Decision No. [2015] NZSAAA 03

Reference No. SAA 003/13

IN THE MATTER of the Education Act 1989 and the Student Allowances Regulations 1998

AND

IN THE MATTER of an appeal by XXXX of XXXX against a decision of the Chief Executive, Ministry of Social Development

BEFORE THE STUDENT ALLOWANCE APPEAL AUTHORITY

Neil Cameron

HEARING on the papers

DECISION
The appeal is allowed

REASONS

Overview

[1] This is an appeal from the decision of the Secretary on review to confirm the decision by StudyLink to suspend the appellant's allowance for a four week period between the 9th July − 5th August 2012 when she was not attending classes and to establish an overpayment of $615 as a consequence.

The issue on appeal
[2] The issue on appeal is whether StudyLink acted correctly in suspending the appellant's allowance for this period.

[3] It should be emphasised that although the Ministry discusses the question of debt write-off and the appellant addresses a number of arguments specifically to that issue, the question of write-off *per se* is not in issue on this appeal. Section 305(1) of the Education Act 1989 limits the jurisdiction of the Authority to issues of eligibility, duration and quantum. The Authority's jurisdiction does not extend to the question of whether properly established overpayments should nevertheless be written off. Where this question alone is in issue the matter is one exclusively for the Ministry.

Factual background
[4] In December 2011 the appellant applied for an allowance for the 2012 academic year. In January 2012 she also applied through her education provider to go on an overseas study exchange in the second trimester. In March her allowance application was approved for the first two trimesters of her education provider's three trimester academic year – ie from the 5th March – 18th November. This period included a mid-trimester break from the 5th – 16th July. By virtue of reg 35 of the Student Allowances

Regulations 1998 her allowance would continue to be paid during this break (see [9] below). In May, in the course of an unrelated dispute, she told StudyLink that she would be going on an overseas exchange in the second trimester – leaving in late July. However no details of the proposed exchange were, or could have been, provided at that stage.

[5] On the 27th June, one week before the end of the first trimester, she was formally notified that she had been accepted for the exchange. Sometime before the 9th July she filled in the student's portion of the overseas study application form, which was necessary to ensure that her allowance continued to be paid while she was overseas, and submitted it to her education provider for confirmation. Her provider sent her an email on the 10th purporting to attach a scanned copy of its completed section for her to forward with her section to StudyLink. Unfortunately the attachment failed. On the 18th she queried this and on the 23rd she finally received the duly completed section. Oddly the copy she was sent appears to have been signed off by her education provider only on the 20th – not the 10th as the initial email suggested. She then immediately forwarded a hard copy of the whole document to StudyLink to the address specified on the application form and emailed a copy of the confirmation section to the Student Loan office in Tauranga. While it is not now disputed that the form was in fact sent to StudyLink on or around the 23rd, it is clear that it either never arrived or, if it did, that it was then lost. Certainly StudyLink remained unaware of the situation until mid-September when the appellant's education provider updated her study details which showed that her overseas course had in fact started on the 6th August. This had the effect of increasing the break between her first and second trimester courses from just over one week to four weeks.

[6] In its Regulation 37(2) Report the Ministry states that *"[a]t the time the exchange was approved the appellant knew the commencement date of her study [overseas] would be 6 August"*. Unfortunately there is no evidence to support this statement in the documentation included by the Ministry in the appeal file. Somewhat surprisingly the appellant does not seem to have been asked this question by either Studylink or the Review panel and she herself has provided no specific information on the issue – in spite of the fact that it is obviously crucial to some of the submissions she makes. It may be that the letter notifying her of her selection for the exchange on the 27th June included the dates. Her education provider confirmed to StudyLink that this was sometimes the case but did not say whether it was so in this instance. The appellant herself says that as soon as the exchange was confirmed she completed her portion of the overseas study application form, which required her to provide her proposed travel dates – for which it could be assumed it would be necessary for her to know her course start date. This form appears to have been submitted to her education provider sometime in the following week – and certainly no later than the 9th July – so she may well have known by then. She also says that in the period immediately after she received notification that she would be going, she spent time confirming her course dates and arranging her flights which suggests the same conclusion. Nevertheless, the student's portion of the overseas study application form does not require the student to give the dates of the overseas study – they are required only on the education provider's portion. In this case her education provider has said that they normally fill in the dates when they give the form to the student – implying that prior to that time the student may well be unaware of them. It is accordingly conceivable that she remained unaware of the precise start date of her overseas course as late as the 23rd July when her education provider finally returned the completed form to her and she forwarded it to StudyLink.

[7] Following receipt of the new course dates from her education provider in mid-September, StudyLink reviewed her eligibility. Because the break between her courses exceeded the three week limit prescribed by reg 35(2), an overpayment for the period between the 9th July when her first trimester classes ended and the 5th August when her overseas classes commenced was established. The appellant was advised of this on the 21st September and in October she notified StudyLink that she intended to apply to review this decision. Her formal application was received in February 2013 and following the usual processes a Student Allowance Review panel hearing was convened on the 6th June 2013 at which she made further submissions. On the 17th the Secretary confirmed the original decision. In doing so she found that "*in accordance with regulation 35"* the appellant was not entitled to an allowance for the four week mid-trimester break and that as she had not informed StudyLink of the change of dates in a timely fashion the overpayment was not due to any fault on StudyLink's part and was accordingly correctly established. While there was no "*reason to doubt that the Applicant had indeed sent in the overseas form* [containing the new study dates] *to StudyLink at the end of July"*, even if it had been received in the usual way this would not have prevented the overpayment as the form was sent and would have been received after the bulk of that overpayment had happened. On the other hand both the Secretary and the two advisors on the review panel accepted that in relying on her submission of the completed overseas study application form as sufficient notification of her new study dates "*it appears she was taking the correct actions as advised by the university staff*".

[8] On the 24th July she appealed this decision. The Ministry's Regulation 37(2) Report was completed on the 24th October and received by the Authority on the 29th. Under reg 37(3) it is the Authority's responsibility to forward a copy of this report to the appellant for comment "*immediately*". Regrettably this does not seem to have happened and the appellant did not receive her copy of the report until mid-January. At that point further delays occurred largely due to a number of fairly lengthy extensions of time granted to her. The file was finally referred to the Authority for decision, pending final submissions if any from the Ministry, on the 24th December. The Ministry provided brief supplementary submissions on the 8th January 2015. Further delays then occurred when, in the course of considering the appeal the Authority requested and received further factual information from the Ministry relating to reg 35. Obviously delays such as this are unacceptable. However no blame can be attributed to the Ministry in this regard. Indeed the initial Regulation 37(2) Report and the Ministry's subsequent response to the appellant's submissions were submitted well within the normal parameters and the Ministry's responses to the Authority's subsequent queries were exemplary.

Relevant legislation and practice

Regulation 35(2)

[9] Regulation 35 provides for the suspension of allowance payments where students are not engaged in active study for more than two weeks as a result of injury or sickness (reg 35(1)) or because of a break in tuition exceeding three weeks within or between courses (ie generally scheduled vacation periods) (reg 35(2)). Clause (2) provides that:

> *"Where a student … does not attend any course conducted at a … tertiary provider for a period of more than three weeks, because of a break in tuition at that … tertiary institution, the payment of any allowance … must be suspended*

> *until [teaching is resumed] in a course in which the student is enrolled, unless the chief executive permits payment to continue."*

[10] **The meaning of "suspend" in reg 35(2)** – Although in the event it is not in issue in this appeal, the correct interpretation of reg 35(2) is a matter of some uncertainty. The Ministry interprets the provision as requiring allowance payments to be stopped for the whole of any break in tuition exceeding three weeks. In an early email exchange with StudyLink the appellant accepted that she was not entitled to be paid for the fourth week, but described as "*bizarre*" the loss of payments for the whole of the period simply because of "*the one week later start*" of the overseas course. Although factually this claim is incorrect – her overseas course in fact started three weeks later than the one she had previously been enrolled for – in terms of the interpretation of reg 35(2) she has a point. It is certainly strongly arguable that, as currently drafted, the provision does not support the practice adopted by StudyLink.

[11] The basic argument appears compelling. Regulation 35(2) requires that payments must be *"suspended*" where a student *"does not attend any course … for a period of more than 3 weeks*". In ordinary usage/language the meaning of this seems clear – "*suspension*", as opposed to, say, "*loss of entitlement*", would normally be seen as something that follows the triggering event and means that no further payments under the entitlement may be made. This is, for example, clearly the meaning intended by the use of similar wording in reg 34 (suspension of an allowance due to the provider losing accreditation) where the suspension can only affect payment of an allowance as from the date the accreditation was lost. Similarly under reg 35(1) (discretion to suspend in cases of absence due to illness or injury exceeding two weeks) where the wording is identical to that of cl (2), StudyLink currently pays the first two weeks of allowance, only suspending payment once the triggering time period has elapsed. It does this because, as the Ministry stated in response to a request for further information from the Authority in the course of considering this appeal:

> *"The wording at the start of the provision, "where a student does not attend a secondary school or tertiary provider for a period exceeding 2 weeks ... " suggests that the discretion in Regulation 35(1) is only triggered once the student has failed to attend the tertiary provider for a period exceeding two weeks. This is therefore a prospective rather than retrospective provision. This suggests that it is not intended that the Chief Executive exercises discretion from the beginning of the period of injury or sickness but rather once the student has failed to attend classes for the specified time period of two weeks. This would mean that if the student was absent from classes for a period of four weeks due to illness or injury that the Chief Executive may exercise their discretion and suspend the allowance for two weeks."*

With all due respect to the Ministry this certainly appears to be the obvious and correct interpretation of the wording of cl (1). However it is difficult to see any logical basis on which the virtually identical wording in cl (2) ("*where a student does not attend … for a period of more than 3 weeks*") can be interpreted to mean that the suspension can or must be backdated to the start of the period of non-attendance. Nor are there any other "*indications provided in the enactment*" (s 5(2) of the Interpretation Act 1999) to suggest that that drafting should be glossed in this way. It is true that cl (1) provides for a discretion to suspend whereas cl (2) provides that an allowance "*must*" be suspended if the pre-condition applies coupled with a discretion not to do so in appropriate cases but this is not relevant to the question of when the suspension should commence. Its relevance, if any, is as to the nature of the discretion conferred (see further below [18]).

[12] As a matter of principle, where a provision is intended to impose what is in effect a retrospective loss of entitlement to any benefit, it is important that it do so in clear and understandable terms. Regulation 35(2) does not do this. It would not have been difficult to do so if that was indeed its intention. Similar provisions in other legislation make such things abundantly clear – compare, for example, ss 21 and 22 of the New Zealand Superannuation and Retirement Income Act 2001 (payment of superannuation to a recipient who is absent from New Zealand for more than 30 weeks).

[13] Accordingly, if it were necessary to decide the matter in this appeal, it would, in my view, be difficult to avoid the conclusion that insofar as the starting date for the suspension of allowance payments is concerned, reg 35(2) must be interpreted in exactly the same way that reg 35(1) currently is. This means that StudyLink's current practice where breaks in tuition occur is not authorised by the Regulations. While I have no doubt that reasonably respectable policy arguments can be made to justify treating the situations in clauses (1) and (2) differently, these are not reflected in the current drafting. There is, in my view, a need to urgently review this provision with a view to making its intent clear and, if necessary, to clearly differentiate the treatment of non-attendance due to breaks in tuition from the treatment of non-attendance due to other causes.

[14] **The policy underlying reg 35(2)** – In its Regulation 37(2) Report the Ministry states that:

> *"The policy behind the regulation concerned is to not provide for payments while not engaged in active study at an institution (vacation breaks). Students are expected to support themselves during this period."*

As a statement of the policy behind reg 35(2), this is somewhat unhelpful. Although it is certainly the policy behind the provision of student allowance support in general – which is clearly intended primarily to provide support for students only while they are engaged in active study – reg 35 specifically provides an exception to this by continuing payment for up to three weeks during non-teaching periods. This would appear to reflect a recognition both that scheduled vacation periods should generally be seen as part of a full-time study programme and that it is either unrealistic to expect students to be able to support themselves over such a short period, or that to do so would unduly disrupt their study – either directly or by depriving them of a necessary period of recuperation. By the same token the provision of a general discretion to continue allowance payments over longer periods would appear to enable account to be taken of individual difficulties that may be faced by students if they are forced to support themselves during vacation breaks and situations where longer breaks occur due to circumstances beyond their control and the absence of other avenues of assistance makes continued student allowance support appropriate.

[15] **The discretion and current guidance for staff on reg 35(2) cases** – The provision of a discretion to continue payments in reg 35(2) means that any staff member approving the suspension of a student's allowance must at least be aware of its existence and be in a position to consider whether the case is an appropriate one for exercising it should the circumstances suggest it. While this does not mean that the exercise of the discretion must be actively considered in every case, it does mean that the option must be available. It is accordingly unfortunate that the current guidelines for staff undertaking this task not only provide no guidance on the exercise of the discretion but make no mention of its existence. Suspension is described as

mandatory in all cases – "*students can only be paid a Student Allowance during vacation periods that are 3 weeks or less"*. Identical advice is given to students on the StudyLink website – *"for breaks longer than three weeks, you are not entitled to receive the Student Allowance"*. No doubt the number of occasions on which it will be appropriate not to suspend payment where the three week maximum is exceeded will be few and far between, but this does not exonerate the Ministry from ensuring that its staff are aware of the possibility in every case and from providing appropriate guidelines so as to promote consistent and fair decision-making on those rare occasions when the issue may be a live one. Nor does it absolve the Ministry from informing students of both the existence of the discretion and the situations in which it might be relevant. It appears that the Ministry is currently in the process of developing guidelines covering the exercise of this discretion. It is unfortunate that this was not done sooner.

[16] **The Ministry's view of the discretion** – In response to the Authority's request for information on its approach to the exercise of this discretion, the Ministry describes it as "*residual*" and argues that the fact that the regulation provides that in such cases a student's allowance "*must*" be suspended means that it was intended to be exercised only "*in rare and extraordinary circumstances*". It cites as an example of its exercise the continuation of payments to students affected by the Christchurch earthquakes. Accordingly while "*extreme weather conditions, interruptions to essential services, non-controlled health and safety issues, or civil defence emergencies*" will qualify for consideration, the situation the appellant found herself in will not. She was "*aware when her study in New Zealand ended and when her study overseas began*" and accordingly the fact that her mid-trimester break would breach the three week limit was "*not unanticipated*".

[17] With all due respect to the Ministry, I do not accept that the drafting of reg 35(2) restricts the exercise of the discretion it confers in the way suggested. First, the discretion that is conferred is in absolutely general terms ("*unless the chief executive permits payment to continue*"). Elsewhere in the Regulations, where it is intended to restrict the use of a discretion to specific or extraordinary circumstances, the relevant provisions are drafted so as to make this clear. See, for example, reg 30 (allowance must be suspended unless satisfied that failure *"due to reasons beyond the recipient's control"*), reg 4(6) (discretion to grant extension of time if satisfied that "*special circumstances*" exist), reg 20(7) (*"where he or she considers that in any particular case special circumstances exist"*). If it had been intended to confine the exercise of the discretion to "*rare and extraordinary circumstances*" it would have been easy enough to say so.

[18] Secondly, the fact that under reg 35(2) suspension is mandatory once the three week period is exceeded whereas under reg 35(1) it is discretionary, does not in itself suggest that the exercise of that discretion should be based on more restricted criteria. It simply recognises the difference between the subject matter of the two provisions. Where absence due to illness or injury is concerned it makes perfect sense to adopt a regime which requires StudyLink to make a positive decision to suspend. It would be safe to predict, for example, that a reasonably high proportion of such cases will be seen as not requiring or justifying suspension – the inability to study is unanticipated and is likely to be of short duration; in most cases it can be accommodated by the education provider and won't seriously affect the student's study/chances of success overall; students who are ill are generally unlikely to have alternative avenues of support, etc. Conversely where lengthy breaks in tuition occur, it makes more sense to suspend payments automatically, subject to a discretion to continue in appropriate

cases where suspension would not be justified in terms of the objectives of the student allowance scheme and would be unreasonable in relation to the student concerned. Where a break in tuition exceeds three weeks a student will generally have at least a theoretical chance of obtaining some alternative source of support; such breaks are generally not unanticipated and can, to at least a limited extent, be planned for, etc. This certainly means that in practice payments are far less likely to be continued under cl (2) than in cl (1) cases. But this does not mean that cl (2) cases should be subject to a *"rare and extraordinary circumstances"* standard. The usual test of whether it is reasonable in all the circumstances, including the objectives of the provision in issue, to permit payment to continue is sufficient and is, in my view, what is contemplated in the wording of the provision.

[19] Finally, as with the issue of whether "*suspension*" is intended to be retroactive (see [12] above), basic principle requires that a statutory discretion to waive a requirement in favour of a student beneficiary should not be restricted in its operation unless the enabling provision clearly provides for this to be the case. In my view this provision does not do that and it is not for the Ministry now to impose such restrictions through its control of internal decisionmaking procedures. If it is decided that the correct approach is in fact the one that the Ministry currently says that it adopts the provision needs to be amended to make this clear.

The duty to notify under reg 41

[20] Regulation 41 provides that students must notify StudyLink "*without delay*" of any change in their circumstances "*of such a nature that it affects or may affect the recipient's entitlement to that allowance, the rate at which it is paid, or payment of it".* On the other hand in all its communications with students – including in the declaration students are required to sign as part of the application process – StudyLink describes this obligation in rather more absolute terms as simply a duty to notify any change in their "*study situation"* "*straightaway*". As the Authority said of this in [2012] NZSAAA 02, at [11]:

> *"The actual obligation imposed by the Regulation is less onerous, only requiring changes that 'affect or may affect' their allowance to be notified. … it is implicit in this wording that some knowledge of and assessment or opportunity for assessment of the relevance of any change in circumstances on the part of the student is necessary before the duty to notify arises. Accordingly where, for example, a student is, through no fault of their own, unaware of a particular change of circumstances, no duty to notify can arise. Similarly where a student is aware of the change but has a reasonable belief that it will not affect his or her entitlement or the rate or payment of their allowance, reg 41 does not require notification – although it may well in practice be prudent to do so."*

The general power to review and vary an allowance under reg 45

[21] Regulation 45 confers a general discretion on the chief executive to review any allowance in order to ascertain whether the recipient of the allowance is entitled to receive it. If, following such a review, the chief executive considers that the student was not entitled to receive an allowance over the period in question the regulation confers a discretion to suspend, terminate, or vary that allowance "*from such a date as the chief executive reasonably determines*". This general power is in addition to the specific provisions dealing with suspension of allowances in Part 5 of the Regulations (ie regs 28-35).

The basis of this appeal

[22] The appellant's case is essentially that the suspension of her allowance for the four weeks in question is unjustified and unfair because she had in fact notified StudyLink as soon as she could of both the exchange itself and the new course dates. She did this by submitting her completed overseas study application form on the 23rd July. The fact that this form was either not received by StudyLink or was subsequently mislaid was not her fault.

> *"I studied on exchange for a semester.*
>
> *Prior to leaving I notified the university/StudyLink of the dates I would be studying on exchange. I did this in a way that conformed to any request for this information, and before all deadlines.*
>
> *I disagree with the overpayment since I provided all the necessary information about my study dates, in a timely way."*

[23] As recorded in the Secretary's decision, at the review hearing she was asked why she did not notify StudyLink of the change in her study plans earlier and why the form was sent in so late in the process. In reply she

> *"stated that she did everything the university had asked her to do. She was told not to contact StudyLink until the form had been completed and then asked her to send it on 23 July which she did."*

This statement appears to have been accepted by all the members of the Review Panel. Both advisors commented that she had been given wrong or poor advice and the Secretary stated that she empathised "*with the applicant's predicament in that it appears she was taking the correct actions as advised by the university staff*".

[24] The point is also reinforced by the appellant in her supplementary submissions on appeal in which she responds to criticism from the Ministry that she relied on her education provider instead of communicating directly with StudyLink:

> *"I relied on the university only insofar as that they were necessary to complete parts of the application form… the form requires a university staff member to complete part of the form. This does not mean that I relied on the university to communicate my change in circumstances, I simply relied on them to fill out their part of the form – which they did – and which I then sent to StudyLink to inform them of the change in circumstances.*
>
> *It is true that the university staff advised me that I needed to complete the overseas application form. StudyLink seems to agree that this is the only appropriate way of communicating my change in circumstances. … In this respect, I relied on the opinion of the university that I would need to fill out an overseas study form in order to communicate the change in circumstances. Additionally, I relied on the university's advice that I did not need to take further steps beyond the application for overseas study form, which is advice that does not seem to be disputed by StudyLink. The university's advice to complete the forms is consistent with what StudyLink requires, and it is what I did. This does not constitute any sort of reliance on advice that the university offered at the expense of fulfilling my obligations to notify StudyLink of the change."*

[25] In addition in her submissions on appeal the appellant states that

> *"Prior to my departure I repeatedly told StudyLink officers in phone conversations and in person … that I would be going on exchange … Although I rely on the fact that I communicated the change in circumstances through the overseas study form, I note, further and alternatively, that I had told multiple StudyLink officers that I was preparing to go on exchange during 2012."*

Unfortunately StudyLink has no record of any such discussions, either in person or by phone. Nothing is recorded on the appellant's file and any relevant phone records would have been deleted after three months. Furthermore the appellant's claim that she repeatedly told StudyLink of the impending exchange during 2012 appears for the first time in her submissions on this appeal. Although it was evident from the start of the review process that her failure to notify StudyLink of her change in circumstances in the second part of the year formed a central part of StudyLink's case against her, she did not mention these conversations either at the Review Panel hearing – where the panel members could have explored the matter with her – or in her notice of appeal to the Authority. In addition, given that the exchange was only confirmed in late June and that prior to that date she was unaware of her overseas study dates it is difficult to see why she would feel the need to "*repeatedly*" contact StudyLink about it at that early stage. In the circumstances I have no option but to discount her claim as unverifiable.

[26] She also argues that the delay between her receiving confirmation of the exchange and her submission of the overseas study application form was unavoidable. StudyLink's statement

> *"that 'sending the overseas study application form approximately four to five weeks after she knew of her change in study plans resulted in her being overpaid' … neglects the fact that it took time for me to fill the form in (having to confirm my travel dates etc after my exchange was confirmed so that I could accurately complete the form) and then I had to physically deliver the form to the university and wait for the relevant sections to be completed by them before it could be sent. StudyLink's claim would suggest that I sat on the form for a couple of weeks before sending it off, when the reality is that it was completed and sent without delay."*

[27] In addition in her supplementary submissions on appeal she appears to argue that in any case reg 35(2) does not apply to her situation because

> *"Between my first semester … and my second semester … I was not on a "holiday". I remained enrolled at* [the New Zealand education provider]. *It was unavoidable that classes started one week later at* [the overseas provider]. *If I had continued at* [the New Zealand provider] *I would have had a three week mid-semester break, it was only because* [the overseas] *classes started a week later that this break period was longer. The allowance should not have been suspended."*

With all due respect this is to misunderstand reg 35(2). The provision is not about "*holidays*" as such. Nor is it about enrolment as such. It is about any "*break in tuition*" and there is no doubt that the period between the end of the appellant's first trimester course and the start of her overseas study was of this nature. Furthermore if the appellant's arguments were in fact correct in this regard it would not be at all helpful to her case. If the break between the two courses is for some reason not covered by reg

35(2) she would simply not be eligible for consideration for an allowance over the period at all – since, with the exception of cases falling within the provisions of Part 5 of the Regulations (regs 28-35), students are only eligible for an allowance while they are actively engaged in study.

[28] Finally she argues that in any event it was essentially unfair to suspend her allowance in the circumstances. In this context she repeats that she completed the forms in a timely fashion, fulfilled all her obligations to communicate the change in her circumstances, and, because she assumed that she would remain eligible for an allowance in the changed circumstances, was unaware that the payments she was receiving were improper. She describes the extra one week's break that the arrangement produced as "*unavoidable*" if she were to undertake the exchange. She also notes that her allowance was the only source of income available to her during the exchange since the terms of her visa precluded her from working.

The Ministry's submissions

[29] In essence the Ministry makes three submissions. First it argues that the appellant's allowance was properly suspended for the four weeks in question. Secondly it says that the payments she received for this period, while clearly erroneous, were not paid as a result of any fault or error on StudyLink's part and are accordingly fully recoverable. Thirdly the Ministry is clear that there are no compelling reasons suggesting that it would now be improper or unfair to go ahead and take steps to recover the overpayment.

[30] First, whether the case is seen as one of suspension under the *"break in tuition"* provisions of reg 35(2) or as one of ineligibility under the general rule that to be eligible to receive an allowance a student must be actively engaged in full-time study, she was not entitled to be paid an allowance for the four weeks in question. In discussing her entitlement to receive an allowance over this period the Ministry concentrates, as did both StudyLink and the Secretary before it, on reg 35(2) as the applicable provision. In the Ministry's view reg 35(2) reflects the basic policy that:

> *"The purpose of Student Allowances and student accommodation benefits is to assist students with their costs while they are engaged in active study at an institution. As a result, part of the general policy settings is a requirement that students support themselves during periods where they are on a vacation break (period longer than three weeks)."*

[31] It appears from the appeal file that in applying reg 35(2) to the appellant's situation, neither StudyLink in the first instance nor the Secretary on review gave any consideration to the discretion conferred by the regulation. Rather they seem to have assumed that suspension for the whole period was mandatory once it became apparent that the allowable three week "*break"* had been exceeded. Given the internal guidance currently provided by the Ministry (see [15] above), that is scarcely surprising. Nevertheless in its Regulation 37(2) Report the Ministry belatedly notes the existence of the discretion and states that it was in fact considered:

> *"Taking into consideration the intention of student allowance, the duration of the vacation break, the fact the appellant was not on study leave and the appellant knew on 27 June 2012 that her study dates were to change, resulting in a longer vacation break between courses, it was decided that it was not appropriate for the chief executive to permit payment to continue in this instance."*

With all due respect to the Ministry this statement is incorrect. First, there is nothing in the file to suggest that any such decision was in fact taken or any such criteria considered by either StudyLink or the Secretary on review. Nor has the Ministry been able to point to any such documentation subsequently. Secondly, it is clear that the criteria this passage states were considered are very different from the criteria that the Ministry now says would have governed the exercise of the discretion if it had in fact been considered (see above [16]).

[32] The Ministry also notes the possibility that reg 35(2) may not apply in the appellant's situation. Arguably the period between the end of her first trimester courses and the commencement of her overseas study "*does not fit comfortably within the wording of regulation 35(2)*" as the "*break in tuition"* involved was not a break between two tuition periods at the same tertiary institution – which is what the regulation appears to contemplate by requiring the suspension to end when the provider "*resume[s] teaching*". If this is correct, the Ministry argues in the alternative that irrespective of the nature of the break and why it occurred, the appellant was not entitled to an allowance over the four weeks in question simply because she was not actively engaged in study. In such a case StudyLink is entitled to review and terminate, cancel or suspend her allowance under the general review power conferred by reg 45. Accordingly in the Ministry's view, whichever avenue is chosen, the appellant was not entitled to the payments she received for the weeks in question.

[33] Secondly the Ministry argues that this overpayment was not the result of any fault on StudyLink's part. It was wholly due to the appellant's failure to comply with her obligation to notify StudyLink of her changed study arrangements in a timely fashion as required by both reg 41 and the agreement she signed in her allowance application. While the Ministry accepts, as it must, that prior to the 27th June when she received official notification that the exchange had been approved she was in no position to notify StudyLink of anything, it is the delay between this date and the date when she claims to have notified StudyLink by post – which was sometime after the 23rd July – that is the problem. Even if her application form giving notice of the revised course dates had been received in the normal way, it would have been "*after the commencement date of the overpayment*" and accordingly too late to prevent it. On the other hand if she had notified StudyLink – whether by phone or email or through her StudyLink account – of the new starting date for her second trimester course as soon as she became aware of it, no overpayment would have occurred – or at least if it had it would have been more arguably StudyLink's fault.

[34] In response to the note on the appellant's file showing that she had told StudyLink in May that she would be going on a study exchange in the second half of the year, the Ministry rejects any suggestion that by doing so she was complying with reg 41 or that StudyLink was somehow at fault in not exploring the matter further. As she provided no details of her proposed study there was nothing StudyLink could have done about it at that stage. Similarly with the claim that she talked to local StudyLink staff about the exchange later in 2012. Not only is there no record of any such contact, there is also no suggestion anywhere in her submissions that she in fact notified StudyLink of the changed study dates – which is what would be required to discharge her reg 41 obligation.

[35] In attributing the overpayment to the appellant's failure to notify the change in start dates in a timely fashion, the Ministry also states that "*the appellant has not suggested that she was unaware that she would not qualify for a student allowance if*

her vacation break was longer than 3 weeks". This is, with all due respect, incorrect. At the Review Panel hearing the appellant is recorded as having stated that at the time "*she was not aware that the difference [in starting dates for the two courses] would affect her Student Allowance*". This does not appear to have been queried or disputed by either of the advisory members or by the Secretary – who were clearly in the perfect situation to do so – and there is nothing in the Review decision or in the appellant's subsequent statements that might suggest that it is untrue. Indeed in the circumstances it might be thought to be eminently believable.

[36] Finally the Ministry argues that once it is accepted that the debt is properly established then, applying ordinary principles, there is no basis on which that debt should be written off, even if this Authority had jurisdiction to consider the matter. In order for the usual principles to apply it is clear that the overpayment must have been made as a result of a mistake on the part of StudyLink and the student must have altered their position in reliance on the validity of the payment. In the Ministry's view any such claim falls at the first hurdle since there is clearly no such mistake in this case.

Discussion

Common ground

[37] First, it is now accepted that, whatever StudyLink's initial position might have been, the appellant did indeed send in her missing overseas study application containing the start date for her overseas course on or about the 23rd July. It is also accepted by the Secretary and by the two advisory panel members at the Review hearing who had the opportunity to question the appellant about it, that she had been told by her education provider that completing the overseas study application and forwarding it to StudyLink was the "*correct*" way of notifying StudyLink of the change in her circumstances – see [23] above. In addition the Review panel appears to have accepted without comment her assertion that she was not aware that the extra two week's "*break in tuition*" resulting from the exchange would affect her Student Allowance eligibility – see [35] above.

The decision to suspend – reg 35(2) or reg 45?

[38] Whether the appellant's situation is best seen as governed by reg 35(2) or reg 45 the initial question is the same. Was her allowance validly suspended? Both regulations provide for a student's allowance to be suspended in the event of a finding that they are not entitled to receive it over the period in question and both provide the chief executive (ie StudyLink) with a discretion not to suspend in appropriate cases. In this case it is clear that, absent the exercise of the relevant discretion, the appellant was not entitled to receive an allowance for the four weeks in question. She was not engaged in study and the period exceeded the permitted three week tuition break. The question is whether the discretion not to suspend her entitlement should have been exercised.

[39] Although the question under either regulation is the same, in my view the decision in this case correctly falls under reg 35(2) rather than the general review and suspension discretion in reg 45. While it is true that reg 35(2) appears to contemplate only the situation where there is a "*break in tuition*" between courses offered by the same provider there is no great difficulty in applying it to the appellant's situation. As the appellant says she remained enrolled at her New Zealand education provider throughout. The overseas course she was taking was undertaken on an exchange basis and counted towards and formed part of her New Zealand degree. Accordingly I

see no problem in regarding the "*break*" between these two courses as well within the intent of reg 35(2). In this context I also note that the provisions permitting allowance payments to continue where a student is studying overseas in reg 26 proceed on the basis that the overseas course can be seen as part of the student's domestic course for which they are eligible for an allowance. This reinforces the view that breaks between such courses must be governed by reg 35(2) rather than falling simply within the general review discretion. Furthermore it is a basic principle in the application of statutes that "*the specific excludes the general*" – in other words where a matter is dealt with specifically by a provision it is that provision that must be applied rather than some other general provisions which would, in the absence of specific provision, be able to be called in aid. Accordingly in considering the exercise of the discretion not to suspend the appellant's allowance where the lack of entitlement stems from non-attendance resulting from a break in tuition it is reg 35(2) that must be applied.

The reg 35(2) discretion and its application

[40] Although reg 35(2) is initially cast in mandatory terms providing that where the three week limit is exceeded the allowance "*must*" be suspended, it nevertheless confers a discretion to continue payment in appropriate cases. Where a discretion of this sort is conferred it is incumbent on the deciding officer to take it into account in making any decision to suspend under the Regulation. No doubt in most cases there will be nothing to indicate that grounds for its exercise in a student's favour are likely to be present and any consideration that is given to it will be cursory at the best. Nevertheless cases will arise where the appropriateness of suspension may be questionable – for example where a break in tuition exceeds the three week period by a few days and/or as a result of circumstances beyond the student's control – and in such cases guidelines need to be available for the deciding officer. It is evident that currently no guidelines have been provided by StudyLink for their staff and that the coverage of reg 35(2) in the manual simply describes it in mandatory terms (see [15] above). From the papers in this appeal there is nothing to suggest that the officer who originally decided that the appellant's allowance must be suspended viewed that suspension as anything other than mandatory. Similarly in both the material prepared by StudyLink for the Secretarial review and in the report by the Secretary and her final decision there is no mention whatsoever of the existence of the discretion to continue payment. It would accordingly appear unlikely that it was ever considered.

[41] In the Ministry's view the "*residual discretion* [conferred by reg 35(2)] *is only available in rare and extraordinary circumstances*" such as "*extreme weather conditions, interruptions to essential services, non-controlled health and safety issues, or civil defence emergencies*". As discussed above at [17]-[19] I reject this reading of reg 35(2). In my view there is nothing in the wording or context of the regulation to support the view that the exercise of the discretion is intended to be limited in this way. Nor is it necessary to restrict the discretion to extraordinary situations to preserve the integrity of the policy underlying the student allowance scheme. If the Ministry in fact believes that such a restriction is necessary the Regulations must be redrafted so as to make that clear – both to those administering the discretion and to education providers and students.

[42] Accordingly, in my view, the discretion conferred by reg 35(2) is a general one. The question for StudyLink should have been simply whether the break in tuition in the appellant's situation was one for which it is appropriate to continue to make allowance payments. That question depends on such things as the nature and duration of the break, the reasons why it exceeds the permitted period, the degree of control, if any, that the student had over their situation, the extent to which the student could be

expected to anticipate the situation and act to mitigate its effects, any personal circumstances that may render suspension inappropriate or unfair and whether suspending the student's allowance for the period in question fits with the purpose and intent of the Regulations.

[43] First, as the Ministry states, student allowances are intended to assist those students who need assistance only while they are engaged in full time study. When they are not so engaged "*students are expected to support themselves*". This expectation, however, only makes sense where the circumstances are such that the student has at least some possibility of supporting themselves through paid employment of by some other means. (Which is presumably why, for example, the Studylink guidelines for the exercise of the reg 35(1) (illness/injury) discretion require consideration of the availability of alternative sources of financial support.) Accordingly reg 35 provides an exception to the general rule where a student is either physically unable to support themselves (illness/injury) or the temporary nature of the break (ie between courses) and its short duration preclude any realistic prospect of finding some alternative means of support. In the present case it is strongly arguable that suspending the appellant's allowance for the four week period between the two courses on the basis that she should be supporting herself over the period makes no sense whatsoever. As she herself makes clear she received notification of the exchange one week before the end of her first course and five weeks before the commencement of her overseas study. Her four week "*vacation*" period appears to have been taken up with completing the paperwork relating to the exchange, making travel and other arrangements, and travelling/acclimatising to her new environment. Taking account of the time needed for doing all this, any free time that she might have had to try and obtain some alternative source of support would have been well below the three week threshold set by the regulation. It is impossible to imagine that a student who is about to go overseas for the rest of the year would have been capable of finding a job in order to support herself over such a period. Furthermore no doubt the arrangements that needed to be made for her overseas study imposed a further drain on her resources which rendered her allowance income even more necessary. On a more conceptual level, it is also certainly arguable that the extra week or so spent in travel/acclimatisation can be seen as an essential part of her study programme and therefore as deserving support in the same way as active study. In this context it is worth noting that reg 26(3) makes specific provision for allowance coverage of periods spent in necessary travel for "*short courses of study overseas*" approved under cl (2).

[44] Second, it is relevant that the duration of the break was not something over which the appellant had any control or which, short of not applying for the exchange in the first place, she could have avoided. Furthermore when she applied for the exchange she was unaware of the start date of the overseas course and, indeed, may not have been able to discover it even if she had tried. Nor was there anything at that stage that should have alerted her to the possibility that her dates might change to the extent they did, delaying her second trimester start date by three weeks. Whether she became aware of the new start date in late June as the Ministry assumes or only in mid-July (see above [6]), the fact is that by then it was far too late to do anything about it. In that sense it is probably fair to say that the situation was not only outside her control but it was also essentially unanticipated.

[45] Thirdly, it is also necessary to take into account the benefits of exchange arrangements such as those entered into by the appellant and the possible impact of not extending students' allowance entitlement for a short period to enable them to receive proper support in undertaking them. It is undoubtedly beneficial to students,

their parent institutions and the community in general to encourage study exchanges of this sort. This is clearly recognised by reg 26 which permits allowance payments to be continued in respect of approved overseas study. Where such exchanges, as here, result in students needing slightly more support than they would otherwise have received that seems to me to be a small price to pay to support such programmes and to treat students who are selected for them fairly. Not accommodating the sort of situation the appellant found herself in, is both unfair to students who go the extra mile and apply for such programmes and seems likely to provide at least a minor disincentive to others to put themselves forward for such programmes.

[46] Fourthly, while I accept that the duration of any extension sought under reg 35(2) is only of marginal relevance to the discretion, it is certainly a factor that needs to be considered. Although the four week break in this case exceeded the break the appellant would have had if she had not undertaken the exchange by slightly over two weeks, it only exceeded her "*entitlement*" under reg 35(2) by one week. No doubt an exchange which involves an eight or nine week break before the overseas course commences raises rather different concerns, but by any measure one week is a rather different matter and should not, of itself, preclude the granting of an extension.

[47] Accordingly I am satisfied that the decision of the Secretary on review to confirm the decision to suspend the appellant's allowance for exceeding the three week limit under reg 35(2) is incorrect. It was open to StudyLink to exercise the discretion conferred by the regulation and not to suspend the appellant's entitlement. That is what should have happened. I accordingly substitute that decision. The overpayment that has been established for the four weeks in question is therefore invalid.

[48] This conclusion renders discussion of the appellant's failure to notify StudyLink of the details of her exchange as soon as she became aware of them unnecessary. Whether the appellant complied with her reg 41 obligation or not is irrelevant to the question of whether her allowance was properly suspended in this case. While there may be cases in which the discretion under reg 35(2) turns on an assessment of whether the student was at fault in some way this is not one of them. In this case the reason why the discretion should be exercised in the appellant's favour turns on the circumstances of the break itself, the policy underlying the three week break exception, the overall fairness of the outcome in terms of the ability of the student to anticipate and control the situation and the desirability of encouraging students to undertake arrangements of this sort. Suffice it to say that in terms of the duty to notify in this case, there are a number of matters that would need to be resolved before the Ministry's view that she was in breach of her obligations could be accepted. It is still unclear, for example, when the appellant became aware of the details of the exchange and in particular whether this was before or after the commencement of her mid-trimester break (see above [6]). Similarly, issues remain over the suggestion at the Review hearing that she was unaware of the significance of the change in dates for her allowance eligibility (see above [35]), and that in acting as she did she was relying on her education provider's advice (see above [23]).

The appeal is allowed. The decision of the Secretary on review to uphold StudyLink's decision to suspend the appellant's allowance for the four week period from the 9th July – 5th August 2012 when she was not attending classes is overruled. A decision to permit payment of her allowance to be continued for the period under reg 35(2) is substituted.

Accordingly the overpayment of $615 established against the appellant is invalid.

DATED at WELLINGTON this 11th day of March 2015

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Neil Cameron
Student Allowance Appeal Authority