

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the Claimant's appeal. I set aside the decision of the Bolton appeal tribunal dated 2 January 2002 and I substitute my own decision, which is that the claimant's earnings from part-time employment must be disregarded from 18 July 2001.

REASONS

2. The claimant was a supply teacher. She claimed contribution-based jobseeker's allowance from 18 July 2001, at the beginning of the school summer holidays. She had last worked on the preceding day and had been told that there would probably be work for her at the same school on 17 September and 18 September 2001. During the academic year 2000-2001, she had worked for a number of schools within the area of one local education authority. The average number of hours she worked was 13.3 per week. She was paid at an hourly rate and received her payments on the 25th of each month. There was a possibility that she would obtain work in one school or another at the beginning of the autumn term, before 17 September.

3. The Secretary of State made various enquiries about the claimant's position and decided on 12 August 2001 that the claimant was not entitled to jobseeker's allowance. He accepted that she was not in remunerative work but he decided that her earnings were sufficient to disentitle her from benefit. The claimant appealed. The tribunal dismissed her appeal. He rejected the claimant's argument that the earnings should be disregarded and he followed R(IS) 10/95 and held that each monthly payment of earnings received had to be taken into account over a period of a month, even though the claimant would have worked only for odd days and not for a whole month. On that basis, he concluded that each of the monthly payments received in June, July and August 2001 disentitled the claimant from benefit for the following month.

4. The claimant now appeals, with my leave and the support of the Secretary of State on the ground that the tribunal erred in failing to disregard the earnings under regulation 99(2) of, and paragraph 2 of Schedule 6 to, the Jobseeker's Allowance Regulations 1996. Those provisions provide that there shall be disregarded,

“[i]n the case of a claimant who, before the date of claim –

(a) has been engaged in part-time employment as an employed earner ..., and

(b) has ceased to be engaged in that employment, whether or not that employment has been terminated,

any earnings in respect of that employment except earnings to which regulation 98(1)(b), (c), (d), (f), (ff) or (g) applies; but this paragraph shall not apply where the claimant has been suspended from his employment.”

5. The Secretary of State refers to my decision in CJSA/3869/99. That case was different from the present because it involved a permanent, albeit part-time, employee but it was necessary for me to consider the application of paragraph 2 of Schedule 6 to the 1996 Regulations. I said:

“13. Mrs Swainson submitted that the claimant had not ceased to be engaged in part-time work because she had an obligation to return to work at the end of the half-term holiday. I do not accept that submission. Paragraph 20 of Schedule 6 to the Jobseeker’s Allowance Regulations 1996 provides that:

‘[i]n this Schedule ‘part-time employment’ means employment in which the claimant is not to be treated as engaged in remunerative work under regulation 52 or 53 (persons treated as engaged, or not engaged, in remunerative work).’

“That paragraph is not well drafted but the reference to regulation 52 seems to me to make it plain that a person is to be regarded as engaged in part-time work in circumstances where he or she would be regarded as engaged in remunerative work if a greater number of hours per week were worked. Regulation 52(1) provides:

‘Except in the case of a person on maternity leave or absent from work through illness, a person shall be treated as engaged in remunerative work during any period for which he is absent from work referred to in regulation 51(1) (remunerative work) where the absence is either without good cause or by reason of a recognised, customary or other holiday’.

“That provision would be unnecessary if a person on holiday were to be regarded as engaged in remunerative work purely because there was an obligation to return to work. So, too, would be the reference in paragraph 2 of Schedule 6 to a person who is suspended from employment. Furthermore, Mrs Swainson’s approach would mean that a person was engaged in work during periods of sickness apart from during holidays and that would be wholly inconsistent with the approach taken in relation to other income-related benefits. A person absent from work during a period of incapacity has always been eligible for income support or its predecessors. I regard it as being clear that, except where provision is made to the contrary, a person is engaged in remunerative work or part-time employment in a period only if actually working during that period.”

In CJSA/3869/99, the claimant, being a permanent employee employed during term-time only, had a regular cycle of work and would have been treated as being in remunerative work throughout the year under regulation 51 of the 1996 Regulations had she worked for at least 16 hours a week. I took the view that it would be odd if “engaged in ... employment” had a different meaning in paragraph 2 of Schedule 6 from the meaning it had in paragraph 1 (which provides for earnings to be disregarded where a person has ceased to be engaged in remunerative work) and I did not consider that the unsatisfactory definition of “part-time employment” in paragraph 20 of Schedule 6 contemplated any overlap or gap between remunerative work and part-time employment. It followed that the claimant in that case was to be treated as engaged in part-term employment throughout her cycle of work. Therefore, she had not ceased to be engaged in part-time employment during the school half-term in

respect of which she had claimed jobseeker's allowance, so that her earnings did not fall to be disregarded under paragraph 2 of Schedule 6.

6. In CJSA/2079/98 et al., it was held that a teacher should not be treated as being on holiday during school holidays unless there was evidence of a contractual entitlement to holidays. In the light of both CJSA/3869/99 and CJSA/2079/98, the Secretary of State therefore concedes that, unless it can be shown that the claimant in the present case had a cycle of work, she had ceased to be engaged in employment at the time of her claim for jobseeker's allowance and her earnings should have been disregarded under paragraph 2 of Schedule 6. In my view, that must be right. It may be that paragraphs 1 and 2 of Schedule 6 are capable of producing some odd results in cases where the claimant is normally engaged in short-term casual employment but I do not see how they can sensibly be construed in any different way.

7. The only live issue, therefore, is whether the claimant in the present case might have had a regular cycle of work. The Secretary of State seems to raise that as a theoretical issue because he is content for me to decide the case in the claimant's favour. The claimant's representative submits that a cycle of work cannot be established in the case of a supply teacher who works for odd days by agreement with a number of schools on an irregular basis. I agree. A supply teacher is a truly casual worker, unlike the claimant in CJSA/2079/98 who was a tutor for children with special educational needs employed on a sessional basis centrally by a local educational authority. It is in the nature of supply work that it is irregular, covering for teachers who are sick or on courses. Of course, there may be temporary periods of regular employment where, for instance, a supply teacher covers for a person on long-term sick leave or maternity leave, but it is unlikely that they will be long enough to give rise to a cycle and, in any event, that was not the position in the present case at the date of claim. By contrast, a tutor employed on a sessional basis usually has an expectation of regular employment, even if the precise extent of the employment may vary depending on the needs of pupils or whether pupils are absent. No doubt there are difficult cases that will have to be considered on their merits in due course – supply teachers kept in regular employment by agencies and centrally employed "relief" staff whose services are not always needed spring to mind – but the present case appears straightforward.

8. Accordingly, I am satisfied that the tribunal erred in holding that the claimant's earnings did not fall to be disregarded under paragraph 2 of Schedule 6 of the 1996 Regulations. I imagine that means the claimant will be entitled to jobseeker's allowance from 18 July 2001 but I formally leave any other questions arising on the claim to be determined by the Secretary of State.

(Signed) **MARK ROWLAND**
Commissioner
26 February 2003