Decision No. [2017] NZSAAA 04

Reference No. SAA 3/17

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

AND

IN THE MATTER of an appeal by **XXXX** of Christchurch 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 dismissed

REASONS

Overview

[1] This is an appeal against the decision of the Secretary on Review to confirm the decision by StudyLink to decline the appellant's student allowance application for study in 2017 on the grounds that she had exhausted her allowance entitlement, having reached the 120 week limit applying to her situation.

The issue on appeal

[2] The issue on appeal is whether the application of the 120 week limit to the appellant in 2017 on the basis that at the time of her enrolment she was over 40 years of age is correct.

Factual background

[3] The appellant is 46 years of age. In January 2017 she decided to return to university study, applying for a Student Allowance for the 2017 academic year. Prior to 2017 she had already received a Student Allowance for the following periods of study:

Education Provider	Year of study	Course studied	Allowance payment (weeks)
Massey University	1996	Unknown	40
Massey University	1997	Unknown	40
Massey University	1998	Unknown	40
Massey University	2000	Bachelor of Social Work	38
Massey University	2003	Bachelor of Social Work	15
TOTAL			**173**

[4] Her application was declined as she had already exceeded the 120 week limit which came into force in 2014 for students 40 years old or more at the time of enrolment. Previously, and indeed over the whole period when she was studying at Massey University, her entitlement would have been 200 weeks. At the end of January 2017 she applied to review this decision. In February she was informed of the options available to her to have her application dealt with – either by way of a Student Allowance Review Panel hearing or by the Secretary on the papers. The appellant indicated that she wanted the case dealt with by way of a hearing. She was accordingly sent a request to provide the necessary waiver to permit a NZUSA representative to attend the hearing. She declined to sign this waiver describing it as unlawful and unprofessional and indicating that she objected to being asked to sign it under duress – ie the indication that if she did not sign the waiver a hearing could not be held. After a short correspondence, the Ministry suggested an alternative procedure since in the absence of a signed waiver the hearing could not be held in its usual form as her private information could not be given to the NZUSA representative without her permission. It was agreed that she should have a one-on-one meeting with the Secretary dealing with the file and at that meeting would be able to make further submissions and discuss any issues she wished to raise. She agreed to this arrangement and a meeting was eventually held in early April 2017 at which she presented her case to the Secretary. In mid-April the Secretary upheld the original decision to decline her allowance application, confirming that the 120 week limit was applicable to her and that, because she had already had 173 weeks of allowance she had reached that limit. In early May the appellant appealed to this Authority arguing that the refusal to grant her an allowance was discriminatory as it was posited purely on her age, and that the review process that she had gone through was unfair in that in the person of the Secretary the Ministry was simply reviewing its own decisions and was accordingly subject to a conflict of interest. In her submission she also states that throughout the process she has been subjected to *"structural violence"* by the Ministry of Social Development and other government departments.

Relevant legislation

[5] Regulation 20(1)(b) of the Student Allowances Regulations 1998 provides that no student is eligible to receive a Student Allowance for more than 120 weeks of

study for any *"recognised course or courses of study"* that commence on or after the 1st January 2014 *"and at the commencement of which the student is of or over the age of 40 years"*.

[6] This limit is subject to the usual exception permitting its extension in any particular case in which the Secretary considers that *"special circumstances"* exist justifying an extension (see reg 20(7), (7A)).

[7] In [2016] NZSAAA 1 at [14] the Authority held that reg 20(1):

> *"Applies to any student over the age of 40 seeking an allowance for any course or courses undertaken after the 1st January 2014 irrespective of when and at what age they commenced the qualification of which that course is a part."*

Accordingly, the fact that the appellant had enrolled for a range of other courses and qualifications prior to 2003 – and at that stage had a 200 week entitlement – is irrelevant to her entitlement in 2017. There is no question that when she applied for an allowance for 2017 she was subject to the 120 week limit and, absent *"special circumstances"*, was no longer eligible for allowance assistance.

The Secretary's decision

[8] In confirming the original decision, the Secretary notes what appears to have been a reasonably lengthy discussion with the appellant about the application of reg 20(1) to her case at the end of which the appellant appears to have accepted that she fell within the terms of the regulation and that her entitlement was accordingly limited to 120 weeks which had already been exhausted. Accordingly, in his view the only question remaining is whether there are any special circumstances that would allow the Chief Executive to exercise *"the limited discretion"* to extend her eligibility. Consistent with the Ministry's operational policy special circumstances in this context essentially means personal circumstances, generally beyond the student's control, that have prevented that student completing their chosen course of study within the applicable allowance eligibility limit. The Secretary is clear that no such circumstances exist in this case – nor indeed had any been claimed by the appellant in either her submissions or in her contributions at the meeting. The original decision to decline her application was accordingly correct.

[9] Finally, on the issue of discrimination based simply on age, he says:

> *"The role of the Secretary is to independently review the decision made by the Ministry to ensure that correct and fair decisions have been made in accordance with the law governing Student Allowance entitlement. This process requires me to either confirm the decision made or substitute it for any other decision that the person might have made. It does not permit me to substitute my will over that the legislature or direct the Ministry to make a decision that contravenes the Regulations. It is not for me to judge the quality of the enactment itself; only that the decision reached was done so "in accordance with it". If the applicant wishes to pursue her argument in regards to discrimination on the basis of age she is free to do so in the proper jurisdiction. I make no other comment in regards to the merits of her argument other than to highlight that an entitlement decision made with regards to age is not peculiar or unique to the Student Allowance Regulations and that the law*

does permit actions that would otherwise amount to unlawful discrimination to stand where they are justifiable."

The basis for this appeal

[10] From the Secretary's decision it is clear that the appellant now accepts that she is subject to the 120 week eligibility limit in reg 20(1)(b). Furthermore, at no point in her submissions, either in the course of the review or on this appeal, does she suggest in any way that her case is one in which *"special circumstances"* would justify an extension of her eligibility. It is true that in her submissions at both stages of the process she emphasises the financial hardships she is facing – and has indeed faced for a number of years – and the inexorable growth of her Student Loan debt but this is not advanced as a *"special circumstances"* argument in any sense and would not, in any case, be of any assistance to her as a special circumstances argument since financial hardship in itself cannot trigger the discretion.

[11] Accordingly, the only real basis for this appeal now put forward by the appellant is that the regulation amounts to unjustified discrimination against her:

> *"Regulations which require a reduced timeframe for a person of 40 years or older to receive a Student Allowance … is discrimination based on age. As such, the applicant is the victim of discrimination based on her age."*

[12] In addition, she appears to argue that the limitation on allowance eligibility based on age in the Regulations is unlawful in that it is not only discriminatory, but is also unauthorised by the Education Act 1989 – it is, in other words, ultra vires that legislation. In developing this argument she starts with the supremacy of Parliament and argues that "*Regulations and Policy are not on the same level in the hierarchy of law, as legislation"* and states:

> *"That the Education Act 1989 does not state anywhere, that there is –*
>
> *(a) A time limit for which Student Allowance shall apply or*
> *(b) That there should be any legal discrimination against any person who makes application for Student Allowance."*

[13] In this context she also states that she has been the victim of *"structural violence"* from the Ministry of Social Development *"since 2010"*. It is somewhat unclear from her submissions what she means by this, but it appears that what she is saying is she has suffered injury in this particular at least by being denied access to education and other resources by a discriminatory process related to her status.

[14] Finally, she also describes the review process to which she has been subjected as unfair:

> *"… the Ministry of Social Development decision to:*
>
> *(a) Review a decision that a member of its own staff had made, and*
> *(b) To assert that it could be a fair hearing where the person sitting in judgment and the respondent are employed by the same organisation, is clearly a Conflict of Interests. As such the applicant does not believe that she has had a fair hearing or a fair review of decision, prior to this matter coming before the Student Allowance Appeal Authority."*

It is somewhat unclear, however, whether this criticism is being advanced as a ground of appeal in the sense that some remedy is being asked for, or whether it is simply an observation on the process to which she has been subject so far.

The Ministry's submissions

[15] In its Regulation 37(2) Report the Ministry emphasises that the appellant falls squarely within reg 20(1)(b) in that she commenced her current course of study after the 1st January 2014 when she was over 40 years of age. In doing so the Ministry emphasises that the information concerning eligibility was available to her at the time on the StudyLink website. The Ministry also notes that this is not a case in which there is anything in the appellant's submissions to indicate that there are any special circumstances that could justify any extension to her allowance entitlement and also makes it clear that her unfortunate financial circumstances alone cannot be taken into consideration in this regard.

[16] Insofar as the appellant's argument in terms of discrimination are concerned the Ministry essentially repeats the comments made by the Secretary on review to the effect that neither the review process nor the Student Allowance Appeal Authority are appropriate vehicles for dealing with issues of this sort. Furthermore, the Ministry points out that the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 are not *"supreme law"* and do not override *"other, conflicting legislation"*. In response to the appellant's criticism of the review process as unfair the Ministry simply emphasises the authority given to the Secretary to conduct the review process under the Regulations, and emphasises the independence of the Secretary in the sense of having had no prior involvement or contact with the decision being reviewed.

Discussion

[17] When the appellant commenced her university study in 1996 she was entitled to up to 200 weeks of Student Allowance. This was the entitlement of all students enrolling at that time irrespective of age. In 2013 this changed as part of a reform package aimed at restricting access to allowance support for some groups and better targeting that support. As a consequence, when she came to recommence university study in 2017 she found that her eligibility had been reduced to 120 weeks because she was now over the age of 40. As she had already received 173 weeks of allowance assistance her application for an allowance for 2017 was declined and she was obliged to rely simply on Student Loan support. Understandably this has produced a sense of grievance and unfairness and a feeling that she is being discriminated against simply on the basis of her age.

[18] Unfortunately, whatever one's views of her situation and of the loss of allowance entitlement as a result of her age, the legislation making these changes is quite clear and is without doubt directly applicable to her. Under reg 20(1)(b) she is entitled to 120 weeks of supported study and she has exceeded that limit already. Both the original decision maker and the Secretary on review are clearly correct in this regard.

[19] It is also quite clear that no exception can be made in her case in recognition of any *"special circumstances"* that might exist. As the Secretary emphasises in his review decision, at no stage in her earlier submissions does she seek in any way to

make out a case for an exception of this sort to be made and the issue has not been raised by her on this appeal either.

[20] Insofar as the question of discrimination is concerned the Authority is in exactly the same position in this regard as both the Ministry and the Secretary. Clearly reg 20 discriminates between different groups of students purely on the basis of age. The appellant is undoubtedly correct in this. However, it does so quite clearly and as a matter of very clearly articulated government policy and it leaves absolutely no basis on which either the Ministry or the Authority can modify the result. Although as subordinate legislation regulations are not vetted for compliance with the New Zealand Bill of Rights Act 1990 in the same way as Acts of Parliament, this particular change was introduced as part of the 2013 Budget and was fully debated in the House. As both the Ministry and the Secretary on review have made clear to the appellant the appropriate avenue for addressing her complaint is for her to raise it with the Human Rights Commission. And both the Ministry and the Secretary have provided her with the relevant information to enable her to do so if she should so wish. Furthermore, in this context it is also important to reiterate the Secretary's comment that provisions such as the one the appellant complains of are *"not peculiar or unique to the Student Allowances Regulations"*; and to emphasise that there are in fact many situations in which *"the law does permit actions that would otherwise amount to unlawful discrimination to stand where they are justifiable"*.

[21] Nor are the regulations implementing these changes ultra vires the Education Act 1989 – either in implementing time limits on allowance entitlement or in linking those limits to age or other criteria the Government of the day might consider appropriate. The regulation making power conferred by section 303(1) of that Act is both general and clear – any regulations necessary may be made "establishing allowances to help people pursue courses of education or training". And, in the absence of infinite resources, it is inherent in this that the regulation making body must have the power to limit availability where it is deemed appropriate to do so.

[22] Insofar as I understand the appellant's *"structural violence"* argument the response is essentially the same. Neither the review process nor this appeal are appropriate fora for challenging issues of this sort.

[23] Finally, I reject the appellant's characterisation of the review process as unfair and less than independent. Firstly, the procedures provided by the Education Act 1989 make no bones of the fact that the first stage of the process, as with any other complaint involving a government entity (and as with most similar disputes in the private sector) is an internal one. There are obvious reasons for this and many, if not most disputes are satisfactorily resolved at this stage. Any such review can only be conducted by Ministry staff, reliant on reports prepared by other Ministry staff. The protections for the complainant are threefold. First, the staff member conducting the review, and indeed the staff members preparing the paperwork for it, are "independent" actors in the sense that they have had no prior involvement with the case and generally no part in making the initial decision. Secondly, the person seeking the review has access to all the relevant papers and can present their case either in writing or in person. Indeed in this case the Secretary has gone to considerable pains to modify the hearing procedure that is normally followed to accommodate the appellant's position. So far as I am aware the procedure he adopted is unusual, if not unprecedented, and in this case it appears to have been successful in terms of the treatment of the issues and the clarification of the situation. The resulting review

decision by the Secretary was, with all due respect, comprehensive and sensitive to the appellant's concerns and situation. Thirdly, the legislation provides for appeals to an independent, outside body which is not beholden in any way to the Ministry of Social Development if it cannot be satisfactorily resolved internally. The process the appellant has gone through so far has no doubt been stressful, frustrating and time consuming but it was not *"unfair"*. She has had every opportunity to present her case and have it heard and considered. Indeed she has done so.

The appeal is dismissed. The decision of the Secretary on review to uphold StudyLink's decision to decline the appellant's Student Allowance application for the 2017 academic year because she had exhausted her allowance eligibility is upheld.

DATED at WELLINGTON this 10th day of October 2017

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Neil Cameron
Student Allowance Appeal Authority