DGR/HJD/71

Commissioner's File: CI/532/1989

SOCIAL SECURITY ACTS 1975 - 1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Truro

Case No: 16/6/89

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 16 June 1989 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 16 June 1989. The claimant's representative asked for an oral hearing, a request which was acceded to. At that hearing the claimant, who was present, was represented by Mr R Drabble of Counsel, instructed by Mr T Jones a solicitor from Messrs Bryan Thompson & Co, whilst the adjudication officer appeared by Mr Ian Butt of the solicitor's office of the Departments of Health and Social Security.

3. On 20 January 1989 form BI00 (OD) 1988, containing a claim for disablement benefit in respect of occupational deafness, was received from the claimant at the local office of the Department. On 7 February 1989 the adjudication officer decided that disablement benefit was not payable because the period between the date of claim and the latest date prior thereto on which the claimant worked in an occupation prescribed in relation to occupational deafness, namely 25 November 1983, exceeded 5 years. In other words, he considered that the claimant was caught by regulation 25(2) of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 which so far as was relevant read as follows:-

> "25(2) ... disablement benefit ... payable by virtue of section 50A of the Act, shall not be paid in pursuance of a claim in respect of occupational deafness which is made later than 5 years after the latest date, before the date of the claim, on which the claimant worked in an occupation prescribed in relation to occupational deafness."

In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

4. They went into the matter with a commendable thoroughness, and gave lengthy reasons for their decision which read as follows:-

> "The law is contained in the Social Security (Industrial Injuries etc.) Regulations 1985, Regulation 25(2). This provides that a claim in

respect of occupational deafness cannot be made later than five years after the latest date before the date of the claim on which the claimant worked in an occupation prescribed in relation to occupational deafness (except in certain circumstances which do not apply here). The claimant's representative sought to argue that for the purposes of the Regulation the date when the claimant last worked in the relevant occupation could be extended beyond the 25th November 1983 on the basis that his employment could not be regarded as terminating on this date due to (a) the fact that at this date he had six weeks annual leave due to him for which he received payment and (b) that during the six week period the Ford Christmas shut-down of three weeks occurred and this could also be removed from the five year limit. The representative also drew attention to the fact that the claimant was entitled to twelve weeks' notice but did not press the Tribunal to accept that this period should be added presumably on the ground that the notice was waived under the voluntary redundancy terms. The Tribunal could not accept the representative's argument. In following the decision of the Tribunal of Commissioners R(I) 2/79 they applied the 'actual working' test, i.e. the Tribunal were of the opinion that the five year period had to run in effect from the last day when the claimant actually worked at his prescribed occupation. They could not accept the representative's argument regarding the linking of periods of interruption since it appeared to the Tribunal that this only related to the aggregation of periods of employment in prescribed occupations to give a ten year (or appropriate) period.

The claimant's representative also argued that the Tribunal should have some latitude in applying the five year limitation. He pointed out that since the claimant retired in 1983 the Regulations had been amended and that prior to about 1987 (the date was not established at today's Tribunal) the claimant's occupation was not regarded as a prescribed occupation under Schedule 1 A10(b) of the Social Security (Industrial Injuries etc.) Regulations 1985. It was therefore inequitable that the situation should have arisen whereby at the time of retirement in 1983 the claimant was not entitled under the Regulations but at a subsequent date the Regulations were changed to enable the claimant to come within them and yet he still had to claim within the five year period. The Tribunal again considered Decision R(I) 2/79 and while they were sympathetic to the claimant's argument they took the view that had Parliament wished to extend the time for claimants in the present claimant's position it would, when amending the Regulations, have also amended the time limit and the Tribunal felt that it was not open to them to make a decision which appeared to run contrary to the Tribunal of Commissioners' Decision R(I) 2/79."

As the position was on 16 June 1989, I see nothing wrong with the tribunal's decision.

5. However, subsequently the Court of Appeal in McKiernon v The Secretary of State for Social Security decided that regulation 25 was ultra vires. This, of course, rendered the tribunal's decision erroneous in point of law, but on 13 July 1990 the position was changed again, by the coming into operation of paragraph 4(3) of Schedule 6 to the Social Security Act 1990. This reads as follows:-

"4(3) Regulations 6(2)(c), 25 and 36 of the Social Security (Industrial Injuries) (Prescribed Disease) Regulations 1985 (onset of occupational deafness and time for claiming in respect of occupational deafness or occupational asthma), and any former regulations which they directly or indirectly re-enact with or without amendment, shall be taken to be, and always to have been, validly made [my emphasis]."

6. Manifestly, paragraph 4(3) was to operate retrospectively. The draftsman could not have made the position clearer (see CI/465/1989). The result is that, although, pursuant to the judgment of the Court of Appeal, the original regulation 25 was ultra vires and therefore without effect, its invalidity was subsequently rectified and the original regulation given force by virtue of paragraph 4(3) of Schedule 6 to the Social Security Act 1990. Moreover, such rectification had retrospective effect. Accordingly, by Act of Parliament the tribunal's initial decision, which was originally valid but which, after the determination of the Court of Appeal in McKiernon v The Secretary of State for Social Security, was rendered invalid, was, as from 13 July 1990, retrospectively transformed again into a valid determination.

7. However, Mr Drabble contended that the matter was not as simple as that. accepted that paragraph 4(3) had a retrospective effect, but his contention was that the new validated regulation 25 had perforce to take subject to section 165A(2) of the Social Security Act 1975, in the form in which it was enacted on 15 July 1986, the date of the claim in the McKiernon case. That particular provision then read as follows:-

"165A(2) Regulations shall provide for extending, subject to any prescribed conditions, the time within which a claim may be made in cases where it is not made within the prescribed time but good cause is shown for the delay."

8. Mr Drabble put his case this way. He pointed out that in the McKiernon case regulation 25 had been declared ultra vires because it contravened section 165A(2). The latter provision required any regulation made pursuant to section 77(2) to contain an extension of time for good cause, and regulation 25 did not. Now, although regulation 25 was validated as from 13 July 1990 with retrospective effect, it had to take effect subject to any verriding stipulation that operated at the time it was originally enacted, and such a stipulation, contained in section 165A(2), required as a condition of the operation of regulation 25 an extension of time for the bringing of a claim where the claimant had good cause for this concession. It followed that in the present case, the claimant could lodge a claim for industrial deafness out of time, if he could show continuous good cause.

9. Mr Drabble endeavoured to support his general contention by reference to paragraph 4(2) of Schedule 6 to the Social Security Act 1990 which reads as follows:-

"4(2) In section 77 of that Act [i.e. the Social Security Act 1975], at the end of sub-section (2) (power to modify provisions relating to disablement benefit and its administration) there shall be added the words -

'and for the purposes of this subsection the provisions of this Act which relate to the administration of disablement benefit or reduced earnings allowance shall be taken to include section 165A

and any provision which relates to the administration of both the benefit in question and other benefits'."

Section 77(2) originally read as follows:-

> "In relation to prescribed disease ..... regulations may provide -
>
> (a) for modifying provisions of this Act relating to disablement benefit, and the administration of such benefit; and
>
> (b) ....".

The Court of Appeal in the McKiernon case, or at the least the majority members, held that section 77(2), pursuant to which the original regulation 25 was made, did not bite on section 165A. Mr Drabble pointed out that under paragraph 4(2) section 77(2) was not amended, so that it could bite on section 165A (and, inter alia, enable any newly validated regulation 25 to escape the provisions of section 165A) with retrospective effect. The amendment of section 77(2) was only prospective. He therefore contended that this omission supported his submission that the validated regulation 25 was meant to stand subject to the good cause extension provision originally contained in section 165A(2). The significance of all this, as far as concerned the present appeal, was that, if Mr Drabble was right in his contention, then the claimant would be in a position to seek an extension of time in which to bring his claim over and above the statutory 5 year limitation on the ground that he had good cause.

10. I reject Mr Drabble's argument. In my judgment, the effect of paragraph 4(3) is to validate retrospectively the original regulation 25 as drafted, and to remove the vice which caused it to be declared by the Court of Appeal ultra vires. The sole ground on which the Court of Appeal decided that the Secretary of State had exceeded his powers in making regulation 25 was that it failed to comply with sub-section (2) of section 165A. In the words of Russell LJ:-

> "The second submission made by Counsel is more fundamental. Where, as in this case, a statute enables a Secretary of State by regulations to modify any provision contained in primary legislation, the appropriate modification should be expressly stated in the statutory instrument and is not to be inferred or implied from the content of the regulation. Sub-section (2) of section 165A is a mandatory provision requiring the Secretary of State to make regulations incorporating provisions for extending the time within which a claim for benefit may be made outside the prescribed time where good cause for delay can be shown. That sub-section cannot be overridden by any statutory instrument unless the instrument itself, and in specific terms, modifies sub-section (2)."

That submission of Counsel Russell LJ accepted, as did the Court as a whole.

11. Now, the effect of paragraph 4(3), which was contained in a Schedule to an Act, and was not contained in a mere statutory instrument, was to validate retrospectively the original regulation 25, notwithstanding its failure to incorporate, pursuant to section 165A(2), a provision for extending time where good cause could be shown. There is no reason why the validated regulation 25 should take subject to section 165A(2). By the authority of an Act of

Parliament regulation 25 has been elevated retrospectively to a position where it has an independent existence uncircumscribed by the provisions of section 165A(2).

12. It follows from what has been said above that there is no significance in the fact that under paragraph 4(2) the extension to section 77(2) is not made retrospective. Although the legislature decided to extend section 77(2) for the future, there was no need to do so retrospectively for the purposes of enabling the validated regulation 25 to shake free of the provisions of section 165A(2).

13. For completeness I should say that Mr Butt on behalf of the adjudication officer accepted the analysis that I have given above.

14. Accordingly, in the present case there was no power under which the tribunal could extend time, however strong a case might be made out that the claimant had good cause for his delay. Moreover, the tribunal were right to follow the decision of a Tribunal of Commissioners R(I) 2/79 and to apply the "actual working" test. The 5 year period had to run from the last day when [illegible] claimant actually worked at his prescribed occupation, and in the present [illegible] the claim had been made outside that statutory period. The tribunal did not err in point of law.

15. It follows from what has been said above that I have no option but to dismiss this appeal.

(signed) D G Rice
Commissioner

Date: [illegible]