

Work efforts

As to the last of these contentions, it was argued for Tyrikos that it had not been made plain to him that his work efforts were unsatisfactory, nor that he was restricting himself too narrowly in the range of work he was pursuing. The AAT's attention was drawn to a note from a 1992 field assessor's report which stated 'advised to look for all types of work not only the type of work he had in the past'. However, Tyrikos said this advice had not been given, and cited in support that his signature on that form appeared before the quoted notation. A record of an interview in 1994 recorded a discussion with Tyrikos about restricting work efforts. This also was not accepted by Tyrikos, as his signature was located earlier in the form than the references to the discussion, and he submitted his signature acknowledged only the contents preceding the note.

The AAT placed some significance on the fact that on 2 July 1996 in his fortnightly form, Tyrikos stated that the work he was seeking was courier driver or sales representative, and the DSS's response was only to issue further verification certificates. The AAT also noted that after the field officer's interview in 1992 in which it was alleged that the issue of restricting work efforts was dis-

cussed, it was recorded 'work efforts satisfactory': Reasons: para. 14.

The AAT was satisfied, having heard the evidence, including evidence from the prospective employers:

- that the positions were genuine positions and advertised by word of mouth;
- that on the balance of probabilities, the hand drafted form with two advertised positions signed by employers had been lodged on 30 July 1996; and
- that, as to advertised positions, the requirements of the activity test were met.

On the wider issue under the activity test, namely whether the scope of Tyrikos' job seeking was too limited, the AAT found that there was doubt that the applicant's attention had been significantly drawn to the need to broaden the scope of his job search efforts. In so finding, the AAT said there was 'doubt' about the assessments in 1992 and 1994 (presumably accepting the submissions about the location of the signatures on the forms. The AAT made reference to the fact that the DSS repeatedly accepted forms on which it was clear that Tyrikos was seeking work only as a driver or sales representative. The AAT applied s.603A(1) (a) and (b) of the Act which provides:

'Subject to subsections (2) and (3), a person is not required to satisfy the activity test for a period if:

- (a) the Secretary is satisfied that special circumstances, beyond the person's control, exist; and
- (b) the Secretary is satisfied that in those circumstances it would be unreasonable to expect the person to comply with the activity test for that period.'

The special circumstances taken into account were Tyrikos' difficulty with English, his health, and the failure of the DSS to draw his attention clearly to the need to widen his work efforts.

The AAT noted in passing that of the two job inquiries in the fortnight recorded on the form which Tyrikos withdrew at the regional office before submitting the hand-drafted form, telephone contact with one of the employers on the file revealed that the employer had a sign in the window seeking sales assistants. The AAT indicated, without it being necessary to decide, that the sign in the window would constitute advertising.

Formal decision

The AAT set aside the decision under review and directed that newstart allowance be paid to Tyrikos for the 6-week deferment period.

[M.C.]

Student Assistance Decisions

AUSTUDY: financial supplement; application by required date

**NGUYEN and SECRETARY TO
THE DEETYA**
(No. 12384)

Decided: 11 November 1997 by B. Barbour.

The background

In February 1996 Nguyen applied for AUSTUDY, and he was advised that payment had been approved for the period March to December 1996. On 23 March 1996 he was further advised of his eligibility to 'trade in' \$2897 of his AUSTUDY grant in order to receive a Financial Supplement (a Supplement) of \$5796, but that such an application

needed to be made before 30 September 1996 or the amount of Supplement may be reduced. On 27 November 1996 the DEETYA advised that the maximum Supplement had been reduced to \$1733, for which Nguyen would need to trade in \$866. On 4 December 1996 Nguyen applied for the Supplement of \$1733, but the next day the DEETYA advised that the amount of Supplement had been further reduced to \$1111, for which amount Nguyen applied and was granted. Nguyen sought review of the decision not to increase the amount of the Supplement beyond \$1111 for 1996. This decision was affirmed by an Authorised Review Officer on 7 January 1997 and by the SSAT on 1 April 1997.

The law

The sole issue for determination was whether Nguyen was entitled to receive only \$1111 by way of Supplement in 1996. The provisions regarding Financial Supplement are set out in the AUSTUDY Regulations under the *Student and Youth Assistance Act 1973* (the Act). Regula-

tion 9 sets out the maximum amount of Supplement and the formulae for its calculation. Section 12A of the Act allows a student to receive a lower AUSTUDY benefit in order to obtain a higher Supplement. In relation to both AUSTUDY and the Financial Supplement, eligibility periods apply. However, regulation 14 allows the Supplement Eligibility Period to be taken as identical to the Grant Eligibility Period (AUSTUDY) when an application for the Supplement is lodged after a particular date, and where:

'...'

- (a) the student has taken all reasonable steps to ensure that the application [for the Supplement] would be lodged by that date; and
- (b) the student is prevented from lodging the application by that date because of circumstances beyond his or her control ...'

Correct date of application

Nguyen argued that owing to limited English skills he had not understood the initial notification from the DEETYA regarding Supplement applications, and so

was unable to apply for the Supplement before December 1996. The AAT noted that s.7(8) of the Act required that applications for Financial Supplement from an eligible student (which Nguyen was accepted as being) be made by 31 May or 30 September in the relevant year. The AAT concluded that the DEETYA had incorrectly advised Nguyen that an application had to be made by 30 September. Because Nguyen was receiving AUSTUDY prior to 31 March, the correct date was 31 May. In any event Nguyen did not apply until December 1996, and so was not eligible for the full amount of the Supplement that might otherwise have been available. The AAT found that the DEETYA's application of the calculation formulae contained in s.9 of the Act was substantially correct, with one minor variation in relation to calculation of the number of days for which Nguyen was eligible from March to December 1996. This resulted in a consequential minor increase in the maximum amount to which Nguyen could have been entitled, had he applied by the specified date.

Beyond his control

The AAT further noted that no evidence beyond his oral assertion was provided by Nguyen as to his poor English skills, and that he had in the past successfully applied for both AUSTUDY and job search allowance. Nguyen's evidence was that he regarded the DEETYA's notices as unimportant, and he took no note of them until December 1996. The Tribunal concluded that Nguyen's circumstances did not fall within the scope of regulation 14.

Formal decision

The AAT affirmed the decision under review.

[P.A.S.]

AUSTUDY: minimum time of course; illness, circumstances beyond control

**RODOLICO and SECRETARY TO
THE DEETYA
(No. 12521)**

Decided: 24 December 1997 by G. Woodard.

Rodolico sought review of the SSAT's decision to affirm the DEETYA decision that he was not entitled to be paid AUSTUDY in 1997.

Rodolico had been enrolled in a 4-year engineering course at two institutions since 1989. He failed subjects in 1989, and eventually passed first year in 1990. Rodolico was enrolled as a full-time student in all years except 1995. In 1991 he failed all subjects which he repeated and mainly passed in 1992. Rodolico passed some subjects in 1993 but no subjects in 1994. He told the AAT that he had passed 6 of his 7 subjects in 1996, and according to Rodolico he was averaging 73% in his subjects in 1997. Rodolico had studied for 5.7 years prior to commencing study in 1997.

Rodolico explained that he had failed to complete his course in the allotted time because he had suffered an illness which had caused him to fail a year. His doctor, who had first seen Rodolico in 1993 diagnosed him as suffering anxiety, restlessness, variable mood and low confidence and self-worth. These conditions had affected Rodolico's ability to concentrate and his relationship with his partner at that time. Rodolico continued to suffer from these conditions through 1994. His second relationship in 1994 also broke down. Rodolico's partner in 1994 had psychological problems, and Rodolico attempted to assist her to overcome these problems by driving her to medical appointments and supporting her emotionally.

The law

The relevant law is set out in the AUSTUDY Regulations. Regulation 41(1) provides that AUSTUDY is payable to a student for the minimum time for the course plus one year. In Rodolico's case this would be 5 years. Regulation 48(1) states that no account is to be taken of a failed year of study for the purposes of

calculating the minimum time of a course, if the failure was because of the student's illness which was not diagnosed before the course in question, or other circumstances beyond the student's control.

Circumstances beyond control

The AAT found that Rodolico's failure in 1994 was not due to circumstances beyond his control, but rather because he chose to support his partner rather than concentrate on his studies. The AAT found this behaviour admirable, but not circumstances beyond Rodolico's control.

Illness

The AAT noted that Rodolico's behaviour in 1994 might have been due to his mood disorder and anxiety. However the evidence showed that Rodolico had not found it necessary to see his doctor for treatment for lengthy periods in 1994. He did not see his doctor until the exam period when he realised that he had wasted 1994 and that his partner was probably unwell.

The AAT concluded that Rodolico had not failed his course in 1994 because of illness or because of circumstances beyond his control. Thus 1994 had to be taken into account when calculating the years Rodolico had studied. Because Rodolico had studied for more than 5 years he was not entitled to AUSTUDY payments in 1997.

Formal decision

The AAT affirmed the SSAT's decision.

[C.H.]

Social Security Reporter

Annual subscription

.... \$40.00 (6 issues)

Back Issues Available

.... \$6.00 each, plus postage

tel: 03 9544 0974

fax: 03 9905 5305

email:

M.Gillespie@law.monash.edu.au