

(7)

(53)

Availability for employment
- non availability on any day
in week where reg 7 (2) BSA by apms

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *34/99

(Commissioner's File No.: CJSA/1279/98)

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

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so as to arrive by

23 SEP 1999

1999

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This appeal by the adjudication officer succeeds. In accordance with the provisions of section 23(7)(a) of the Social Security Administration Act 1992 I set aside the decision made by the social security appeal tribunal on 24 November 1997. I substitute my own decision. This is to the effect that the claimant is not available for employment for the period 30 July 1997 to 12 August 1997, both dates included.

2. In this case the tribunal has attempted albeit clumsily, to do justice. However, in the process it has ignored particular legal provisions which must be applied but which might be thought to cause injustice. Further, some of the submissions in this case have introduced needless complexity and I have attempted to set out the position in as straightforward a manner as possible.

3. The claimant was born on 28 January 1946 and commenced registering as unemployed on 6 May 1997. At some stage he was awarded jobseekers allowance. His signing day was Tuesday and his benefit week ran from Wednesday to Tuesday. All was in order until 29 July 1997 when he told the Job Centre that he was proposing to take a holiday in North Wales. Some of the documents referred to this information having been given on 29 August 1997 but I assume that is in error because that date would not make sense in the context. He completed form ES674 indicating that he was going away on 2 August 1997 and would return home on 9 August 1997. He would be staying at a holiday park in a caravan and would be out of contact until he returned home. He stated that he was not willing to return home immediately to take up a job opportunity if one were offered to him while away and that he would not be able to do so because it was only one week in the year that he was looking forward to, the same as any person would. Knowing the luck he had had over the years he very much doubted that he would hear any chance of a job. He stated that he would not be available for work for the period 2 August 1997 to 10 August 1997 and would not be looking for work while he was away. These statements are unambiguous and unqualified.

4. On 13 August 1997 the adjudication officer decided that the claimant was not available for employment for the period 30 July 1997 to 12 August 1997. The implication was that he was not entitled to jobseekers allowance for that period, although this is not stated in the decision. I have confined my own decision to the question of availability. I am not persuaded that the adjudication officer gave the correct reason for the decision but on 19 August 1997 the claimant appealed to the social security appeal tribunal against the decision of the adjudication officer. In his letter of appeal he stated that he was looking for work while he was away. However, he did not attend the hearing of the tribunal which took place on 24 November 1997. The tribunal found that the claimant was not available for work during his one week

holiday, and did not believe that he was looking for work while on holiday. However, the tribunal was of the opinion that had the claimant been given the opportunity he would have extended his available hours in the days before he went on holiday. I think that the tribunal was trying to achieve a situation where the claimant was paid jobseekers allowance for the week ending 5 August 1997 but not for the week ending 12 August 1997. On 4 February 1998 the adjudication officer applied for leave to appeal to the Social Security Commissioner against the decision of the tribunal. Leave was granted on 16 February 1998 by the full-time chairman of the Independent Tribunal Service.

5. Section 1 of the Jobseekers Allowance Act 1995 provides for the payment of jobseekers allowance if, in addition to the satisfaction of other conditions, a claimant is available for employment. Regulation 6(1) of the Jobseekers Allowance Regulations 1996 provides that 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 and, by virtue of regulation 7(1) he must not restrict the total number of hours for which he is available for employment to less than 40 hours in any week, each of these provisions being subject to exceptions which do not apply in this case. In the present case the claimant had not restricted his availability to less than 40 hours per week. Accordingly, he must be a person who has restricted his availability in any week to 40 hours or more. Therefore he comes within regulation 7(2). Regulation 7(3) provides that a person who comes within regulation 7(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. The "week referred to" is the benefit week which in the claimant's case runs from Wednesday to Tuesday. Regulation 7(3) is subject to exceptions in regulation 14 but none of the circumstances set out in regulation 14 applies to this case.

6. Tuesday fell on 29 July 1997, 5 August 1997 and 12 August 1997. If the claimant was not available for employment on any days during any week ending on a Tuesday, then he is not regarded as available for employment for the whole of that week, even if in fact he was available for at least 40 hours on other days of the week. This is the provision which many people regard as unjust and which the tribunal was trying to mitigate. However, it is clear that in the way it approached this question the tribunal was in error of law and I have no choice but to set its decision aside. However, I do adopt the finding of fact made by the tribunal that the claimant was not available for work while he was on holiday. In his letter of appeal he indicates that he was available and was looking for work, but this lacks all

credibility when compared with what he stated on form ES674 details of which I have given above.

7. Regulation 19(1)(p) provides that where a claimant does intend to reside at a place other than his usual place of residence and has given written notice to an employment officer that he will not be actively seeking employment, can nevertheless be regarded as actively seeking employment subject to certain other conditions and limitations. However, he must still be available for employment even if he is not actually actively seeking employment.

8. For the above reasons this appeal by the adjudication officer succeeds.

(Signed) H Levenson
Commissioner

(Date) 27 April 1999