

## Overpayment: 'deserted wife'

BELL and SECRETARY TO DSS  
(No. 89/1101)

Decided: 15 October 1990 by M.D. Allen, C.J. Stevens and J. Kalowski.

The DSS decided that Bell had received \$23 391.70 in excess of her entitlement to a widow's pension. The SSAT affirmed the decision under review and she appealed to the AAT.

### The facts

Bell was granted widow's pension in August 1979 on the basis that she was a 'deserted wife'. In July 1986 the DSS was informed that Bell and her husband had never separated and were still living together. In August 1982 Bell and her husband had purchased a house as joint tenants. By letter received 26 August 1986, Bell notified the DSS of a reconciliation and requested cancellation of her benefits.

On 23 March 1989 Bell pleaded guilty in a local court to an offence under the *Social Security Act*. She had failed to notify the DSS that she was employed while receiving widow's pension. She was convicted and fined \$1500 plus costs. The total amount admitted to have been obtained as a result of the offence was \$4444.40.

Bell's case was that, as a result of a motor vehicle accident, she had become difficult to live with and her husband had left her. She was later awarded \$61 000 and purchased a house. There was a shortfall of \$16 000 between the price of the house and her damages award and, as financial institutions would not lend to a single woman, she had approached her husband. The property was subsequently purchased as joint tenants. Later the loan was refinanced and in both instances the couple had presented themselves as cohabiting. A joint account was opened in their names which either party could operate.

In his evidence, Bell's husband conceded that the solicitor handling the purchase was not informed that the parties were living separately. Bell conceded that, as against the rest of the world, there was no indication that she and her husband had separated.

### The legislation

At all relevant times the definition of 'deserted wife' in the *Social Security Act* read:

"deserted wife" means a wife who has been deserted by her husband without just cause for a period of not less than three months'.

### The cases

The Tribunal said the concept of desertion is not without difficulty. The leading case was *Pardy v Pardy* [1939] P 288 where Sir Wifred Greene said:

'The word "desertion" may describe an act or it may describe a state. For the act of desertion both the *factum* of separation and the *animus deserendi* are required. . . . A *de facto* separation may take place without there being an *animus deserendi*, but if that *animus supervenes*, desertion will begin from that moment, unless, of course, there is consent by the other spouse.'

In *Tulk v Tulk* [1907] VR 64, Cussen J said:

'Desertion commences when one of the spouses, without the consent of the other, terminates an existing matrimonial relationship, with the intention of forsaking that other and permanently or indefinitely abandoning such relationship. . . . An existing matrimonial relationship does not end so long as both spouses *bona fide* recognize it as subsisting.'

In *Powell v Powell* (1948) 77 CLR 521, the High Court followed *Pardy* and held the *animus deserendi* might be inferred from the words and conduct of the deserting spouse, a continuance of the *de facto* separation and the absence of consent by the other party. In *Potter v Potter* (1954) 90 CLR 391, the majority said:

'If the proper conclusion is that the respondent spouse has brought to an end, against the will of the other, a pre-existing matrimonial relationship or *consortium vitae*, the other is entitled to a decree of dissolution.'

### The decision

The AAT found that Bell tailored her evidence to best advantage what she perceived as her interests and had a history of deception in her dealings with the DSS. It noted the case of *Petty and Davis* (1982) 10 SSR 99:

'Where applicants make an untruthful or misleading statement concerning their relationship they must realise that the inference is likely to be drawn against them, that they are endeavouring to conceal the true nature of their relationship.'

There were discrepancies as to where Bell lived at various times and an inference was drawn that she attempted to conceal the true state of affairs from the DSS.

Both the husband and wife recognised that, although they were living apart (if indeed they were), the marriage was still on foot and neither of them took any step to change this state. At no time did Bell's husband have the requisite *animus deserendi*. Rather, it was Bell herself who, by her conduct and specific requests for him to leave, deserted her

husband. The Tribunal said she could not be regarded as a wife deserted by her husband, much less deserted without just cause. At all times the husband supported the wife and his 2 daughters, paid the bills and maintained a joint account. Bell was never entitled to a widow's pension on the basis of being a deserted wife.

### Formal decision

The AAT affirmed the decision under review.

[B.W.]

## Invalid pension: anti-social personality disorder

GARDINER and SECRETARY TO DSS

(No. N89/38)

Decided: 14 February 1991 by R.N. Watterson, T.R. Russell and H.D. Browne.

On 1 June 1988, the DSS made a decision to cancel Gardiner's invalid pension. He appealed to the SSAT which considered he was 85% permanently incapacitated for work and satisfied s.27(a) of the *Social Security Act*, but that less than half his incapacity was due to medical impairment, so he did not satisfy s.27(b).

### The facts

Gardiner was 41 and had not worked for a living in a sustained way for 20 years. During that time the principal source of income for him and his family had been the social security system. In 1983 he was granted invalid pension on the grounds of drug addiction, multiple fractures, nervous diarrhoea, anxiety and depression. The DSS reviewed his eligibility after receiving information that he was involved in touch football as a player and referee.

Gardiner had left school at 14, worked briefly as an office boy and as a labourer in an abattoirs 'on and off' for 5 years. Since 1969, his only jobs had been weekend work as a supervisor at an RSL club for 4 or 5 months, 2 nights' work as a ticket seller and 14 weeks' work erecting real estate signs. In nearly all these jobs he had been in trouble for fighting

and his convictions for violence were tendered at the hearing.

Gardiner became addicted to drugs in 1969 and spent time in prison for drug related offences. Following rehabilitation he no longer suffered from drug addiction after 1982. In 1983 he became active in touch football and continued to play 2 games a week, occasionally refereed, and for 2 years until mid-1988 he worked voluntarily as administrator in the sport. He gave evidence that he could cope with work where he was his own boss, but became aggressive if he had to work with people telling him what to do.

#### Medical evidence

An orthopaedic surgeon who examined Gardiner for the DSS expressed the view that Gardiner had no clinical evidence of disability in his neck or back, but there was evidence of early osteoarthritic change in his left knee and the odd ache or pain in his right hand because of an old injury. There were few occupations which Gardiner could not do from an orthopaedic point of view. A gastroenterologist for the DSS noted an irritable bowel condition which would not prevent Gardiner working.

A psychiatrist for the DSS, whose specialty was drug addiction, had concluded in a written report that Gardiner suffered from no mental illness. At the hearing he said the applicant suffered from a recognised psychiatric disorder known as an anti-social personality, which was permanent, but capable of improvement. His condition was not severe enough to prevent him from working, but restricted the environments in which he could work and the type of work he could do. He needed a 'tough minded' boss prepared to meet violence and he should not work dealing with members of the public.

A psychiatrist who had treated Gardiner for drug dependency considered that Gardiner did not possess the requisite social, interpersonal and communication skills to re-enter the workforce. She noted his long term drug abuse which had segregated him from mainstream society for a long period of time. If forced to re-enter the workforce, she said, he would be likely to respond with violence and anti-social behaviour. She diagnosed him as having an anti-social personality disorder which became evident in adolescence and persisted to the present. It was not work itself which was likely to trigger his aggressive behaviour, but supervision by others, or interaction with others. She saw little prospect of recovery.

#### The decision

The issues were whether Gardiner was permanently incapacitated for work and, if so, was at least 50% of such incapacity directly caused by a mental impairment. The AAT found that Gardiner's physical impairments contributed to a very limited degree to his inability to work.

The AAT acknowledged that it had the benefit of far more extensive psychiatric evidence than did the SSAT, and concluded that Gardiner's psychiatric impairment contributed to at least 50% of his incapacity for work. The opinion of Gardiner's treating psychiatrist was preferred as she had the advantage of treating him over a period of time. The AAT also witnessed an outburst of behaviour by Gardiner during the hearing which, it said, was of the type which would make it highly improbable for him to maintain any paid work.

#### Formal decision

The AAT set aside the decision of the SSAT and decided that Gardiner was at all relevant times qualified to receive invalid pension.

[B.W.]

## Invalid pension: personality traits and mental illness

EDGE and SECRETARY TO DSS  
(No. N89/224)

Decided: 9 November 1990 by M.D. Allen.

Edge was granted invalid pension in 1978, having been injured in a motor vehicle accident in 1971. The DSS cancelled his pension from April 1988. The SSAT affirmed the decision under review and Edge appealed to the AAT.

#### The facts

Edge was attempting to set up a business growing lettuces hydroponically. He had also undertaken some fencing and timber cutting on his property. Former employees gave evidence that he was a hard worker and a good employer but he had financial difficulties. The DSS argued that Edge had made a good recovery from the car accident and was fit for light work but conceded he could not do heavy labouring.

A clinical psychologist agreed with evidence given by a psychiatrist that the applicant did not exhibit any evidence of mental illness. He considered, however, that Edge would have difficulties in any occupation in which he would have to 'interface' with the public and in situations where he was subject to persons in authority over him. He considered Edge had a rigid, dominant personality and that he would be difficult to work with.

Edge's orthopaedic surgeon considered that Edge had suffered a severe injury which left him with a permanent physical disability which prevented him engaging in heavy labouring work. When the evidence of the former employees was put to him on cross-examination he agreed that Edge was far fitter than he would have expected and, if he could do the tasks suggested, he was capable of undertaking light work.

#### The decision

Section 27 of the *Social Security Act* refers to a permanent incapacity for work that is caused by mental impairment. 'Impairment' is not defined in the Act but the AAT agreed with *Mancuso* (1989) 53 SSR 705 in which impairment was said to refer to some diminished or reduced capacity. It said there was no doubt that a mental state which caused a person to be well nigh unemployable because of unacceptable personality traits would amount to such an impairment.

The AAT found that the accounts given by the former employees showed Edge's capacity for work to be greater than might be expected given the severity of his injuries. He lived in an isolated area where the principal occupations were rural-based and was unfit for day to day work in a labouring type occupation. Section 27(b) states that 50% of an applicant's permanent incapacity must be directly caused by physical or mental impairment. In this case that had not been shown and any inability to obtain the light work of which Edge was capable was a factor of where he lived and its restricted labour market, rather than his capacity to undertake suitable employment.

#### Formal decision

The AAT affirmed the decision under review.

[B.W.]