



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CJS/69/2001

SOCIAL SECURITY ACT 1998

APPEAL FROM DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER J M HENTY

1. The appeal is dismissed. Although the tribunal may have been in error of law insignificant that decision is in substance correct. The Secretary of State identified two possible errors:-

- (i) In para 3 of the full statement the tribunal took upon themselves to consider the substantive question. The question was, as afterwards appears, in the exclusive jurisdiction of the Secretary of State but, if error there was, it is entirely venial. In fact, I do not, myself, regard that what they did was any more than reassuring themselves on the issue; and
- (ii) in para 6 they expressed the view that the ultra vires question was not one for them. In fact it was, though, in the outcome, nothing turns upon that.

2. This is an appeal with leave granted by me from the decision of an appeal tribunal dated 29.8.2000.

3. The claimant claimed JSA on 28.2.00, his former employment having ceased on 22.2.00. The claim form instructed the claimant to produced his P45 and his last five pay slips. He attended his personal advice interview on 7.3.00 (66). At that interview, he produced evidence of his savings and said that he would send his P45 later. His former employer did not respond to requests for a duplicate P45 and, on 11.4.00, the claimant was expressly asked to send the P45, which he said, at the time, was with his accountant. On 4.5.00, the decision maker determined that he was not entitled to JSA because he had not shown that he was not in remunerative work since he had not provided the P45 to show that his employment had, in fact, ceased. On 31.5.00, the claimant finally sent in his P45. The decision maker determined that a properly completed form was not received until 31.5.00 and that was, therefore, the date of his claim.

4. (i) Regulation 4(1)(a) of the Claims and Payments Regulations 1987 provides:-

“(1A) In the case of a claim for income support or jobseeker’s allowance, the claim shall –

- (a) be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which the claim is made;
- (b) unless any of the reasons specified in paragraph (1B) applies be made in accordance with the instructions on the form; and
- (c) unless any of the reasons specified in paragraph (1B) applies, include such information and evidence as the form may require in connection with the claim.”

The form required the documents to which I have referred above.

(ii) Regulation 6(4A) provides:-

“(4A) Where a person ... notifies the Secretary of State (by whatever means) that he wishes to claim a jobseeker’s allowance –

(a) if he is required to attend under regulation 46(a) –

(i) ...

(ii) if, without good cause, he fails to attend ... or does not comply with the requirement of paragraph (4AA)(b) the claim shall be treated as made on the first day on which he does attend at that place and does provide a properly completed claim.”

5. The claimant’s grounds of appeal (39) are that regulation 27 of the Decisions and Appeals Regulations 1999 is ultra vires. That I have – and so had the tribunal – power to declare secondary legislation ultra vires, is a matter on which I have no doubt. In coming to the contrary conclusion in para 6 of the full statement the tribunal were, thus, in error of law.

6. Regulation 27 provides:-

“ 27. (1) No appeals lies to an appeal tribunal against a decision set out in Schedule 2.”

Para 5 of Schedule 2 lists any decision of the Secretary of State under the Claims and Payments Regulations, except certain designated decisions which are not applicable here.

7. I would note that, in the commentary to Schedule 2 in Vol III legislation 2001, at p2.445, it is stated: “If reg 27 is made under section 12(2) of the Social Security Act 1992, it is arguable that much of Schedule 2 to the Regulations is ultra vires having regard to section 12(3).”

The enabling power is, in my view, clearly that in sections 12(2) and (3) of the 1998 Act, expressly referred to the list of enabling legislation fastidiously set out in Schedule 1 to the 1999 Regs. There is there no mention of section 12(1) being the enabling legislation, and no provision in Schedule 3 would appear to be appropriate, save possibly para 9, but the omission of any reference to section 12(1) and Schedule 3 in Schedule 1 of the 1999 Regs seems to me fatal to the Secretary of State’s primary submission that these were the enabling provisions. Schedule 3 relates to decisions against which an appeal lies: we are not concerned with those decisions here, but with decisions against which an appeal does not lie. That is provided for by Schedule 2. Therefore, in my view, the enabling provisions are sections 12(2) and (3).

Sections 12(2) and (3) provide as follows:-

“(2) In the case of a decision to which this section applies, the claimant and any other person as may be prescribed shall have a right to appeal to an appeal tribunal but nothing in this section shall confer a right of appeal in relation to a prescribed decision or a prescribed determination embodied in or necessary to a decision.

- (3) Regulations under subsection (2) above shall not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required." (My underlining.)

For the limited purpose – and I need go no further than that – of determining whether a claim has been validly made, and that is the point at issue in this case, it is clear that the enabling legislation does not exclude from the regulations which may be prescribed, regulations which determine that no appeal is permitted – claims have to have been validly made for them to have a right of appeal. For the reasons set out above, no claim was validly made until 31.5.00. The Regs can, therefore, provide for there to be no appeal in respect of a decision of the Secretary of State under the Claims and Payments Regulations so far as they relate to the situation where no claim had been validly made. The Regulations are not, therefore, in my judgment ultra vires in that respect. I, therefore, reject the claimant's submission on this score.

8. When granting leave I made two directions.

- (i) I asked whether regulation 4(1B)(b) Claims and Payments Regulations might be relevant. That provides the following reason for the purposes of relaxation of the provisions of reg 4(1A)(c):-
- (b) the information or evidence required by the form does not exist."

The Secretary of State in para 8 of his submissions to me of 29.3.2001 submits that this is a matter for the Secretary of State alone and not one for the tribunal. This submission is borne out by the Commentary to Reg. 4 of the Claims and Payments Regs. in Vol.III of Legislation 2001 at p.2.23 as follows:-

"Thus the major effect of these new rules is that there is now a requirement to produce the specified information and evidence before a claim is treated to having been made ... whether the necessary evidence has been produced or whether the claimant is exempt under para (1B) will therefore be a decision for the Secretary of State, i.e. there will be no right of appeal to a tribunal in cases of dispute."

I accept that submission.

- (ii) I asked whether the claimant could avail himself of regulation 19(5)(d) of the Claims and Payments Regulations on the grounds that he had implicitly been told that his claim would not succeed until he had provided his P45.

In para 9 of the submissions to me, the Secretary of State states:-

"In my submission, regulation 19(5)(d) of the Claims and Payments Regulations is of no assistance to the claimant and the tribunal were entitled not to record any findings on it. Even if there has been a transfer of information by an officer such as falls within regulation 19(5)(d), I submit that the evidence suggests that this information did not lead the claimant to believe that a claim would not succeed. Indeed, the claimant evidently pursued his P45 and then submitted a claim, suggesting that he believed to the contrary that a claim would succeed. In my submission in the context

of regulation 19(5)(d), 'claim' must be understood as referring to a claim that satisfies the requirement of regulation 4 of the Claims and Payments, and hence a claimant must have been led to believe that a properly completed claim form properly supported by all the relevant evidence and information would not succeed."

Again I accept that submission.

9. My decision is as therefore set out in para 1 above. The appeal is dismissed.

(Signed) J M Henty
Commissioner

(Date) 25 January 2002