Bullen 151

CJ Hunt J

CJSA/924/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal in part. He is not entitled to credits for unemployment in respect of the weeks commencing 21 July 2002 and 28 July 2002. He is entitled to such a credit for the week commencing 4 August 2002.

REASONS

2. This case arises out of a claim for credits. Only three weeks are in issue but the loss of three credits may turn out to be of more significance than the loss of three weeks' benefit. Before considering the merits of this appeal, I shall explain why that may be so.

3. Until 1975, a credit was a credited contribution in the context of a scheme in which a person's contribution record consisted of contributions that had each been paid or credited in respect of a week. Since 1975, a person's contribution record has consisted of an earnings factor. The amount of Class 1 contributions (which are paid by employees earning more than the lower earnings limit) depends on the contributor's earnings and each contribution produces an earnings factor equal to those earnings. Each Class 2 contribution (paid by a self-employed person) or Class 3 contribution (paid voluntarily by a person not required to pay Class 1 or Class 2 contributions) produces an earnings factor equal to the lower earnings limit (i.e., the minimum amount of earnings upon which there would be a liability to pay Class 1 contributions). Where a person is entitled to have earnings credited in respect of a week while, say, unemployed, the amount of earnings credited is again equal to the lower earnings limit and the contributor is said to be entitled to a "credit". Although that term may be thought to be an anachronism, it remains useful as a shorthand expression.

4. A credit is relevant to entitlement to benefit only if there are insufficient paid contributions in the relevant year to satisfy the second contribution condition for entitlement to a benefit that has two contribution conditions. Thus, any "award" of a credit for, say, unemployment is made subject to the condition that the claimant will ultimately only be entitled to have earnings credited for that week "if and to no greater extent than that by which his relevant earnings factor for that year falls short of the level required to make that year a reckonable year" (regulation 3(1) of the Social Security (Credits) Regulations 1975). There is thus usually some uncertainty at the time a decision as to entitlement to credits is made as to its possible practical significance. The potential significance for the claimant's entitlement to retirement pension and incapacity benefit may be taken as two examples.

5. For a man retiring at the age of 65, the second contribution condition for entitlement to a basic Category A retirement pension at the standard rate for a single person (£79.60 per week in 2004-05) requires that he have an earnings factor of at least 52 times the lower earnings limit in each of 44 of the 49 complete contribution years (i.e., tax years commencing on 6 April) since the one in which he reached the age of 16. If the earnings factor is that amount in fewer than 44 years, the amount of the pension is reduced by $1/44^{th}$ for each year by which the target is missed. It is therefore often difficult to know whether the loss of a credit will be of any significance for the claimant's future entitlement to retirement pension, both because one may not know whether the claimant has, or will, pay contributions producing a high enough earnings factor in the relevant contribution year and because one may not know

what gaps the claimant has, or will have, in his contribution record so far as other contribution years are concerned. The number of contribution weeks in a contribution year depends on the number of Sundays in the tax year but obviously in most years there are 52. Therefore, if the claimant has been unemployed all year, the loss of a single credit will usually prevent that year from counting towards entitlement to a retirement pension. If the lack of that contribution year has any significance at all, the consequent loss for a single person would, at current rates, be about £1.80 pw or about £2,340 over a period of 25 years. On the other hand, a gap in a contribution record can be filled at the end of the relevant contribution year by the claimant paying Class 3 contributions, at the rate (in 2004-05) of £7.15 for each week in respect of which a credit has been disallowed.

6. The second contribution condition for entitlement to incapacity benefit is that the claimant must have either paid or been credited with contributions producing an earnings factor equal to 50 times the lower earnings limit in each of the last two complete contribution years ending before the benefit year (running from the first Sunday of the calendar year) in which falls the beginning of the relevant period of incapacity for work. Thus, in a 52-week contribution year, a claimant who is unemployed all year can have the year count for contribution purposes if he loses two credits, but not if he loses three. Class 3 contributions cannot count towards entitlement to incapacity benefit. Therefore, a shortfall cannot be made up through the payment of voluntary contributions. 2002-03 was a 52-week year. Loss of three credited contributions in that year would mean that the claimant would not be insured against loss of employment due to incapacity for work commencing in the benefit years 2004 and 2005. The loss could be considerable because basic long-term incapacity benefit can be payable at the rate of £74.15 (in 2004-05) until the claimant reaches pensionable age if he remains incapable of work. A claimant's circumstances may permit that loss to be mitigated by a claim for an income-related benefit, but that is not always so. Also, it may occasionally be possible to reduce the loss by delaying a claim until a later benefit year in respect of which the contribution conditions would be satisfied. However, it cannot be assumed that either of those options will be open to any particular claimant. Losing three credits may therefore have serious implications.

7. The credits at issue in the present case are credits for unemployment to which, subject to the over-riding condition imposed by regulation 3(1) mentioned above, a claimant is entitled where regulation 8A of the Social Security (Credits) Regulations 1975 applies. Regulation 8A(2) and (3) provides –

> "(2) Subject to paragraph (5) this regulation applies to a week which, in relation to the person concerned, is –
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> (a) a week for the whole of which he was paid a jobseeker's allowance; or
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> (b) a week for the whole of which he satisfied or was treated as having satisfied the conditions set out in paragraphs (a), (c) and (e) to (h) of section 1(2) of the Jobseeker's Act 1995 (conditions for entitlement to a jobseeker's allowance) and in respect of which he has satisfied the further condition specified in paragraph (3); or
>
> ...
>
> (3) The further condition referred to in paragraph (2)(b) is that the person concerned –

(a) furnished to the Secretary of State notice in writing of the grounds on which he claims to be entitled to be credited with earnings –
   (i) on the first day of the period for which he claims to be so entitled in which the week in question fell; or
   (ii) within such further time as may be reasonable in the circumstances of the case; and
(b) has provided any evidence required by the Secretary of State that the conditions referred to in paragraph (2)(b) are satisfied."

For these purposes, a "week" is a period of seven days commencing on a Sunday (see section 122(1) of the Social Security Contributions and Benefits Act 1992 which has replaced the Social Security Act 1975 under which the 1975 Regulations were originally made.)

8. Section 1(2)(a) to (c), (e) and (h) of the Jobseekers Act 1995 provides –

"Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he –
(a) is available for employment;
(b) has entered into a jobseeker's agreement that remains in force;
(c) is actively seeking employment;
...
(e) is not engaged in remunerative work;
...
(h) is under pensionable age
..."

9. Section 6(1) provides –

"For the purposes of this Act, a person is available for employment if he is willing and able to take up immediately any employed earner's employment."

10. Section 9 of provides for a jobseeker's agreement which effectively amounts to an agreement between the claimant and an employment officer as to the terms upon which the claimant will be regarded as being available for work. The agreement has effect only for the purposes of section 1 of the Act and it is noteworthy that it is not a condition of entitlement to a credit that there should be a jobseeker's agreement in force (because regulation 8A of the 1975 Regulations does not require that the condition in section 1(2)(b) of the 1995 Act be satisfied).

11. At the material time, regulations 5 to 8 of the Jobseeker's Allowance Regulations 1996 provided –

"**5.**– (1) In order to be regarded as available for employment, a person ... who is engaged in voluntary work is not required to be able to take up employment immediately, providing he is willing and able to take up employment on being given 48 hours' notice.

...

(4) Where in accordance with regulation 7, 13 or 17 a person is only available for employment at certain times, he is not required to be able to take up employment at a time at which he is not available, but he must be willing and able to take up employment immediately he is available.

...

6.– (1) In order to be regarded as available for employment, a person must be willing and able to take up employment of at least 40 hours per week, ...

(2) In order to be regarded as available for employment, a person must be willing and able to take up employment of less that 40 hours per week ...

7.– (1) Except as provided in regulation 13 and in regulation 17(2), a person may not restrict the total number of hours for which he is available for employment to less than 40 hours in any week.

(2) A person may restrict the total number of hours for which he is available for employment in any week to 40 hours or more providing –

(a) the times for which he is available to take up employment (his "pattern of availability") are such as to afford him reasonable prospects of securing employment;

(b) his pattern of availability is recorded in his jobseeker's agreement and any variations in that pattern are recorded in a varied agreement and

(c) his prospects of securing employment are not reduced considerably by the restrictions imposed by his pattern of availability.

(3) A person who has restricted the total number of hours for which he is available in accordance with paragraph (2) and who is not available for employment ... for one day or more in a week in accordance with his pattern of availability shall not be regarded as available for employment even if he was available for employment for a total of 40 hours or more during that week.

8.– Subject to regulations 6, 7 and 9, any person may restrict his availability for employment by placing restrictions on the nature of the employment for which he is available, the terms or conditions of employment for which he is available (including the rate of remuneration) and the locality or localities within which he is available, providing he can show that he has reasonable prospects of securing employment notwithstanding those restrictions and any restrictions on his availability in accordance with regulations 7(2), 13(2), (3), (4) or 17(2)."

12. Regulations 13 and 17 permit further restrictions to be placed on availability on grounds of religion, conscience, physical or mental disability or caring responsibilities and in the case of workers who have been laid off. Regulation 14 provides that, in certain circumstances, a person who is not otherwise available for employment shall be treated as so available.

13. For the purposes of section 6 of the Act and regulations 6 and 7 of the 1996 Regulations, "week" means a "benefit week", which means a period of seven days ending on the day on which the claimant signs on (see regulations 4 and 1(3) of the 1996 Regulations).

14. The claimant was aged 58 at the relevant time. He lived in Shropshire and had claimed jobseeker's allowance in April 2002. He was not entitled to it for reasons that do not appear in the papers but he completed a jobseeker's agreement to the effect that he would be available for work from 8am to 6pm from Monday to Friday and he "signed on" on every other Wednesday so that he would be entitled to credits under regulation 8A of the 1975 Regulations. It so happened that the Salopia 2002 International Scout Camp was to take place two miles from his home from Saturday, 27 July to Friday, 2 August 2002. The claimant volunteered to help at the camp and to lead a team introducing novices to caving. He anticipated that it would be difficult, although not impossible, for him to leave the camp to sign on on 31 July and he mentioned this to the JobCentre on 17 July. He was given a voluntary work form, which he completed on 23 July and handed in to the JobCentre on 25 July. On the form, he indicated that, far from being paid for his work at the camp, he would have to pay camp costs of £60. More importantly, he said that, if the JobCentre wished to contact him about a job or interview, a message for him could be left on his home number which he would access daily. However, in answer to the question "can you arrange to give up the voluntary work, or rearrange it, at 48 hours notice to attend interviews or start work ?", he answered "no" but, in answer to the follow-up question "how long would it take ?", he answered "until 2/8/02". In the light of that information, the Secretary of State decided that the claimant could not be regarded as available for employment from 25 July 2002 to 7 August 2002. When he next signed on, on 7 August 2002, he was told that his claim for "credits" had been closed and he would lose three weeks' credits. He appealed.

15. Although the claimant referred to the loss of credits in his letter of appeal, the Secretary of State's submission to the tribunal dealt only with the decision on availability. His argument was that the claimant was not available for work during the week he was away because he was not prepared to attend an interview or take up a job at less than 48 hours' notice. This meant that he was not available for employment for at least one day in each of the benefit weeks ending on 31 July 2002 and 7 August 2004 and, by virtue of regulation 7(3) of the 1996 Regulations, it was argued, the claimant was therefore not to be regarded as available for employment for the whole of those weeks.

16. The claimant was confused by what was then a standard letter from the Appeals Service – but, I believe, is no longer – which failed to indicate that, if he wished there to be an oral hearing, it would take place considerably nearer to his home than the Appeals Service's regional office in Birmingham. He therefore opted for a paper hearing and wrote a letter further explaining his position. He said:

> "When signing on for National Insurance Credits on 17th July 2002 I mentioned that I would be unable to sign on the next occasion – 31st July as I had been asked to help out at an International Scout Camp being held from 27th July until 2nd August. I was informed that this was not a problem and credits for this signing would be made if I completed the form I was handed. I completed the form and delivered to the Job Centre on 24th July. The gist of this form was that I was doing unpaid (in fact I had to pay £100 towards the cost of the camp) voluntary work.

"I confirmed what I had told the Job Centre that in the event of work coming up I would be available, but that I hoped an employer would, bearing the nature of the task I was engaged on be sympathetic to deferring a start until after the end of the camp. I would, however, be checking my answer phone at home from my mobile phone, should an employer or the Job Centre be in touch and I would be prepared, if necessary, to let down the young people I was helping.

"In the event, no contact was made. However, on signing on again on 7th August I was told that my claim for National Insurance Credits had been closed and I would lose 3 weeks. I maintain that this is grossly unfair as on 2 of those weeks my position was no different from usual, in that I was at home awaiting a call. On the week of the Camp itself I was contactable and available, all as agreed with the Job Centre."

17. The tribunal dismissed the appeal, saying in the decision notice that the Secretary of State had been "entitled to rely on the initial statement" made by the claimant that he would not give up his voluntary work or re-arrange it at 48 hours notice. In his statement of reasons, the tribunal said:

> "The tribunal found that the difficulty that was insurmountable for [the claimant] in his appeal was that he had stated that he would not be available to give up voluntary work or re-arrange it at 48 hours notice to attend interviews until 2nd August 2002. In the tribunal's view this was conclusive in relation to the jobseeker's agreement and amendments made by the completion of that form and accordingly the Decision maker was entitled to make the decision against which [the claimant] appealed. For the sake of fullness I should add that I endorse the Decision Maker's reasoning as set out in the written submission in relation to the reasoning in reaching the decision."

The claimant now appeals with my leave.

18. In my judgment, the tribunal erred in failing to address the question raised expressly by the claimant as to his entitlement to credits. I have some doubts as to whether the Secretary of State was entitled to issue a decision in terms of availability save as part of a decision in terms of entitlement to jobseeker's allowance or credits (see CIB/2338/00) although, as I have indicated, any positive award of credits would be provisional. However, whatever the position on that issue, it is plain that a decision as to entitlement to credits was communicated orally to the claimant, even if it was not issued in the proper form, and it is equally plain that it was that decision against which the claimant was appealing.

19. In her helpful submissions on this appeal, Ms Melinda Earles has submitted on behalf of the Secretary of State that the submission to the tribunal explained correctly why the claimant's non-availability for work for one week from 27 July to 2 August resulted in a decision that he was not available for work for the whole of the two benefit weeks from 25 July to 7 August. It was, she submits, the consequence of regulation 7(3) of the 1995 Regulations. She further submits that it then follows that the condition of section 1(2)(a) of the 1995 Act was not met on at least one day in each of the three contribution weeks beginning on 21 July, 28 July and 4 August 2002 so that the claimant was not entitled to credits under regulation 8A(2)(b) in respect of those three weeks.

20. The question that I raised when I granted leave to appeal was whether regulation 7(3) has any bearing on this case, given that it is linked to regulation 7(2) which makes sense only in the context of a jobseeker's agreement. As I have indicated, such an agreement is not required for entitlement to credits. Ms Earles has replied to that suggestion by submitting that the reason that a requirement for a jobseeker's agreement is omitted from regulation 8A of the 1975 Regulations is to enable an award of credits to be considered retrospectively and that, as the claimant in this case did in fact have a jobseeker's agreement, regulation 7(2) and (3) must be applied to his case. In any event, she argues that a claimant must still satisfy the conditions of section 6 and be immediately available for work at all times, save for any relaxation under regulations 6 and 7 of the 1996 Regulations.

21. In my view, regulation 6 has nothing to do with the case in hand. It merely provides that a person must generally be available to take up employment of 40 hours a week and also be available to take up part-time employment. Therefore, it is concerned with the nature of the employment for which the claimant is available and it is not concerned with the question of the number of hours for which a claimant must make himself available to take up work at the drop of hat, as required by section 6.

22. Regulation 7 is also concerned with the nature of the employment for which the claimant is available. Otherwise, the reference to regulation 7 in the opening words of regulation 8 (permitting restrictions as to the nature, terms and conditions or locality of employment for which the claimant is available) would be inappropriate. Whereas regulation 6 is concerned with the number of hours that a claimant is prepared to work, regulation 7 is concerned with the hours within which the claimant is prepared to work. Thus, under regulation 7(2), a claimant may exclude night work or work at week-ends (as did the claimant in the present case) or, subject to his retaining reasonable prospects of securing employment, work on, say, Wednesday afternoons. In fact, the claimant in the present case was prepared to work for up to forty hours a week out of the fifty hours available between 8am and 6pm from Monday to Friday.

23. It is only regulation 5 that directly qualifies section 6 of the Act. However, regulation 7 is linked to section 6 by regulation 5(4), which has the effect that a person is required to be available to take up work immediately only during the hours within which he has said, under regulation 7, that he is prepared to work. Thus, in the present case, the claimant was generally to be regarded as available for work if, on a Saturday, he was able and willing to the up work on the following Monday. It is important to note that the provision does not deem the claimant to be available for work throughout the week. It is unnecessary for it to so because section 1 of the 1996 Act does not require that the claimant be available for employment throughout the week. It just requires that he be available for work *in* the week. The extent of the availability must, however, be sufficient to meet the requirements of the regulations. The language of regulation 5(4) accepts that the claimant will not in fact be available for work, in the sense of being able and willing immediately to take up employment, for part of the week.

24. I accept that my suggestion as to the significance of the lack of any need for a jobseeker's agreement in a credits case was misconceived. I am not sure that I entirely accept Ms Earles' explanation for the lack of any reference to section 1(2)(b) of the 1995 Act in regulation 8A(2)(b) of the 1975 Regulations, because the 1996 Regulations make provision for the back-dating of a jobseeker's agreement. However, the point does not matter in the present case because, as Ms Earles submits, the claimant did in fact have a jobseeker's

agreement. Even though he was only claiming credits, it appears that it was necessary for him to have a jobseeker's agreement if he was to avail himself of the opportunity to restrict the hours within which he was prepared to work under regulation 7(2) and so also to take advantage of regulation 5(4). Otherwise, there could be no qualification of the stringent rule imposed by section 6. It is not suggested in the present case that the claimant had, while on the camp, ceased looking for employment within the hours recorded in his jobseeker's agreement. The only question is whether he had ceased to be available to take up such work immediately.

25. What, then, is the meaning of regulation 7(3), upon which Ms Earles relies ? I find it difficult to see what it adds to section 6 as qualified by regulation 5(4). However, as I am content to accept that section 6, taken with regulation 5(4), broadly has the effect that Ms Earles submits that regulation 7(3) has, I need not explore this question any further. Nor, on the facts of this case, need I explore the possible implications in a credits case of regulation 14(1)(i) and (j), under which a person may be treated as available for work for part of a benefit week immediately following a "claim" or preceding the end of an "award". That is because I am satisfied that the result of the present case is the same whether or not the claimant was to be regarded as not being available for employment for the whole of any benefit week in which fell at least one day on which he was not willing to take up work.

26. When I granted leave to appeal, I suggested that the tribunal might have erred in regarding the claimant's statement on the voluntary work form as being conclusive evidence against him when he had qualified it in his statement to the tribunal. A challenge before a tribunal is an appeal rather than a review and so it is not usually enough to find that the Secretary of State's decision was reasonable in the light of the evidence available to him when there is new evidence available to the tribunal. However, I have come to the conclusion that the subsequent qualification of the statement on the form is immaterial so that the issue of conclusiveness does not arise.

27. I am quite content to accept the claimant's subsequent explanation that, notwithstanding the way the form was completed, his true position was that he expected to be able to persuade any prospective employer to defer the start of employment until the camp had ended but that he would have accepted employment immediately had he not been able to obtain deferment. In my judgement, a person who will obtain a deferral of employment of more than 48 hours if it is possible to do so cannot be regarded as willing to take up employment at 48 hours' notice. Thus, from the Saturday until the Wednesday, the claimant cannot be regarded as having been available to take employment at 48 hours' notice, so as to take advantage of regulation 5(1). Notwithstanding his agreed pattern of availability, he was not entitled to take advantage of regulation 5(4) in respect of the Saturday and Sunday because he was not available for employment on the Monday or within 48 hours of the Monday.

28. On the other hand, even on the face of the voluntary work form, it is plain that the claimant was prepared to take up employment immediately after the camp, subject to his agreed pattern of availability. Therefore, on the Thursday and Friday he was prepared to take employment at 48 hours' notice even though his pattern of availability meant that he could not be expected to take up employment until the following Monday.

29. On that basis, the tribunal erred in not finding that the claimant was available for employment from Thursday, 1 August 2002 and therefore for the whole of the benefit week

commencing on that day. It follows that he was entitled to a credit in respect of the contribution week commencing on 4 August 2002, subject to his having claimed it within a reasonable time. I am quite satisfied that, in the circumstances of this case, his claim on 7 August, supplemented by his notice of appeal received on 14 August, was sufficiently prompt for the purposes of regulation 8A(3) of the 1975 Regulations.

30. It is equally clear that there was at least one day in each of the contribution weeks commencing 21 July and 28 July on which the claimant was not available for employment. That is because, even if the Thursday and Friday of the first week could, under regulation 14(1)(j) of the 1996 Regulations, be treated as days on which the claimant was available for employment, the Saturday was not such a day. In the following week, the claimant was not available for employment from the Sunday to the Wednesday. As regulation 8A(2)(b) of the 1975 Regulations requires that the condition of availability in section 1(1)(a) of the 1995 Act be satisfied for the whole week in respect of which a credit is claimed, no credit can be awarded for either of those two weeks.

(Signed) MARK ROWLAND
Commissioner
24 September 2004