Federal Court

Family payment: special reason for not being treated as a couple

SECRETARY TO DSS v LE-HURAY

(Federal Court of Australia)

Decided: 17 June 1996 by Jenkinson J.

The AAT had decided that for the purposes of payment of family payment under the *Social Security Act 1991*, Le-Huray should be treated as not being a member of a couple. The DSS appealed against that decision to the Federal Court.

The facts

Le-Huray married in 1982 and divorced in 1992. There were 2 children of the marriage, one born in 1983 and the other in 1989. After the marriage was dissolved the children lived with Le-Huray, and were in her care and control. It was not in dispute that each of the children was a 'FP child' of Le-Huray.

The AAT had decided that Le-Huray was a 'member of a couple' for the purposes of the *Social Security Act*. When Le-Huray's taxable income was combined with her partner's taxable income, the total income of the family exceeded the family payment income limit. It was not disputed by Le-Huray before the Federal Court, that she was a member of a couple. Nor was it disputed that her combined taxable income exceeded the family payment income limit.

Le-Huray's partner, Parsons, had also been married and had 2 sons, aged 17 and 15 years, living in Western Australia with their mother. Parsons had paid his former wife a lump sum at the time of their divorce which included maintenance payments. However, Parsons still made payments to his former wife for large costs incurred on behalf of the children.

Parsons began living with Le-Huray in January 1992 in her house. He brought to the household his bed and a stereo. He pays Le-Huray $70.00 a week to cover his costs. Their is no pooling of financial resources, and neither party owes any legal obligations to the other. Parsons does his own washing and ironing, but assists to some extent with the housekeeping and gardening.

Le-Huray's former husband pays maintenance for the children, of $8400 a year. Le-Huray borrowed money from her father and discharged the mortgage on her house. She uses the maintenance payments to repay the loan from her father.

The law

Section 4(2)(b) of the *SSA* provides that a person is a member of a couple if that person is living with a person of the opposite sex in a marriage-like relationship. The indicia which the decision maker is to consider when deciding whether a person is living in a marriage-like relationship, are set out in s.4(3). When considering whether the relationship is marriage-like, consideration must be given to:

- the financial aspects of the relationship,
- the nature of the household,
- social aspects of the relationship,
- any sexual relationship, and
- the nature of the people's commitment to each other.

Section 4(6) provides that a person will not be a member of a couple if a determination is made under s.24 of the *Social Security Act* in relation to that person. Section 24(2) provides that the Secretary to the DSS may determine in writing that a person is to be treated as not being a member of a couple where:

> '(d) the Secretary is satisfied that the person should, for a special reason in the particular case, not be treated as a member of a couple . . .'

Marriage-like relationship

The Court observed that the AAT had meticulously considered all aspects of Le-Huray's relationship with Parsons. The AAT had concluded that although Le-Huray and Parsons were financially independent of each other, the totality of the evidence pointed to there being a marriage-like relationship. This conclusion was based on there being a supportive relationship with a strong emotional commitment to each other. Parsons and Le-Huray enjoyed an exclusive sexual relationship and some shared social life. After noting that the finding of the Tribunal had not been disputed before it, the Court agreed with the AAT's finding that Le-Huray was living in a marriage-like relationship with Parsons.

Special reason for not being treated as a couple

The AAT had quoted from the SSAT's decision which had found that there was a special reason for not treating Le-Huray as being a member of a couple. The SSAT's decision was based on the particular circumstances of the case in which it found that Le-Huray's children would be disadvantaged if the SSAT concluded that family payments should not be made. The AAT disagreed with this conclusion, stating that there was no suggestion in the evidence that the family payment was spent directly on the children, or that if the payments were to cease the children would miss out in any direct way. The AAT noted that the children's father was paying substantial maintenance which Ms Le-Huray used to pay off a loan rather than on the children. Finally, the AAT had concluded that the children were not the only people to be affected by a decision not to pay family payment to Le-Huray.

The AAT had concluded that there were special circumstances in this case, because the children's father paid maintenance for their support, and he played an important role in their lives. The AAT found that the children's father was the only father figure in their lives, and that it was inappropriate for Parsons to be treated as being financially responsible for the children. The Federal Court summarised the AAT's conclusion as:

> 'It would appear that the Tribunal found "special reason" for not treating the respondent (Le-Huray) as a member of a couple in the circumstances that, unless she were not to be so treated, Mr Parsons would be treated as responsible for the financial support of the children if she should cease to be employed.'

(Reasons, p.14)

Jenkinson J stated that the only sense in which Parsons could be financially responsible for the children under the *Social Security Act* is in the expectation that his income will be available for application and support of the children in the ordinary course of events, if Le-Huray were not bringing any income into the household. The Court pointed out that at the time of the AAT's decision Le-Huray was employed, and there was no evidence that her employment would cease in the foreseeable future. Therefore, there was no reason to suppose that Parsons would be financially responsible for the children. The mere possibility that this might occur in the future could not justify exercising the discretion in s.24(2).

According to Jenkinson J, the AAT made a further error of law when it decided that the relationship between the children and their father would be interfered with if Parsons' income was taken into account. The legislative scheme in the Act did not contemplate either fostering or impairing the development of, or the maintenance of, an emotional or economic relationship between the children and their parent. However, there may be circumstances where it would be appropriate to exercise the discretion pursuant to s.24(2)(d), where such a relationship would be impaired. In this case there was no evidence of that occurring, either at the time of the AAT's decision or in the immediate future. Therefore, there was no justification for the AAT's findings.

> 'There must be in the circumstances of the particular case some harm, or risk of harm, to the welfare of the children, or, perhaps, of the person having their care and control, attendant upon abstention from exercise of the power conferred by sub-section 24(2) before special reasons can be found, in my opinion.'

(Reasons, p.18)

Finally, the Court noted that the AAT's finding of a special reason in the particular case involved exercising a wide discretion in order to effect its view of the justice of the case. It was the Court's opinion that

> '"The scope and purpose" of sub-section 24(2) is to enable the welfare of dependent children by family payment subvention to be advanced in circumstances where the application of (the income test) would not advance, but would impair their welfare.'

(Reasons, p.19)

Formal decision

The Court ordered that the appeal be allowed and the decision of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal be set aside, and that the decision of the authorised review officer be affirmed.

[C.H.]

SSAT decisions

Important note: Decisions of the Social Security Appeals Tribunal, unlike decisions of the Administrative Appeals Tribunal and other courts, are subject to stringent confidentiality requirements. The decisions and the reasons for decision are not public documents. In the following summaries, names and other identifying details have been altered. Further details of these decisions are not available from either the Social Security Appeals Tribunal or the Social Security Reporter.

Newstart allowance: failure to enter case management activity agreement, link between failure and cancellation

AA and SECRETARY TO DSS

Decided: 26 July 1996

AA was in receipt of newstart allowance and had entered into a case management activity agreement. A term of the agreement required him to attend interviews with his case manager when asked.

A letter was sent to him requiring him to attend an interview with his case manager to discuss his progress and 'if necessary' to review his agreement. He did not attend the interview or a further such interview specified in a second letter. He was notified that he was taken to have failed to enter a new case management activity agreement when required, and his newstart allowance was cancelled.

AA had been absent from his home when the letters were sent and the interviews were to take place. This absence was indefinite but ultimately extended over several weeks. He arranged for a friend to keep mail safe for him but not to forward it to him. He argued that his efforts to find work over the same period (which were ultimately successful) should be weighed against his failure to attend the interviews.

Was there a requirement to enter a new case management activity agreement?

Under s.45(5)(c) of the *Employment Services Act,* to qualify for newstart allowance a recipient must be prepared to enter a further case management activity agreement when required. Section 44 provides that a person may be taken to have failed to enter such an agreement by reason of a failure to attend interviews or to respond to correspondence. These provisions applied to AA. However, the SSAT held that the letter requiring him to review his agreement 'if necessary' was not sufficiently clear to require him to definitely enter a new agreement. Therefore, he could not be taken to be unprepared to enter a new agreement when required or to have failed to enter an agreement.

Did AA take reasonable steps to comply with the terms of his current agreement?

Although the letters may not have required AA to enter a new agreement, they did require him to attend interviews with his case manager. Under a term of his current agreement, he had to attend such interviews when required. His failure to attend the interviews was a failure to comply with that term.

Under s.45(5)(b), to qualify for newstart allowance a recipient must take reasonable steps to comply with the terms of their case management activity agreement. Under s.45(6), a person is taking reasonable steps to comply unless the main reason for non-compliance was not within their control, and the circumstances of their failure were not reasonably foreseeable by them. The SSAT held that the main reason for AA's failure to comply was his failure to ensure that mail was forwarded to him promptly, or to alert his case manager to his temporary change of address. As both of these matters were within his control, he had failed to take reasonable steps to comply with the agreement.

The link between failure to take reasonable steps to comply and cancellation

The SSAT held that failure to take reasonable steps to comply with the agreement did not of itself justify cancellation; a number of procedural steps needed to take place first.

Under s.601(5) and (6) of the *Social Security Act* (which apply to case management activity agreements by virtue of s.45 of the *Employment Services Act)*, failure to take reasonable steps to comply with a term is a failure to satisfy the activity test. Section 624 of the *Social Security Act* provides that a failure to satisfy the activity test will mean new-