requires meeting the definition of 'dependent child' within s.5(2) of the Act:

> '. . . a young person who has not turned 16 is a dependent child of another person (in this section called the "adult") if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day to day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person is not a dependent child of someone else under paragraph (a); and is wholly or substantially in the adult's care.'

The Act provides in s.869(1) for the Secretary to the DSS to make a declaration in certain circumstances that family payment be shared between two persons, each qualified for family payment in their own right, and for the Secretary to specify in the declaration the share that each is to receive.

The issues

The AAT set out the following issues:

- whether the decision made by the SSAT to pay a share of family payment of 8% between July and November 1996 should be affirmed, varied or set aside; and
- whether family payment should resume being paid to Hume after March 1997 (when access resumed).

Sharing a rate of family payment

Initially after their separation, Hume and his ex-wife had arranged access to the children of the marriage by agreement between themselves, without the need for formal orders. In June 1996, a magistrate issued interim orders that set provision for fortnightly access, commencing Friday morning and ending Sunday evening. The interim orders were later confirmed by orders of the Family Court.

The evidence of Hume confirmed that access had occurred as per the orders until November 1996, when financial circumstances precluded Hume from having access to his children. Access resumed in March 1997 on the same basis as previously and essentially in compliance with the court orders. Hume's financial contribution was limited in the main to providing for the children during the time when they were with him, and petrol costs in picking them up from their mother. His claim for 16% of the family payment was based on the period of time in which he had access to the children in each fortnight. In that time, he argued he was the responsible parent. Mrs Hume's evidence confirmed the regularity of the periods of access.

The DSS submitted that despite departmental policy in shared family payment cases requiring that shared care and responsibility exceed 30% before the Secretary would apportion family payment between two people, neither the SSAT not the AAT was bound by such policy. However in circumstances where the Family Court Orders gave 'long term parental responsibility' to Mrs Hume, the AAT should apply the precedents set in the Federal Court, notably *Vidler v Secretary to the DSS* (1994) 36 ALD 720 and *Field v Secretary to the DSS* (1989) 52 *SSR* 694, and pay 100% of the family payment to Mrs Hume only.

The AAT decided that 100% of the family payment should be made to Mrs Hume, because of the operation of s.5(2), Mrs Hume being the 'adult' contemplated within s.5(2)(a).

The AAT further decided that a declaration under s.869(1) for sharing of family payment can only be made if two persons are each qualified for family payment in their own right. 'Considerable regard must be given to the Family Court Orders and the authority and expertise of that Court to make them': Reasons: para. 30. In so deciding, the AAT applied *Field* and *Vidler*. That being the case, it was unnecessary for the AAT to go on to consider the second issue, whether payment should resume in March 1997. There was no material change in the circumstances from the earlier period where the AAT had found no eligibility for a shared payment.

Formal decision

The AAT set aside the decision under review and found that Hume had no entitlement to a share of family payment for his children.

[M.C.]

Newstart allowance: unreasonable delay entering into a CMAA

SECRETARY TO THE DEETYA and BALDAM (No.12420)

Decided: 25 November 1997 by T.E. Barnett.

The DEETYA sought review of an SSAT decision that Baldam had not unreasonably delayed entering into a Case Management Activity Agreement (CMAA), and that therefore her newstart allowance should not have been cancelled under s.45(5) of the *Employment Services Act 1994* (ESA).

Background

Baldam had a lengthy history of difficulty in meeting her obligations in relation to case management, having been breached and had her newstart allowance cancelled on two previous occasions. The facts leading to the decision made by the DEETYA on this occasion, that Baldam had unreasonably delayed entering into a CMAA, involved her failure to attend a meeting with a newly appointed case manager in order to enter into a new CMAA. Baldam was sent two notices relating to the meeting date, but gave evidence that she did not receive either letter. Although she was staying with her mother at the relevant time, she had returned to her usual residence every few days to check her mail. Baldam also stated that she was prepared to enter into a new CMAA.

The DEETYA argued that Baldam was deemed to have received the letters sent to her in the ordinary course of the post under the *Acts Interpretation Act 1901*. She had not taken reasonable steps to ensure she received her mail, but should have had the mail redirected to her mother's home. Her failure to attend the meeting of which she was notified, in order to enter into a new CMAA, and her failure to contact her case manager to let him know she could not attend, constituted an unreasonable delay in entering into a CMAA. Therefore, she was not qualified for newstart allowance under s.45(5)(c) of the ESA. Further, as she failed to enter into a CMAA when required to do so under s.38, she did not qualify for the allowance under s.45(5)(a) of the ESA, nor was it payable under s.625 of the *Social Security Act 1991*. It was argued that Baldam's prior history should be taken into account by the AAT in making its decision.

The legislation

Section 45(5) of the ESA provides:

> 'The person is not qualified for . . . newstart allowance . . . in respect of a 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; and . . .
>
> (b) at all times during the period when the person is a party to the agreement, the person is prepared to enter into another such agreement instead of the existing agreement if required to do so under section 38.'

Section 625 of the *Social Security Act 1991* in turn provides that a newstart allowance is not payable if a person fails to enter into such an agreement.

The AAT's findings in relation to Baldam's conduct

The AAT found that Baldam was prepared to enter into a CMAA at the relevant time. Her past behaviour was not sufficient evidence of a consistent disregard by her of the requirement to enter into a CMAA such that the AAT could be satisfied that she was not prepared to enter into an agreement on this occasion. She had entered into two previous agreements when asked to do so. The AAT accepted that Baldam took reasonable steps to collect her mail, that she did not receive the letters notifying her of the appointment, and that when she became aware of her failure to attend she immediately contacted her case manager. The DEETYA, at the time the breach was imposed, had not attempted to contact Baldam to seek an explanation, and therefore had no idea whether she had acted unreasonably or had a reasonable justification for her non attendance at the appointment.

The Acts Interpretation Act and deemed receipt of notices

Although Baldam was deemed to have received the letters under the *Acts Interpretation Act 1901*, in reality she had no knowledge of the letters or the appointment. The AAT adopted the view taken by the Tribunal in *Geeves and Secretary to the DEET* (1996) 2(1) *SSR* 49 that unreasonable delay involves some mental element. As a result Baldam could not be said to have unreasonably delayed entering into a CMAA.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Newstart, compliance with CMAA, job offer

SECRETARY TO THE DEETYA and PARKER (No. 12450)

Decided: 28 November 1997 by E.A. Shanahan.

Parker's newstart allowance (NSA) was cancelled on 14 June 1996 and this was affirmed by an authorised review officer. On 12 December 1996, the SSAT set aside this decision, directing that the matter be remitted to the DEETYA for reconsideration. The SSAT directed that Parker remained qualified for NSA at all times and had a reasonable excuse for not complying with his Case Management Activity Agreement (CMAA). The DEETYA appealed to the AAT.

The facts

Parker had considerable experience in the mining industry. He received NSA from 12 April 1995 and entered a CMAA on 8 June 1995. His CMAA was amended on 17 May 1996, requiring Parker to check training courses available at Bendigo Skillshare and Eaglehawk Training Station. His case manager was Fordham and it was apparent that there was a lack of rapport between the two.

Clause 4 of his CMAA required that he accept an offer of a placement or a job under various training and skills programs. The agreement also provided that if Parker did not accept a suitable job or failed to comply with his CMAA his NSA 'may be stopped'.

On 17 May 1996 Parker attended Skillshare and the Eaglehawk Training Station to find out what courses were available. He then went to the Bendigo TAFE which offered a 'Certificate in Small Scale Mining Course' in 1996. Parker decided he wanted to do this course and was advised to attend an information night on 12 June 1996.

On 22 May Fordham nominated Parker for a Jobskills position as an RSL groundsperson with cleaning and maintenance duties. Parker attended as required on 30 May and was interviewed by the RSL the following day. Parker expressed interest in the training component of the job but did not think the practical duties were of much benefit as he already had the required skills. On 3 June Parker was offered the position but did not decide whether to accept it, as on the same day he had to undertake another component of his Jobskills Plan. On that day the Jobskills personnel decided that Parker should not be placed on the Jobskills program 'purely because of the negativity that we experience from Mr Parker'.

On 5 June Fordham advised Parker that a breach report would be issued if he rejected the position as an RSL groundsperson. Parker then rang to accept the position but was informed that they no longer wanted him for the job. Parker told Fordham he wished to pursue the mining course offered at the Bendigo TAFE and that he had applied for AUSTUDY.

On 13 June, Fordham advised Parker that he was in breach of his CMAA and his NSA was cancelled the following day. Parker subsequently completed the TAFE course whilst he received AUSTUDY. He also obtained a student loan of $600 to pay for the course.

The legislation

Section 45(5)(b) of the *Employment Services Act 1994* provides that a person is not qualified for NSA unless he or she satisfies the Employment Secretary that he or she is taking reasonable steps to comply with their CMAA. Section 45(6) provides that a person is taking reasonable steps to comply with a CMAA unless they have failed to comply with the terms of the agreement and

(a) the main reason for failing to comply involved a matter within the person's control, or,

(b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.

The issues

The AAT had to determine whether there was a breach of the CMAA, and, if there was a breach:

- was it something which was within the control of Parker; or,
- was it something that Parker could reasonably foresee?

Federal Court decision

The AAT reserved its decision until the Federal Court decided *Secretary to the DEETYA v Ferguson* (1997) 2(10) *SSR* 144. This case also dealt with a breach of a CMAA. It was an appeal against an AAT decision that a failure to attend an interview because the person forgot could be a matter that was not within the person's control. The Court concluded that the question of whether a person is taking reasonable steps to comply with a CMAA depends on the person's attitude to the performance of the terms of that agreement, attendances at appointments on previous occasions, attempts to seek work, and other relevant information. As a result the matter was remitted to the AAT for further consideration on the basis of these findings.

Discussion

The AAT was satisfied that by accepting the job offer on 5 June 1996, Parker had complied with the terms of the CMAA. It noted that the position offered to Parker was an unskilled job, performing essentially labouring duties. He had previously performed such duties and he felt they were unlikely to lead to long term employment. In contrast, the mining