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SOCIAL SECURITY

No 39 October 1987

Opinion

The correct criteria

Problems in the decision-making process are evidenced by decisions featured in this issue of the Reporter. In particular problems of proof seem to be presenting difficulties for those administering the Social Security Act.

In Kershaw the issue was whether the applicant was co-habiting with her estranged husband. The evidence was inconclusive, especially as there was an absence of independent evidence to any significant degree. The Tribunal could only conclude that it could not say beyond reasonable doubt that the marriage had been restored. This is perhaps a surprisingly high standard adopted by the Tribunal.

This may be contrasted with the approach adopted in Bush where the Tribunal adopted the standard of the balance of probabilities in evaluating the nature of a relationship between two parties said to be in a de facto relationship. Similarly, in Patron the Tribunal when examining whether or not a person had received a letter from the Department said that in the absence of corroboration it was more likely than not that the letter was received.

In Hoang the problem was that there was no evidence which indicated the applicant had been working while in receipt of unemployment benefits, although there may have been some circumstantial evidence that he had been working. Nevertheless it appeared that the Tribunal wanted more than 'suggestive' evidence to base its decision.

Of course it has often been commented, both in the Reporter and elsewhere, that the AAT often adopts inconsistent approaches at times in relation to certain issues in its social security jurisdiction. Such an occurrence is perhaps an inevitable consequence of the structure and function of the Tribunal and is something of which the Tribunal is acutely aware.

But there is a more deep rooted problem. Original decision making obviously leads to the appeals heard by the AAT. It is not too difficult to imagine that the DSS would work from a presumption that there was a marital relationship in a case such as Kershaw and not adopt almost the opposite presumption as the AAT appeared to do. Similar comments could also be made about Hoang.

The point is that the presumptions that may operate, the standards of proof and evidence required may not only vary between differently constituted Tribunals, but more seriously they may vary between the DSS and the AAT. Thus those who appeal have their eligibility determined on quite different criteria than those who do not.

Punishing fraud

In this issue we also look at the sentencing of persons convicted of welfare fraud. This is another area where inconsistent approaches give rise to various types of punishment for similar behaviour. We examine the reasons why that might occur.

B.S.

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