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

necessary did change the characterisation of the course. The AAT accepted that O'Neill had abandoned the course by the end of February 1997, even though he was still at that time enrolled, as he had ceased to do any reading or studying by that time.

The AAT found that O'Neill had made a deliberately false statement when he denied he was enrolled at an educational institution. He did nothing to correct that false statement in his later 'continuation' forms. Section 1224 applies and there is therefore a debt owing to the Commonwealth.

Formal decision

The AAT set aside the decision under review and substituted the following decision:

> 'that the applicant has been overpaid in respect of:
>
> (a) Job Search Allowance paid from 21 June 1994 to 3 July 1995;
>
> (b) New Start Allowance paid from:
>
> (i) 4 July 1995 to 31 December 1995;
>
> (ii) 1 January 1997 to 28 February 1997; and
>
> (c) such overpayments are debts due to the Commonwealth to be recovered by the respondent'

[A.B.]

Newstart allowance: 'unemployed' and 'activity test' requirements

GOULD and SECRETARY TO THE DfaCS
(No. 19990268)

Decided: 27 April 1999 by R.P. Handley.

Background

Gould's newstart allowance was cancelled on the basis that he was not unemployed and did not satisfy the activity test. Gould had established a cooperative organisation called the Open Interchange Consortium (OIC) with the object of raising awareness of the Internet and electronic commerce, as a means of generating work for members of that organisation. Gould was the Honorary Secretary of OIC and its Public Officer. From June 1995 to June 1996, and from July 1997 to October 1997 self-employment was an approved activity for Gould's newstart allowance under the 'Self Employment Development Program'. In January 1998 his allowance was cancelled because he was working 12 to 14 hours a day for the OIC as its Secretary.

Gould argued that he was actively seeking work, through OIC, in that he was pursuing contractual engagements for himself and other OIC members.

Was Gould unemployed?

The AAT accepted that Gould was essentially using the business structure of OIC in the course of finding remunerative work for himself and others. The structure was 'a shadow' of Gould, had no independent life and was not trading.

> 'In the Tribunal's view, the mere fact that a person operates in the guise of another business structure of which the person is an officer, does not, for the purpose of s.593(1) mean that the person is employed and therefore disqualified from receiving NSA ... Thus the fact that the applicant used business structures in finding work for himself is not definitive.
>
> The Tribunal finds that the Applicant was not "employed" in the ordinary meaning of the word in the period in question. He was not in paid employment. Certainly he was dedicating a significant amount of time to OIC activities, but the primary objective of this voluntary activity was to find himself (and others) remunerative work. The Tribunal therefore determines that the Applicant was "unemployed".'

(Reasons, paras 46-47)

Did Gould satisfy the activity test?

To satisfy the activity test a person must be actively seeking and willing to undertake paid work. Evidence was given by Gould that he had approached a number of organisations via their Chief Executive Officers seeking contracts. The Department had investigated these alleged contacts and could not confirm that he had in fact sought work as specified on his continuation forms. The AAT, however, found the investigations were deficient, and accepted that Gould had sought work in the manner outlined.

Gould had also looked for work in the Information Technology sections of the *Australian* and in the 'Computing' sction of the Friday edition, as well as making submissions in response to advertised tenders on behalf of the Olympic Co-ordination Authority and Tourism Victoria. In those circumstances the AAT was satisfied that Gould was actively seeking and willing to undertake paid work.

Formal decision

The AAT set aside the decision under review and substituted a new decision that Gould remained qualified for newstart allowance at all relevant times, and therefore, his newstart should not have been cancelled.

[A.T.]

Restart re-establishment grant: application after sale of farm

SECRETARY TO THE DFaCS and STAATZ
(No. 19990090)

Decided: 17 February 1999 by S.A. Forgie.

The Secretary to the DFaCS sought review of a decision made by the SSAT that Staatz was eligible for a restart re-establishment grant under the *Farm Household Support Act 1992* (the Act). These grants were intended as assistance for people who were leaving the land and leaving farming.

The issue

The issue as identified by the AAT was whether Staatz had to lodge any claim for re-establishment grant before the farm was sold.

Background

There was no dispute before the Tribunal in regard to the facts that applied in this case. Staatz was in a mixed pastoral and agricultural business partnership, 'Staatz Enterprises' with his parents and one brother. The business was conducted on land owned by Staatz's parents. The partnership rented the land from the parents and the area that was rented was two-thirds of the whole. Another brother, who was not part of the partnership Staatz Enterprises, rented the remaining third. Staatz worked full-time on the farm and all his income was derived from it.

The farm was put on the market in 1998 and the three brothers spoke to Centrelink about the sale. All three brothers understood that there would be no grant until the farm was sold. The other two brothers embarked on their plans for their future lives. They left the farm before the sale was completed, however they lodged their claims at the time they left, ie before the farm was sold. Staatz stayed on until it was sold and waited until some few days after the sale to first lodge his claim.