

# Student Assistance Decisions

## **AUSTUDY: waiver; partners' payments linked; special circumstances**

**CARSTAIRS and SECRETARY TO THE DFACS**  
(No. 20000906)

**Decided:** 11 October 2000 by  
E.K. Christie.

### **Facts**

Carstairs and her partner, Dienemann, had been social security recipients over many periods of their six-year relationship. Carstairs was in receipt of AUSTUDY when her partner recommenced work earning approximately \$1064 a fortnight on 8 February 1999. Centrelink subsequently sought to recover AUSTUDY overpaid between 8 February and 17 May 1999 totaling \$2143.84 on the grounds that Carstairs had not complied with her statutory obligation to notify changes in circumstances, and it was not advised of the earnings until 16 March 1999 when it received a letter of 11 March 1999 from Dienemann.

In evidence, Carstairs confirmed she did not advise Centrelink that Dienemann had returned to work. She had left this task to him. She was aware that AUSTUDY payments were calculated on the basis of her partner's income, but she was not aware of how the actual rate was calculated. She did not believe there was a need for her to personally notify because her benefits had been adjusted previously when Dienemann had advised Centrelink of changes in his employment circumstances. She had, however, telephoned Centrelink sometime in March 1999 to query why her benefits had decreased, and during that call she had informed Centrelink that her partner was working.

Dienemann said that he had verbally advised Centrelink of his pending return to work with some idea of earnings although Centrelink had no record of it. He had called the Melbourne office shortly after he started work. That advice was limited because his employer had not been able to provide accurate details. [It is not clear if this call was claimed to have been made from Carstairs' telephone, but Dienemann acknowledged in cross examination that

the first call he could have made to Centrelink from that telephone was 22 March 1999.]

A Centrelink review officer had noted that Carstairs' file contained several letters from Dienemann.

### **Reasons for decision**

The issue was whether the debt should be waived. The relevant provisions of the Act were:

**1237A(1)** Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

...

**1237AAD** The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
  - (i) making a false statement or a false representation; or
  - (ii) failing or omitting to comply with a provision of this Act or the 1947 Act: and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.'

The AAT followed *Junor & Secretary DSS* (1997) 48 ALD 326 in holding that Carstairs was personally required to notify of Dienemann's change in circumstances. As that was not the case she contributed to the administrative error that led to the overpayment, so the debt could not be waived under s.1237A.

After referring to *Beadle & DGSS* (1984) 20 SSR 210 as to the meaning of the expression 'special circumstances', the AAT concluded that the circumstances in which the overpayment occurred were sufficiently 'unusual' or 'uncommon' to justify the description. From Carstairs' past experience over a number of years of variations to her payments after Dienemann advised of a change in circumstances, it was reasonable for her to infer, and come to believe, that their files in Centrelink were linked, and that information notified by Dienemann about changes in his employment circumstances would be acted on by Centrelink and be reflected in

changes to her AUSTUDY entitlement. Applying *Callaghan & Secretary DSS* (1996) 2(9) SSR 125 the AAT found, on the civil standard of proof, that Carstairs did not knowingly fail to comply with a provision of the Act. Accordingly, it concluded that s.1237AAD(1) applied.

### **Formal decision**

The AAT set aside Centrelink's decision and in substitution decided to waive the whole debt accrued from 8 February to 26 May 1999 under the 'special circumstances' provision of the Act.

[K.deH.]



## **HECS: debt remission; special circumstances**

**CALLAGHAN and SECRETARY TO THE DETYA**  
(No. 20000907)

**Decided:** 13 October 2000 by  
S.A. Forgie.

Callaghan was a sportsman in the National Ironman Series in 1999. In the first semester of that year he had been a student at the Curtin University of Technology enrolled in three subjects. He withdrew from two subjects on 19 March 1999, but withdrew from the other subject after the census date of 31 March 1999. He incurred a Higher Education Contribution (HEC) debt in respect of that subject pursuant to s.196L of the *Higher Education Funding Act 1988* (the Act), and requested that it be remitted.

### **Legislation and guidelines**

Section 106L of the Act enables the whole or part of a HEC debt to be remitted if the Secretary is satisfied that special circumstances apply to the person. Subsection 106(3) provides:

For the purposes of this section, special circumstances, in relation to a person, include a circumstances that the Secretary is satisfied:

- (a) are beyond the person's control; and
- (b) do not make their full impact on the person until on or after the census date for the course of study for the semester ... ; and

- (c) make it impracticable for the person to complete the course requirements for the course of study for the semester during the semester or during the year in which the semester occurs ...

Pursuant to s.106L(3A) the Secretary may issue guidelines '... relating to the circumstances in which the Secretary will be satisfied of a matter referred to ...' in s.106L(3)(a), (b) or (c). Where issued, any decision must be in accordance with those guidelines.

The Secretary issued guidelines in October 1997 for the remission of HEC debts for units of study commenced on or after 1 January 1998. They noted that he could also be satisfied that special circumstances exist even though they were not dealt with in the guidelines. The relevant parts of the guidelines read:

The Secretary may be satisfied that a person's circumstances:

- (a) are beyond a person's control if:
  - a situation occurs which a reasonable person would consider is not due to the person's action or inaction, either direct or indirect, and for which the person is not responsible. This situation must be unusual, uncommon or abnormal. A lack of knowledge or understanding of HECS or OLDPS is not considered to be beyond a person's control.
- (b) do not make their full impact on the person until on or after the census date for the course of study for the semester or the study period (as the case requires) if the person's circumstances occur:
  - (i) before the census date, but worsen after that day, or
  - (ii) before the census date, but the full effect or magnitude does not become apparent until on or after that day, or
  - (iii) on or after the census date.
- (c) make it impracticable for the person to complete the course requirements for the course of study for the semester during the semester or during the year in which the semester occurs or the units of study for which he or she was enrolled for the study period (as the case requires) if the person is unable to:
  - (i) undertake the necessary private study required, or attend sufficient lectures or tutorials or meet other compulsory attendance requirements in order to meet their compulsory course requirements, or
  - (ii) complete the required assessable work, or
  - (iii) sit the required examinations, or
  - (iv) complete any other course requirements because of their inability to meet (i), (ii) or (iii).

Special circumstances might arise from medical, family, personal, employment or course related reasons. In considering a per-

son's application, the Secretary must be satisfied that the person has met the criteria outlined above in (a), (b) and (c).

The AAT noted that the word 'include' in s.106l(3) allowed two possible interpretations. Its meaning could be exhaustive so that for circumstances to be special they must have the characteristics set out in paragraphs (a), (b) and (c). Alternatively, it could have an inclusive meaning, so that special circumstances *may* be found in circumstances having the characteristics set out in those paragraphs, and may also be found to exist in other circumstances without those characteristics. Because the word 'means' in the Act suggests an exhaustive definition, the AAT considered that, by contrast, the word 'includes' in s.106L(3) should not be read in an exhaustive fashion.

As it would have reached the same decision on either interpretation, the AAT did not express a concluded view. It observed, however, that if s.106L(3) was not an exhaustive provision then the guidelines were inconsistent with it insofar as they stated:

- s.106L(3) of the Act outlines what circumstances the Secretary may be satisfied are special circumstances under the legislation; and
- in considering a person's application, the Secretary must be satisfied that the person has met the criteria outlined above in (a), (b) and (c).

The AAT noted that Lindgren J in *SDETYA v Ellem* (2000) FCA 695 had similarly criticised later guidelines.

On the meaning of the expression 'special circumstances', the AAT referred to *Beadle v DGSS* (1985) 26 SSR 321 and *Groth v SDSS* (1995) 2(1) SSR 10, and concluded that the Federal Court has not been prepared to prescribe any particular characteristics to identify circumstances as special. If confined at all, its meaning is confined only by what is out of the usual or ordinary case, and that must be determined in the context of the relevant legislation and its objectives.

**Facts and reasons**

In early April 1999, after the census date, Callaghan received an invitation to train with 'the best ironmen in Australia'. The AAT was prepared to find that the invitation was beyond his control. Callaghan recognised acceptance would lead him to miss a large amount of time from his studies. He accepted the invitation and withdrew from the last subject on or about 9 April 1999.

In reaching its decision the AAT said:

It may well be unusual, uncommon or abnormal for students to be invited to train with the

top ten ironmen in the country but that is not the appropriate standard to apply. The appropriate standard to apply is whether it is unusual, uncommon or abnormal for students to be given an opportunity 'to realise a dream' or, perhaps more prosaically, to follow another career or employment opportunity or another activity. I am of the view that it is not unusual, uncommon or abnormal to receive such opportunities.

...

In Mr Callaghan's case, I am satisfied that he was faced with a genuine choice. It was not one which, by dint of circumstances, he could not refuse. Life, as it is wont to do, gave him a choice between working towards being an elite sportsman in his field or working towards being a surveyor. It might well have been a case in which he was 'mad not to' take up the offer of training on the Gold Coast and putting his course 'on hold' as it were but that does not make the choice one that was out of his control. It was in his control.

(Reasons, para. 36-8)

It followed that Callaghan's circumstances did not fit within the guidelines, nor did they fall within a broader meaning of 'special circumstances'.

**Formal decision**

The AAT affirmed the decision to refuse to remit the debt.

[K.deH.]

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