Formal decision

The Tribunal affirmed the decision to cancel Haldas' CP because of the assets test, but set aside the decision to reject his claim to have the hardship provisions applied to his situation, and in lieu determined that s.1129 applied to Haldas.

[P.A.S.]

Suspension of newstart allowance: failure to attend appointment; whether reasonable and reviewable

BUTLER and SECRETARY TO THE DFaCS (No. 2004/735)

Decided: 13 July 2004 by G. Friedman.

Background

Butler was in receipt of newstart allowance (NSA) from March 2001, but this payment was cancelled on 6 October 2003 after Butler failed to contact Health Services Australia to make an appointment for a medical review. This decision was set aside after review by an Authorised Review Officer (ARO), who wrote on 28 October 2003 advising Butler to attend an appointment with a psychologist on 18 November 2003. Centrelink sent a similar letter dated 29 October 2003, which also advised that failure to attend the interview may result in cessation of NSA payments, though Butler contended that he never received this second letter.

Butler did not attend the interview on 18 November 2003, but sent a nominee who delivered a letter from Butler. He advised the Tribunal that he had not attended for medical reasons, and believed his letter to this effect was a sufficient explanation for his non-attendance. Following the failure to attend the interview, payment of NSA was suspended, a decision affirmed by an ARO on 8 December 2003. Butler appealed to the SSAT which on 12 February 2004 determined that it had no jurisdiction to review the decision to require Butler to attend the interview with a psychologist, and further on 23 March 2004 affirmed the decision to suspend payment of NSA.

Butler alleged that some documents and medical reports had been obtained by Centrelink without his consent, that Centrelink had been at times unhelpful and insulting in their dealings with him, and that he was suffering extreme financial difficulties through the Centrelink decision to suspend his NSA payments.

The issues

The issues in this matter were first, whether the requirement to attend an appointment was a reviewable decision and, second, whether the decision to suspend NSA payments following the failure to attend that interview was correct.

The law

Under s.63(3) of the *Social Security (Administration) Act 1999* Centrelink may require a person to attend an appointment as part of the consideration of the person's entitlement to NSA. That Act by s.63(5) further provides that:

> **63.(5)** If:
>
> (a) a person is receiving, or has made a claim for, a newstart allowance; and
>
> (b) the Secretary notifies the person under subsection (3); and
>
> (c) the requirement of the notification is reasonable; and
>
> (d) the person does not comply with the requirement;
>
> a newstart allowance is not payable, and if, at a later time, a newstart allowance becomes payable to the person, an administrative breach rate reduction period applies to the person.

The meaning of 'decision' is defined in s.23(1) of the *Social Security Act 1991* ('the Act') to mean:

> 'decision' has the same meaning as in the *Administrative Appeals Tribunal Act 1975*;
>
> Note: subsection 3(3) of the *Administrative Appeals Tribunal Act 1975* defines 'decision' as including:
>
> - making, suspending, revoking or refusing to make an order or determination;
> - giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
> - issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
> - imposing a condition or restriction;
> - making a declaration, demand or requirement;
> - retaining, or refusing to deliver up, an article;
> - doing or refusing to do any other act or thing.

The issues in this case were, therefore, whether the requirement to attend an interview with a psychologist was a 'decision' as defined in the Act, and so whether it was reviewable, and whether the decision to suspend NSA payments to Butler was correct.

Discussion

The Tribunal noted the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and in particular the comment in that matter that a 'decision' '... must resolve an actual substantive issue...'. Here, the Tribunal accepted that the requirement to attend the psychologist appointment was preparatory to the determination of Butler's entitlements to NSA, and so not a reviewable decision within the terms of the Act.

The Tribunal noted Butler's anger over the way he believed Centrelink had handled his claims, but that he was unwilling to provide the medical and other information necessary for a determination of his entitlement to be made. Given his long-standing health difficulties, the Tribunal concluded that the requirement that he attend the appointment with a psychologist was a reasonable one within s.63(5) of the Act in order to clarify his entitlement to NSA or another payment. In turn, the Tribunal determined that the decision to suspend NSA payment was correct.

Formal decision

The Tribunal affirmed the decisions under review.

[P.A.S].

Austudy: whether enrolled

SINES and SECRETARY TO THE DFaCS (No. 2004/683)

Decided: 29 June 2004 by N. Isenberg.

Background

Sines attended Southern Cross University. He received Austudy from 2001 to 20 March 2003. The University subsequently advised Centrelink that Sines' 2002 enrolment was cancelled from 28 March 2002 and Centrelink raised a debt of $5901.35 for the period 29 March 2002 to 20 March 2003.

The University then advised Centrelink that Sines enrolment for semester one was reinstated and Centrelink recalculated the debt for the period 22 July 2002 to 20 March 2003. The basis of the

debt was that Sines was not enrolled at the University during this time.

The evidence

Sines attended all necessary classes and passed all relevant examinations in semester 1 and 2 of 2002.

Sines enrolled at the start of 2002 and did not believe there was any need to re-enrol in semester 2 as he had selected a number of full-year subjects. When he enrolled he was in difficult financial circumstances and could not pay the student union fees. Apart from this, he fully participated in campus life.

In August 2002, the University cancelled his enrolment because he had not paid these fees. Sines did not discover this until June 2003 when he was advised of the overpayment by Centrelink. At this stage he offered to pay the full amount but was advised that the University would only accept the amount relevant to semester 1. Once these fees were paid he was re-enrolled for semester 1 only.

The law

The relevant sections of the *Social Security Act 1991*, included ss.568, 541(1) and 541B(1) which require a person to satisfy the activity test, to undertake full-time study and be enrolled in a course of education, in order to be eligible for Austudy.

The issue

The issue considered by the Tribunal was whether Sines was enrolled and qualified for Austudy from the start of semester 2, 2002.

Conclusion

The AAT dealt firstly with the issue of whether Sines was undertaking study in semester 2 of 2002. The Tribunal found that he was, as he attended classes and passed examinations.

The Tribunal then considered whether he was enrolled in semester 2 of 2002. The Tribunal found that there was no evidence that enrolment was conditional on payment of union fees and that the only 'sanction' for not paying these fees was that Sines did not receive his semester 1 results at the usual time. It was also noted that the University did not inform Sines that payment of these fees was a condition of enrolment, nor that he was 'sanctioned' for failing to pay the fees. The University accepted his assignments and allowed him to sit for examinations even after his enrolment was cancelled.

The Tribunal referred to the case of *Okely and Secretary, Department of Education Training and Youth Affairs* [1999] AATA 429, which considered the meaning of 'enrol' and stated:

> As regards the requirement that the applicant have been 'enrolled' as a student of a secondary school ... the Tribunal is of the opinion that the word 'enrolled' should be interpreted flexibly having regard to the nature of the relevant school.

(Reasons, para. 27)

The Tribunal accepted that Sines attended the University and that on the basis of the dictionary meaning of enrolment and the approach taken in the case of *Okely*, Sines was 'enrolled' in semester 2 of 2002.

The Tribunal then considered whether he was enrolled after this time.

The evidence was that Sines returned to Sydney after completing semester 2 and intended to find a job. He could not find work but decided not to return to study and claimed unemployment benefits in early 2003.

On the basis of this evidence, the Tribunal found that Sines did not intend to re-enrol and consequently had no entitlement beyond the end of his examinations in semester 2.

Formal decision

The AAT set aside the decision and substituted a decision that there was a debt from the end of semester 2, 2002 until 20 March 2003.

[R.P.]

Waiver of compensation recovery debt due to special circumstances

HIGGINS and SECRETARY TO THE DFaCS (No. 2004/793)

Decided: 1 June 2004 by S. Webb.

Background

Higgins was injured on 14 December 1996 during an assault. He received newstart allowance from 14 January 1997 to 10 March 1999.

Higgins claimed compensation for his injuries and requested an estimate of the compensation preclusion period charge that would apply if he settled the case for a nominal settlement of $300,000.

In October 2002 Centrelink advised Higgins that the estimate of charge was $5219.96, based on a settlement of $300,000 and a lump sum preclusion period from 14 December 1996 to 21 September 2001.

Higgins' compensation claim was settled by consent on 21 November 2002 for $200,000.

On 26 November 2002 Centrelink advised Higgins that a lump sum preclusion period would apply from 14 December 1996 to 18 February 2000 and $14,353.50 was to be repaid before releasing the balance of the settlement to him. Higgins sought review of that decision.

The issues

The sole issue was whether there were grounds to disregard all or part of the compensation payment or whether it was appropriate to waive all or part of the amount that was recovered from that payment.

Discussion and the law

The *Social Security Act 1991* ('the Act') provides that the Secretary may issue a notice for recovery by deduction from a compensation payment prior to release to the claimant (s.1184). The recoverable amount that is specified is a debt to the Commonwealth.

The Act specifies the circumstances where all or part of a compensation payment may be disregarded (s.1184K) and when recovery of debts payable may be waived in whole or in part (s.1237AAD).

The Tribunal said that the clear intention of the compensation recovery provisions of the Act is to prevent a person receiving income support from two different sources during the same period of time. For that reason compensation-affected payments under the Act are not payable during a lump sum preclusion period. However, provision is made to take account of special circumstances where it may be appropriate to treat a compensation payment, in whole or in part, as not having been made, or to waive the Commonwealth's right to recover a debt.

The Tribunal considered it was not appropriate to disregard any amount of Higgins' compensation payment pursuant to s.1184K, nor was it necessary to