Newstart allowance and impose a deferment (i.e. non-payment) period of six weeks. The decision was affirmed by the SSAT and Wan applied to the AAT.

The legislation

Section 593(b) requires that to qualify for Newstart allowance a person receiving it must satisfy the activity test. A person does not satisfy the activity test if the person fails to take reasonable steps to comply with a notified requirement of the Employment Secretary (s.601(3)) or with the terms of a Newstart Activity Agreement currently in force (s.601(5)).

A person who is removed from Newstart allowance for failure to satisfy the activity test is subject to a deferment period of 2 weeks, or 6 weeks in accordance with s.624(4) if an automatic deferment period has applied to the person within the previous 3 years. A deferment period had been previously imposed on Wan in 1989, and the DSS had applied s.624(4) to him.

Did Wan fail the activity test?

The issue was whether Wan failed the activity test, on the basis of failure to comply with a Newstart Agreement or with a requirement of the Secretary.

The AAT found that the arrangement recorded in the note of 20 November 1991 could not be regarded as an extension of the Newstart Agreement because it was not in a form approved by the Employment Secretary as required by s.604.

The DSS argued that the arrangement made on 20 November amounted to a requirement of the Secretary under s.601(2), and that Wan's non-compliance resulted in failure to satisfy the activity test. The AAT expressed some doubt that there was a valid 'requirement' under the sub-section, but decided against the DSS on the alternative ground that Wan had not been 'notified' of the requirement in accordance with s.601(2)(b).

The sub-section was silent as to the requirements for notification. In deciding whether the note amounted to notification, the AAT said that it was relevant to consider not just the means of communication but also the adequacy of the information conveyed. Since a penalty attached to failure to comply with a notified obligation, the provision requiring notification should be construed strictly.

Although the note and the referral form when read together contained all necessary information, the referral form given to Wan to take away was deficient. The AAT said:

> 'Proper notification requires that where a document is provided to someone in the applicant's situation, and the person can reasonably be expected to rely on it later, it should indicate comprehensively the time, date, place and probably phone number necessary to enable the person to fulfil his or her obligations.'

(Reasons, para. 34)

In view of the finding that Wan had not failed to satisfy the activity test, it was unnecessary to determine whether the deferment period should be 2 weeks, or the 6 weeks fixed by s.624(4).

Formal decision

The AAT set aside the decision under review and substituted a decision that a deferment period of 6 weeks should not have been applied and remitted the matter to the DSS for payment of Newstart allowance to Wan.

[P.O'C.]

Unemployment benefits: work test

Sickness benefits: willingness to work

ROLPH and SECRETARY TO DSS and SECRETARY TO DSS and ROLPH

(No. 8325)

Decided: 19 October 1992 by B.H. Burns, N. Attwood, H.G. Julian.

With the consent of the parties, the AAT reviewed two applications for review at the one hearing.

The first application was to review a decision of the SSAT affirming a decision of the DSS to cancel Rolph's unemployment benefit from 8 March 1991. It was agreed by the parties that this decision incorporated an earlier decision by the DSS not to pay unemployment benefit from 22 January 1991 to 4 February 1991.

The second application requested review of an SSAT decision setting aside a DSS decision not to pay sickness benefit to Rolph, and substituting a decision that he was likely to qualify for Newstart allowance.

The issues

Unemployment benefits: With regard to the period 22 January 1991 to 4 February 1991 the AAT stated the issue to be whether Rolph had taken reasonable steps to obtain employment. For the period 22 January 1991 to 7 March 1991 the issue was whether Rolph was willing to undertake paid work that was suitable to be undertaken by him, as well as whether Rolph had taken reasonable steps to obtain such work (see ss.116(1) of the *Social Security Act* 1947).

Sickness benefits: For the period 24 June 1991 to 30 June 1991, the issue was whether Rolph was willing to undertake paid suitable work but for his accepted sickness, and whether he would be willing to take reasonable steps to obtain such work (see ss.117(1) of the *Social Security Act* 1947 and s.666 of the *Social Security Act* 1991).

The facts

After hearing oral evidence from Rolph, the AAT referred to an affidavit of Rolph's as well as the s.37 documents, and made the following findings of fact. Rolph left school at 14 and worked as a labourer on his parent's farm and other farms for a number of years. He became a truck driver at 21 and helped form the ACT Lorry Owner/Drivers' Association. In 1972 he was elected Branch Secretary of the Transport Workers Union in Tasmania, a full time position. Four years later he was dismissed from office. Rolph maintains that he was wrongfully dismissed and has been involved in litigation ever since.

He was paid unemployment benefits from 1976 until the decisions under review were made by the DSS. Since 1976 he has moved a number of times living in remote areas in NSW and Tasmania.

In his affidavit Rolph set out the steps he had taken between 21 January 1991 and 24 June 1991 to obtain suitable employment. These were offering his services to 12 individuals in the immediate area around where he lived, 16 applications for jobs with transport firms in Tasmania, registration with CES, reading public employment notices, and involvement in litigation. The 12 individuals were mainly relatives or close friends who could only offer him casual work for little payment. Rolph would select names from the Hobart Telephone Book and send a letter a week looking for work with little hope of success. The AAT concluded that there was no real prospect of

Rolph obtaining a job through any of these efforts. Rolph clearly saw his priority as pursuing litigation to clear his good name and reputation. Rolph spent approximately 20 hours a week on chores associated with his basic life style and the rest of his time on litigation.

After referring to the evidence that had been put before it, the AAT stated:

> 'We gained the distinct impression . . . that for some time now and certainly in relation to each of the relevant periods in question, he [Rolph] has not been in any real sense willing to undertake any paid suitable work and we so find.'

(Reasons para.16)

Instead, Rolph continued to pursue litigation against his former employer and this took up most of his time. The AAT concluded that Rolph had made token efforts only to obtain paid work and did not accept Rolph's evidence, finding him unimpressive. When sickness meant Rolph was unable to work, the AAT found that Rolph would have been unwilling to undertake work.

Formal decision

The AAT decided:

- to affirm the decision to cancel unemployment benefits from 8 March 1991;
- that Rolph was not entitled to payment of unemployment benefits from 22 January 1991 to 4 February 1991;
- to set aside the SSAT decision and substitute decisions that Rolph was not qualified for sickness benefit from 24 June 1991 to 30 June 1991 or for sickness allowance from 1 July 1991 to 29 August 1991.

[C.H.]

Family allowance: review of cancellation and payment of arrears

SECRETARY TO DSS and DARLINGTON

(No. 8439)

Decided: 18 December 1992 by J.R. Dwyer, J.G. Billings, S.D. Hotop.

DSS sought review of a decision of the SSAT which had set aside a decision to cancel family allowance, and restored Darlington's payments of family allowance from the time they had been suspended in October 1990.

Darlington had been in receipt of family allowance in September 1990, when a review form was sent to her indicating that she did not have to return it unless her income or assets exceeded certain limits, or other particular changes in circumstances had occurred. Because she had changed her address twice in February and March 1990 (without notifying the Department), the letter was returned to the Department marked 'Return to Sender'.

Her payments were suspended and the Department argued that this was pursuant to s.168(1)(c) of the *Social Security Act* 1947 which gave the Secretary power to suspend a payment, 'having regard to any matter that affects the payment of a pension, benefit or allowance under this Act'.

Darlington's family allowance was paid into a bank account which she had last updated in October 1990. She did not do so again until March 1992. Meanwhile, on 7 October 1991, a letter advising her of the cancellation was sent to the same address. It was also returned to the Department marked 'Address Unknown'. When in March 1992, she discovered that payments had not been made into her account, Darlington asked for a resumption of payments and arrears from October 1990. She was told that she would have to reclaim and she did so on 1 April 1992. On 14 April 1992 she was advised in writing that she was not entitled to any arrears as she did not request a review of the decision to cancel her payments within 3 months.

Which Act?

The decision of the SSAT was made after the coming into effect of the *Social Security Act* 1991. However, the facts in issue extended from October 1990 to April 1992 and accordingly, the AAT decided that both the 1947 and 1991 Acts were relevant.

Cancellation or suspension?

Darlington did not challenge the validity of the decision to suspend payment, but she argued that her allowance should not have been cancelled unless it was known that she was not entitled to family allowance. The only reason given by the Department for the cancellation was that an administrative decision had been made that entitlements should be cancelled after 12 months of suspension, as otherwise inactive files would clutter up the computer system. The Department explained that the cancellation resulted from a computer program designed to cancel payments 12 months after they were suspended in circumstances such as these; and s.882B of the 1991 Act provides that such a cancellation is taken to have been made because of a determination by the Secretary.

The Tribunal held that a concern about files cluttering up a computer is not a reason for which the Secretary can properly cancel a person's entitlement to family allowance. However, the Tribunal agreed that under s.882 of the 1991 Act, the Secretary could properly determine that family allowance was not payable to Darlington in the absence of information as to her financial circumstances. Even so, while the Secretary had the power to cancel Darlington's family allowance, this may not have been the correct or preferable decision.

After this case was argued but before it was decided, the Full Federal Court delivered its reasons for decision in *O'Connell and Sevel* ((1993) 71 *SSR* 1029). The Department argued that neither this nor the decision in *Garratt* (1992) 68 *SSR* 981 were relevant as they involved the 1947 Act rather than the similar, but not identical, provisions of the 1991 Act. The Department also argued that *O'Connell* and *Garratt* could be distinguished on their facts as in both those cases family allowance was cancelled without any period of suspension.

The AAT disagreed and held that the preferable decision would have been to leave the payments suspended:

> 'Applying the views expressed by Deputy President Johnston and apparent-