

- (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. Hallows.

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.

Formal decision

The decision of the SSAT was varied to include after the word 'Agreement' the additional words 'until notice is given to Edmonston under s.44 of the *Employment Services Act 1994*'.

[A.T.]

Newstart allowance: failure to comply with CMAA

SECRETARY TO DEETYA and SVITLIK

(No. 11402)

Decided: 18 November 1996 by S.A. Forgie.

Background

A delegate of the Secretary to the DEETYA made a decision to cancel payment of newstart allowance to Svitlik because it was considered that he was not taking reasonable steps to comply with the terms of his case management activity agreement (CMAA). This decision was affirmed by an Authorised Review Officer, but set aside by the SSAT, which substituted a decision that Svitlik was taking reasonable steps to comply with the terms of his CMAA and remained qualified for newstart allowance.

The facts

Under the terms of the CMAA Svitlik agreed to participate fully in a New Work Opportunity program with Self Help, on a daily basis for six months commencing from 2 August 1995. However, he only attended the program until 19 September 1995.

According to training documents produced by Self Help, the course was supposed to offer 7 core modules, including on the job training, and electives such as desk top publishing, computer, secretarial and nursery skills, furniture manufacturing/restoration and sales training. Svitlik's evidence was that he was never provided with a copy of this document and none of the modules specified therein were offered when he attended the course. There were only two computers on the premises, one operated by Self Help staff. Self Help operated a plant nursery and those attending the course

were asked to work there but Svitlik refused as he was supposed to be attending a training program. Although he attended Self Help's premises daily from 9 a.m. to 4 p.m., the course participants drank coffee all day and came and went as they pleased. There was no teacher, apart from a person who came once a week to teach motivational 'self esteem'. Another person attended just prior to Svitlik's cessation of the course to conduct training in marketing. Svitlik refused to take part in the exercise proposed as part of that course as it required him to sell Amway products on behalf of Self Help. He said that he had sold Electrolux products for a number of years and was at Self Help to be trained to go into the work force.

Self Help completed a 'Cessation Advice' form which stated that Svitlik continually refused to work, and that when required to work he would only sign on and off and then leave. The form stated that he had officiated at many weekly weddings and funerals as he was a pastor. Svitlik gave evidence that he had officiated at only two weddings and a funeral with the permission of Self Help.

Svitlik and another course participant complained to the Commonwealth Employment Service about the Self Help program. Officers from that service visited Self Help to discuss the matter with course participants but by 18 September 1995 nothing had been done and the course had not improved according to Svitlik, who then advised Self Help he would not be returning.

The case manager gave evidence that Self Help had been contacted about the complaints, and was given one week to provide training schedules and improve the program. Svitlik was told to continue with the course. Only two of the original ten participants, being those who complained, failed to complete the course.

Who may make a decision in relation to cancellation of newstart allowance?

The AAT noted s.626 of the *Social Security Act 1991* (the Act), as modified by s.45 of the *Employment Services Act 1994* (the Employment Act), which provides in effect that newstart allowance is not payable for an activity test deferment period if a person fails to take reasonable steps to comply with a CMAA, and s.660I of the Act which enables the Secretary to cancel newstart allowance if satisfied that it is being paid to a person to whom it is not payable. Those provisions come within Part 2.12 of the Act and decisions made under that Part are made by the Secretary to the DSS (the Secretary).

Power to delegate such decision making to an officer is to be found in s.1299 of the Act and under s.1298A, the Secretary and the Secretary to the DEETYA (the Employment Secretary) may agree on administrative arrangements enabling officers of the latter Department to perform duties and exercise functions under Part 2.12 of the Act. The AAT did not explore whether appropriate delegations were held by the primary decision maker, but it was of the view that the decision said to have been made by a delegate of the Employment Secretary was in fact made by a delegate of the Secretary. As it did not affect the AAT's jurisdiction to review the decision however, the Tribunal did not express a conclusive view on the issue.

Did Svitlik take reasonable steps to comply?

The AAT accepted Svitlik's evidence and found that there was in fact no course conducted at Self Help's premises but that participants either worked in the nursery, played computer games, talked or drank coffee. None of these activities formed part of Self Help's course. The only instruction consisted of weekly motivational self esteem. These findings were not affected by the fact that 8 other participants had completed the program as meeting daily without a structure and without some form of instruction could not mean that they were attending a course.

The AAT concluded Svitlik could not participate in Self Help's New Work Opportunity sales/clerical course because there was no course in which to participate. His refusal to attend Self Help's premises was not the reason for his failure to comply with the terms of his CMAA, the absence of the course was. This was not a matter that was within his control or reasonably foreseeable by him. Accordingly, pursuant to s.45(6) of the Employment Act, Svitlik was taking reasonable steps to comply with the CMAA and met the additional qualification criteria for newstart allowance imposed by s.45(5) of the Employment Act.

Formal decision

The AAT affirmed the decision of the SSAT.

[A.T.]