Administrative error

The AAT said it was clear the Guide attempts to address the situation of widowed, separated and divorced parents forming *new* relationships. When they reconciled, Cowie's parents were resuming an *old* relationship so the last paragraph did not apply.

Formal decision

The AAT set aside the SSAT's decision and reinstated the decision to raise and recover the overpayment.

[K.deH.]

AUSTUDY: away from home rate; parents' home inadequate for study

RAZI and SECRETARY TO THE DEETYA
(No. 12725)

Decided: 18 March 1998 by T. E. Barnett.

Background

Razi migrated with his parents from Iran in 1994. In 1995-96 he undertook English classes and some further study. In 1997 he enrolled in a TAFE course, and was granted AUSTUDY at the standard rate from 7 March 1997. On 23 May 1997 Razi advised that he no longer lived at home, and sought payment at the away-from-home rate, which was refused.

Both Razi's father and mother had been unable to obtain work since arrival in Australia, although both had worked previously and his father had run his own building business. Two or three times each week the parents invited friends with their children to their home to 'play music, dance, talk and laugh together'. These social gatherings would last into the evenings and sometimes late at night. The AAT accepted that, although Razi had his own room to study in, his parents were not sympathetic towards his study needs, and that this caused frequent arguments between them.

The issue

The issue for determination was whether it was impractical for Mr Razi to live at his parent's home because of the study difficulties there.

The law

Regulation 77 of the *Austudy Regulations* provides as follows:

> '77(2) A tertiary student qualifies for the away-from-home living allowance if the student is not living with a parent and it would be impractical for the student to live at his or her parents' principal home because:
>
> (a) . . .
>
> (b) it is difficult to study there; or
>
> . . . '

'Difficult to study'

The AAT noted that since leaving home Mr Razi's education results had improved, as had his relationship with his parents. The AAT concluded that regulation 77(2)(b) did not require that special or exceptional circumstances exist, but rather that studying at home be difficult, and that it was therefore impractical for the student to live at home.

The AAT was satisfied that studying at home for Razi was difficult due to his relationship with his parents and their social activities. As to whether living at home would be 'impractical' the AAT applied the Macquarie Dictionary definition to conclude that the issue to be determined was 'whether living at home is not fitted to the applicant's studies because of difficulty in studying there': Reasons, para. 16. For the aforementioned reasons, and the employment and financial difficulties of his parents, the AAT found that this criterion had been met. The AAT considered whether it would be practical for Razi to live at home but study elsewhere, such as at public libraries, but concluded this would be impractical as:

> '(Razi) would still have to contend with parties at his home when he returned . . . and would also be required to remain in an environment with his parents which was not only disruptive to his studies but openly hostile'

(Reasons, para. 19)

The decision

The AAT set aside the decision of the SSAT and substituted the decision that Razi was qualified for the away-from-home rate of living allowance.

[P.A.S.]

AUSTUDY debt: administrative error

VARRICCHIO and SECRETARY TO THE DEETYA
(No. 12723)

Decided: 17 March 1998 by B.H. Burns.

Varricchio sought review of a DEETYA decision to raise and recover $2123.18 of AUSTUDY overpaid from 1 January to 9 August 1995.

The facts

He was 16 years old when he signed an application form that had been completed by his father (Mr Varricchio). Varricchio had a hearing disability and his mother (Mrs Varricchio) was receiving child disability allowance (CDA) from the DSS for him. In reply to a question on the form asking if either parent receives a DSS pension, benefit or allowance etc., Mr Varricchio had ticked the 'yes' box in the column marked 'Mother'. When asked for the 'exact name of pension/allowance' he had written 'disability'. Mr Varricchio told the AAT he had never known the correct name for CDA and they always referred to it as a disability payment.

The DEETYA read the answers to mean Mrs Varricchio was receiving a disability support pension (DSP), and it paid maximum rate AUSTUDY during the period on that basis, despite the form also showing Mr Varricchio's income to be $41,256 which would have precluded payment of DSP to Mrs Varricchio.

For Varricchio it was argued that the poorly worded question and the lack of clear instructions for filling out the form was the cause of an 'erroneous' answer. This and the DEETYA's failure to check with the DSS, the apparent conflict between Mr Varricchio's income and Mrs Varricchio's receipt of DSP, were administrative errors to which the overpayment was solely attributable so that it must be waived pursuant to s.289(1) of the *Student and Youth Assistance Act 1973* (the Act). The DEETYA had conceded the amounts were received in good faith.

Administrative error

The AAT found the word 'exact' in the question:

> 'was sufficient to put a person filling out the form on notice as to the degree of particularity required by it . . . His response to the nature of the question was incomplete and inadequate to say the least, and for this reason the Tribunal

finds that an error was committed by Mr Varricchio.'

(Reasons, para. 27)

On the other hand it considered that because Mr Varricchio's answer

'did not in fact answer the question, and should have created a doubt in the mind of the respondent such as to cause inquiry as to the exact nature of the pension or allowance [an administrative error] was made in so far as there was a failure to verify the assumption made on the basis of the information provided by [Mr Varricchio] in the relevant answer.'

(Reasons, para. 26)

The AAT could not waive the debt under s.289(1) as the debt was not due solely to administrative error, and it did not find any circumstances sufficiently special to waive the debt under s.290C of the Act.

Formal decision

The AAT affirmed the decision under review.

[K.deH.]

Federal Court

Lump sum compensation payment: income

SECRETARY TO THE DSS v CUNNAAN
(Federal Court of Australia)

Decided: 3 October 1997 by Foster J.

The DSS appealed to the Federal Court against a decision of the AAT that the sum of $58,775.00 received by Cunnaan as a result of a workers compensation claim was not a lump sum compensation payment. Cunnaan lodged a claim for workers compensation because of a back condition. She had not worked since 18 August 1988, and was paid a social security benefit from 13 September 1988. Her claim was settled and an award was made by the Compensation Court (NSW) that a total amount of $58,775.00 was payable to her. That sum was made up of $2500 of weekly compensation payments from August 1988 to March 1994 (the date of settlement), $31,275 for permanent impairment of the back and legs, $15,000 for pain and suffering, $8725 in interest and $10,000 for medical expenses.

The law

Section 1165(1) of the *Social Security Act 1991* (the Act) provides that where a person is qualified for a 'compensation affected payment' and receives a lump sum compensation payment, the benefit will not be payable for the 'lump sum preclusion period'. The term 'compensation' is defined in s. 17(2) and includes:

'(c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme,

...

(e) made wholly or partly in respect of loss earnings or lost capacity to earn.'

Section 17(4A) provides that a payment of arrears of periodic compensation payments is not a lump sum compensation payment. Section 1165(4) sets out a formula by which a preclusion period is calculated, and it was accepted before the Court that if Cunnaan had received a lump sum compensation payment, the preclusion period had been correctly calculated. According to s.1184(1), the DSS has the discretion to treat the whole or part of the compensation payment as not having been made if it is appropriate to do so in the special circumstances of the case

The AAT's decision

The SSAT's decision was to apply a preclusion period of 52 weeks dating from the award of the compensation court. The AAT had first considered the payment of $2500 which represented $8.60 a week periodical compensation payments. It applied s.17(4A) of the Act, and found that this could not be a lump sum compensation payment, and should be excluded from the total amount received by Cunnaan under the Award. As the remaining amounts were not for lost earnings or lost capacity to earn, they did not fall under the definition of lump sum compensation payment.

Compensation or income

It had also been argued before the AAT in the alternative, that the amount received by Cunnaan should be classified as income pursuant to s.8(1) of the Act. The AAT followed an earlier AAT decision of *Hungerford and the Repatriation Commission* (1989) 21 ALD 568, in which it was decided that income must relate to gains derived by a person in consideration of personal exertion or other services, or the disposition of property.

Lump sum compensation

Foster J agreed that for a lump sum compensation payment to be subject to a preclusion period it must be made wholly or partly in respect of lost earnings or lost capacity to earn. The Court was satisfied that s.17(4A) should not be given the extended meaning given to it by the AAT. Foster J referred to the Explanatory Memorandum accompanying the Amendment to the Act inserting s.17(4A), and noted that the purpose of the provision was to ensure that where a lump sum payment was simply a total of previously unpaid periodic payments, it would not be characterised as a 'lump sum compensation payment'. According to the Court it was not intended that this section apply where there was a component of arrears of periodical payments in a compensation award. The payment should be characterised by the total sum payable, not the individual parts.

Foster J referred to an earlier Federal Court decision of *Secretary to the DSS* v *Banks* (1990) 23 FCR 416, and found that the Act was little different from when this decision had been made by the Federal Court. In that decision the Court had recorded that the purpose of the legislation was to prevent 'double dipping'. It was appropriate to apply the same reasoning in this case. If the lump sum was regarded as a whole, then the $2500 clearly related to lost earnings or lost capacity to earn, and thus the total sum should have been regarded as a 'lump sum compensation payment'.

Special circumstances

Because the AAT had not made any findings in relation to special circumstances, the Court simply noted that if the application of the law in this case resulted in genuine hardship then the provisions of s.1184 gave a discretion to alleviate that hardship.

Income

Foster J said that the AAT should not have followed *Hungerford* but rather *Read* v *The Commonwealth* (1988) 167 CLR 57. In that appeal Brennan J had considered the definition of *income* under the *Social Security Act 1947*, which according to the Court was indistinguishable from the definition in the present Act. In *Read* the Court had found that the