CJSA/1638/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner achieves no practical success. The decision of the Coventry appeal tribunal dated 12 March 2003 is erroneous in point of law, for the reasons given below, and I set it aside. However, it is expedient for me to substitute a decision having made the necessary findings of fact (Social Security Act 1998, section 14(8)(a)(ii)). My decision is that the claimant's appeal against the Secretary of State's decision dated 15 July 2002 is disallowed. The claimant is not entitled to jobseeker's allowance from and including 17 June 2002.

2. This is a particularly difficult case requiring the application of the rules on term-time only workers as explained by the Tribunal of Commissioners in cases R(JSA) 4/03 and R(JSA) 5/03. It illustrates how tiny differences in calculations and in the way in which work is organised can lead to claimants falling one side or other of the line defining entitlement to jobseeker's allowance (JSA).

3. There was an oral hearing of the appeal in October 2003, at which the claimant was represented by Ms M Hession of Rowley Ashworth, solicitors, and the Secretary of State was represented by Mr L Scoon of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both of them for their submissions at the hearing, which very helpfully enabled the essential issue in dispute to be identified. However, further written submissions were needed about the exact working out of the principles involved. I regret the further delay, but I wished to be sure that the case to be made for the claimant was explored as fully as possible.

4. The basic legal rules are clear, following the two decisions of the Tribunal of Commissioners, and I do not need to set out all the relevant legislation. The crucial provision is regulation 51(2) of the Jobseeker's Allowance Regulations 1996, which applies in determining whether a claimant is engaged in remunerative work for 16 or more hours a week and so excluded from entitlement to jobseeker's allowance (JSA). It provides:

> "(2) For the purposes of paragraph (1), the number of hours in which a claimant or his partner is engaged in work shall be determined--
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> (a) where no recognisable cycle has been established in respect of a person's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours, which he is expected to work in a week;
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> (b) where the number of hours for which he is engaged fluctuate, by reference to the average of hours worked over--
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> (i) if there is a recognisable cycle of work, and sub-paragraph (c) does not apply, the period of one complete cycle (including, where the cycle involves periods in which the person does not work, those periods but disregarding any other absences);
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> (ii) in any other case, the period of five weeks immediately before the date

> of claim or the date of supersession, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately;"

Sub-paragraph (c), which set out a special rule for employees, especially those employed at educational establishments, who had an annual cycle of work, was declared inapplicable as contrary to European Community law in R(JSA) 4/03.

5. The crucial part of the Tribunal of Commissioners' decisions is paragraph 29 of R(JSA) 5/03:

> "29. A person who is employed to work throughout school or college terms but not during school holidays or college vacations usually, but not always, has a recognisable cycle of work of a year. The cycle may become recognisable in practice even if it is not established by the contract of employment (R(JSA) 5/02). The number of hours worked each week during a cycle of work inevitably fluctuates because of the periods of no work during the school holidays or college vacations. Where there is a cycle, regulation 51(2)(b)(i) requires the average to be calculated by taking into account `periods in which the person does not work ... but disregarding other absences'. In the ordinary case, this means dividing the total number of hours worked during the terms by 52 less the number of weeks of holiday to which the particular claimant is entitled. The result determines whether the person concerned is in remunerative work or not for the whole period of the cycle (R(IS) 8/95) so that it is not necessary where there is a cycle to attribute the holiday entitlement to any particular weeks. There may be cases where there is a question as to the precise period covered by the relevant cycle but in all the cases before us it is appropriate to take the cycle as covering the academic year commencing in the September before the date of claim."

The reference to holiday entitlement is to contractual entitlement and to holiday for which a person is paid (paragraph 27 of R(JSA) 5/03).

6. The claimant made a claim for JSA which was treated as made on 17 June 2002. She was employed by Coventry University Students' Union (CUSU) in their shop. Her current statement of terms and conditions of appointment, as at 1 January 2002, stated that she was employed for 25 hours per week for term-time only and that the term-times for 2001/2002 ran from 24 September 2001 to 14 December 2001, from 7 January 2002 to 22 March 2002 and from 22 April 2002 to 14 June 2002. Those dates covered 31 weeks. She had worked on a term-time only contract, for varying hours, since February 1996. Her weekly hours were changed from 29 to 25 in 2001. On 15 July 2002 a representative of the Secretary of State decided that the claimant was not entitled to JSA from 17 June 2002 because she was in remunerative work. That decision was based on the then current understanding of the law as being that someone in the claimant's circumstances was treated as working out of term-time for the hours worked on average during term-time.

7. The claimant appealed, saying that she had been awarded benefit out of term-time in the past. She provided evidence of that and also referred to a test case going through the courts, apparently being represented by a regional official of her trades union. There was a hearing on 12 March 2003, although unfortunately no record of proceedings is included in the Appeal Service file. The appeal tribunal disallowed the appeal and confirmed the Secretary of State's decision.

8. The appeal tribunal's statement of reasons described the claimant's case as being that she ceased to be employed at the end of the summer term and so should be entitled to JSA on that basis. That case was rejected, with a finding that there was a continuous and continuing contract. The statement also referred to a recent decision of a Tribunal of Commissioners (CJSA/2079/1998, now reported as part of R(JSA) 5/03) for the proposition that where a contract of employment came to an end at the beginning of what would be a period of absence even if the contract continued, the person concerned would be treated as still in employment if it was expected that she would resume employment after that period of absence, for instance by following a long-standing practice. Thus, even if the claimant's contract had come to an end, she was to be treated as still in employment on 17 June 2002, making the crucial question the number of hours for which she was treated as engaged in work. That part of the appeal tribunal's decision is not now disputed.

9. On the question of the hours of work, the appeal tribunal had referred to a provision in the claimant's statement of terms and conditions that she was entitled to 18 days' paid annual leave. It went on to say, relying on the same decision of the Tribunal of Commissioners:

> "The Tribunal also stated that in relation to income-based benefits regard should be had only to those weeks of paid holiday. In consequence, where as here there is a recognisable cycle of work the total number of hours worked during term time should be divided by 52 less the number of weeks of holiday to which the claimant is entitled. Only unpaid holidays are to be included in the calculation. Regulation 51(2)(b) must be applied (*Hockenjos v Secretary of State for Social Security* (2001)). ... The number of hours deemed to be worked per week will be affected by the calculation referred to above. On the evidence the appellant will nevertheless be treated as falling within [regulation 51(1) of the JSA Regulations]."

10. The claimant now appeals against the appeal tribunal's decision with my leave. The initial written submission on behalf of the Secretary of State, dated 23 June 2003, invited me to dismiss the appeal, although at the oral hearing Mr Scoon agreed that the appeal tribunal had made errors of law. I can state them briefly.

11. First, in the absence of a copy of the record of proceedings it is impossible to be sure that the appeal tribunal brought to the attention of the claimant and any representative the decision of the Tribunal of Commissioners now reported as R(JSA) 5/03 or the decision of the House of Lords in *Banks v Chief Adjudication Officer* [2001] UKHL 33, [2001] 1 WLR 1411, now reported as part of R(IS) 15/01, (which is the decision that I think the appeal tribunal must have meant to refer to instead of *Hockenjos*). Since R(JSA) 5/03 was central to the appeal

tribunal's reasoning, there would have been a breach of the principles of natural justice and of the right to a fair hearing if the claimant and any representative did not have a fair opportunity to deal with the effect of that decision. No complaint about the lack of such an opportunity was made in the application on behalf of the claimant for leave to appeal, but that application was made by solicitors who apparently had not been acting at the time of the hearing on 13 March 2003. Therefore, I conclude on balance that there was an error of law in this respect.

12. Second, the appeal tribunal did not adequately explain why the calculation of the average hours worked by the claimant over a cycle of year came to 16 or more. It was not good enough, in a case where all the issues were disputed and any calculation was likely to produce a figure very close to the dividing line, simply to state a conclusion. The working out of the calculations and the findings of fact on which they were based needed to be set out expressly.

13. Third, the findings of fact made by the appeal tribunal were limited and inaccurate, in a way which went to undermine the conclusion expressed about average hours of work. The appeal tribunal apparently regarded the claimant as having worked for 775 hours (31 x 25) in the terms forming part of the annual academic year cycle from September 2001 to September 2002. The appeal tribunal also made a finding that she was entitled to 18 days' annual leave. If those days were treated as the claimant's sole contractual entitlement to paid holiday, that would in accordance with paragraph 29 of R(JSA) 5/03 leave 775 to be divided by 48.4 (52 - 3.6). That is on the assumption, accepted by the parties here, that five working days should be equivalent to the a week. The result is an average of 16.01. The margin is wafer-thin, and one reason why the appeal tribunal needed to set out its workings in full.

14. However, the appeal tribunal's finding as to holiday entitlement was not properly based on the evidence then available. The provisions about leave in the claimant's statement of terms and conditions (which was before the appeal tribunal) were as follows:

> "Your paid annual leave entitlement will be 18 working days based on your contractual 31 weeks Term Time only (This is a historical calculation, based on custom and practice). This entitlement assumes being in employment over the full 12 months. You will only be entitled to a proportional entitlement if you commence or leave during the leave year.
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> Additionally you will be entitled to appropriate public holidays plus any extra statutory days, which fall within the CUSU trading year, September to June."

The appeal tribunal did not take account of the claimant's contractual entitlement to paid holiday on public holidays in the period from September to June and on extra-statutory days. There was no evidence before it of the number of extra-statutory days allowed. It is plain, from looking at the dates of the third term in 2001/2002, that two public holidays would have fallen within term-time, ie Monday 6 May 2002 and Monday 22 May 2002. As the claimant was not required to work on those days, they should (in the absence of any evidence to the contrary) have been deducted from the total of hours worked by the claimant during the annual cycle. That principle is now agreed by the parties in the present case and in my judgment it follows from the general

approach of the Tribunal of Commissioners, even though in neither decision did it expressly grapple with this problem (see, in particular, paragraph 30 of R(JSA) 5/03: "The object of the exercise under ... the equivalent of regulation 51(2)(b)(i) ... was to ascertain the average number of hours usually worked when the claimant was not on holiday or absent due to sickness, etc."). If two days' worth is deducted from the total hours worked in the year and added to the paid holiday entitlement, 765 would have to be divided by 48 (52 - 4). The result is 15.93, under the crucial level by another wafer-thin margin.

15. For that reason, the failure of the appeal tribunal to make adequate findings of fact on the evidence available to it or to seek further evidence of the claimant's holiday entitlement for public holidays and extra-statutory days was material to its decision. That holds good even though there is a difficult issue of law, explored below, about what days of holiday should go into the divisor in the calculation.

16. This is not a case where I can say that, since I have also reached the conclusion that the claimant is not entitled to JSA because she was in remunerative work, the decision of the appeal tribunal should not be set aside, even though its reasoning was faulty or there was a breach of natural justice. The appeal tribunal's conclusion was reached on a faulty and inadequate factual basis. A conclusion can only be substituted on a correct factual basis if the appeal tribunal's decision is set aside, so that the necessary findings of fact can be made.

17. For all the reasons given above, I set the appeal tribunal's decision aside as erroneous in point of law. As I have received the necessary additional evidence, it is plainly expedient for me to substitute a decision on the claimant's appeal against the Secretary of State's decision of 15 July 2002.

18. The essential additional evidence is an extract from the CUSU Staff Handbook, sent in by Ms Hession in advance of the oral hearing, in accordance with a direction. The claimant's statement of terms and conditions contained a general provision that it should be read in conjunction with the CUSU Staff Handbook. The Handbook contained this paragraph (3.9.1.3) about statutory holidays and extra-statutory days:

> "In addition to New Year's Day, Good Friday, Easter Monday, May Bank Holiday, Spring Bank Holiday, Late Summer Bank Holiday, Christmas Day and Boxing Day, the University determines an extra 5 statutory days' holiday each year and CUSU employees are granted these also. Term Time only staff who do not normally work during Summer vacation will not be entitled to Summer Bank Holiday payments."

That information is consistent with information obtained by Mr Scoon over the telephone from someone in CUSU about what would be the "appropriate" public holidays for the claimant. On that basis, which I accept, her entitlement was to paid holiday on seven bank holidays (excluding the late summer bank holiday) and on five extra-statutory days. Ms Hession told me that the claimant had confirmed that overall entitlement. Mr Scoon's information was that the Tuesday after the spring bank holiday at the end of May was an extra-statutory day, as was the Tuesday after Easter Monday and some days after Christmas. At the oral hearing, discussion

proceeded on the basis that there were two days of public holiday and two extra-statutory days falling within term-time on which the claimant was not required to work. I am not sure now where the second extra-statutory day in term-time (in addition to the Tuesday after the spring bank holiday) comes from, but I accept for the purposes of the present decision that there were two.

19. It was accepted by Ms Hession that, in accordance with R(JSA) 5/03, the claimant was still in employment or to be taken as in employment on 17 June 2002 and had an annual cycle of work from September to September, following the University's academic years. Thus the crucial issue is the average number of hours worked throughout the cycle, even during periods of no work. It is accepted and agree that, as the claimant did not have to work for four days which would otherwise have been term-time working days, the total hours worked during the 2001/2002 cycle were 755. Where the claimant and the Secretary of State part company is over the divisor to be applied.

20. At the oral hearing, Mr Scoon had suggested that the four term-time holiday days should be added to the 18 days, making 22 working days to be deducted from 52 weeks. That produced a divisor of 47.6, which when applied to 755 hours resulted in an average of 15.86 hours. Ms Hession was obviously content with that result. However, it seemed to me that there was no obvious reason why only 22 days of holiday should be taken into account when the claimant's contractual entitlement over the whole year was to 30 days of paid holiday. I therefore directed further written submissions on the issue.

21. The further submission on behalf of the Secretary of State, dated 10 November 2003, was that all the days of paid holiday entitlement should be deducted from 52 weeks, regardless of whether days of holiday fell within term-time or outside. In the present case, as the claimant's total entitlement was to 30 days' paid holiday, that would require dividing 755 by 46, giving an average of 16.41 hours per week. Even if the four term-time days of holiday were left out, 755 divided by 46.8 gave an average of 16.13 hours per week. Rowley Ashworth's reply on behalf of the claimant was that, as the claimant had no choice as to the days on which she took her 12 days of public holiday and extra-statutory days, only 18 days should be deducted from 52 weeks for the purposes of the calculation under regulation 51(2)(b)(i) of the JSA Regulations. That would involve dividing 755 by 48.4, giving an average of 15.6 hours per week.

22. I cannot accept that submission on behalf of the claimant. I can see no basis in reason or law for distinguishing between the 18 days of paid holiday specified by number in the statement of terms and conditions and the 12 days of public holidays and extra-statutory days specified in conjunction with the Staff Handbook. There is no statutory or general entitlement to paid holidays on days declared as public or bank holidays (see Campbell & Smith Construction Group Ltd v Greenwood [2001] IRLR 588). An employee's entitlement to paid holidays on such days depends on the terms of the contract of employment. For the same reason, Mr Scoon's submission at the oral hearing cannot stand with the principles adopted in R(JSA) 5/03. All days of holiday entitlement under the claimant's contract of employment should in general be deducted from 52 weeks in fixing the divisor in the regulation 51(2)(b)(i) calculation. It also seems to me that, if days of holiday during term-time are to be deducted from the total of hours

worked during the cycle, they should also be deducted from the 52 weeks in the divisor, but I do not have to make a final decision on that issue. As shown in the Secretary of State's submission of 10 November 2003, whether 26 days or 30 days are deducted from 52 weeks in the divisor, the weekly average of 755 hours worked over the annual cycle comes to more than 16 hours.

23. For that reason, the claimant is to be treated as engaged in remunerative work for every week in the annual cycle beginning on 24 September 2001 and therefore is not entitled to JSA from and including 17 June 2002. My decision to that effect is set out in paragraph 1 above.

(Signed) J Mesher
Commissioner

Date: 19 February 2004