the AAT from reviewing the amount of a Garnishee Notice, rather than the issuing of a Garnishee Notice. The Federal Court decision in Walker should clarify the matter.]

Practice and procedure: stay order

SECRETARY TO DSS and GIASOUMI (No. 11361)

Decided: 6 November 1996 by J.R. Dwyer.

On 5 September 1996 the SSAT decided the Giasoumis' application for review, by remitting the matter back to the DSS with directions that their age pension be recalculated on the basis that certain amounts not be included in their assets. The DSS applied to the AAT for a direction that that decision be stayed until the DSS's application for review by the AAT had been heard.

The background

The DSS asserted that the Giasoumis' assets included a number of loans to trusts. The SSAT had decided that the sums of $388,133 and $47,913 were not assets for the purposes of the assets test. Mr Giasoumi was working full time as an estate agent and earned approximately $180 a week. It was submitted that if the Giasoumis' assets were calculated in accordance with the SSAT's direction, the Giasoumis could be entitled to either a full or part aged pension. As their claim had been lodged in October 1994, the arrears of a full aged pension to both the Giasoumi's would be approximately $29,000.

The law

Section 41(2) of the *Administrative Appeals Tribunal Act 1975* enables the AAT to make an order staying the operation and implementation of an SSAT decision. In *Dart and Director General of Social Services* (1982) 4 ALD 553, Davies J considered the AAT's power to make a stay order, noting that it was a balance between hardship to the pensioner and convenience to the DSS.

The issues

The DSS submitted that the substantive issues to be decided in this matter were complex. The case dealt with the actual date of disposition of assets, whether there had been adequate consideration, and whether a loan is an asset which is recoverable. There were a number of trusts and partnerships involved. The DSS submitted that it was appropriate to make a stay order in this matter for three reasons:

- there would be difficulty recovering any age pension paid as a result of the SSAT decision, if the AAT subsequently upheld the DSS's application for review;
- the DSS case had merit; and
- there was no evidence of hardship to the Giasoumis if the stay order was granted.

The AAT accepted that ss.1223AB and 1223(1) of the *Social Security Act 1991* (the Act) do not seem to allow for recovery of amounts paid pursuant to a decision of the SSAT if that decision is later set aside by the AAT. The AAT also found that the DSS does not have the power to recover those moneys by any other means than those set out in the Act.

On behalf of the Giasoumis it was submitted that there were sufficient funds available to allow the DSS to recover any moneys which might be paid to them. The AAT noted that the complexity of the Giasoumi's financial arrangements meant that it was most unclear whether the DSS would be able to recover any outstanding moneys. The AAT also had considerable doubt that the DSS had the authority to recover such moneys pursuant to the Act. It did not consider that recovery could be effected by withholdings from any future entitlement to the age pension. The AAT took into account the doubts concerning recoverability when considering whether a stay order should be issued.

The AAT was of the opinion that the DSS had a prospect of succeeding in its application for review at the substantive hearing. This was also a relevant factor. The AAT was careful not to use the stay proceedings as a preliminary trial of the issues, but noted that the DSS had arguable case.

With respect to whether the Giasoumis were suffering financial hardship, the AAT recorded that they were living with their daughter and son-in-law and four grandchildren in a four bedroom home. Mr Giasoumi earned approximately $180 a week. Tax returns were provided to the AAT, but the AAT found that there was not enough information contained in those returns to enable it to find that the Giasoumi's were in financial hardship. No further information was provided.

Finally, the AAT noted that if it did not grant a stay order, and age pension was paid to the Giasoumis, the substantial hearing of the matter would be ineffective because any moneys paid would not be recoverable.

Formal decision

The AAT granted an order staying the SSAT's decision of 5 September 1996.

[C.H.]

Newstart allowance: unreasonably delaying entering into a CMAA

SECRETARY TO THE DEETYA and O'CONNELL (No. 11345)

Decided: 31 October 1996 by H.E. Hallowes.

Background

The Secretary to the DEETYA requested a review of a decision of the SSAT made on 29 February 1996. The SSAT had set aside a decision to cancel O'Connell's newstart allowance on the basis that there was no evidence of a written notice having been given to her under s.44(3) of the *Employment Services Act 1994* (the Act), advising her that she was being taken to have failed to enter into a Case Management Activity Agreement (CMAA). It was not disputed that O'Connell was sent and received two notices pursuant to s.38(5) of the Act requiring her to enter into such an agreement and giving the place and time at which the agreement was to be negotiated. She did not attend the interviews specified in those notices.

The legislation

The AAT considered the following provisions of the Act:

'44.(1) 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.

(2) The Employment Secretary may be so satisfied:

(a) because of the person's failure to:

(i) attend the negotiation of the agreement; or

(ii) respond to correspondence about the agreement; or

(iii) agree to terms of the agreement proposed by the case manager, or

(b) for any other reason.

(3) The Employment Secretary may give the person a written notice stating that the person is being taken to have failed to enter into the agreement. If such a notice is given the person is taken to have failed to enter into the agreement.

(4) A notice under subsection (3) must:

(a) set out the reasons for the decision to give the notice; and

(b) include a statement describing the rights of the person to apply for a review of the decision.

45(5) The person is not qualified for a . . . newstart allowance in respect of period unless .

(a) when the person is required under section 38 to enter into a Case Management Activity Agreement in relation to the period, the person enters into that agreement . . .'

The issues and findings

It was argued on behalf of the DEETYA that s.44 did not apply because there were two ways in which a person could be disqualified from newstart allowance under the Act: ss.45(5) and 44. In this case the DEETYA sought to rely on s.45(5) alone, and argued there was no need to consider a reasonableness test under s.44.

The AAT rejected this approach. It was satisfied that the language of the statute was unambiguous and required a consideration of the matters set out in s.44, before a person's newstart allowance could be cancelled for failing to enter into a CMAA.

The AAT was also satisfied that O'Connell had unreasonably delayed entering into a CMAA. She had forgotten the first appointment, and attended a dental hospital on the second occasion but made no attempt to notify the Employment Secretary or arrange a further appointment time. The AAT found no evidence that O'Connell was given a notice under s.44(3) of the Act, however, and therefore directed that such notice be given to her before cancellation of newstart allowance was effected under s.660I of the *Social Security Act 1991*.

Formal decision

The AAT set aside the decision under review and remitted the matter back to the Secretary for reconsideration in accordance with the directions that s.44 of the Act applied, the AAT was satisfied that O'Connell had unreasonably delayed entering into a CMAA, and that written notice complying with ss.44(3) and 44(4) of the Act be given to her.

[A.T.]

Newstart allowance: unreasonably delaying entering into a CMAA

SECRETARY TO THE DEETYA and EDMONSTON (No. 11400)

Decided: 15 November 1996 by H.E. Hallowes.

Background

Edmonston had been sent two notices under s.38 of the *Employment Services Act 1994* (the Act) requiring him to enter into a Case Management Activity Agreement (CMAA) and of the time and place at which the negotiation of the agreement was to take place. He had not attended those interviews.

A delegate of the Secretary to the DEETYA decided to cancel Edmonston's newstart allowance because he had failed the activity test by failing to enter into a CMAA. This decision was affirmed by an authorised review officer. On review, the SSAT noted that there was no evidence Edmonston had been issued with a notice under s.44(3) of the Act advising him that he was being taken to have failed to enter into such an agreement. The SSAT concluded that there was therefore no power to cancel Edmonston's newstart allowance. It set aside the decision and sent the matter back to the Secretary for reconsideration in accordance with the direction that Edmonston could not be taken to have failed to enter into a CMAA.

The Secretary to the DEETYA sought review on the basis that the SSAT had 'erred in deciding that Edmonston cannot be taken to have failed to enter into a CMAA and that the Secretary did not have the power to cancel Edmonston's newstart allowance'.

The issues

It was argued, on behalf of the DEETYA, that a letter sent to Edmonston by the Commonwealth Employment Service (CES) satisfied the requirements of s.44(3) of the Act (quoted in *O'Connell*, p. 92 this issue). The letter stated:

> 'I wish to advise you that as you have failed to enter into a CMAA/attend a review interview, your Allowance has been cancelled. Full details of the reasons for this decision are included in the Activity Test Breach Report that is enclosed with this letter.
>
> The Department of Social Security (DSS) has been advised of this decision. DSS will advise of the period of cancellation and date of effect.
>
> You are entitled to seek a review of any decision made in relation to your Allowance.
>
> If you wish to discuss the decision to cancel your Allowance, or wish to seek a review of this decision, you should contact the CES . . .'

Alternatively, it was argued that as Edmonston did not enter into a CMAA when required under s.38 of the Act, he was no longer qualified to be paid newstart allowance which should therefore be cancelled pursuant to s.660I of the *Social Security Act 1991*. It was argued that s.45 could 'stand alone' without the need to consider the issues raised under s.44 of the Act.

The AAT's approach

The AAT referred to the decision of *Re Ferguson and Secretary, DEETYA* (1996) 2(4) *SSR* 47 in which the AAT discussed the 'quasi penal nature of the provisions' relating to failure to comply with obligations arising from case management and also noted the complex interaction between the *Employment Services Act* and the *Social Security Act*. Further, in *Re Secretary, DEETYA and O'Connell*, p.92 this issue, the AAT rejected a submission made on behalf of the Department that there are two gateways by which a person may become disqualified for newstart allowance, namely by virtue of either s.44 or s.45 of the Act. The AAT in this case concurred with the reasoning in both those decisions. It was satisfied that it is only if a notice is given under s.44(3) that a person can be taken to have failed to have entered into a CMAA. The AAT found that no notice complying with the requirements of s.44(3) of the Act had been sent to Edmonston.

The AAT was satisfied, however, that Edmonston had unreasonably delayed entering into a CMAA. He had forgotten the first appointment. In relation to a second appointment made when Edmonston was visiting the CES, Edmonston had stated that he had not attended because he was waiting for a letter confirming the appointment. Although such a letter was sent it was not received by him. The AAT was of the view that the decision of the SSAT should be varied to include a direction that notice be given to Edmonston under s.44 of the Act.