Bulletin 170
[SHEET]

CJSA/1244/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal.

REASONS

2. The claimant is a single man. He lives in Lancashire but worked as a self-employed seasonal worker, providing pony rides and rides in a horse-drawn carriage at a seaside resort in Devon. He has been doing this for some years, working from early July until early November. This appeal is concerned with the claim for jobseeker's allowance he made on 10 November 1999.

3. On that claim, he said that his gross receipts in the 1999 season had been £1,870 and that his expenses had been £900. He had no evidence to support either figure. With some hesitation, the Secretary of State accepted the figure for income but not for expenses. He decided that the claimant should be treated as gainfully employed throughout the year and the earnings were therefore spread over the whole year, producing a figure of £35.96 pw, of which £5 pw was disregarded in calculating the claimant's income for the purposes of assessing his entitlement to jobseeker's allowance. The claimant appealed. On 22 April 2000, a tribunal allowed the appeal at a paper hearing. The Secretary of State obtained a statement of reasons for the decision and then applied for it to be set aside on the ground that it appeared from the reasons that the tribunal had had before him a written submission on behalf of the claimant which had not been supplied to the Secretary of State. A full-time chairman declined to set the decision aside, completing the standard proforma used by the Appeals Service and stating that there "was not a document relevant to the proceedings in which the decision was given which was either not sent to or received by a party to the proceedings at an appropriate time". He failed to comment on the Secretary of State's ground for applying for the decision to be set aside. The Secretary of State protested. It appears that the further submission was then brought to the attention of the full-time chairman who now set aside the tribunal's decision. However, despite the fact that the Secretary of State had asked for the opportunity to make further submissions in the light of the claimant's submission, the case was relisted the day after notice of the setting aside was issued. Happily the tribunal noticed the problem and adjourned the hearing to allow the submissions to be made. This time, there was an oral hearing. The claimant did not attend but the Secretary of State was represented. The tribunal allowed the appeal only to the extent of reducing the amount of earnings to be taken into account to £31.90 pw, which was a figure suggested by the Secretary of State because the claimant had now provided evidence for some of his expenses. The claimant now appeals with the leave of the regional chairman. The appeal is supported, but only to the extent that it is suggested that the amount of the claimant's earnings to be taken into account should be further reduced to £26.81 pw.

4. That support is negligible because the suggested figure is after the application of the £5 disregard whereas it is quite clear that the tribunal were adopting the

submission made to them by the Secretary of State which produced a figure for earnings before the disregard was applied. I have no doubt that the local office, whose submission had been accepted by the tribunal, interpreted the decision in that way and applied the disregard properly. Had they not done so, the claimant would have protested in his grounds of appeal. The remaining 9p reduction now suggested is due to the Secretary of State submitting that the claimant's weekly earnings should be calculated by dividing his annual earnings by 365 and multiplying the result by 7, instead of simply dividing the annual earnings by 52. That purist approach is supported by reference to CIS/371/93 and CJSA/1039/99 and I accept that it is the approach to be preferred. The Jobseeker's Allowance Regulations 1996 appear not to make any specific provision for calculating weekly earnings of self-employed earners once annual earnings have been ascertained, whereas regulation 97(1)(b)(iii) provides for calculating the weekly earnings of employed earners by dividing annual earnings by 52. However, I do not consider it to be an error of law to calculate weekly earnings for self-employed earners by dividing annual earnings by 52 in the absence of a statutory provision to that effect, at any rate where the difference it makes is as small as in this case and the figure to which the calculation is being applied is itself a "rough" figure. Such a way of calculating weekly earnings is perfectly conventional, even if not the best, and it seems absurd to insist on self-employed earners being treated differently from employed earners in this regard. I do not accept that the tribunal erred in law in their calculation of the claimant's earnings.

5. When I first saw the file, I raised a procedural point, arising out of the fact that leave to appeal was granted by a chairman other than the one who was the tribunal. However, for the reasons I gave in CIS/4772/00, I am satisfied that there is nothing in the point.

6. The real issue arising on this appeal is whether the claimant's earnings should be spread over the whole year at all. The claimant complains that he has been able to keep going in previous years only because he has been paid benefit without his earnings being taken into account. When granting leave to appeal, the regional chairman suggested that the approach taken by the tribunal was not obviously consistent with the concept of income-based jobseeker's allowance as a subsistence benefit.

7. Section 1(2) of the Jobseekers Act 1995, as originally enacted and in force in 1999, provides –

> "Subject to the provisions of his 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, which remains in force;
> (c) is actively seeking employment;
> (d) satisfies either –
> (i) the conditions set out in section 2; or
> (ii) the conditions set out in section 3;
> (e) is not engaged in remunerative work;
> (f) is capable of work;
> (g) is not receiving relevant education;

(h) is under pensionable age;
(i) is in Great Britain."

Section 3(1) makes provision for income-based jobseeker's allowance.

"The conditions referred to in section 1(2)(d)(ii) are that the claimant –
(a) has an income which does not exceed the applicable amount (determined in accordance with regulations under section 4) or has no income;
(b) is not entitled to income support;
(c) ....;
(d) ....;
(e) ....; and
(f) is a person –
(i) who has reached the age of 18; or
(ii) ....; or
(iii) ....

Regulation 51 of the Jobseeker's Allowance Regulations 1996 provides –

"(1) For the purposes of the Act "remunerative work" means –
(a) in the case of a claimant, work in which he is engaged or, where his hours fluctuate, is engaged on average, for not less than 16 hours per week; and
(b) ....; and
(c) ....,
and for those purposes, "work" is work for which payment is made or which is done in expectation of payment.
(2) For the purposes of paragraph (1), the number of hours in which the claimant or his partner is engaged in work shall be determined –
(a) where no recognisable cycle has been established in respect of a person's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours which he is expected to work in a week;
(b) where the number of hours for which he is engaged fluctuate, by reference to the average of hours worked over –
(i) if there is a recognisable cycle of work, and sub-paragraph (c) does not apply, the period of one complete cycle (including, where the cycle involves periods in which the person does not work, those periods but disregarding any other absences);
(ii) in any other case, the period of five weeks immediately before the date of claim or the date of supersession, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately;
(c) where the person works at a school or other educational establishment or at some other place of employment and the cycle of work consists of one year but with school holidays or similar vacations during which he does no work, by

disregarding those periods and any other periods in which he is not required to work."

Regulation 95(1) provides –

> (1) Except where paragraph (2) applies, where a claimant's income consists of earnings from employment as a self-employed earner the weekly amount of his earnings shall be determined by reference to his average weekly earnings in that employment –
>
> (a) over a period of one year; or
>
> (b) where the claimant has recently become engaged in that employment or there has been a change which is likely to affect the normal pattern of business, over such other period as may, in any particular case, enable the weekly amount of his earnings to be determined more accurately.

Regulation 1(3) provides that, for the purpose of the Regulations, "self-employed earner" has the meaning it has in the Social Security Contributions and Benefits Act 1992 by virtue of section 2(1)(b) of that Act, which in turn provides:

> ""self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)".

8. The Secretary of State has relied heavily upon CIS/166/94 throughout these proceedings. In that case, the claimant was a self-employed builder who claimed income support from 24 November 1992 until, as it turned out, 8 February 1993. The tribunal had found that he had been in "more or less regular employment - short periods of unemployment only" and that he "has always had some work in the pipeline, even if there was a break of weeks – he knew there was something else coming up" but work "had run dry" at the time of his claim. The Commissioner accepted that the claimant was not engaged in remunerative work during the period of his claim but rejected a submission that the claimant should be regarded as having earnings from self-employment only while engaged in remunerative work. He referred to the definition of "self-employed earner" and held that the concept of gainful employment was different from the concept of remunerative work and that the claimant could be treated as having earnings from gainful employment during a period when he was not engaged in remunerative work. He remitted the case to another tribunal for determination of the question whether the claimant was gainfully employed during the period of the claim, requiring them to make findings as to –

> "(i) whether new orders were foreseeable;
>
> (ii) whether the business was a going concern and regarded as such by the claimant, his bankers, creditors and others;
>
> (iii) whether the claimant was genuinely available for and actively seeking alternative work;

(iv) whether the claimant hoped or intended to resume work in his business when economic conditions improved;

(v) whether the claimant was undertaking activities in connection with the business hitherto pursued;

(vi) whether there was work in the pipeline;

(vii) whether the claimant was regarded as self-employed by the Secretary of State and the Inland Revenue;

(viii) whether the claimant held himself out as being anxious to become employed for purpose of gain (for example by advertising or otherwise soliciting new trade); and

(ix) whether the interruption in question was part of the normal pattern of either the claimant's particular work or the general occupation being pursued."

9. In the present case, the first tribunal considered those questions but nonetheless allowed the claimant's appeal. The tribunal found that new orders were not foreseeable from November to July and that even then the securing of a new licence was not a mere formality. He also concluded that the business was not a going concern during the off-season, that during that period the claimant was looking for work, did not pursue activities connected with the business and had no work in the pipeline. As to the seventh test, he found no evidence from the Inland Revenue and regarded the Secretary of State's view as inconsistent with the claimant signing on and being available for work. He found that the claimant was not holding himself out as available for similar work during the off-season. It was the last test that he thought most difficult because there was clearly a pattern to the claimant's work but he regarded "the uncertainty over the licence renewal and the fact that he signs on between these periods and the fact that he may not go back" as rendering the test inconclusive. After that decision had been set aside, the Secretary of State submitted to the new tribunal that, "although it is not automatic that he gets a licence, there is no reason to suppose he will be refused as he has been awarded a licence in previous years". The second tribunal accepted that submission. He also regarded the business as a going concern and held that further work was foreseeable and that there was work in the pipeline, on the basis, it appears, that it was likely that work would be resumed in July 2000. The claimant complains about those findings but does not suggest that he did not intend to return to his work in Devon in July 2000. When granting leave to appeal, the regional chairman raised the question whether CIS/166/94 had been correctly applied by the tribunal or, in the alternative, whether it had been correctly decided by the Commissioner.

10. The Secretary of State submits that CIS/166/94 was correctly applied by the tribunal and that it was correctly decided. His representative points out that it has been followed in CIS/422/95 and CIS/14632/96. The latter decision involved a roofer whose circumstances were very similar to those of the claimant in CIS/166/94. Neither CIS/166/94 nor CIS/14632/96 involved a seasonal worker. The facts of CIS/422/95 were far more like the facts of the present case. The claimant in CIS/422/95 ran an amusement arcade from April to September but did some work on

the equipment during the off-season. The Commissioner did not determine the case on the basis of the amount of the claimant's income, although he said that, applying CIS/166/94, consideration of the claimant's earnings would have produced the same result as he reached by another route. Instead, he found there to be a recognisable cycle of work and, applying a provision equivalent of regulation 51(2)(b)(i) of the 1996 Regulations, held that the claimant was to be treated as being in remunerative work throughout the year and was therefore not entitled to benefit on that ground.

11. It seems to me that the difficulty in these cases arises because, whereas regulation 96 of the 1996 Regulations makes provision for attributing earnings from employed earner's employment to particular weeks, no such provision is made in respect of earnings of a self-employed earner. CIS/166/94 effectively decides that the earnings are to be attributed to the period over which the claimant is "gainfully employed". The tests suggested in CIS/166/94 are ways of determining whether a period of self-employment has come to an end, although it was also pointed out in that case that consideration must be given to whether there have been changes in the pattern of the claimant's employment so that earnings are to be calculated under regulation 95(1)(b) by reference to periods other than a year, because, although self-employment has not come to an end, it is possible to identify different periods of self-employment that do not merely represent the natural rhythms of the work.

12. It may well be that, as was held in CIS/166/94, a person can be "gainfully employed" when not engaged in "work for which payment is made or which is done in expectation of payment". I need not determine the extent to which that is true. However, I do not consider that a person can be said *not* to be "gainfully employed" when he *is* engaged in "work for which payment is made or which is done in expectation of payment". People may be engaged in work when not carrying out activities in connection with their employment in cases where periods of no work are ordinary incidents of their employment. That is particularly so in the case of self-employed earners. It is also true of those who work cycles that include periods of no work. Where the claimant is a seasonal worker, there is likely to be a cycle of work consisting of one year, so that the approach taken in CIS/422/95 is applicable. In such a case, it is unnecessary to go through all the tests suggested in CIS/166/94. The earnings will be taken into account over the period of the cycle. If the weekly average of hours worked over the cycle is 16 or more, the claimant will not be entitled to jobseeker's allowance at all. If the weekly average is less than 16, the claimant will be entitled to jobseeker's allowance but the earnings will be taken into account. This approach creates a reasonable degree of equity between, say, a person who works for 18 hours a week throughout the year and a person who works for 36 hours a week for six months of the year. It also answers deals with the apparent anomaly, identified by the claimant, that a person might be refused jobseeker's allowance during the on-season but have earnings taken into account during the off-season so that, over the year, he was expected to subsist on an income less than his applicable amount. That situation should not arise. If a person works an average of 16 hours per week or more over the whole year, his earnings are unlikely to be as low as the claimant in the present case has claimed and, in any event, he is disentitled throughout the year due to the number of hours he works rather than the amount of earnings. If he works for less than an average of 16 hours per week over the whole year, and has sufficiently low earnings, he remains entitled to jobseeker's allowance during the on-season, however many hours per week he works during that period.

13. The regional chairman raised the question whether a person who "has no income" satisfies the condition of entitlement for income-based jobseeker's allowance (see s. 3(1)(a)) and whether regulation 30 ought to apply only where a claimant in fact has income at the time of the claim. It is true that that might be more in accordance with the traditional concept of a subsistence benefit, but the tendency of modern social security legislation has been to expect claimants to make some provision of their own for their future needs and to provide less by way of week-to-week support if, looking at a claimant's resources and requirements over a longer period, he is thought not to need it. I note that the Secretary of State has not the 1996 Regulations in response to the criticism made by Lord Scott of Foscote in *Banks v. Chief Adjudication Officer* [2001] UKHL 33 [2001] 1 W.L.R. 1411 (also reported as R(IS) 15/01) of the operation of regulation 51(2)(c) of the 1996 Regulations. I presume that lack of action is deliberate. I do not regard the result of the present case to be any more unreasonable than the result in that case and I do not consider that I should depart from the approach taken in previous Commissioners' decisions. In particular I bear in mind that it is necessary for someone to have established a pattern of work as a seasonal worker before he is caught in the way that the present claimant is and that it might be thought that a person who has worked for only part of each of the last few years in that way considers it worthwhile. If it has been worthwhile to this claimant in the past only because he was overpaid benefit, he will no doubt give the employment up, if he has not already done so. I also bear in mind that it is possible for a person to abandon any commitment to future seasonal work if the Secretary of State insists on that as a condition of securing immediate entitlement to jobseeker's allowance to avoid destitution. Such an abandonment would both break the cycle of work and end the period of gainful employment as a self-employed earner. Whether this represents a sensible policy may be open to debate but I suspect any other policy would be too. Seasonal workers have been regarded as a problem for those administering benefits for the unemployed at least since the First Report of the Royal Commission on Unemployment Insurance (Cmd 3872) was published in 1931 and a universally accepted policy that works well in all cases has yet to be found.

14. In the present case, the tribunal plainly found that the claimant was a seasonal worker who would be returning to that work in July 2000. That was not in dispute, save to the extent that the claimant raised the possibility that he might not be granted a licence. I consider that the tribunal were entitled to take the view that, since a licence had always been granted before, it was likely to be granted again. If, as the claimant suggests in his grounds of appeal, some event had arisen making the grant of a licence less likely, the decision could have been superseded. On the basis that the claimant was a seasonal worker, he was to be regarded as engaged in work for which payment was made for the whole year from July 1999 to July 2000. The Secretary of State ought to have enquired whether the hours the claimant worked during the on-season were such that the average over the whole year was 16 or more. As it was, there was no evidence on that issue before the tribunal and the tribunal did not consider the point.

15. There is also no evidence before me as to the number of hours the claimant worked. However, I can see no purpose in referring this case to another tribunal for determination. There cannot now be any question of recovering benefit paid to the claimant even if he were to be treated as having been in remunerative work at the time

of his claim. In those circumstances, I will not be doing any injustice to the Secretary of State if I assume that the average number of hours worked by the claimant over the relevant year was less than 16 per week. On that basis he was not engaged in remunerative work so as to be disentitled to jobseeker's allowance altogether. However, he was to be regarded as gainfully employed in self-employed earner's employment and his earnings were to be taken into account in the manner that the tribunal decided.

M. ROWLAND
Commissioner
22 May 2002