Volume 3, Number 11, October 1999



# SOCIAL SECURITY



## Including Student Assistance Decisions

## Opinion

### *Ordinary income on a yearly basis: what does it mean?*

The income test set out in the Pension Rate Calculator under the *Social Security Act 1991* is to be applied to determine the reduction to a person's pension entitlement due to income. The first step under s.1064-E1 requires an assessor to 'Work out the amount of the person's ordinary income on a yearly basis'. A recent decision of the AAT, *Secretary to the DFaCS and Wiltshire* (decided 30 July 1999, No. 19990562) once again looked at what this step requires. It looked at the question 'Does it mean "Work out the amount of the person's ordinary income for a particular year" or does it mean "Work out the amount of the person's ordinary income for a particular period, expressed on a yearly basis" ?'

Wiltshire was an aged pensioner who did some short-term part-time work for a two month period. The Department maintained the income earned on average per fortnight ($210) as an annualised amount ($10,951) during the fortnights that she worked. The SSAT on the other hand had taken the view that the whole of the earnings for the two months worked was to be treated as income for a one-year period.

The AAT noted that the leading High Court decision on this issue was *Harris v Director-General of Social Security* (1985) 59 ALJR 194; (1985) 24 *SSR* 294 where the Court considered the meaning of the term 'the annual rate of income of the claimant or pensioner' in s.28(2) of the 1947 Act. The Court said:

> The distinction between an annual amount of income and an annual rate of income is critical to an understanding of s.28(2). If an annual amount of income were a component in the s.28(2) calculation, it would be necessary to identify a commencing date of the income year in order to ascertain what receipts fell into one year and what into the next. But a rate of income, like a rate of interest, may vary within any annual period though it is expressed as an annual rate. It is a current rate of income, expressed as so much per annum. An annual rate of income may not subsist for a year: an annual rate of income that obtains in one week may change in the week following. Annual income is the sum of the products of each annual rate of income that obtained during any part of the year multiplied by the fraction of the year during which it obtained.

The SSAT in Wiltshire's case had decided that in enacting s.1064-E1 in 1991, Parliament had intended to change the law so that, in working out

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The **Social Security Reporter** is published six times a year by the Legal Service Bulletin Co-operative Ltd. Tel. (03) 9544 0974 ISSN 0817 3524

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**Subscriptions** are available at $60 a year, $40 for Alternative Law Journal subscribers.

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Print Post approved PP381667/00178

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the amount of a person's ordinary income on a yearly basis, regard was to be had to a person's income over a 12-month period. This decision is consistent with the AAT decision of *Secretary to the DSS and Morris* 2(6) *SSR* 80. *In Morris* the AAT considered that the phrase 'ordinary income on a yearly basis' in the 1991 Act was clear and unambiguous, there was no need to refer to any extraneous material such as explanatory memorandums to determine its meaning, and therefore rejected a submission that the 1991 Act was not intended to affect the substance of the 1947 Act, but merely convert the language of that Act into plain English.

The AAT in *Wiltshire's* case, however, was of the view that s.1064-E1 did not bring about any change in the law, and in this is consistent with the AAT decisions of *Secretary to the DFaCS and Lennon* 3(10) *SSR* 152 decided 31 May 1999 and *Secretary to the DSS and Moroney* No. 13070 decided 7 September 1998. In each of these cases it was determined that *Harris* remained relevant and must be followed.

However, the method of working out the person's rate of income remains one of uncertainty because *Harris* considered that the correct method would depend upon the circumstances of a particular case. The Court said:

> At the time when an annual rate of income is ascertained, it is necessary to have regard to the pensioner's sources of income at that time and to find what each of those sources would yield over the period of a year assuming the current yields from those sources were to continue. It is not necessary to predict whether the pensioner will retain his sources of income for the year or whether the current yields will be maintained, for the annual rate of income is the current rate of income though it is calculated and expressed as an annual rate. If the current income from a current source is receivable as so much per week or per month, it must be calculated and expressed as an amount per annum.But an annual rate of income is not ascertained merely by extending to a year the income receipts of a shorter period without considering the period in respect of which the particular item of income has been received. A pensioner whose only income apart from his pension is $1,000 paid annually as a dividend on an investment has an annual rate of income of $1,000. It is wrong in law as it is absurd in fact to say that he has an annual rate of income of $52,000 in the week in which he receives the dividend and a nil annual rate of income for 51 weeks of the year. His investment, the source of his income, yields an annual sum and, so long as the pensioner retains the investment, his annual rate of income from that source will be $1,000. If that source of income were lost, the annual rate of income from that source would be reduced to nil from the time of the loss. When a pensioner is in receipt of weekly wages from employment, however, his annual rate of income from that source is calculated on the assumption that his earnings at the current rate will continue for the year. If he were to retire from work, that source of income would be gone and the annual rate of income attributable to that source would be nil. In cases where pensioners or claimants are employed intermittently, it may be appropriate in some cases to treat the intermittent work as a continuing source of income and to take an average of earnings over a period as the yield from that source, and in other cases to treat each employment as a separate source of income yielding its particular amount of earnings. The former method would establish a comparatively constant annual rate of income; under the latter method, the annual rate of income would change as the pensioner or claimant went into and out of employment. The circumstances of the particular case would show which method is more appropriate ...
>
> If a pensioner is in casual employment earning different amounts each week, as Mrs Harris was, it may be appropriate — it is a question of fact — to determine the annual rate of income attributable to casual employment by striking an average of earnings over a period.

In *Dunning and Secretary to the DSS* (1986) 33 *SSR* 420, the AAT said what was required was the identification of the most appropriate means of calculating a pensioner's annual rate of income, it was not a matter of discretion, and, once identified, was the only correct means to adopt to calculate the income. *Harris* gave some indication of the matters which need to be looked to, that is:

- where employment is regular, the annual rate of earnings is to be assessed on the assumption that the earnings will continue for the year, until there is a change in the employment situation;
- where there is investment income, with a dividend paid annually that income is to be maintained over 52 weeks of the year;

The more difficult situations arise in the other two possibilities identified in Harris, that is where:

- there is intermittent employment; or
- a pensioner is in casual employment earning varying amounts.

In those circumstances, according to *Harris* the method of assessment may vary. In *Blanusa and Secretary to the DSS* (1985) ALD 351; (1985) 28 *SSR* 346, the AAT said of *Harris*:

> The High Court have therefore established a number of factors which it is relevant to take into consideration when determining an appropriate period over which to strike an average of earnings, to calculate the annual rate of income from time to time. An 'annual rate of income' has been defined. A Tribunal should turn its mind to 'those income payments which would be received by the pensioner during the ensuing year'. On initial grant of pension it is necessary to ascertain from an applicant all sources of income over the preceding 12 months. Secondly, it must be determined whether they are likely to continue over the ensuing year. The assumption must be, that they are likely to continue to yield at the current rate until something occurs which falsifies that assumption. Thirdly, it needs to be ascertained whether the income is received at frequent and regular intervals, intermittently or at lengthy intervals. If a change occurs in the level of income from one source, 'the new level' is the basis for calculating the annual rate from that source. The period over which an average should be struck for a source of income will be dependent on the source of the income, the regularity with which it is received and its likely continuance.
>
> As we are dealing with an annual rate of income from which is determined the annual rate of pension (Section 28), which must be paid in fortnightly instalments to the pensioner (Section 41(2)), it may be appropriate that the period used over which to strike a rate of pension should be some period which divides into the 52 weeks of the year. Whether it is appropriate to use a period of 52 weeks, 26 weeks or 13 weeks will depend on the factors as expressed by the High Court.

In both *Moroney* and *Lennon*, there was a short period of earnings in each year, and this was an established annual pattern of work, for example working as Santa Claus each year over the Christmas period. In both cases it was determined that the income earned should be treated as income over the full 12-month period, as with dividend income. The predictability of employment appears to have been missing in *Wiltshire's* case and the AAT determined that the earnings for the two-month period should be treated as the annualised amount during the period of employment. That is, there was presumably nothing to displace the assumption that employment would continue. On the other hand the AAT in *Moroney* took the approach that:

> the correct basis for determining the ordinary income on a yearly basis is to determine what is the sum of the products of each current rate of income at a particular time that obtained during any part of the year and then multiply that rate of income by the fraction of the year during which it was earned. To obtain a correct result that calculation can only be made with the wisdom of hindsight which is something which is not available to the applicant in the day to day administration of the Ordinary Income Test. However,

when it comes to making a claim for an overpayment the applicant does have the benefit of hindsight as in the present case where by the time the applicant claimed there was a debt due to the Commonwealth because of an overpayment of age pension the facts were known and it was not necessary to determine a future estimated income based on the current rate of income. In that regard I find that Mr Moroney earned $1,800.00 over four weeks and that it was more likely than not that he would not earn further income as Santa Claus (or from any other source of employment) until December 1998.

Accepting that the respondent's current rate of income at December 1997 was $23,400.00 per annum as is submitted by the applicant it is then necessary to determine what is the ordinary income on a yearly basis and that can only be determined by applying to that current rate of income of $23,400.00 the formula as outlined by the High Court in *Harris* by multiplying the current rate at a particular time by the fraction of the year during which it obtained. In this case by applying the rate obtained for four weeks and the formula of four weeks over fifty-two weeks, the ordinary income on a yearly basis in relation to Mr Moroney is therefore $1,800.00.

Whilst flexibility in assessing the 'ordinary income on a yearly basis' may well be necessary, the cases demonstrate the difficulty in achieving consistency in applying the principles enunciated in *Harris.* Departmental policy appears to adopt the approach of annualising income in all cases, however, where intermittent employment or fluctuating income is concerned, the Department's Guide indicates that averaging should occur, generally over a 13-week period, although an assessment of circumstances may warrant annualising over a different time period. Difficulties can be created where different regional offices, or even different decision makers adopt a different view of how income should properly be assessed.

Another problem lies in the terms of the Act itself. Where a pensioner is sent a recipient notification notice, requiring him or her to notify of a change in income within 14 days, and such a change is notified, a decision maker is then apprised of information which arguably indicates that the correct rate of social security entitlement is no longer being paid and must be reduced or increased according to the legislative requirement set out in the Act. For example, a pensioner may notify of fluctuating income fortnightly and have his or her pension increased, reduced, stopped and restarted as a result, on the basis of the fortnightly income taken as an annualised figure. However, a different assessor, taking an averaging approach may determine that, when the earnings are averaged over say a 13-week period, no pension at all is payable during the period. When this is done with the benefit of hindsight an overpayment may result.

Thus, while the case law has arguably clarified the meaning of the term 'ordinary income on a yearly basis' the practical application of Step One in s.1064-E1 remains a matter of some uncertainty, to the detriment of those in receipt of pension entitlements.

[A.T.]