Bulletin 171

CJSA/2079/1998
CJSA/4014/1998
CJSA/426/1999

DECISIONS OF THE TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. We allow the first and second appeals and dismiss the third appeal.

REASONS

Introduction

2. We held an oral hearing of these appeals. The appellant in CJSA/2079/98 was represented by Mr Anthony Pearce, the Midlands Regional Officer of the National Union of Teachers. Neither the appellant in CJSA/4014/98 nor the appellant in CJSA/426/99 appeared or was represented although we had before us written submissions on behalf of both those appellants. The Secretary of State was represented in all three appeals by Mr Akhlaq Choudhury of counsel, instructed by the Solicitor to the Department of Health and the Department for Work and Pensions.

3. These appeals arise out of claims for jobseeker's allowance made as long ago as the summer of 1997. They are considered together because they raise various aspects of a common issue as to the entitlement of part-time teachers or lecturers to jobseeker's allowance during school holidays or college vacations. In each case, the number of hours for which the claimant was employed during term time was liable to fluctuate, depending on the demand for his or her particular teaching, and, at the beginning of the school holidays or college vacations, there was an element of uncertainty as to the extent to which he or she would be employed the following term or, it was argued in two of the cases, whether he or she would be employed at all.

4. The appeals turn on the question whether the claimants were engaged in remunerative work during the school holidays or college vacations. Before we consider the details of the individual cases, we will set out the legislation and make some general observations on the issues that arise from it.

The legislative framework

5. Jobseeker's allowance was introduced with effect from 7 October 1996. A claimant may be entitled to contribution-based jobseeker's allowance, which replaces unemployment benefit, or income based jobseeker's allowance, which replaces income support for those required to be available for work.

6. As originally enacted, section 1 of the Act provided:

> "Subject to the provisions of his Act, a claimant is entitled to a jobseeker's allowance if he –
>
> (a) is available for employment;

(b) has entered into a jobseeker's agreement, which remains in force;
(c) is actively seeking employment;
(d) satisfies either –
(i) the conditions set out in section 2; or
(ii) the conditions set out in section 3;
(e) is not engaged in remunerative work;
(f) is capable of work;
(g) is not receiving relevant education;
(h) is under pensionable age;
(i) is in Great Britain."

Section 2 provides for the contribution-based conditions, which include not having earnings in excess of a prescribed amount. Section 3 provides for the income-based conditions, which include having an income (from all sources and not just earnings) which does not exceed the applicable amount. The applicable amount is intended to take into account the needs of the claimant's family. Section 4 makes provision for the amount payable by way of jobseeker's allowance and has the effect that entitlement to contribution-based jobseeker's allowance is reduced by the amount of any earnings that do not disentitle the claimant altogether under section 2 and that entitlement to income-based jobseeker's allowance is reduced by the amount of any income that is not sufficient to disentitle the claimant altogether under section 3.

7. At the time with which we are concerned (subsequent amendments do not affect the issues arising on these appeals), regulation 51(1) and (2) of the Jobseeker's Allowance Regulations 1996 provided –

"(1) For the purposes of the Act "remunerative work" means –

(a) in the case of the 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

(b) in the case of any partner of the claimant, work in which he is engaged or, where his hours of work fluctuate, is engaged on average, for not less than 24 hours per week; and

(c) in the case of a non-dependant, or of a child or young person to whom paragraph 18 of Schedule 6 refers, 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 the claimant or his partner 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, and sub-paragraph (c) does not apply, 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 the date of review, 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;

(c) where the person works at a school or other educational establishment or at some other place of employment and the cycle of work consists of one year but with school holidays or similar vacations during which he does no work, by disregarding those periods and any other periods in which he is not required to work."

Regulation 52(1) provided –

"(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."

8. The principal reason that we are considering in 2002 claims made in 1997 is that these appeals were all stayed pending the litigation which culminated in the House of Lords deciding *Banks v. Chief Adjudication Officer* [2001] UKHL 33, [2001] 1 W.L.R. 1411 (also reported as R(IS) 15/01). That case was concerned with the effect of regulation 51(2)(c).

9. At the oral hearing, we heard argument as to whether the claimants were (a) on holiday when they claimed and (b) in a recognisable cycle of work. Following the oral hearing, we again stayed the appeals to await a hearing before us in three other cases (CJSA/5732/99, CJSA/5836/99 and CJSA/3444/00) in which it was argued on behalf of the claimants that regulation 51(2)(c) involved unlawful discrimination against women. All parties agreed that we should decide the present appeals in conformity with whatever decision we reached in those other cases. In the event, we have held that regulation 51(2)(c) is inconsistent with Council Directive 79/7/EEC and should not be applied. Accordingly in this decision we have proceeded as though regulation 51(2)(c) were not present.

10. These regulations, and regulation 5 of the Income Support (General) Regulations 1987 which is in similar terms, have for some time caused difficulties for decision-makers, tribunals and Commissioners alike. They are complicated but at least part of the problem has been caused by trying to apply to these modern, weekly, at least partly income-related benefits concepts that were developed in relation to unemployment benefit which was a daily wholly contribution-based benefit introduced ninety years ago.

11. Defining 'remunerative work' as being work in which someone is engaged for not less than 16 hours a week (24 hours in the case of a claimant's partner) is simple enough. But how do you arrive at the appropriate number of hours when the working hours fluctuate? And how do you deal with those periods during most people's working year, when for some reason or other they are absent from work (and, therefore, not engaged in work at all)?

12. The first step in any analysis is to recognise that periods when a person does no work fall into various categories. Consideration of regulations 51(2) and 52(1) suggests that the relevant categories are:

(a) periods during which someone is without work because he or she is between jobs,

(b) periods of no work (other than holidays) during which someone is without work because work is not provided by his or her employer,

(c) periods during which someone can properly be regarded as being on holiday,

(d) periods of absence due to sickness and maternity leave.

(e) periods of unauthorised absence "without good cause".

In these appeals, we are not concerned with periods of absence due to sickness or maternity leave, but it is apparent from the terms of regulation 52(1) that a person who is otherwise in remunerative work ceases temporarily to be so engaged during such absences. We are also not concerned with periods of authorised absence, but it is equally apparent that such absences are to be treated in the same way as holidays.

13. What each of these appeals does require us to determine is into which of categories (a) to (c) fall the periods of school holiday or college vacation at the claimant's place of employment.

Determining whether a person is between jobs

14. Obviously a person cannot be regarded as engaged in remunerative work if he or she has no employment. Therefore, when a person has been engaged in remunerative work, it is necessary to consider whether that employment has ended so that the person has become unemployed (unless employed in some other employment). This is not always as easy as one might think because, where a person's work involves periods of activity interspersed with periods of inactivity, it is

not always necessary for an employer and employee to address their minds to their relationship during the periods of inactivity. Teachers, for instance, may be employed under a succession of termly contracts. In the context of unemployment benefit, there were a large number of cases considering the position of teachers during school holidays.

15. In two of the appeals before us, the local adjudication officer cited R(U) 1/62, a decision of a Tribunal of Commissioners concerning a temporary teacher, for the proposition that a claimant could be treated as having a customary holiday "unless his employment has been 'terminated' in the sense both (a) the legal obligations of the contract of service have been terminated and (b) there is no intention that the employment shall be resumed on the next available opportunity". That approach was based on a doctrine originally developed by the Umpire under the Unemployment Insurance Acts. In the cases before us, the local adjudication officers appear to have overlooked the fact that the approach taken in R(U) 1/62 was heavily qualified by another Tribunal of Commissioners in R(U) 1/66 and then rejected by yet another Tribunal of Commissioners in R(U) 7/68 and R(U) 8/68.

16. In R(U) 1/66, the majority of the Tribunal said, at paragraph 18:

> "We are ... confident that those who developed this doctrine were thinking in terms of the situation where it was obvious to both the employer and the employee that the latter would resume employment after the "holiday" period. We think that R(U) 1/62 should be applied in this spirit and that fine distinctions should be avoided. We find it hard to believe that the insurance officer would succeed in proving an intention to resume unless there were either some express arrangement, though not necessarily an enforceable contract, or at least a tacit understanding perhaps based on long standing practice."

17. Looking at the earlier decisions, it seems doubtful that the Tribunal's confidence was justified. In any event, three years later, the Umpire's doctrine was subjected to a more fundamental reappraisal by another Tribunal of Commissioners. In R(U) 7/68 (which was actually concerned with the "normal idle day rule" as it applied to a Fleet Street "casual casual" employed for individual nights by a large number of different employers, with the available work being allocated by his union), the Tribunal commented that:

> "[t]he history of the holiday cases since 1962 is that of a stream of indignant appellants who could not understand how their employment could be said not to have terminated when their contract of employment no longer subsisted."

At that time, the legislation made specific reference to the termination of employment and the Tribunal noted that, under the National Insurance Acts, it was the termination of "employed contributor's employment" that was important and that that term was defined as employment as an employed earner which in turn meant "employment under a contract of service". In the light of the legislative framework, they concluded that the Umpire's doctrine adopted in R(U) 1/62 should no longer be applied and they held that the phrase "termination of employment" should –

"be interpreted according to its natural and ordinary meaning with the result that as soon as the contract of service between the particular employer and the claimant is terminated the employment under it is terminated also and not merely suspended".

On the facts of the case, they held that the claimant's employment was terminated at the end of each night's work.

18. In R(U) 8/68, the same Tribunal applied that approach to a case involving a part-time music teacher. The claimant had been employed by a local education authority on a written contract for the summer term in 1955 but had in fact worked ever since. He was given his National Insurance card at the beginning of the summer holiday in 1967 which is when he made his claim for unemployment benefit, having been made redundant from his other job as violinist in a theatre orchestra. He had not been formally notified that he would start work again the following term, but in fact he and his employers both expected that he would. The Tribunal considered that the fact that the employers had that expectation at an early stage of the summer holiday was a strong indication that there was a running contract and they held the employment under the contract to have been suspended rather than terminated. They also held the school holidays to be customary holidays for him, so that he was not entitled to benefit.

19. In modern employment law a failure to renew a fixed term contract may amount to a dismissal and employment under a succession of such contracts may be regarded as continuous. In *Ford v. Warwickshire County Council* [1983] 2 A.C. 71, a lecturer employed on a succession of annual contracts, each operating from September to July, was held by the House of Lords to be "absent from work on account of a temporary cessation of work" during the summer vacations and therefore to have been in continuous employment under paragraph 9 of Schedule 1 to the Employment Protection (Consolidation) Act 1978 from the commencement of the first contract until she was "dismissed" when she was told at the end of her eighth year that she would not be offered another contract. Their Lordships accepted that there was no contract subsisting during the summer vacations, but nonetheless decided that a person could be "absent from work" when a contract had ended where the absence was, as a matter of fact, temporary.

20. We do not find the reliance in R(U) 7/68 and R(U) 8/68 on the notion of contract to be helpful when the existence of the "contract" can only be inferred from the sort of tacit understanding mentioned in R(U) 1/66. Under the Jobseeker's Act 1996, the legislative framework has once again changed and it is neither necessary nor desirable to rely solely on the contractual position when deciding whether a person is between jobs or is merely absent from work. Regard should be had to reality. It is not realistic to draw a distinction between a teacher employed under an indefinite contract and a teacher employed under a succession of termly contracts.

21. In employment law, one is looking backwards from the eventual dismissal and so, in *Ford v. Warwickshire County Council*, the House of Lords had the benefit of hindsight. That luxury is not open to a decision-maker considering a claim made by a teacher or lecturer at the beginning of a period of school holidays or college vacations. He or she must consider what will happen at the beginning of the next

term. Reliance on mere "intentions", as in R(U) 1/62 is apt to produce confusion and injustice. On the other hand, the approach taken to the facts of the cases in R(U) 1/66 and R(U) 8/68 seems to us to be right, even if the legal analysis is no longer valid.

22. In our view, the approach taken by decision-makers should be as follows. 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 is expected that the he or she will resume 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 long standing practice of re-employment will continue.

Holidays and periods of no work

23. It is normally easy to determine whether someone is absent due to a holiday but, again, cases where the person works at a school or college have given rise to much argument, because the distinction between absence due to a holiday and absence due to there being a period of no work may not be obvious.

24. It has been generally accepted that non-teaching staff, or at any rate lower-paid grades of such staff, are not to be regarded as being on holiday in school holidays or college vacations, except for such periods when there is specific evidence that they are. On the other hand teachers have been regarded as being on holiday during school holidays, even when it is clear that they have not been paid over the school holiday period and have been keen to obtain other employment. The distinction is derived from decisions of the Umpire concerning unemployment benefit. It dates from at least 1920 (compare case No. 171 with case No. 786) and was carried into the post-Second World War scheme (compare C.W.U. 7/48, C.W.U 8/48 and R(U) 17/62 with R(U) 1/66, R(U) 8/68 and R(U) 4/88). In our view that distinction, which historically might have made some sense, is no longer tenable on any rational basis. There is no good reason why teachers should be treated in any different way from other workers, when to do so might disentitle them from a benefit of last resort to which they would otherwise be entitled on income grounds.

25. The continuing validity of the old case-law was already being doubted in R(U) 4/88 insofar as it affected part-time teachers, although the Tribunal of Commissioners decided not to depart from it. Now the legislative context has changed fundamentally. As will appear below, the distinction between a period of holiday and a period of no work is important when it comes to determining, under regulation 51(2) of the 1996 Regulations, whether a person is engaged in remunerative work. Whether or not the whole of a period of school holiday or college vacation is treated as a period of holiday for the person concerned makes no difference in a case where the person has a regular cycle of work and the number of hours worked is plainly either above or below the 16 (or 24) hour threshold whichever of the two approaches is applied. But there are cases where the distinction is important.

26. The approach taken in the case of non-teaching staff is based on a view that it is simply unrealistic to regard a person working in a school or college as being on holiday for the whole of the school holidays or college vacations when a person doing similar work in another establishment would have far shorter holidays. It seems to us

to be equally unrealistic to regard teachers and lecturers as necessarily being on holiday for the whole of the school holidays or college vacations. Where a benefit of last resort is concerned, regard should be had to reality.

27. We consider that the extent to which a person is regarded as being on holiday should, as the claimants in these cases have argued, be determined by reference to their contractual entitlement to holiday and that in the context of an income-related benefit, it makes perfect sense to have regard only to those weeks of holiday for which a person is actually paid. From 1 October 1998, when the Working Time Regulations 1998 came into force, it may generally be assumed that a worker is entitled to four weeks annual leave in the absence of any evidence of greater entitlement. However, the appeals before us are concerned with earlier periods and no such assumption can be made.

Calculating the number of hours for which a person is engaged in work

28. Applying regulation 51(2) is relatively straightforward once it has been established that a person is still engaged in employment and his or her entitlement to holidays has been ascertained. If he works the same number of hours each week when not on holiday, that is the number of hours to be taken into account for the purpose of regulation 51(1). If the number of hours fluctuates, an average is taken. How the average is calculated when there is no cycle of work is determined under regulation 51(2)(b)(ii) which allows some discretion as to the period over which the average is to be calculated. Regulation 51(2)(b)(i) makes more specific provision in a case where there is a recognisable cycle of work.

29. A person who is employed to work throughout school or college terms but not during school holidays or college vacations usually, but not always, has a recognisable cycle of work of a year. The cycle may become recognisable in practice even if it is not established by the contract of employment (R(JSA) 5/02). The number of hours worked each week during a cycle of work inevitably fluctuates because of the periods of no work during the school holidays or college vacations. Where there is a cycle, regulation 51(2)(b)(i) requires the average to be calculated by taking into account "periods in which the person does not work ... but disregarding other absences". In the ordinary case, this means dividing the total number of hours worked during the terms by 52 less the number of weeks of holiday to which the particular claimant is entitled. The result determines whether the person concerned is in remunerative work or not for the whole period of the cycle (R(IS) 8/95) so that it is not necessary where there is a cycle to attribute the holiday entitlement to any particular weeks. There may be cases where there is a question as to the precise period covered by the relevant cycle but in all the cases before us it is appropriate to take the cycle as covering the academic year commencing in the September before the date of claim.

30 We recognise that our approach is not that taken by the learned Commissioner in R(IS) 15/94, decided under regulation 5 of the Income Support (General) Regulations 1987. The claimant's wife was a school receptionist who worked only during school terms and was not paid at all in respect of school holidays. It was held that she had a cycle of work of one year, that the school holidays were periods of holiday for her, that the holidays were "periods in which the person does no work",

that they were therefore not "other absences" to be disregarded in calculating the number of hours worked and that the average number of hours worked was therefore to be calculated by taking an average over the whole year, including the school holidays. In our view, that reasoning is flawed. Firstly, the learned Commissioner overlooked the fact that, even on the understanding of the law then current, the school holidays were not periods of holiday for the claimant. Secondly, it seems plain to us that holidays were to be treated as "other absences" and therefore were to be disregarded. The object of the exercise under regulation 5(2)(b)(i) of the 1987 Regulations (equivalent to regulation 51(2)(b)(i) of the 1996 Regulations) was to ascertain the average number of hours usually worked when the person concerned was *not* on holiday or absent due to sickness, etc. The distinction drawn by the learned Commissioner in R(IS) 15/94 between holidays that are part of a cycle and *ad hoc* holidays was not warranted by the legislation and gives rise to differences in the treatment of claimants for which we can see no justification.

31. Despite these criticisms, we agree with the conclusion reached in R(IS) 15/94. In our view, it was precisely because the school holidays were *not* holidays for the claimant's wife that they were "periods in which the person does no work" rather than "other absences". However, the application of the flawed reasoning in R(IS) 15/94 led to R(IS) 7/96 being wrongly decided. The latter decision should no longer be followed.

32. We now apply these principles to the three appeals before us.

Conclusion in CJSA/2079/1998

33. The claimant claimed jobseeker's allowance from 17 July 1997. She was a qualified teacher and had been working as a school tutor for children with special educational needs since September 1994. She was employed by a local education authority on a sessional basis; that is to say she completed a monthly return of the number of hours she had taught and then submitted it to her employer who paid her accordingly. She received no pay if she was absent from work or if a pupil was absent or if a school was closed and, in particular, she received no pay in respect of holidays. She claimed, and was paid, unemployment benefit in the summer holidays in 1995 and 1996. The claim with which we are concerned was made at the beginning of the school summer holiday in 1997, the first after the replacement of unemployment benefit by jobseeker's allowance. It was disallowed on the ground that the claimant was in remunerative work because she worked for not less than 16 hours a week during term time and that her absence from work during the school holidays was due to a recognised, customary or other holiday. The claimant appealed on the ground that she was not employed all year and she received no pay during the holidays. On 4 November 1997, the Birmingham social security appeal tribunal dismissed her appeal, finding that the claimant had expected to start work again on 8 September 1997 and stating that they were "looking at the situation as it actually is, regardless of written requirements." They agreed with the adjudication officer that the claimant had been absent from work due to a recognised, customary or other holiday and also found that she had a cycle of work consisting of one year. The claimant was granted leave to appeal by the tribunal chairman.

34. It is clear on the evidence that the claimant was not paid during the school holiday and had no entitlement to holiday. In those circumstances, as Mr Pearce argued, her vacations should not have been regarded as periods of holiday and the tribunal's decision is erroneous in point of law.

35. However, there then arises the question whether the periods of no work during the vacation were part of a cycle of work. We can see no reason not to adopt the tribunal's finding that the claimant's employment had not been terminated. The awards of unemployment benefit made in 1995 and 1996 may well have been made on the basis that continuity of employment had not been established then but, by the time of her claim in 1997, the claimant had completed two cycles of academic work. Her work had been sufficiently secure for her not to have made any claims for benefit save in the summer holidays. The tribunal applied the correct test and made a clear finding that the claimant expected to start work again in September. Despite Mr Pearce's arguments to the contrary, we consider that the tribunal were plainly correct to find that continuity of employment and the existence of a cycle of work were established.

36. As the school holidays were periods of no work for the claimant but were not periods of holiday, the total number of hours she had worked over the last year should have been divided by 52 so as to arrive at the figure to enable it to be determined whether or not she was engaged in remunerative work. Unfortunately, there is insufficient evidence before us as to the number of hours worked, because the Secretary of State and the tribunal considered it to be sufficient to establish that it was at least 16 hours a week averaged over just the terms. As the average must be taken over the whole year, further enquiries must be made.

37. Accordingly we allow the claimant's appeal and set aside the tribunal's decision. We leave it to the Secretary of State to calculate the number of hours in accordance with this decision and deal with any other questions that may arise if the claimant was not engaged in remunerative work at the time of her claim. If there is any further dispute, the case will have to be referred back to a Commissioner for final resolution.

Conclusion in CJSA/4014/1998

38. In this case, the claimant was a lecturer at a college of further education. Her principal contract of employment, which commenced in January 1996, was for 15.5 hours a week during academic terms. There was no entitlement to paid holiday under the contract. The contract stated that "your rate of pay allows for the fact that you have no formal entitlement to holiday with the result that the pay you receive for each hour worked is comparable to that paid to employees who are entitled to holiday". The academic terms covered 38 weeks in a year but the claimant received her pay over the calendar year in 12 equal monthly instalments. The contract provided for a suitable adjustment if the contract was terminated during the academic year. Depending on the demand for other courses, the claimant was employed under additional contracts. During the 1996-97 academic year, she had four such contracts, under which she worked for 7.5 hours a week for 12 weeks during the autumn term, 8.5 hours a week for 10 weeks during the spring term, 7.5 hours a week for 4 weeks of the summer term and 5 hours a week for another 6 weeks of the summer term. On

27 June 1997, the claimant claimed jobseeker's allowance in respect of the summer vacation. Her claim was disallowed on the basis that she worked in an educational establishment and had a cycle of work consisting of a year but with vacations when she did no work so that, applying regulation 51(2)(c) of the 1996 Regulations, her average hours of work were to be calculated by excluding those vacations. Taking into account the additional contracts, the claimant's average hours of work over 38 weeks amounted to 21.6 and the adjudication officer decided that she was to be regarded as being in remunerative work under regulation 51(1)(a) for the whole year of the cycle. The claimant appealed but her appeal was dismissed on 15 April 1998 by the Bolton social security appeal tribunal, who adopted the adjudication officer's reasoning. The chairman granted leave to appeal.

39. The tribunal erred in law in relying on regulation 51(2)(c) because it is inconsistent with Council Directive 79/7/EEC. However, we can substitute our own decision based on regulation 51(2)(a) and (b).

40. It is not suggested by the claimant that she was not continuously employed under her main contract or that there was not a recognised cycle of work under that contract. On the other hand, it is also not suggested by the Secretary of State that there had been established any recognisable cycle of additional contracts. It is plain that the legislation contemplates a fluctuation of hours within a cycle of work. It is also plain that, for the purposes of regulation 51(1), hours worked under different contracts must be aggregated. However, the first question we have to determine is whether the hours worked under the additional contracts in the present case should be aggregated so as to be brought into the calculation as fluctuations within the whole cycle of work established by the first contract or whether they should only be aggregated during the periods covered by the additional contracts.

41. There may well be cases where the latter type of aggregation is appropriate. However, here the additional contracts were with the same employer and involved the same kind of work as the main contract. Furthermore, the work under the additional contracts was performed during the periods of work within the cycle established by the main contract. In those circumstances, it seems to us that the additional contracts should be treated as fluctuations in the main contract and aggregated accordingly. Thus, we consider the tribunal were right to add together the hours worked in all the contracts during the three terms before the claim and to take them into account over the whole cycle.

42. This makes it necessary to decide whether the claimant's absence from work during any part of the cycle was due to there being a period of holiday. It is clear that there was no entitlement to holiday pay. The fact that her remuneration was spread over the year in equal monthly instalments does not affect the fact that she had no entitlement to holiday. Nor does the fact that her remuneration was enhanced to take account of the lack of holiday entitlement. That is a matter that is taken into account when her earnings are calculated. Therefore, the vacations were to be taken into account under regulation 51(2)(b)(i) as periods of no work and not as periods of holiday.

43. The question whether the claimant was engaged in remunerative work now becomes one of arithmetic. The total number of hours worked was 824. As there was

no period of holiday, the divisor is 52. That produces an average of just under 16 hours per week. Accordingly, the claimant was not engaged in remunerative work.

44. It does not follow that she is entitled to jobseeker's allowance from the date of her claim. She had earnings throughout the year and they were sufficient to disentitle her from contribution-based jobseeker's allowance. We do not know enough about her circumstances to know whether or not those earnings and any other income would disentitle her from income-based jobseeker's allowance.

45. We set aside the tribunal decision and allow this appeal, concluding that this appellant was not in remunerative work during the relevant period. We leave other questions arising on her claim to be determined by the Secretary of State. If there is any further dispute, the case must be referred back to a Commissioner.

Conclusion in CJSA/426/1999

46. The claimant in this case was a tutor at an independent tutorial college for students who were mostly studying for A levels and GCSEs. On 18 November 1996, he was sent a letter "to confirm your appointment as an employee", which set out his main terms of employment. His appointment was stated to have begun on 11 September 1994 and could be terminated only on notice or on payment by the college in lieu of notice. His rate of pay was based on hourly rates for contact hours with pupils, which depended on the level of the course being taught and whether fewer than three students were being taught together. Timesheets were to be submitted and payments were made at the end of each month. The contract also stated that the claimant would "be expected to work such hours as are reasonably necessary for the proper performance of your duties and responsibilities, with a minimum of 21.25 hours per week" (although this could be varied and the variation could be without notice if, among other circumstances, a student was absent through illness or injury). It was also stated that there was no entitlement to paid holiday. On 30 July 1997, the claimant made a claim for jobseeker's allowance. The claim was disallowed on the basis that the summer holiday was to be regarded as a recognised holiday because the claimant's contract was not terminated at the end of each term and both he and his employer expected him to return to work in September, at the end of the summer holiday. The claimant appealed, stating that he had been awarded unemployment benefit the previous summer and jobseeker's allowance the previous Christmas and that he had only not claimed at Easter because he had found employment. He also stated that his hours of teaching depended on demand and usually amounted to between 16 and 20 hours a week, although that fell off to less than 10 hours a week after public examinations had been sat, and that he had no guarantee of being re-engaged in September. He further stated that he was looking for a permanent full-time job in place of his current one, rather than just holiday employment. In support of his appeal, he supplied a letter from the college bursar stating –

> "Although [the claimant] has worked regularly for us in the past, his contract is valid only for a single academic year. In other words, there is no ongoing guarantee of work, as the contract is only renewable if there are a sufficient number of students wishing to take a course of study that requires [the claimant's] particular expertise. This kind of information becomes known just

a few days before term starts and tutors are then engaged to teach the various subjects involved."

The Norwich social security appeal tribunal dismissed the claimant's appeal on 2 October 1997. They accepted that there might not have been work available for the claimant when the summer vacation came to an end but they held that nonetheless the contract of employment continued until terminated by notice, that "in reality" the claimant and the college both expected the claimant to return to work at the end of the vacation and that the claimant was to be regarded as having been on holiday – and "still in remunerative work" – during that vacation. Leave to appeal was granted by the regional chairman on 15 January 1999, after an unsuccessful application by the claimant for the decision to be set aside.

47. It is unnecessary for us to consider the claimant's first ground of appeal, alleging that there was a breach of the rules of natural justice, because we accept that the tribunal's decision is erroneous in point of law on other grounds.

48. The claimant's second ground of appeal is that the tribunal erred in law in finding him to have been absent from work by reason of a holiday. We accept that they did err in that respect. It is plain that the claimant had no entitlement to holidays under his contract.

49. The tribunal further erred in failing to make a finding, or to adjourn to obtain information, as to the number of hours the claimant worked during the terms. The claimant's letter of appeal to the tribunal had raised the possibility that the average weekly number of hours worked during the terms was less than 16, in which case, even if the vacations had been periods of holiday for him, he would not have been disentitled from benefit during them.

50. The claimant's third ground of appeal is that the tribunal erred in failing to explain why they rejected the evidence of the bursar. We do not accept this ground because it is clear that the reason the tribunal rejected the bursar's evidence was that it was inconsistent with the claimant's written contract of employment which, as the tribunal found, expressly provided that his employment under the contract continued until terminated.

51. As the tribunal erred in finding the vacation to be a period of holiday for the claimant, we must set aside their decision. We now have unchallenged evidence before us that the claimant worked 889.75 hours during the academic year 1996-97. We accept that evidence and can therefore substitute our own decision for that of the tribunal. The claimant's contract clearly established a cycle of work, which continued into the vacation because the claimant's employment under the contract had not been terminated. The question whether the claimant was engaged in remunerative work during the cycle is to be determined under regulation 51(2)(b)(i). The arithmetic is straightforward. Dividing 889.75 by 52 produces a figure that is greater than 16. In those circumstances, our decision is to the same effect as that of the tribunal. The claimant is not entitled to jobseeker's allowance from 30 June 1997 because he was engaged in remunerative work.

52. Accordingly, we dismiss this appeal, though for reasons which are quite different from those given by the tribunal.

H. H. JUDGE MICHAEL HARRIS
Chief Commissioner

MARK ROWLAND
Commissioner

ANDREW BANO
Commissioner

26 September 2002