Perkich told the Tribunal he believed pension payments would stop when he was imprisoned because he had told prison authorities he was receiving the DSP. Perkich suffered a rare nervous disorder which required high doses of medication so that his judgement and function was compromised at the time he was imprisoned. He was not expecting a custodial sentence when it was imposed, and this further added to levels of anxiety at the time.

Perkich agreed that he had received notices from time to time while in receipt of the DSP prior to imprisonment, and he accepted that such notices contained the necessary information requiring him to notify within 14 days if he went to gaol.

When he was in gaol his bank account was accessed by a friend, to whom he had given withdrawal slips. This was confirmed by evidence from his bank.

Withholdings to recover the debt had been in place from the end of 1994. Perkich requested a review of the decision to recover the overpayment in 1996. In the course of that review it was found that the amount of the debt had been miscalculated, and it was increased. Despite a favourable social work report compiled by a DSS social worker at the time of the request for review, the decision to continue to recover the debt remained unchanged.

The issues

The issues were whether there was an overpayment that was a recoverable debt under the *Social Security Act* (the Act), and whether any part of the debt should be written off or waived.

The legislation

Section 1224(1) of the Act provides that if an amount is paid to a person because the person failed or omitted to comply with a provision of the Act, there will be a debt recoverable by the Commonwealth. Section 132(1) provides for the giving of notice to a person in receipt of DSP requiring the person to advise of certain events.

Section 1237AAD allows for waiver of a debt in special circumstances. This provision was introduced into the Act on 1 January 1996, at which time $1448 of Perkich's debt, which through various recalculations was ultimately found to total $2332, remained outstanding.

Is there a debt

As Perkich was at all times qualified for DSP, there could only be a debt in this case if there had been a failure or omission to comply with a provision of the Act. That failure was not notifying being in gaol.

The Tribunal considered the analysis of the equivalent provisions to subsections 132(1) and (5) by the President, Mathews J in *Vitalone and Secretary to the DSS* 38 ALD 169. Social work evidence at the time of imprisonment was suggestive of the possibility of relying on 'reasonable excuse' within the meaning of subsection 132(5), if the interpretation by Mathews J in *Vitalone* of the interaction between subsections (1) and (5) were followed.

Perkich was given the opportunity to consider whether he wished to argue that no debt arose, on the basis of 'reasonable excuse'. Perkich elected not to pursue that issue and chose to rely only on the waiver provisions. His choice appeared to have been motivated by a desire to have the matter resolved speedily. Despite there being no need to address the issue of the existence of a debt further, the AAT did recommend that the present uncertainty in the law in regard to notices under s.132 should be clarified by legislative amendment: Reasons : para. 20.

Special circumstances

The Tribunal found that whilst Perkich did fail to comply with a provision of the Act he did not do so knowingly, as he did not appreciate that he had to personally notify the DSS. Hence it was open for the Tribunal to consider the application of the 'special circumstances' provisions to that part of the debt that remained outstanding when he sought review in 1996 (*Lee v Secretary to the DSS* (1996) 139 ALR 57).

The special circumstances which the Tribunal found to exist were:

- *Health:* Perkich was found to have severe and unusual health problems that had been difficult to diagnose and occasioned him great stress. Furthermore he had a borderline personality disorder and dysfunctionality in family and social life.
- *Social circumstances:* Because of assaults on him where he had previously lived he was assisted to relocate by his counsellor, but to an area where he has no counselling support. The difficult circumstances of his family life were again referred to under this heading.
- *Circumstances surrounding the overpayment:* Reference was here made to Perkich's belief that prison authorities would pass on the information. The AAT also accepted the evidence that he had not had the benefit of the larger part of the moneys received, because a friend had made the withdrawals. A restraining order against Perkich prevented him approaching that person about the moneys.
- *Financial circumstances*: These are best described in the Tribunal's words: 'I have rarely seen a person whose financial circumstances were as desperate as those of Mr Perkich.'

Formal decision

The AAT varied the decision under review to provide that whilst there was a debt due to the Commonwealth , so much of the debt as was outstanding at the time of the social work report was prepared in March 1996, should be waived on the grounds of special circumstances so that Perkich was to be refunded amounts recovered since that time, and be relieved of the obligation to pay the remaining amount unpaid at the date of delivery of the AAT decision.

[M.C.]

Newstart allowance: breach of CMAA

SECRETARY TO THE DEETYA AND HALL
(No. 11908)

Decided: 23 April 1997 by A.M. Blow.

The facts

Hall received newstart allowance (NSA). He entered a case management activity agreement (CMAA) on 13 October 1995. In November 1995, he was offered a placement which entailed attending a training course and working for a company named Tasmanian Devil Jet Pty Ltd. Hall initially accepted the offer of the placement. However, he later changed his mind and did not attend any part of the training course. Nor did he attend the company premises to commence work. The DSS decided that Hall had failed to take reasonable steps to comply with his CMAA, and cancelled his NSA. The SSAT set aside the DEETYA decision and substituted its decision that Hall's NSA should not have been cancelled.

The Act

Section 45(5) of the *Employment Services Act 1994* requires that to be qualified for newstart allowance a person must satisfy the Employment Secretary that they are taking reasonable steps to comply with the terms of their CMAA. Pursuant to s.39(2)(a) and (b) of that Act, a CMAA is taken to include terms requiring a person to:

- accept any offer of paid work other than work that is unsuitable to be undertaken by that person; or
- accept any offer of a placement under the New Work Opportunities Program administered by the DSS.

Findings

The AAT found that Hall had accepted the offer of a placement and had accepted the company's offer of paid employment. However, the AAT said that s.39(2)(a) and (b) did not require performance of the work contract once there had been an offer and acceptance. The AAT noted that the relevant provisions of the Act were quasi-penal provisions and should therefore be given a narrow interpretation. The AAT decided that because Hall had accepted an offer of a placement, he had conformed with the strict requirements of the Act, even though he never commenced the placement.

Although the AAT commented that Hall had been 'far too choosy' and 'unreasonable', it decided that the DSS was wrong in deciding he ceased to qualify for NSA.

Formal decision

The AAT affirmed the decision of the SSAT.

[H.B.]

Newstart allowance: written notice of obligation

CARLYLE and SECRETARY TO THE DEETYA (No. 12306)

Decided: 17 October 1997 by W.J.F. Purcell.

Background

On 21 May 1996 and 5 June 1996, a case manager wrote to Carlyle requesting him to attend an interview in order to complete a case management activity agreement (CMAA). Carlyle did not attend the appointments. On 2 July 1996 the DEETYA imposed a breach on Carlyle's newstart allowance because he had unreasonably delayed entering into a CMAA.

At the time Carlyle was living in a block of flats. He had shared a flat there for some years with his mother. He then moved into another flat which he shared with a man. When Carlyle formed a relationship with a woman, now his de facto spouse, the man got upset. As a result there was distress and disharmony in the flats. It was at this time that Carlyle and his mother experienced trouble with receipt of mail. Carlyle claimed he did not receive either of the case manager's letters.

Issue

Is non-receipt of letters sufficient reason for delaying entering into a CMAA?

The legislation

The relevant legislation is contained in Division 3 of the *Employment Services Act 1994* (ES Act). In particular s.38 discusses CMAAs and subsection (5) states that if a person is required to enter into an agreement, they must be given written notice of the requirement and the place and times at which the agreement is to be negotiated. A note to this section indicates that ss.28A and 29 of the *Acts Interpretation Act 1901* are to apply.

Section 44 of the ES Act sets out what happens when there is a failure to negotiate an agreement. The Employment Secretary must be satisfied that the person is unreasonably delaying entering into the agreement.

Section 45(5) of the ES Act states that a person is not qualified for newstart allowance unless when the person is required under s.38 to enter into a CMAA, the person enters into that agreement.

Responsibility for mail problems

Carlyle claimed that he did not receive the letters from the case manager because of problems with mail delivery. His mother gave supporting evidence to the AAT. Carlyle maintained that as his de facto wife was expecting their first child, he would not have deliberately jeopardised his eligibility for payments. He did not unreasonably delay entering into the agreement.

The DEETYA argued that the letters were sent by pre-paid post to the Carlyle's residential address and this was sufficient notice. The reasons for Carlyle's non-compliance was within his control and he did unreasonably delay.

The AAT accepted the evidence of Carlyle and his mother relating to problems with mail delivery and that he did not receive the letters.

However the AAT found that Carlyle had attended a seminar on the subject of case management and had an expectation that he would receive correspondence from a case manager in the near future. The Tribunal found that Carlyle 'did not take any, or sufficient action to secure his mail, nor did he advise the Department of the difficulty he was experiencing with his mail ... he was reckless or indifferent to the requirement to enter into a Management Agreement': Reasons, para.17.

Consequently, the Tribunal was satisfied that Carlyle's failure to attend the interviews was indicative of unreasonable delay in entering into a CMAA.

Formal decision

The Tribunal affirmed the decision under review

[M.A.N.]

Disability support pension: permanently blind

LAWSON and SECRETARY TO THE DSS (No 11767)

Decided: 11 April 1997 by A.M. Blow.

The facts

Lawson applied for DSP on 27 December 1995 on the basis that he was legally blind. His claim was rejected by the DSS, and this decision was affirmed by the SSAT. Because his eyesight deteriorated rapidly in early 1995, he gave up his job as an engineer. He could no longer read or drive. While he could distinguish between light and dark, he could make out little on a television screen. He had a special pair of glasses nine millimetres thick which made images bigger but did not improve his eyesight. However, he could read, with difficulty, using the glasses.

The medical evidence

Various written medical reports indicated that Lawson had extremely poor vision in his right eye and even less visual ability in his left eye. Dr Sidhu, an ophthalmologist, wrote that he was 'legally blind in the left eye from an ischaemic optic neuropathy for which no treatment is possible'.

The Act

Section 95(1) of the *Social Security Act 1991* provides that a person is qualified for DSP if permanently blind, over 16 and compliant with certain Australian residency requirements. The Act does not define the term 'permanently blind'.

Previous cases

Previous cases such as *Leach and Director-General of Social Services* (1983) 13 *SSR* 135 establish that 'permanently