as the parentage of the children was not a critical point, this aspect of the matter did not affect the tribunal's decision.

Formal decision

The Federal Court dismissed the appeal.

[P.H.]

Waiver of AUSTUDY overpayment

SECRETARY TO DSS and MIGOTTO
(Federal Court of Australia)
Decided: 24 July 1991 by Heerey J.

Anna Migotto received an overpayment of AUSTUDY under the *Student Assistance Act* 1973 during 1989. Late in that year, she was granted sickness benefits; and the DSS decided to recover the AUSTUDY overpayment by reducing the rate of her sickness benefits.

On appeal, the AAT decided that the Secretary could waive recovery of the AUSTUDY overpayment under s.251(1) of the *Social Security Act*. The DSS appealed to the Federal Court (under s.44 of the *AAT Act*) against that decision.

The legislation

Section 246(2) of the *Social Security Act* authorises the recovery, by deductions from a current pension, allowance or benefit, of any amount paid to a person 'under a prescribed educational scheme that should not have been paid'. AUSTUDY is a prescribed educational scheme.

Section 251(1) of the *Social Security Act* allows the Secretary to write off or waive recovery of debts arising or payable 'under or as a result of this Act'; and s.251(4) includes in that class of debts a debt arising under the *Veterans' Entitlements Act* and an assurance of support debt.

No legislative authority for waiver

Heerey J. said that, before a debt to the Commonwealth could validly be waived, specific statutory support was needed; and he referred to *The Case of Dispensations* (1604) 145 ER 224; and s.1 of the *Bill of Rights* 1688 (Eng).

Heerey J. held that the debt owed by Migotto, resulting from overpayment of AUSTUDY, was not payable 'under or as a result of the [*Social Security*] *Act*'.

The exclusion of the debt owed by Migotto was confirmed by s.251(4), which deemed a very limited category of debt to be debts arising or payable under the *Social Security Act*:

> 'The limited terms of ss.(4) point against a conclusion that the power to waive . . . extends to all debts due to the Commonwealth, or to all debts which the Commonwealth seeks to recover by deduction from payments under the Social Security Act.'

(Reasons, pp. 6-7)

'Considerations of policy and convenience', Heerey J. said, 'lead to the same result': Reasons, p. 7. The logical place for a power to waive recovery of AUSTUDY overpayments was with those who were responsible for administering the AUSTUDY scheme. In fact, s.31C(1) of the *Student Assistance Act* authorised the Minister to waive recovery of an overpayment under that Act. But no power was conferred on the Secretary to the DSS or the AAT to exercise that power.

Formal decision

The Federal Court allowed the appeal and set aside the decision of the AAT.

[P.H.]

Discretion to disregard compensation payment

SECRETARY TO DSS v SMITH
(Federal Court of Australia)

Decided: 26 June 1991 by von Doussa J.

This was an appeal, under s.44 of the *AAT Act*, from the AAT's decision in *Smith* (1991) 60 *SSR* 832.

The AAT had decided that a payment of compensation made to Smith in respect of an industrial injury should be treated as not having been made, so as to avoid recovery (under ss.152 and 153 of the *Social Security Act*) of sickness benefit paid to Smith for an unrelated temporary incapacity for work. According to the AAT, the 'unusual fact situation' justified a decision that there were 'special circumstances' within s.156 of the Act.

The scope of the s.156 discretion

The DSS first argued that s.156 could not be used to alleviate a result which flowed from the terms of ss.152 and 153 of the *Social Security Act*, or to override an apparently unjust result which was the product of the legislation.

Von Doussa J. rejected this argument:

> 'The fallacy of the argument lies in its failure to read s.156 as part of the overall scheme enacted in Part XVII to provide for cases where a person becomes eligible to payments under the Act and from an independent source by way of compensation that is in whole or in part in respect of an incapacity for work.'

(Reasons, p. 9)

That scheme involved the arbitrary 50% formula in s.152(2)(c)(i), the application of which could be alleviated through the discretion in s.156, as O'Loughlin J had recognised in *Hulls* (1991) 60 *SSR* 834.

According to von Doussa J., there were other arbitrary elements in the scheme: the use of average weekly earnings in s.152(2)(e) and the commencement of the lump sum payment period in accordance with s.152(3) were other examples. These provisions were 'intended to operate together as a fair balance of the interests of the recipient of the payment with the interests of others in the community whose needs must be met as far as possible from a finite budget allocation for social security measures': Reasons, p. 10.

The scheme of Part XVII of the *Social Security Act* recognised that 'perfect matching of eligibilities ... for pension and for payments by way of compensation in respect of an incapacity for work is impracticable'. At the same time, the legislation 'recognised that from time to time a case may arise where the degree of unfairness to a recipient of a payment by way of compensation would bring about an unreasonable or unjust result which was outside that which could be justified by the practical expediency of the arbitrary provisions in ss.152 and 153': Reasons, pp. 10-11.

Von Doussa J also rejected the parallel argument advanced by the DSS that the 'circumstances' which could be considered under s.156 should be confined to matters which arose external to the operation of the scheme:

> 'The facts peculiar to a particular person cannot be considered in isolation from the operation of the provisions of ss.152 and 153. The operation of those sections in the light of the facts surrounding the person concerned is part of the circumstances of the case.'

(Reasons, p. 12)

In the present case, von Doussa J said, it had been open to the AAT to find 'special circumstances' and to exercise its discretion under s.156 in favour of Smith:

> 'Allowing that the object and purpose [of Part XVII] is one of practical expediency at the expense in some cases of perfect fairness it was open to find, as the Tribunal did, that the operation of Part XVII would otherwise be unjust in the circumstances of this case.'

(Reasons, pp. 14-15)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]