

## Overpayment: whether a member of a couple

**QX02/2 and SECRETARY TO THE  
DFaCS**  
(No. 2002/220)

**Decided:** 5 April 2002 by B. McCabe.

### The issue

In this matter the Tribunal was required to consider the question of whether the applicant QX02/2 was a member of a couple for pension purposes, and so whether her entitlements needed to be determined taking into account her husband's income.

### Background

Between January 1997 and June 2000, QX02/2 received social security benefits but her entitlement was reviewed in 2000 after a data matching exercise, and the Department sought to recover \$63,042 from her. QX02/2 denied any overpayment and stated that, although legally married, she and her husband were not a 'couple', that she was unaware of her husband's employment or earnings, and that in any case special circumstances existed to justify them not being regarded as a couple.

QX02/2, who married her husband in March 1988, had two daughters from a previous relationship and five daughters from her marriage. In 1992 her husband, was sentenced to four years jail after being convicted of the sexual abuse of the eldest daughter. After his release from jail, the husband returned to the matrimonial home in 1993, and the youngest child of the marriage was born in August 1996.

From about late 1996 the relationship between QX02/2 and her husband deteriorated. Her husband ceased dining with the family, or caring for the children, and made minimal contributions toward household costs, save for meeting a few utility bills. He became threatening and aggressive, engaged in sexually inappropriate behaviour in front of the children, and became verbally and sexually abusive toward QX02/2. Despite increasing depression during this period, QX02/2 felt powerless to move out of the home, particularly as she had seven children, until finally advised to do so by her doctor. She moved out in 2000 at about the time questions about her husband's income were being raised by Centrelink. Mr QX02/2 had worked fulltime from January 1997, but never advised his wife of his employment or earnings. She presumed he was on some form of benefits and was attending TAFE training, and

although she had declared her marriage to Centrelink had never advised of her husband's earnings.

### The law

The *Social Security Act 1991* (the Act) provides by s.4(3) that:

4.(3) In forming an opinion about the relationship between two people ... the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:

- (a) the financial aspects of the relationship ...
- (b) the nature of the household ...
- (c) the social aspects of the relationship ...
- (d) any sexual relationship between the people;
- (e) the nature of the people's commitment to each other ...

In addition, s.24(1) of the Act provides that where a person is legally married and not living separately and apart from another person, the Department may determine that the person is not a member of a couple if '... a special reason in the particular case ...' exists.

### Matters considered by the Tribunal

The Tribunal considered the relevant circumstances as required by s.4(3) of the Act, noted above. The Tribunal noted that the couple had few joint assets, did not pool their financial resources or have financial obligations in respect of each other, nor share household expenses. Mr QX02/2 played no active role in the care, discipline or management of the children. The couple had no social dimension to their relationship, nor common friends. Although they had occasional sex, QX02/2 was used as a convenient source of sexual gratification by her husband, and this did not amount to a consensual interaction such as might constitute a relationship. They had little or no commitment to each other. The Tribunal concluded that Mr and Mrs QX02/2 were not a 'couple' for pension purposes, and therefore that Mr QX02/2's income should not be taken into account in determining QX02/2's entitlements.

In further considering whether, in any case, a 'special reason' existed in this case sufficient to justify the exercise of the discretion contained in s.24(1) of the Act, the Tribunal noted the decision in *Beadle v Director-General of Social Security* (1985) 7 ALD 670 that, to be considered 'special', the reason must be 'unusual, uncommon or exceptional'. The Tribunal further noted the decision in *Secretary, Department of Social Security v Le-Huray* (1996) 138 ALR 533 that the discretion was designed for situations where the purpose of the Act would be frustrated if discretionary relief were

unavailable. These would include situations where '... some harm, or risk of harm, to the welfare of the children, or, perhaps, of the person having their care and control, [was] attendant upon abstention of the exercise of the power ...' (at p.542).

The Tribunal in this matter concluded that it would be a perverse result, and one which could not have been the intention of the legislation, if QX02/2 and the children were expected to repay the money they lived on during a period when Mr QX02/2 had failed to discharge his parental obligations toward them.

### The formal decision

The Tribunal set aside the decision under review, finding that QX02/2 was not a member of a couple and therefore that no debt had arisen.

[P.A.S.]

## Carer payment and bereavement payment: whether left care permanently on admission to nursing home

**SECRETARY TO THE DFaCS and  
O'NEILL**  
(No. 2002/235)

**Decided:** 16 April 2002 by  
E.K. Christie.

### Background

O'Neill was in receipt of carer payment in respect of her mother, Hewett. On 5 December 2000, Hewett moved from a private residence and was admitted to a nursing home for care. On 9 February 2001, Hewett died at the nursing home. O'Neill had advised the Department that Hewett had entered the nursing home.

### Issues

Whether O'Neill, as carer for her late mother, was entitled to a lump sum bereavement payment. This issue was dependent on whether O'Neill's late mother left her care permanently, or temporarily, on admission to a nursing home.

### Legislation

The relevant legislation is contained in ss.198AAA, 198AC and 235(1) of the *Social Security Act 1991*.