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MR/SH/2

Commissioner's File: CI/337/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR REDUCED EARNINGS ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This appeal is allowed. The decision of the Sunderland social security appeal tribunal dated 19 July 1991 is erroneous in point of law. I set that decision aside and refer the case for determination by a differently constituted tribunal.

2. The claimant did not attend the hearing of this appeal but he was represented by Ms Alison Kellett of the East End Citizens Rights Centre, Hendon, Sunderland. The adjudication officer was represented by Mr L Scoon of the Solicitor's Office of the Departments of Social Security and Health.

3. This case concerns a claim for benefit in respect of a prescribed industrial disease. It is necessary to explain some of the legislation before turning to the facts. Before 1 October 1986, disablement benefit had been payable under sections 57 and 76(1) of the Social Security Act 1975 to a person who suffered, as a result of a prescribed disease, "from loss of physical or mental faculty such that the assessed extent of disablement amounts to not less than 1%". A weekly pension was paid if the assessment was at least 20% and a gratuity (which could sometimes be converted into a pension) was payable if the assessment was 19% or less. From 1 October 1986, disablement benefit became payable only if the assessed extent of disablement was at least 14% (subject to immaterial exceptions) and it is now always paid as a weekly pension. Before 1 October 1986, there had been an increase of disablement benefit known as special hardship allowance, payable under section 60 of the Social Security Act 1975. Subsections (1) and (7) provided:-

" (1) The weekly rate of a disablement pension shall, subject to the following provisions of this section, be increased by an amount not exceeding the appropriate amount specified in Schedule 4, Part V, paragraph 6, if as the result of the relevant loss of faculty the beneficiary -

(a) is incapable, and likely to remain permanently incapable, of following his regular occupation; and

(b) is incapable, of following employment of an equivalent standard which is suitable in his case,

or if as the result of the relevant loss of faculty the beneficiary is, and has at all times since the end of the period of 90 days referred to in section 57(4) of this Act been, incapable of following that occupation or any such employment.

....

(7) Regulations may make as respects a disablement gratuity provision corresponding to that made by this section as respects a disablement pension, and may include provision for payment of a pension in lieu of a gratuity."

Regulation 18(1) of the Social Security (General Benefit) Regulations 1982 provided:-

"Where in any case a beneficiary is entitled to or has received a disablement gratuity, such beneficiary shall as respects that gratuity have the like rights to payments in respect of special hardship as he would have had by way of increase of disablement pension under section 60 if the disablement gratuity had been a disablement pension payable during the period taken into account by the assessment."

From 1 October 1986, special hardship allowance ceased to exist and was replaced by reduced earnings allowance which was a freestanding benefit rather than a mere increase of disablement benefit. Reduced earnings allowance was payable under section 59A of the Social Security Act 1975, introduced by paragraph 5 of Schedule 3 to the Social Security Act 1986. Subsection (1) provided:-

"Subject to the provisions of this Part of this Act, an employed earner shall be entitled to reduced earnings allowance if -

(a) he is entitled to a disablement pension or would be so entitled if that pension were payable where disablement is assessed at not less than 1%; [and]

(b) as a result of the relevant loss of faculty, he is either -

(i) incapable, and likely to remain permanently incapable, of following his regular occupation; and

(ii) incapable of following employment of an equivalent standard which is suitable in his case,

or is, and has at all times since the end of the period of 90 days referred to in section 57(4) above been, incapable of following that occupation or any such employment."

Subsequent amendments to that section are not material.

4. On 25 August 1987, the claimant completed a form for claiming disablement benefit. His claim was in respect of Vibration White Finger which first became a prescribed disease on 1 April 1985. At the bottom of the claim form appeared the following advice:-

"INCREASES OF DISABLEMENT BENEFIT

The increases shown below may be paid in addition to disablement benefit. The conditions for each allowance are explained more fully in leaflet NI6 which may be obtained from any local social security office. If you do not have a copy of this leaflet and you wish one to be sent to you, please put a cross in this box.

Special hardship allowance

You may be entitled to this allowance if, as a result of the disease, you are unable to go back to your regular occupation or to other work of an equivalent standard."

There followed similar information in respect of other increases of disablement benefit which are not material to this appeal. Special hardship allowance had, of course, already been abolished by the time the claimant completed that claim form.

5. The claimant did not tick the box requesting further information about special hardship allowance. It appears that he did not think that he would be entitled to it. It is only on 10 April 1989 that he completed a form to claim reduced earnings allowance. That form seems to have been received by the claimant's local office on the following day and it was on that following day that the claimant was examined by a medical board in respect of his claim for a disablement benefit. The medical board found that he was suffering from Vibration White Finger and they found that as a result he had a loss of faculty, described

as "intermittently reduced circulation of both hands" the resulting disablement from which they assessed at 7% from 1 April 1985 for life. On 28 April 1989, the claimant was informed of that assessment and was also informed that the adjudication officer had decided that in view of it no disablement benefit had been awarded. The claimant did not appeal against that decision of the adjudication officer.

6. When claiming reduced earnings allowance, the claimant had originally said that he wished to claim only from 7 January 1988 which was the date of a "medical". However, on 30 October 1989, he sought payment from 1 April 1985. The adjudication officer appears to have treated the original claim for reduced earnings allowance as having been made on 10 April 1989 (and not on the following day) and the claimant was awarded the allowance from 10 January 1989. The adjudication officer further decided as follows:-

> "The claimant is not entitled to reduced earnings allowance from 1.4.85 to 9.1.89 (both dates included). This is because his claim for that period made on 30.10.89 was not made within the time limit set out in regulations and he has not proved that there was continuous good cause for the delay in making the claim."

That decision was given on 3 December 1990. The claimant appealed. In the written submission to the tribunal, the adjudication officer drew attention to the fact that on any view the claim in respect of the period from 7 January 1988 to 9 January 1989 had been made when the claimant completed the original form on 10 April 1989 so that the decision set out above was not entirely accurate. The adjudication officer also appears to have regarded special hardship allowance as no more than an earlier name for reduced earnings allowance.

7. Blissfully unaware of the complex issues underlying this case, the tribunal simply considered the issue whether the claimant had "good cause" for his delay in claiming reduced earnings allowance (see regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987. They dismissed his appeal. Their findings were brief.

> " 1. [The claimant] claimed disablement benefit for Vibration White Finger on 25 August 1987.
>
> 2. At that time he had decided that he was incapable of following his regular occupation through problems with his fingers.
>
> He claimed reduced earnings allowance on 10 April 1989."

The reasons for their decision were equally brief.

> " 1. The guidelines about special hardship allowance on the disablement benefit claim form seemed to apply to someone in [the claimant's] position (i.e. he was incapable of

following his regular occupation through the disease) yet he had delayed for 20 months before claiming.

2. Continuous good cause for this delay was not established and the appeal failed."

Having unsuccessfully applied for that decision to be set aside by another tribunal, the claimant now appeals with the leave of a Commissioner.

8. The adjudication officer now concerned with the case supports the claimant's appeal and Mr Scoon submitted that the tribunal had made insufficient findings of fact and given insufficient reasons for their decision. It is well established that a failure by the chairman to record findings and reasons for a tribunal's decision sufficient for compliance with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 renders the tribunal's decision erroneous in point of law. It is equally well established that a person may have good cause for delay in claiming benefit if the delay was due to a mistaken belief that was reasonably held (see, for instance, R(P) 1/79). In the present case, despite the claimant having appeared before the tribunal, the chairman has recorded no finding as to the claimant's reason for not claiming sooner than he did. It may be implicit that the reason was simple ignorance but a tribunal must consider a claimant's state of mind in greater detail and decide whether the ignorance was based on a mistaken belief reasonably held. It is not enough merely to point to the information at the end of a claim form for disablement benefit. I agree with the view expressed in CI/407/1991 that that information <u>can</u> be misleading but I also agree with the further view expressed in that case that what is relevant is whether the particular claimant concerned was reasonably misled. The decision in the present case must clearly be set aside and the case be referred to a differently constituted tribunal who must make further findings of fact.

9. However, there are more fundamental questions to be answered. Firstly, the claim for reduced earnings allowance could not possibly succeed in respect of the period 1 April 1985 to 30 September 1986 because reduced earnings allowance did not exist then. It was necessary for the claimant to make a claim for special hardship allowance in respect of that period. Throughout this case it appears to have been assumed that the claim for reduced earnings allowance could be treated by the adjudication officer and the tribunal as a claim for special hardship allowance. However, only the Secretary of State is entitled to decide that a claim for reduced earnings allowance "is sufficient in the circumstances of any particular case" to be treated as a claim for special hardship allowance under regulation 4(1) of the Social Security (Claims and Payments) Regulations 1987. The separate entries in paragraphs 5 and 10 of Schedule 4 to those Regulations indicate clearly that reduced earnings allowance and special hardship allowance are to be treated as separate benefits for claim purposes and there is no transitional provision allowing a <u>claim</u> (as opposed to an award)

for one to be treated as a claim for the other. The tribunal had no power to consider a claim for special hardship allowance in respect of the period 1 April 1985 to 30 September 1986 in the absence of evidence that the Secretary of State had accepted that there had been a claim.

10. Secondly, any claim for special hardship allowance was bound to fail in the absence of any entitlement to a disablement gratuity in respect of the period 1 April 1985 to 30 September 1986. Although there had been no appeal against the adjudication officer's decision in respect of disablement benefit, the document dated 30 October 1989 (document 17) included what seems to me to be an application for review of that decision, inviting the adjudication officer to consider the effect of regulation 13 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986 in the light of CI/156/88 (now reported as R(I) 1/90). As far as is disclosed in the papers before me, that document was treated merely as an application for the backdating of reduced earnings allowance and no one has ever considered entitlement to a disablement gratuity. If that is so, the adjudication officer may wish to refer that question to the tribunal to whom I am referring the claim for reduced earnings allowance. Then, if the Secretary of State accepts the claim for reduced earnings allowance, or the document of 30 October 1989 or some other document, as a claim for special hardship allowance, all issues can be dealt with together.

11. The third fundamental question is whether the claimant's claim for reduced earnings allowance (and, if it is accepted as such, for special hardship allowance) was late at all. This is the issue raised in the letter of appeal drafted by Mr Brian Chapman, Ms Kellett's predecessor at the East End Citizens Rights Centre. If the claim was not late, no question of "good cause" arises. Mr Chapman's argument was that, under the legislation in force at the time disablement benefit was claimed, the three month prescribed time for claiming reduced earnings allowance did not start running until the assessment of disablement was made, which in this case was either the day of claim for reduced earnings allowance or the day following that date. He submitted that that was the relevant legislation in the present case and therefore the claim for reduced earnings allowance may have been made before the prescribed time started but it was certainly not late.

12. Mr Scoon supported the original adjudication officer's decision on the simple basis that the claim in respect of the period before 10 January 1989 was late under the legislation in force at the date of claim on 10 April 1989. Under paragraph 5 of Schedule 4 to the Social Security (Claims and Payments) Regulations 1987, which came into force on 11 April 1988, the prescribed time for claiming reduced earnings allowance is:-

> "As regards any day on which apart from satisfying the conditions that there is an assessment of disablement of not less than 1% and the making of a claim, the claimant is

entitled to the allowance that day and the period of 3 months immediately following it."

Before the 1987 Regulations came into force, paragraph 10 of Schedule 4 was amended by regulation 9 of the Social Security (Claims and Payments) Amendment Regulations 1988 so as to prescribe a time for claiming special hardship allowance.

> "As regards any day on which, apart from satisfying the conditions that there is a current award of disablement benefit and the making of claim, the claimant is entitled to benefit, that day and the period of 3 months immediately following it."

Mr Scoon submitted that, even if earlier legislation which had been in force during the period in respect of which benefit was claimed had the effect that the prescribed time for claiming benefit did not start until the date on which the assessment of disablement was made, the only legislation relevant to the claim in this case was that in force at the date of claim for reduced earnings allowance or special hardship allowance. He made that submission on the grounds that the 1987 Regulations were "procedural", as they undoubtedly are.

13. This dispute gives rise to four questions:-

(a) What is the effect of a claim made before the prescribed time for claiming?

(b) What was the date of claim in this case?

(c) What were the times prescribed before 11 April 1988 for claims for special hardship allowance and reduced earnings allowance?

(d) Did those prescribed times remain effective after 11 April 1988?

I can deal with the first two questions quite briefly. I take the view that, if a claim is made before the prescribed time for claiming, the Secretary of State has the right to require a fresh claim to be made within the prescribed time. But Mr Scoon was prepared to accept that, if he does not do so and the claim is processed in the ordinary way, it should be treated as having been properly made within the prescribed time. Therefore, in this case, it does not matter whether the claim for reduced earnings allowance was made on 10 April 1989 or 11 April 1989. Furthermore, I do not agree with the submission made to the tribunal that the claimant should have been treated as having made a separate claim in respect of the period 1 April 1985 to 6 January 1988 on 31 October 1989. Although this case differs from R(SB) 9/84 in that the original claim included a specific reference to a claim in respect of a period before it was made, I take the view that such a period may be varied before the decision of the adjudication officer is made when the variation is raised "in connection with the investigation of a claim" (see

paragraph 11 of R(SB) 9/84). Therefore, I propose to take the date of claim for benefit in respect of the whole period under consideration as having been 10 April 1989.

14. I now turn to the prescribed time for claiming under the legislation in force before 11 April 1988. Mr Chapman had based his assertion that time did not start to run until the date of the assessment of disablement on paragraphs 11596, 11769 and 11770 of the Adjudication Officer's Guide which show clearly that the Chief Adjudication Officer is, or was, of the view that the prescribed time for claiming disablement benefit and special hardship allowance before 30 June 1986 and reduced earnings allowance before 11 April 1988 did not start before the assessment of disablement had been made. Neither Mr Scoon nor Ms Kellett was able to explain why the Chief Adjudication Officer was of that view so I have looked closely at the relevant legislation for clues. I confess that I started with a serious doubt about the Chief Adjudication Officer's view in respect of disablement benefit itself (which is not relevant to the present appeal) because I do not see how the assessment of disablement can precede the claim for disablement benefit.

15. Before 1988 the prescribed times for claiming benefits were set out in Schedule 1 to the Social Security (Claims and Payments) Regulations 1979. When first drafted, paragraph 10 provided that the prescribed time for claiming special hardship allowance was:-

> "The period of 3 months from the first day on which the conditions for the receipt of the increase are satisfied."

In CI/294/1983, the Commissioner held that the conditions for the receipt of special hardship allowance were not satisfied until there had been an award of disablement benefit. With that decision I respectfully agree, but it was reversed with effect from 10 April 1984 by regulation 3 of the Social Security (Claims and Payments) Amendment Regulations 1984 which inserted, after the words "the conditions", the words "other than the existence of a current award of disablement benefit". A further exception was introduced from September 1985 by the insertion of the words "and of making a claim" when the whole schedule was substituted by regulation 4 of, and Schedule 1 to, the Social Security (Claims and Payments) Amendment (No. 2) Regulations 1985. From 30 June 1986 the Schedule was again substituted (by regulation 2(3) of, and the Schedule to, the Social Security (Claims and Payments, Hospital In-Patients and Maternity Benefit) Amendment Regulations 1986) and the time prescribed by paragraph 10 was then:-

> "As regards any day on which, apart from satisfying the conditions that there is a current award of disablement benefit in the making of a claim, the claimant is entitled to benefit, that day and a period of 3 months immediately following it."

That remained the position until special hardship allowance was

abolished from 1 October 1986. Regulation 5 of the Social Security (Industrial Injuries and Diseases) Miscellaneous Provisions Regulations 1986 then provided that paragraph 10 of Schedule 1 to the 1979 Regulations should be omitted and instead there was inserted a new paragraph 10A which provided that the prescribed time for claiming the new reduced earnings allowance was:-

> "The period of 3 months from the first day on which the conditions, other than the making of a claim, for receipt of the allowance are satisfied."

It is to be noted that that is in the same general style as the pre-30 June 1986 version of paragraph 10 and refers to "conditions ... for receipt" rather than conditions for entitlement. No further changes were made before the 1979 Regulations were replaced by the 1987 Regulations.

16. It seems to me that the Adjudication Officer's Guide was based on an understanding that an assessment of disablement is a condition of <u>receipt</u> of both special hardship allowance and reduced earnings allowance but is not a condition of <u>entitlement</u> to those benefits. I agree with the distinction. A person cannot receive either special hardship allowance or reduced earnings allowance until the assessment of disablement (which in the case of special hardship allowance is necessary for receipt of disablement benefit) has been made, but once the assessment has been made the claimant can receive benefit in respect of the period before the date on which the assessment was made because there was underlying entitlement during that period. However, in so far as paragraph 10 in respect of special hardship allowance is concerned, in my view the Adjudication Officer's Guide does not show a proper regard to the words "other than the existence of a current award of disablement benefit" in the versions of paragraph 10 existing from 10 May 1984 to 29 June 1986. For special hardship allowance, the assessment of disablement is merely part of the process of obtaining an award of disablement benefit. I do not believe that the draftsman can possibly have intended the phrase "other than the existence of a current award of disablement benefit" to refer only to the adjudication officer's decision and not to the conditions for obtaining that decision. I have considered CI/119/1986 in which the Commissioner reached the opposite conclusion (and which may lie behind the Chief Adjudication Officer's guidance to adjudication officers) but I respectfully disagree with that decision.

17. On the other hand, so far as reduced earnings allowance is concerned, there is no phrase which provides that an assessment of disablement is not to be included in the "conditions .... for receipt". I therefore consider that the Adjudication Officer's Guide is right to regard the time prescribed under that paragraph as running only from the date on which the assessment of disablement was made.

18. Therefore, during the period 1 April 1985 to 30 September 1986, for which special hardship allowance might be claimed in the present case, the prescribed time for claiming was not materially different from that under the present legislation. (I do not consider that the amendment from 2 September 1985 made any practical difference, although it was doubtless a clarification, because I do not think it could seriously have been argued that the time for claiming did not start running until the claim was made. Whatever the conditions for receipt may have included in other contexts, they clearly did not include the making of a claim in the context of Schedule 1 to the 1979 Regulations.) It follows that the 1987 Regulations should be applied to claims for special hardship allowance made after 10 April 1988. However, from 1 October 1986 to 10 April 1988, the prescribed for claiming reduced earnings allowance was not the same as it is under current legislation and the question arises whether claims made after 10 April 1988 in respect of that earlier period should be considered under the 1987 Regulations or under the 1979 Regulations.

19. There is of course a presumption, both by virtue of section 16 of the Interpretation Act 1978 and at common law, that new legislation does not apply retrospectively so as to affect existing rights and obligations unless the contrary intention appears. It has also been said that that presumption does not apply to purely procedural measures because no person has a vested right in any particular course of procedure. However, in Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 AC 553 at 558, Lord Brightman, delivering the opinion of the Privy Council, said:-

> "But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute course of action) may at the same time be prospective in relation to another aspect of the same case (eg, because it applies only to the post-statute commencement of proceedings to enforce that course of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the course of action.
>
> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and the relevant provisions of any interpretation statute. The sort of problem which can arise is neatly illustrated by The Ydun [1899] P 236. This was an action by the owner of the barque Ydun against the Corporation of Preston. On September 13, 1893 the barque went aground owing to the alleged negligence of the Preston Corporation, which was the Port Authority. On December 5, 1893, the Public Authorities Protection Act 1893 was passed. It came into force on

January 1, 1894. It had the effect of curtailing the period of limitation applicable to the institution of proceedings in such an action from 6 years to 6 months. The position therefore at the date of the accident was that the owners had until September 1899 to issue their Writ; but on January 1, 1894, if the Act applied to this course of action, they had only until March 1894. The owners issued their Writ in November 1898."

In The Ydun, the Court of appeal had decided that the new statute had the effect that the Writ issued in November 1898 was out of time. In Yew Bon Tew, Lord Brightman returned to consider the Ydun at page 562:-

"Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. For example, in The Ydun [1899] P 236 the barque might have grounded on May 13 instead of September 13, 1893, and the Act might have come into force on December 5, 1893, when it received the Royal Assent, instead of 27 days later. Had those been the facts the Act would, if its procedural character were the true criterion of its effect, have deprived the owners of their ability to pursue their course of action on the day the Act reached the statute book. A limitation Act which had such a decisive effect on an existing course of action would not be "merely procedural" in any ordinary sense of that expression. Their Lordships assume (without expressing an opinion) that the Ydun was, on is facts, correctly decided.

Their Lordships considered that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. The plaintiffs assert that a limitation Act does not impair existing rights because the course of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of The Ydun because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the loss of the course of action. The Public Authorities Protection Act 1893 can be regarded as procedural on the facts of The Ydun case, but a slight alteration to those facts would have made it substantive. A limitation Act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts."

It therefore seems to me that, in the absence of a clear contrary intention, where a prescribed time is running when there is an amendment of the law which shortens it, the new legislation has effect if it leaves part of the time still to run and it does not have effect if, under the new legislation, the time would have expired before the new legislation came into effect.

20. If it is thought that the distinction is not entirely logical, the answer may lie in a statement by Staughton LJ in Secretary of State for Social Security v. Tunnicliffe [1991] 2 All E R 712 (also reported as an Appendix to R(G) 4/91) which was recently approved by the House of Lords in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co Ltd [1994] 2 W L R 39.

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

21. In L'Office Cherifien, Lord Mustill who had been a member of the court in Tunnicliffe, having cited that passage, continued at page 49:-

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statue affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

22. In the present case, the time prescribed by the 1979 Regulations for claiming reduced earnings allowance in respect of the period 1 October 1986 to 10 January 1988 had not even started when the 1987 Regulations came into effect on 11 April 1988. Under the new regulations, if they were effective, the time for claiming in respect of that period would have already passed. That could not possibly be fair. In respect of the days in the period 11 January 1988 to 10 April 1988, there would still have been short periods in which claims could have been made timeously even if the new Regulations were effective but they would have been shorter than the duration of the prescribed time under both the 1979 and the 1987 Regulations. That remained unchanged at three months; it was only the starting date that changed. It would have been easy for

the draftsman of the 1987 Regulations to have included a transition provision so that, say, the prescribed time for claiming reduced earnings allowance in respect of any period before 11 April 1988 should be either the time prescribed by paragraph 10A of Schedule 1 1979 Regulations or the period of three months commencing on 11 April 1988, whichever ended sooner. However, he did not include such a provision and I cannot imply one. Either the 1979 Regulations still apply to claims in respect of any period before 11 April 1988 or else the 1987 Regulations do. I take the view that the 1979 Regulations apply to the claim made in this case in respect of the period from 1 October 1986 to 10 April 1988 and that the 1987 Regulations apply to the claim made in respect of the later period.

23. The tribunal to whom this case is now referred must therefore consider it on the following basis:-

(a) There can be no entitlement to special hardship allowance before 1 October 1986 unless a disablement gratuity is awarded and the claim for reduced earnings allowance or some other document is accepted by the Secretary of State as a claim for special hardship allowance and the claimant can show that there was continuous good cause for his delay in claiming special hardship and one or other of the incapacity conditions for special hardship allowance was satisfied.

(b) In respect of the claim for reduced earnings allowance from 1 October 1986 to 10 April 1988, there was no delay in claiming. The tribunal should therefore consider the incapacity conditions.

(c) The claim for reduced earnings allowance from 11 April 1988 to 9 January 1989 was made on 10 April 1989 and the claimant must show continuous good cause for his delay in claiming from 11 July 1988 to 11 April 1989, if he is to obtain benefit for the whole period, and he must show that one or other of the incapacity conditions was satisfied.

I draw attention to the fact that the claimant has said that he was not incapable of carrying out his former occupation during at least part of the relevant period. That does not necessarily mean that he was capable of that work but it clearly calls for serious consideration by the tribunal.

(Signed) M. Rowland
Commissioner

(Date) 18 February 1994