Decision No. [2018] NZSAAA 2

Reference No. SAA 5/17

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

AND

IN THE MATTER of an appeal 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 to uphold StudyLink's decision to retrospectively decline the appellant's Student Allowance for the second half of 2016 due to his failure to pass more than half of a full-time course in the most recent course of study for which he received an allowance and to establish an overpayment of $4,752.47 against him as a result.

The issue on appeal

[2] The issue on appeal is whether the appellant's withdrawal from his course in the first half of 2016, for which he was receiving a Student Allowance, which resulted in his failing to pass more than half of a full-time course in that period of study was "*due to reasons beyond* [his] *control*" within reg 30(2)(a) of the Student Allowances Regulations 1998.

Factual background

[3] In January 2016 the appellant applied for and was approved an allowance to cover study for a Bachelor of Film Arts (BFA) for the 2016 academic year. His 2016 programme appears to have consisted of three courses, taught consecutively over three semesters. Unfortunately towards the end of the first course (*"Industry Perspectives, Issues and Research Techniques"*) he withdrew from both the course and the degree. At the time he withdrew he had satisfactorily completed three of the five course assessments required and, as his Provider put it, was *"up to date and fully meeting the requirements of the programme"*. Despite this, his withdrawal meant that he failed the paper, losing the credits it would have given him and falling foul of the performance requirement in reg 30(1) (see [11] below).

[4] It is safe to say that the teaching and content of the *"Industry Perspectives"* course was, from its inception, the subject of considerable student dissatisfaction. In early April this came to a head, with the whole class writing a letter to the Provider expressing their concerns. The Provider responded immediately, reviewing the course materials and teaching, and consulting with members of the class and staff. In early May it formally responded, accepting that a number of areas *"require(d) attention"* and detailing the steps that would be taken to try and address them. In particular, it was recognised that class concerns about the timetable and course content, and about the absence of specialist and film industry input, needed to be dealt with. Although it is not altogether clear from the appeal file, it appears that this response largely defused the situation. Certainly most, if not all, of the other students continued with the programme. Of the 11 or so students enrolled, the Provider says that so far as it was aware the appellant was the only student to withdraw from the course. On the other hand at the Review hearing the appellant disputed this, stating that he knew of three other students who had withdrawn as a result of the issues raised.

[5] The appellant formally withdrew on the 16th May. StudyLink was duly informed of this by the Provider and on the 18th suspended his allowance and sent him the standard letter advising him that this might affect his future allowance eligibility. In particular the letter stated – somewhat inaccurately – that he could only be considered for another allowance if he had passed more than half the *"full-time tertiary course, you were receiving Student Allowance for"* unless he *"didn't pass because of a reason beyond your control"*.

[6] Prior to his withdrawal the appellant had discussed the issue of withdrawal and the possibility of a fees refund with his Provider. He was advised that he was not entitled to a refund as he was well outside the eight day withdrawal period. In April and early May he also contacted StudyLink – three times by phone and once by email – seeking advice on his eligibility for a fees refund and asking about his Student Loan and Allowance status. While the contemporaneous record of the three phone contacts leaves a lot to be desired, on at least two occasions he appears to have been advised that if he withdrew it could affect his future loan and allowance eligibility and at least some reference was made to the performance criteria that would be applied. Specifically on the 18th April, in response to his saying that he was planning to withdraw "*due to health [and] personal issues",* he was advised that he would *"have to let us know if withdrawing, EFTS will be ocunted* (sic – "counted"?) *if full refund not reced amy* (sic – "may"?) *affect future study for performance testing, if RBC (*ie reasons beyond his control) *will need to provide evid."* This advice, although given in the context of a query about his Loan status, appears to focus on the consequences of withdrawal on his *"future study"* generally and accurately reflects the significance of EFTS as an indication of acceptable academic performance. To similar effect when he called twice about his Loan/Allowance status on the 12th May he was again given general advice about the possible effects of his proposed withdrawal. In particular on the second occasion – which is specifically described as a query about his allowance – the notes record that he was told that his allowance was currently approved and, in the event of withdrawal, was *"advised how SA works for passing more than half"*. What that advice consisted of is unclear. In what appears to be a reference to this conversation, the appellant says that he was told that if he had passed more than half of the *"assessments"* he had completed (which he had) he would meet the performance requirement. The Ministry, while not denying that he may have believed this to be the case, denies that any such advice would have been given.

[7] On the 16th May, in addition to formally notifying his Provider of his withdrawal, he contacted StudyLink by email seeking advice on its refusal to refund his fees. It is clear, both from the timing of the email and the way the request for advice is couched, that even if

the email was sent before he formally withdrew, he already regarded it as a fait accompli. Certainly he did not wait for StudyLink to reply to his query. When StudyLink did reply on the 23rd it not surprisingly focused on the fees question, advising him of his Provider's right to retain his fees subject to their having delivered the course *"as promised"*, outlining the implications his withdrawal might have for any future Loan entitlement and inviting him to supply details of the reasons behind his decision to withdraw in case his entitlement became an issue in the future.

[8] Subsequently he challenged his Provider's refusal to refund his fees with the aid of the local Community Legal Services Trust primarily on the basis that the delivery of the course, with its lack of a specific focus on film, breached an essential term of his contract (s 7 of the Contractual Remedies Act 1979) and rendered the course *"not reasonably fit for purpose"* (s 29 of the Consumer Guarantees Act 1993). In mid September the parties reached a confidential settlement with the Provider refunding the disputed fees in full.

[9] At the end of May the appellant re-enrolled in a Certificate in Applied Small Business Growth and Development with a different provider and applied for an allowance to cover the second half of 2016. In his application he stated (incorrectly) that he had not been in receipt of a Student Allowance previously and was accordingly not asked about his previous academic performance. StudyLink sought to access his results via the results matching process with the Ministry of Education. This was necessary because his failure to answer the previous study/Student Allowance question correctly on his application meant that, although StudyLink was aware that he had withdrawn from his previous course, it was unable to verify whether this meant that he had failed more than half a full-time course or whether he had in fact, for example, passed his first paper before he withdrew – which would have given him 0.333 EFTS thus satisfying the more than half requirement. In the meantime, in order to ensure that he continued to receive financial assistance, his application was approved subject to the usual warning that if it transpired that he had not passed *"more than half of the last full-time tertiary course you got a Student Allowance for"* his allowance would be cancelled and he might end up having to repay any payments that he had received. In late September the Ministry of Education confirmed that he had failed his first half year paper. At the end of October his ongoing entitlement was assessed, his allowance was duly declined and an overpayment of $4,752.47 was established.

[10] In mid December 2016, he challenged this decision citing the content and delivery issues raised with the Provider in April as justifying his withdrawal from the course due to *"circumstances beyond his control"*. A review hearing was held on the 15th June 2017. Both the appellant and his solicitor attended and made submissions. On the 21st June the Secretary upheld the decision and on the 12th July the appellant appealed to this Authority.

Relevant Legislation and Policy

[11] Regulation 30(1) of the Student Allowances Regulations 1998 provides that any allowance "*must be suspended if the amount of work (if any) passed by the recipient in the most recent course of study for which an allowance was paid was … in the opinion of the chief executive, equivalent to half or less than half of a full-time course*". However clause (2)(a) provides an exception where the chief executive "*is satisfied that the failure of the recipient … is due to reasons beyond the recipient's control*".

[12] Unlike in a number of other situations under the Regulations, suspension of an allowance under this provision is mandatory. Once it is determined that for the relevant study period the student has failed half or more of a full-time course the allowance *"must be*

suspended" whether or not it is, in a broader sense, fair or equitable to do so. The Regulations, in other words, do not provide the chief executive with anything approaching a general discretion, permitting continuation of an allowance in such cases only in the very narrow circumstance of the failure being due to *"reasons beyond the recipient's control*".

[13] Whether or not a student has passed more than half a full-time course depends on the Equivalent Full Time Student (EFTS) value of the courses a student has passed relative to the EFTS value of a full-time course for the programme being undertaken. In the appellant's case he had enrolled for courses with an EFTS value of 1.0 over the study period January–November 2016. The programme he had enrolled for seems to have consisted of three courses delivered over three semesters. Applying the EFTS formula to his enrolment, he needed to pass more than 0.2 EFTS in order to retain eligibility. In fact the course he was undertaking in the first semester would, on its own, have given him 0.333 EFTS if he had passed it. His failure to complete it meant that he received none.

[14] Where the reg 30(2)(a) exception is raised StudyLink guidelines provide that *"reasons beyond* [the student's] *control"*

> *"May include but are not limited to:*
>
> - *medical, social or psychological reasons which prevented the student passing their course …*
> - *course cancellation – where the education Provider has cancelled or changed the course or withdrawn tuition*
>
> *Financial hardship is not in itself an acceptable circumstance."*

In relation to "*course cancellation*" the guidelines state that acceptable evidence of such issues "*may include*"

> *"a statement by their education Provider advising of a change in the course, withdrawal of tuition etc. which was not initiated by the student and which made it impossible for them to complete the course."*

[15] Similarly in its online advice to students StudyLink describes the discretion generally as covering situations where you have *"had something significant happen in your life that means you failed your course"* and by way of example says:

> *"It could be that you had a serious:*
>
> - *Illness that put you out of action for some time (eg, glandular fever)*
> - *Accident and ended up in hospital for a while.*
>
> *Or you may have other special circumstances, eg you've been in a Civil Defence emergency, like a flood or earthquake.*
>
> *It doesn't include reasons like: …*
>
> - *you weren't interested in the course.*"

[16] Consistent with the absolute wording of the performance requirement in reg 30(1), both the internal guidelines and the advice given to students emphasise the limited nature of the reg 30(2)(a) discretion. To qualify as an exception the circumstance(s) must be outside the student's control and must prevent the student meeting the requirement. Where, as here, failure is due to withdrawal, the circumstances – be they illness, family crisis, external events or issues with either an individual course or the programme as a whole – must essentially render it impossible for the student to complete the course as planned. In this context it is significant that in the StudyLink guidelines the *"change*(s) *to the course"* ground forms part of a wider *"course cancellation"* ground and must be both attested to by the provider and render completion of the original course *"impossible"*. This again is consistent with the intent of the regulation. It suggests that, generally at least, only a change in the course amounting to the substitution of a new and different course will suffice. The fact that a course fails to live up to its prospectus, partially duplicates some other course or wanders into areas that the student was not warned about and did not expect will not suffice. Such a course remains the original course and it is perfectly possible for the student to complete it despite its failings.

The Secretary's Decision

[17] The Secretary identifies the key issue as whether the decision to withdraw was one that was *"freely entered into by the applicant or … as he submits a forced consequence of the Provider failure to deliver the programme he was promised".* In concluding that it was the former, he rejects the appellant's argument that, as the fees settlement with his Provider shows, the delivery of the course was so defective that it amounted to a *"breach of an essential condition"* of his enrolment contract that was so *"fundamental and egregious that he was compelled to withdraw"*. First, the settlement reached by the parties is not proof that his claims were justified and may well have occurred, as such settlements generally do, for reasons unrelated to the merits of his claim. Secondly, the Provider's failures were not, in any event sufficient to render withdrawal the only reasonable option:

> *"Subjectively the applicant may have felt that the programme was not meeting his specific needs but objectively I find that it came down to a matter of choice. In reaching that conclusion I make no judgement about the decision itself. He was clearly unhappy with the course content and was free to make any choice he desired. The applicant was able to balance out the various considerations and determine whether it was in his best interests to remain on the programme or withdraw; with both options open to him and both having their relative merits and consequences. The education Provider responded to concerns raised by the class, took steps to address those concerns and encouraged the applicant to continue. Continuing with* [the] *programme was a reasonably available option available to him. Indeed, having already achieved 47% based on the assessments completed at the time of withdrawal it seems very likely that not much more was required of him to successfully complete the first course."*

[18] As regards the advice the appellant says he received from StudyLink that provided he had passed more than half of his *"assessments"* his withdrawal would not create any problems for his allowance status, the Secretary emphasises that there is simply "*no evidence*" of any such advice being given. Rather, given that it would be "*clearly inconsistent with requirements of reg 30*" and with both the clear guidelines given on the StudyLink website and in its training material, there is good reason to suppose that it was unlikely to have been.

[19] More generally the Secretary also concludes that in any event, irrespective of the outcome on the *"circumstances beyond control"* point, the reason the appellant now finds himself having to repay his allowance is the result of his failure to complete his allowance application for the second half of 2016 accurately:

> "*Notwithstanding the application or non-application of the reasons beyond control discretion, the reason the applicant finds himself now with a debt are due less to his decision to withdraw and more to his failure to accurately declare his correct circumstances. The question "have you at any time … received a student allowance?" is one that is simply framed and difficult to imagine erroneous interpretations. It simply asks the reader to recall if they have ever received a student allowance since a certain date. In the applicant's case the answer should have been yes. In fact the applicant had applied for a student allowance four times previously and received it on three of those occasions.*
>
> *The applicant is unsure why he answered 'no' instead of 'yes' having been plainly aware of the correct answer. The only explanation offered was that he completed the application in a hurry and made a mistake. That explanation is in my view unsatisfactory. It is incumbent on any person completing such an application to exercise due care to ensure that their answers are correct and not misleading to the best of their knowledge and belief."*

The significance of the previous allowance question in the online application is that ticking *"yes"* reveals a follow-up question asking whether the applicant has passed more than half of *"your previous full-time course"*. Since, whatever his beliefs about the significance of his having passed three of the five in-course assessments, he was well aware that by his withdrawal he had failed his *"previous full-time course"* in its entirety he would have had to answer *"no"* to this – with the result that his application would have been declined and "*the Ministry would not have begun payments that may eventually need to be returned."*

The Basis for this Appeal

[20] As he has done throughout, the appellant relies on two reasonably distinct arguments. First he attributes his withdrawal/failure to the problems that arose with the delivery, content and resourcing of the course he was enrolled in. His decision to withdraw *"was the direct result of serious issues with the course. These issues caused detriment to* [him] *and were beyond his control."* Secondly he makes what appears to be a general unfairness argument based on the incorrect advice he says he received from StudyLink "*that he needed to pass more than half of the assessments that he sat*" saying that he withdrew in reliance on this advice and implicitly arguing that he should not now be disadvantaged/punished for doing so.

[21] On the central *"reasons beyond control"* question, he rejects the Secretary's conclusion that continuing with his studies was in the circumstances "*a reasonably available option*". First, he reiterates his view that the course offered by his Provider was so fundamentally different from what he had been promised and had signed up for that his decision to withdraw was essentially the only option open to him. In particular, having already completed a preliminary Diploma in Film Making, which had a significant audio component, he had enrolled for a degree in film arts and had, due to staffing and other issues, ended up covering things he had already covered in the Diploma and being *"taught audio instead"*. In support of this he cites the class wide complaint in early April, the Provider's acknowledgement of the seriousness of their concerns and its promise to address them. He also emphasises the

fact that he ultimately received a settlement resulting in a full fees refund despite having completed over a third of the course. In his view, this settlement, based as it was on his assertion that the course, as delivered breached both the Contractual Remedies Act 1979 and the Consumer Guarantees Act 1993, shows clearly that there was *"something fundamentally wrong with the service"* he received, and *"should be taken as conclusive of the fact that the issues with the course were not of his doing, and were beyond his control"*.

[22] In addition he makes a number of subsidiary arguments:

- First, due to the way the course was being taught he had "*suffered a detriment and had a legal remedy*". This means that if he continued with the course, he would, in his view, suffer a further detriment in that he would lose what he regards as his right to a full fee refund. Accordingly continuing with his studies was not a reasonable option since "*it cannot be said that an option is reasonably available to someone, if taking that option means foregoing their legal avenues to remedy a wrong done to them*".

- Secondly the detriment he suffered was ongoing and "*irremediable*". Even if his Provider took effective steps to remedy the situation for the remainder of the course he would *"still have suffered the detriment of having three months without teaching on the subject … enrolled in*".

- In addition in any case *"there was a real and justified risk that the school would not be able to rectify issues".* The Provider had been aware of the issues that came to a head in April/May from the start of the course and had taken no steps to deal with it. Remaining in the course would require him "*to spend further time in the course, which had the real potential to cause even further detriment*".

[23] He also takes issue with the Secretary's rejection of his claim that prior to his withdrawal he was advised by StudyLink that he would meet the allowance performance requirements provided he had *"passed more than half the assessments that he sat"* – which he had. While it is somewhat unclear whether he sees this advice as another circumstance beyond his control contributing to his decision to withdraw, or whether the argument is more one of general unfairness that would be more relevant to the question of whether the debt should be enforced, he argues that the Secretary has essentially applied too high a standard of proof to the factual issue underlying it. In the absence of any proper contemporaneous notes he says that *"on the balance of probabilities, it should be accepted a Ministry representative told* [him] *that he needed to pass more than half of the assessments he had completed, and that* [he] *relied on this information."* In his view it is entirely feasible that the staff member involved could well have mischaracterised the "*passing more than half*" requirement. Indeed his subsequent withdrawal from the course in a context in which he was trying to *"make sure that he was doing everything properly"* indicates that he clearly understood it in the way he claims which in itself suggests that that was what he was in fact told. In addition he notes the complexity of the policy which seems to require quite elaborate explanation in the material available to students, and suggests that the staff member dealing with student queries may well have been relatively young and inexperienced and accordingly, presumably, less at ease with the requirements than he or she should have been.

[24] Finally, in response to the Secretary's criticism of his failure to complete his subsequent allowance application correctly, he says that he completed it in a hurry and missed the question and that due to the advice he had received even if he had answered it correctly

and had then been asked if he had passed more than half of his previous course he would have said that he had – producing the same outcome.

The Ministry's Regulation 37(2) report

[25] The Ministry essentially adopts the findings made by the Secretary, arguing that the appellant's decision to withdraw was an exercise of choice on his part and that the reason for the debt now established against him is his failure to notify StudyLink of his true position when he applied for an allowance for the second half of 2016.

[26] In accepting the Secretary's view that the appellant's withdrawal from his course was essentially the product of his personal dissatisfaction with its direction and teaching rather than a response to fundamental problems with it that rendered it impossible for him to continue in his studies, the Ministry emphasises that the *"reasons beyond control"* discretion is one which can be exercised only in cases where circumstances independent of the student actually prevent completion of the course. Here:

> *"From the evidence provided by the appellant there is no evidence that the appellant could not complete his course. The appellant decided to withdraw from the course even though he was meeting the course requirements. … the evidence provided indicates there were concerns from the students about the delivery of the course. The issues were addressed by the education Provider and the course continued to be delivered. The appellants decision to withdraw indicates the withdrawal was a personal choice and not for reasons beyond his control such as medical or health reasons which may have prevented him from being able to complete course requirements."*

This conclusion is supported by the evidence received from the Provider that no other students appear to have withdrawn from the course as a result of the problems identified in the letter of complaint.

[27] Insofar as the significance of the settlement reached between the appellant and the Provider is concerned, the Ministry also accepts the Secretary's view that it is essentially irrelevant to the determination of the issue. And as to whether the appellant might have been misled by any advice he received from StudyLink, it says that:

> "*it is unlikely the appellant would have been advised that he had to pass more than half of his assessments. StudyLink does not use the word assessments when referring to the passing more than half requirement. All of StudyLink's correspondence and internal communication refers to the course(s). All communication, even communication with the Providers (which is outside the Ministry's control) refers to course, programmes and qualifications. The term 'assessment' is not used in this context whatsoever."*

[28] Finally on the question of the overpayment, the Ministry emphasises that it was made as a result of the appellant's failure to declare his previous allowance history in his application, and adds that he was advised very clearly that the grant of his allowance was provisional and that it would be reviewed if it later transpired that he *"didn't pass more than half of the last full-time tertiary course"* that he received an allowance for.

Discussion

[29] The key issue is whether the appellant's withdrawal from his course in the first half of the year was the result of *"reasons beyond [his] control"*, or whether he was simply exercising the choice available to any student to withdraw from courses/programmes that do not live up to their expectations or that they no longer feel are meeting their needs. It is clear that the requirement that in order to maintain eligibility for support, a student must maintain a successful academic record is an essential component of any sensible student support policy. And that passing more than half of a full-time course is not a particularly onerous requirement. Nor is it one that is hard to understand. Unsurprisingly, therefore, reg 30(1) is expressed in absolute terms and the single exception provided by 30(2)(a) is a narrow one. In this context the policy guidelines formulated by the Ministry, emphasising that, at least ordinarily, only students who have been prevented from achieving the required academic threshold by circumstances for which they bear no responsibility, make perfect sense. As these guidelines make clear, the issue in such cases is not whether the student's failure to achieve the required standard – whether as a result of withdrawal or otherwise – was merely reasonable in the circumstances. Rather it is whether, in the circumstances, failure/withdrawal was, as the Secretary characterised it, a *"forced consequence".*

The content and delivery of the film arts course/programme

[30] Where provider failure is in issue, as in this case, consistent with reg 30 and as the Ministry's guidelines suggest, that failure must be such that the student either cannot complete his or her course at all – for example because it has been cancelled or the provider has failed to provide tuition – or it has been altered to such an extent that it is simply no longer the course the student signed up for. In my view neither situation can be said to have occurred in this case. The Provider continued to offer and teach both the course the appellant was undertaking and the degree programme it formed part of, and the problems of delivery, content and resourcing that blighted the first semester, while significant, did not amount to a change in the overall content, thrust or nature of that course so as to make it a different entity from the one he had enrolled in. It remained a course on film and the film industry.

[31] In arguing that the delivery of the course was so defective and different from what he had been led to believe it would be as to justify his withdrawal, the appellant's major criticism is that he had enrolled for a film arts course and had been assured when he did so that it would be taught by film staff. In the event, he says, the teaching was focused on *"audio"* rather than film topics, many if not most of the classes were taught conjointly with audio students, and one of the two film members of the teaching staff resigned before the course started while the other in fact had little involvement with the teaching. This description of what was actually delivered is central both to his dispute with his Provider over the repayment of his fees – which his solicitor argued primarily on the twin grounds that the course as offered amounted to a fundamental breach of the contract for services that he had entered into and/or was not fit for its suggested purpose – and to this appeal. As a result he regards the Provider's eventual refund of his fees in full – albeit, so far as can be ascertained, without any admission of liability – as vindicating his description of the course and his characterisation of it as amounting to compelling circumstance driving his withdrawal describing it as "*conclusive of the fact that the issues with the course were not of his doing, and were beyond his control."*

[32] His solicitor presents the argument in stark terms saying that he *"had enrolled to study film arts, and due to staffing issues was instead placed in the audio classes and taught audio instead."* I have no great difficulty in accepting that, if this assertion were correct, the

divergence between the course the appellant signed up for and the course as taught would be sufficiently fundamental to amount to an *"change"* to the course rendering it impossible for him to complete his enrolment as planned. However, with all due respect to him and to his solicitor's careful submissions, I do not accept that the situation was in fact nearly as extreme as this description would suggest or that the combination of audio and film components that occurred was necessarily illegitimate or entirely unexpected.

- First, it is significant that the class letter of complaint – while certainly expressing concern about the lack of material on the film industry, the absence of guest lecturers from that industry, a paucity of learning resources relevant to film, the lack of consideration given to film students in the combined classes with audio students and the overall quality and content of the teaching in general – nowhere suggests that the course was therefore effectively an audio course. Rather it reads as a critical commentary on what was in fact the first year of a new degree which sought to expand on the Provider's somewhat limited traditional degree offerings that was, in its first outing at least, undergoing considerable teething problems in terms of staffing, resources and coherence. The basic complaint was not that the material presented was not focused on film or that the course was not a *"film course"*. It was essentially that it was not doing film terribly well and needed both rather more sophisticated material and teaching and more contact with the film industry. It is also clear that a number of the points made in the letter go beyond concerns with the specifics of the course – which it needs to be borne in mind appears not to have been a practical film course anyway but was concerned with the rather more generic *"Industry Perspectives, Issues and Research Techniques"* – and relate to the overall preparedness of the Provider to teach a film degree, expressing concerns about future access to specialised film gear, practical exercises and the industry itself. Overall, then, I do not read the class complaint as a rejection of the course as a film course. It is an indication of serious student concerns that the Provider needed to address and it gives every indication that its authors believe that if those concerns are in fact addressed the course will start to meet their expectations.

- Secondly, it is relevant that the programme the appellant had enrolled for, while billed as a Bachelor of Film Arts, is described in the prospectus as covering all aspects of the film and television industries and as involving, among other things, collaboration *"with student audio practitioners"*. Accordingly at least some treatment of audio topics in combined classes with audio students was to be expected. Furthermore within the general parameters approved by NZQA for any particular degree programme, providers have considerable discretion over the precise topics to be covered, the depth of that coverage and the manner in which the course is delivered. As the Secretary notes *"tutors, content and assessment can vary by offering and are at the discretion of the education provider".* Accordingly it *"is possible, even likely that the content of any individual course may not offer exactly what an individual student desires"*.

- Thirdly, despite the claimed focus of the teaching on audio topics, it appears that the three assessments completed by the appellant all related to film topics and not exclusively to audio or other unrelated areas. Similarly with the two items of assessment he did not complete. The course, in other words, was certainly being assessed as a film course and the appellant was completing those assessments more than adequately.

- Fourthly, at least a fortnight prior to the appellant's withdrawal the Provider responded to the complaints it had received, making a number of changes to the course content and teaching and foreshadowing a number of others. Shortly after the complaint was received, for example, the teaching for the course was taken over by a member of the film staff and a number of commitments were made as to the use of film staff and guest speakers from the film industry for the remainder of the course and in later modules. More generally commitments were also made to assist students with film projects in future and for the proper provision and maintenance of film gear. In his submissions the appellant says that in his view there was still a real risk that the Provider could not or would not rectify the issues that had arisen, noting that the course co-ordinator had been aware of the problems since the start of the year and nothing had been done until the class had taken the extreme step of lodging a formal letter of complaint. This ignores at least two things. First, as noted above, even before he withdrew the Provider had in fact already responded, redeploying film staff to the course, revising the timetable and reviewing/remarking the first assessment. Secondly, most if not all of the other students seem to have continued with the course/programme which strongly suggests that they did not share his doubts.

- Fifthly, if the failure of the programme had indeed been as fundamental as he suggests, it might be anticipated that the Provider would have been faced with mass withdrawals from disaffected film students. This does not appear to have been the case. Even if the appellant is correct in his claim at the review hearing that three other students left the course, a small number of withdrawals can be expected in almost any course and it is clearly impossible at this stage to say whether they were likely to be due to the same sorts of concerns as motivated the appellant. The fact remains that most, if not all, of the other students continued with the course. This strongly suggests that the undoubted problems that occurred were nowhere near as severe as the appellant perceived them to be. Furthermore it is significant that the appellant himself had completed 65% of the assessment and well over half the course before he started taking steps to withdraw – and that initially at least the grounds on which he was considering withdrawal were expressed largely in terms of health and personal problems. Again this also suggests that the deficiencies in the course, which he says were evident from the start, were perhaps not as fundamental as he claims.

- The appellant supports his case by referencing the fact that his Provider refunded his fees for the first half year course in full despite his having completed fourteen weeks of study. He sees this settlement – which was made in the context of arguments based on breaches of the Contractual Remedies Act 1979 and the Consumer Guarantees Act 1993 – as an acknowledgement that the course as delivered was, as he claims, fundamentally defective. With all due respect this argument is unhelpful in this context. First, although the settlement was a confidential one, the fact that it was made does not mean that the Provider thereby accepted any liability – indeed the opposite is likely to be the case. Secondly, as the Secretary makes clear, in a dispute of this sort there are likely to be several reasons why the parties may feel constrained to settle which do not involve any acknowledgement of the position of the other party. In the circumstances it would scarcely be surprising that his Provider should agree to refund the fees for the first part of the year rather than risk the adverse publicity that would be likely to follow from any public claim that he might take against them.

- Finally, for what it is worth, despite its later settlement of the fees dispute, his Provider clearly did not accept that the issues that had arisen with the course justified his withdrawal. Indeed when he was discussing the subject with the Campus Manager in early May it is unclear whether the question of the adequacy of the course was even raised or whether he was focused on a period of illness that had disrupted the previous few weeks of his studies. In response to his initial request for a fees refund he was advised that his best course of action was to *"continue on in the programme"* since he had *"submitted and passed all assessments to date, and* [was] *excused the final two weeks of Semester 1 due to medical reasons, you are up to date and fully meeting the requirements of the programme."*

[33] Accordingly while it is evident that the class was spending rather less time on film topics – and probably rather more time in combined classes with audio students – than one might expect of the first course in a Batchelor of Film Arts, it is difficult to see this as amounting to a fundamental failure to deliver the programme promised. It remained a course on film and the film industry. Any withdrawal in such circumstances is a matter of choice. I see no reason not to accept the Secretary's view that none of the concerns expressed by the appellant are sufficiently weighty to render his continuing with the programme impossible or completely unreasonable. He had enrolled for a degree in film, had had at least some teaching in the film area, albeit obviously not as much as he had anticipated, had completed a number of assignments on film and could anticipate that the remainder of the programme would remain largely on track. While his decision to withdraw in the light of the initial difficulties faced by the course he had enrolled in is certainly understandable, it was nevertheless a matter of choice on his part in a situation where it was perfectly possible for him to continue with his degree studies and to achieve all or most of the objectives that he had when he initially enrolled. It is certainly not a situation where he could be said to have been faced with a situation where withdrawal was unavoidable if he was to achieve those objectives.

Other "detriment"

[34] In what appears to be a related argument, the appellant also suggests that because of the defects in the course he had "*suffered a detriment and had a legal remedy*" which in turn meant that continuing with his studies was not a reasonable option since "*it cannot be said that an option is reasonably available to someone, if taking that option means foregoing their legal avenues to remedy a wrong done to them*". This argument is misconceived. Whether he remained in the course or withdrew and sought a refund of his fees – to which he may or may not have been entitled – was entirely up to him and would, in ordinary circumstances, depend at least in part on his assessment of the likelihood of getting a refund and what the consequences might be if he didn't. Deciding to complete the first half year course – which required only the completion of two more assessments and which would have provided him with sufficient EFTS to retain his allowance if he then decided to withdraw from the remainder of his 2016 enrolment – as his Provider advised and as most if not all of his fellow students did – was an eminently reasonable option. It was certainly not something that was precluded by the possibility that if he withdrew he might be able to get a fees refund for his first half year study.

The provision of erroneous advice

[35] He also makes a more general argument concerning what he says was erroneous advice he received from StudyLink and on which he says he ultimately based his decision to withdraw. This appears to be a general fairness argument rather than a suggestion that the advice itself was somehow an element in forcing his withdrawal. As such it is probably better seen as a factor to be taken into account in the decision to enforce the debt against

him rather than as something rendering the decision to suspend his allowance itself erroneous. If it is the latter then that is a question concerning the exercise of the reg 30(2)(a) discretion and it is certainly within the jurisdiction of this Authority but if it is the former then it is a matter which properly falls to be taken into account by the Ministry in the exercise of its discretion to write off a duly established debt and as such is outside the jurisdiction of this Authority.

[36] In either case the starting point has to be whether the appellant's version of the advice he says he received is sufficiently credible to make the question a serious issue. In my view it is not. Although he cannot remember when the contact in question was made, or indeed of the context in which it was made, he says that he contacted StudyLink prior to withdrawing in order to ensure that he was doing everything properly. In this conversation he says that he was advised that he *"needed to pass more than half of the assessments that he sat"* and says that he *"only withdrew from the course after receiving this advice and receiving confirmation by the school that I had passed more than half of the assessments completed"*. It seems to be accepted by both parties that this conversation is the second of two conversations noted by StudyLink on the 12th May – four days before he formally withdrew. The contemporaneous file note indicates that the contact concerned his allowance status and that in the course of it he complained that his Provider would not refund the fees he had paid for the second semester if he withdrew from the course. Unfortunately the record states simply that he was *"advised how SA works for passing more than half"*. Whether the conversation mentioned EFTS, full-time courses or simply assessments as the appellant claims is not recorded. The Ministry's view, which is essentially accepted by the Secretary, is that it is inconceivable that the appellant would have received the advice he says he did – even in a casual conversation. None of StudyLink's student literature or staff guidelines uses the term *"assessments"* in relation to the passing more than half requirement. Rather *"all communication … refers to course, programmes and qualifications".* This argument is persuasive up to a point. However, while I accept that it would certainly be most unlikely for StudyLink staff to provide advice specifically in the terms suggested by the appellant, it is not in my view impossible for even the standard advice to be expressed in such a way that the appellant would have got the impression that what he was being told was that he needed to have passed more than half of the *"course"* that he had done so far – ie the three assignments he had completed. In other words his claim that he believed that he had done all he needed to do is certainly credible; his claim that this was the result of clearly incorrect advice from StudyLink is much less so.

[37] On the general question of the performance standards for allowance eligibility, the advice received from StudyLink and what the appellant says he believed was required of him, a number of other points are relevant apart from just the conversation with StudyLink on the 12th May.

- First, the appellant is an experienced student who had received an allowance on five previous occasions (and had thereby exhausted 157 weeks of his 200 week entitlement prior to his June 2016 application) and can be expected to be at least generally familiar with the eligibility requirements. The StudyLink website and the information provided to students on the *"passing more than half"* requirement is absolutely clear and does not permit of the sort of interpretation he seems to have put on what he was told. If he had consulted this website – which is, with all due respect, a fairly obvious place to check if you need advice – at any stage in his extensive allowance career he would have been well aware of the requirements.

- Secondly, from the StudyLink record he had certainly received at least general advice linking performance measurement with EFTS calculations prior to the conversation on the 12th May. In particular on the 18th April (see above [6]), in the context of a query about his Loan status, he appears to have been advised on the general performance requirements for future study. While the notes are again regrettably far from clear, they certainly suggest that he was told that the number of EFTS he had obtained *"will be counted"* and *"may affect future study for performance testing"* and was advised of the reasons beyond control exception.

- In addition, when he withdrew he was immediately sent the standard letter by StudyLink suspending his allowance, warning of the possible impact of his withdrawal on his future eligibility and outlining the conditions under his allowance could be reinstated. In particular he was told very clearly that he could not be considered for another allowance unless he had passed *"more than half of your full-time tertiary course, you were receiving Student Allowance for"*. Even if he had received erroneous advice previously, at that stage he would have been well aware that his withdrawal would mean that he would get a failing grade for the course and that accordingly, irrespective of his performance in the in-course assessments he had completed, he could not possibly be said to have passed *"more than half* " of it. There were then at least two courses of action open to him. First, he could have reconsidered his withdrawal and sought to reinstate his enrolment. Although technically the deadline for adding courses would undoubtedly have passed, faced with a student who had successfully completed three fifths of the course work and was well on track to pass the course with good grades, I have little doubt that his Provider would have found a way to do this. Secondly, if, despite his failure, he intended to apply for an allowance in the second half of the year he could have contacted StudyLink immediately to discuss his position – and in particular the option of repaying the allowance he had received for his failed course. Unfortunately he did neither. Indeed when he subsequently applied for a new allowance at the end of May he answered the question concerning previous receipt of an allowance incorrectly, ticking the *"no"* box with the result that he was never asked whether he had passed more than half of the EFTSs for those courses and was subsequently approved an allowance he was not entitled to.

[38] Accordingly, I do not accept that the appellant is likely to have received the advice that he says he did from StudyLink – although I do not doubt that when he decided to finally withdraw he did so in the belief that passing the three assessments would be sufficient to protect his future allowance position. In my view it is highly probable that the advice he did receive would have been couched in the standard language and would have either referred to *"course"* or, at the least, to *"study"*. Furthermore even if I did accept that the advice he received on the 12th May was as he says, there were a number of circumstances that should have alerted him to the need to check further – both before and after he withdrew – and a number of steps he could have taken to rectify the situation he then found himself in.

Conclusion

[39] I accept the Secretary's view that the circumstances in which the appellant found himself and the issues that arose with his course were not such as to effectively force him to withdraw from the course. Rather his withdrawal was a result of a choice on his part born of disillusionment with the way in which the film course was being handled and a lack of faith that his Provider would get it right in the future. He in fact chose to withdraw from film studies

altogether and moved on to a new education provider and what appears to be a new field of study. That was a choice that he was perfectly entitled to make and it is one that I would have no real difficulty in accepting as reasonable in the circumstances. But it was not one that was forced on him by some fundamental defect in the course he was undertaking. As the Secretary (and, indeed, his Provider) said, continuing with and completing the remainder of the course was also a perfectly sensible option which would have had the advantage of preserving his allowance entitlement while letting him reconsider his commitment to film studies in the second half of the year. Nor was his withdrawal contributed to in any significant way by any misinformation he received from StudyLink. Such evidence as exists weighs against such a finding but even if it didn't, any contribution it might have made to his decision would be minor. In the absence of circumstances beyond his control driving his withdrawal from his first half year course he was ineligible for the allowance he received for the second half of the year and, once this was established, StudyLink had no option but to suspend that allowance and to seek to recover the payments it had made.

The appeal is dismissed. The decision of the Secretary to confirm StudyLink's decision to retrospectively decline the appellant's Student Allowance for the second half of 2016 due to his failure to pass more than half of a full-time course in the most recent course of study for which he received an allowance and to establish an overpayment of $4,752.47 against him as a result, is upheld.

DATED at WELLINGTON this 31st day of July 2018

Neil Cameron
Student Allowance Appeal Authority