Bulletin 188

CJSA/1589/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I find the decision of the Appeal Tribunal "the Tribunal" given on 20 January 2003 under Registration No. U/45/167/2003/00267 was erroneous in point of law. Following an oral hearing of the case, I allow the claimant's appeal. As empowered under section 14(8)(a) of the Social Security Act 1998, I give the decision which I consider the tribunal should have given, which is as follows:

> **"The claimant having been paid 11.115 days holiday pay following the termination of his employment (to be considered as earnings under regulation 98(1)(c) of the Jobseeker's Allowance Regulations 1996), is to be treated as being in remunerative work by virtue of those earnings for 12 days, namely from 28 November 2002 to 9 December 2002 (both dates included) (regulation 94(1), (2) and (5) of the regulations). Therefore he is <u>not</u> to be treated as being in remunerative work by virtue of those earnings from 10 December 2002 to 26 December 2002 (both dates included).**

I remit the matter to the Secretary of State for the calculation and payment of the benefit owing to the claimant as a result of my decision. If there is any dispute about the amount of that payment, either party may remit the matter to me, or to another Commissioner if I am not available.

2. The claimant is a man who was employed for some years as a seasonal custodian at an historic site between the months of March and October. In 2002, his contract ended on 2 November and he claimed Jobseeker's Allowance ("JSA") on 4 November 2002. According to the written submission to the tribunal, his employers confirmed to the decision maker by telephone on 11 November 2002 that the claimant was contracted to work a three day week and was entitled to 12.2 days holiday pay, which was due to be paid on 30 November 2002; holiday entitlement was based upon basic hours only, with overtime not counting towards holiday entitlement. The decision maker refused JSA for the period from 28 November (the first day of the relevant benefit week) to 25 December 2002. The claimant appealed, disputing the number of hours worked as well as the period covered by the holiday pay for which he was not therefore entitled to JSA. The decision was reconsidered, but not revised, and the appeal proceeded.

3. The tribunal was held on 20 January 2004, the claimant being present. He produced his payslips, which showed that the holiday pay he actually received was for 100.04 hours, (which, on a nine hour day, equates to 11.115 days). The tribunal proceeded on the basis of the entitlement advised by the claimant's employers on the telephone on 11 November 2002, and concluded that the claimant was entitled to 12.2 days holiday pay, which it increased under regulation 94(5) of the Jobseeker's Allowance Regulations 1996 ("the Regulations") to 13 days. As the claimant was contracted to work for three days a week, the holiday pay was therefore to be taken into account for an equivalent period of four weeks and one day. It dismissed the appeal, and although noting that the claimant disputed the hours used in the calculation as the holiday pay actually been paid to him was in respect of 100.04 hours only, it revised the decision so that the claimant was not entitled to JSA for the period from

28 November to 26 December 2002 (both dates inclusive) as he was to be treated as being engaged in remunerative work for that period.

4. The claimant appealed with my leave, on the grounds that the tribunal had not dealt correctly with the calculation of his holiday pay and that, as calculated, it did not represent what had actually happened.

5. The Secretary of State's representative has supported the appeal throughout. In his initial written submission he dealt first with what was probably a slip by the tribunal, which recorded in the statement of reasons that regulation 98(1)(c) of the Regulations provides that any holiday pay payable *more* than four weeks after the date employment ended should be treated as earnings; the regulation actually provides that it is holiday pay *except* any paid more than four weeks after the termination of employment which is to be treated as earnings. It is accepted overall that the claimant's holiday pay was due on 30 November 2002, being the month in which the claimant's employment terminated (page 13) and was actually paid on 29 November 2002 (page 27). It was thus payable, and paid, within 28 days of the end of the claimant's employment, and it is common ground that the holiday pay therefore falls to be treated as earnings.

6. The Secretary of State's representative submitted that entitlement to JSA is conditional on the person not being in remunerative work (see section 1(2)(e) of the Jobseeker's Act 1995); "remunerative work" is itself defined in regulation 51(1)(a) of the Regulations as meaning work of not less than 16 hours a week. It is again common ground that during the period of his employment the claimant was in remunerative work.

7. The Secretary of State's representative also submitted that, as a result of regulation 98(1) of the Regulations, the claimant's holiday pay fell to be treated as earnings and that it is clear from the terms of regulation 52(3) that the earnings must be *paid* to the claimant and the claimant's employer paid holiday pay for 100.04 hours (page 27). The tribunal, on the contrary, looked at what it considered to be the claimant's *entitlement* of 12.2 days as given in the telephone conversation of 11 November 2002. Further points made by the Secretary of State's representative at that stage will arise for consideration later and I need not comment on them here.

8. Following submissions on behalf of the Secretary of State and the claimant, I directed an oral hearing at the claimant's request. In the event, at the hearing on 19 April 2005, the claimant was indisposed, but was represented by Mr Stewart Wright of The Child Poverty Action Group. The Secretary of State was represented by Ms Carine Patry. I am very grateful to them both for their clear, helpful submissions.

9. The Secretary of State's representative submitted a skeleton argument on 25 January 2005, in preparation for an oral hearing which was then postponed, in which he raised the issue of whether the claimant remained within a recognisable cycle of work after he stopped working on 2 November 2002, so that he should be considered as remaining in remunerative work after that date under regulation 51 of the Regulations, irrespective of the holiday pay issue. A Tribunal of Commissioners held in R(JSA) 5/03, paragraph 22 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 employment after that period, either because of 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 the submission of the Secretary of State's representative, it was not apparent from the papers whether the claimant remained within a recognisable cycle of work, and this issue should be determined before a decision could be made on how the claimant's holiday pay should be treated.

10. Mr Wright, in his submission of 12 April 2005, responded to this last point by advising that, as instructed by the claimant, in this case the facts were that he had worked as a seasonal custodian for his employers for three years prior to the period of employment immediately relevant to this appeal. He had "gone back" to work for them at the same place in March 2003. In each of the years for which he had worked there, he had been given a contract for a minimum of 27 hours a week for three days a week from March to September, and then a new/amended contract for October of that year for eight hours per day – a minimum of 24 hours a week – due to the change in seasons and reduction in the hours the premises were open. Each new contract was discrete and the claimant applied for employment each year. In January of each year he was asked to indicate if he wished to be considered for the following season and, if so, to complete a new application form. This was assessed in open competition with others, and followed by a formal interview. Although in the initial years interviews had taken place, subsequently this had been dispensed with; the claimant understood this to be so that the employers could save the travelling expenses involved in his travelling to interview. He had worked for his employers for the 2003 season, but was not offered a position in 2004, and in the current year of 2005 had declined to apply because of his broken arm.

11. At the oral hearing, Mr Wright reiterated the points made in his skeleton argument and Ms Patry supported the view that the employment ended on 2 November 2002. I may say at this stage that I accept this submission. There is no reason to suppose the details given by the claimant are inaccurate and whilst the claimant may have held the post of seasonal custodian for five successive summers in total, there is nothing to indicate that the claimant should be considered as remaining in employment after 2 November 2002. In these circumstances, regulation 51 of the Regulations has no application.

12. That being the case, it is then necessary to consider the attribution of the claimant's holiday pay. Mr Wright submitted in his skeleton argument and at the hearing that, on the basis that the claimant's employment came to an end on 2 November 2002 and that, on the facts, there is no question that he remained within a recognisable period of work at the period relevant to this appeal, during his period of employment he was engaged in remunerative work of not less than 16 hours a week on average, that the holiday pay paid to him of 100.04 hours equates to a maximum of 11.115 days holiday pay and that this was paid to him less than four weeks after the end of his employment in November 2002 so that it must count as earnings to which regulation 52(3) of the Regulations must apply. It provides:

"(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 ...".

13. Mr Wright continued that the claimant should thus be treated as engaged in remunerative work for the period for which the holiday pay is to be taken into account in accordance with Part VIII of the Regulations – that is, he is not entitled to JSA for that period. The holiday pay amounted to 11.115 days, which is therefore rounded up to 12 days (regulation 94 (5) of the Regulations). Under regulation 93, the income of a claimant is to be calculated on a weekly basis. Regulation 94(1) provides:

> " (1) Earnings derived from employment as an employed earner and income which does not consist of earnings shall be taken into account *over a period* determined in accordance with the following paragraph and at *a weekly amount* determined in accordance with regulation 97 (calculation of weekly amount of income). [emphasis added]
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> (2) Subject to the following provisions of this regulation, the period over which a payment is to be taken into account shall be –
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> (a) in a case where it is payable in respect of a period, a period equivalent to the length of that period."

14. Further, submitted Mr Wright, regulation 97 then provides:

> (1) For the purposes of regulation 94 (calculation of earnings derived from employed earners employment and income other than earnings), subject to paragraphs (2) to (7), where the period in respect of which a payment is made –
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> (a) does not exceed a week, the weekly amount shall be the amount of that payment;
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> (b) exceeds a week, the weekly amount shall be determined –
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> (i) in a case where that period is a month ....
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> (ii) in a case where that period is 3 months .....
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> (iii) in a case where that period is a year ....
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> (iv) in any other case by multiplying the amount of the payment by 7 and dividing the product by the number equal to the number of days in the period in respect of which it is made."

In this case, regulation 97(1)(b)(iv) must apply, the payment being for a period of more than a week but not falling within any of the other categories. Under regulation 97(1)(b)(iv) of the Regulations, the sum of £633.27 received by the claimant as holiday pay amounted "to a

weekly income of £398.82 by converting the 12 days", as JSA is a weekly benefit unlike, for example, supplementary benefit, where benefit was calculated on a daily basis.

15. Regulation 94(2)(a) referred to "a period equal to that period". Taking into account that JSA is a weekly benefit, Mr Wright relied on the decision of Mr Deputy Commissioner Warren in CJSA/3438/98, (also referred to by the Secretary of State's representative in his initial submission):

> " 11. The [adjudication officer] submits...that the holiday pay was in respect of holiday [the claimant] was entitled to take but did not take during the currency of his employment. That being so, it is suggested that the period should be equated with the period of holiday the claimant could have taken when he was working; and because the appellant's job entailed a four day week the period should be one week and one day.
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> 12. I reject the submission as unnecessarily artificial. In my judgment the tribunal got it right in taking the simple straightforward view of the regulation that a payment of five days holiday pay is taken into account for a period of five days. The [adjudication officer's] solution treats those who have lost part-time jobs more harshly than those who have lost full-time jobs. I see nothing in the plain words of the regulation to lead me to conclude that such a result was intended."

16. It appears that, whilst there was no oral hearing in CJSA/3438/98, the point was contested. Mr Wright also noted before me Mr Deputy Commissioner Warren's reference to potentially harsh treatment, and that the same position could arise in the present case, although he did not wish to develop further any possible argument that more part-time workers are women and the interpretation favoured by the tribunal could therefore be indirectly discriminatory. He did not see any good reason to read regulation 94 differently for part-time workers, so that the days covered by the holiday pay for which the claimant is to be treated as being in remunerative work, with consequent exclusion from entitlement to JSA, should run consecutively, and not follow the pattern of the claimant's part time work.

17. He was aware that, as also cited by the Secretary of State's representative, in CJSA/4508/1998 Mr Commissioner Williams accepted the submission of the adjudication officer that holiday pay should be attributed on the basis of "working days", but noted this to be a brief decision and that it is not plain whether this point was the subject of argument. It appears the claimant in that case was working a five day week.

18. Mr Wright respectfully submitted that Mr Commissioner Williams' approach was wrong. He drew further support for that view from R(SB) 11/85 where the Commissioner did not dissent from the idea that 23 days holiday pay should be taken as three weeks and two days; whilst that was not the main point at issue in the case, it would support the analysis. He submitted that this is the correct approach, with the added attraction of being a workable system.

19. On behalf of the Secretary of State, Miss Patry confirmed agreement to a very large extent with Mr Wright's submissions. The matter came down to the interpretation of regulation 94(2)(a), where she agreed with Mr Wright. She noted the passing reference to discriminatory behaviour, which would in any event be indirect, and no admission was made

on behalf of the Secretary of State with regard to that point, which had not been taken further by Mr Wright. She agreed that the interpretation of the legislation in CJSA/3438/98 is correct rather than that in CJSA/4508/1998. It is clear from the text of CJSA/3438/98 that both arguments were before the Deputy Commissioner, and it was quite possible that this was not so in CJSA/4508/1998. She also accepted that, administratively, this method of calculation would prove a more workable scheme, even without taking into account the question of hardship.

20. Finally, Miss Patry emphasised that the tribunal's error, was based on regulation 52(3) of the Regulations – essentially the tribunal made its calculation on the basis of the employer's formula as advised over the telephone and did not take into account the actual payment. For the purpose of regulation 52(3), payment is the relevant consideration, not the employer's expressed principle of entitlement. There had been a disservice to the claimant, as well as an error of law.

21. I accept these submissions. The tribunal was fundamentally in error in taking as its basis for calculation, very specifically, and in considerable detail, the claimant's apparent *entitlement* to holiday pay according to the principles stated by his employer, rather than the actual payments received by the claimant, despite his having produced his payslips as evidence of actual payments made. In the event, the difference was of one day only, against the claimant. Regulation 52(3) of the Regulations quite clearly refers to earnings which are paid, not to which there is an entitlement - and this avoids the situations where despite entitlement, a claimant may be left empty handed at the termination of his employment with no payment having been made.

22. Similarly, I accept the arguments as to the interpretation of regulation 94(1) and (2) and the point as clearly put by Mr Deputy Commissioner Warren in the extract from CJSA/3438/98 repeated in paragraph 15 above. Payment of 100.04 hours of holiday pay equates to 11.115 days of holiday pay and is to be taken into account for 12 days, not for 4 weeks and one day as decided by the tribunal.

23. For these reasons the claimant's appeal succeeds, and my substituted decision is set out in paragraph 1 above.

(signed on the original)

E A Jupp
Commissioner

15 June 2005