Background

A beneficial reading of case management

In recent months the Administrative Appeals Tribunal has published a number of decisions relating to cancellation of newstart allowance as a result of failure to enter into, or failure to comply with the terms of, case management activity agreements under the *Employment Services Act 1994*. Under the *Social Security Act 1991* the period of deferment after cancellation for 'activity test' failure for a person unemployed longer than 18 months is 6 weeks, and even longer if there have been previous activity test failures. Given these serious consequences, it is essential that the legislation be administered with care and fairness. However, the recent decisions have highlighted a number of problems with the implementation of the *Employment Services Act* and the legislation itself.

Content of case management activity agreements

First, the content of case management activity agreements as contained in the standard pre-printed form does not conform with the *Employment Services Act*. In *Secretary to the DEETYA and Ruiz* (19 June 1996) the Tribunal found that the relevant provisions of the *Employment Services Act* ought to be construed strictly as the consequences, in the nature of penalties, apply where no compliance is found. Clauses 5 and 6 of the case management activity agreement forms require a person to 'contact, attend or provide information' to the case manager or the CES 'when I have information concerning this agreement or when asked'. The AAT found that the appearance of clauses 5 and 6 on the pre-printed agreement form assumed the terms would be included in every agreement and precluded negotiation even though these terms were not mandatory under s.39(3). Further, these terms could not be approved by the Secretary with regard to the needs of the individual as required by ss.39(5), (6) and (7) because they were too vague to permit the Secretary to consider the person's capacity to comply with whatever might be required. Thus the AAT found that the terms were not part of the case management activity agreement, and no penalty could be imposed for their breach.

This reasoning might be extended to cover other terms on the pre-printed form. In particular, clause 1, which states: 'I will do everything I can to get a job and I am willing to undertake suitable paid work', would appear vulnerable on the basis that it would be difficult to ascertain just what activities 'everything I can' might include at the time of approval of the terms of the agreement.

The agreement forms should be redesigned. The whole point of the case management process was to provide individually tailored plans to assist the long-term unemployed. An administrative process which sets in concrete standard terms prior to negotiation is simply incapable of meeting the needs of a particular individual. Further, terms should refer to specific tasks and be simply expressed. Given the severe penalties for non-compliance, it is only fair that a job seeker should be able to look at their agreement to clearly see exactly what tasks need to be undertaken to maintain their payment, and be confident in the knowledge that nothing further is required of them.

Nature of breach decisions

Secondly, the recent decisions appear to demonstrate a pattern of imposition of non payment periods for failure to attend to essentially administrative or technical requirements by reason of mis-communication or misadventure.

In *Ferguson and Secretary to the DEETYA* (1996) 2 *SSR* 47, the penalty was imposed for forgetting to attend an interview with the case manager. In *Geeves and Secretary to the DEETYA* (1996) 2 *SSR* 49, the penalty was imposed for failure to respond to an unreceived letter requiring attendance at an appointment to enter into a case management activity agreement. In *Goodson and Secretary to the DEETYA* (2 May 1996), a penalty was imposed for failure to respond to an unreceived letter to attend an interview with the case manager. In none of the above cases did the failure cause the person to forego a job opportunity, yet a severe penalty was readily imposed and the matter reached the level of the AAT without settlement. The clearest demonstration of imposition of a penalty for failure to comply with a technical requirement was in *Ruiz*. In that case a penalty was imposed for failure to attend a seminar, which was conducted simultaneously with another requirement under the same agreement to attend a job club. The respondent, being confused about what was required of him, attended only the job club.

Both *Ferguson* and *Ruiz* demonstrate that, even in a climate in which severe penalties have been incorporated into the legislation, there remains the requirement that provisions imposing penalties, including civil penalties, should be strictly construed. Further cases such as *Geeves* and *Goodson* have taken this approach in practice. In *Geeves* it was decided that a finding that a person unreasonably delayed entering into an agreement under s.44, required an element of intent to delay. In *Goodson* the 'failure to take reasonable steps to comply with the terms' of an agreement required, before cancellation under s.45(5) can occur, was reasoned to be a reference to a failure to comply with the terms of the agreement generally.

The Deputy President in *Goodson and Secretary to the DEETYA* said:

> '... the case manager and the ARO and the SSAT and this Tribunal, standing in the shoes of the decision maker, are all under a duty to genuinely consider the circumstances, including the applicant's explanation and to exercise a discretion to consider whether or not he has taken reasonable steps to satisfy , not only this particular request, but the terms of his activity agreement generally. It may well be that one failure to attend an interview would not transform an applicant who had previously been a reliable performer into one who is not taking reasonable steps to satisfy all the terms of his agreement.'

The view taken in *Secretary to the DEETYA and Smith* (24 June 1996) may be at odds with the above approach in so far as the Senior Member said:

> 'The legislative provisions in question do not refer to "the substantial requirements of the agreement", nor to a "substantial effort to comply with the agreement". Section 45(5) of the Act provides that a person is not qualified for newstart allowance unless while the agreement is in force, the person satisfies the Employment Secretary that the *person is taking reasonable steps to comply with the terms of* the agreement.' [Senior Member's emphasis]

This decision can be reconciled with the approach in the above cases, in particular with that of the Deputy President in *Goodson*, as the test is not one of compliance with only some terms and not with other terms, assuming that the terms are duly authorised and correctly approved under s.39. Nor is the test one of the extent of the effort made to comply. However, the test is one of 'taking reasonable steps to comply with the *terms* of the agreement', being the terms as a whole, and not a test in respect of each and every term as might be implied from the Senior Member's wording in *Smith.* It is noted that, as the respondent did not appear before the AAT in *Smith* the point may have been less rigorously argued than in other cases.

It is suggested that where this decision cannot be reconciled with the Deputy President's approach in *Goodson* that the views of the Deputy President be preferred.

Given the above, the Department ought to revise its guidelines to ensure that penalties are only imposed, and matters only pursued, where the legislation clearly authorises such a penalty, and any discretion is appropriately exercised so that penalties are not imposed for technical failures.

Design of the legislation

The interaction between the *Employment Services Act* and the *Social Security Act* is unnecessarily complex. The recent case of *Ferguson* demonstrated that both the Department and the Tribunal had difficulty in establishing the applicable provisions in respect of the decision under review, and the appeal process. It is the writer's view that the Tribunal does have the appropriate jurisdiction given ss.147(5), 151(1)(c) and 152(b) of the *Employment Services Act*, but that the provisions could be much clearer.

Cumbersome appeal processes

In addition to complexity, the legislation is problematic in other respects. The appeal mechanisms appear to have been designed without due regard to the practical realities and level of disadvantage suffered by the long-term unemployed. A person has the right not to agree to inappropriate terms under the *Employment Services Act* and can appeal to the SSAT, which has only a recommendatory power in these matters, before the person signs the agreement. However, in most cases seen by the Welfare Rights Centre in Sydney, it is not until the person has been unable to comply with the terms and has received advice, that they realise the terms were inappropriate and ought not to have been approved. While a person can then appeal on the basis that the terms ought not to have been approved, such a recommendation of the SSAT is only effective from the date of the SSAT's decision or a later date. As the failure to comply has already occurred in respect of the original terms, a decision that those terms were inappropriate cannot save the job seeker from the imposition of the penalty.

Further, s.154 of the *Employment Services Act* requires a person appealing about the terms of their case management activity agreement, to state expressly that they are applying for a review of a decision made under s.39. Given that the legislation also contains provisions allowing the SSAT to operate informally, and to take applications by telephone, and that the SSAT is intended to assist unrepresented persons, such a provision would appear to serve no other function than to operate as a barrier to access to review.

In response to these difficulties, review of inappropriate terms is taking place in practice by a technical method requiring the applicant to argue that the inclusion of inappropriate terms in the case management activity agreement was a matter beyond their control. This argument permits the person to avail themselves of s.45(6) of the *Employment Services Act,* which deems a person to be taking reasonable steps to comply with their case management activity agreement unless the person failed to comply with the agreement, and the reason for the failure was within the person's control or foreseeable by them. Some support for this approach can be found in *Ruiz*. In that case the AAT made an alternative finding that the failure of the case manager to adequately explain the activities necessary to be undertaken was the main reason for the respondent's failure to attend. The case manager's failure to explain was not a matter within the respondent's control.

In for life

Finally, the Employment Services (Terminating Events) Determination No.2 of 1995 has given rise to some interesting problems. That instrument determines when case management ceases. A person must comply with the terms of their case management activity agreement up until a 'terminating event' has occurred in order to avoid a penalty. In a number of situations people who are not receiving newstart allowance may still be subject to the terms of their case management activity agreement, and any penalty incurred for non-compliance while they were

not in receipt of the allowance. For example, a person who discontinued their allowance because they had employment of less than 13 weeks duration, but did not advise the CES in writing that they no longer wished to be a participant, would suffer a penalty for any non-compliance that occurred during the period of employment.

It is the experience of the Welfare Rights Centre in Sydney that job seekers do not expect they might continue to be subject to case management requirements during periods of non-receipt of an allowance. Consequently, it does not occur to job seekers to inquire how they might discontinue case management. The result is that the Determination provides a further avenue for the imposition of penalties in contexts in which any failure may have no relevance to the person's actual employment prospects. While a person's access to case management services ought not be compromised by short periods of non-receipt of the allowance, a job seeker ought not be exposed to the risk of a penalty during this period. The determination ought to be revised to remove this possibility.

Conclusion

While there is a good argument for legislative reform of the *Employment Services Act* and the Determinations thereunder, the recent cases demonstrate that scope already exists to apply the law in a more beneficial manner than has so far been the case. Decision makers should review their approach to these cases to ensure that penalties are only applied in those cases in which the legislation specifically demands it, and thus avoid the imposition of severe penalties for the type of technical or administrative failures seen in some cases to date.

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The Chief Justice went on to refer to matters which were of present concern with respect to the external administrative review process, and in particular the membership of the AAT. Members should have specialist skills, not just management skills. Also, there is a need for a high level of competence in decision making in a judicial manner. This involves not only skill and knowledge, but independence and impartiality. The Chief Justice disagreed with the recommendation of the ARC in its report on better decision making, that legal qualifications should not be a pre-requisite for appointment to a new tribunal. He was not suggesting that all members would require legal qualifications, but that presiding officers should have legal training. The Chief Justice was extremely supportive of specialist non-legal members on a tribunal.

Finally, the Chief Justice concluded that the success of the AAT:

> '... depends on the maintenance of nice distinctions between the departmental lines of ministerial responsibility and the interventionist function of external merits review.'

DEET TO DEETYA

On 11 March 1996 the name of the Department of Education Employment and Training was changed to the Department of Education Employment Training and Youth Affairs, that is, from DEET to DEETYA.

[C.H.]