- from income earned by means of independent employment by a dependent student over 16 years of age up to a specified amount.

[A.T.]

Ferguson: forgotten, not forgiven

The Federal Court has recently handed down the first decisions on case management activity agreements (CMAAs). The decisions in *Secretary, DEETYA and Ferguson* and *Secretary, DEETYA and O'Connell* (both reported in this issue) clarify some of the complex procedures by which people can be penalised under the *Employment Services Act 1994* and the *Social Security Act 1991*. The decisions require a more beneficial approach to the treatment of persons who may have delayed entering into, or failed to comply with, agreements between themselves and the CES or case manager than has been seen to date.

In view of the Government's decision not to proceed with the *Reform of Employment Services Bill 1996* at the present time, the case management system under the *Employment Services Act 1994* continues, although the nature of the penalties has been varied from a fixed non-payment period to a substantial rate reduction over a longer period since July this year. When the proposed market-based employment services come into operation in March 1998, it is envisaged that the new services will operate pursuant to the activity test provisions in the *Social Security Act 1991* which contain provisions equivalent to ss.44, 45(5)(b) and 45(6) of the *Employment Services Act* in respect of Newstart Activity Agreements. Consequently, the practical implications for decision-making processes apparent from *Ferguson,* in particular, are worthy of attention.

Under s.45(5)(b) of the *Employment Services Act* a person loses qualification for the newstart allowance where the Employment Secretary is not satisfied that 'the person is taking reasonable steps to comply with the terms of the agreement'.

Section 45(6) states:

> 'a person is taking reasonable steps to comply with the terms of a case management activity agreement unless the person has failed to comply with the agreement and:
>
> (a) the main reason for failing to comply involved a matter that was within the person's control; or
>
> (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.'

Ferguson was penalised because he had forgotten to attend an appointment with his case manager owing to his excitement at the prospect of going to another State to look for work. The AAT had found in Ferguson's favour reasoning that his failure had been neither within his control nor foreseeable by him pursuant to s.45(6). 'To forget', the AAT had said 'is not the same as to ignore'.[1]

The *Ferguson* decision, sets up the following three-step process to be followed in making decisions in relation to failures to comply with CMAAs.

Is there a failure to comply with the agreement?

The first step is to decide whether there has in fact been a failure to comply with the agreement. The Federal Court assumed, for the purposes of *Ferguson* without making a finding on the point, that Ferguson's failure to attend the appointment amounted to a failure to comply with his CMAA, as this had not been in issue before the AAT. However, the Court left open the opportunity for arguments to be raised on this point in other matters.

The Court gave some guidance first in relation to construction of the agreement, stating:

> 'Obviously, an obligation under the agreement to attend when requested for interview does not involve an obligation to attend at any request however little notice is given ... In addition the obligation to attend being but part of the entire document, would also be construed having regard to the other parts of the document including those specifically negotiated.'

Further, it might be argued that the extent of an action or inaction is relevant to whether or not it constitutes a failure. The Court said: 'It is not every failure which would amount to a failure to comply with that term. For example, being a few minutes late would not necessarily be in breach of the agreement as properly construed.'

It is suggested that it is also important to check that terms of the agreement actually comply with s.39 of the *Employment Services Act* or the equivalent provision of the *Social Security Act.*[2]

Is the reason for non-compliance caught by s.45(6)?

Having established that there is a failure to comply with the agreement, the second step is to decide whether or not the person is caught by either s.45(6)(a) or (b). The Court said that 'subs (6) provided a filter through which the conduct of the respondent would have to pass before the person could be called upon to satisfy the Employment Secretary that that person had been taking reasonable steps to comply with the terms of the agreement'. In short, s.45(6) is not an exclusive definition of 'reasonable steps' but a description of circumstances in which a person will be deemed to have been taking reasonable steps to comply with their agreement. 'Where a person's circumstances are caught by s.45(6), they may still be considered to have been taking reasonable steps to comply with their agreement under the broader test found in s.45(5)(b).'

The Court decided that s.45(6) required 'that the reason for failure to comply with the terms of the agreement be positively shown to have been within the person's control, rather than requiring possibly the lesser matter to be made out that the reason was not within (i.e. that it was beyond) the person's control.'

In considering s.45(6)(a), the Court said that what was within a person's control was a question of fact but that the phrase was intended to refer to something which the person could have realistically done something about. The Court found that, forgetting, unaccompanied by illness or some other external factor, was a matter which the person could have done something about.

In considering s.45(6)(b), the Court decided that what is reasonably foreseeable by the person requires 'an objective assessment on the relevant facts in relation to [a] particular person, with that person's health, knowledge and background'. However, it was not necessary to consider the actual state of mind of the person. The test is whether a person with the attributes of the person concerned in the circumstances would foresee the event preventing compliance, rather than whether they actually foresaw the event.

The Court did not indicate when the foreseeability test should be applied. The writer suggests that this test must be applied at the time of signing the agreement. Otherwise it is difficult to differentiate between a foreseeable event and an event that the person could have done something about and was thus within their control and covered by s.45(6)(a).

Has the person taken reasonable steps in all of the circumstances under s.45(5)(b)?

Having found that the circumstances were either within the person's control or foreseeable by the person, the third step is to decide whether the person has been taking reasonable steps to comply with

the agreement under s.45(5)(b). Whether or not a person has been taking reasonable steps to comply with their agreement does not depend on the particular failure alone, but upon matters including 'the person's attitude to performance of the terms of the agreement, attendances on other occasions, attempts to seek work and the range of information.'[3]

In summary, while to forget may be human, the power to forgive is within s.45(5)(b).

Mr Ferguson's matter was remitted to the AAT for consideration under s.45(5)(b), given the findings of the Court that mere forgetting was caught by s.45(6).

The decision in *Ferguson* should encourage a less narrow application of the legislation than has been seen to date in cases handled by the Welfare Rights Centre, Sydney. The effect of this decision is that people ought no longer be penalised for one-off or insubstantial failings or problems arising from mere communication difficulties where they are otherwise making a genuine attempt to comply with their agreements. The removal of the risk of penalty for minor or technical failings will enable the case manager and participant to re-focus on the provision of employment assistance rather than to operate in an atmosphere dominated by an emphasis on warnings of penalties and the lack of bargaining power of the unemployed person. The absence of this emphasis on coercive aspects of the process will result in more balanced negotiation of agreements and a greater likelihood of compliance and positive outcomes.

References

1. *Ferguson and Secretary, DEETYA* (1996) 42 ALD 742.
2. See AAT cases of *Secretary, DEETYA and Ruiz* (1996) 41 ALD 627; and *Peter Hall and Secretary, DEETYA*, unreported AAT decision of D.P. Blow, 23 April 1997.
3. This broad test is consistent with the decision of the AAT in *Goodson and Secretary, DEETYA* (1996) 42 ALD 651.

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One of the difficulties envisaged is the potential conflicts which may occur in meeting obligations arising under the program or directions issued by a program sponsor, and the obligations otherwise arising in seeking work, such as attending interviews. The legislation allows for a 'reasonable excuse' when considering a person's compliance, but these issues are not otherwise dealt with.

The legislation is designed to reinforce a person's obligation to participate in work schemes in return for unemployment payment. It may incidentally offer an unemployed person the chance to acquire new skills or enhance their opportunity of gaining work, but that is clearly not the primary intention of the provisions. The compulsory aspect of the scheme remains controversial and, as with case management, may lead to harsh consequences for some, where a person's conduct does not meet the 'reasonableness' test.

[A.T.]