(153) CBJSA: ongoing contractual retirement pay ments are 'pension payments'.

(7)

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Starred Decision No: *45/99

(Commissioner's File Nos.: CJSA/5381/97 and CJSA/1360/98)

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Miss J Bravo
Office of the Social Security and Child Support Commissioners
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 22 SEP 1999 **1999**

but note that the Commissioner has granted the claimant leave to appeal.

PLH *Commissioner's Files: CJSA 5381/97 & 1360/98*

SOCIAL SECURITY ADMINISTRATION ACT 1992
JOBSEEKERS ALLOWANCE ACT 1995

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claim for:	Jobseekers Allowance
Appeal Tribunal:	Bristol SSAT
Tribunal case ref:	3/24/97/05764 & 18207
Tribunal date:	26 June & 20 November 1997

[ORAL HEARING]

1. This case comes before me as two joined appeals by the claimant against decisions of social security appeal tribunals on 26 June and 20 November 1997, each holding him disentitled to receive contribution based jobseeker's allowance because he was in receipt of periodic compensation payments for redundancy from his employment, which fell to be treated as pension payments and were in excess of the prescribed amount. For the reasons given below I have concluded that both tribunals were correct in law in reaching this conclusion and accordingly both these appeals must be dismissed.

2. I held an oral hearing of the joined appeals, at which the claimant appeared and presented his case in person and Huw James, solicitor, appeared for the adjudication officer. As well as the helpful oral submissions they both made to me I have of course taken into account all the written submissions and material in both appeal files, but will refer to them only so far as is necessary to explain the reasons for this decision. Page references are to the numbering in the first appeal file CJSA 5381/97.

3. These appeals both concern the "contribution based jobseeker's allowance" which is the name now given to state unemployment insurance. The risk covered by this insurance benefit is the loss of earnings from employment due to being out of work. The rules contain offset provisions for people who, while out of work, are nevertheless receiving payments from their previous employment in the form of continued current earnings of various kinds, or deferred earnings by way of pension. To the extent that people out of work continue to receive such payments from their employment, they do not qualify for the insurance benefit because they are not suffering the loss.

4. The single point at issue in both these appeals is identical and the only difference between them is that they derive from two different claims made by the claimant for jobseeker's allowance following the termination of his employment by reason of redundancy on 31 December 1996. The first claim was made from 1 January 1997 and

the second (after a short period when the claimant was unavailable for work and so could not claim anyway) was made on 24 March 1997. In each case, the claimant very properly declared that he was continuing to receive annual compensation payments from his employer under a contractual redundancy arrangement at the rate of £14,982 a year: and in each case his claim was rejected on the ground that these had to be counted as "pension payments" under the offset rules referred to above. Both tribunals confirmed that they did, and the question I have to decide is whether that was correct.

5. There has been some confusion in the written stages of the procedure about the exact nature of the payments received by the claimant; but by the time of the appeal hearing before me the material facts were clear and beyond dispute. The claimant is a former civil servant whose department, then known as the Property Services Agency, was sold off to the private sector in October 1993. His years of service as a civil servant entitled him to benefits under the Principal Civil Service Pension Scheme on his eventual retirement, and also to benefits under the separate Civil Service Compensation Scheme in the event of being made redundant. As part of the terms of the transfer of his employment out of the public sector, he was guaranteed an equivalent package of retirement and redundancy benefits in his new private sector employment.

6. As regards pensions, he chose to leave his accrued benefits for previous service frozen in the civil service scheme, and to become entitled to accruing benefits from his new private employer's own company scheme for future service only, from October 1993. Nothing turns on that, as it is now common ground that the annual compensation payments he is receiving (and will continue to receive to age 60) are *not* part of his retirement benefits under either of those pension schemes. Instead, they are contractual payments being made by his private employer, not under any separate funded scheme but out of its own operational assets, in satisfaction of the redundancy terms negotiated with him as part of his contract of employment on transfer of his employment to them.

7. Those terms are set out in letters dated 22 April and 27 October 1994 from the employer company to the claimant, at pages 61-62 and 69-70. They were agreed direct between him and them, to replace (but not exactly mirror) the benefits to which he would previously have been entitled under the Civil Service Compensation Scheme in the event of his employment coming to an end by redundancy before normal retirement age. So far as material, they entitled the claimant if made redundant on or before 31 March 1997 to annual compensation payments at the rate of £13,919 per annum, index-linked to the retail price index from 1 October 1993, and remaining payable until the age of 60 (when the claimant would be able to draw his retirement pension under the separate retirement pension schemes).

8. The payments in issue in this case are those received by the claimant under this arrangement by virtue of his eventual redundancy at the end of December 1996. He was then 56 and is still only 58, so that he has not started to draw any retirement pension under either the civil service or private sector pension schemes. Thus both at the time he made his claims and today, the only periodic payments derived from his previous employment being received by him are from his contractual redundancy arrangement.

9. The rules that determine whether the claimant can also draw state insurance benefits in these circumstances are now in the Jobseekers Act 1995 and the Jobseeker's Allowance Regulations 1996 SI No. 207.

10. By s. 4(1) of the Act, the amount payable in respect of a claimant who has paid the requisite contributions (there is no dispute about that in this claimant's case) is to be calculated by:

> "(a) determining the age-related amount applicable to him; and
>
> (b) making prescribed deductions in respect of earnings and pension payments."

11. "Pension payments" are defined by s. 35(1) so far as material as follows:

> "(a) 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 ..."

12. "Occupational pension scheme" is stated by the same section to have the same meaning as it has in the Pension Schemes Act 1993 by virtue of section 1 of that Act.

13. The age-related weekly amount for a person of the claimant's age (some £50 or thereabouts) and the deductions to be made for "earnings" and "pension payments" are prescribed in the regulations. Reg 80 deals with earnings and requires the whole weekly amount of the claimant's earnings to be deducted, calculated in accordance with later provisions of the regulations. Such earnings are defined by reg 98(1) to include "(b) any compensation payment"; but it is specifically provided by reg 98(2) that "earnings" shall *not* include "(b) any periodic sum paid to a claimant on account of the termination of his employment by reason of redundancy". Thus there is no question of the periodic payments at issue here being caught as "earnings" under this head.

14. By reg 81 however, a deduction must be made for the weekly equivalent of any "pension payments" in excess of a flat allowance of £50 per week which a claimant is allowed to keep without it affecting his insured benefit. There is no doubt that the claimant's payments are periodical payments made in relation to him in connection with the coming to an end of his employment. They thus fall within the first part of the definition of "pension payments" under s. 35(1) of the Act, which applies unmodified.

15. In my judgment therefore the single question on which this case depends is whether the arrangement under which the claimant draws such payments (namely his contractual redundancy arrangement with his private employer, negotiated in place of his previous rights under the Civil Service Compensation Scheme) was or was not an "occupational pension scheme" under the definition in s. 35(1), as incorporated by reference from s. 1 Pension Schemes Act 1993.

16. That definition 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 of 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; ..."

17. I was referred in the written submissions to some earlier Commissioners' decisions on the provisions for taking pension payments into account under the former unemployment benefit. However as Mr James rightly pointed out the statutory wording with which they were dealing was different, and the jobseeker's allowance provisions have to be considered afresh. I do not need to comment on those decisions as they do not point the answer to the question I have to decide on the new legislation.

18. On this, the claimant contended strongly that the definition in the Pension Schemes Act 1993 could have nothing to do with his private contractual arrangement with his employer, which could not be turned into a "pension scheme" in this way. It was purely an individual redundancy package, arranged and funded entirely differently from the pension schemes of which he was a member. The 1993 Act which was concerned with the regulation of pension schemes could not have been intended to extend to such arrangements. Moreover it would be an absurd result that such payments on redundancy should be brought into account as "pensions" for jobseeker's allowance when they were obviously intended to be left out of the reckoning as "earnings" by the specific exclusion in reg 98. The reality was that he was not drawing anything at all by way of pension, so there were no "pension payments" to be taken into account.

19. In my judgment however this attractively presented argument cannot stand up against the breadth of the definition in s. 1 Pension Schemes Act 1993. Mr James was right to my mind in submitting that there is nothing to take the claimant's redundancy arrangement outside that definition; and the consequence is that his payments do count as "pension payments" within the extended meaning in the Jobseekers Act.

20. There is in my judgment no doubt that the contractually binding arrangement made between the claimant and his former employer as part of the terms of his employment both (a) was an "arrangement ... comprised in one or more instruments or agreements" and (b) had effect in relation to his former employment so as to provide the benefits on termination of service for which his service qualified him. On their face, the plain words of the definition therefore include it.

21. The claimant's main argument was that the definition should bear a more restricted meaning than those words suggest, because of its context in a statute dealing with pensions regulation. However that is impossible for me to accept, in view of what was said by the Court of Appeal in a case dealing specifically with the definition in that context: see *Westminster City Council v. Haywood*, [1998] Ch 377. In that case Millett LJ (with whom both other members of the court agreed) set out at p 404G-405B the definition from s. 1 of the Act of 1993 as above, and the definition of a "public service pension scheme" which does not matter for the present purpose, and said:

> "These are very wide definitions. It is sufficient for present purposes to say that the council's severance scheme and its superannuation scheme, considered separately, are each an occupational pensions scheme and a public service pensions scheme within these definitions."

22. The "severance" and "superannuation" schemes referred to in that case were local authority schemes, which the court in a later part of the judgment held to be separately constituted, that provided in separate ways for (1) compensation in the event of redundancy and (2) pension benefits on eventual retirement. That is a standard division of function in public sector schemes, and of course similar to that between the Civil Service Compensation and Pension Schemes of which this claimant was formerly a member. Thus the mere fact that a scheme provides only for compensation payments on redundancy, and is separate from any scheme providing pensions of the more normal type at retirement age, was held not enough to take it outside the wide definition.

23. In a later case, *City and Council of Swansea v. Johnson* [1999] 2 WLR 683 at 688D-689F, Hart J held that he was bound to follow what Millett LJ had said and that it was not open to him to put some restriction on the words "benefits ... payable on termination of service" so as to exclude compensation payments to an employee put out of work before pension age through no fault of his own (whether or not these were payable under a separate scheme from the employer's normal pension scheme). He further held that the reference to "qualifying service" did not mean anything more than such service as qualified the earner for the benefit in question.

24. The first of those authorities is binding on me, and the second is persuasive. By virtue of the Court of Appeal's decision in the *Westminster* case, a severance or redundancy compensation scheme must be held to fall within the definition of an "occupational pension scheme" in s. 1 Pension Schemes Act 1993, even though separate from any retirement pension scheme. I agree with Hart J that it was not open to him, and it is not now open to me, to hold otherwise.

25. I also agree with him on the meaning of "qualifying service" in this context. The result is that the arrangement in this case did also satisfy that part of the definition, since it provided for money to become payable on termination of the claimant's employment which his previous service qualified him to receive.

26. Finally it is in my judgment beyond argument that the contractual arrangement described above between the claimant and his employer was an "arrangement comprised in an agreement", notwithstanding that it was an individual arrangement for him.

27. In my judgment therefore the periodical redundancy payments received by the claimant from his former employer do count as "pension payments" for the purposes of jobseeker's allowance, and their weekly equivalent has to be taken into account under reg 81 Jobseeker's Allowance Regulations 1996 SI No. 207 so far as it exceeds £50.

28. I do not for my part consider there to be any absurdity or inconsistency in this result. Periodical payments under an employer's scheme or arrangement of this type after employment terminates appear to me to have the same essential characteristic of deferred or contingent "pay" for this purpose, whether the reason is permitted early retirement or premature termination on redundancy. It seems to me consistent to treat both in the same way as "pension payments" under reg 81 whether or not they come from the same source. Nor do I find any absurdity or inconsistency in their both being

taken into account as pension payments though excluded from counting as "earnings". The point of excluding both from the definition of "earnings" in reg 98 is not to remove them from the reckoning altogether, but to allow the first £50 a week of these types of payment to be left out of account while continued *current* earnings left within reg 80 would be fully deductible.

29. For the reasons given above, I dismiss both of the claimant's appeals.

(Signed)

P L Howell
Commissioner
2 June 1999