facts subsequent to the time of the decision under review. However *Haidar* concerned a closed period, whereas the Howletts' issue did not, and in any event the Court in *Haidar* stated the following general proposition consistent with *Lumsden* and ultimately the course adopted by the AAT in the Howletts' matter:

> 'It is clear enough that the Tribunal sitting on appeal from a decision maker, be it the Minister or another Tribunal, must take into account the facts as they exist at the time the matter is heard by the Administrative Appeals Tribunal, to the extent those facts are relevant to the decision. It is not limited to taking into account events which occurred at the time the original decision was made, nor for that matter facts as they were known at that time, notwithstanding that later knowledge would lead to a revision of the earlier factual assessment.'

(Reasons, para. 43)

However, the powers of a review Tribunal may be limited further by the nature of the decision itself. In this instance the question arose whether the decision to 'stop' the pension was a decision to cancel or one to suspend.

Suspension or cancellation

As explained in *Freeman v Secretary to the DSS* (1988) 45 *SSR* 587 the distinction between suspension and cancellation is important in establishing the extent of the Tribunal's powers to vary a decision from a date later than the original decision was made:

> '... the nature of a cancellation of the pension is different in substance and effect from that of suspension. A decision suspending a pension has an ongoing effect and the suspension may be terminated at any appropriate time. It may well be within the ambit of the Tribunal's decision to terminate a suspension if the facts before the Tribunal showed that the pension or benefit ought to have been suspended only up to a particular date. A decision cancelling a pension does not have ongoing effect in that way.'

The distinction was of importance here where the original decision referred to pension being 'stopped'. Was this the language of a cancellation or of a suspension? The AAT decided it was a decision to cancel the pension.

The AAT pointed out that had the decision made on 4 September 1996 to 'stop' pension been correct at the time it was made (which the Tribunal expressly found it was not) the Tribunal would have had no power to reinstate age pension from a later date when the partnership account may have fallen below $10,000.

The AAT found that the decision under review was one to cancel pension and it was not correct at the time it was made. Section 43(1)(c) of the *Administrative Appeals Tribunal Act 1975* allowed the Tribunal to set the cancellation decision aside and substitute a decision to suspend pension from the first payday after the settlement moneys were received, with the suspension to continue till the point of time when liquid assets fell below $10,000. This was established on the evidence supplied after the hearing as being 15 June 1998.

Formal decision

The AAT set aside the decision under review and substituted the new decision that age pension should be suspended from the first pension payday after 16 September 1996 until the first pension payday after 15 June 1998.

[M.C.]

Age pension: ordinary income on a yearly basis

SECRETARY TO THE DFaCS and LENNON (No.19990368)

Decided: 31 May 1999 by Deputy President A.M. Blow.

Background

The two respondents, Mr and Mrs Lennon, were age pensioners. Mr Lennon for a number of years did casual work for the Board of Studies (NSW), marking Higher School Certificate examination papers. In 1997 he did such work from 29 October until 28 November. The Secretary contended that Mr Lennon's fortnightly income during the fortnights that he worked should have been taken into account in assessing his rate of pension for each relevant payday. The SSAT, by majority, took the view that his income from that work had to be taken into account over a one-year period.

Mr Lennon earned a total of $2329 from the employment in question. On 15 December 1997 a delegate of the applicant decided to reduce the age pension rate of both respondents for the pension paydays that fell on 13 November 1997 and 27 November 1997 on the basis that Mr Lennon's ordinary income on a yearly basis from employment was $25,332. That decision was affirmed by an authorised review officer on 11 May 1998. On 15 July 1998, the SSAT set aside the delegate's decision, and remitted the matter for reconsideration with a direction that the respondents' age pension rate for the two paydays in question be recalculated on the basis that Mr Lennon's ordinary income on a yearly basis from employment was $2329.

The legislation

Section 55(a) of the Act states that a person's age pension rate is to be worked out using Pension Rate Calculator A, in s.1064 of the Act. Module E states:

> **'1064-E1.** This is how to work out the effect of a person's ordinary income on the person's maximum payment rate:
>
> Method Statement
>
> Step 1 Work out the amount of the person's ordinary income on a yearly basis.'

Mr Lennon's income from his casual work clearly came within the definition of ordinary income.

The issue

Was Mr Lennon's 'ordinary income on a yearly basis' to be calculated on the basis that he would continue to earn at the rate he was earning during his periods of employment; or should the amount that he actually earned during those weeks have been treated as his yearly income from employment?

The AAT referred to *Harris v Director-General of Social Security* (1985) 59 ALJR 194 in which the High Court discussed the difference between annual amount of income and annual rate of income. The AAT also referred to an earlier AAT decision *Dunning and Secretary, Department of Social Security* (1986) 33 *SSR* 420. In *Dunning*, the AAT, relying on *Harris* stated:

> 'different means may have to be adopted to calculate the annual rate of income of different pensioners, the means being suited to the source or sources of the pensioner's income and the manner in which the pensioner derives that income. But the adoption of a means of calculating the annual income is not a matter of discretion, though it may involve judgment or evaluation. In any particular case, there is a means of calculating the annual income which is the most appropriate in the circumstances of that case. That means, once identified, is the only correct means to adopt to calculate the income.'

(Reasons, para. 14)

The AAT also referred to *Secretary, Department of Social Security and Morris* (1996) 2(6) *SSR* 80, a case which concerned the meaning of the words 'ordinary income on a yearly basis' in which the AAT decided that regard must be had to the person's income over a 12-month period. The AAT in *Morris* indicated that regard must be had to an

annual amount of income, not an annual rate.

Deputy President Blow disagreed with this, and stated:

> 'I do not regard the words "the amount of the person's ordinary income on a yearly basis" to be clear or unambiguous. When one has regard to their context, the likely cost to the Commonwealth that would result if they had been intended to effect a change to the means test, and the fact that the 1991 Act was primarily intended to rewrite the 1947 Act in plain English, I think those words should be interpreted as referring to a person's rate of income from time to time, expressed as an annual rate.'

(Reasons, para. 21)

In this case, Mr Lennon had a regular pattern of earnings from the NSW Board of Studies, for a period of between 2 and 4 weeks each year. The amount thus earned was referrable to a 12-month period. The income earned by a pensioner would need to be assessed differently in different circumstances, as stated in *Harris*.

Formal decision

The decision was affirmed.

[A.B.]

Jobsearch allowance: full-time study; PhD course

O'NEILL and SECRETARY TO THE DfaCS (No. 19990259)

Decided: 23 April 1999 by K.L. Beddoe.

Background

On 21 June 1994 O'Neill lodged a claim for job search allowance. On the form he stated that he was not enrolled at an educational institution, and that he had ceased casual employment. On 29 August 1994 he lodged further forms on which he indicated that he was studying on 4 July 1994. On 30 June 1995 O'Neill lodged a claim for job search/newstart allowance. The claim form included a question: 'Before making this claim were you a ... student (full or part time) ...' to which the applicant did not respond thereby indicating a negative answer. On the same day he also lodged a fortnightly review form again ticking the 'No' box in relation to the study question. He continued to give negative responses to the question about study throughout 1997.

In June 1998 Centrelink ascertained from the University of Melbourne that O'Neill had been enrolled as a PhD student from 26 January 1993 to 31 December 1997. He was granted leave of absence from 1 January 1996 to 31 December 1996.

Based on this, the following decisions were made:

- the applicant had been overpaid job search allowance from 21 June 1994 to 3 July 1995;
- the applicant had been overpaid newstart allowance for the periods: 4 July 1995 to 31 December 1995 1 January 1997 to 27 July 1997, and
- that the Department should recover debts due to the Commonwealth amounting to $15,845.

Those decisions were in effect affirmed by the SSAT (that Tribunal inadvertently referred to the total debt as an amount of $158,453).

O'Neill sought review of these decisions.

The legislation

Sections 531(1), 613(1) and 1224 of the *Social Security Act 1991* (the Act) are the relevant provisions.

> '**531.(1)** Subject to subsection (2), a job search allowance is not payable to a person who is enrolled in a full-time course of education or of vocational training for the period that:
>
> (a) starts when the person starts the course; and
>
> (b) finishes when the person:
>
> completes the course; or
> abandons the course; or
>
> gives notice to the provider of the course that the person:
>
> wishes to withdraw from the course; or
>
> wishes to withdraw from such number of subjects that the person's course will no longer be a full-time course; and
>
> (c) includes periods of vacation.'

Section 613 is in similar terms with regard to payability of newstart allowance.

The issue

The issue was whether O'Neill was enrolled in a full-time course of education while he was enrolled as a PhD student.

Discussion

The AAT referred to the Federal Court decision of *Secretary, Department of Social Security v Jordan* and *Secretary, Department of Social Security v Jiang* (1998) 49 ALD 496). Hill J stated:

> 'In the Secretary's submission, should a university declare a course full time, then a student enrolled in that course would satisfy the criteria of s.531 and s.613, becoming ineligible for a job search or newstart allowance. In her submission, this would be the case irrespective of the amount of time the student was required by the course to spend attending the university, working on assignments or preparing for the course generally. She submitted that "we are not entitled to second guess the institution".
>
> Counsel for the respondents submitted that the question must be resolved by the tribunal by looking at all the facts and that the classification by the institution of the course is merely one of the factors to consider. With respect, I agree.
>
> The classification of the course by the educational institution offering it is a factor to consider; indeed it may provide at the least a prima facie indication and perhaps often will, absent other factors, be determinative. But that classification cannot be the only factor to be considered ... Other relevant facts will include the number of hours the student is required to attend the university, the number of hours expected to be spent working at home on study and assessments and the times and days the student is required to attend the university. The task of statutory interpretation, however, is not to define an expression in the abstract. The context in which the expression is employed will cast light on the meaning which parliament intended. In the present case the context is that of conferring upon unemployed applicants a benefit where they are seeking work. An applicant who is enrolled in a full time course of educational or vocational study is to be regarded as not able to participate in the full time work force and thus disentitled to the benefit. Hence in construing the expression "full time course of education" it will often be relevant to consider whether the course is so structured that it would be inconsistent with the ability of the applicant to become engaged in full time employment.
>
> Thus, whether a person is enrolled in a full time course of study will involve an issue of fact and degree to which these factors will all be relevant. In my opinion, the classification by an institution cannot be the final answer. If it were, difficulties might arise were an institution to fail to classify a course or where the educational institution flies in the face of common sense and reality in classifying what might otherwise be thought to be a part time course as a full time course, or vice versa.'

In this case, the applicant was considered to be a full-time student by the University. There were no set hours, but there was a heavy workload. The AAT concluded that working for a PhD on the basis that it will be concluded within 4 years is inconsistent with being available for employment. The fact that O'Neill had been less diligent than