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 Hewitt 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*.

Sub-section 198AAA(1) provides for a situation where the care receiver is admitted permanently to an institution where care is provided for the care receiver. Sub-sections 198AC(1) and (2) provide that where a person providing constant care for a care receiver temporarily ceases to provide that care the person does not cease to be qualified for the carer payment merely because of that cessation. But s.198AC(3) states:

> 198AC(3) However, the period, or the sum of the periods, for which subsection (1) or (2), or a combination of those subsections, can apply is:
>
> (a) 63 days in any calendar year; or
>
> (b) another period that the Secretary, for any **special reason** in the particular case, decides to be appropriate. [Tribunal emphasis]

Section 235(1) provides for the continuation of carer payment for the bereavement period where the person cared for dies.

The circumstances where a lump sum bereavement payment is payable are set out in s.236A and the applicable paragraph in O'Neill's case was paragraph (a):

> **236A(1)** A lump sum is payable to a person under this section if:
>
> (a) the person remains qualified for carer payment because subsection 235(1) ... applies; and ...

Whether permanently left care

The Department submitted that O'Neill ceased to qualify for carer payment on 1 December 2000 as Hewett was admitted permanently to an institution where care was to be provided for her. They relied on several factors including that: Hewett was admitted to a permanent bed; O'Neill did not seek to utilise the respite provisions for temporary absences under s.198AC; at the time of Hewett's admission, O'Neill had only used 37 of her possible 63 respite days; and O'Neill did not contest the cancellation of her carer payment, but instead claimed age pension. The Department argued that the nature and severity of Hewett's illness (dementia) indicated that it was unlikely that she would return to O'Neill's care in the foreseeable future. The Department contended that the fact that Hewett did not return to O'Neill's care reinforced its assertion that her admission was permanent.

The Department also submitted that O'Neill was not entitled to have a lump sum bereavement payment because: Hewett was admitted permanently, resulting in O'Neill being entitled to a further carer payment for 14 weeks from the date of admission; and O'Neill had already received 14 weeks payment under s.198AAA and so did not come within the bereavement provisions of s.235 of the Act. Additionally, as O'Neill did not come within s.235 provisions of the Act, she was not entitled to a lump sum bereavement payment under s.236A of the Act.

Alternatively, the Department submitted that even if Hewett's admission was temporary, O'Neill was not eligible for a lump sum bereavement payment because s.235 could not be satisfied by O'Neill. O'Neill could only continue to receive carer payment during a temporary cessation of care under s.198AC. This is normally only 63 days respite leave per calendar year. At the time of admission, O'Neill had already taken 37 respite days in 2000. Given that a further 70 days elapsed from the date of admission to the date of Hewett's death, carer payment would not have been payable to O'Neill under s.198AC at the time of Hewett's death. A lump sum bereavement payment was not payable to her under s.236A.

The Department also submitted that there were no 'special reasons' for the number of respite days to be varied from the 63 days prescribed by the statute.

O'Neill submitted Hewett was admitted to a permanent room on 4 December 2000 as she believed that her mother had exhausted the number of respite days she was entitled to for the year. The room Hewett occupied was the same room she would have been admitted to as a 'respite' resident. O'Neill did not intend the admission of her mother would be permanent, notwithstanding the illness and condition of her mother. She had a reasonable expectation that her mother would return to her private home for the remainder of her lifetime when her mother's condition had been stabilised with medication and care. O'Neill continued to provide care for her mother whilst at the nursing home. This was consistent with the expectation that she would resume continuous care for her mother in her private home.

O'Neill submitted that she had applied for age pension acting on advice from a Centrelink officer to do so. She responded in good faith, at the instigation of the Centrelink officer and did not have the knowledge or desire to not rely on the advice given to her.

The Tribunal considered the plain meaning and common law construction for the meaning of 'permanent' and concluded that together they clearly and unambiguously defined 'permanent' to mean 'lasting or intended to last indefinitely'. In O'Neill's situation this meant for her mother to have given up personal residence at O'Neill's home 'once and for all'.

The Tribunal concluded that Hewett had not been admitted permanently to the nursing home on the basis of O'Neill's evidence and that there were no objective facts to establish the inference, contended by the Department, that Hewett, because of her medical condition, had given up personal residence in O'Neill's home 'once and for all'.

The Tribunal concluded that 'the contention by the Department in this regard was mere speculation and cannot be acted upon: see *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169' (Reasons, para. 30).

Consequently in accordance with s.198AAA(1), O'Neill remained qualified to receive carer payment following Hewett's admission to the nursing home.

Special reasons to extend days of respite care

The Tribunal considered whether there were 'special reasons' to extend the period beyond 63 days (of respite care) in any calendar year: s.198AC.

The Tribunal referred to *Boscolo v Secretary, Department of Social Security* (1999) 90 FCR 531 and concluded that there were 'special reasons' for the period of carer payment to continue for 14 weeks after Hewett entered the nursing home on 5 December 2000.

The reasons for this decision included: the fact that the Department did not notify or inform O'Neill that she should consider having Mrs Hewett admitted permanently to a nursing home or hospital; based on this lack of advice, it was reasonable for Hewett to continue to care for her mother whilst in the nursing home; that Hewett had been given incorrect advice by Centrelink when she sought information about her qualification for carer payment and bereavement payment; and the decision of the AAT given in *Secretary, Department of Social Security and McAvoy* (1996) 23 AAR 543.

The Tribunal concluded that O'Neill was entitled to a lump sum bereavement payment under s.236A(1), because O'Neill remained qualified for carer payment, as she satisfied the requirements prescribed by s.235(1) of the Act.

Formal decision

The decision under review was affirmed. This meant that the application for review by the Secretary, Department of Family and Community Services was unsuccessful.

[M.A.N.]