Severance payment = occupational pension.

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's File No: *CJSA 1051/00*

JOBSEEKERS ACT 1995
SOCIAL SECURITY ACT 1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: P L Howell QC

30 March 2001

Claimant's name:	[redacted]
Claim for:	Jobseekers Allowance
Tribunal:	Exeter SSAT
Tribunal case ref:	S/03/194/1999/00897
Tribunal date:	1 October 1999

PLH *Commissioner's File: CJSA 1051/00*

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[ORAL HEARING]

1. My decision is that the decision of the Exeter social security appeal tribunal chairman sitting alone on 1 October 1999 was not erroneous in law in holding that periodical "drip feed" payments made to the claimant under a redundancy scheme following the termination of his employment had to be brought into account as "pension payments" for the purposes of jobseeker's allowance; and the claimant's appeal against that decision must therefore be dismissed.

2. I held an oral hearing of this appeal at which Matthew Brown, welfare rights officer with the Exeter CAB, appeared for the claimant and Huw James, solicitor, appeared for the Secretary of State.

3. The claimant is a man now aged 48 who was made redundant from his employment with the London and Manchester Insurance Group on 2 May 1999. He had given virtually the whole of his working life to the group until then, having originally entered its employment on 2 August 1971 at the age of 18. He claimed jobseeker's allowance from 3 May 1999 until he was able to find further work. The only issue before the tribunal, and before me on this appeal, was the proper treatment for jobseeker's allowance of what were described as 'drip feed' payments which he received at the rate of £3,624.11 a month for the period from the date of termination of his employment. Those were paid to him under the terms of the London and Manchester's redundancy compensation scheme, about which evidence was given to the tribunal.

4. The facts themselves are not in dispute, and appear either from the documents in the appeal papers before me or from the decision notice, record of proceedings and statement of facts and reasons of the tribunal at pages 14 to 21 of the appeal file. As shown by the agreed statement of redundancy terms, payment details and calculation at

pages 11 to 13, the claimant became entitled on his redundancy to a statutory lump sum redundancy payment of £4,953 on which no question arises, and in addition to further compensation calculated as a monthly entitlement referred to as a "drip feed" arrangement over a maximum period of 20 months from his termination date, at a monthly rate of £3,624.11.

5. The first three months of this were payable in advance with his final pay and the other amounts due to him on leaving, followed by regular monthly payments beginning in the fourth month, in his case August 1999. However the remaining 17 monthly payments to take him up to the stated total amount described in the terms of his redundancy agreement on page 11 as "Compensation Payment to be Paid Monthly ("Drip Feed") £72,483.12" were not an unconditional entitlement: as recorded by the tribunal on page 17 and accepted to be the position by both sides before me, the terms of the London and Manchester employment conditions relating to redundancy included a provision that if the person concerned took other gainful employment (as this claimant in fact later did) the "drip feed" payments stop or are reduced.

6. The claimant's entitlement to continued periodical payments from his former employer was thus bound to come to an end in any event at the end of the 20 months, when he would still have been well under the earliest age at which he could have started drawing any payment under the London and Manchester Group Pension Scheme of which he was a member. In fact they came to an end even earlier still, because of his taking other, though less well paid, employment within 20 months from the date of his redundancy.

7. It is common ground that the redundancy arrangement was a separate contractual arrangement, not part of or in any material way connected to the group's pension scheme; and that the "drip feed" payments were made not under the terms of any approved pension scheme but out of the employer's own resources in the same way as normal wages and salaries to continuing employees.

8. In those circumstances Mr Brown on behalf of the claimant submitted to me, as he had to the tribunal, that it was wrong for any of the "drip feed" amounts, either the initial three-month payment in advance or the regular monthly payments from August 1999 onwards, to be brought into account at all against the contribution-based jobseeker's allowance to which the claimant would otherwise have been entitled from 3 May 1999 onwards while he remained out of employment.

9. It is further common ground that the payments so long as they went on being made were payments by way of compensation to the claimant for the termination of his employment by reason of redundancy, and for that reason could not count as "earnings" having to be taken into account under reg 80 Jobseeker's Allowance Regulations 1996 SI No. 207 since they all fell within the exception in reg 98(2) *ibid.* Everything therefore depends on whether they also fell outside the definition of "pension payments" having to be brought into account (so far as they exceed £50 per week) under reg 81.

10. As the tribunal correctly recorded, this depends in turn on whether they are within the definition in section 35(1) Jobseeker's Act 1995 as "periodical payments made in relation to a person...in connection with the coming to an end of an employment of his, under an occupational pension scheme..." For this purpose the definition of "occupational pension scheme" borrowed from section 1 Pension Schemes Act 1993 by section 35(1) is as follows:

> "Any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with qualifying service in an employment of any such description or category;..."

11. Mr Brown's argument was that despite the apparent breadth of this definition as confirmed in the existing Court of Appeal authority and Commissioners' decisions on it which he did not dispute, it should not be applied so as to catch the claimant in this present case. In particular, he submitted that the nature of the payments at issue here was fundamentally different from those considered in the earlier authorities and showed that they could not be lumped together with those as "pension payments", since they had none of the intrinsic elements of a pension and no similarities with it beyond the fact of being payments made on or after the termination of employment and (after the first three months at any rate) being paid at periodic intervals. The previous authorities all concerned cases where the "severance" or similar payments were being received indefinitely, or over a period that aligned with the start date for a pension under a pension scheme so that payments went on being received without a break. Different considerations should apply to a case such as this one, where the payments were self-evidently a redundancy payment to compensate for the loss of a job and were only payable as instalments of a maximum lump sum over a strictly limited (and even reducible) period, in no way integrated with the claimant's pension provision. Such payments were plainly not themselves "in the form of pensions", nor did they fall within any proper meaning of "or otherwise", which should be read as covering only different types of provision made under a normal pension scheme or possibly payments in kind on the termination of employment, but did not cover this claimant's situation. The tribunal had moreover erred in failing to differentiate the monthly periodic payments which only started from August 1999 from the initial three-month payment made in advance; that at the very least should have been left out of account because, like the statutory redundancy payment itself, it had in fact been paid all in one lump and should not therefore have been treated as a "periodical payment" within the definition in section 35(1) at all.

12. Despite these attractively presented arguments it seems to me that given the extreme breadth of the definitions in point here Mr James' argument to the contrary must be right, and there is no ground on which this claimant's case can be distinguished from the previous authorities on the extended category of payments that have to be brought into account as "pension payments" for the purposes of jobseeker's allowance. There can I think be no doubt that for the reasons explained in decision CJSA 5381/97 and the Court of Appeal and High Court authorities to which it in turn refers (*Westminster City Council v Hayward* [1998] Ch 377, *City and Council of Swansea v Johnson* [1999] Ch

189) a periodical payment made following termination of employment is not prevented from being within the definition of a "pension payment" *either* by being payable only under a redundancy compensation scheme entirely separate from any pension scheme, *or* by being payable only under a contractual arrangement from the employer's own resources rather than out of a separate fund.

13. The facts as recorded by the tribunal in the present case do in my judgment show that the "drip feed" arrangement here was sufficiently defined, in the employee's terms and conditions of employment and/or some separate arrangement referred to as the "new scheme" introduced in 1998 (see page 17), to count as a "scheme or arrangement" within the first part of the Pension Schemes Act definition, and the calculation on page 13 shows clearly that the claimant's entitlement both arose by reason of, and was calculated according to, the long period of service which qualified him to receive it, so that the last part of the definition is also satisfied.

14. In my judgment, Mr James was right in submitting that the benefits in the form of cash payments becoming payable on and by reference to the termination of service were within the middle part of that definition whether the cash benefits themselves fell to be paid as a lump sum, or periodical payments, or partly one and partly the other; and he was also right in submitting that there is nothing in the definition to exclude periodical amounts which cease to be payable at some later date, either at the end of a fixed period or by a reason of an earnings condition which may reduce the entitlement or bring it to an end altogether.

15. Finally the alternative argument on the first three months' payment under the drip feed arrangement (that it did not count as a "periodical payment" at all because all three months were paid together in one lump in advance) has also in my judgment to be rejected, since the terms of entitlement at page 11 and the method of calculation at page 13 make it quite clear that this was a *monthly* entitlement from the start of the drip feed arrangement on the date of redundancy. That is in my judgment sufficient to bring the whole of the drip feed payments into account as periodical payments notwithstanding that the first three of them were paid together in advance. It could not be disputed that if the whole of the drip feed arrangement had been for quarterly payments in advance they would all have counted as "periodical payments" from the outset, and I cannot see that it can make any difference that there should be a switch to a monthly payment interval in the fourth and following months, the first payment in advance being no doubt intended to assist the employee over the immediate aftermath of his redundancy.

16. For those reasons I have not been persuaded that the circumstances take this case outside the wide definition of "pension payments" which the decisions referred to above confirm has to be applied in this context, and I accordingly dismiss this appeal.

(Signed)

P L Howell
Commissioner
30 March 2001

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Stewart Wright
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5 April 2001

Dear Stewart

Re: Commissioner's Decision on Pensions and JSA

Please find enclosed a copy of CJSA/1051/2000. Following the spate of Commissioners' Decisions regarding severance payments being treated as occupational pensions, I took this one to the Commissioner. I felt it could be distinguished on its facts and provide guidance on what might be an exception to the rule that such payments are pensions for the purposes of JSA. The arguments used are well summarised in the decision.

Sadly it appears there can be no exception to the rule and the policy implication now seems clear: if your ex-employer is looking after you then the state doesn't have to. It makes you wonder what we pay national insurance for!

There is no appeal against this decision planned.

I have scored out my client's name but he has no objection to the decision being published in the Welfare Rights Bulletin, should you wish to do so. If you need to discuss anything my direct line is 01392 208132.

Yours sincerely

Matthew Brown
Welfare Rights Officer