

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal in part. I set aside the decision of the Stevenage appeal tribunal and I substitute the following decision: the claimant is entitled to jobseeker's allowance from 15 June 2002 to 27 June 2002 but is not entitled to jobseeker's allowance from 28 June 2002 to 11 July 2002.

REASONS

2. This is another appeal raising questions about the consequences of failing to "sign on" for jobseeker's allowance. At one stage I directed an oral hearing because there appeared to be a substantial issue as to the effect of the decision of the Court of Appeal in *Secretary of State for Work and Pensions v. Ferguson* [2003] EWCA Civ 536 (reported as R(JSA) 6/03) but the Secretary of State has now resiled from his original position and I consider it to be unnecessary for there to be an oral hearing. Accordingly, I revoke my direction.

3. Before considering the submissions in this case, it is convenient first to set out the material provisions of the Jobseeker's Allowance Regulations 1996.

"23. A claimant shall attend at such place and at such time as an employment officer may specify by a notification which is given or sent to the claimant and which may be in writing, by telephone or by electronic means.

24.

(6) A claimant shall, if the Secretary of State requires him to do so, provide a signed declaration to the effect that –

(a) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been available for employment or satisfied the circumstances to be treated as available for employment, save as he has otherwise notified the Secretary of State,

(b) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph he has either been actively seeking employment to the extent necessary to give him his best prospects of securing employment or he has satisfied the circumstances to be treated as actively seeking employment, save as he has otherwise notified the Secretary of State, and

(c) since making a claim for a jobseeker's allowance or since he last provided a declaration in accordance with this paragraph there has been no change to his circumstances which might affect his entitlement to a jobseeker's allowance or the amount of such an allowance, save as he has notified the Secretary of State.

....

(10) Where, pursuant to paragraph (6), a claimant is required to provide a signed declaration he shall provide it on the day on which he is required to attend in

accordance with a notification under regulation 23 or 23A or on such other day as the Secretary of State may require.

25. (1) Subject to regulation 27, entitlement to a jobseeker's allowance shall cease in the following circumstances –

- (a) if a claimant fails to attend on the day specified in a notification under regulation 23 or 23A, other than a notification requiring attendance under an employment programme or a training scheme;
- (b) if –
 - (i) that claimant attends on the day specified in a notification under regulation 23 or 23A but fails to attend at the time specified in that notification (other than a notification requiring attendance under an employment programme or a training scheme), and the Secretary of State has informed that claimant in writing that a failure to attend, on the next occasion on which he is required to attend, at the time specified in such a notification may result in his entitlement to a jobseeker's allowance ceasing, and
 - (ii) he fails to attend at the time specified in such a notification on the next occasion;
- (c) if that claimant was required to provide a signed declaration as referred to in regulation 24(6) and he fails to provide it on the day on which he ought to do so in accordance with regulation 24(10).

....

26. Entitlement to a jobseeker's allowance shall cease in accordance with regulation 25 on whichever is the earlier of –

- (a) the day after the last day in respect of which that claimant has provided information or evidence which shows that he continues to be entitled to a jobseeker's allowance,
- (b) if regulation 25(1)(a) or (b) applies, the day on which he was required to attend, and
- (c) if regulation 25(1)(c) applies, the day on which he ought to have provided the signed declaration,

provided that it shall not cease earlier than the day after he last attended in compliance with a notification under regulation 23 or 23A.

27. (1) Entitlement to a jobseeker's allowance shall not cease if a claimant shows, before the end of the fifth working day after the day on which he failed to comply with a notification under regulation 23 or 23A or to provide a signed declaration in accordance with regulation 24, that he had good cause for the failure.

....”

Regulation 23A is in terms similar to regulation 23 but relates to “joint-claim couples”. Regulation 28 makes provision as to what is to be taken into account when considering “good cause” for failing to comply with a notification under regulation 23 or 23A, regulation 29 makes provision as to what is to be taken into account when considering “good cause” for

failing to sign a declaration under regulation 24(6) and regulation 30 deems there to be "good cause" in some circumstances.

4. Where entitlement to jobseeker's allowance has ceased, it is open to a claimant to make a new claim. The effect of section 1 of the Social Security Administration Act 1992 and regulation 19(1) of, and paragraph 1 of Schedule 4 to, the Social Security (Claims and Payments) Regulations 1987 is that the new claim is generally effective from the date on which the claim is made, but regulation 19(4) and (6) enables a claim to be back-dated in certain limited circumstances.

5. In CJSJA/2327/01, Mr Commissioner Jacobs made it clear that an award of jobseeker's allowance could be brought to an end under regulation 25 of the 1996 Regulations only by a decision of the Secretary of State to that effect. He further made it clear that, where a claimant had made a new claim which had been allowed from the date of claim and the claimant had appealed, contending that he was entitled to benefit in respect of the period between the date on which the first award had been terminated and the date from which the second award had commenced, the appeal should be treated as both an appeal against the decision terminating the first award and as an appeal against the decision making the second award.

6. The implication of that approach for the Secretary of State is that any request for benefit in respect of a period between the termination of one award and a new claim should be treated as both a request for revision or supersession of the termination of the old award and a request for the back-dating of the new claim. In the ordinary case of a failure to "sign on", where the request for benefit during that period is made at the same time as a new claim made within a month of the decision terminating the original award, there is no difficulty because an application for a revision under regulation 3(1) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 of a decision extends the time for appealing against that decision (see regulation 31(2)(a)). If the request for benefit is made too late to be treated as such an application for revision, supersession will usually have to be considered and that will raise a question as to the date from which the supersession can be effective.

7. In the present case, the claimant had been in receipt of jobseeker's allowance on the basis that he "signed on" every other Friday. He "signed on" on 14 June 2003 but failed to do so on 28 June 2003. The consequence was that his "claim was closed" on 9 July 2002, with effect from 15 June 2003. On 12 July 2003, the claimant did attend to "sign on" and, because his previous award had been terminated, he was required to make a new claim on form JSA4(RR), which is used for "rapid re-claims". He also completed form JSA5, to request the back-dating of his new claim. On that form, he said that he had been so busy concentrating on trying to obtain employment that he had simply forgotten to "sign on" on 28 June 2003. The request for back-dating was refused and the new claim was allowed only from 12 July 2002. The Secretary of State did not explicitly consider revision of the termination of the award but, applying CJSJA/2327/01, is to be taken to have refused to revise. The claimant appealed and his appeal was dismissed. He now appeals against the tribunal's decision with my leave.

8. Insofar as the tribunal decided that there were no grounds under regulation 19 of the Social Security (Claims and Payments) Regulations 1987 for back-dating the new claim made on 12 July 2002, they were plainly correct. The case did not fall within the scope of regulation 19(4) or (6) of the 1987 Regulations and in those circumstances the tribunal had no power to back-date the claim. However, it is common ground that the tribunal erred in law because he did not consider whether the previous award had been correctly terminated with effect from 15 June 2002.

9. "Signing on" usually involves both attendance as required under regulation 23 of the 1996 Regulations and making a signed declaration as required under regulation 24(6). Regulations 23 to 27 have been considered by the Court of Appeal in *Secretary of State for Work and Pensions v. Ferguson* [2003] EWCA Civ 536 (reported as R(JSA) 6/03). Their effect may be summarised as follows.

10. Where a claimant is required to attend a Jobcentre to "sign on" and fails to do so, he has five days in which to show "good cause" for the failure. No decision is made until that period of five days has elapsed. If "good cause" is shown within those five days, the award of jobseeker's allowance is not terminated (regulation 27(1)). Otherwise the award is terminated. If the claimant shows that he satisfied the conditions of entitlement to jobseeker's allowance up to, and possibly beyond, the date when he failed to "sign on", the award will be terminated from the date of the failure to "sign on" (because the date fixed by regulation 26(a) will not be earlier than that fixed by regulation 26(b) or (c)). If he does not show such continued satisfaction of the conditions of entitlement, the award will be terminated from the day after the day in respect of which there is evidence that those conditions were satisfied (because the date fixed by regulation 26(a) will be earlier than that fixed by regulation 26(b) or (c)). Thus, if a claimant has started work, the award will be terminated from the commencement of the employment but, in the more usual case where the claimant has not provided any information to the Jobcentre since he last "signed on", the award will be terminated with effect from the day after he last "signed on". Once an award has been terminated, a claimant may regain entitlement by making a new claim but will lose benefit in respect of the period between the date from which the termination of the original award was effective and the day before the date of the new claim, unless there are grounds for back-dating the new claim.

11. In the present case, the claimant had not contacted the Jobcentre by the time the Secretary of State made his decision on 9 July 2002 and so the award of jobseeker's allowance was very properly terminated with effect from 15 June 2002, which was the day after he had last "signed on". However, it is now conceded by the Secretary of State that, when the claimant made his new claim on 12 July 2002, he provided in his form JSA5 information or evidence that he had continued to satisfy the conditions of entitlement to jobseeker's allowance throughout the period from 15 June 2002 until his new claim. In those circumstances, the Secretary of State should have revised the decision terminating the award of jobseeker's allowance, so as to terminate the award with effect from 28 June 2002, which is when the claimant failed to "sign on", and therefore, as is now conceded, the tribunal should have allowed the appeal to that extent. It is unfortunate that the claimant waited until his next "signing on" day before making a new claim for benefit because, as there are no grounds for back-dating the claim, the consequence is that he has lost two weeks' benefit and credits. That is why I give the decision set out in paragraph 1 above, allowing the appeal in respect of the first part of the disputed period but not the second part.

12. This, of course, is not the same result as was obtained in *Ferguson*, where the facts were very similar to those in the present case and the Secretary of State successfully appealed to the Court of Appeal against a Commissioner's decision to much the same effect as mine. Indeed, in the present case, the Secretary of State at first relied on *Ferguson* when inviting me to dismiss the claimant's appeal in its entirety. The reason that I directed an oral hearing is that that approach did not appear to me to be consistent with the Court's reasoning. As I have indicated, the Secretary of State has now changed his stance as to the effect of that reasoning. He has also sought to explain the Court's decision.

13. The explanation for the apparent discrepancy between the reasoning and the decision in *Ferguson* seems to lie in the history of the case. The Secretary of State brought the appeal because he wished to challenge the reasoning of the Commissioner. He was concerned, in particular, with the implications it had for cases where claimants failed to make any contact at all with a Jobcentre after failing to "sign on" and he appears to have been rather less concerned about the effect it had in Mr Ferguson's case. Mr Ferguson was unrepresented and, when applying for leave to appeal, the Secretary of State undertook to pay to him the benefit awarded by the Commissioner and not to recover it in the event of the appeal succeeding.

14. The Secretary of State's representative tells me that there was a form JSA5 in the bundle before the Court of Appeal but that neither party before the Court referred to it. Whether that form did not provide "information or evidence which shows that he continues to be entitled to jobseeker's allowance" or whether it was simply overlooked, I do not know, but it is plain that the Court was not aware of any such information or evidence. As the Secretary of State's representative submits, that explains why the Court, having accepted at least most of the Secretary of State's submissions on the law, did not dismiss his appeal on the facts. Furthermore, Mr Ferguson does not appear to have challenged the Secretary of State's assertion that he did not continue to satisfy the conditions of entitlement to jobseeker's allowance after he had last "signed on" and that explains why it was also not regarded as necessary to refer the case to another tribunal. So too would the undertaking, as there would be no point in referring the case to a tribunal if the claimant was going to keep the benefit awarded by the Commissioner in any event.

15. Thus it can be seen that the Court's decision was made on the basis that Mr Ferguson had not at any time provided information or evidence which showed that he had continued to be entitled to a jobseeker's allowance up to the date when he failed to "sign on". However, in most cases coming before the Secretary of State as applications for revision, or before tribunals as appeals, the claimant will be arguing that there is such information or evidence. If the argument is accepted, the award of jobseeker's allowance is not terminated until the date he failed to "sign on".

16. Although the point has not been taken by the Secretary of State, I have considered the effect of the words "has provided" in regulation 26(a) of the 1996 Regulations. Plainly, as a matter of practicalities in a case where a claimant has failed to "sign on", an initial decision by the Secretary of State to terminate the award of jobseeker's allowance will always be effective from the day after the last day on which the claimant "signed on" unless the claimant "has provided information or evidence which shows that he continued to be entitled to a jobseeker's allowance" before the decision is made. The question that arises is whether account can be taken of such information or evidence on a revision or appeal, if the information or evidence is provided after the initial decision is made but before any decision is made on revision or appeal. New evidence may be taken into account on a revision or an appeal, provided that it is relevant to the circumstances obtaining at the time of the original decision. However, regulation 3(9)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and section 12(8)(b) of the Social Security Act 1998 preclude a change of circumstances occurring after the date of the initial decision from being taken into account on, respectively, a revision or an appeal. Is the material fact taken into account by the Secretary of State when terminating an award of jobseeker's allowance merely the fact that the claimant has not continued to satisfy the conditions of entitlement to jobseeker's allowance, or is it the fact that the claimant has not provided information or evidence to that effect so that later provision of information or evidence is a change of circumstances that must be ignored on revision or appeal?

17. Three considerations lead me to the conclusion that the provision of information or evidence showing continued entitlement to jobseeker's allowance does not amount to a change of circumstances. Firstly, it is not clear why, in a case where a claimant has failed to "sign on" but it is eventually accepted that he did in fact satisfy all the conditions for entitlement to jobseeker's allowance, the mere fact that the information or evidence has been provided after the termination of the award means that he should suffer a penalty of the loss of two weeks' arrears of benefit, in addition to suffering a loss of benefit from the date of his failure to "sign on" until the date he makes a new claim. Secondly, if such an additional penalty was intended, the draftsmen would, in my view, have made it clear that the information or evidence should be provided within the five days allowed for showing "good cause" for the failure to "sign on", rather than requiring it to be provided within the more variable period of time that may elapse before the Secretary of State's decision. Thirdly, it seems to me that the language used was intended merely to place a burden of providing fresh information or evidence on a claimant in a jurisdiction where there would otherwise initially be a burden of investigation on the Secretary of State and a duty to have regard to other evidence.

18. As the Secretary of State submitted in *Ferguson*, regulation 26(a) is intended to avoid overpayments by allowing the Secretary of State to terminate promptly an award of jobseeker's allowance in a case where a claimant has failed to "sign on" and has not shown continued entitlement during the previous fortnight. However, I am satisfied that the language used does not prevent the Secretary of State's decision from being adjusted on revision or appeal if the claimant takes appropriate action within the time allowed under the Social Security and Child Support (Decisions and Appeals) Regulations 1999 and provides the information or evidence before a further decision is made.

(Signed) **MARK ROWLAND**
Commissioner
22 December 2003