Administrative Appeals Tribunal decisions

Sole parent pension: shared custody

SECRETARY TO DSS and EDWARDS

(No. 9276)

Decided: 28 January 1994 by E. Hallowes.

There were three applications for review of decisions of the SSAT. The first was a decision of 22 July 1992 affirming decisions to reject Edwards' claim for sole parent pension (SPP) and family allowance (FA). The second was a decision of 31 August 1992 setting aside decisions to cancel payment of special benefit (SB) and not to grant SB, and remitting the matter to the Secretary to reconsider in accordance with directions given. The third was a decision of 20 January 1993 setting aside a decision rejecting a claim for SPP and substituting a decision that Edwards had an SPP child and therefore satisfied s.249(1)(b) of the Act since the date of his claim for SPP lodged on 4 December 1992.

The history

Edwards separated in January 1991 from the mother of his child Kaila who was born on 14 May 1990. Under a Consent Order made on 13 May 1991, Edwards and Kaila's mother had joint guardianship of the child but the mother had custody. The order was varied on 11 December 1991 to provide that Edwards should have access to Kaila each alternate week commencing 23 December 1991.

On 30 December 1991 Edwards was transferred from job search allowance (JSA) to SB. On 7 January 1992 he lodged a claim for SPP and FA (the first claim). He was refused SPP on the ground that he did not have a dependent child and that under s.251, payment of SPP to Kaila's mother precluded payment to him. He was refused FA on the ground that he did not have a dependent child and that ss.846 and 868 at the time precluded payment of family allowance to two people for the same child.

Edwards received SB which was cancelled on 15 June 1992. He then received JSA, but this was cancelled on 21 September 1992 as he was found not to be looking for full-time work throughout each fortnight and therefore taken to be in breach of the JSA activity test.

On 24 November 1992 he was granted custody of Kaila each alternate week commencing 23 November 1992. He lodged a second claim for SPP, which was refused.

Legislation

As at the date of Edwards' second claim for SPP on 4 December 1992, the *Social Security Act 1991* relevantly provided that a person who was not a member of a couple and had at least one SPP child was qualified for SPP: s.249(1)(a) and (b). For a young person to be an SPP child of an adult the young person must be under 16, and be either a dependent child of the adult or a maintained child of the adult: s.250(1). The terms 'dependent child' and 'maintained child' were defined in s.5(2) and 5(9A).

A young person could be an SPP child of only one person at a time: s.251(1). If a young person would, but for that subsection, have been an SPP child of two or more people, the Secretary was to make a written determination specifying whose child the SPP child was to be: s.251(2).

The first decision

The DSS argued that Edwards did not have a 'dependent child' or a 'maintained child' at the time of the first claim, and therefore did not have an SPP child. The AAT applied the principles discussed by the Federal Court in *Secretary, DSS v Field* (1989) 52 *SSR* 694 and *Secretary, DSS v Wetter* (1993) 73 *SSR* 1065 and the AAT in *Juren* (1993) 75 *SSR* 1087. Having regard to the length of the periods that Kaila spent in her father's care, the fact that her parents lived in close proximity and that her mother had custody under the order, the AAT concluded that Kaila was not a dependent child of Edwards.

Nor was she a maintained child of Edwards since he did not maintain her 'in the main' or 'as to the greater part' (applying the words of Hill J in *Wetter*). Since she was not a dependent child of Edwards at the time, he did not qualify for FA, and as she was neither a dependent child nor a maintained child, he was not entitled to SPP.

The second decision

Edwards' special benefit had been cancelled on 26 June 1992, and a claim for payment of special benefit refused. The DSS argued that the requirements of s.729(2)(d) were not met because Edwards failed to register with the CES and therefore JSA was not payable to him. The DSS also argued that Edwards was able to earn a sufficient livelihood and therefore did not satisfy s.729(2)(e). His care of Kaila did not preclude him from working or seeking work.

The AAT rejected both these arguments. The CES refused to register him because he did not meet its criteria for registration. The AAT accepted Edwards' evidence that there was no child care available in the country town where he lived. Applying what was said by the AAT in *Guven* (1983) 17 *SSR* 173, the AAT said that because of his domestic circumstances Edwards could not reasonably be expected to, and was therefore unable to earn a sufficient livelihood at the time his benefit was cancelled.

The third decision

At the time of Edwards' second SPP claim made on 4 December 1992, he had custody of Kaila each alternate week under an order of the Family Court. The AAT found that he had the right to have and make decisions concerning Kaila's daily care and control during the week she resided with him. She was his dependent child and he therefore had an SPP child.

SPP is a payday-based payment. Under s.42(2) if a payday-based payment is payable to a person the person is entitled to a full instalment of the pension on each payday, and nothing on a day falling outside the period of payability.

The AAT found that Edwards was qualified for SPP for the period of each week that he had custody of Kaila. The effect of s.42(2) was that he was entitled to no payment, since the fortnightly pension payday fell during the week that Kaila was in her mother's custody. The AAT observed that the operation of the Act was capricious and unfortunate in the circumstances. It would have been preferable if the Court had given Kaila's parents joint custody. The Secretary could then have acted under s.251 to determine whose SPP child Kalia was to be.

Formal decision

The AAT affirmed the first two decisions. It set aside the third decision and remitted the matter to the Secretary to

reconsider in accordance with directions that Edwards was not entitled to SPP following his claim of 4 December 1992 as he did not have an SPP child on a pension payday.

[P.O'C]

Sole parent pension: 'member of a couple'

GAIN and SECRETARY TO DSS (No. 9288)

Decided: 4 February 1994 by M.T. Lewis, J.D. Campbell and I.R. Way.

Gain asked the AAT to review a decision not to grant him sole parent pension and family allowance. His claim was rejected on the grounds that he was not a single person and did not have any dependent children.

Was the applicant a member of a couple?

The principal question to be decided by the AAT was whether Gain was a member of a couple. If he was then he could not qualify for sole parent pension. Gain was legally married to another person at all relevant times. Under s.4(2) of the *Social Security Act 1991* a married person is a member of a couple 'and is not in the Secretary's opinion living separately and apart from the other person on a permanent basis'. Section 4(3) sets out relevant criteria which must be weighed in determining whether a married person is separated from his or her spouse.

Section 4(5) is also relevant in the case of a person who applies for sole parent pension and who is married. Where the person has shared the same residence with their spouse for a period of 8 weeks and they are separated or claim to be separated then the Secretary cannot form the opinion that they are living separately and apart on a permanent basis unless the weight of evidence supports the formation of that opinion.

In this case the AAT was hampered by a lack of evidence on the part of Gain's wife. She would not attend the hearing and it was necessary to rely on written statements made by her at various points in time. She had resisted the notion that her marriage was at an end in some of those statements and had continued to either live in the matrimonial home or frequently visit the home. It seemed that her resistance to a separation and divorce was motivated out of concern for the welfare of her children.

Gain called evidence to indicate that he had taken on the care of his children without his wife's assistance and that she, in effect, no longer lived at the home. There was evidence of separate sleeping arrangements when his wife did stay in the home, although according to Gain, there had been occasional sexual relations initiated by his wife. There was also evidence of separate income and expenditure and a separate social existence. There was also much evidence of hostility between Gain and his wife. Against this was the apparent desire of the wife to continue with the marriage in some form.

The DSS argued that the evidence was not clear on the point of the couple being separated. It was submitted that there must be some doubt as to whether the couple were still together. In effect the DSS asked the AAT to find that this was simply a poor marriage, instead of not being a marriage at all.

The AAT concluded that they were not so uncertain as to prevent them from deciding the case on the balance of probabilities:

> 'Central to our deliberations has been the consideration of the consortium vitae. In considering the issue of whether the *consortium vitae* may be broken by the unilateral action of one party, we refer to the decision of Emery J in the Family Court of Australia *In the Marriage of Xuereb* (1976) FLC 90-029. In that matter it was found that from the date that the husband informed his wife that the marriage was, as far as he was concerned, at an end, there was an end to the consortium vitae, and he then found that the marriage had broken down irretrievably . . . Although these decisions are from another jurisdiction they are useful nonetheless in the Tribunal's consideration of whether, when the applicant [Gain] considered the marriage had ended, even if that was not shared with or by his wife at the time, this can and should be a factor in finding that the applicant and his wife are living separately and apart on a permanent basis. In the particular circumstances of this case we find that the marriage had ended by the commencement of the period under review. In coming to this view, we gave consideration to whether this was merely a bad marriage, but nonetheless a marriage.'

Reasons, paras 33-34)

Even though Gain's wife entered the home at least once a week, this did not suggest to the AAT that there was a marriage-like relationship between Gain and is wife. While there was no evidence that she had a permanent residence he could not stop her from entering the home as she was a joint owner. Overall, the weight of the evidence supported the conclusion that Gain and his wife were living separately and apart on a permanent basis.

Formal decision

The AAT set aside the decision under review and substituted a decision that Gain is not a member of a couple and that he is living separately and apart from his wife on a permanent basis and that Gain's children were dependent children of Gain.

[B.S.]

Application for extension of time

DEPARTMENT OF EMPLOYMENT, EDUCATION AND TRAINING and SECRETARY, DSS

SECRETARY, DSS and HUGHES (No.9279)

Decided: 31 January 1994 by S.A.Forgie.

This was an application for an extension of time lodged by the Secretary of the Department of Employment, Education and Training (DEET) ('the Employment Secretary'). It relates to a decision made by the SSAT, dated 24 May 1993, setting aside a decision of a delegate of the Employment Secretary. The SSAT decided that the respondent, Hughes, had not reduced his employment prospects and that a non-payment period of 12 weeks should not have been imposed.

The SSAT was reviewing an original decision made by DEET that Hughes' newstart allowance should be cancelled on the basis that he had reduced his employment prospects by moving from Taringa to Lismore. Although the effect of the decision was that by virtue of s.634(1) of the *Social Security Act 1991*, newstart allowance was not payable for 12 weeks, in fact he was not paid for a period of 5 weeks and 3 days. At the end of this period, he had moved back to the original area and re-registered with the local CES.

The SSAT decision was stated to have been made on 13 May 1993, but the reasons for the decision were dated