In the present case, the AAT said, it had originally been Howie's intention that the strawberry venture might provide him with an adequate income. However, there had never been any realistic prospect of such a small strawberry farm achieving that result. In the AAT's view, 'such an enterprise was never capable of being described as a serious business undertaking'.

In any event, the AAT said, by the second year of the venture, Howie's intentions had changed—he had decided to harvest the second (1984) crop and then to plough in the strawberry crop. Finally, the amount of time which he was devoting to the venture in March 1984 was minimal. Taking all those factors into account, the AAT concluded that from 26 March 1984 until 30 June 1984 (when Howie began to harvest the 1984 crop), Howie had been qualified for unemployment benefit.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Howie was 'unemployed' with s.107(1) between 26 March 1984 and 30 June 1984.

OZDIL and SECRETARY TO DSS (No. V84/227)

Decided: 7 June 1985 by I. R. Thompson.

The AAT *affirmed* a DSS decision to reject an application for unemployment benefit by a 37-year-old grape grower.

Ozdil and his wife owned a 20-acre vineyard which had proven inadequate to support their family. Although they had placed the vineyard in the hands of estate agents for sale, they had been unable to sell it because no one was willing to pay the price which they asked. In the meantime, Ozdil had continued to attend to pruning, weeding, spraying, irrigation and harvesting and drying of the grapes.

Ozdil said that, although he had done the bulk of the work, he had attempted to find other employment and had been prepared at any time to leave the running of the vineyard to his wife. Evidence given by an agricultural specialist confirmed that Ozdil's wife could have operated the block by herself. According to Ozdil's accounts, the vineyard had produced a gross income of $24 000 in 1983, $30 000 in 1984 and was expected to produce gross income in excess of $30 000 in 1985.

The AAT referred to several earlier decisions—*Vavaris* (1982) 11 *SSR* 110; *Guse* (1981) 6 *SSR* 62; *Yilmaz* (1984) 17 *SSR* 174 and *Anderson* (1984) 19 *SSR* 198, where the eligibility of marginal primary producers for unemployment benefit had been considered. Those cases had established, the AAT said,

> that the question whether the applicant is not unemployed for the purposes of s.107(1) of the Act is to be decided by ascertaining the extent to which he has been engaged in an economic enterprise.

(Reasons, para. 16)

The AAT said that the degree of Ozdil's involvement in the vineyard and the size of the income produced by the vineyard showed that he had been engaged in an economic enterprise of substantial scale, and had been committed to working full-time on the vineyard. Accordingly, he could not be regarded as 'unemployed'; and he had not qualified to receive unemployment benefit.

VIJH and SECRETARY TO DSS ((No. N85/20)

Decided: 26 July 1985 by R. A. Hayes, H. D. Browne and J. R. Taylor.

Anand Vijh had been injured in 1981 while working for the NSW State Rail Authority (SRA). Although he then began a workers' compensation claim against the SRA, his employment contract with the SRA was not terminated. Over the 4 years since 1981, Vijh had remained available for light duties work and the SRA had made that work available to him intermittently.

Although the conditions of Vijh's employment with the SRA prohibited him from undertaking other employment, he had regularly attempted to find other work during this period. Following a short period of light duties work with the SRA in June 1984, Vijh applied to the DSS for unemployment benefit. The DSS rejected that application on the ground that Vijh was not 'unemployed'.

After another period of light duties work with the SRA, which ended in October 1984, Vijh made his second application for unemployment benefit. The DSS also rejected this application on the ground that he was not 'unemployed'. (Vijh had been offered no further period of light duties work with the SRA between October 1984 and the hearing of this matter.)

Vijh asked the AAT to review the 2 DSS decisions.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified to receive unemployment benefit if the person meets age and residence requirements and if the person passes the 'work test'—that is, the person must be unemployed, capable of undertaking and willing to undertake paid work, and have taken 'reasonable steps' to obtain such work.

Section 107(7) defines 'unemployed' as including unemployment due to industrial action, unemployment due to termination of employment and a person having been stood down or suspended from employment.

Not 'unemployed'

The AAT examined the relationship between Vijh and the SRA; and concluded that, during the relevant periods, there had been an employer/employee relationship, even though the SRA only paid Vijh for those scattered periods when he did light duties work. Accordingly, although Vijh was able to establish that he was capable of undertaking, and was willing to undertake, paid work and that he had taken reasonable steps to find such work, he could not be said to have been 'unemployed'. Until such time as Vijh's employment with the SRA was formally terminated, he remained an employee of the SRA and could not be treated as 'unemployed', despite the failure of the SRA to offer him paid work:

> [I]t may be that a special benefit might be payable, at the discretion of the Secretary, and depending upon the circumstances, under Division 6 of the Act. But it would not seem that unemployment benefit can be used to relieve an employee who is being exploited by his or her employer, or who is otherwise disadvantaged in employment.
>
> The Tribunal views the difficulties of the applicant in this review as being beyond resolution through the granting of unemployment benefit. The applicant claims that he is discriminated against, and that he is the victim of unfair bureaucratic practices, particularly on the part of the SRA. Fortunately there are many avenues which he might use to have his complaints explored, in particular, the NSW Ombudsman, the NSW Anti-Discrimination Board, his local member of State Parliament, and his trade union representative. Whether he is being treated unfairly by SRA is beyond the jurisdiction and capacity of this Tribunal to judge. However he remains an employee of SRA and, as such, is ineligible for unemployment benefit until such time as his employment is formally terminated. This does not, of course, reflect upon his eligibility for other benefits, in particular, sickness benefit, or special benefits.

(Reasons, pp.14–15)

Formal decision

The AAT affirmed the decision under review.

Unemployment benefit: student

COLLINS and SECRETARY TO DSS (No. S84/130)

Decided: 13 June 1985 by R. A. Layton.

James Collins completed his secondary schooling in November 1983. He then applied for admission to a number of tertiary institutions, his first preference being a university course. He also applied for unemployment benefits which were paid to him after the expiry of 6 weeks (in accordance with s.120A of the *Social Security Act*).

In January 1984, Collins was offered a place in a tertiary college which he accepted in February. He advised the DSS that he was about to commence a tertiary course and wished to cancel his unemployment benefit. But on the following day he contacted the DSS and said that, because his first preference was to obtain employment, his wished to continue on unemployment benefits; and that he would continue with his college course until he found a job.

However, the DSS cancelled Collins' unemployment benefit as from the date when he began his college course, on 27 February 1984. Collins continued with that course until November 1984 when, having failed most of the subjects, he withdrew from the course and was re-granted unemployment benefit as from 26 November 1984.

Collins asked the AAT to review the February 1984 cancellation of his unemployment benefit. In this application for review, the AAT was asked to decide Collins' qualification for unemployment benefits between 27 February 1984 and 25 November 1984.

The legislation

Section 107(1) of the *Social Security Act* provides that a person who meets age and residence requirements is qualified to receive unemployment benefits if that person satisfies the Secretary that,

> (i) throughout the relevant period he was unemployed and was capable of undertaking, and was willing to undertake, paid work that, in the opinion of the Secretary, was suitable to be undertaken by the person; and
> (ii) he had taken, during the relevant period, reasonable steps to obtain such work.

The evidence

Collins told the Tribunal that, during the 9 months when he was enrolled as a college student, he had applied for some 15 employment positions and had finally been successful in obtaining employment as a student nurse commencing from January 1985.

During the 9 month period, Collins had attended the CES office on each working day and had attended at his college on 4 days a week. He had devoted some 30 hours a week to his course. This was substantially less than the recommended time because of the time which he had spent in looking for employment vacancies and attending interviews. He attributed his failure in the college course to the amount of time that he had spent in looking for employment.

Qualified for unemployment benefit

The AAT said that, in *Thomson* (1981) 38 ALR 624, it had been established that one of the important considerations in deciding whether a person, who was engaged in studies, could be 'unemployed', was that person's intention. On the evidence presented in this case, there was no doubt that Collins'

> aim was to obtain employment and that he was continuing on with his Institute course only to keep his mind occupied and that he would have given up that course at any time if a full-time position had been found by him or been available to him.

There was also no doubt, the Tribunal said, that Collins was capable of undertaking and willing to undertake paid work. Finally, 'his regular attendances at the CES employment agency, together with his regular viewing of newspapers, as well as his written letters to employers', indicated that he had taken reasonable steps to obtain employment. For these reasons, the AAT said, Collins fulfilled all of the necessary requirements in s.107 of the *Social Security Act*.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Collins be paid unemployment benefits for the period from 27 February 1984 to 25 November 1984.

PHIPPS and SECRETARY TO THE DSS (No. N84/546)

Decided: 5 June 1985 by A. P. Renouf.

The AAT *affirmed* a DSS decision to recover the sum of $296 paid to the applicant by way of unemployment benefit.

The central question was whether payments of unemployment benefit should have been made to Phipps between 16 November and 16 December 1982. Phipps had finished full-time schooling at the end of 1981 but had re-enrolled as a private student at a local technical college, so that he could re-sit the HSC examination at the end of 1982. When Phipps applied for unemployment benefit in November 1982, he claimed that he had given up his studies in August.

Phipps had last attended formal classes on 12 October 1982, and sat for the HSC examinations ending on 3 November 1982 and had enrolled as a full-time university student in February 1983. On the basis of this information, the DSS concluded that Phipps ceased his full-time secondary studies on 3 November 1982 and that, because of s.120A of the *Social Security Act*, unemployment benefit should not have commenced until 15 December 1982.

The legislation

Section 107(1) of the *Social Security Act* provides that a person is qualified for unemployment benefit if the person meets age and residence requirements and passes the 'work test'—that is, the person must be unemployed, capable of undertaking and willing to undertake paid work and have taken reasonable steps to obtain such work.

Section 120A provides that unemployment benefit is not payable to a former full-time secondary student during the period of 6 weeks after the person ceased to be a full-time secondary student. Section 120(3) provides that a full-time secondary student undertaking a course at the end of which examinations are held,

> shall not be taken for the purposes of this section to cease to be a full-time secondary student until . . . the last of those examinations has been held.

The postponement rule

The AAT rejected an argument raised by Phipps that s.120A did not apply to private students and concluded that, on the basis of s.120A(3), he did not cease to be a full-time secondary student until the last of his HSC examinations on 3 November 1982. Accordingly, the postponement provisions of s.120A(1) should be applied against Phipps and he was not entitled to receive benefit until 6 weeks after 3 November, namely, 16 December 1982.

The work test

The AAT said that, in its view, Phipps had not satisfied the requirements of s.107(1) during that period. Although he had been unemployed, he had not been willing to undertake paid work nor had he taken reasonable steps to obtain such work because—

> the overriding, long-term commitment of the applicant throughout was not to obtain employment but to pursue his studies at the tertiary level.

(Reasons, para. 19)

Family allowance: late claim

ELSDON and SECRETARY TO DSS (No. S84/69)

Decided: 7 August 1985 by J. A. Kiosoglous, F. A. Pascoe and J. T. B. Linn.

Margaret Elsdon had come to Australia with her *de facto* husband, C, and his daughter in October 1975. At the time of her arrival in Australia, she had held a 2 month entry permit; although she believed (because of information given to her by C, who had handled the paperwork for their trip to Australia) that she had a permanent entry permit. Two months after her entry into Australia (in December 1975) Elsdon became a prohibited immigrant under s.7(3) of the *Migration Act* 1958 (Cth). However, Elsdon did not learn of her prohibited status for some 4 years.

In the meantime, Elsdon gave birth to a child, J, in August 1976; but she did not claim family allowance for this child because C destroyed the family allowance claim form handed to Elsdon whilst she was in hospital.

As mentioned above, Elsdon learned that she was a prohibited immigrant in 1979. In December 1980, Elsdon ceased to be a prohibited immigrant (because s.7(4) of the *Migration Act* provided that a person who had overstayed a temporary entry permit ceased to be a prohibited immigrant after 5 years). However, because Elsdon continued to believe that she was a prohibited immigrant, she allowed herself to be persuaded by C not to claim family allowance for her child. (Elsdon later told the AAT that, during this period, she lived in fear of C's acts of violence and of C reporting her to the migration authorities.)

In June 1983, Elsdon separated from C and retained custody of the child, J. Following advice from her solicitor, Elsdon applied for and was granted a permanent entry permit by the Department of Immigration and Ethnic Affairs. In November 1983, Elsdon claimed and was granted family allowance in respect of J. The DSS dated the payment of that allowance from November 1983, refusing to backdate payment to the date of J's birth. Elsdon asked the AAT to review that refusal.

The legislation

Section 102(1)(a) of the *Social Security Act* provides that family allowance is payable to a person from the date of eligibility if a claim is lodged within 6 months of that date or, if the claim is lodged after that 6 months period, 'in special circumstances'. In any other case, the allowance is payable from the date when the claim is lodged.

Section 96(1) provides that a family allowance is not to be granted to a person