entitlement to DSP.

The medical evidence was provided by Grigorian's treating doctor, 3 Commonwealth medical officers, an occupational physician, and a rehabilitation counsellor. Grigorian was diagnosed as suffering from neck, arm and back pain (cervical spine degeneration), peptic ulcer, right inguinal hernia, diabetes and allergic rhinitis.

It was agreed by most doctors that Grigorian could not do his usual work as a cleaner or storeman. The Commonwealth medical officers stated that Grigorian could undertake light duties.

Grigorian argued that he was not able to do clerical work because his English was not good enough.

Continuing inability to work

It was not in dispute that Grigorian had a physical impairment and so satified s.94(1)(a). At the hearing the DSS accepted that Grigorian had an impairment rating of 20%, and so satisfied s.94(1)(b). The issue for the AAT was whether Grigorian had a continuing inability to work.

To meet this condition the AAT had to be satisfied that Grigorian's impairment would prevent him undertaking his usual work and work for which he was currently skilled, for at least 2 years. The AAT would also have to be satisfied that Grigorian's impairment prevented him undertaking educational or vocational training during the next 2 years, or that the training would be unlikely to equip Grigorian within the next 2 years to do work for which he was currently unskilled (s.94(2)).

The AAT decided that Grigorian's 'usual work' was the work he had performed since coming to Australia. It followed the definition of 'usual' set out in *Hamal* (1993) 75 *SSR* 1082 and *Chami* (1993) 74 *SSR* 1073, namely the dictionary meaning.

The AAT accepted the medical evidence which indicated that Grigorian was not fit for his usual work as a cleaner or storeman because of pain to the back, neck and arms. The AAT found that the diabetes and rhinitis were controlled. The peptic ulcer has healed and the hernia was not a problem. However, it found that Grigorian was not able to to do work which involved heavy lifting, bending or repetitive tasks.

Grigorian held a fork lift driver's licence and was a teacher of the Armenian language. The AAT was not satified that Grigorian was prevented from participating in vocational or educational training during the next 2 years because of his impairment. In the past Grigorian had successfully completed a TAFE course and attended a film course. He represented himself before the AAT without an interpreter. The AAT found Grigorian was fit for light unskilled or semi-skilled work, and that he would not be prevented from undertaking educational or vocational training during the next 2 years because of his impairment.

Formal decision

The AAT affirmed the SSAT decision to cancel payment of the disability support pension.

[C.H.]

Job search allowance: homeless person

SECRETARY TO DSS and SELKE (No. 9077)

Decided: 27 October 1993 by S.A. Forgie.

The applicant was in receipt of job search allowance (JSA). In May 1993 the DSS had decided that she was not eligible for the higher rate of the allowance payable to a homeless person. The SSAT subsequently decided that she was entitled to this rate. The DSS asked the AAT to review the decision.

Was the respondent a homeless person?

Section 5(1) of the *Social Security Act* 1991 defines as a homeless person a person who is not a member of a couple, has no dependent children, is not receiving financial support from a parent or guardian and is not in receipt of income support other than a social security benefit. In addition, s.5(1)(c) requires that the person:

> '(i) does not live, and for a continuous period of at least 2 weeks has not lived, at a home of the parents, or of a parent, of the person because the parents are not, or neither parent is, prepared to allow the person to live at such a home; or
>
> (ii) does not live at a home of the parent, or of a parent, of the person because domestic violence, incestuous harassment or other exceptional circumstances make it unreasonable to expect the person to live at such a home.'

The respondent was 16 when she first claimed JSA. At that time she lived with her parents in a location just north of Cooktown and over 350 kilometres north of Cairns. Cooktown is only accessible during the wet season by using a four-wheel drive vehicle. The respondent lived at a location where there were only two houses. She lived with her parents and eight of her eleven siblings. The respondent's opportunities were limited in this place and she decided to move to Cairns in March 1993 where she lived in a youth hostel and began a full-time course at a TAFE college. While there she applied for a young homeless allowance (YHA) which led to the present appeal.

The DSS argument

The DSS submitted that the respondent was not a homeless person as it could not be said that her parents were not prepared to allow her to live at home. The DSS view was that she had made a voluntary decision to leave home. It was also argued that she was not unable to live at home because of 'domestic violence, incestuous harassment or other exceptional circumstances'. There was no claim of domestic violence or incestuous harassment in this case. Thus there would need to be exceptional circumstances for the respondent to qualify. According to the DSS

> 'these exceptional circumstances had to fall within a narrow compass so that only those who were "genuinely homeless" came within the definition. A more generous interpretation might be seen by the community as providing a financial incentive to young people to leave home.'

(Reasons, para.8)

The DSS referred to its *Guide to the Administration of the Social Security Act* which explained what constitute 'exceptional circumstances' for the purposes of s.5(1). The Guide stated at para. 12.21300 that '[i]t is unreasonable to expect the claimant to live in the parental home where sexual abuse, domestic violence or exceptional circumstances of a comparable nature exist'. 'Other exceptional circumstances', said the *Guide*, 'referred to problems which pose a threat to the claimant's physical or psychological well-being.'

Finally, the DSS argued that the *ejusdem generis* rule should be applied to the words of s.5(1)(c)(ii). By the application of this rule, the words 'exceptional circumstances' should be

confined in their meaning to the same class of the words 'domestic violence and incestuous harassment'. The class created by these words was 'that of physical, psychological or moral endangerment'. As the respondent had left home voluntarily her circumstances did not fall within the class.

The AAT's decision

The AAT felt no need to consider the *Guide* referred to by the DSS. It referred to the High Court's decision in *Hunter Resources v Melville* (1988) 77 ALR 8 which regarded such material as 'nothing more than an expression of opinion of what the relevant legislation means' (at 11). As the AAT regarded the meaning of the legislation as clear, it considered it unnecessary to refer further to the *Guide*.

The issue in this case was whether the respondent fell within 'exceptional circumstances' under s.5(1)(c)(ii). The AAT considered that it was not correct to limit the ordinary meaning of 'exceptional circumstances' by reference to the class of behaviour created by the preceding words in the section. In conclusion, such circumstances must 'simply be circumstances which are out of the ordinary and which make it unreasonable to expect a person to live at home'.

But the AAT then considered whether the circumstances must take place in the home or whether it could look at other matters such as the location of the home and employment opportunities. As the section used such words as 'home' and 'live' in the context of circumstances which made it unreasonable to live at 'such a home', the Tribunal concluded that 'the circumstances must pertain to the person's living at such a home rather than simply to the person's living in the area where the home may be located': Reasons, para. 16).

This precluded the respondent from the definition as:

> 'The main reasons for Miss Selke's moving from her parents' home were its isolation and the need for her to obtain training and place herself in a better position to obtain employment. While these two reasons are directly related to the location of her home at Quarantine Bay, they are not factors which pertain to the home itself and make it unreasonable for her to live there within the meaning of the Act. They pertain to the home's location and to the opportunities in the community in which it is located and not to a home such as Mr and Mrs Selke's home. They also related to her abilities to find work, and while it is unreasonable to expect that she will be able to continue to live there as well as work, the definition of a 'homeless person' relates only to circumstances of her living there and I cannot take into account circumstances relating to her working there.'

(Reasons, para. 17)

The AAT also considered that even if this view was incorrect the circumstances could not be described as exceptional:

> 'They are, unfortunately, equally applicable to other homes at Quarantine Bay and Cooktown as well as homes in other remote, and indeed not so remote, areas of Australia. Furthermore, the circumstances do not make it unreasonable to live at Quarantine Bay for, although it would not be reasonable to continue to live there and expect to work, it is not unreasonable to live there. The two concepts, that of living and that of working, are different and the legislation makes no reference to working.'

(Reasons, paras 17-18)

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the respondent is not a homeless person within the meaning of the *Social Security Act* and is not entitled to payment of young homeless allowance.

[B.S.]

Newstart allowance: 'required' to attend CES

BROWN and SECRETARY TO DSS

(No. 9088)

Decided: 29 October 1993 by S.A. Forgie.

Background

Trevor Brown had been in receipt of newstart allowance when on 6 October 1992 a delegate of the Secretary to the Department of Social Security (DSS) decided that the allowance was not payable for a two-week period. This was because he had failed to attend an appointment at the CES on 24 September 1992. The decision was affirmed by an Authorised Review Officer and by the Social Security Appeals Tribunal. Brown then asked the AAT to review the decision.

The legislation

Section 627(1) provides that where a person is receiving newstart allowance and the Secretary is of the opinion that the person should attend an office of the DSS or the CES, the Secretary notifies the person that they are required to do so, and the requirement is reasonable, a newstart allowance is not payable to the person where the person does not comply.

Subsection 627(3) provides that the Secretary may, despite subsection 627(1), determine that the allowance is payable 'if the Secretary is satisfied that the person had a reasonable excuse for not complying with the requirement'.

Findings of fact

Brown commenced a course at Lismore TAFE in February 1992 in which he was enrolled on a full time basis. The evidence suggested that his attendance was not regular. On 23 July 1992 an officer of the CES wrote to him about the course. She suggested that he should withdraw from it and that he should contact a specialist CES officer to discuss other options. The letter also noted that he would need to have a new newstart agreement concluded.

The officer wrote to him again at the end of August 1992 suggesting that he make an appointment with the newstart officer for an assessment. In that letter she also discussed another employment placement program. A further letter of 15 September 1992 reported on developments and made further suggestions concerning people who might assist him. Following receipt of that letter, Brown phoned the CES and made an appointment for 24 September 1992. He did not attend at the CES office on that day.

The AAT considered these events in the light of subsection 627(1). The first issue was whether or not the Secretary had formed an opinion that Brown should attend an office of the CES. In view of the language in the letter, the AAT had doubts as to whether it was clear that the Secretary had formed an opinion that he should attend the office. The Tribunal also considered whether or not Brown had been 'required' to attend to the extent that there was a failure by him to do so.

'Required' to attend

After considering a number of cases about the meaning of the word 'required', the AAT concluded that the word 'can have a meaning ranging from wish or desire to require or oblige'. The AAT said the meaning must be gleaned from the context in which the word appears. Here, the effect of s.627 is that if a person does not comply with a 'requirement', the person suffers 'a not inconsequential