Student Assistance Decisions

AUSTUDY: are AUSTUDY payments included as parental income?

SECRETARY TO DEET and SHERMAN
(No. 10855)

Decided: 1 April 1996, by W. Eyre

Background

DEET sought review of the SSAT's decision that the 1993-94 income of Sherman's step-mother was not to be taken into account in determining her entitlement to AUSTUDY.

The facts

In December 1994, Sherman lodged an application for AUSTUDY in 1995. Her application was rejected because her father's taxable income for the preceding financial year (1993-94) exceeded the limit at which any allowance was payable. On 16 January 1995, her father, a widower, married a woman who had been receiving sole parent pension and AUSTUDY prior to the marriage. These payments ceased upon her marriage. Sherman's AUSTUDY application was subsequently reassessed taking Sherman's father's 1993-94 income as well as her step-mother's 1993-94 income (consisting of sole parent pension and AUSTUDY) into account, with the result that her parental income increased. Her application was again refused.

The legislation

Regulation 84 of the *AUSTUDY Regulations* provides that a parental income test is applied in calculating a student's entitlement to the standard or away-from-home living allowance. Regulation 85 defines 'parent' to include a spouse of a student's parent if the student normally lives with the spouse. Subregulation 86(1) sets out the formula for calculating parental income for a year of study. Subregulation 86(2) defines parental income to include *inter alia* his or her taxable income. Subregulation 86(7) refers to increases in a student's parental income and regulation 90 refers to falls in parental income. Regulation 91 provides that the parental income test is not applied in working out the student's living allowance *while* (the AAT's emphasis) a parent gets *inter alia* AUSTUDY and is a single parent. Regulation 109 requires a student to inform the Department about certain prescribed events, including where the student gains a parent as defined in the Regulations. Regulation 12C enables the Department to reassess a student's entitlement where information relevant to that entitlement is received subsequent to the initial assessment.

The issue

Sherman argued that her stepmother's 1993-94 income should not be included because it consisted solely of payments which were excluded from the parental income test under regulation 91, the marriage to her father disqualified her stepmother from those payments, and the joining of the incomes of her father and stepmother was inappropriate because they related to separate households when earned. The SSAT had decided that the only income of Sherman's stepmother which should be taken into account was income earned after she became Sherman's parent as defined by regulation 85, and that since she was not Sherman's parent when her 1993-94 income was earned, it could not be included in the parental income test.

The AAT's approach

The AAT found that Sherman gained a parent as defined in regulation 85 when her father married her stepmother and that pursuant to regulation 109 she was obliged to advise the Department of this event. It noted that regulation 91 does not purport to exclude the parental income test wherever a parent is in receipt of AUSTUDY and is a single parent, but rather excludes it only *while* the parent gets AUSTUDY because 'while' must be read in its usual temporal sense. The AAT found that sole parent pension and AUSTUDY are not excluded from the definition of parental income in subregulation 86(2). It could see no statutory basis for confining parental income to income received by the parent while the parent was a parent of the student seeking AUSTUDY.

The AAT conceded there may be an inconsistency in excluding Sherman's stepmother's income while she was in receipt of AUSTUDY and was a single parent, and including it at a later date. The Tribunal expressed considerable sympathy for the situation of Sherman and her family but was bound to apply the Regulations as drafted and had no discretion which would assist her.

Formal decision

The AAT set aside the decision under review and substituted its decision that the income of Sherman's stepmother was to be taken into account in determining her entitlement to AUSTUDY living allowance.

[S.L.]

AUSTUDY: overpayments due to incorrect estimates of student income are recoverable debts

HENDERSON and SECRETARY TO DEET

Decided: 12 July 1995, by S.D. Hotop.

Background

Henderson sought review of a decision of the Student Assistance Review Tribunal (SART) which affirmed a decision of a senior authorised person that student assistance overpayments totalling $7063.20 were recoverable from Henderson.

The facts

In December 1990, Henderson lodged an application for AUSTUDY in 1991 in which he indicated he expected to receive $3000 in income (other than AUSTUDY) for the 1991 calendar year. In June 1991, he advised DEET that his estimated income for that period was $10,500. His AUSTUDY entitlement was reassessed and he was advised he had been overpaid $1741.74. In August 1991, Henderson requested that his future AUSTUDY payments be withheld in order to offset the overpayment and he was advised this would reduce his outstanding debt to approximately $600 by the end of 1991. In October 1991, the Department advised Henderson that the

then balance of the overpayment was $998.28 and that by the end of 1991, it would be $583.63.

In December 1991, Henderson lodged an application for AUSTUDY in 1992 in which he indicated he expected to receive $5000 in income (other than AUSTUDY) for the 1992 calendar year. His application was granted. In January 1992, he was advised that at the current rate of withholdings from his 1992 AUSTUDY, the outstanding amount of his 1991 overpayment ($583.63) would be cleared on 13 May 1992. In July 1992 Henderson advised that his income for 1992 would be $8800 and requested that all of his AUSTUDY be withheld in repayment of the overpayment of AUSTUDY benefits.

In February 1994, Henderson was advised that a data-matching exercise between DEET and the Australian Taxation Office indicated his taxable income for 1991 and 1992 may have been greater than the amounts he had declared to DEET. In May 1994, Henderson advised that his income for 1991 was $15,015.02, and for 1992 was $19,026.61. In June 1994, an authorised person in DEET decided that Henderson had been overpaid a total of $6479.66 in AUSTUDY benefits ($2257 in 1991 and $4222.66 in 1992).

At Henderson's request, a senior authorised person in DEET reviewed that decision and decided to vary it by increasing the amount of the overpayment in 1991 to $2840.63, which increased the total overpayment to $7063.29. The SART subsequently affirmed the decision as varied.

The legislation

Regulation 82 of the *AUSTUDY Regulations* describes the effect of the student income test on the living allowance and prescribes a formula for calculating the allowance payable having regard to the student's income during the relevant year. Regulation 12C provides that where information subsequently received by the Department indicates that an existing determination of a student's entitlement to living allowance under regulation 12B is not correct, an authorised person may make a further determination under regulation 12B amending the existing determination. Regulation 12E relates to the consequence of an overpayment of AUSTUDY and provides that where a student has been paid an amount under a determination of entitlement that is greater than the student would have been paid if all information relevant to the student's entitlement was known, an amount equal to the difference between the amount paid and the amount that would have properly been payable is taken to be a student assistance overpayment for the purposes of Part 6 of the *Student and Youth Assistance Act 1973*.

The evidence

Henderson conceded that his income exceeded the maximum amount allowable but was critical of DEET's handling of his case after he advised of his revised estimate of income in June 1991. He said there was delay in the Department implementing his request to cease all payments to prevent the debt increasing. He said he had acted in good faith and felt he was being penalised by DEET's failure to act promptly. He agreed that, in hindsight, he should have kept the Department fully informed of the increases in his income by lodging progressive 'Review of circumstances' forms, but said he was never advised by anyone in the Department to do so. On the contrary, Departmental officers were quite blasé about his income situation relying on the redirection of further payments to offset any overpayment created. Henderson pointed out that his revised estimates lodged in the middle of 1991 and 1992 were fairly accurate at the time and were not exceeded until the end of the academic year in October when he was able to work more and earned substantially more income.

Henderson also argued that regulation 12E operated harshly in his case because his total entitlement was retrospectively reassessed when during the greater part of both years he had an entitlement, albeit a progressively diminishing one, to receive AUSTUDY. He also submitted it would be more equitable to calculate overpayments with reference to the income earned in excess of the threshold level (the threshhold amounts were $4000 in 1991 and $5000 in 1992).

The AAT's approach

The AAT found that the decision of the authorised person in June 1994 that Henderson had been overpaid a total of $6479.66 in AUSTUDY benefits in 1991 and 1992 was clearly authorised by regulation 12C. It also noted there was no dispute that the senior authorised person who varied the decision and increased the amount of the overpayment had correctly applied the formula in regulation 82 and correctly determined the amount of living allowance that was payable to him. It followed that pursuant to regulation 12E, the difference between what he had been paid and what he should have been paid in 1991 and 1992 were student assistance overpayments for the purposes of Part 6 of the Act and were, accordingly, recoverable from Henderson under that Part.

The AAT expressed some sympathy for Henderson's argument about the unduly harsh effect of the student income test but was bound, as was DEET, to apply the law as it stood. The AAT pointed out that Henderson himself had largely caused the overpayment; if he had kept the Department progressively informed about the amount of his income during 1991 and 1992, the amount of any subsequent overpayment of AUSTUDY would have been greatly reduced. It noted that under s.48 of the Act and regulation 109, Henderson was obliged to notify the Department within 7 days if he received more income than the latest estimate given to the Department. He compounded his problems by proceeding in 1992 in the way he had proceeded in 1991 — that is by giving a low initial estimate of his income and only one revised estimate in the middle of the year. At the time of his application for AUSTUDY in 1992, he should have realised that given his 1991 income was approximately $15,000 and that he was continuing in the same employment, his estimate of $5000 for 1992 was unrealistically low.

Formal decision

The AAT affirmed the decision under review.

[S.L.]