On the basis of the evidence, the AAT concluded that Ferguson had forgotten about his appointment when he decided to go to Western Australia. The 'forgetting' was not within his control and it was not reasonably foreseeable by him. Therefore he had not failed to comply with the CMAA. The AAT set out 5 steps a decision maker should comply with when making a decision such as this. These are:

- identify the sections of the legislation;
- the terms of that section;
- the delegation power;
- which legislative test applies; and
- the findings in relation to the particular person in relation to that test.

Formal decision

The AAT set aside the decision under review and substituted its decision that the decision to cancel Ferguson's NSA be set aside.

[C.H.]

[Editor's note: The DSS have appealed to the Federal Court.]

Newstart allowance: enrolment in a full-time course of education

LAUDER and SECRETARY to DSS (No. 10888)

Decided: 26 April 1996 by S.A. Forgie.

Lauder applied for newstart allowance in 1995. His claim was rejected by the DSS because he was enrolled in a full-time course of education. The SSAT affirmed the decision to reject his claim and Lauder applied for review by the AAT.

The facts

Lauder was an architect by profession. Having been retrenched in November 1994, he applied for newstart allowance which was granted. For the first semester in 1995, he was enrolled as a full-time student in a Diploma of Management course at the Hervey Bay Senior College. He applied for AUSTUDY which was granted. By the time he was 3 weeks into his course, he discovered, contrary to advice previously received, that he was only entitled to the single rate of Austudy as his wife was not considered a dependent spouse. He lodged a further claim for newstart allowance, having maintained his registration with the CES as an unemployed person while undertaking his course.

The issue

Newstart allowance was not payable to Lauder if he was enrolled in a full-time course of education.

The law

Section 613 of the *Social Security Act 1991* states, in as far as is relevant here, that '. . . a newstart allowance is not payable to a person who is enrolled in a full-time course of education . . . ' the AAT noted that the term 'full-time course of education' is not defined in the Act. The AAT then set out the relevant guidelines of the DSS, without comment, apart from stating that they are not binding on the AAT. It then referred to the case of *Harradine v Secretary, DSS* (1989) 10 AAR 412 because it referred to the notion of full-time, although in the context of previous legislation which read 'engaged on a full-time basis in a course of education' and not 'enrolled' as in s.613.

The AAT said that the question it had to answer was to be resolved not 'by what the student does regardless of the designation of the course, but by reference to the student's enrolment in a course that is characterised as a full-time course of education . . .': Reasons para. 26. The AAT agreed with the view taken in *Re Secretary, DSS v Cheary* (1993) 17 AAR 97 that, whether or not a course in which a student is enrolled is a full-time course, is a matter of degree. The designation of the course by the institution is one factor to be considered. Other factors are whether the lectures are held during normal working hours and the hours which the institution expects a student to devote to the course, apart from formal contact hours. In Lauder's case the course had been designated as a full-time course with lectures held during normal working hours. Whilst the contact hours were only 14, this had to be balanced against the institution's designation leading to the conclusion that Lauder's course was a full-time course. The AAT was satisfied that between March and June 1995 Lauder was enrolled in a full-time course of education. Therefore, pursuant to s.613 (1) of the Act, the AAT decided that newstart allowance was not payable to him during those times.

Austudy Regulations and newstart provisions

The AAT found that Lauder had experienced great difficulties in ascertaining what his benefits would be under the Austudy Regulations, and what they would be under the Act. It said that some of the difficulties were to due to differences in language in the Act and in the Austudy Regulations, so that a student might not be able to establish that he is undertaking a full-time workload under the Austudy Regulations, and at the same time, find that he is enrolled in a full-time course of education for the purposes of the newstart provisions. This would result in a student missing out on both Austudy and newstart payment. The AAT said that the provisions of the Act and of the Austudy Regulations should be made complementary and consistent with one another.

Formal decision

The AAT affirmed the decision of the SSAT to reject the applicant's claim for newstart allowance.

[G.H.]

Cancellation of newstart allowance: unreasonable delay in entering into a CMAA

GEEVES and SECRETARY TO DEET (No. 10873)

Decided: 17 April 1996 by A.M. Blow.

A decision was taken by a delegate of the Department of Education, Employment and Training to cancel Geeves' newstart allowance on the ground that he had unreasonably delayed entering into a case management activity agreement. This decision was affirmed by the SSAT.

Background

Geeves became a participant in the case management system provided for in the *Employment Services Act 1994* (the Act) in July of 1995. In October his case manager, Employment Assistance Australia, sent him two notices requiring him to attend an interview to 'reach' and 'complete' a case management activity agreement. The AAT accepted that these terms were sufficient to constitute a requirement pursuant to s.38(3) of the Act that Geeves enter into such an agreement, and a giving of notice of that requirement and of the place and time at which the agreement was to be negotiated in accordance

with s.38(5). Geeves did not respond to those notices. On 9 November a delegate of the Employment Secretary sent Geeves a notice under s.44(3) stating that he was being taken to have failed to enter into a case management activity agreement by reason of his failure to attend the two appointments for interviews.

The issue

Section 44 of the Act sets out the circumstances in which a person can be taken to have failed to enter into a case management activity agreement. Subsection 44(1) provides:

> 'This section applies if:
>
> (a) a person has been given notice under subsection 38(5) of a requirement to enter into a case management activity agreement; and
>
> (b) the Employment Secretary is satisfied that the person is unreasonably delaying entering into the agreement.'

The AAT accepted that Geeves had not received the two notices sent to him. By virtue of s.29 of the *Acts Interpretation Act 1901* and s.23(12) of the *Social Security Act 1991* however, notices sent by mail to the last known address of a person, and not physically received by them, are to be treated as having been 'given'. Therefore, s.44(1)(a) of the Act had been satisfied.

The only issue, therefore, was whether s.44(1)(b) applied, that is, whether the AAT, standing in the shoes of the Employment Secretary, was satisfied that the applicant was unreasonably delaying entering into the case management activity Agreement.

The evidence

The letters requiring Geeves to attend interviews had been posted to an address in New Town. Geeves had been itinerant with no fixed place of abode from mid-1995 for several months. He then went to live with a friend at the property in New Town. Both Geeves and his friend vacated that address in mid-October 1995, unexpectedly. Geeves stayed at various residences until finding accommodation on 21 November 1995. He did not notify the DSS, the CES or Employment Assistance Australia that he had left the New Town address until 20 November 1995, after he learned of the decision to cancel his newstart allowance. He said that he had not received the letters despite having returned to New Town at least once in search of mail.

Meaning of unreasonably delaying

The AAT was of the view that 'unreasonably delaying' involved some mental element, such as where a person is aware of an appointment to negotiate an agreement but fails to attend without a reasonable excuse, or where a person deliberately does not collect or does not bother to collect their mail because they do not wish to receive notification of such an appointment. The AAT was satisfied that Geeves had not deliberately or knowingly refrained from notifying his change of address or from attempting to collect his mail. As a result, his state of mind was not such that he could be said to have unreasonably delayed entering into a case management activity agreement, and s.44 of the Act could not apply.

Formal decision

The AAT set aside the decision under review and in substitution decided that Geeves' newstart allowance not be cancelled.

[A.T.]

Overpayment of job search allowance: nature of additional income received

GAFFEY and SECRETARY TO DSS
(No. 10897)

Decided: 1 May 1996 by M.T. Lewis, J.D. Campbell and M.M. McGovern.

Mr Gaffey, an ordained Deacon of the Catholic Church, was in receipt of job search allowance (JSA) between January and November 1994. At the same time he was in receipt of monthly payments from the Roman Catholic Church and intermittent payments from casual employment. JSA was cancelled in November 1994 when the DSS became aware of his other income and an overpayment of JSA of $6,109.15 was raised.

Background

Following Mr Gaffey's ordination as a Deacon he left the ministry due to a problematical relationship between himself and Cardinal Clancy. He did not return until 20 years later when he sought Cardinal Clancy's assistance in locating a bishop in south-east Asia who would accept him as a late vocation to the priesthood.

Mr Gaffey was invited to work as a volunteer in a welfare program in the Diocese of Ubon Ratchathani in Thailand and he travelled to Thailand to commence this work in June 1993 returning to Australia in December 1993. While in Thailand Mr Gaffey was provided with food and accommodation.

On his return to Australia Mr Gaffey was hospitalised for treatment in a drug and alcohol unit and his medical costs were paid by the Sydney Archdiocese. Following his discharge from hospital he met with Cardinal Clancy who agreed to ex gratia payments being paid to Mr Gaffey.

In addition to receiving these payments of $867.50 a month from the church, Mr Gaffey also engaged in casual work for a theatrical agent. Mr Gaffey was in receipt of JSA but did not advise the DSS of the other income he was receiving.

Status of the ex gratia payments

Mr Gaffey maintained that the payments were reimbursement of expenses and unpaid stipend for the period he spent in Thailand. Cardinal Clancy, however, classified the money as an ex gratia payment payable to Mr Gaffey due to his health and inability to work as a Deacon. The payments were equivalent to the stipend payable to a Deacon. Cardinal Clancy argued that there was no debt to Mr Gaffey in respect of the period he worked in Thailand.

The AAT gave more weight to Cardinal Clancy's evidence and stated that irrespective of the status of the payments, Mr Gaffey had a duty to disclose the payments to the DSS.

On that basis the AAT affirmed the decision under review. As there was some uncertainty as to whether Mr Gaffey's income from casual employment had been taken into account in calculating the debt the AAT referred the recalculation to the DSS.

Formal decision

The AAT affirmed the decision under review in respect of the cancellation of Mr Gaffey's JSA and remitted the matter to the DSS for recalculation of the amount of debt due to the Commonwealth.

[A.A.]