Bullch 178
[Short]

CJSA/1080/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the Liverpool appeal tribunal dated 31 October 2001. I set aside the tribunal's decision and substitute my own decision. The decisions of the Secretary of State dated 6 February 2001 and 16 February 2001, purporting to decide that the claimant was not entitled to jobseeker's allowance, are of no effect. The decision of the Secretary of State dated 18 January 2001 was correct as regards income-based jobseeker's allowance but not as regards contribution-based jobseeker's allowance. The claimant is not entitled to income-based jobseeker's allowance from 11 January 2001 but is entitled to contribution-based jobseeker's allowance, subject to the usual waiting days. If there is any dispute as to the precise date from which entitlement should commence, the matter must be referred to me or another Commissioner.

REASONS

2. It is common ground that there was "an unfortunate series of events" in this case but there is a dispute as to the consequences. I do not entirely agree with the submissions of either Mr Paul Neville of the Welfare Rights Advisory Service of Sefton Metropolitan Borough Council, on behalf of the claimant, or of Mr Christopher Willman, on behalf of the Secretary of State. Nonetheless, I have found their submissions to be very helpful and I am grateful to them both.

3. The claimant was a nursery nurse, doing supply work. She claimed jobseeker's allowance with effect from11 January 2001, on a form signed on Monday, 15 January 2001 and received the following day, stating that she had ceased work on 28 November 2000 due to the fact that she was going for an operation. She disclosed no income on her claim form but the Jobcentre telephoned the local education authority and were told that she had received £60.20 per week sick pay from her employers. On 18 January 2001, the Secretary of State decided that the claimant was not entitled to jobseeker's allowance on the ground that her income exceeded the applicable amount and the claimant was given notice of that decision in the following terms:

> "We cannot pay you Jobseeker's Allowance from 11 January 2001.
>
> "We cannot pay you because you have as much or money coming in that the law says you need to live on.
>
> "We cannot pay Jobseeker's Allowance for the first 3 days of your claim. Ask us if you want to know more about this.
>
> "We may still credit you with Class 1 National Insurance contributions if you continue to attend the Jobcentre.
>
> "The attached sheet shows how we worked this out. If you want more information please get in touch with us. Our phone number and address are at the top of this letter."

The letter went on to give further information, including the claimant's right of appeal. The "attached sheet" said:

"This payment of Jobseeker's Allowance is based on the amount the law says you need to live on. We call this income-based Jobseeker's Allowance.

"The amounts on this page apply from 14 April 2001.

"How much money the law says you need to live on each week	£53.05
"Your living expenses	£53.05
"We take away This is because of how much money you already have coming in.	£55.20

"This could be things like

- Social Security Benefits
- earnings
- savings over £3000.00
- other money coming in.

"You are not entitled to Jobseeker's Allowance because you have more money coming in than the law says you need to live on."

Underneath that information, someone wrote: "backdated sick pay".

4. The claimant then received letters dated 6 February and 16 February 2001 in identical terms, saying:

"We have looked at your claim again following a recent change.

"We cannot pay you an allowance from 13 January 2001. This is because:

you did not attend to sign your declaration.

If you do not attend this office when you are meant to we cannot pay you Jobseeker's Allowance."

5. The claimant appealed by a letter received by the Jobcentre on 1 March 2001. She said:

"I am writing concerning my claim for Jobseeker's Allowance dating from 13 January 2001.

"Firstly I received a letter saying I could not be paid due to receiving some money. This was sickness benefit, which was owed to me from weeks earlier. I telephoned and was told it didn't matter. I had received money and I should live on that instead, because money I received was over £60.00.

"Consequently I did not go to sign on that Friday and I have received letters ever since regularly saying I will not receive payment because I did not attend to sign my declaration.

"I would like to appeal because I do not consider it was my fault.

"The education department is very busy and claims are put into the work to be done baskets. My payments are always weeks behind.

"These two sickness benefits were for weeks earlier, when I had been to hospital for an operation.

"I do supply work from time to time and I do not think it fair for the wages clerk to ring Jobseekers Allowance weekly on my behalf, as suggested, to report the hours I have worked. I should be trusted when I fill in the forms; this sort of comment puts people off doing a day's work due to hassles when claiming benefits.

"I urge you to reconsider my claim and read through my records.

"I will gladly give you the number for you yourself to contact my employer. ...

"I hope you will appreciate the fact I have always been honest and am genuinely unemployed and should rightly be receiving some benefit to live on.

"I should receive back payments I am entitled to."

Despite the date referred to in the first sentence being 13 January 2001, that letter was treated as a late appeal against the decision dated 18 January 2001, disallowing the claim for jobseeker's allowance from 11 January 2001. On 8 April 2001, the claimant provided further information, saying she had claimed "sickness benefit", by which she meant statutory sick pay, from 28 November 2000 to 8 January 2001 and had received a late payment of "sickness benefit" on 18 January 2001, the day she had been told she was not entitled to jobseeker's allowance. In a letter received by the Appeals Service on 6 July 2001, the claimant wrote to complain that she had not been told that she still had a live claim in existence and should have signed on, that she had frequently told the Jobcentre that she was not working and that she considered she had been misled. She said:

"From my point of view I was claiming for all the lost weeks continuing from that first decision.

"I was not working and could have continued to sign fortnightly as required had I known."

She made it plain that she wished the tribunal to consider her entitlement to benefit down to 23 April 2001.

6. The claimant produced two payslips at the hearing, one showing a gross payment of £60.20 statutory sick pay and the other showing a gross payment of £34.79 for 5½ hours work, each payment being accompanied by a tax rebate. The first was for a pay period ending on 14 January 2001, for which the pay date was 25 January 2001, and the other was for a pay period ending on 28 January 2001, for which the pay date was 8 February 2001. It was submitted to the tribunal that there would have been another payslip between those two and that it would have showed another payment of statutory sick pay for the pay period ending 21 January 2001, for which the pay date would have been 1 February 2001. I am not entirely sure why there should have been another payment of statutory sick pay that week but I am prepared to accept that the claimant's representative is correct. It seems to be implied that each payment was made in respect of a period that was actually before the "pay period"

mentioned on the payslip. In any event, there would also have been earlier payments of statutory sick pay.

7. Mr Neville, who represented the claimant before the tribunal, drew the tribunal's attention to regulation 96(1) of the Jobseeker's Allowance Regulations 1996, which provides that –

> "... a payment of income to which regulation 94 (calculation of earnings derived from employed earner's employment and income other than earnings) applies shall be treated as paid –
>
> (a) in the case of a payment which is due to be paid before the first benefit week pursuant to the claim, on the date on which it is due to be paid;
>
> (b) in any other case, on the first day of the benefit week in which it is due to be paid or the first succeeding benefit week in which it is practical to take it into account."

His argument, if I understand it correctly, was that payments were "due to be paid" at the end of each pay period but that it would not have been practical to take account of the payment due in the second week of the claim until later because the amount of the payment would not have been known until after benefit should have been paid. Accordingly, it was submitted, the claimant was entitled to benefit during that second week and the decision of 18 January 2001 should not have been issued when it was because it should have been realised that, by the time the claimant first came to sign on on 26 January 2001, she would have been entitled to benefit for that second week.

8. The tribunal rejected the argument and the claimant now appeals with my leave. When I granted leave, I raised the following questions:

> "Firstly, did the decision dated 18 January 2001 relate only to income-related jobseeker's allowance and, if so, why ? Is statutory sick pay a form of "earnings" affecting entitlement to contribution-based jobseeker's allowance or is it "other income" ? Secondly, should the appeal have been treated as being, either additionally or alternatively, an appeal against the decision notified on 16 February 2001 ?"

9. Mr Willman does not challenge Mr Neville's argument as to the attribution of income but argues that the decision of 18 January 2001 was nonetheless correct, dealing as it did only with entitlement during the first week of the claim. The second week's entitlement would, it is submitted, have been dealt with had the claimant signed on on 26 January 2001. Mr Willman also says that the decision was intended to deal with entitlement only to income-based jobseeker's allowance. He concedes that statutory sick pay is not a form of "earnings" and so would not disentitle the claimant from contribution-based jobseeker's allowance. Furthermore, he accepts that the claimant satisfied the contribution conditions for entitlement to contribution-based jobseeker's allowance. But, it is submitted, the claimant's failure to sign on on 26 January 2001 was fatal to her claim for jobseeker's allowance by virtue of regulations 25 and 26 of the 1996 Regulations. It is pointed out that she failed to show good cause for her failure to sign on within the five days allowed by regulation 27. For that reason, while it is conceded that the tribunal should have considered the merits of the decision of 16 February 2001, which, he says, was concerned with contribution-based jobseeker's allowance, it is submitted that the tribunal was bound to dismiss the claimant's appeal.

10. Mr Neville replies that the claimant could hardly be expected to sign on when she had been told she was not entitled to jobseeker's allowance. He also submits that the failure to sign on did not close the claim for contribution-based jobseeker's allowance. It is also submitted that the claimant plainly had good cause for her failure to sign on and that the Secretary of State is to be taken to know that she had good cause because it was the information that he provided that was the cause of her failure to sign on. Finally, an argument, which I need not consider, is raised under the Human Rights Act 1998.

11. I have some doubts about the way Mr Neville suggests the claimant's statutory sick pay should have been taken into account (because it seems to me it was due to be paid on the pay date, rather than at the end of the pay period (see R(IS) 10/95)) but, in any event, it is common ground that statutory sick pay did fall to be taken into account as income other than earnings in the first week of the claimant's claim for jobseeker's allowance. The decision issued on 18 January 2001 was therefore correct insofar as it related to income-based jobseeker's allowance.

12. Assuming, in the claimant's favour despite my reservations, that Mr Neville is correct in submitting that no income fell to be taken into account in the second week of her claim, I nonetheless do not accept that the Secretary of State was not entitled to issue a decision on 18 January 2001, before the claimant first signed on. This is because I do not accept that issuing the decision on that date had the unfair result Mr Neville suggests.

13. As he submits, the effect of the decision that the claimant was not entitled to jobseeker's allowance was that the claim ceased to subsist by virtue of section 8(2) of the Social Security Act 1998. In my view, two things follow from that. Firstly, the requirement to sign on on 26 January 2001 lapsed, save as a condition for obtaining Class 1 credits. Secondly, it was open to the claimant to make a new claim.

14. As to the first of those consequences, I entirely accept Mr Neville's argument that it is not reasonable to expect a claimant to sign on once she has been told that her claim for benefit has been unsuccessful. Even if he is right that the claimant was actually entitled to benefit in the second week of her claim, I do not see how the claimant could have been expected to realise that, when she had been told that it was her income that disentitled her from benefit and she was still receiving income each week. It is not reasonable, as Mr Willman suggests it is, to assume that a claimant who has been told that attendance is necessary to obtain Class 1 credits will in fact attend. The claimant may not wish to claim such credits and, indeed, may not be able to do so if his or her earnings in the contribution year already exceed 52 times the lower earnings limit (see regulation 3 of the Social Security (Credits) Regulations 1975).

15. However, the reason that I go further than Mr Neville and hold that the requirement to sign on had lapsed altogether in relation to jobseeker's allowance is that the requirement had lost its purpose. Attendance is required to enable a claimant to prove continued entitlement to jobseeker's allowance. It is, as the claimant pointed out, unnecessary to sign on for jobseeker's allowance purposes if there is no entitlement to jobseeker's allowance. Furthermore, the consequence of a failure to attend and sign a declaration as required is that entitlement ceases under regulation 25 of the 1996 Regulations. If it has already been decided that the claimant has no entitlement, there is plainly no entitlement that can cease.

16. In relation to income-based jobseeker's allowance, this avoids the unfair result that the parties suggest would otherwise follow from the claimant's failure to allege good cause for her non-attendance within five days, which was before she could reasonably have been expected to discover that the non-attendance was of any significance. As I have said, the

second consequence of the claim having ceased to subsist from 18 January 2001 was that the claimant could make a new claim. That was her remedy. She had been told that she was not entitled to jobseeker's allowance because of the amount of her income. It was therefore reasonable to expect her to make a new claim when her income dropped below £53.05 per week. A claim can be back-dated up to a maximum of three months under regulation 19 of the Social Security (Claims and Payments) Regulations 1987 and so it was not necessary for action to be taken within five days of 26 January 2001. If, as Mr Neville argues, the claimant was entitled to benefit in what would have been the second week of her original claim, a new claim could have been back-dated to 19 January 2001 on the basis that the form of the Secretary of State's decision was information which led the claimant to believe that a claim made that week would not succeed, so as to bring her within the terms of regulation 19(4)(d). In fact, it appears that no new claim was made until April. I do not know why that was. It may be arguable that the letter of appeal received on 1 March 2001 should have been treated as a new claim, but that is not a matter within my jurisdiction on this appeal.

17. I am concerned only with the claim made with effect from 11 January 2001 and I cannot take account of circumstances not subsisting on 18 January 2001 when the Secretary of State's decision was made. It is common ground that the claimant was not entitled to income-based jobseeker's allowance on, or before, 18 January 2001. Accordingly, in relation to income-based jobseeker's allowance, this appeal must fail.

18. I turn to the question of the claimant's entitlement to contribution-based jobseeker's allowance. I raised this question when I granted leave to appeal because the claimant had claimed both income-based and contribution-based jobseeker's allowance and the decision of 18 January 2001 appeared to be given in respect of both types of jobseeker's allowance, even though the reasons for the decision were appropriate only to income-based jobseeker's allowance. The identical decisions issued on 6 February 2001 and 16 February 2001 also purported to be in relation to jobseeker's allowance without distinguishing between the income-based and contribution-based varieties. As Mr Willman says that the decision of 18 January 2001 was intended to relate only to income-based jobseeker's allowance and submits that the decision of 16 February was intended to relate to contribution-based jobseeker's allowance, it may be that the decision of 6 February, of which he and I were unaware until Mr Neville sent a copy with his last submission, was intended to relate only to income-based jobseeker's allowance and was made as a result of the computer overlooking the decision of 18 January 2001. For the purposes of this decision, I shall proceed on that assumption. If it is right, the decision of 6 February is simply of no effect because it had already been determined that the claimant was not entitled to income-based jobseeker's allowance and there had not been a new claim that would have justified another decision. If the assumption is wrong, I presume one or more decisions must have been issued in error and can be ignored on that ground. In any event, I cannot see how the decision can affect the outcome of this appeal.

19. If, as Mr Willman contends, the decision of 18 January 2001 related only to income-based jobseeker's allowance, the decision issued on 16 February was justifiable as a decision in respect of contribution-based jobseeker's allowance. Regulation 26(a) of the 1996 Regulations provides that, where entitlement to jobseeker's allowance is to cease because a claimant has failed to sign on, entitlement ceases the day after the last day in respect of which the claimant has provided information or evidence showing that he or she continued to be entitled to jobseeker's allowance, where that is earlier than the dates prescribed by regulation 26(b) or (c). Here, the last day in respect of which the claimant had provided evidence that she continued to be entitled to jobseeker's allowance was arguably 13 January 2001 (i.e. the Saturday before the Monday on which she signed the claim form). However, there is nothing in regulation 26(a) to prevent a person from providing, on a date *after* the decision is made,

information or evidence that entitlement lasted longer, so that the decision can be changed on revision, supersession or appeal. I agree with Mr Willman that the claimant's appeal should have been treated as being an appeal also against the decision of 16 February. In my view, contrary to Mr Willman's submission, that would have enabled the tribunal to award contribution-based jobseeker's allowance for the period between the waiting days and the date on which the claimant failed to sign on. The period would have been limited because regulation 26(b) or (c) would have applied.

20. However, I am not prepared to accept that the decision of 18 January 2001 did relate only to income-based jobseeker's allowance. That may have been what the Jobcentre intended but there is not the slightest indication on the decision itself that it applied only to income-based jobseeker's allowance. Even an expert on social security law might have thought that the explanation attached to the decision was merely wrong, rather than being an indication that the decision was intended to relate only to income-based jobseeker's allowance. In particular, the information about credits tends to imply that obtaining credits was the *only* reason for continuing to sign on. In any case, the decision was issued with a view to its being read by a claimant and I do not see how any claimant could have been expected to realise that a decision issued in the form of the decision dated 18 January 2001 did not relate to contribution-based jobseeker's allowance as well as income-based jobseeker's allowance. There may be cases in which it is right to imply a limitation to a decision where such a limitation was intended by the Secretary of State but was not expressed on the face of the decision, but I am not prepared to do that where the result would be prejudicial to a claimant who has acted reasonably upon a literal reading of the decision. In this case, the claimant reasonably believed that the Secretary of State had decided that she was not entitled to any form of jobseeker's allowance and so she reasonably believed that there was no need to attend the Jobcentre on 26 January 2001. I do not consider that I should give the decision an artificial construction, which would result in her being penalised for her non-attendance. The Secretary of State is estopped from denying that the decision issued in his name means what it says. In the circumstances of this case, the application of the doctrine of estoppel does not breach the rule that estoppel cannot prevent a statutory duty from being carried out (R(P) 1/80, R(SB) 4/91).

21. Therefore, I take the decision of 18 January 2001 as applying to contribution-based jobseeker's allowance. It follows that the decision of 16 February, like the decision of 6 February, was of no effect because it had already been determined that the claimant was not entitled to jobseeker's allowance. It also follows that the requirement to sign on had lapsed for the purpose of contribution-based jobseeker's allowance as well as income-based jobseeker's allowance, so that regulations 25 and 26 did not apply. Accordingly, there was no limit to the period for which the tribunal could have awarded contribution-based jobseeker's allowance on appeal from the decision of 18 January 2001.

22. On that approach, it is plain that the tribunal erred in law in failing to consider whether the claimant was entitled to contribution-based jobseeker's allowance. As it is common ground that she did satisfy the conditions of entitlement to that allowance, I can make the award. The Secretary of State can supersede my decision to take account of changes of circumstances after 18 January 2001. If that results in my decision being terminated before 23 April 2001, the Secretary of State may consider whether any documents received by him, such as the letter of appeal to the tribunal, should be treated as further claims by the claimant.

(Signed) **MARK ROWLAND**
Commissioner
17 March 2003