

SPECIAL CIRCUMSTANCES AND THE COMMON LAW

EATOCK v SECRETARY, DEPARTMENT OF FAMILY AND COMMUNITY SERVICES

ADMINISTRATIVE APPEALS TRIBUNAL, [2002] AATA 1015, MR M GRIFFITH, MEMBER, 25 OCTOBER 2002

by Kirsten Storry

Although the common law has not always been understanding, or accommodating of the Aboriginal experience, the decision of the Administrative Appeals Tribunal in *Eatock v Secretary, Department of Family and Community Services* ('*Eatock*') demonstrates that it is capable of doing so with compassion and flexibility.

Eatock, the applicant, was a 64 year old Aboriginal woman who was attempting postgraduate study and was, for the period of that study, receiving Abstudy instead of the age pension. The applicant was experiencing severe depression and considerable health problems during her postgraduate studies which were compounded, if not caused, by her problematic relationship with the university administration and the social security bureaucracy. In the end, the applicant surrendered her Abstudy allowance and re-applied for the age pension. The respondent then sought to recover the amount of benefit overpaid in the time between the applicant's official cessation of postgraduate studies and her notification to Centrelink.

The issue in this case was whether the obligation on the applicant to repay the overpaid amount should be waived. The Member, Mr Griffith, held that it was desirable to waive the debt pursuant to section 43F of the *Student Assistance Act 1973* (Cth), which provides that:

The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that:

- (a) the debt did not result wholly or partly from the debtor or another person knowingly:
 - making a false statement or a false representation; or
 - failing or omitting to comply with a provision of this Act; and
- (b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
- (c) it is more appropriate to waive than to write off the debt or part of the debt.

In reaching this decision Mr Griffith made two important points on the interpretation of this clause. Firstly, Mr Griffith narrowly construed the term 'knowingly' as meaning actual knowledge,¹ in line with the interpretation of a similar section by Deputy President Forgie in *Re Callaghan and Secretary, Department of Social Security*.² Secondly, Mr Griffith held that the existence

of 'special circumstances' was to be determined on the basis of 'the particular circumstances of the Applicant viewed in context', and not whether the circumstances fell within or outside the range of postgraduate experience, as the Social Security Appeals Tribunal had asserted.³ Importantly for the applicant's case, Mr Griffith also concluded that her evidence was 'compelling' and she herself was 'a witness of truth'.⁴

CONCLUSION

While *Eatock* might appear to be a fairly unassuming case of little real consequence, it is nevertheless striking for two reasons. Firstly, this is a case of a battle fought and won by an individual against the bureaucracy of the social security machine. Secondly, this decision demonstrates the flexibility of the common law in taking into account individual circumstances for which statute law cannot provide.

Unfortunately however, the flexibility shown by Mr Griffith does leave it open to later tribunal members to take a less compassionate approach and marginalise the Aboriginal experience, as the lower courts in this case could be said to have done. While this case demonstrates that the special disadvantage of Aborigines in the justice system may be taken into account in administrative law matters, this case does not establish any general principle and its impact may well be confined to its facts.

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1 *Eatock v Secretary, Department of Family and Community Services* [2002] AATA 1015 ('*Eatock*') [34].

2 (1996) 45 ALD 435.

3 *Eatock* [2002] AATA 1015 [36].

4 *Ibid* [35].

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