Sole parent pension: reverse burden of proof

BAGY and SECRETARY TO DSS
(No. 8994)

Decided: 17 September 1993 by J.R. Dwyer.

Elizabeth Bagy was granted supporting parent's benefit on 13 February 1989, following the birth of her child on 28 December 1988.

When the *Social Security Act* 1991 was introduced on 1 July 1991, Bagy began to receive sole parent pension.

On 11 December 1992, the DSS decided to cancel Bagy's pension on the ground that she was living in a marriage-like relationship with K, the father of her child. The SSAT affirmed that decision and Bagy appealed to the AAT.

The legislation

Section 249(1)(a)(i) of the *Social Security Act* 1991 prescribes, as one of the qualifications for sole parent pension, that the claimant is not a 'member of a couple'.

The phrase 'member of a couple' is defined in s. 4(2) to include a person living with a person of the opposite sex in a relationship which, in the Secretary's opinion, is a marriage-like relationship.

Section 4(3) lists the factors which the Secretary is to take into account in forming the opinion required under s. 4(2).

Section 4(4) imposes what is, in effect, a reverse burden of proof for certain claimants: if a claimant or recipient has been living in the same residence as a person of the opposite sex for at least 8 weeks and one of several pre-conditions is met, then:

> 'the secretary must not form the opinion that the claimant or recipient is not living with the other person in a marriage-like relationship unless, having regard to all of the matters referred to in subsection (3), the weight of the evidence supports the formation of an opinion that the claimant or recipient is not living in a marriage-like relationship with the other person'.

Two of the pre-conditions referred to in s.4(4) are that a child of both people lives in the residence: s.4(4)(d)(i); or that the people have at any time shared another residence with each other: s.4(4)(d)(vii).

The Section 4(3) factors

Bagy had lived in 5 residences over a period of almost 3 years — from March 1990 to January 1993. Her child and the child's father, K, had lived in the same residences as Bagy over that period.

Bagy claimed that she and K lived as independent adults and had no sexual, social or financial relationship.

The AAT considered the various factors listed in s.4(3) and made the following findings:

- Bagy did not regard herself as married; that she and K had no assets or liabilities in common;
- Bagy and K shared household expenses;
- some aspects of the household in which they lived, but not others, were marriage-like;
- the social aspects of their relationship were ambiguous;
- there had been a long-standing commitment between Bagy and K similar to that of a married couple; and
- the relationship between Bagy and K would probably have continued indefinitely if the DSS had not cancelled Bagy's pension.

The AAT commented on the uncertainties surrounding this case:

> 'In deciding what weight to give to the various factors, I consider it is appropriate to give weight to the fact that the two matters which I regard as most significant as tending to negate the existence of a marriage-like relationship, were both matters where Ms Bagy's evidence was uncorroborated and hardly capable of contradiction by other evidence. That is particularly relevant in a case such as this where Ms Bagy's evidence on many other points has been shown to be not entirely reliable. As was pointed out in *Smith and Secretary to DSS* (1985) 7 ALN 371; 26 SSR 314, in such matters corroboration though not essential, is an aid to proof and also influences the weight to be given to particular findings.'

(Reasons, para. 54)

The AAT also said that it did not give much significance to Mrs Bagy's evidence that she did not use K's surname. It was 'even more common now than in 1981', when the AAT decided RC (1981) 3 ALD 334; 4 SSR 36 and referred to the practice of married women keeping their own surname, 'that people live together in a marriage-like relationship, whether married or not, without the woman using the man's surname': Reasons, para. 56.

It was also still the case, as it had been in 1981, that attempts by DSS officers to investigate sexual or social aspects of relationships were criticised as an invasion of privacy:

> 'Thus evidence on those issues is frequently restricted to the evidence of the applicant and maybe his or her partner. In matters such as this where there are some problems of credibility, that evidence is not altogether satisfactory.'

(Reasons, para. 56)

The AAT noted that Bagy and K had lived in their most recent residence for more than 8 weeks, that their child also lived there, and they had previously shared a number of residences.

In those circumstances, s.4(4) applied and the AAT, standing in the shoes of the Secretary, must not form the opinion that the claimant is not living in a marriage-like relationship unless the weight of the evidence would support that conclusion.

The AAT said that its findings on the s.4(3) factors, its concerns about the credibility of some of Bagy's evidence and the lesser weight given to some factors because of the absence of independent corroboration:

> 'mean that I cannot find that the weight of the evidence supports the formation of an opinion that Ms Bagy was not living in a marriage-like relationship with [K] at the relevant date.'

(Reasons, para. 57)

Formal decision

The AAT affirmed the decision of the SSAT.

[P.H.]

Extension of time to apply to the AAT: relevant considerations

KNEZEVIK and SECRETARY TO DSS
(No. 8711)

Decided: 18 May 1993 by J.R. Dwyer, D. Elsum and E.A. Shanahan.

The application raised two aspects. The first concerned review of a decision of the SSAT made 8 June 1992. The second concerned an application for extension of time in which to lodge an appli-

cation for review of an earlier decision to reject a claim for invalid pension lodged in March 1986, which had been considered by the SSAT in March 1987.

Rate of rent assistance

The SSAT had ordered that, subject to lodging a claim, Knezevik be paid disability support pension including a component of rent assistance, from 1 February 1989. Knezevic claimed he had been underpaid rent assistance from that date. The AAT found that the calculations of his entitlement by the DSS were not in accordance with the Rate Calculator in s.1064-D5 of the *Social Security Act* 1991. Furthermore, the DSS had purportedly applied that Rate Calculator to calculate his rent assistance from 1 February 1989, although the Rate Calculator only came into effect in 1992.

As well as applying the wrong formula, the DSS had also erred in taking the amount of weekly rent paid by Knezevic to be $45 from 1 February 1989 to 10 January 1993, although there was evidence on the DSS file that he had been paying $65 a week from September 1992 or earlier.

The AAT ordered that the rent allowance be recalculated according to the correct tables and taking account of the correct amounts of rent paid throughout the arrears period.

Rate of special benefit

There was a further issue arising from the SSAT decision, concerning the calculation of special benefit to be paid to Knezevic between 22 November 1988 and 30 January 1989. Knezevic pointed out at the hearing that the amount calculated by the DSS was more than twice his entitlement. The DSS acknowledged their error.

The extension of time

In March 1987 the SSAT recommended the dismissal of the appeal by Knezevic against the rejection of his invalid pension claim lodged on 18 March 1986. Knezevic was informed by letter dated 28 April 1987 that his appeal was dismissed and that he had 28 days to appeal to the AAT. The delegate adopted the SSAT's reasons and Knezevic was sent a copy. Knezevic did not dispute having received the letter. Up to the date of the AAT hearing, he had not applied for review of the decision. At the AAT's suggestion, he did so in the course of the hearing.

Section 29(1) and (2) provide that an application shall be lodged not later than the 28th day after the applicant is furnished with written reasons for decision. The application for review lodged during the hearing was out of time. However, the AAT is empowered by s.29(7) of the *Administrative Appeals Tribunal Act* 1975 to extend the time for making an application, if the applicant applies in writing for an extension. Knezevic applied in writing during the hearing for an extension.

The AAT referred to the decision of the Federal Court in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305 in which Wilcox J distilled from earlier decisions on extensions of time, a number of principles to guide the exercise of the discretion to extend time. The AAT proceeded to apply the six factors identified by Wilcox J.

1. Whether there is an acceptable explanation for the delay and whether it is fair and equitable to extend time.

Knezevic said that he had sought advice from a Legal Aid Office after receiving the letter of 28 April 1987, but was unable to obtain an appointment until after the 28-day period had passed. He thought there was no point seeing the solicitor at that time and did not apply to the AAT. He did not know that he could lodge an application himself and seek an extension of time.

Knezevic had from at least December 1988 complained to DSS officers about the SSAT's decision but had not been told that he could apply to the AAT for an extension of time for lodging an application for review. The AAT concluded that he did have an acceptable reason for the delay.

As to the second aspect which requires a consideration of the balance of fairness, Knezevic argued that it was fair and equitable to extend time because he had protested for many years about the decision and because his medical condition in 1986 was the same as in 1989 when he was found to be entitled to invalid pension.

2. Action taken by Knezevic to show he continued to contest the decision.

Knezevic had complained about the decision to DSS officers but had not actively pursued his claim for invalid pension when advised by DSS officers to do so.

3. Prejudice suffered by the respondent due to the delay.

The AAT accepted a submission by DSS that it would not be possible to obtain further medical evidence to resolve the issue of fact as to whether the applicant's medical condition in 1986-8 was the same as in 1989.

4. Unsettling of other people or of established practices.

The AAT said that because of the five-year delay it would need to be very 'positively satisfied' that it was fair and equitable to extend time before it would do so.

5. The merits of the substantial application.

On examining the medical reports on the DSS file relating to his 1986 invalid pension claim, the AAT concluded that while his claim for invalid pension

> 'was not without merit, the substantial merits do not appear so clear as to satisfy us that fairness requires the grant of the extension of time, more than five years out of time.'

(Reasons, para. 45)

6. Considerations of fairness between the applicant and other people in a like position.

The AAT referred to remarks by Fitzgerald J in *Lucic v Nolan* (1982) 45 ALR 411 at 416 with respect to a similar discretion in the *Administrative Decisions (Judicial Review) Act* which identified the matters of public concern that must be balanced against the interests of the applicant. These concerns include the 'need for finality in disputes, the efficient use of public resources, the appropriate allocation and expenditure of public funds'. The AAT concluded that there was no consideration of fairness requiring that Knezevic should be allowed to apply five years out of time.

Formal decision

The application for leave to apply for review out of time was refused.

[P.O'C.]

Compensation preclusion: income or compensation

MARTIN and SECRETARY TO DSS
(No. 8720)

Decided: 20 May 1993 by P.W. Johnston, S.D. Hotop and J.G. Billings.

Martin's husband claimed the disability support pension (DSP) on 21 May 1992, and Martin claimed wife pension.