

THE SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *10/99

(Commissioner's File No.: CJSA/5529/97)

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

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so as to arrive by 9 April. 1999

(REASON) As Being In Remunerative Work -
Compensation Payment - While Applies To Grant & Day

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1 I allow the claimant's appeal against the decision of the Sutton social security appeal tribunal. It was brought by leave of the chairman, but following a technical hitch leave was regranted by a Commissioner. The decision was that the decision of the adjudication officer was confirmed. The adjudication officer decided that the claimant is not entitled to jobseeker's allowance from 1 January 1997 to 30 December 1997. For the reasons given below, the decision of the tribunal is erroneous in law. I therefore set it aside. I substitute for that decision my own decision at paragraph 2.

2 My decision is that the claimant was not, and was not to be treated as, engaged in remunerative work on 7 January 1997 or on any day between 1 January 1997 and that day.

3 The tribunal recorded the facts as agreed. Unfortunately, it did not state some of the key facts in its decision, or alternatively adopt a statement of agreed facts. The claimant appealed on this ground, and on the ground that the tribunal misapplied regulation 94 of the Jobseeker's Allowance Regulations 1996. The adjudication officer now acting supports the appeal on both grounds. I agree that the decision of the tribunal does not record the facts adequately. Nor does it deal correctly, with regulation 94 of the Jobseeker's Allowance Regulations 1996, perhaps because of an error in the adjudication officer's submission to it. I therefore allow the appeal and set aside the tribunal's decision. Having done so, it is expedient in this case that I deal with the matter myself. I do so to avoid further delay and cost. It is also because there are no relevant facts in dispute and the issues of law have been covered fully in the submissions.

4 I find the facts as follows. On 1 October 1996, the claimant agreed with the employer that her employment would end on 31 December 1996 without formal notice on either side. On 31 December 1996 the claimant's employment with her employer ended as agreed, the basis being said to be voluntary redundancy. She had worked for the employer since March 1973. She was 41 at the date her employment ended. By way of settlement, she received a sum of £41,500.00 from the employer. It was to be paid within three working days following termination of employment. There were no deductions from this sum. It included redundancy pay of £4,095.00, but no sums in lieu of notice, accrued pay or holiday pay, normal earnings, other accrued payments, or refunds of pension contributions. The claimant received no other sums (for example by way of accrued holiday pay) from the employer. I assume, in absence of anything to the contrary, that the sum was paid by 4 January 1997.

5 The claimant claimed jobseeker's allowance with effect from 1 January 1997 in a claim received on 7 January 1997. The adjudication officer decided that jobseeker's allowance could not be awarded. This was because the claimant had received a compensation payment of £33,310.00. No award could be made until and including 31 December 1997. The adjudication officer's submission to the tribunal explains only in part why this stops entitlement to jobseeker's allowance.

6 A claimant cannot claim jobseeker's allowance while engaged in remunerative work or while treated as engaged in remunerative work: Jobseekers Act 1995, section 1(2). Regulation 52(3) of the Jobseeker's Allowance Regulations 1996 provides that a person who was in remunerative work and who is paid earnings under regulations 98(1)(b) and (d) derived from that work continues to be treated as in remunerative work "for the period for which those earnings are taken into account in accordance with part VIII".

7 Regulation 98(1)(b) includes in earnings any "compensation payment". A "compensation payment" is defined by regulation 98(3) as meaning *any payment made in respect of the termination of employment* other than six specific exceptions. The tribunal in this case decided, in my view rightly, that the sum - or part of it - received by the claimant was a compensation payment. It did so noting that the sum was one that could not have been made but for the ending of the employment, following R(U) 5/92 (see paragraph 5 of that decision). The tribunal, again rightly in my view, noted that the specific sum said to be the amount of the compensation payment by the adjudication officer appeared to be wrong, although it did not need to decide the correct sum. I do not need to do so either. For completeness, regulation 98(1)(d) (retainers) does not apply.

8 The claimant is therefore to be treated as being in remunerative work (following 31 December 1996) for the period for which the compensation payment is to be taken into account under part VIII - regulations 88 to 139 - of the Jobseeker's Allowance Regulations 1996. The regulations relevant to this claim are regulations 94 and 96 and potentially 97 and 99.

9 Regulation 94(6) defines the period during which a compensation payment is to be taken into account. It is subject to regulation 94(7). The period begins:
on the date on which the payment is treated as paid under regulation 96.

10 Regulation 96 provides that a payment shall be treated as paid not when it is actually paid but on the date on which it is due to be paid. If the payment is not due before the first benefit week under the claim, then the payment is treated as paid on the first day of the benefit week in which it is due or the first succeeding benefit week in which it is practicable to take it into account. For this purpose "benefit week" is defined by regulation 1(3) of the Jobseeker's Allowance Regulations 1996 in an extended definition as meaning, amongst other things, the period of 7 days ending on the day before the first day of the benefit week following the date of claim. That (second) benefit week is defined in that regulation as the period of 7 days ending on the date notified by the Secretary of State.

11 The compensation payment was due by 4 January. The claimant's claim was made slightly late, and no decision appears to have been taken about whether to allow the late claim from the first date claimed. It is not entirely clear whether the sum is to be treated as received before, or on, the first day of the first week of claim. There is also no note of the date advised by the Secretary of State, if any. That is

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for the Secretary of State to decide, and not the tribunal or me. In practice, however, this matters little. It is convenient to treat the payment as made on 4 January for the purposes of this decision and without details of any decision of the Secretary of State to any other effect.

12 The period for which the compensation payment is to be taken into account ends:

- (a) subject to sub-paragraph (b), where the person who made the payment represents that it, or part of it, was paid in lieu of notice of termination of employment or on account of the early termination of a contract of employment for a term certain, on the expiry date;
- (b) in a case where the person who made the payment represents that it, or part of it, was paid in lieu of consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, on the later of -
 - (i) the date on which the consultation period under that section would have ended;
 - (ii) in a case where sub-paragraph (a) also applies, the expiry date; or
 - (iii) the standard date;
- (c) in any other case, on the standard date.

This is, or may be, subject to regulation 94(7). That places a maximum of 52 weeks on the period from the start date. The end of the period cannot therefore in this case be later than the end of 52 weeks from 4 January 1997, that is 2 January 1998. It was that provision which the tribunal applied.

13 On the facts, as the adjudication officer now acting submits, paragraph (b) does not apply here. Nor does paragraph (a) because there is no representation by the employer that any part of the sum is paid in lieu of notice. Paragraph (c) must apply. The period therefore ends on the "standard date".

14 "Standard date" is defined by regulation 94(8)(c) as the *earlier* of two dates: the expiry date and what I might term the apportionment date. The "expiry date" is defined by regulation 94(8)(b) as one of three dates. The relevant date here is that in regulation 94(8)(b)(i):

the date on which any period of notice applicable to the person was due to expire, or would have expired if it had not been waived; and for this purpose "period of notice" means the period of notice of termination of employment to which the person is entitled by statute or by contract, whichever is the longer, or, if he is not entitled to such notice, the period of notice which is customary in the employment in question.

In this case, it is stated by agreement between the employer and employee, and not disputed, that she was entitled to 12 weeks notice, or, in the case of compulsory redundancy, normally 3 months notice.

15 What is the expiry date here? The adjudication officer's submission to the tribunal cited the regulation. It then assumed that what I have termed the apportionment date was to apply without considering the expiry date and without giving any reason why it should not be considered. That was clearly wrong, as in

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every case the relevant date is the *earlier* of the expiry date and the apportionment date. Both must be identified and considered. The tribunal found only that "Regulation 94 was rightly applied to the payment and the appellant is excluded for the maximum period of 52 weeks." It therefore repeated the error of the adjudication officer and in so doing erred in law. The claimant's representative contended, in appealing, that the agreement for the redundancy was made on 1 October 1996. It followed that the period of notice expired on 31 December 1996. This was submitted to be the expiry date on the facts, and therefore should apply to the exclusion of the apportionment date. In the submission to me, the adjudication officer now acting contends that the expiry date is 24 December 1996 (12 weeks after the agreement on 1 October 1996).

16 It is not clear whether the claimant was entitled to notice for 12 weeks or 3 months. As the employer and the claimant reached agreement on 1 October 1996, it makes no practical difference in this case. Either way, the "expiry date" was not later than 31 December 1996. Consequently, the expiry date was before the start date (which I took to be 4 January 1997, but could not be before 1 January on any version of the facts).

17 The consequence is that the period during which the compensation payment was to be taken into account ended before it started. Regulation 94(6) cannot have been intended to apply to negative periods of time. I conclude that there is no period of time in this case over which the compensation payment is to be taken into account. It follows that there is no period during which the claimant is to be treated as engaged in remunerative work following 31 December 1996 by reason of regulation 52(3). There is no other evidence that she was engaged or to be treated as engaged in remunerative employment either on 1 January 1997 or 7 January 1997.

18 I therefore allow the appeal. My formal decision is in paragraph 2. I refer the appeal to the adjudication officer to determine entitlement to jobseeker's allowance as claimed on 7 January 1997 in the light of this decision.

David Williams
Commissioner

12 January 1999