apart on a permanent basis or whether they were a 'member of a couple' for the purposes of ss.4(2) and 24(1) of the *Social Security Act 1991* (the Act).

The evidence

Kaloudis lived with her husband in rented accommodation. They owned no real estate and their combined personal property was estimated at $5000. Since she had ceased work, her husband paid all the household bills and gave her $70 a week for groceries. She did all the household chores.

She and her husband did not share a bedroom and rarely interacted. There was no sexual relationship and no real companionship or emotional support. They ate meals separately but the meals were prepared by Mrs Kaloudis. They watched television separately in separate rooms. They did not look after each other when sick. They occasionally attended social occasions such as children's birthdays together. The evidence of the daughter Anna Maria Kaloudis was that her parents' marriage was 'hopeless', that they rarely communicated and avoided each other within the home. The daughter-in-law also confirmed that the marriage was strained, giving evidence that the husband was abusive, rude and withdrawn. Mr Kaloudis did not give evidence.

A form completed by Mrs Kaloudis stated that she did 'all the household chores and in return I receive free board'. Similarly, Mr Kaloudis completed a question by writing 'because I pay all the bills and the weekly groceries our arrangement is she does all the household tasks for free board'.

The AAT was not satisfied that the claim for SA and the 'partner details' were completed by Mr and Mrs Kaloudis together as alleged by the DSS.

Although different documents completed by Mr and Mrs Kaloudis gave differing separation dates, the AAT commented that 'the T-documents tend to confirm the bleak nature of the relationship as described by Mrs Kaloudis': Reasons, para. 22.

The AAT noted that documents completed by Mrs Kaloudis when applying for sickness benefit in February and June 1993, confirmed that she was 'married', but that she did not endorse a box beside the word 'separated'. The AAT noted that these forms were completed when these proceedings were not contemplated, although the forms were contemporaneous with the alleged date of separation.

Living separately and apart?

The AAT referred to the case of *In the Marriage of Todd (No. 2)* (1976) 9 ALR 401 at 403 where Watson J said that separation involved 'the destruction of the marital relationship (the consortium vitae)'. Watson J went on to say that 'in every case it will be necessary to have regard to the particular circumstances of the people . . . it is wholly inappropriate to fall back on standards, conventions or "role models"': Reasons, para. 29.

The factors which suggested the couple were living separately and apart were:

- the absence of meaningful regular communication;
- the absence of domestic and social interaction between the couple;
- the eating of meals separately;
- the apparently abusive and condescending behaviour of Mr Kaloudis;
- the absence of a sexual relationship; and
- the absence of any compassion or caring for each other.

The factors which suggested they were not living separately and apart on a permanent basis were:

- they continued to share the same home;
- they remained married and had been for over 20 years;
- Mrs Kaloudis did all the domestic chores including cooking her husband's meals and washing his clothes;
- they owned personal property jointly; and
- the financial arrangement where Mr Kaloudis paid the bills and provided weekly grocery money.

The AAT found, on balance, that Mrs Kaloudis was a 'member of a couple', and was not living separately and apart. In reaching this conclusion, the AAT pointed to the fact that they continued to live in the same house, that she did all the domestic chores and that Mr Kaloudis paid all the bills and provided grocery money. The AAT indicated that these factors 'suggested a regime inconsistent with living separately and apart': Reasons, para. 36.

Decision

The SSAT decision was affirmed by the AAT.

[H.B.]

CMAA: unreasonable delay

SECRETARY TO THE DEETYA and CHADWICK (No. 11524)

Decided: 11 December 1996 by M.D. Allen.

Background

The DEETYA made a decision that Chadwick had unreasonably delayed entering into a Case Management Activity Agreement (CMAA). Chadwick appealed to the SSAT which decided that Chadwick had not unreasonably delayed entering into such an agreement. The DEETYA sought a review of the SSAT decision.

The issue

The issue for consideration by the AAT was whether or not Chadwick had unreasonably delayed entering into a CMAA.

The facts

On the 30 August 1995 the Commonwealth Employment Service (CES) sent a letter to Chadwick advising him that he was to have an interview with his case manager on 11 September 1995 to complete his CMAA. Chadwick failed to attend this interview. A second letter was sent to Chadwick on the 14 September 1995 advising of a rescheduled interview for 21 September 1995. Chadwick also failed to attend this interview. As a result of his failure to attend, the CES sent a breach notice to Chadwick.

Chadwick gave evidence that at the time of the proposed appointments, he was concerned with the health of his aged parents. His mother who lived at her home was almost blind and his father who had suffered a broken hip was in hospital. At this time, Chadwick was living in Naremburn and his mail was forwarded to that address. Chadwick gave evidence that he did not check his mail everyday. He conceded that he had received the first letter but that he had not opened it until after the appointed date for the interview. He also gave evidence that the second letter was retrieved from the mail box but when opened the time for the interview had also passed. Chadwick stated that he did not know why he did not contact the case manager in either of these circumstances after realising that he had missed the interviews.

Unreasonable delay — objective test

The AAT acknowledged that Chadwick had matters which occupied much of his

attention, particularly the care of his parents and that he did not check his mail everyday. The AAT considered the meaning of the term 'unreasonable'.

Referring to *W v L* [1974] 1 QB 711, the AAT found that the term unreasonable was to be considered in the light of what a reasonable person would do in the circumstances. The AAT also considered *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* 108 ALR 163, in which the Full Federal Court stated that any analysis of reasonableness required the taking into account of all relevant factors.

The AAT decided that the test of whether someone had unreasonably delayed must be judged at an objective standard against what a reasonable person would do. The AAT found that a reasonable person would have checked their mail box consistently and if an appointment had passed, they would have taken steps to contact the relevant person, and explain why they had not attended. The AAT found that Chadwick had waited until he had received a breach notice before he contacted the case manager and that he had unreasonably delayed entering into a CMAA.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary of the DEETYA with the direction that Chadwick had unreasonably delayed entering into a CMAA.

[B.M.]

CMAA: correct respondent, unreasonable delay

BROWNE and SECRETARY TO THE DEETYA (No. 11531)

Decided: 10 January 1997 by S.A. Forgie.

Background

An officer of the DEETYA had decided on the 30 July 1996 that Browne had unreasonably delayed entering into the Case Management Activity Agreement (CMAA). Both the Authorised Review Officer of the DEETYA and the SSAT affirmed the decision. Browne then appealed to the AAT.

The issues

The first issue that arose was whether or not the Employment Secretary was the correct respondent to the proceedings or whether it should be the Secretary to the DSS. This issue arose because the AAT noted that a decision to cancel Browne's allowance would be made under s.660I of the *Social Security Act 1991* and as the AAT had observed in *Secretary, DEETYA and Svitlik* (1997) 2(7) *SSR* 94 such a decision was one made by the Secretary to the DSS.

The second and primary issue was whether Browne had unreasonably delayed entering into a CMAA.

The correct respondent

Section 1260(1) of the *Social Security Act 1991* specifies who the parties before the SSAT are and includes the Secretary to the DSS. Section 1260(1A) provides that if a decision is made on the basis of issues determined solely by the Employment Department, then the Secretary referred to in s.1260(1) is the Employment Secretary and not the Secretary to the DSS.

The AAT considered that if the decision was one made on the basis of issues determined solely by the officers of the DEETYA then the correct respondent would be the Employment Secretary.

In coming to its conclusion that the Employment Secretary was the correct respondent, the AAT considered the inter-relationship between the *Social Security Act 1991* and the *Employment Services Act 1994*. The effect of these provisions is that newstart allowance was not payable to Mr Browne for the activity test deferment period if he had been required to enter into a CMAA and failed to do so. If newstart allowance is not payable, the Secretary to the DSS is to determine that his newstart allowance is to be cancelled pursuant to s.660I of the *Social Security Act 1991*. This decision is automatic and follows on matters determined by a delegate of the Employment Secretary under s.44 of the *Employment Services Act*. In this sense, the decision under s.660I is made on the basis of issues solely determined by officers of DEETYA.

The evidence

Turning to the primary issue, the AAT considered the oral evidence given by Browne. Browne gave evidence that he had been asked by Employment Assistance Australia, by letter dated 18 June 1996, to attend an interview for the purpose of completing a CMAA. Browne could not attend this interview as his son was ill and a second interview was arranged by Browne's partner. Browne's partner wrote down the details of the second interview. The second interview was scheduled for 26 July 1996 and a letter confirming the details was sent but never received by Browne. The AAT heard that although Browne was in the same room as his partner when she rescheduled the appointment, he did not hear any of the details.

Browne did not attend on the 26 July 1996 and the case manager recommended that Browne be terminated from case management for failing to enter into a CMAA. This recommendation was then referred to an officer of the DEETYA who decided that Browne's newstart allowance should be cancelled under s.660I of the *Social Security Act 1991*.

On the 30 July 1996, a letter was then sent to Browne, advising that he was being taken to have failed to enter into a CMAA.

Unreasonable delay

The AAT found that the first letter received by Browne was a valid notice under the *Employment Services Act 1994* and that it notified him of his obligations under that Act, namely to enter into a CMAA. The AAT found that Browne's reason for not attending the first interview was reasonable and that Browne did not receive the second letter which confirmed the details of the second interview, and held that the Employment Secretary could not rely on s.29 of the *Acts Interpretation Act 1901* to deem the letter as having been given as there was no evidence that the letter was prepaid and posted.

Regarding the second interview, the AAT looked at whether Browne's failure to attend was reasonable and examined his ultimate reason for failure, that is, his lack of knowledge. The AAT found that Browne was under an obligation to attend the second interview and was aware of that obligation. Although he was entitled to ask his partner to organise a second interview, he could not abrogate his responsibilities. The AAT found that it was not reasonable that he did not ask his partner about the time and date of the second interview. Nor was it reasonable that he did not check what had happened to the confirmation letter that was being sent out. The AAT decided that Browne had unreasonably delayed entering into a CMAA.

Formal decision

The AAT affirmed the decision of the SSAT.

[B.M.]