

clusion, the applicant would not be entitled to SPP.

Character of the relationship

Tory and Peck had been together since December 1990 and had an exclusive sexual relationship. They had strived to maintain a high degree of autonomy, independence and equality of power which they considered were factors not present in marriage. They provided emotional support and showed strong commitment to each other. Both indicated a desire that the relationship should continue indefinitely, while acknowledging that either should be free to part if either one should 'change direction'.

They did not hold themselves out as married, but were regarded by close friends and relatives as a couple. They shared some social activities but not all. The AAT found that they had a loving relationship and intended it to continue. The relationship was, in this aspect, 'marriage-like'.

They shared the space of the house, as well as the cooking and other domestic chores. The household arrangements were found by the AAT to be equivocal as an indicator of whether the relationship was 'marriage-like'.

Peck shared with her husband the responsibility for the care and support of her children. Tory had never assumed any responsibility for a 'father' role with Peck's children, nor did Peck wish him to do so. This aspect of the relationship was not 'marriage-like'.

Tory and Peck has purchased a property as tenants-in-common in unequal shares, indicating an intention to avoid the survivor succeeding to the other's share. Tory paid one quarter of the mortgage payments, Peck paid the rest. Household expenses were shared in similar proportions. Personal property was owned separately. There was one joint bank account, for the accumulation of funds for renovation of the home. There was no other significant pooling of finances. Neither had made provision for the other under any will or insurance policy.

The AAT noted Peck's views that the relationship differed from marriage, but remarked that the traditional notion of the breadwinner/home duties division of roles was no longer generally regarded as necessary characteristics of marriage (*Donald and Secretary to DSS* (1983) 14 SSR 140). While in *Donald* the joint investment in a home was not a conclusive factor, in the present case it carried greater weight given the existence of the emotional and exclusive involvement of

Tory and Peck, factors that were lacking in *Donald*.

The AAT concluded that the relationship was 'marriage-like', because:

Their emotional involvement and the degree of stability and permanence indicated by the purchase of a home together outweigh the lack of financial interdependence and shared parental responsibility.

Peck therefore did not qualify for payment of SPP. The AAT affirmed the decision under review.

[P.O'C.]

Marriage-like relationship: male party a homosexual

SECRETARY TO DSS and WIELAND
No. 8340

Decided: 27 October 1992 by T.E. Barnett, J.G. Billings and S.D. Hotop.

The AAT affirmed a decision of the SSAT which set aside a decision of a delegate of the Secretary to cancel Wieland's widow's pension and to raise and recover an overpayment of \$46,234. The delegate's decision had been based on a finding that Wieland had been living with Kenneth Dickson as his wife on a bona fide domestic basis. Wieland disputed that finding.

Wieland was a 57-year-old divorcee. She was granted unemployment benefit from February 1984 and was transferred to widow's pension from 29 April 1987 until it was cancelled on 18 July 1991. The alleged overpayment related to the whole of the payments received during that period.

The legislation

The legislation took various forms over the period under consideration, from February 1984 to July 1991. The issue was substantially the same until the legislation was changed from 1 January 1990, namely, whether Wieland was living with a man as his wife on a bona fide domestic basis although not legally married to him.

From 1 January 1990 the legislation directed the Secretary to have regard to a list of enumerated factors when forming an opinion as to whether a person was living in a 'marriage-like relationship': these factors now appear at s.4(3) in the *Social Security Act* 1991. Even prior to the enactment of that subsection and its

predecessor, very similar criteria had been developed in cases such as *Tang and Director-General of Social Services* (1981) 2 SSR 15.

If the relationship was 'marriage-like' then Wieland's entitlement was to be assessed as if she were married to Dickson. His income throughout the relevant period would have precluded her entitlement altogether.

Circumstances of the relationship

At the time that Wieland commenced to receive benefits, she was living in the caravan of her friend Kenneth Dickson in a caravan park in Karratha. She had been living there since 1982. There was no form of sexual or physical relationship, Dickson being a homosexual. At one stage he shared his bedroom with a male friend and Wieland accepted this.

Dickson's caravan was 20 feet long with two bedrooms. Wieland occupied the second bedroom and paid half the site-hire fee, electricity, food and other expenses. Dickson used Wieland's car on condition he paid for the fuel he used. They socialised both together and separately. Dickson would drink most evenings after work before coming home late to a meal that Wieland cooked and left in the oven for him.

In May 1984 Wieland signed a Homewest application form for rental accommodation as the 'wife' of Dickson and they subsequently leased a house together as 'Mr and Mrs Dickson'. They used separate bedrooms in the house and continued to contribute equally to household expenses. Dickson gave her signed bank withdrawal forms for payment of his contribution but required her to account for all amounts spent. In 1991 Dickson went to Perth for an operation and gave Wieland a signed authority to withdraw moneys from his bank account.

When Wieland applied for widow's pension she falsely represented on the application form that she paid board to 'Mr and Mrs Dickson'. In April 1987 she made a statement to the DSS that she shared a house with 'Mr and Mrs Kenneth Dickson and Mr Eric Strelcuinus'. In later statements and interviews she disclosed that she lived with Dickson whom she described as a 'friend'. In her evidence she said that she made the false representations out of fear that the DSS would otherwise assume a de facto relationship and cancel her pension.

Dickson gave evidence that Wieland was a close friend but that his homosexuality precluded a sexual relationship with her. He admitted they allowed people to consider them as a couple because it helped to conceal his homosexuality in

the small town of Karratha. He said that he applied to Homewest as a married man because as a single man he had no hope of obtaining a house.

Issues of credit

In assessing Wieland's credibility as a witness it was relevant to take into account that she had made false representations in the past. The AAT accepted her reasons for the false representations and her claim that she believed she was entitled to the benefits. The evidence of Dickson was also accepted as truthful despite the fact that he had made false statements about the relationship in the past, including falsely claiming Wieland as his dependent spouse for taxation purposes in 1985-86.

Assessing the relationship

The AAT found that there was a degree of mutual society, protection and support, but no sexual or sentimental aspect to their relationship. They pursued their respective interests in ways more normally associated with friends sharing accommodation. The AAT laid emphasis on the strict accounting for money spent and the fact that they kept their finances separate, until Dickson's illness in 1991.

The association had benefits for each. Wieland's presence was used in part as a 'front' by Dickson to conceal his homosexuality from the town, while the shared living costs enabled Wieland to remain with her circle of friends in Karratha enjoying an independent lifestyle.

The AAT concluded that Wieland had not been living with Dickson on a bona fide domestic basis *as his wife*.

[P.O'C.]

Compensation preclusion: commencement of preclusion period: special circumstances

MARTIN and SECRETARY, DSS (No. 8888)

Decided: 4 August 1993 by S.D. Hotop.

Martin requested review of the SSAT decision to preclude her from receiving a social security benefit from 29 August 1990 to 5 February 1991. The SSAT also decide that no special circumstances existed for the purposes of s.1184.

The facts

Martin was injured in a car accident on her way to work on 10 February 1989. She continued in casual employment until 23 June 1989 when her employment was terminated because of her injury. She received periodic payments to 28 August 1990 and social security benefits from 7 December 1989 to 22 February 1991. Martin's claim for damages was settled for \$39,675 which included \$11,175 to be repaid to the worker's compensation insurer. The net amount of \$28,000 comprised \$23,500 for pain and suffering and \$5000 for economic loss.

The preclusion period

At the hearing Martin did not challenge the length of the preclusion period, which the AAT found had been correctly calculated at 23 weeks. Martin did challenge the date of commencement of the preclusion period on 29 August 1990. Martin submitted that she received periodic payment until 31 March 1990 and therefore the preclusion period should commence on 1 April 1990, the day after periodic payments ceased (see s.1165(3)). The AAT accepted the documentary evidence supplied by DSS and found that periodic payments were made until 28 August 1990.

Therefore any social security payments made to Martin in the 23 weeks from 29 August 1990 were recoverable pursuant to s.1166(1). An amount of \$3053 of sickness benefit had been paid during that period.

Special circumstances

Pursuant to s.1184 the whole or part of a lump sum of compensation can be treated as not having been made in the special circumstances of the case. Martin sub-

mitted that special circumstances applied in her case because most of the settlement money paid to her was for pain and suffering and not for economic loss. She also submitted that she was in financial hardship, suffered from a permanent spinal injury and that she had been disadvantaged by poor legal representation.

The AAT agreed that the '50% rule' worked to the disadvantage of Martin because only 17.5% of her compensation settlement was for lost earnings. However as the Federal Court noted in *Smith v Secretary, DSS 1991 62 SSR 876* 'the "50% rule" was not the only arbitrary feature of this particular legislative scheme': Reasons para.17. The formula presumes a weekly rate of earnings which may bear no resemblance to the person's actual earnings. Martin was employed on a casual basis, earning on average less than \$200 per week. The rate of earnings used to calculate her preclusion period presumed a rate of earnings of \$598.90 per week. This was to the advantage of Martin. Nonetheless the harshness of the '50% rule' was a factor to be taken into account when considering special circumstances.

Martin's financial circumstances were not considered to be unusual or exceptional by the AAT. She was receiving Austudy and owned a car worth \$11,000. She had a number of small liabilities in connection with her rented accommodation, and her settlement moneys had been spent on legal costs, her car and other debts.

According to Martin she had been advised by her solicitor that the amount she would have to repay DSS would be 'minimal'. She only accepted the settlement because she was under stress at the time. The AAT referred to *Venables and Secretary to DSS (1988) 43 SSR 548; Secretary to DSS and Bolton (1989) 50 SSR 650* and stated that incorrect legal advice was not a special circumstance.

The AAT accepted that Martin was suffering from a permanent spinal injury and that this caused her pain and restricted the jobs she could do. However Martin was studying to be an art teacher and would not be prevented from undertaking this occupation because of her injury. The AAT found that Martin's physical injury was not sufficiently serious to constitute a special circumstance. The AAT concluded by finding no special circumstances existed in this case and stating:

'The Tribunal would point out, however, that it is not the purpose or function of the Commonwealth's social security legislation to restore innocent accident victims, who have thereby suffered financial detriment, to the financial position they enjoyed immediately before the relevant accident.'

(Reasons, para.27)