Decision No. [2017] NZSAAA 01

Reference No. SAA 003/16

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

AND

IN THE MATTER of an appeal by **XXXX** of Whangarei 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 upheld

REASONS

Overview

[1] This is an appeal against the decision of the Secretary on review to confirm the decision by StudyLink to review the appellant's allowance entitlement for the period from the 17th August – 29 November 2015 in which the parties' combined income exceeded the relevant income threshold, and to vary her entitlement from the "*student with dependent partner*" rate to the "*student with earning partner*" rate, and to establish and recover an overpayment of $4,684.20 as a consequence.

The issue on appeal

[2] The issue on appeal is whether the decision to retrospectively review and vary the appellant's allowance entitlement over the period in question was reasonable in the light of alleged errors and omissions by StudyLink in advising the appellant of the implications for that entitlement of her husband's ACC claim for earnings related compensation covering the same period.

Factual background

[3] In February 2015 the appellant applied for a Student Allowance to support her study for the 2015 academic year. Based on her self-employed husband's estimated income of $400 gross per week she was approved an allowance at the "*student with dependent partner*" rate entitling her to payments of $348.42 net per week plus an Accommodation Benefit of $38. In mid 2015 her husband injured his back. In September she contacted StudyLink seeking additional assistance because her husband was no longer working and her allowance was inadequate to cover household expenses. On the 1st October her husband lodged a claim with ACC citing a prolapsed

disc which was placed on hold by ACC pending full medical reports. Although the appellant had informed StudyLink of the injury initially, she did not notify the ACC claim. At the end of October she applied for a Job Seeker Support Hardship (JSSH) benefit. Although this was initially approved by StudyLink, it was subsequently cancelled when it was realised that she had not yet completed her period of study – which ran through to the end of November – and was thus still receiving a Student Allowance. In early November she renewed her application for Jobseeker Support to cover the vacation period once her Student Allowance had ceased, and also says she arranged to talk to StudyLink to discuss whether she could access any other forms of support while she was still on a Student Allowance. In her submissions on this appeal she says that this meeting took place on the 2nd November, and states that at it she not only discussed the other support options that might be available but also informed the StudyLink representative of her husband's ACC claim – which was still on hold – and asked whether this claim, if successful, would affect her entitlement to a Student Allowance. Although the Ministry says in its submissions that there is no record of this meeting in its system, the appellant supports her claim by referring to a note on her file which would appear to relate to this meeting and which appears to confirm at least the first part of her description, suggesting that she received advice on Temporary Additional Support (TAS), Accommodation Benefits and Disability Allowances. Unfortunately, there is no mention of the existence of any such note in either the Review Decision – which ignored the appellant's description of this meeting entirely – or in the submissions made by the Ministry on this appeal.

[4] On the 12th November the appellant's husband submitted a Partner's Form in support of her JSSH application declaring a nil income but noting his ACC claim which was currently on hold until the end of January 2016, and saying that if it were approved he would be "*possibly entitled to ACC payments of $400 per week*". On the 26th November ACC approved physiotherapy to address his "*back strain"* while the main claim was on hold. The next day this was reconsidered and the parties were told that, although the claim for a prolapsed disc had not been accepted, earnings related compensation based on simple back strain had been approved. Payments were to be backdated to the 1st October – ie the date the initial application was made. The first backdated payments were duly made on the 27th November, 3rd December, and 4th December at the statutory minimum rate of $410.79 net per week ($483.58 gross). StudyLink was not informed of these payments at the time. However, on the 7th December ACC reversed this decision, informing the appellant's husband that his claim had now been declined. He immediately lodged a review of this decision and it was ultimately reversed at the end of December with ACC confirming that it would pay earnings related compensation for the prolapsed disc at the statutory minimum rate backdated to the date of the injury, the 3rd August.

[5] Although StudyLink had been informed of the ACC claim by her husband on the 12th November, it is unclear when it first became aware that it had been approved or that payments had been made. The appellant certainly did not immediately inform StudyLink of either the payments made at the end of November or the final approval of her husband's full claim in December. She says in her submissions that she rang StudyLink in early January 2016 to say that the ACC compensation had been approved and that her husband's income was accordingly "*approximately $400 per week*" as it had been prior to his accident. The Ministry has no record of this phone conversation and states that the first it knew of the ACC payments was as a result of data matching early in February. As a result of this a debt of $4,684.20 was established against the appellant in mid-February for the period for which her husband had received the

backdated ACC payments. Those payments had the effect of increasing the parties' combined weekly income to a sum in excess of the "*student with dependent partner*" threshold, reducing her entitlement from $348.42 net per week plus an Accommodation Benefit of $38 to the considerably lower rate of $75.92 net per week with no Benefit.

[6] At the end of February the appellant applied for this decision to be reviewed. At the start of April the matter was heard by the Secretary on the papers and the original decision was upheld. An out of time appeal against this decision was lodged and accepted in June.

The decision of the Benefits Review Committee on the JSSH benefit

[7] In addition to the Student Allowance overpayment, the backdated ACC payments made to the appellant's husband also affected her eligibility for the Jobseeker Support benefit she was receiving over the vacation period in December 2015 and January 2016. This also resulted in an overpayment being established against her. Her appeal against this determination was upheld by the Benefits Review Committee (BRC) in June 2016 following a hearing which at which she made detailed submissions on, among other things, the ACC payments issue. It is significant that, having heard from the appellant in person – rather than simply on the papers – the BRC essentially accepted her description of her interactions with StudyLink over these payments. In particular the BRC accepted that, at least in relation to the JSSH application, the appellant had "*supplied all documents and advised of her husband's ACC payments to the best of her ability … during this time*" and that "*errors were made by the Ministry who failed to advise the applicant of the correct process and omission of information to the applicant*". In particular, the BRC found that "*there is no evidence suggesting any information was supplied or discussed with the applicant advising of back dating ACC payments and the potential creation of debt".* Finding that the *"lack of information received is an error of the Ministry's"*, the BRC reversed the overpayment and recommended that the debt, amounting to $1,751.00, be written off.

Relevant legislation

The "student with dependent partner" entitlement

[8] At the relevant time, Schedule 2 of the Student Allowances Regulations 1998 set the weekly combined income threshold for receipt of an allowance at the "*student with dependent partner*" rate at $423.92 gross pw. In contrast to situations where a student is on a standard allowance and exceeds the weekly income limit, the regime for partnered students is a "*cliff face*" one, without any provision for the allowance to be abated where the threshold is exceeded. Any income in excess of the combined income limit, no matter how small, will result in a dramatic reduction in the allowance payable as well as the automatic loss of the accommodation benefit.

The power to review

[9] Regulation 45 of the Regulations confers a discretion on the Chief Executive (ie StudyLink) to review any allowance at any time in order to ascertain whether it is being properly paid and at an appropriate rate. Following any such review StudyLink then has a discretion, where it is appropriate, to "*suspend, terminate or vary the rate*" of any allowance that is being or has been paid "*from such date as [StudyLink] reasonably determines*". As the Authority has said on a number of occasions, reg 45 is not mandatory. It confers discretions which, like all such discretions, must be exercised reasonably, having regard to all the circumstances of the case and, in particular, to any errors and omissions on the agency's part that may have contributed to the situation.

The question of jurisdiction

[10] Section 305(1) of the Education Act 1989 provides a statutory review and appeal process from any discretionary decision (ie any decision that "*the person … making it [has] the power to make in some other way*") "*fixing the amount of any allowance*" or "*declining to award an allowance*". As the Ministry notes in its submissions, and as the Authority itself has accepted in a number of decisions, the jurisdiction conferred by s 305 does not extend to the question of whether any overpayments properly established as a result of the operation of reg 45 should be written off. That is an administrative matter, entirely at the discretion of the Chief Executive and is a matter for which the Ministry has promulgated a reasonably comprehensive set of guidelines. On the other hand, the decision to review and retrospectively decline or vary the rate at which an allowance is paid under reg 45 is itself squarely within the section and is accordingly amenable to the statutory appeal process. Under reg 45 StudyLink is under no obligation to either review a student's allowance or retrospectively vary or decline an allowance even if it is satisfied that the student was not entitled to the allowance or has been paid at an incorrect rate. Where, in all the circumstances of the case, it would now be inappropriate to decline or vary an allowance that has been paid to a student, StudyLink is free to recognise this and simply leave matters as they stand. In such cases the issue is not whether any particular "*overpayment*" should be written off. It is whether the decision to retrospectively decline an allowance or alter the rate at which it should have been paid is correct. (See generally on the question of the availability of the statutory appeal process in cases of this sort [2005] NZSAAA 18 at [14]–[22]; [2007] NZSAAA 07 at [7]; [2011] NZSAAA 02 at [35], [36]; [2012] NZSAAA 02 at [12].)

Earnings related ACC payments

[11] It is not disputed that earnings-related ACC payments are "*income"* for student allowance purposes and that backdated payments must be treated as weekly income over the period they relate to. Section 209(2) of the Accident Compensation Act 2001 provides that where earnings related compensation is approved, the minimum amount that must be paid to a full-time earner, irrespective of the claimant's actual pre-injury earnings, is 80% of the adult minimum wage for a 40 hour week. At the relevant time the minimum sum payable under this provision was $472 gross pw (ie 80% of the gross adult minimum wage of $590 pw). Accordingly, as the appellant points out in her submissions on appeal, any student who is receiving or whose partner is receiving earnings related compensation must automatically be ineligible for an allowance at the "*dependent partner*" rate. Even if the compensation is only being paid at the required minimum rate it will exceed the combined income threshold of $423.92 gross pw by just over $48. This is entirely predictable and is entirely consistent with the policy behind the "*student with dependent partner"* allowance category – in policy terms at least, if not in reality, a combined household income at or marginally below minimum wage is unlikely to be seen as producing a situation of "*dependency"* requiring additional supplementation by the State.

The Secretary's decision

[12] First, although it does not directly form part of his reasoning, it is clear that the Secretary's decision proceeds on the basis of a fundamental misconception as to the way in which earnings related ACC payments are calculated. In his decision the Secretary accepts without question both StudyLink's statement that ACC compensation is simply calculated to provide "*in general up to a limit of 80% of the person's previous year's liable earnings*", and its application of this formula to the husband's situation in

which it is suggested that, since he received ACC payments of approximately $480 gross pw this must mean that prior to his accident he was earning approximately $600 gross pw (rather than the approximately $402 pw that he declared on the Partner's Form). This is simply incorrect. The appellant's husband received the ACC payments that he did because under s 209(2) of the Accident Compensation Act 2001 that was the minimum amount payable. It is unfortunate to say the least that neither StudyLink nor the Secretary, whose task it was to critically assess the submissions and statements made by both parties, saw fit to check the true situation with either the relevant legislation – which is straightforward enough – or with the Ministry's Legal Services section.

[13] In concluding that the overpayment was properly established and could not be attributed to any fault on StudyLink's part, the Secretary found that StudyLink first became aware of the ACC payments as a result of the data matching process in February 2016. He rejected the appellant's argument that StudyLink had been informed of their circumstances and had "*failed to act on the advice*" concluding that "*there is no evidence that the Ministry provided incorrect advice or failed to act on any information provided*". Although the appellant in her Review Application placed considerable weight on the meeting she said she had with a StudyLink representative on the 2nd November – at which she says she asked about the impact the ACC claim, if accepted, would have on her allowance and was told that it "*would be fine as the ACC payments would be a replacement for the self-employed income we had declared*" – no mention of this appears in either the Secretary's discussion of "*all of the information presented*" which he says he has based his decision on, or in the decision itself. This is unfortunate, particularly as the appellant, in her submissions, specifically noted the lack of any entry on her file relating to this part of the suggested conversation and requested an explanation for the omission. The lack of any discussion of or response to this in the Secretary's decision is rendered more surprising by the fact that the Ministry's report actually responds to and comments on the appellant's description of this meeting, misidentifying it as involving a phone conversation rather than the face-to-face discussion that the appellant consistently refers to and, not surprisingly, noting the lack of any record of any such call in the system. More significantly, while not ruling out the possibility that such a meeting/discussion had taken place as the appellant claims, the Ministry states that if it had she would be likely to have been advised that "*if the payments were the same from ACC as the self declared income then the rate would not [be] affected*", and that "*[g]iven ACC pays at 80% of a person's income, it would also be expected that any ACC income would be lower than what the partner had already declared as his income*". The implications of these comments are fairly clear. First, the advice the Ministry suggests would be likely to have been given is almost exactly the advice the appellant says she in fact received. This at least lends her account of the meeting an air of credibility that warranted serious further investigation by the Secretary. Secondly, at the very least they render the Secretary's simple assertion that there is no evidence that the Ministry provided incorrect advice open to serious challenge. On the surface at least, given the erroneous view of how ACC compensation is calculated evident at a number of different levels within the Ministry and the Ministry's acceptance that if she had been given advice it would have been squarely based on that view, the appellant's contention that she was informed that any compensation her husband received would be unlikely to unduly affect her allowance entitlement cannot be easily dismissed.

[14] Having concluded that the appellant had not been misadvised by StudyLink, the Secretary essentially attributes the overpayment to her failure to notify StudyLink of the

actual payments her husband was receiving from ACC and, implicitly, of the fact that although the first set of payments was only approved at the end of November, they were eventually back dated to early August 2015.

> *"As late as 5/1/16 the Applicant's advice to the Ministry was that her partner's income was approximately $400 per week. This appears to be based on a misunderstanding of the relevant rules. … The Applicant relied on her own knowledge and interpretation of how income is calculated and while it is not difficult to see how the Applicant arrived at her conclusion it was one that ultimately provided (sic) incorrect. The Ministry relied on the declarations of the Applicant that her partner's income remained at approximately $400 and the Applicant bears the responsibility of having made that declaration."*

[15] The appellant "*ought to* [have been] *aware of the risk that any change had the potential to mean the estimate* [of income made at the start of her course] *was no longer correct*", and was accordingly in breach of her "*obligation to advise a change in circumstances*". This raises two points. First, it appears to attribute the situation that has arisen to the appellant's "*misunderstanding the relevant rules*" when in fact it is clear that the Ministry itself also misunderstood the rules, being unaware both of the minimum earnings related payment "*rule*" and of the fact that it inevitably disqualifies a recipient from receiving the allowance the appellant was receiving. Secondly, it is in any event entirely unclear how compliance with her obligation to notify the ACC payments would have assisted the situation. Her husband was only notified on the 27th November that his claim had been accepted and that the first back payments for the lesser injury had been made – and even then ACC changed its mind on this just over a week later. This was two days before the end of the final week for which the appellant received an allowance. If she had advised StudyLink of the ACC payments then, as she was certainly required to do by the Regulations, the result would have been almost exactly the same. By the 27th the only way she could have avoided the debt she now has would have been to refuse to accept the ACC payments altogether – which, as they had been approved by then, would probably have been ineffective as amounting to a deliberate "*deprivation of income*" contrary to the provisions of reg 44.

The basis for this appeal

[16] The appellant's basic argument on this appeal is relatively straightforward. Essentially, she says that StudyLink either misinformed her or, at the very least, failed to inform her when it should have of the implications of her husband's ACC claim for her allowance entitlement and for the allowance payments she had been receiving over the period covered by the claim. Based on this misinformation she and her husband continued with the ACC claim, which they might otherwise have abandoned, in the belief that any payments they might receive from ACC would either not adversely affect her allowance status or only affect it marginally. As a result, she has now been saddled with a debt in excess of $4,500 which, she implies, could have been avoided if she had received proper advice in early November before it was too late to withdraw the ACC claim.

[17] Crucial to this argument is the meeting she says took place at her local StudyLink office on the 2nd November 2015. This meeting was arranged specifically to discuss her allowance and explore other support options that might be available to her in combination with that allowance. Her description of what was said at this meeting has remained substantially the same at every stage of this appeal. In her initial response to

the Integrity Intervention Centre's letter notifying her husband of the results of the data matching she states simply that at this meeting she "*let StudyLink know that [her husband] had applied for compensation from ACC on 1/10/15 but that the claim was on hold*". In her review application she adds that she also "*applied for extra support as well as the Student Hardship benefit*" and, although she "*cannot remember all the details of this discussion as I was so upset*", she is clear that she also asked the StudyLink representative "*what would happen if ACC did at some point accept [her husband's] claim and was told that this would be fine as the ACC payments would be a replacement for the self-employed income we had declared. Based on this we decided that we would hang in there in the hope that ACC would approve the claim*". Similarly, in her notice of appeal from the Secretary's decision she says:

> *"At my meeting with a StudyLink representative on 2 November 2015 I discussed our situation in detail. I was told that any potential future ACC payments would not affect my Student Allowance because my partner's income is under the threshold and as ACC payments are a replacement of this income they were fine. Based on this we decided that we would continue to fight for ACC compensation. The StudyLink representative was obviously not aware that the ACC's minimum full time compensation is higher than the Student Allowance threshold, and as such the advice that the ACC payments would not affect my Student Allowance was incorrect. Based on this advice I decided to continue studying as well as continuing to battle ACC. The lack of case notes from this lengthy appointment is disappointing. This appointment with StudyLink lasted approximately an hour, however the only notes entered into my case file from this visit are* 'rece'd extra help app tor TAS/ASUP and DA for partner. Also assisted a/n to AOL for JSSH for summer period NFA'.*"*

[18] In response to the Ministry's Reg 37(2) Report she fleshes out this point a little further:

> *"As I have previously mentioned … our decision to continue fighting ACC for compensation was based on the advice received from a StudyLink representative on … 02/11/15 …*
>
> *It would have made no sense for us to keep trying to get my husband's injury covered by ACC if we had been told that this would affect my Student Allowance entitlement. As the amount of ACC compensation that we were entitled to was only marginally more than the Student Allowance I was receiving we would have effectively just been swapping one source of income for another, and this would have done nothing to help us out of the dire financial situation we have been in since my husband's accident.*
>
> *StudyLink's conclusion that they are unlikely to have incorrectly advised me as they did not know the exact amount of weekly compensation we would be paid … also does not make sense as the compensation payments we eventually received from ACC were the minimum full time weekly compensation that ACC pay out. This means that it is not possible as a full time worker to receive ACC compensation and still qualify for Student Allowance payments. StudyLink staff were obviously not aware of this, and wrongly assumed that our entitlement would be 80% of $400. That StudyLink staff are not aware of ACC's minimum payment amount was confirmed when StudyLink* [in setting out the Ministry's case for the

> Secretary] *wrongly interpreted the amount of ACC compensation paid to us to mean that my husband's pre-injury income was $600 per week … ."*

[19] In addition to the meeting on the 2nd November the appellant also points to the application that was received by StudyLink on the 12th November for a JSSH benefit. In his Partner's Form supporting this application her husband stated that he was "*possibly entitled to ACC payments of $400 per week*" but noted that his claim was currently on hold and was unlikely to be resolved until early in 2016. This notification of the ACC claim was never followed up with the parties.

[20] More generally the appellant says that overall she has "*always kept StudyLink informed of our circumstances and sought advice on how to proceed*". She reiterates that she received her Student Allowance payments in good faith in the belief that she was "*entitled to it after in-depth discussion of our situation with a StudyLink representative",* and says that it was *"the wrong advice I was given [that] directly caused this debt to be established*".

The Ministry's submissions

[21] The Ministry's case is also straightforward. It is clear that the appellant was properly granted a Student Allowance initially at the "*student with dependent partner*" rate on the basis of the party's combined income. The payment of her allowance at this rate for the whole period of study was fully justified in the absence of any information concerning any other source of income that could affect her eligibility. The decision to review and vary the rate of allowance she had received was essentially inevitable once StudyLink became aware of the back payments that had been made in December for the period from 17th August – 29th November 2015. Over that period there is no question that as a result of the ACC payments the parties' combined income was over the threshold and her entitlement reduced to the drastically lower "*student with working partner*" rate. Accordingly, the only question is whether there is anything in the circumstances which would suggest that this debt should now be written-off. On this issue the Ministry first makes its usual submission that decisions concerning debt write-off are not subject to the statutory review process mandated by s 305 of the Education Act 1989. Secondly, again as is usual in cases of this sort, it nevertheless addresses the substance of the write-off issue and argues that the overpayment was not incurred as a result of any error on StudyLink's part.

[22] On the question of the appellant's meetings with StudyLink in early November 2015 and her argument that she either received incorrect advice on the likely impact of any ACC payments, or that she was simply not informed of that impact when she should have been, the Ministry appears to accept that, although "*there are no notes on the system which record the conversation*" some such discussion is likely to have taken place. However, the Ministry denies that any incorrect advice is likely to have been given to her or that she was not given advice that she should have been. It is very clear that at that point, with the ACC claim on hold, and in the absence of any specific information about any payments that might be made and the likely time periods involved, no advice on its impact on her allowance could or would have been given by a StudyLink officer.

> *"The Ministry acknowledges that in November 2015 the appellant informed StudyLink that her husband had applied for ACC. However the appellant could not provide any other information as she herself was not aware:*

- *whether the ACC claim would be accepted*
- *if the claim was accepted what would be the period covered by the compensation and …*

Although StudyLink was informed that the appellant's husband had applied for ACC there was no concrete information available which could be used to assess her entitlement to Student Allowance because the appellant herself did not have the information. In addition the appellant had no other source of income for the relevant period therefore the appellant's allowance payments continued uninterrupted."

Accordingly:

"It is submitted that StudyLink was in no position to provide incorrect advice to the appellant as there was no information supplied by the appellant apart from the fact that her husband had applied for ACC payment. The appellant until end December 2015 did not know the date or amount of claim that would be approved. In the absence of vital information it is highly unlikely that the appellant could have received incorrect advice."

[23] In response to the appellant's general claim of lack of information concerning the impact of the ACC payments on her allowance the Ministry in its supplementary submissions adds two things. First, with reference to her claim that StudyLink should have told her that any ACC payments could affect her allowance, the Ministry notes that at the BRC hearing she *"informed the Committee that she was aware that the ACC payments would "slightly affect her SA rate""*. This is, with all due respect, inaccurate. What the BRC in fact noted was that the appellant said that she was "*told [the] payments would only slightly affect her SA rate"* – which puts a rather different complexion on the matter, and which, if accepted, actually tends to confirm her claims of having been given erroneous advice. Given that she was receiving an allowance with a *"cliff face"* income threshold, any ACC payments her husband received would either not affect her allowance at all or would affect it drastically. Only having a *"slight"* effect was not an option and any advice that it was would be clearly incorrect. Secondly the Ministry seeks to attribute the situation she is now in at least in part to her failure to contact ACC to "*inquire about the possible rate of payment*" – "*if she contacted ACC she would have been made aware that ACC paid a minimum of 80% of the minimum wage. Then she would have been in the position to ascertain the impact of the ACC payment on her Student Allowance*".

Discussion

[24] This is not a case about whether a properly established overpayment should or should not be written off. At no stage were the payments made to the appellant made in error. Based on the couple's declared combined income – which has not been challenged and which in fact drastically reduced as a result of her husband's accident – the payments made to her up until the end of her period of study in November were perfectly proper. Indeed StudyLink was required to make them. Furthermore, as the Ministry points out, at the time they were made they were the only source of income available to the appellant. The payments made by ACC to the appellant's husband which retrospectively rendered her ineligible to receive an allowance at the rate she had been receiving it were essentially made after the completion of her allowance

period and the problems that have now arisen have come about solely because they were backdated. Accordingly, the only basis on which the appellant can challenge the decision to review and vary her allowance entitlement is that the decision to do so in the face of what she says is StudyLink's failure in to advise her properly of the inevitable consequences for her allowance status of continuing to pursue her husband's ACC claim, is unfair and/or unreasonable and hence not a proper exercise of the review discretion conferred by reg 45. Central to this argument is the alleged meeting in early November with a StudyLink representative and the erroneous advice she says she was given at that meeting. This is crucial since at that stage the ACC claim was still on hold and accordingly the situation was still sufficiently fluid for her husband to be able to withdraw his claim and avoid the situation that has now arisen. Accordingly, if this appeal is to succeed, it is necessary to resolve a number of questions:

- Are the appellant's claims concerning the meeting of the 2nd November, and the advice she was given at that meeting, credible?
- If not, should StudyLink nevertheless have advised her and her husband of the implications of a successful ACC claim for her allowance when he gave notice of the claim in support of her JSSH application on the 12th November – and in doing so revealed that he was unaware that if the claim was successful the compensation ACC would be required to pay him would be well in excess of the $400 pw pre-injury income on which the allowance was based?
- If it is accepted that the appellant was in fact given erroneous advice by StudyLink or that proper advice was not given when it should have been, did this advice or the lack of it deprived her of the ability to properly assess and respond to the situation facing her in November 2015?
- If the appellant was in fact given erroneous advice which resulted in her being unable to avoid the situation that occurred, is this sufficient to render the decision to review and vary her allowance entitlement unreasonable?

The meeting with a StudyLink representative in early November

[25] The appellant's main claim is that at the meeting with a StudyLink representative in early November she was advised that, as any payout would simply be a replacement for her husband's pre-injury income – which was well below the allowance threshold – her allowance "*would be fine*" if the ACC claim succeeded. From this she seems to have taken that either her allowance would not be affected at all or, at the most, that it would only be "*slightly"* affected. Neither is correct – the minimum income based ACC payment her husband could receive if the claim was successful was significantly in excess of the combined income threshold and the "*cliff face"* nature of that threshold meant that its effect on her entitlement could never be *"slight"*.

[26] Based on all the material forming part of the Review decision and on the submissions made on this appeal by both the Ministry and the appellant, I accept the appellant's statement that she met with a StudyLink representative in her local office in early November to discuss "*further options"* for support and to explore the implications for her allowance of the ongoing ACC claim. In its submissions the Ministry does not directly dispute that such a meeting could have taken place. It simply notes that there is no record of any such conversation "*on the system*". Whether this means that there is no record of the meeting at all or whether it means that there is a record of the meeting but not of the alleged discussion of the ACC claim (which is essentially how

the appellant describes the record of this meeting that she says she has seen on her file) is unclear. On the other hand, in her various submissions, including those made to the BRC, the appellant provides a credible description of this meeting, strongly suggesting that it in fact occurred. In particular

- she provides a coherent description of the meeting, the necessity for it and the events that led up to it (ie the earlier meeting at which she only had time to deal with the initial JSSH application); and
- she refers to the file entry which appears to record the main business of the claimed meeting (ie seeking assistance with her applications for Temporary Additional Support, an Accommodation Supplement and a Disability Allowance together with advice on renewing her JSSH application for the upcoming vacation period). These applications seem to have been received online by StudyLink the next day which itself lends some credibility to the account.
- In addition, I note that her description of her whole interaction with StudyLink over this period appears to have been accepted as at least credible by the BRC – albeit primarily in the context of her JSSH application rather than the Student Allowance. And the BRC, unlike the Secretary on review, had the advantage of having heard her submissions in person and hence was in a rather better position to assess her claims.

[27] I am also satisfied that the ACC claim was indeed discussed at this meeting as the appellant claims. The appellant would have been well aware that any ACC payments her husband received would count as income and that an income in excess of around $400 pw could well affect her continued receipt of an allowance at the rate she was receiving it. In October she had already made an online application for her allowance to continue in 2016 which was incomplete pending the receipt of income details from her husband and any successful ACC claim would be important for that. It would accordingly be natural for her to wish to explore the impact of any future ACC payments should the claim be accepted in the context of the more general discussion of the possible sources of assistance open to her and her husband. Conversely, there is really no reason why she would have avoided mentioning the ACC claim at this meeting. The meeting was in many ways the first opportunity to discuss the implications of the ACC claim and check what appears to have been appellant's perfectly natural, if incorrect, assumption that any ACC payments that they might eventually receive would be based on her husband's pre-injury income and hence have little or no impact on her allowance entitlement.

The advice received

[28] In relation to the advice the appellant says she received at this meeting the Ministry argues that, even if the matter had been raised with StudyLink, in view of the uncertainties about whether any ACC application would ultimately be accepted, and if so what period it might cover, StudyLink would have only been able to give "*information of a general nature*" to the appellant about its impact. With all due respect to the Ministry, it is, entirely unclear to me what it believes the "*information of a general nature*" in relation to this matter was likely to be. In the circumstances, faced with the obvious uncertainty of the situation and in the context of a direct request from the appellant for some guidance on the likely impact of any earnings-related claim, the appellant's description of the response she received seems to me to be exactly the sort of "*general information*" that a StudyLink staff member would be likely to give. As

discussed above (at [13]) this is supported by the report outlining the Ministry's position prepared for the Secretary at the review stage. In that report the writer accepted that if such a discussion had taken place, the appellant would have been likely to have been told that "*if the payments were the same from ACC as the self declared income then the rate would not [be] affected*", and that "*[g]iven ACC pays at 80% of a person's income, it would also be expected that any ACC income would be lower than what the partner had already declared as his income*". This advice, which would clearly have been incorrect, is essentially what the appellant says she was told. In the circumstances, I am satisfied that her claim that she was advised that "*any potential future ACC payments would not affect my Student Allowance because my partner's income is under the threshold and as ACC payments are a replacement of this income they were fine"* is entirely credible.

The notification of the ACC claim on the 12th November

[29] This renders it unnecessary to discuss whether or not StudyLink can be seen as also at fault in not following up the notice it received of the ACC claim on the 12th in which the appellant's husband gave an estimate of the compensation he believed he could receive which was based on an incorrect view of the way compensation would actually have to be calculated in his case. While there are arguments both ways, if it were necessary to make a decision, my view would be that in the circumstances of this case StudyLink was not under any clear obligation to take steps to immediately follow up and correct this apparent misconception. First, the error is at the most one of omission – it is a simple failure to follow up on the implications of information received rather than the more serious positive provision of incorrect or misleading advice. Secondly, although with the benefit of hindsight it is clear that the statement that he would *"possibly be entitled to ACC payments of $400 per week"* suggests a fundamental misunderstanding of the situation, it is certainly arguable that at the time it was sufficiently ambiguous to excuse StudyLink's failing to follow it up immediately and that by placing the application on hold pending clarification of his income it had done all that could reasonably be expected. In addition, the statement was made in the context of the appellant's JSSH application rather than in relation to her allowance entitlement and, although StudyLink deals with both SA and JSSH applications, the handling of the two areas appears to be distinct so that expecting information given in one area to be followed up in another may well be unrealistic.

The impact of the advice given

[30] The erroneous advice the appellant received from StudyLink and the failure to warn her that, given her husband's declared pre-injury income, a successful ACC claim would require a minimum payment of $472 gross pw and of the impact of this on her allowance, especially as it would inevitably be backdated, had serious consequences for the appellant and her husband. At the time she met with StudyLink in November, the ACC claim was on hold until January 2016 while the medical evidence was being assessed. She and her husband could have decided to withdraw the claim at any time if they had been aware that it could cause the sorts of problems that it now has. To a lesser extent, the same is true in early December when the decision had to be made whether or not to challenge ACC's decision to finally decline the whole claim and terminate the payments that had been being made for the lesser injury. Given that a successful ACC claim would only have delivered a marginally higher weekly payment than remaining on her existing level of allowance (ie an increase in overall income of just under $68 nett pw) a decision to stick with the status quo rather than continue with the claim may well have been more attractive. The money from her allowance had already been received, and was essential to their continued financial survival over the

latter half of the academic year. The substitution of ACC payments for it, while leaving the family slightly better off overall, would have entailed the repayment of her allowance and the establishment of a debt of well over $4,500 that would continue to affect their financial security no matter how generous the repayment options offered by the Ministry. Accordingly, while in retrospect it may be that substituting the ACC payments for her Student Allowance might be seen as the more rational choice, there are certainly good reasons to take the opposite view and, if appraised of the true situation, to decide to forego it. But to assess her options she needed to be aware of the full consequences of a successful ACC application. Once StudyLink had been informed of the claim, it was in a position to provide her with the necessary advice to enable her to make a properly informed choice. It did not do so, not because the information she was asking for was too speculative – as the Ministry suggests – but because the staff member concerned was not aware of the way ACC payments were required to be calculated. If he or she had been, the advice that needed to be given to the appellant would have been both obvious and straightforward.

[31] It is true, as the Ministry says, that she could have raised the matter with ACC at any time if she was concerned about what payments they were likely to receive – although I note that there is nothing to suggest that StudyLink even advised her to do this – and that if she had, she would no doubt have been told that if the application were successful the minimum payment her husband would receive would be $472 gross pw. She would also have been told that it would be backdated – probably to the date of the injury. However, the fact is that she sought advice on the matter from StudyLink and appears to have received a response that accorded with what seems to have been her own assumptions about the way ACC compensation was generally calculated and its consequent likely lack of impact on her allowance. This removed any need to pursue the matter further with ACC itself. Furthermore, her query was in fact a query about her allowance rather than about ACC per se and was, in my view, quite properly directed to StudyLink as the agency responsible for the administration of all aspects of the allowance system.

Does StudyLink's failure to provide proper advice render the subsequent decision to review and vary the appellant's allowance entitlement unreasonable?

[32] The picture that emerges from this – in terms of both the lack of awareness of the fundamentals of ACC compensation among front line staff and more generally within StudyLink, and the lack of proper resources to enable front line staff to identify and deal properly with issues of this sort – is concerning. If the appellant's account is indeed accurate, it is evident that the StudyLink representative failed to recognise the significance of the ACC claim and lacked a proper understanding of the basis on which ACC compensation payments must actually be calculated where a claimant's income is at or below the minimum full time wage – as will always be the case where a student is receiving an allowance at the *"dependent partner"* rate. Whether any guidance on this was available to local staff at the time is unclear but it seems unlikely. It is StudyLink's job to be aware of the possible impact of income derived from other government agencies on allowances, and to be prepared to advise students accordingly. The lack of understanding of the basis on which ACC payments must be made in *"dependent partner"* situations exhibited in this case is unacceptable. In this context the link between accident compensation and student allowance eligibility is a direct one, in the sense that receiving compensation based on the minimum wage is, both in fact and in terms of the policy underlying the *"dependent partner"* entitlement, incompatible with the status of *"dependency"*. Awareness of the minimum wage ACC *"floor"* is, in my view, essential to the day-to-day administration of such allowances and front line staff

need to have the resources available to either accurately respond to the sorts of queries made by the appellant in this case or, at least, to enable them to identify such queries as problematic so as to seek further specialist advice on the client's behalf. Furthermore, as the matter is, in my view, essentially a student allowance one, simply referring students in the appellant's position to ACC for advice is inadequate. It is the implications of any projected ACC pay out for allowance eligibility that need to be spelled out, not just the details of the pay out itself and that is a task that is properly StudyLink's.

[33] The advice to be given in this case was straightforward and did not depend in any way on the ACC claim being finalised. Based on what StudyLink knew about the appellant's current allowance status and what it should have known about ACC, the consequences for her of a successful ACC claim were obvious, unpleasant and unavoidable. They were not speculative. All the appellant had to be told was that if they continued with the ACC claim and it was successful, the minimum weekly payment her husband could receive would push their combined income over the allowable threshold and lead to the downgrading of her entitlement to the much lower *"earning partner"* rate and that, if the compensation was backdated – as it inevitably would be – this would result a debt being established against her for the bulk of the allowance payments she had already received.

[34] In my view it is incompatible with StudyLink's obligations to its clientele to argue, as the Ministry essentially does, that the only point at which StudyLink should be expected to provide advice in such cases is once compensation has been approved and the payment details have been finalised. By then in situations like this it is simply too late for the student to avoid the consequential loss of their allowance and all that might imply in terms of the creation of debt. Apart from anything else, any attempt to decline ACC payments once they have been approved risks falling foul of the *"deprivation of income"* provisions of reg 44. And the only *"advice"* StudyLink can sensibly give once the ACC payments have been finalised is as to the size of the resulting debt and the ways in which it can be paid off – which is no help to anyone.

[35] In the circumstances of this case the erroneous advice provided by StudyLink in early November is more than sufficient to render the subsequent decision to review and vary her entitlement unreasonable. The obligation on StudyLink to provide accurate and comprehensive advice in such situations is a heavy one, and the consequences of failing to provide such advice in this case were serious, saddling an already vulnerable student and her family with an unanticipated and substantial debt. Furthermore, this is not a case in which the appellant can be readily seen as being at fault in relation to the creation of the overpayment. Prior to ACC approving the initial payments – which did not happen until the end of November – she was, in my view, under no obligation to report the claim to StudyLink. Under reg 41 her obligation was to report any change in her or her husband's circumstances *"of such a nature that it affects or may affect"* her entitlement. First, it is arguable that simply making a claim for compensation is not something that in itself *"affects or may affect"* her entitlement – especially where, as here, it was immediately put on hold until the end of January 2016. Secondly, the requirement under reg 41 is that the student knows or suspects, or at least ought to know, that the circumstance that has arisen might affect their allowance. Prior to the end of November, when the first ACC payments were approved, she clearly believed that any compensation they might receive would be less than her husband's pre-injury income and accordingly would have no effect on her entitlement. This belief was reinforced by the advice she received from StudyLink. Furthermore, even if she had

reported the claim when it was lodged in October and had regularly reported its progress to StudyLink there is no reason to believe that the outcome would have been any different. There was nothing StudyLink could have done with the information to either confirm or vary her entitlement and it would simply have been recorded. It is true that at the end of November when ACC made the initial pay out, the appellant did not notify StudyLink of the resulting change in their combined income or of the fact that it had been backdated. Her obligation to do so was clear and there is no question that she was at fault in not doing so. However, this only arose essentially after her allowance period had ended, and when it was already too late to avoid the overpayment, and cannot detract from StudyLink's earlier erroneous advice which was the direct cause of that overpayment.

The appeal is upheld. The decision of the Secretary on review to confirm the decision by StudyLink to review and vary the appellant's allowance from the "*student with dependent partner"* rate to the "*student with earning partner"* rate for the period 17/08−29/11/2015 and to establish an overpayment of $4,684.20 as a consequence is quashed.

DATED at WELLINGTON this 18th day of May 2017

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Neil Cameron
Student Allowance Appeal Authority