Bulletin 171

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case no: CJSA 2162 2001

SOCIAL SECURITY ACTS 1992 - 1998

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE COMMISSIONER

Commissioner David Williams

Claimant:	**Mrs Pauline Knightley**
Benefit:	Jobseeker's allowance
Tribunal:	Portsmouth
Tribunal case ref:	U 03 201 2000 00911
Tribunal hearing:	1 November 2000
Date of decision:	10 May 2002

DECISION OF THE COMMISSIONER

1 I allow the appeal.

2 The claimant is appealing, with permission of a Commissioner, against the decision of the Portsmouth appeal tribunal on 1 November 2000 under reference U 03 201 2000 00911. The tribunal's decision was that the appellant's appeal was allowed in part. The appellant was not entitled to jobseeker's allowance because she was not actively seeking employment and could not be treated as actively seeking employment in the two weeks from 19. 4. 2000 to 2. 5. 2000 (both dates inclusive), but was not disentitled on that ground for the period to 18. 4. 2000.

3 For the reasons given below, that decision is erroneous in law. I set it aside. It is expedient that I replace it with the decision that the tribunal should have made. This is:

> **The appeal is allowed. The appellant met the requirement of section 1(2)(c) of the Jobseekers Act 1995 throughout the period in question and is not disentitled to jobseeker's allowance on that ground.**

4 I held an oral hearing in London on 25 March 2002. The appellant was represented by Mr D Forsdick of counsel, from the Free Representation Unit. The Secretary of State was represented by Mr J Moffett of counsel, instructed by the Office of the Solicitor to the Department for Work and Pensions. I am grateful to both for their careful written submissions and for their help at the hearing.

Background to the appeal

5 This case is about the borderline between income support and jobseeker's allowance. It is also about the status, if any, of a jobseeker's agreement. The facts set out below are not in dispute. The appellant (Mrs K) had not worked for 20 years. She had been on income support. This was stopped when her youngest daughter became 16 on 5 January 2000. She signed a jobseeker's agreement at her local jobcentre on 6 January 2000. The agreement, though she did not fully appreciate it at the time, was that she was available for work 3 hours a day every day, a total of 21 hours. She thought she had agreed 3 hours a day for 5 days a week, a total of 15 hours.

6 On 22 February Mrs K went back to the jobcentre because she had found part time work for a government department. The work was for 12½ hours a week. Mrs K also told the jobcentre of her medical problems. A new jobseeker's agreement was agreed and signed by both her and an employment officer on a standard form. Its non-standard terms were:

> Most hours I can work a week: 13:00. Hours reduced due to health. Agreed that looking for 13 hours a week maximum at the moment. TTWA [location] to [location] by public transport. Referred to [named company] to identify job goals. Possibly something in the care or clerical field. Starting work at [...] on 28 February for 12.5 hours a week. *Jobsearch will not have to be shown for any more hours.* Medical evidence seen at initial new claim. To be reviewed at next client adviser interview. *(Italics mine).*

No specific jobsearch steps are indicated in the standard place on the copy of the form in the appeal papers.

7 On 18 April Mrs K went into the jobcentre again at the request of another employment officer. They discussed but did not agree a new jobseeker's agreement. Mrs K was prepared to agree a jobseeker's agreement committing her to 12½ hours work a week with agreed jobsearch activities, noting that her employer had promised her an increase in hours to 20 hours a week from August. The employment officer was prepared to agree 16 hours work a week until health problems improved, with a more extended jobsearch. No attempt was made to use the standard procedures to resolve this disagreement, and no new jobseeker's agreement was made. But Mrs K's jobseeker's allowance was stopped, that apparently being notified on 9 May, but no copy of the decision or the letter notifying it is in the papers to this appeal. In fact, it appears that there were two decisions. The first decision was that Mrs K was not available for work during the period to 2 May 2000. The second was that she was not actively seeking work during the same period. Mrs K appealed.

The tribunal decision

8 The tribunal considered if Mrs K was actively seeking employment from and including 12 April 2000 to 2 May 2000. It also heard another appeal at the same time on the question of availability during that period. The record of proceedings shows the secretary of state's representative supporting the appellant on the availability question. The tribunal then reached two decisions. The appeal against the decision that Mrs K was not available for employment was allowed. The appeal against the decision that she was not actively seeking employment was allowed for the period to 17 April 2000 but dismissed from that date. This was because Mrs K had brought in evidence of a jobsearch on 18 April when she went to the jobcentre. The tribunal found that Mrs K has provided no evidence of a jobsearch after 18 April, when the new jobseeker's agreement had been proposed to her, but also found that she took no additional steps after 18 April when it was reasonable to expect her to do so in order to have the best prospects of securing employment. The tribunal found that she did not satisfy section 7 of the Jobseekers Act 1995 ("the 1995 Act"), and that she was not protected by regulations 19 or 20 of the Jobseeker's Allowance Regulations 1996 ("the Regulations").

Grounds of appeal

9 The application for permission to appeal was originally made against both decisions. But there was nothing to appeal against, so far as Mrs K was concerned, on the question of availability. The file originally opened under number CJSA 1834 2001 about the availability decision was closed without decision, and the decision about availability is now final.

10 A Commissioner granted permission to appeal and raised the question whether the February jobseeker's agreement still remained operative. The secretary of state's representative made a written submission on the appeal at the direction of the Commissioner. It concluded that an oral hearing was requested if the Commissioner did not accept the submission. But the submission was internally inconsistent. Further, it did

not deal with all the issues that the Commissioner had raised on granting permission to appeal. I therefore directed an oral hearing. I did so also because there appeared to be limited relevant authority on the difficult questions that this appeal appeared to raise.

Setting aside the tribunal decision

11 At the oral hearing it was agreed by both counsel that the decision of the tribunal should be set aside. I indicated at the hearing that I agreed with both submissions, and set aside the decision of the tribunal on the grounds of inadequacy. As the matter was discussed at the oral hearing and I was accepting submissions of counsel, it was agreed that I would deal with that matter only briefly in my full decision. The tribunal had clearly got in a muddle about the evidence of jobsearch before 18 April, and its decision was inadequate. I confirm that decision, and set aside the tribunal decision. I then heard full submissions for both parties on all aspects of the appeal.

Mrs K's arguments

12 The main argument for Mrs K is that the jobseeker's agreement concluded in February had not been replaced by another jobseeker's agreement, nor had it been ended by a proper decision to end it. It was still in effect in April and May. It had been decided that Mrs K met the availability criterion. The jobseeker's agreement provided that she did not have to look for work actively, and she met that criterion too. So she met all the tests in section (1)(2) (a), (b) and (c) of the 1995 Act, and was entitled to jobseeker's allowance. The Secretary of State could not now argue otherwise because the employment officer could only enter into an agreement with Mrs K if the requirements of section 9(5) of the 1995 Act had been met. There was no suggestion by the secretary of state's representative that the employment officer had entered into an agreement that could not properly be made, and that could not now be raised as an argument. Mrs K was fully entitled to say that she and the employment officer had agreed about availability and jobsearch and that was the basis on which her claim should be decided.

The Secretary of State's arguments

13 For the Secretary of State it was submitted that three issues required to be decided. The first was whether a claimant who took the action to seek employment and to improve job prospects that was specified in the jobseeker's agreement automatically satisfied section 1(2)(c) of the Jobseekers Act 1995. The second was whether section 1(2)(c) could ever be satisfied if no steps were taken actively to seek employment even where an employment officer was of the opinion that none were needed. Third, if the claimant was working all the hours she was asked to work, should she nonetheless be asked to look for more hours? I have no problem with the third issue. As the Commissioner indicated in CJSA 4435 1998, availability for work and actively seeking work are two different criteria and are to be considered separately. An active jobsearch could enhance future employability of a claimant currently employed to the full extent available at that time. Mrs K could at some point reasonably be expected to look for more work at a future date. The other two issues are not straightforward.

14 Mr Moffett submitted that the jobseeker's agreement could not as a matter of law be determinative of the position under section 7 of the Jobseekers Act 1995, because the

Act stated that it had effect only for section 1. That meant it did not have effect for section 7. Further, it was clear from regulation 18 of the Jobseeker's Allowance Regulations 1996 that steps to look for work had to be taken in all cases for jobseeker's allowance to be awarded. There were no exceptions. This was confirmed by regulation 18. It did not include satisfaction of the jobseeker's agreement as a factor in deciding the application of section 7. At the same time, there was no requirement in law that the claimant had to comply with the jobseeker's agreement. That is why the duty was placed under section 7 and not on the agreement. Therefore the tribunal was right to look at whether Mrs K had conducted a jobsearch in April regardless of the terms of the February jobseeker's agreement.

15 Mr Moffett also submitted that the opinion of the employment officer in the February 2000 agreement was neither binding on the Secretary of State in April nor decisive of the steps that should be taken to comply with section 1(2)(c). The Secretary of State could take a different view to that of the employment officer. In the circumstances of this case there were good reasons for the Secretary of State to take a different view in April and May to that of the employment officer in February. The jobseeker's agreement was not, in a legal sense, an agreement. The Secretary of State and the tribunal were entitled to depart in April from the opinion held by the employment officer on 22 February 2000 notwithstanding that the view had been agreed with Mrs K. It followed that Mrs K, by taking no steps to find employment during the period after 19 April, had not complied with section 1(2)(c) notwithstanding the fact that she had complied with the February jobseeker's agreement.

The Jobseekers Act 1995 and regulations

16 Section 1 of the 1995 Act provides:

> (1) An allowance, to be known as jobseeker's allowance, shall be payable in accordance with this Act.
> (2) Subject to the provisions of this Act, a claimant is entitled to 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;
> ...
> [*and satisfies other conditions not relevant in this case*]
> (3) A jobseeker's allowance is payable in respect of a week.
> (4) [*definitions not relevant to this case*].

"Jobseeker's agreement" is defined by section 35(1) of the Act as having the meaning given by section 9(1).

17 Section 7 of the 1995 Act is headed "actively seeking employment", the term used in section 1(2)(c). Section 7(1) provides:

> For the purposes of this Act, a person is actively seeking employment in any week if he takes in that week such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment.

The rest of the section provides for regulations and relevant definitions.

18 Section 9 of the Act is headed "The jobseeker's agreement". It provides:

> (1) An agreement which is entered into by a claimant and an employment officer and which complies with the prescribed requirements in force at the time when the agreement was made is referred to in this Act as "a jobseeker's agreement".
> (2) A jobseeker's agreement shall have effect only for the purposes of section 1.
> (3) A jobseeker's agreement shall be in writing and signed by both parties.
> (4) A copy of the agreement shall be given to the claimant.
> (5) An employment officer shall not enter into a jobseeker's agreement with a claimant unless, in the officer's opinion, the conditions mentioned in section 1(2)(a) and (c) would be satisfied with respect to the claimant if he were to comply with, or be treated as complying with, the proposed agreement.
> (6) An employment officer may, and if asked to do so by the claimant shall forthwith, refer a proposed jobseeker's agreement to [the Secretary of State] for him to determine -
> (a) whether if the claimant concerned were to comply with the proposed agreement, he would satisfy -
> (i) the condition mentioned in section 1(2)(a), or
> (ii) the condition mentioned in section 1(2)(c); and
> (b) whether it is reasonable to expect the claimant to have to comply with the proposed agreement.
> (7) - (11) [*Not relevant to this case*]
> (12) Except in such circumstances as may be prescribed, a jobseeker's agreement entered into by a claimant shall cease to have effect on the coming to an end of an award of jobseeker's allowance made to him...
> (13) In this section and section 10 "employment officer" means an officer of the Secretary of State or such other person as may be designated for the purposes of this section by an order made by the Secretary of State.

19 Section 10 of the Act is headed "variation of jobseeker's agreement". Subsection (1) provides that a jobseeker's allowance may be varied in the prescribed manner by agreement between the claimant and any employment officer. The subsequent subsections make similar provision for a variation as those made in section 9 for an agreement. Section 11 provides for reviews of and appeals against section 9 agreements 9 and section 10 variations. Fuller details about jobseeker's agreements, variation, and review are in regulations 31 to 45 of the Regulations. The links between the agreement and the conditions in section 1(2)(a) and (c) of the 1995 Act are in regulation 31 in the following terms:

> The prescribed requirements for a jobseeker's agreement are that it shall contain the following information:
> ...

(b) where the hours for which the claimant is available for employment are restricted in accordance with regulation 7, the total number of hours for which he is available and any pattern of availability;

...

(e) the action which the claimant will take -

(i) to seek employment; and

(ii) to improve his prospects of finding employment;

...

Did Mrs K meet the tests of entitlement?

20 The core tests for entitlement to jobseeker's allowance are those in section 1(2)(a) to (c). The claimant must be available for work. She must have a jobseeker's agreement that is in force. And she must be actively seeking work. Mrs K, it has been decided, was available for work to the extent necessary. She had a jobseeker's agreement. But the Secretary of State is of the view that it was not in force or, if it was, she nonetheless was not actively seeking work.

Was the February jobseeker's agreement in force?

21 Was the jobseeker's agreement signed by Mrs K and the employment officer in February 2000 still in force in April and May 2000 as required by section 1(2)(b)? The initial validity of the jobseeker's agreement has not been challenged, so I assume that it is a valid agreement when concluded and that section 9(5) of the 1995 Act was met when it was signed by both parties. Mr Forsdick relied on this in developing his arguments. The starting point when considering a jobseeker's agreement that is in force is to assume that section 9(5) is complied with. Consequently, if the jobseeker's agreement is in force and observed then not only is section 1(2)(b) met, but so also are section 1(2)(a) and (c).

22 It is undoubtedly the case that the agreement was valid and in force as at 22 February. Was it still in force after 18 April? There is no evidence that either party asked that the proposed agreements in April be referred for assessment under section 9(6) or that any variation was agreed under section 10. Nor was any review requested or appeal made under section 11. In my view, although the Act does not say so in express terms, the only consistent interpretation of the structure created by, and the wording of, sections 1, 9, 10 and 11 of the Act is that a jobseeker's allowance that is in force only comes to an end in defined circumstances. These are: on the coming to an end of a jobseeker's allowance award under section 9(12) (unless regulations provide otherwise); when there is an agreed variation under section 10; or when another agreement is proposed but not agreed and the proposal results in a decision of the Secretary of State imposing a new agreement. Any other view would allow the Secretary of State to sidestep the review and appeal procedures while ignoring the terms agreed between the claimant and the Secretary of State. Such a view cannot be the correct way of interpreting and applying the machinery laid down in sections 9 to 11. It would also avoid giving any substantive effect to the jobseeker's agreement.

23 Mr Moffett sought to support his argument by a reference to the policy justification for his approach. In his view (as summarised in the written submissions) "an agreement states the position as at the time it was entered into, and it would be impossible to

anticipate every eventuality." Therefore, if I may paraphrase the argument that follows, the Secretary of State can later ignore a jobseeker's agreement if the Secretary of State concludes that it should be ignored.

24 I do not find that approach persuasive for several reasons:
(1) Section 1(2)(b) refers to an agreement being "in force". That suggests that the agreement must continue to be an operative agreement or one with some legal effect, not one that merely exists as a piece of paper. It also assumes that a jobseeker's agreement is intended to have a continuing future effect, not merely an effect at the date it was signed.
(2) Much of a jobseeker's agreement is about what "I" will or must do and what "we" will do or "you can expect from us". In other words, it has and is intended to have the prospective effect usual in an agreement. It is different from a claim for jobseeker's allowance. That is determined as at the date of decision of the claim and without regard to future circumstances, and the claim ceases to exist after it is determined (Social Security Administration Act 1992 section 1, read with Social Security Act 1998, section 8). This argument seems to some extent to be confusing the agreement with the claim.
(3) Sections 10 and 11 deal with precisely the future problems that concern Mr Moffett. They allow "every eventuality" to be taken into account (in some cases by imposing an "agreement") but they do so in a way that allows the claimant an opportunity to reach an agreement and an opportunity to appeal a disagreement.
(4) The jobseeker's agreement at the centre of this appeal contained both in its standard form and its specific terms statements to the effect that it would be reviewed. To ignore the point about actively seeking employment in the way for which Mr Moffett contends, the Secretary of State must also ignore both the specific and standard terms about review. It cannot be said that Parliament has failed to make provision for future reviews of an agreement, or that this agreement itself has ignored future reviews. I do not accept that Parliament created the structure of jobseeker's agreements in a way that allows the Secretary of State to ignore not only its express terms about actively seeking work but also its express terms about reviews. On the contrary, Parliament has provided alternative ways of dealing with reviews, and the Secretary of State must follow the procedures laid down by Parliament.

25 I conclude that the agreement of 22 February 2000 was still in force in April and May, and that the proposed agreements of both parties in April are of no legal effect. Whether Mrs K was or was not actively seeking employment in April and May must be judged against the background that a jobseeker's agreement containing the terms set out in paragraph 6 above was in force at the time.

What does "in force" mean?

26 In essence, I take the argument for the Secretary of State to be that even if the February jobseeker's agreement was "in force" in April, that "force" was irrelevant to the duties of the appellant in actively seeking work. Again quoting the skeleton, the statement in the agreement "cannot be determinative of what steps a claimant is required to take in order to satisfy the conditions in section 1(2)(c) of the Act, as defined by section 7(1)". While a claimant could not claim jobseeker's allowance unless she or he had agreed a jobseeker's agreement stating what she or he is going to do to look for work or more work, the jobseeker's agreement is irrelevant to what the appellant must actually do to find work. In other words, the so-called agreement is devoid of substantive effect

when considering section 1(2)(c) at any date other than the date on which it was concluded. But if that is so, how can it be said that the agreement is "in force"? Given the prominence of the requirement for a jobseeker's agreement in the 1995 Act and in the practical delivery of jobseeker's allowance to claimants, that seems a counterintuitive conclusion. What is the purpose of an agreement that has no substantive effect beyond the mere fact that it has to exist? The answer must lie in answering another question: is that what Parliament intended?

27 Mr Moffet's argument that Parliament intended a jobseeker's agreement to be devoid of purpose beyond the fact that it must exist for section 1(2)(b) to be satisfied is based on section 9(2):

"A jobseeker's agreement shall have effect only for the purposes of section 1."

As he put it, this made it clear that it had no effect for any other section. It was only section 1 to which it applied. It did not have effect for section 7, the section that provides for the test of actively seeking work. Mr Forsdick pointed out in reply that section 9(2) referred to section 1, not just section 1(2)(b). It therefore applied also to section 1(2)(a) and (c).

28 I find Mr Moffett's argument to be taking literal interpretation too far, notwithstanding the presence of the "only". If Mr Moffett was right, then why have careful provisions about varying agreements, imposing agreements, reviewing and appealing agreements, and brining agreements to an end? And why state that the jobseeker's agreement had to be "in force"? There is also force in Mr Forsdick's response. Section 1 is - as is common in the drafting of social security and welfare Acts of this sort - the central operative section on which all other sections in that Act and also the elaborate subordinate construct in the Regulations are founded. In my view, if a jobseeker's allowance has effect for section 1 then it must have effect for all the provisions that flow from that section. The purposes of section 1 are, in that specific sense, central to the purposes of the Act as a whole, and that is how the section is drafted. The wording of section 1(1) and 1(2) expressly integrate the rest of the Act into the payability and entitlement provisions of that section. And, again, section 1 refers to the agreement being "in force".

29 The "only" in section 9(2) I take to be included expressly to confine the effect of the jobseeker's allowance to the Act and the jobseeker's allowance scheme, not as confining the effect of the agreements to one small part of the Act. The "only" emphasises that a jobseeker's agreement is not an agreement between the Secretary of State and the claimant to which the laws of contract and the jurisdiction of the ordinary courts can be applied. Section 9(2) serves to emphasise that the jobseeker's agreement derives its authority only from the 1995 Act and that it has no standing in law outside the operation of that Act. The provision is, perhaps, necessary as the language used is that of contractual arrangement, and the standard form of a jobseeker's agreement bears some similarity to a standard form contract. I therefore reject the proposition that the jobseeker's allowance has no application to section 7 or other sections apart from section 1 itself.

The effect of regulation 18

30 That conclusion does not deal with the supporting argument of the Secretary of State that the Regulations exclude a jobseeker's agreement from being relevant to the question whether a claimant is actively seeking work under section 7. Mr Moffet based this part of his argument on section 7(1) of the Act, on the fact that the tests in section 7 and in regulation 31 of the Regulations are different, on the terms of regulation 18(3) of the Regulations, and on the consistency of those points with section 9(2). He further supported his point by drawing attention to the fact that nothing in the Act or the Regulations contained any provision requiring a claimant to comply with the terms of a jobseeker's allowance.

31 Before dealing with these arguments, I note the terms of the jobseeker's agreement. In the columns above the two signatures on the standard form it states:

> This jobseeker's agreement sets out
> - when I can work
> - the types of work I am willing to do
> - what I am going to do to find work and increase my chances of finding work.

Further across it states:

> **Actively seeking work**
> I understand that I must actively seek work. I will be asked regularly to show what I have done to find work. I have been advised to keep a record of what I do to find work.

In this unusual case the specific part of the agreement contradicted this and stated that Mrs K did not have to do anything. That is now conceded by the Secretary of State. The Secretary of State also conceded that if the agreement was valid and did have effect for the purposes of section 7, then Mrs K wins this appeal.

32 The regulations made under section 7(1) are regulations 18 to 22 of the Regulations. Mr Moffett drew attention in particular to the terms of regulation 18(1) and (3). Regulation 18(1) provides:

> For the purposes of section 7(1) ... a person shall be expected to have to take more than one step on one occasion in any week unless taking one step on one occasion is all that it is reasonable for that person to do in that week.

Regulation 18(2) sets out some steps that it is reasonable for a person to be expected to take. Regulation 18(3) provides that in determining if the requirements of section 7(1) are satisfied in any week, "regard shall be had to all the circumstances of the case, including...". There follow ten sets of circumstances. As Mr Moffett pointed out, the terms of the jobseeker's agreement are not one of those sets of circumstances. Regulation 18(4) deals with three sets of circumstances where steps by the claimant are to be disregarded for the purposes of section 7. Mr Moffett contrasted this with regulation 31. That sets out the content of the jobseeker's agreement as already noted. The required

content of a jobseeker's agreement under regulation 31(e) is different to the requirements in regulation 18. His conclusion is that the two act independently of each other.

33 Mr Forsdick resisted this, pointing out that the starting point was that the jobseeker's agreement in this case was not unilaterally imposed by either party. He also pointed to what he regarded as the absurdity of the Secretary of State's argument in this case, given the terms of the jobseeker's agreement, and the severity of the conclusions drawn from the Secretary of State's argument.

34 On the facts, Mrs K set out her position to the employment officer. She and the officer agreed that she did not need actively to look for work until a further review, and both had signed the agreement in those terms. She was expected to work 13 hours a week, and was working 12 ½ hours a week. She did not have to be available for the other ½ hour, and she did not for the time being have to seek further work. If the Secretary of State could come along later and, without conducting a review, say that she had to do more and that it was reasonable for her to do more, then he was saying that it was not reasonable for Mrs K to abide by the agreement. Further, there was nothing she could do about that after the event, so she could lose entitlement to jobseeker's allowance under a retrospective decision without any chance to redeem the position. Mrs K had been told that the position might change on review, but it had not been changed and the jobseeker's agreement had been left in place. That being so, she was entitled to continue to rely on it.

35 In effect, Mr Moffett's answer was that Mrs K should have ignored the jobseeker's agreement and observed instead the terms of regulation 18 of the Regulations. But was that reasonable in this case in the sense in which that term is used in section 7(1)?

36 My conclusion is that the terms of regulation 18 must be considered within the wording of section 7(1) and in the light of the terms of the jobseeker's agreement that was in effect. I have already decided that it is no answer for the Secretary of State to say that the agreement should not have been in force in April. The remedy for that lay with the Secretary of State and his officers. For whatever reason, his officers had not sought any change to the agreement. Mrs K had been told there might be a review, but following the review in which she took part the Secretary of State was not asked for a formal change of the jobseeker's agreement. That being so, was it reasonable in the section 7 sense to expect Mrs K to look for more or better work when both her general practitioner and, more important, the employment officer agreed in the light of full knowledge of the facts that she did not have to do so?

37 This raises an unstated assumption behind regulation 18. Regulation 18(1) is drafted on the basis that it is always reasonable to take at least one step on one occasion in any one week, although it does not actually say this. But what it actually says is that a claimant *shall be expected to* take the minimum of one step a week (not *shall reasonably be expected*). Is this expectation stated in regulation 18(1) always reasonable? It might be so in the vast majority of cases, perhaps in nearly every case. But the argument of Mr Moffett is that the terms of regulation 18(1) have the effect of saying that one step a week is *always* reasonable for *all* claimants regardless of the circumstances. That goes too far. It conflicts with the approach of regulation 18(3):

> "In determining whether, in relation to any steps taken by a person, the requirements of section 7(1) are satisfied in any week, regard shall be had to all the circumstances of the case..."

That approach must apply in determining the reasonableness of any step taken or not taken by a person for section 7 purposes. It may be an unusual set of circumstances where taking no step can be regarded as reasonable, but section 7(1) allows for that possibility, and I see nothing in the regulation granting powers of that section that permits regulation 18(1) to remove that possibility. Whether it is reasonable to do nothing must, in the final analysis, be a possible approach to "every eventuality", to borrow the Secretary of State's phrase. Regulation 18 must be read as a whole, and that whole must be read within, and not as overriding, the express terms of section 7(1). It must allow for the case, however rare, where taking no steps is reasonable. I do not therefore accept the argument that regulation 18 precludes Mrs K, as a matter of law, from doing nothing in this case.

Is a jobseeker's agreement determinative of the condition in section 1(2)(c)?

38 The final aspect of the Secretary of State's argument is that the terms of a jobseeker's agreement are not of themselves determinative of whether a person meets the requirements of section 1(2)(c). I do not need to decide that as a general proposition in this case as I can deal with the case on the basis of the above analysis without going that far.

Summary and decision

39 Mrs K's position is set out at paragraph 35. I consider it expedient that I take the decision that the tribunal should, in my view, have taken on the basis of the above analysis. I start by summarising that analysis, and I then apply it to this case.

40 I conclude that a valid jobseeker's agreement continues in force until it is varied or brought to an end in accordance with the 1995 Act and the Regulations. It cannot unilaterally be ignored by the Secretary of State. While in force, it is relevant not only to section 1 but also to other parts of the Act including section 7. Section 7 incorporates a test of reasonableness in considering whether someone is actively seeking work for the purposes of section 1. Section 7(1) allows for the possibility that someone can meet the section 1(2)(c) test in a particular week without taking any step to seek work if that is reasonable. Regulation 18 of the Regulations does not, when read as a whole, preclude that possibility in considering whether the test in section 7(1) is satisfied. The terms of the jobseeker's agreement are relevant to the consideration of the reasonableness of the steps taken or not taken by the claimant. I do not decide if the agreement is determinative of that issue.

41 I must now decide this case. I do so on the basis that Mrs K complied fully with the requirements imposed on her since the first jobseeker's agreement in January. She had attended another review and reached another agreement in February, and she had attended a review in April. The agreed terms in the February jobseeker's agreement were that the appellant did not have actively to take any individual steps to look for work or more work for the time being. She had found a part-time job for 12½ hours a week and

was working towards having that job extended. I have concluded that there was no valid termination or variation of the February agreement after the April review, although the opportunity arose for an employment officer to ask for one. There was medical evidence about the extent to which the appellant was working, and the employment officers were aware of this. The tribunal has concluded that the appellant was not available for work to any greater extent than she was actually working.

42 Against that context, I must decide in the terms of sections 1(2)(c) and 7(1) what steps the appellant was reasonably to be expected to have to take in order to have the best prospects of securing employment during April and May. In particular, was it reasonable in all the circumstances for Mrs K to take no steps in any week during this period? My conclusion as a matter of fact is that in these circumstances it was reasonable for her to take no steps as none had been asked for. This is not simply because of the terms of the February jobseeker's agreement, but also because of the absence of any change in that agreement following the review in April, the fact that the tribunal had decided the availability question in Mrs K's favour and that she had already actively found part-time work, the active participation of Mrs K's general practitioner in the process, and Mrs K's own willing participation in the reviews. In my view Mrs K had acted entirely reasonably during this period in doing what she was asked to do under the agreements and stating, on advice, what she felt her limits to be. I therefore determine the appeal in her favour on the issue of actively seeking work throughout the period under dispute.

The borderline between jobseeker's allowance and income support

43 In reality, I suspect that the set of circumstances that occurred here were not in the mind of those shaping the Act and Regulations. A better view might be that this claimant has fallen into a gap between the target of the provisions for jobseeker's allowance and the target of those for income support. This is a gap that was not intended to, and was assumed not to, exist. At the time of the agreement in February 2000, Mrs K was not expected to work 16 hours a week or more because of her health, nor was she available to work for more hours than she was working by reason of her health, nor, I have decided, was she expected actively to seek more work. So she falls outside the obvious focus of section 1 of the 1995 Act. In other words, this case may not be so much a case at the margins of the scope of jobseeker's allowance as beyond that scope. As Mrs K was working under 16 hours a week, she would have been regarded for income support purposes as "not engaged in remunerative work". As that was for accepted health reasons, she might then have met each of the primary conditions of section 124(1) of the Social Security Contributions and Benefits Act 1992 in its original form and the present problems would not have arisen. However, from the date on which jobseeker's allowance came into effect, a claimant for income support had to be within a category listed in Schedule 1A to the Income Support (General) Regulations 1987. Previously, Mrs K was in the category of lone parents. That stopped in January 2000. The only relevant category after that time was if she was "incapable of work". That test has not been applied to her. Perhaps it should have been, as it may be that the only work she was doing was on the advice of her general practitioner. But if it had been applied, and she was found capable of work, but yet not capable of any more work than the part time work she was actually doing, (or she was found to be working at work that was not

therapeutic) then she did not fit easily either into the current conditions for income support or the current conditions for jobseeker's allowance.

44 In these unusual circumstances the employment officer in February probably made the best of the circumstances by, in effect, disapplying the active requirements of section 1 of the 1995 Act pending a further review. If that was wrong on the facts in April, a remedy was available to employment officers following the April review. They should have used section 10. They chose not to do so. I do not consider it right to distort the whole framework of the Jobseekers Act 1995 and to render the status of a jobseeker's agreement nugatory in the way I am asked to do by the Secretary of State to allow the Secretary of State to step round that failure on the part of his officers and retrospectively to cancel, if only in part, the attempt by another officer to try fairly to accommodate Mrs K in a scheme into which she did not readily fit.

David Williams
Commissioner

10 May 2002

[Signed on the original on the date shown]