The legislation

Section 39(1) of the *Employment Services Act 1994* sets out a number of approved activities which could be listed in a CMAA to assist a person to secure employment.

Section 45(5) provides that a person is not qualified for newstart allowance if, while a CMAA is in force, they fail to take reasonable steps to comply with its terms.

Section 45(6) states that a person is taking reasonable steps to comply with the terms of a CMAA unless they fail to comply with the terms and:

> '(a) the main reason for failing to comply involved a matter that was within the persons control; or
>
> (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.'

The AAT findings

The AAT referred to the conflicting evidence relating to the use of the brother's car and the time a similar journey would take if public transport were used.

The AAT concluded that:

- the intended use by Christopoulos of his brother's car was a matter within his personal control; and
- the circumstances which prevented the use of the car were reasonably foreseeable as Christopoulos was aware that his brother occasionally used a steering lock.

Formal decision

The AAT affirmed the decision under review.

[A.A.]

GOODSON and SECRETARY TO DSS
(No. 11018)

Decided: 2 May 1996 by T.E. Barnett.

The DSS cancelled Goodson's newstart allowance on the basis that he had failed to comply with the terms of his case management activity agreement (CMAA).

Background

Goodson signed a CMAA in which one term provided:

> 'I agree to contact, attend or provide information to my Case Manager when I have information concerning this Agreement or when asked.'

Goodson's Case Manager wrote to him on 8 August 1995 requiring him to attend at her office on 14 August 1995. When Goodson failed to attend his Case Manager wrote to him again on 14 August 1995 requiring him to attend an interview on 21 August 1995. Goodson attended that interview.

Goodson explained to his Case Manager that he had not received the first letter dated 8 August, and indicated that there had been trouble with children interfering with mail in letterboxes. He had received his newstart allowance form, and he had received the letter of 14 August 1995.

The Case Manager stated that she was under instructions to recommend a breach of the CMAA if a person failed to attend an interview because the person claimed that a letter had not been received. Those instructions also applied to the authorised review officer who confirmed the breach without further investigation into Goodson's computer record.

The legislation

Section 39(3) of the *Employment Services Act 1994* states that a CMAA may contain terms requiring the person to attend, contact or give information to the CES or the Case Manager.

Section 45(5) provides that a person is not qualified for newstart allowance if, while a CMAA is in force, they fail to take reasonable steps to comply with its terms. Section 45(6) further defines what is meant by taking reasonable steps to comply with the terms of a CMAA.

The SSAT decision

The SSAT had affirmed the decision by applying ss.28 and 29 of the *Acts Interpretation Act 1901* which deals with the service of a document under an Act.

The AAT decision

The AAT stated that the *Acts Interpretation Act* had been wrongly applied because there was no requirement for service specified in the Act in this case. Although the *Acts Interpretation Act* provides for 'deemed' service, this does not stand against satisfactory evidence that there had been no 'actual' service.

The AAT accepted that the letter had not been received by Goodson, and that he could not comply with a request he did not know about.

The AAT indicated its concern at the 'blind following' of a departmental instruction by the primary decision makers. It suggested that in exercising its discretion to consider whether Goodson had taken reasonable steps to satisfy the terms of his CMAA all the circumstances should be considered. These would include Goodson's explanation and his credibility, which could have been assessed by investigating his previous record of attending interviews and responding to requests from DEETYA.

Formal decision

The AAT set aside the decision of the SSAT and substituted the decision that the AAT was satisfied that Goodson had taken reasonable steps to comply with the terms of his CMAA. The matter was remitted to the DSS to amend its records to remove the breach of the CMAA, and the parties were granted permission to apply to the Tribunal on the question of the calculation and payment to Goodson of his entitlement pursuant to this decision.

[A.A.]

Sole parent pension: informal request for review

SECRETARY TO DSS and MARSH (No. 10993)

Decided: 7 June 1996 by T.E. Barnett.

Background

On 30 June 1993, Marsh lodged a claim for sole parent pension. On 14 July 1993 Marsh advised the DSS that she had sold her house for $79,580. She paid $50,000 off her current mortgage and placed $25,000 in a Saver Account. On 20 July 93, the DSS deemed the investment of $25,000 to be earning interest at 3.96% a year. On 14 December 1993, Marsh lodged a review form that showed her investment had reduced to $3,651.62 and that she had earnings from employment. The DSS reduced Marsh's pension due to her earnings, but did not take into account the change in her investment.

The Department wrote to Marsh on 5 occasions between January and April 1994 advising, amongst other things, that bank interest of $989 was taken into account when assessing her rate of pension. These letters included a paragraph discussing the 'deemed income rules' and advising her of her appeal rights.

On 4 more occasions between March 1994 and February 1995, Marsh advised the DSS that her investment had reduced to $3651.62 and then to $500. The DSS failed to adjust her rate of pension. On 9 May 1995, Marsh advised that she had a bank account with a debit balance of $32,000. On 14 June 1995, Marsh queried the DSS's assessment of interest of

$958 a year, when all her bank finances added up to a debit of $33,000 approximately. The DSS amended Marsh's rate of pension and paid arrears from 23 March 1995.

The issues

The substantive issue is whether Marsh is entitled to any arrears of sole parent pension. This depended on whether a telephone call made by Marsh to the DSS tele-service could be construed as a request for a review of a decision.

The legislation

The relevant sections of the *Social Security Act 1991* are s.293, which deals with rate increase determinations and s.299 which discusses the date of effect of a favourable determination both after a review and also after the DSS has been notified of a change in circumstances.

'Application for review'

Marsh gave evidence that she had made more than one telephone call to the DSS, inquiring about the bank interest being taken into account when assessing her rate of payment. She could not recall precise dates but remembered making a telephone call in mid 1994 to the general inquiry number for the DSS.

The Tribunal received evidence from a DSS Administrative Service Officer, who advised that the officers in the Social Security Tele-Services Branch received only about 3 months training and were not experienced officers.

The Tribunal found that Marsh 'made a telephone call to query the bank interest some time between April and June 1994': Reasons, para.8. The Tribunal also found that whenever Marsh was asked to complete a review form, she did so correctly. The Tribunal noted that these forms were assessed by two DSS officers, because Marsh's rate of payment was reassessed due to changes in her employment income. But 'both officers negligently failed to notice the dramatic reduction in her bank balance': Reasons, para. 9.

The DSS argued that the appropriate date of effect of the decision to increase Marsh's rate of sole parent pension should be decided according to s.299(3). This section deals with the situation where a notice of variation of pension has been given to a recipient and the person does not request a review within 3 months. The DSS maintained that Marsh sought a review by letter dated 14 June 1995; this was more than three months after notice of variation was given; and accordingly, arrears can only be paid from the date the review was sought.

The Tribunal stated that it was 'prepared to apply a very broad definition of the term "application for review"': Reasons, para. 14. It considered the situation when a person telephoned the DSS querying the calculation of their pension entitlements. The Tribunal said:

> 'It is up to the Department, in those circumstances, to go forward to assist the enquirer both to formulate the inquiry in words and also to take a basic simple first step of checking to see whether the concern might possibley be justified. This would merely mean asking the customer her name and details and calling her record up on the computer screen. This was what Ms. Marsh was hoping for and in this sense, she was asking for her matter to be reviewed.'

(Reasons, para. 14)

The AAT found that the telephone inquiry made by Marsh in approximtely April/June 1994 constituted an application for review of the DSS's determination dated 31 December 1993. Therefore, pursuant to s.299(3), the date of effect of the determination of 4 August 1995 should be 30 June 1994.

Formal decision

The decision under review was set aside and the following decision substituted:

- that Marsh be entitled to payment of an increased rate of sole parent pension on and from 30 June 1994; and
- that the matter be remitted to the DSS to determine Marsh's entitlements in accordance with this decision.

[M.A.N.]

Age pension: rent assistance for resident of retirement village

KNEVETT and SECTARY TO DSS

(No. 10973)

Decided: 30 May 1996 before J.R. Dwyer.

Knevett requested review by the AAT of the SSAT decision that she was not entitled to rent assistance.

Knevett has been receiving the age pension for a number of years. Following the death of her husband in 1991, she moved to Victoria to be close to her son. She sold her house in Tasmania and moved into a unit in a retirement community. Knevett advised the DSS of these changes in her financial situation.

On 24 August 1994, Knevett asked the DSS whether she was entitled to rent assistance. She advised that she was paying monthly payments of $585.85 to the retirement community. The DSS decided that Knevett was a home owner under the *Social Security Act 1991*, because she had paid $125,000 as 'entry contribution' when she entered the retirement village to ensure tenure.

The law

Pursuant to s.13(2) of the Act, the monthly amount paid by Knevett to the retirement community was rent. A retirement village is described in s.12(3) of the Act as premises which are used for residential premises and primarily intended for people who are at least 55 years old. The premises must consist of either self-care units, service units and/or hostel units, as well as community facilities.

Pursuant to s.1064-D1 of the Act, rent assistance can only be paid to a person who is not an ineligible home owner. That term, 'ineligible home owner', is defined in s.13(1) as a home owner who is residing in a nursing home but not residing in a retirement village. The definition does not state whether the resident of a retirement village is a home owner.

The assets test for residents of a retirement village is set out in Part 3.12. It provides that residents of retirement villages who paid more than specified amounts for tenure of their units, are to be treated as home owners (see ss.1147, 1148 and 1150). The calculation to establish whether or not the person has paid more than the specified amount is set out in s.1190 of the Act.

Ineligible home owner

After applying the formula set out in s.1190, the AAT noted that the specified amount, or as it is defined in the Act, 'the extra allowable amount', was the difference between the pension single home owner assets value limit, and the pension single non-home owner assets value limit. The AAT applied this formula and arrived at the figure $80,500. It was noted that the DSS had used the figure $74,000. The entry contribution paid by Knevett was considerably more than that amount, being $125,000. Therefore, Knevett was deemed to be an ineligible home owner under the Act.

It had been argued on Knevett's behalf that she had only paid part of the $125,000 and therefore only that part she had paid should be considered. The AAT noted that s.1147 (1C), did not refer to the amount paid by the resident, but simply an amount paid for the resident's right to live in the unit. This amount was $125,000.