> [T]hat suspicion is not a sufficient basis for finding as a fact that the applicant lives with Mr Haemza as his wife on a bona fide domestic basis although not legally married to him.

(Reasons, para. 30)

Formal decision

The decision under review was set aside and remitted to the Director-General with the direction that the applicant was, since the date of cancellation, entitled to receive supporting parent's benefit.

STURGES and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. T82/22)

Decided: 15 April 1983 by A. N. Hall.

Christina Sturges claimed that she was entitled to unemployment benefit from 31 March 1982 to 9 June 1982. The DSS had refused her benefit for this period on the basis that, having regard to the income of her 'spouse' she was disqualified from receiving the benefit by virtue of the income test in s.114 of the Act.

The relevant parts of s.114 are:

> (1A) Where an unemployment benefit . . . is payable to a person . . . whose income exceeds $6 per week, the rate per week of that benefit shall be reduced . . .
>
> . . .
>
> (3) For the purpose of sub-section (1A), the income of a person shall include the income of that person's spouse . . .

Section 106 defines 'married person' and 'spouse' to include 'a dependent female and the husband of a dependent female'.

Section 106 also defines 'dependent female' to mean—

> a woman who is living with a man (in this Part referred to as her husband) as his wife on a bona fide domestic basis although not legally married to him.

Sturges had commenced to live in a *de facto* relationship with a Mr Kiel in 1977 or 1978. It was conceded that this relationship deteriorated during 1982 and that by the end of 1981 they were leading independent social lives. However, they continued to live in their jointly owned house until 9 June 1982 when Kiel moved out.

The issue before the AAT was whether a *de facto* relationship existed at the relevant time (i.e. up until 9 June), notwithstanding that the parties continued to live under the same roof.

De facto relationship: did one exist?

The Tribunal first looked to what constituted a *de facto* relationship. It referred to its previous decisions in *Waterford, Tang, R. C., Davis and Petty, Re L. N.*, and, in particular, to *Lambe*. In *Lambe* it was considered that all facets of the interpersonal relationship need to be taken into account.

The AAT, looking at the relationship in this case, concluded that it 'could not be characterized as one in which they were living as if they were man and wife' during the relevant period. This conclusion was based on evidence indicating an independent financial existence, a separate social life and an absence of any sexual relationship.

Separation under the one roof

Whether the parties continuing to live under the one roof should affect this conclusion was then examined by the AAT. It referred to *In the marriage of Pavey* (1976) 10 ALR 259 where the Full Court of the Family Court said of separation under the one roof in relation to marriage:

> In such cases, without a full explanation of the circumstances, there is an inherent unlikelihood that the marriage has broken down, for the common residence suggests continuing cohabitation. Such cases therefore require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the court about this by explaining why the parties continue to live under the one roof and by showing that there has been a change in their relationship gradual or sudden constituting a separation. [(1976) 10 ALR, p.265]

The AAT considered that a similar approach should be adopted towards *de facto* relationships but at the same time suggested that a higher standard of proof was required to show such a relationship as at an end because of the parties' freedom to walk out at any time.

> If there is to be any equality or fairness in the treatment of those who are parties to a legal as opposed to a *de facto* marriage, the Tribunal should . . . exercise some caution in accepting too readily that a *de facto* relationship which has subsisted for some years is at an end when the parties continue to reside under the one roof. If there are subsisting elements of what may be recognised as a marriage-like relationship, albeit a relationship from which as in many legal marriages in difficulty, a close physical realtionship is absent, the true nature of that subsisting relationship must be critically evaluated.

(Reasons for Decision, para. 30)

The AAT found here that a lack of alternative accommodation and convenience were reason enough to continue to reside under the one roof and did not affect the conclusion that the relationship could not be characterised as man and wife.

The only substantial evidence opposed to this conclusion was a statement by Kiel to the DSS that Sturges was his *de facto* spouse when claiming unemployment benefit from November 1981 to 30 March 1982 (when he found employment and so caused Sturges to apply).

The AAT took the view that, as the result (i.e. Kiel paid at the married rate) was not a higher rate of benefit than they would have been entitled to individually, Kiel's statement was

> symptomatic of the applicant's casual attitude towards the normal conventions of society that she would accept the support to which she considered herself entitled on whatever basis she could get it.

(Reasons for Decision, para. 37)

The AAT also noted that Kiel's wages were very low during the period—about $90–$100 per week. As the income test did not operate to disqualify a benefit until the combined income exceeded $144 per week at the time, then, even if Kiel and Sturges were to be regarded as 'spouses', Sturges may well have been entitled to benefit in any event.

Formal decision

The Tribunal set aside the decision under review and directed that unemployment benefit be granted from 31 March to 9 June 1982.

COOPER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/135)

Decided: 27 April 1983 by A.N. Hall.

The AAT *affirmed* a DSS decision to recover $1540 from Dianne Cooper, being an overpayment of widow's pension.

The AAT found that Cooper had ceased to qualify for widow's pension when her husband (who had deserted her 15 months earlier) moved into the home she and her daughter were occupying in June 1980. Although Cooper (and her husband, with whom she was certainly cohabiting by the time of the AAT hearing) told the AAT that they had not been reconciled when he moved into the house, the Tribunal said:

> 20. The reconciliation that was ultimately effected is properly seen, in my view, as having commenced when Mr Cooper was allowed to restore himself in his wife's home. Her acceptance of him in the hope of reconciliation brought his desertion to an end from that time onwards, in my view.

As she had not informed the DSS of this 'reconciliation' and had been been paid widow's pension for a further five months, there was an overpayment recoverable under s.140(1) of the Act.

Invalid pension: 'incapacity for work'

ILICH and DIRECTOR-GENERAL OF SOCIAL SECURITY

(No. V82/175)

Decided: 4 May 1983 by R. Balmford.

Dimitrje Ilich was born in Austria in 1937 and migrated to Australia in 1961, where he worked as a labourer and ward hand until 1979 when he injured his back (for a second time) at work. In January 1981, he applied for an invalid pension but the DSS rejected this application. He applied to the AAT for review of that decision.

'85% incapacity for work': a systematic approach

After referring to 'the concept of 85% incapacity for work' (set out in ss.23 and 24 of the *Social Security Act*), the AAT adopted what was said in *McGeary* (1982) 11 *SSR* 113: 85% incapacity for work was not a 'quantitative' concept; it was an indication 'that a very substantial degree of incapacity needed to exist before a person could be "deemed" to be permanently incapacitated for work.' And the AAT emphasised the following passage from *McGeary*:

> In qualitative terms, therefore, I think that s.23 contemplates a person who is so substantially incapacitated for work as to be

treated as if he were totally incapacitated. The Tribunal then listed (in para. 5) a number of issues which had to be considered when deciding if a person had that 85% incapacity for work. These were:

(1) The person's physical or mental incapacity.
(2) The extent to which the person's ability to engage in paid work is affected by the incapacity.
(3) The work suitable for the person, considering the whole person and the cumulative impact of
  (a) his disabilities;
  (b) his capacity to work a normal day or week;
  (c) his age;
  (d) his work experience; and
  (e) the types of paid work available in the community which that person could perform.
(4) The person's ability to attract an employer.
(5) The distinction between difficulties in attracting an employer which
  (a) reflect an incapacity for work;
  (b) result from depressed job opportunities; and
  (c) result from lack of interest in working.

(The first four of these issues had been spelt out in *Panke*, the fifth in *McGeary*.)

The Tribunal also referred to *Sheely* (1982) 9 *SSR* 86, where the AAT had emphasised that incapacity for work must result from a medical disability – physical or psychic – and included a person who is sick, not 'a person who merely thinks that he is sick'.

The Tribunal's assessment

Reviewing the medical evidence in this matter, the AAT decided that 'the combination of his physical and psychiatric problems, places him on the side of a person who is sick'. While he saw himself as incapable of working that self-perception was 'part of his psychiatric condition' and reduced his capacity for work: Reasons, para. 16.

Ilich's only skill in the context of the Australian work force was, the AAT said, as a labourer or unskilled worker. He could not undertake that employment or sustain his work effort; nor could he attract an employer – and that was because of his incapacity, not because of current economic conditions.

Ilich was, therefore, 'so substantially incapacitated for work' as to qualify for invalid pension in the way outlined by the AAT in *McGeary*: Reasons, para. 17.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Ilich be granted an invalid pension from January 1981.

VOGDANOS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/377)

Decided: 4 May 1983 by R. Balmford.

Constantinos Vogdanos was born in Greece in 1931 and migrated to Australia in 1963, where he worked as a labourer until 1976 when he was injured at work. He applied for an invalid pension in November 1980 but the DSS rejected this application. He applied to the AAT for review of that decision.

The AAT's assessment: 'social security is not therapeutic'

The ATT repeated the discussion of '85% incapacity for work' set out in *Ilich* (in this issue of the *Reporter*) and turned to the medical evidence. A physician and a psychiatrist consulted by Vogdanos said that his combination of spinal disability and psychiatric problems made him at least 85% incapacited for work.

On the other hand, two specialists consulted by the DSS assessed him as fit for a range of work and each of them expressed the view that to grant him an invalid pension would only 'confirm his misconceptions' or 'reinforce his problem of incapacity'. Of that evidence, the AAT said:

> 16. The role of the social security system, however, is not therapeutic; it is to provide financial assistance according to prescribed criteria. It may be considered in a particular case that the provision of that assistance is not in the best interests of the applicant; but such considerations are irrelevant in the assessment of whether the applicant satisfies the criteria for the benefit for which he has applied.

After referring to *Sheely* (1982) 9 *SSR* 86 (where the AAT had said that 'incapacity for work' referred to a person who was sick, not a person who thought he was sick), the Tribunal said that Vogdanos' problems placed 'him on the side of a person who is sick.' His view of himself as an invalid was part of his psychiatric condition.

Vogdanos' only skill was as a labourer or unskilled worker and his incapacity prevented him from undertaking that employment, sustaining his work effort, and attracting an employer prepared to hire him. His inability to attract an employer was 'not related to the present economic situation'. He was therefore 'so substantially incapacited for work' as to qualify for invalid pension in the way outlined by the AAT in *McGeary* (see the reference to that decision in *Ilich*): Reasons, para. 21.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that Vogdanos be granted an invalid pension from November 1980.

AMORE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/529)

Decided: 9 May 1983 by R. Balmford.

The AAT *set aside* a DSS refusal to grant invalid pension to a 51-year-old former labourer who had stopped working in 1977 after several back injury incidents.

The AAT repeated its discussion of '85% incapacity for work' set out in *Ilich* (in this issue) and found that Amore's physical and psychiatric incapacity amounted to an '85% incapacity for work' given his work skills and his medical history which included several compensation claims for his back.

SIGG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/559)

Decided: 9 May 1983 by R. Balmford.

The AAT *set aside* a DSS refusal to grant an invalid pension to a 39-year-old former driver and mechanic who suffered from migrane headaches, regular blackouts and a depression – for which no medical practitioner had been able to find a diagnosis although there was agreement that his symptoms were genuine.

The Tribunal repeated its discussion of '85% incapacity for work' in *Ilich* (see this issue of the *Reporter*) and found that he could not attract an employer for the kind of work to which he was accustomed or for any heavy labouring work, because 'he would be dangerous not only to himself, but to others': Reasons, para. 14.

While it was possible that Sigg's condition might be diagnosed and treated, it was still 'permanent' in that it would last 'for an indefinite time in the future', as the AAT had explained in *Tiknaz* (1981) 5 *SSR* 45.

HOWARD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/127)

Decided: 13 April 1983 by J.D. Davies J, M.S. McLelland and E.L. Davis.

The AAT *set aside* a DSS decision to refuse invalid pension to a 53-year-old former press operator whose left hand was disabled and who suffered a moderate back problem, hypertension, some bronchitis and a functional disability.

The AAT believed that Howard could undertake paid work but concluded that he could not obtain that work: his left hand and back, in combination with his age and limited work skills, would permanently prevent him obtaining a job. (A Department of Employment officer had told the AAT that 'some years ago, persons could obtain unskilled work at least to the age of about 55 but at the present time the age at which an unskilled person could obtain work had dropped to between 45 and 50.')

The DSS form – too narrow

In the course of its Reasons, the AAT criticised the form on which Commonwealth Medical Officers reported their opinion on the degree of incapacity suffered by a claimant for invalid pension. That form gave the CMO several alternatives (or boxes to tick). If the CMO believed the claimant was not permanently incapacitated for work, the CMO had to choose between

- less than 50% (moderately incapacitated);
- 50-70% (materially incapacitated); or
- 70-80% (severely incapacitated).

'By inference', the AAT said, 'a claimant who is "severely incapacitated" is only "70-80%", whereas the degree stated

in s.23 of the *Social Security Act* . . . is 85% . . .' The AAT continued:

> However, a person who is 'moderately incapacitated' or 'severely incapacitated' in an orthopaedic sense may be 'permanently incapacitated for work' in the sense that he is unable, because of his disabilities, to obtain remunerated employment. Decisons of the Tribunal have endeavoured to make it clear that the '85%' which s.23 refers is not a degree of orthopaedic disability. Section 23 is an ameliorating provision, that is to say, it enables the grant of a pension to a person who, for practical purposes, is permanently incapacitated for work notwithstanding that that person may be able to obtain some part-time remunerated employment.
>
> (Reasons, p. 18).

CUGLIARI and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. V81/582)

Decided: 14 April 1983 by R.K. Todd, I.R. Thompson and E. Coates.

The Tribunal *set aside* a DSS decision cancelling an invalid pension held by a 45-year-old former labourer and truck-driver who suffered from 'a severe and degenerative disease of the cervical spine'. The AAT said:

> His loss of physical capacity to do the only types of work he has ever done during his adult life has to be considered in the context of his lack of education beyond the primary stage – and that in Italy, not Australia – and the fact that he has not worked at all since 1971. Applying the principles in *Re Panke* [(1981) 1 *SSR* 9] and *Re McGeary* [(1982) 11 *SSR* 113] . . . he is incapable of attracting an employer prepared to engage and remunerate him. Accordingly he is and has at all times been qualified for an invalid pension.
>
> (Reasons, para. 11).

JAMES and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. Q81/94)

Decided: 29 March 1983 by J.B.K. Williams, M. Glick and M. McLelland.

The Tribunal *affirmed* a DSS decision cancelling an invalid pension held by a 51-year-old former semi-skilled worker who had lost the sight of one eye. The AAT decided that she was capable of undertaking a range of jobs. She had 'assumed an invalid role, a role which the medical evidence does not support'. The medical disability suffered by an applicant for invalid pension must be more than 'a material factor in the incapacity, it must be of such significance that the incapacity can be said to arise or result from the medical condition': Reasons, pp. 7-8.

PAPADOPOULOS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W81/31)

Decided: 11 May 1983 by G.D. Clarkson.

The Tribunal *affirmed* a DSS refusal to grant an invalid pension to a 49-year-old former cook who produced no evidence to establish any medical disability. The only evidence was given by a psychiatrist called by DSS: he said that Papadopoulos over-dramatised his illnesses and was able to work.

ATTARD and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/38)

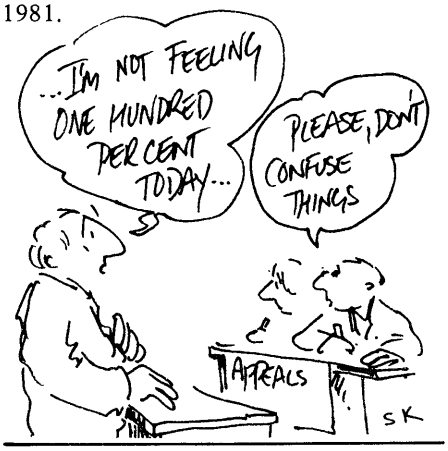
Decided: 22 March 1983 by J.O. Ballard.

The Tribunal *affirmed* a DSS cancellation of invalid pension held by a former storeman and packer. Attard's injuries and disability are not described in the Reasons, whch focus on his unwillingness to undergo rehabilitation and to seek work. (The AAT criticised the initial grant of invalid pension to Attard because it was based on a medical assessment which recommended that it be granted subject to review within a year: this approach ignored the requirement that the incapacity be 'permanent'.)

ORUC and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N81/231)

Decided: 5 April 1983 by J.O. Ballard.

The Tribunal *affirmed* a DSS cancellation of invalid pension granted in 1976 to a 43-year-old former factory worker who suffered a spinal disability, diabetes and deep vein thrombosis. The AAT preferred the medical evidence called by the DSS to the evidence of Oruc's treating doctors because they had relied on Oruc's version of his history – and that version was unreliable. This unreliability was shown by Oruc's concealment, in 1981-82, of the fact of his earlier disability when claiming compensation for an injury suffered in 1981.



LITTMAN and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. Q82/40)

Decided: 16 March 1983 by J. B. K. Williams.

The AAT *affirmed* a DSS decision to cancel an invalid pension held by a 49-year-old woman suffering from a degenerative disease of the spine, a bladder problem and anxiety.

The Tribunal resolved the sharp difference of opinion between medical witnesses by noting that she worked part-time—15 hours a week:

> The opinions of [the doctors consulted by the DSS] are that the applicant is capable of performing clerical type work. These opinions are supported by the fact that she has an employer willing to employ her with her physical limitations on this kind of work albeit on a part-time basis. She is in fact working for something more than 40% of the hours normally worked in clerical occupations.
>
> (Reasons, p.10)

[Comment: Compare this decision with *Mann* (1982) 8 *SSR* 75, where the AAT said 'it would . . . be quite unrealistic and quite wrong to contemplate that because a man can do two, three or four hours work a day that he is to be regarded as being adequately capacitated "for work" '.]

Invalid pension: 'permanently blind'

LEACH and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. W82/46)

Decided: 11 May 1983 by G.D. Clarkson.

James Leach had claimed an invalid pension on the basis that he was permanently blind. The DSS refused to grant a pension on that basis but indicated that it would grant him an invalid pension on the basis of 85% permanent incapacity for work. Leach applied to the AAT for review of this decision.

Section 24 of the *Social Security Act* provides that a person will qualify for invalid pension if that person '(a) is permanently incapacitated for work or is permanently blind . . .' (The section also imposes age and residence requirements.)

Section 28(2) applies an income test to invalid pensions but a person who qualifies on the basis of permanent blindness is exempted from the income test: s.28(2AA).

'Permanently blind' means total blindness

Medical evidence was given that Leach, who was 61 and had worked for many years as an accountant, had a 60% loss of visual efficiency.

The Tribunal took the view that, in order to qualify as 'permanently blind', a person would need to be 'wholly blind as opposed to partially blind'. A partial blindness, in combination with other factors (such as physical and mental capacity, age, education, experience, marketability of skills), might establish permanent incapacity for work – the alternative qualification for invalid pension. But blindness involved 'a purely physical assessment of a bodily sense without reference to those other factors': Reasons, p. 5.

The AAT noted that the DSS used, as its test of blindness, a 'degree of visual acuity measured according to . . . Snellen's test types . . . This may well be more generous to an applicant than strict compliance with the Act'. But the AAT did not decide whether the DSS approach was consistent with s.24 as Leach could not qualify, even on that approach.

Formal decision

The AAT affirmed the decision under review.