Bulletin 197

PLH

Commissioner's File: CJSA 1390/06
(heard with CJSA 1398/06 & 1403/06)

JOBSEEKERS ACT 1995
SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claim for:	Jobseekers Allowance
Appeal Tribunal:	Boston
Tribunal Case Ref:	U/42/030/2005/00533
Tribunal date:	1 March 2006
Reasons issued:	29 March 2006

[ORAL HEARING]

1. These three appeals by the Secretary of State are dismissed, there being in my judgment no error of law in the decisions of the Boston appeal tribunal on 1 March 2006 (Mrs E Knott, chairman, sitting alone) that the claimant casual employees were not excluded from jobseekers' allowance when wholly out of work after their summer employments terminated.

2. I held a combined oral hearing of the three appeals which raised similar issues. Sean Wilson of counsel appeared for the Secretary of State, instructed by the solicitor to the Department for Work and Pensions and assisted by Jason Westerman of the department who has considerable experience of such cases. Jean French, specialist support officer with the London Advice Services Alliance, and Sue Cox of East Lindsey CAB appeared for the claimants. To all of them I am grateful for their helpful written and oral submissions: I am sorry this decision has taken so long to produce, but I found that I needed time to consider the various issues in the cases properly.

3. In each of these cases the question is whether an unemployed person unable to find work, though actively seeking it, throughout the winter months of the year has nevertheless to be treated (artificially, and contrary to the fact) as in "remunerative employment" during those months, by virtue of having been able to get casual summer employment in that and one or more previous years. If the answer is yes, the effect is to deprive him or her of all entitlement to jobseeker's allowance throughout the entire year, even at those times when he or she has no employment of any kind, and in all ordinary uses of the English language is person out of work, actively seeking it on the labour

market: the very circumstance for which the public support voted by Parliament in the form of jobseeker's allowance is in principle intended to provide.

4. The alleged principle that a jobseeker whose efforts to obtain employment have only been successful during the summer months in the last year or so thereby forfeits his or her entire right to this form of public support has been insisted on by the Secretary of State in these and similar cases; I understand as the result of a relatively recent reinterpretation by him of the meaning of his own regulations, under which he now considers this result to be mandatory. The proposition has been consistently rejected by tribunals in Boston, Lincolnshire, which is an area where for many people work is only available at certain times of the year; and in these three sample appeals by the Secretary of State I have to decide whether the tribunals were right or wrong in law to reject the interpretation now being applied.

5. The basic facts of the three cases are not in dispute, and can be stated simply. The claimant in the first case, CJSA/1390/06, is a single man now aged 38 who from March to the end of October in each of the years 2004 and 2005 had worked as an unskilled worker in an amusement arcade inside the funfair at Skegness while it was open during the summer tourist season. During these periods his actual work pattern and the hours of work for which he was required varied widely according to the state of the weather and the tourist trade. He had no guarantee of any work or pay: the funfair was closed in bad weather and he was simply paid a minimum wage for the hours he was required. He had to waive his rights under the working time directive to work not more than 48 hours per week, but work at or over that level would only be available for limited periods such as the bank holiday and summer weeks when the weather was good. At the end of the season his employment was terminated and he was handed his P45. The tribunal recorded that although he had worked for the same employer for more than one season he had no guarantee or promise that he would be offered work when the arcade was opened again. At that time he would have to apply for work and compete with all the other work seekers keen to get even this insecure form of livelihood.

6. In case CJSA/1398/06 the claimant is a single lady now aged 35 who for several seasons has worked from March to October as a housekeeper in a holiday village at Mablethorpe. Her work was for a regular 32½ hours per week at a low or minimum wage during the season, but when it ended she had no work at all and her employment was terminated. The tribunal recorded that even though she had worked for the same employer for several seasons she had no continuing relationship with it, there was no guarantee or promise that she would be taken on for any future season, and to find work

at the start of the next season she would have to apply for it and compete in a large pool of other people also seeking work.

7. In case CJSA/1403/06 the claimant is a lady now aged 51 who worked as a shop assistant in a mini-market at a caravan site in Skegness during the summer season from March to September 2005, having also worked there to a lesser extent during 2004. In the 2005 season she had been employed for 30 hours per week, at a low or minimum wage; her employment had been terminated and she was without work from the end of the season in September 2005. She too had no continuing relationship with her employer after then and although she had worked for the same employer for more than one season her ability to do so again would depend on her applying afresh at the start of the next season, when she would have to compete in a large pool of other people seeking work.

8. In each case the Secretary of State rejected claims for jobseeker's allowance made by the claimants for weeks during the out-of-season months when in fact they had no work or earnings at all. The basis of this rejection was that as they were each shown to have obtained part-time seasonal employment for more than one year in a row, they were required to be treated as persons engaged in a "cycle of work" that extended round the whole calendar year. On that basis their actual hours of work during the summer season, averaged out over the whole year, left them over the weekly limit of 16 hours to count as a person in "remunerative work", and as such disqualified from jobseeker's allowance, at all times.

9. In each case the tribunal overruled this and held that the claimant was not in a "cycle of work" at all during the parts of the year when he or she in fact had no employment and no work. The Secretary of State appeals, essentially on the ground that the tribunal misdirected itself in holding it possible to divide the year up into two separate parts or cycles for JSA purposes in cases such as these.

10. This argument arises because under section 1(2)(e) **Jobseekers Act 1995** it is a condition of entitlement to jobseeker's allowance that the claimant "is not engaged in remunerative work". As under section 1(3) a jobseeker's allowance is payable in respect of a week, that is a condition that requires to be tested on a week-by-week basis in respect of any period for which the benefit is claimed. The Act itself however provides no definition of what this crucial condition is actually to mean, saying only in section 35(2) that it is to be "read with" paragraph 1 of the first schedule. This in turn leaves the meaning wholly at large to be determined by the Secretary of State: saying by paragraph 1(1) that for the purposes of the Act "remunerative work" has "such meaning as may be

prescribed"; and by paragraph 1(2) that regulations may prescribe circumstances in which, for the purposes of the Act –

> **"(a) a person who is not engaged in remunerative work is to be treated as engaged in remunerative work; or**
>
> **(b) a person who is engaged in remunerative work is to be treated as not engaged in remunerative work."**

11. This is a form of enabling provision which in another context Lord Donaldson once described as empowering the Secretary of State to "prescribe that black is white and white is black" so as to make the words mean anything he chooses, presumably stopping at some point short of total irrationality. For my part however I think it is safer to approach the regulations made in pursuance of even such wide enabling powers from the starting-point of the ordinary natural meaning of the words actually used in the statute itself, and only to extend that to a meaning they could never normally bear if this is what the regulations clearly and unambiguously provide.

12. The regulations said to have the effect for which the Secretary of State contends have been criticised for their lack of clarity on several occasions (up to and including the highest judicial level: *Banks v CAO* [2001] UKHL 33, [2001] 1 WLR 1411 *per* Lord Scott at paragraph 113), but remain substantially unaltered; and so far as relevant to these cases are in regulations 51 and 52, **Jobseekers Allowance Regulations** 1996 SI No. 207, providing at the material time as follows:

> **"Remunerative work**
>
> **51 – (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 of work fluctuate, is engaged on average, for not less than 16 hours per week; ...**
>
> **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 a claimant ... 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, ... 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 such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately; ...

Persons treated as engaged in remunerative work

52 – (1) Except in the case of a person on maternity leave ... or absent from work through illness, a person shall be treated as engaged in remunerative work during any period for which he is absent from work referred to in regulation 51(1) (remunerative work) where the absence is either without good cause or by reason of a recognised, customary or other holiday. ...

(3) A person who was, or was treated as being, engaged in remunerative work and in respect of that work earnings to which regulation 98(1)(b) and (c) (earnings of employed earners) applies are paid, shall be treated as engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part VIII."

13. Regulation 52 thus extends the definition to people who would not otherwise be within it for certain weeks when they are not in fact at work or no longer in employment at all. The Secretary of State does not suggest that any of the present claimants is brought within the definition by regulation 52 but the limited (and entirely rational) circumstances for which it provides may nevertheless be of some relevance in casting light on the intended scope of regulation 51 itself. Regulation 53 (Persons treated as not engaged in remunerative work) is the converse provision, made under the other half of paragraph 1(2) of Schedule 1 to the Act: it prescribes a number of instances when a person who is in fact in employment and working is to be specially treated as outside the definition so as not to be excluded from benefit.

14. In each of these cases the tribunal recorded a finding, which is challenged by the Secretary of State, that after the claimant's employment had been terminated at the end of the summer season he or she had no "expectation" of work at the start of the next season the following spring, but only a "hope": that he or she would again find work in the tourist industry with the same or another employer, which in either case would as the tribunal found involve having to apply afresh at that time in competition with the large pool of other people seeking similar work.

15. The reason this is an issue is that in accordance with established authority on persons who continue in work on a year-round but sessional basis (such as those employed in schools or universities who do not work during the holidays or vacations) it is not the continuing existence of a formal contract of employment that is crucial in determining whether there is a continuing employment relationship, and thus whether the person concerned should count as being in or out of work. In particular, a Tribunal of Commissioners emphasised in paragraph 22 of the decision in R(JSA)5/03 that:

"Where a contract of employment comes to an end at the beginning of what would be a period of absence from work even if the contract continued, the person should be taken still to be in employment if it is expected that he or she will resume in employment after that period, either because there is some express arrangement, though not necessarily an enforceable contract, or because it is reasonable to assume that a longstanding practice of re-employment will continue".

In such circumstances regard is to be had to the reality of what is in substance a continuing job, and the person concerned may be found to have continued in remunerative work in the same way as one whose contract had formally continued.

16. There are obviously shades of potential meaning in the word "expectation" in this context, and I do not need to say whether I would have chosen to formulate the point in precisely the way the Tribunal of Commissioners did in the paragraph just quoted. What is important is that the existence of such an expectation is a question of fact to be determined in the circumstances of the individual case; and I am not persuaded that the facts found in the present three cases, where the employment and work conditions were of course materially different from the much more regular kind of job the Tribunal of Commissioners had in mind, required the tribunal to treat these claimants in the same way as analogous to a person remaining in work though with nothing to do during a fixed holiday or vacation period. For my part I agree with the submission of Ms French on behalf of the claimants that there would need to be some element of mutuality in the arrangement or understanding between employer and employee before the kind of "expectation" in point here could be found to exist, of which there is no kind of evidence in any of these cases; but at all events the tribunal's conclusion that in none of them did the evidence establish the claimant had anything more than a hope of being able to get similar or other work again the following season, not amounting to a continuing employment relationship or expectation sufficiently close to it, was not in my judgment perverse or unreasonable on the facts found, and on that basis I cannot interfere with it.

17. The argument therefore comes down to the Secretary of State's broader point that the terms of regulation 51 require such claimants as these to be treated as forming a special category of "seasonal workers" who fall within the definition of "remunerative work" under regulation 51 by virtue of having got seasonal work for more than one year in a row. On this argument, if one can detect that a person has been in work for part of a year and out of it for the remainder, and the same thing has happened the following year, that means they are in a "cycle of work" consisting of a whole year and are in fact engaged in work the whole time. Note that I said "are engaged": that is necessary for this argument to succeed, since it has to depend on the main definition in regulation 51 alone. The more natural way of saying it would be "are to be treated as if

engaged" for periods when not in fact so engaged; but that would require an express deeming provision in regulation 52, and also already noted there is none.

18. In my judgment this is not a necessary or correct construction of regulation 51. As better minds than mine have observed its provisions are not without their difficulties, but for my part I find guidance in the point made by Lord Oliver, referred to by Lord Millett (who was one of the majority) in *Banks v CAO,* [2001] 1 WLR 1426E paragraph 58, about the diffference between a person being *in* work and a person being *at* work. A person with a continuing employment relationship may properly be described, both in ordinary language and in terms of regulation 51, as a person in work notwithstanding that he or she is not actually at work for the time being; and as "engaged in" work in the current week so as to be in "remunerative work" under regulation 51 in that week if his or her normal or average weekly hours at work amount to the 16 or more prescribed in regulation 51(1), taking into account the calculation provisions in regulation 51(2) where they apply.

19. That those calculation provisions are subordinate to regulation 51(1) itself, and are not exhaustive, is obvious from a comparison of the three cases before me. The two women claimants in cases CJSA/1398/06 and 1403/06 each had a fixed work pattern during the period they were in work, of a set number of hours worked per week, repeating without variation each following week while they remained in work until their employment was terminated and they no longer had jobs at all. For the period over the summer months when they were thus employed and in work, each was engaged in remunerative employment by the plain terms of regulation 51(1). Contrary to the assumption made in the submissions on behalf of the Secretary of State, I can see no basis for any application of regulation 51(2) to these cases at all. Since the claimants were engaged for, and in fact working, a fixed number of hours on a regular weekly basis, neither case is one where "no recognisable cycle has been established" so that regulation 51(2)(a) cannot apply; and nor can regulation 51(2)(b), because in neither case did the number of hours for which the claimant was engaged fluctuate. There is no basis in regulation 51 itself (or as has been seen, anywhere else) for treating the period of time for or in which either of these claimants was engaged in work as artificially extended to include any additional period when she was not in work at all because she was out of a job; and I do not therefore accept as legitimate the Secretary of State's attempt to start with the calculation provisions by assuming that the whole year is to be included, and then work backwards to distort the meaning of regulation 51(1) itself as if it contained a deeming provision making people count as in work when in fact they are not. That

seems to me an argument which only holds itself up by its own bootstraps, in requiring one to start with an assumption for which there is simply no basis in the legislation.

20. The same is in my judgment true of the argument when one looks at the facts of the man claimant's case in CJSA/1390/06, even though here his hours of work were not fixed at all and he had only a fluctuating, even intermittent or sporadic, work pattern over the summer season for which he was employed, depending on the vagaries of peoples' holiday patterns and the weather, so that in this case recourse to the calculation provisions in regulation 51(2) was required to work out the weekly average figure demanded by regulation 51(1). Looking at the actual number of hours' work he was able to get in the amusement arcade over the summer seasons as shown by the evidence, it is quite difficult to see any recurrent pattern of hours at work that repeated itself on a regular basis during the course of that season so as to fall within any ordinary meaning of a "recognisable cycle" within the period for which he continued to be in work. There might thus be an argument for simply having to apply the default provision in regulation 51(2)(b)(ii) and taking a retrospective average of hours actually worked over the five weeks or other suitable period before the week in question. The tribunal's practical approach was to take the whole of the summer period for which the claimant was in work, from March when he was taken on until the end of October when his employment was terminated, as one single average period; and in my judgment on facts such as these that was a legitimate one. In terms of the effect it does not matter whether it was right to refer to the whole of that period, as the tribunal did, as one self-contained "cycle" which did not repeat at all while the claimant continued to be in work, or as I think may be more strictly correct, to conclude that in such a case the concept of a cycle did not apply and the only sensible way of arriving at an average figure for any week over the summer season for which the claimant was in work was to take the whole of that period down to that week under regulation 51(2)(b)(ii): the result is the same. The tribunal's calculation of the whole-season average, and its consequent confirmation that the claimant was excluded from jobseeker's allowance for any week before he had actually ceased to be in work by the termination of his employment at the beginning of November, is not challenged on his behalf in this appeal and I am contend to leave that aspect of the matter there.

21. What is not contained in regulation 51, even in a case such as this where the averaging provisions in regulation 51(2) come into play in respect of any week for which they are required, is any provision or basis for treating the claimant as a person in work, engaged in work, or engaged for work, in relation to any week when in fact he is not in work but unemployed and out of a job; any more than in the more straightforward case of

the two women claimants whose working hours while they remained in employment were fixed. Here again the Secretary of State's argument is in my judgment illegitimate in that it proceeds backwards from an assumption about the selection of an averaging period, not just for calculating hours while a person is in work but for deeming him to be in work when in fact he is not, for which there is no basis in the legislation.

22. The only thing that can be pointed to is the fact that each of these claimants has managed to obtain some casual employment for a limited period in each year though being out of a job for the rest of the year, and that this has occurred more than one year in a row. I do not see how the recurrence of an inability to get work at all during the winter months can turn the whole calendar year into one continuous period of the claimant being "engaged in work" for the purposes of regulation 51 so as to be able to call the whole year a "recognisable cycle of work" as the Secretary of State's argument suggests. It may be a recognisable cycle of something, such as bad luck or a badly planned economy, but it is not in my judgment a recognisable cycle of work in the sense relevant for regulation 51(2), which is concerned with the calculation of a numerical average of hours *at* work over a period while a person continues to be *in* work.

23. The point is irresistibly answered by the decision of another tribunal chairman, Mr A N Moss, in a separate case supplied to me for information in these appeals, where he said:

> **"The regulations make no reference to seasonal work – it [the argument now pursued by the Secretary of State] is the interpretative gloss on the regulations that has arisen as a result of Commissioners' decisions. The DWP have taken the approach that all seasonal workers have a recognised cycle of the year if they have worked two cycles. That is an incorrect interpretation of the regulations. On their definition Santa Claus and the Easter Bunny would have a recognised cycle of work of a full year despite only working one day a year – because they do it every year."**

Without delving too far into the employment status of those particular individuals, the chairman's answer to the "recurrence" argument as regards a casual employee wholly out of a job for part of the year is in my view a valid one.

24. No different conclusion is required by any of the authorities referred to me. The main one relied on by the Secretary of State was the observation in a single sentence in paragraph 12 of R(JSA)1/03 that "**where the claimant is a seasonal worker, there is likely to be a cycle of work consisting of one year...**" However the apparent breadth of that remark (which even in its own terms does not purport to be laying down a rule of law to preclude a tribunal making its own judgment on the facts) must be read subject to its context. The case the Commissioner was there dealing with was one of a self-employed

claimant who over a period of several years had continued to carry on business as a pony ride operator at a seaside resort; he had not at any point ceased to carry on that business. It is easy to see why such a person is properly regarded as engaged in remunerative self-employment on a year-round basis: in the same way as, for example, a working farmer, even though there are identifiable periods in the year when there is much to be done and others comparatively little, apart presumably from looking after the ponies and equipment and preparing for next season's harvest of holiday makers. What the Commissioner said immediately before the remark relied on by the Secretary of State was that

> **"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".**

That appears to me to be making exactly the same point as the distinction between being *in* work and being *at* work that I have already emphasised. It does not in my judgment provide any support for the idea that a casually employed person has to be treated contrary to the fact as remaining in work when wholly out of a job, and without even the kind of continuing employment relationship held by the Tribunal of Commissioners to require him or her to be "taken still to be in employment" by way of extension and exception as explained in R(JSA)5/03.

25. There the Tribunal of Commissioners, which included the Commissioner who decided R(JSA)1/03, was careful to draw the distinction between persons in continuing employment but not currently required to be at work by their employer, and cases where someone is without work (or as I would put it, out of work) because he or she is between jobs. In paragraph 14, under the heading "Determining whether a person is between jobs", they said categorically that

> **"Obviously a person cannot be regarded as engaged in remunerative work if he or she has no employment".**

Absent some special provision expressly prescribing that a person in such a position is to be treated as in remunerative work when in fact he or she is not, that simple and basic truth appears to me incontrovertible; and plainly the single Commissioner's remark in paragraph 12 of the earlier case cannot be read as casting any doubt on it.

26. The position of casually and intermittently employed persons such as these claimants is in my judgment materially and obviously different from that of a person continuing in employment under a "one week on, one week off" working cycle during a

lay-off period (R(IS)8/95); a person with an indefinite or continuing contract for year-round working on a "sessional" basis (R(JSA)5/02); or a self-employed person who has established and not ceased to carry on a continuing business even though the actual activity it involves at different times of the year may be cyclical (CIS/493/93, CIS/422/95, R(JSA)1/03, CJSA/1028/05).

27. The present cases by contrast are in my judgment directly analogous with that considered by the Commissioner in R(JSA)1/06 where she held, in my respectful view entirely correctly, that the claimant who had been employed for some years as a seasonal custodian at an historic site for part of the year, but was unemployed and out of work for the remainder, was not engaged in remunerative work while unemployed and in those circumstances regulation 51 had no application. I was told that the point raised may not have been argued before the Commissioner in that case as well and thoroughly as it was before me, but paragraphs 9 to 11 of the report do appear to me to embody a clear decision on it with which for my part I entirely agree, and I consider the same principle applies to these cases as well. That also accords with the distinction as neatly stated in Mr Westerman's written submission on behalf of the Secretary of State at page 35 of file CJSA 1390/06: if the claimant still has employment notwithstanding the current break in the work, then the provisions of regulation 51 have to be considered to determine whether he or she is in remunerative work; if not, determinations under regulation 51 do not arise.

28. The House of Lords case of *Banks v CAO* referred to above was concerned with a separate and even more difficult provision of regulation 51 which is not in point here at all; but in any case nothing said by any of their Lordships in that case, where there was a continuing employment contract at all material times, is in my view anything other than wholly consistent with the meaning of the regulation as I have sought to explain it above.

29. No separate ground was suggested making it necessary for the tribunal decisions to be set aside as erroneous in law and for those reasons, the Secretary of State's appeal in each of these three cases is dismissed and the decisions of the tribunal that the claimants were not engaged in remunerative work for the purposes of jobseeker's allowance after their seasonal employment had terminated in the autumn of 2005 are confirmed.

(Signed)

P L Howell
Commissioner
13 December 2006