Federal Court

Claim for inappropriate payment

CALDERARO v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 17 December 1991 by Gray J.

This was an appeal, under s.44(1) of the *AAT Act*, from the decision of the AAT in *Calderaro* (1991) 62 *SSR* 874.

The AAT had refused to backdate payment of invalid pension to Calderaro over some 12 years before she had lodged a claim for that pension. Calderaro had argued that this was a case for the exercise of the Secretary's discretion, conferred by s.159(5) of the *Social Security Act* 1947, to treat earlier claims for sickness benefit (in 1976) and unemployment benefit (in 1983) as claims for invalid pension.

The legislation

Section 159(5) of the *Social Security Act* 1947 gives the Secretary a discretion to treat a claim for one payment under the Act or under another Commonwealth program as a claim for another payment under the Act 'that is similar in character'.

The exercise of this discretion would permit the person to be paid the substituted pension, allowance or benefit from the date of the earlier claim.

'Similar in character'

The AAT had decided that sickness benefit could be described as 'similar in character' to invalid pension; but that unemployment benefit could not be so described.

In coming to this conclusion, the AAT said the important factor was the legislative qualifications for each payment.

The AAT observed that unemployment benefit was a payment to a person who was capable of working and who was seeking work; and invalid pension was paid to a person permanently incapacitated for work.

On the other hand, the differences between sickness benefit and invalid pension (which hinged on the elusive distinction between temporary and permanent incapacity) were less significant than the fact that they were similarly grounded in a physical or mental disability which incapacitates a person from supporting herself or himself by engaging in paid employment.

Gray J said that the AAT's approach to this question of comparison had involved no error of law. The comparison made by the AAT between the circumstances which would support a grant of unemployment benefit and those which would support a grant of invalid pension conformed to the approach of the Federal Court in *Cooper* (1990) 54 *SSR* 727.

The discretion

Although the AAT had decided that Calderaro's claim for sickness benefit, made 12 years before her claim for invalid pension, was available for the exercise of the s.159(5) discretion, the Tribunal had said that the discretion should not be exercised in this case.

The AAT had taken into account a number of factors when refusing to exercise the discretion. These included:

- the length of time involved;
- the appropriateness in 1976 of the grant to Calderaro of the sickness benefit for which she had applied;
- her assertion when claiming unemployment benefits in 1983 that she was capable of working;
- her treating doctor's opinion (expressed in 1978 and 1979) that she could work; and
- her relative youth in 1976 (she was 17 years of age).

Gray J said that the purpose of subs 159(5) was —

> 'to ensure that a person entitled to a benefit under the Act is not disadvantaged by having made application for some other from of benefit, which may be similar to but not as beneficial as the one to which the person is entitled.'

(Reasons, p.14)

Given this purpose, Gray J said, the decision-maker should view the matter with the benefit of hindsight and should concentrate on considerations directed to fulfilling the purpose of s.159(5). Of the factors considered by the AAT, Calderaro's claim for and grant of unemployment benefit in 1983 and the opinion of her treating doctor that she could have worked in 1978 and 1979 were relevant considerations.

But it had involved an error of law to treat as relevant, as the AAT had, the fact that the grant of sickness benefit to the applicant had been appropriate in the light of the information available in 1976:

> 'The fact that, on the information available in 1976, a decision to grant sickness benefit, and not to advise the applicant to apply for an invalid pension, was appropriate in no way advances the consideration of the question whether, in 1989, with the information then known to the decision maker, it was reasonable to treat the applicant as having applied for an invalid pension in 1976 . . . The purpose of s.9(5) is to overcome the problem that a person has made an inappropriate application, whether or not that application was granted on the information known at the time. Such a question can only be determined by reference to the information available at the time of the second application.'

(Reasons, pp.16-17)

In relying on the apparent appropriateness of the grant of sickness benefit in 1976, the tribunal had acted upon 'considerations . . . foreign to the purpose of s.159(5) and therefore irrelevant'; and in taking those considerations into account, the tribunal had erred in law: Reasons, p.17.

Formal decision

Gray J allowed the appeal and remitted the matter to the tribunal to be dealt with in accordance with the Court's reasons for judgment.

[P.H.]

AAT's reasons for decision: inadequate

STAUNTON-SMITH v SECRETARY TO DSS

(Federal Court of Australia)

Decided: 31 October 1991 by O'Loughlin J.

This was an appeal, under s.44 of the *AAT Act*, from the Tribunal's decision in *Staunton-Smith* (1990) 57 *SSR* 778.

The AAT had affirmed a DSS decision (also affirmed by the SSAT) to cancel Lynn Staunton-Smith's sole parent's pension because she was a 'married person'. The AAT based that deci-

sion on its finding that Staunton-Smith was living with her husband 'as his wife', so that she was a 'married person' within s.3(1) of the *Social Security Act* 1947.

The evidence

Staunton-Smith and her husband married in 1980. They separated in 1981. In March 1989, Staunton-Smith moved into her husband's house; but she maintained that she was still living 'separately and apart' from her husband and so was excluded from the s.3(1) definition of 'married person'.

Staunton-Smith had 3 children from a previous marriage, one of whom (P) had Downs syndrome. Staunton-Smith suffered from Addison's disease, which seriously affected her capacity to look after P.

Staunton-Smith's husband told the AAT that he had allowed his wife to move into his house because of her health problems and his concern for the welfare of P. He provided care to P when Staunton-Smith was too ill to do so herself. He said that their relationship was not like a marriage — there was no sexual or social relationship and they did not share the whole of his house.

Since moving into the house, Staunton-Smith had contributed to the cost of one electricity bill; and, since the cancellation of her sole parent's pension, the husband had met most of her expenses.

The legislation

According to s.43(1) of the *Social Security Act* 1947, 'a married person who is living separately and apart from . . . her spouse' could qualify for sole parent's pension.

The term 'married person' was defined in s.3(1) to mean 'a legally married person (not being a de facto spouse) who is living separately and apart from the spouse of the person on a permanent basis'.

Section 43(2B) of the *AAT Act* 1947 provides that, where the AAT gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings are based.

The wrong question?

O'Loughlin J observed that the AAT had approached the issue of Staunton-Smith's eligibility for sole parent's pension as if it depended on the question whether she was living in a de facto relationship with her husband, rather than on whether she was living separately and apart from her husband. Although similar facts might be relevant to either question, they were not interchangeable, O'Loughlin J said.

Failure to provide adequate reasons

However, O'Loughlin J said, it did not treat this confusion as a reason for setting aside the AAT's decision. Rather, he said, the error of law lay in the AAT's failure to comply with s.43(2B) of the *AAT Act*, in that it had failed to include in its reasons findings on material questions of fact. Although the AAT had referred to the evidence given by Staunton-Smith and her husband, it had failed to make findings on critical aspects of that evidence.

For example, the AAT had not indicated whether it accepted or rejected the evidence given by Staunton-Smith's husband that he and his wife led separate lives and had no social relationship. If the Tribunal had rejected this evidence, it should have said so; if it accepted this evidence, it should have explained why the evidence was unimportant.

Again, the AAT had not commented on the claim made by Staunton-Smith and her husband that they did not hold themselves out as being married and did not believe that their relationship was one of husband and wife.

The AAT had found that Staunton-Smith had resumed the relationship with her husband because she desperately needed shelter and assistance in caring for P and the relationship was supportive and involved some co-operation between them and comfort and support for Staunton-Smith. O'Loughlin J said that he had no difficulty with those findings; but said that the failure of the AAT to address the other matters referred to above involved a breach of s.43(2B).

This failure amounted to a failure to consider all facets of the inter-personal relationship between Staunton-Smith and her husband, a consideration regarded as necessary by the Federal Court in *Lambe* (1981) 4 *SSR* 43 and *Lynam* (1983) 20 *SSR* 225.

It was not enough, O'Loughlin J said, for the AAT merely to note that Staunton-Smith and her husband were sharing accommodation, that one was financially dependent on the other and that there was a supportive relationship between them. It was 'necessary to delve deeper to find the reasons for those arrangements': Reasons, p.20.

While those factors might normally indicate the parties were not living separately and apart, the AAT should have addressed other evidence given by the parties, in order to assess the weight of those factors. In particular, the AAT should have indicated its attitude to evidence that Staunton-Smith's husband had cared for her and P during the period of their separation.

O'Loughlin J said that, although the Federal Court should approach its review of the AAT's reasons 'sensibly and in a balanced way' and need not set aside a decision of the AAT once an error of law had been demonstrated, he had concluded 'that the reasoning process in this matter must be classified as deficient to such a degree that the intervention of this Court is justified': Reasons, p.26.

The Court was left without any indication as to the weight attributed by the AAT to several factors — the absence of a sexual or social relationship; the fact that the parties did not hold themselves out as married or regard themselves as married; the fact that Staunton-Smith's financial dependence on her husband had resulted only from the withdrawal of her social security benefits by the DSS; and the fact that the care shown by Staunton-Smith's husband for her and P had occurred before she returned to live in the same house.

Because it was not possible for the parties to know, in full and complete detail, the reasoning process that guided the Tribunal to its ultimate conclusion, this was an appropriate case, O'Loughlin said, for the Court to allow the appeal.

Formal decision

The Federal Court allowed the appeal and remitted the matter to the AAT for reconsideration in accordance with the Court's reasons.

[P.H.]