(d) profits; (whether of a capital nature or not).

Section 8(2) of the Act provides that a reference in the Act to an income amount 'earned, derived or received' is a reference to:

(a) an income amount earned, derived or received by any means;

(b) an income amount earned, derived or received from any source (whether within or outside Australia).

Company did not cease business

The Tribunal made various findings of fact relating to the financial and business detail of the company. The business conducted by the company had two distinct aspects: sales of sporting equipment to golf clubs in particular which were made on a representational visit basis by Parnell; and sales of sporting equipment via a union/clubs shop system which were made in particular by telephone contact between the company and the union/clubs shop customer.

The Tribunal found that the claim that the company ceased business in November 1998 was not supported by Parnall's evidence. He said that although the selling by representation had ceased the company was still doing business under the union shopper branch of its business and was continuing to pay for the cars and other personal expense items including rental of the domestic premises.

Income derived or earned

The Tribunal found that the Parnells used the company as a banker by arranging for the company to pay amounts relating to their private and/or domestic expenditure. Mr Parnell was remunerated by the company on a fee basis.

The Tribunal referred to two decisions, re *Hill and Repatriation Commission* (1996) 45 ALD 347 and re *Gowans and Repatriation Commission* (1988) 14 ALD 37 which support the proposition that amounts paid by the company in relation to the Parnells private or domestic expenditure represent income earned or derived by Parnell.

The Tribunal also referred to s.20 of the *Fringe Benefits Tax Assessment Act 1986*, but noted that this section is not recognised in the *Social Security Act 1991* in relation to age pensions.

The Tribunal found that the private expenditure paid for the Parnells by the company was done on the basis that the company is effectively reimbursed by remuneration derived by Mr Parnell. The quantum of that remuneration is ordinarily determined by the amounts credited to the Parnells' loan account with the company.

> The effect of the arrangements between the applicants and the company was that the company would pay private and domestic expenditure incurred by the applicants, charge, such amounts to the shareholders' loan account in consideration of the first applicant performing the functions of manager of the company and on the basis that such amounts paid in that consideration were his remuneration as an employee of the company.

(Reasons, para. 14)

Ascertainment of actual income

The Tribunal found that Parnell did derive income from his employment by the company but was not able to ascertain Parnell's actual income during the relevant period. The Tribunal noted that Centrelink made one assessment, the Social Security Appeals Tribunal another and that Parnell did not provide any alternative amount. The Tribunal accepted the SSAT figure subject to one adjustment. The Tribunal reduced the amount to take into account that Parnell's car (the hire purchase payments were paid by company) was used 80% of the time on company business.

Formal decision

The Tribunal decided:

- to set aside the decision under review;
- the annualised income of the first applicant was $8853 a year; and
- both matters were remitted to the DFaCS to give effect to the Tribunal's decision.

[M.A.N.]

Age pension: appropriate period to average income

LESLIE and SECRETARY TO THE DFaCS (No. 2000/857)

Decided: 27 September 2000 by H.E. Hallowes.

Background

Mr and Mrs Leslie undertook work on a casual basis managing motels. They had quite lengthy periods without any income over and above their superannuation and interest payments. During other short periods, they earnt considerable sums of money. Mr and Mrs Leslie disclosed on nine occasions during 1998 that they had been paid for undertaking casual employment managing motels as they had done during 1997. Mr and Mrs Leslie's casual earnings on 20 April 1998 had been averaged across a two-week period. Earnings disclosed on 29 July 1999 were averaged across a four-week period; all other casual earnings disclosed between those dates were averaged across a 12-week period. The impact of Mr and Mrs Leslie's earnings on their rate of earnings, and hence their rate of age pension payable, was usually taken by Centrelink to last for 12 weeks rather than being spread across a 52-week period.

On 11 February 1999, the Leslies advised Centrelink they had earned a total of $400 for the two-week period ending 28 January, 1999. Centrelink decided to average that income over 12 weeks. A further decision was made on 23 May 1999 with respect to the rate of income and rate of pension payable to the Leslies. They had no further earnings until June 1999.

The Leslies were informed by letter dated 12 February 1999 of the rate of age pension payable to them. They sought a review of the decision with respect to the rate of pension payable on 15 July 1999.

Issues

The issues are what is the appropriate period over which income earned should be averaged? And what is the date of effect of a favourable decision?

Legislation

Section 55 of the *Social Security Act 1991* provides that a person's age pension rate is worked out using Pension Rate Calculator A at the end of s.1064 of the Act. The ordinary income test is set out under Step 5 of Module A. Module E of s.1064 provides the steps to work out income reduction. Ordinary income is to be worked out on a yearly basis. The Tribunal also had before it parts of the Social Security Policy and Legislation Guide (the Guide) with respect to the determination of rates of income for pensions. The relevant sections state:

> **Assessment of income for pensions**
>
> There are 2 methods of assessing income for pensions:
>
> - fortnightly versus annual income assessment, and
> - variable income ...
>
> **Variable income**
>
> If income is not earned at a constant or clearly recognisable rate, average earnings over a suitable period may be used to obtain a rate ...

> If there is difficulty in deciding what period to average earnings over, the guiding principle is that the calculation should provide a reasonable reflection of the current rate of income.
>
> Generally an average of the previous 13 weeks earnings provides an acceptable figure if the pattern of earnings is likely to continue. However, less than 13 weeks average MAY be more appropriate if the shorter period better reflects the pattern of earnings.

Section 80(3) sets out that a favourable decision takes effect on the day the person sought the review if the application for review is made more than three months after the decision is made.

Was a decision made?

The Tribunal noted that there was no document before it setting out a decision in respect of the rate of age pension payable to Mr and Mrs Leslie for the period 11 February to 23 May. But the Tribunal assumed a decision had been made because Mr Leslie advised Centrelink by letter dated 15 July 1999:

> ... I have been advised by Suzanne at your office that because we have not advised you that we have not earned any income for a 16 week period from 11th February to 23rd May this year my wife's and my pension have been reduced by about $900.

Was there a failure to notify?

On 12 February 1999 Mr Leslie was advised by letter the details of his rate of payment. Information on the back of the letter indicated that, in assessing Mr Leslie's 'combined yearly income', earnings of $9534.80 were taken into account. Mr Leslie was also advised that his combined yearly income was taken into account in order to determine the rate of age pension payable. He was further advised that he must tell Centrelink if his combined income 'increases' or if his combined income as shown in the letter was 'incorrect'. The letter refers to 'earnings' and 'total income' rather than the rate of earnings and income.

The Leslies were satisfied that the income detailed in the letter was accurate at the time. Mr Leslie had averaged his earnings across a 12-week period as advised by Centrelink. If Centrelink had been consistent with past practice, earlier income averaged across 12-week periods should have dropped out of their rate of earnings and led to an increase in their pension. Mr and Mrs Leslie did not know that this was not occurring. They were surprised that Centrelink was not sending them further advice.

The Tribunal was satisfied that the Leslies did not fail to comply with any notification notices because their income did not increase during the relevant period and the advice with respect to their earnings as at 12 February 1999 was correct. There was no increase in their income until July 1999.

Appropriate period to average income

The Tribunal referred extensively to the recent Federal Court decision *Secretary, Department of Family & Community Services v Rolley* (2000) FCA 806 (4(5) *SSR* 67) which considered income earned from casual employment.

The Tribunal decided that the appropriate period over which to spread the Leslies' casual earnings was the 12-week period chosen on most occasions by Centrelink. The Tribunal considered the character of their income, that is, its source, that it was intermittent, and that the amount varied. The income should not be treated as recurring income as the payments were more in the nature of one-off payments for work, unlikely to be repeated on a regular basis. The Tribunal stated that having chosen a period in order to determine a rate in this matter, no assumption should be made that Mr and Mrs Leslie would continue to earn at that rate. They clearly disclosed the periods of their earnings and once the period was spent the income attributable to that source of income would be nil.

Date of effect of favourable decision

The Tribunal considered there was no reason for Mr and Mrs Leslie to seek review of the decision advised to Mr Leslie in the letter dated 12 February 1999. The decision was in accord with his calculations. But the Tribunal considered that during the period further decisions should have been made with respect to the rate of age pension payable to both Mr and Mrs Leslie to provide a 'reasonable reflection of the current rate of income' (the Guide). The Tribunal directed that the rate of pensions payable to Mr and Mrs Leslie between 11 February and 23 May 1999 be recalculated as no assumptions should have been made that Mr and Mrs Leslie retained an ongoing income from the motels they disclosed they had worked at.

> The amounts of income disclosed by Mr and Mrs Leslie in the 12-week period leading up to 11 February 1999 should only affect the rate of their pensions for the 12-week period following each advice of income to Centrelink. As Mr and Mrs Leslie were not given 'notice' of any decisions during the period 11 February 1999 to 23 May 1999, they were not in a position to apply for review ... The Tribunal therefore finds that the decisions now to be made should take effect and that subsection 80(3) does not preclude the correct rate of age pension being paid to Mr and Mrs Leslie in accordance with these reasons.

(Reasons, para. 12)

Formal decision

The decisions under review are set aside. The matter is remitted to the Secretary with directions that the applicants' rate of age pension payable between 11 February 1999 and 23 May 1999 be recalculated in accordance with these reasons.

[M.A.N.]

Special benefit: newly arrived resident's waiting period; change in circumstances

H & T SARKAR and SECRETARY TO THE DFaCS (No. 2000/644)

Decided: 2 August 2000 by S. Bullock.

The issue

It was not disputed that Mr and Mrs Sarkar were qualified to receive special benefit; the issue rather was whether that benefit was payable to them. This required consideration of whether an exemption from the usual newly arrived resident's waiting period should be granted to Mr and Mrs Sarkar, and in turn consideration of whether there had been a substantial change in their circumstances that was beyond their control. The respondent in August 1999 and the SSAT in September 1999 had concluded that such an exemption should not be granted.

Background

Mr and Mrs Sarkar married in Bangladesh and first applied to migrate to Australia in October 1994. They were advised in September 1995 that their application had been conditionally approved, but then in January 1996 that it had been put on hold due to restrictions in the number of migration places. In August 1996 their application was revived and, after further health checks and supplying of additional (and costly) documentation, it was granted on 8 January 1998. It was then cancelled later that month, as they had by then a newly born child not included in their original application. The family repeated at high cost an English language course, and re-applied, and in June 1998 were advised that their application had been approved. At that time they were formally advised of the difficulties re-