**SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS**

**Commissioner's File No.: CJSA/2375/2000**

# Starred Decision No: 46/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Mr Damien Abbott,*
*Office of the Social Security and Child Support Commissioners,*
*5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

**so as to arrive by 17th July 2001**

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

**Decision:**

1. My decision is as follows. It is given under section 14(8)(a)(i) of the Social Security Act 1998.

1.1 The decision of the Southampton appeal tribunal held on 25th January 2000 is erroneous in point of law.

1.2 Accordingly, I set it aside and, as I can do so without making fresh or further findings of fact, I give the decision that the tribunal should have given.

1.3 My decision is:

I confirm the decision of the appeal tribunal that the claimant should be disqualified from receiving payment of a jobseeker's allowance, but reduce the period of the disqualification from 4 weeks to 2 weeks.

**The appeal to the Commissioner**

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with my leave. The Secretary of State supports the appeal and invites me to give my own decision that is to the claimant's advantage, but does not give him all that he seeks.

**The sequence of events**

3. The sequence of events in this case is important.

*The first course - disqualification*

4. The claimant was receiving a jobseeker's allowance. He was directed to attend course 1. He did not attend on 4th August 1999. For that, he was disqualified from receiving jobseeker's allowance for 2 weeks. He appealed against that decision.

*The second course - disqualification*

5. He was then directed to attend course 2. He did not attend on the mornings of 18th and 19th August 1999. For that, he was disqualified for 4 weeks. He appealed against that decision.

*The first course - appeal*

6. His appeal against the decision on course 1 was allowed on 23rd November 1999 on the ground that he had good reason for not attending the course, as he was sick. The tribunal removed the disqualification.

*The second course - appeal*

7. His appeal against the decision on course 2 was heard on 25th January 2000. The tribunal confirmed the decision.

**Good cause**

8. The reasons given by the claimant for not attending were (a) that he was engaged in a library research and external job search that had been authorised by the trainers on the course and (b) that he had expected to attend the start of another course on one of those dates, but found that he had not been enrolled. The claimant did not attend the hearing of his appeal. The tribunal considered the case on the papers and rejected the claimant's explanations for his attendance.

9. On appeal to the Commissioner, the claimant writes that the tribunal overlooked evidence of his deafness and tinnitus that amounted to sickness and, therefore, showed good cause for not attending. The relevant legislation is regulation 73(2)(a) of the Jobseeker's Allowance Regulations 1996:

> '(2) ... a person is to be regarded as having good cause for any act or omission ... if, and to the extent that, the act or omission is attributable to any of the following:
>
> (a) the claimant in question was suffering from some disease or bodily or mental disablement on account of which-
>
> (i) he was not able to attend the relevant training scheme or employment programme in question;
>
> (ii) his attendance would have put at risk his health;
>
> (iii) his attendance would have put at risk the health of other persons'.

10. The tribunal was aware that the claimant had tinnitus. But the claimant had not put that forward as a reason for not attending the course. Indeed, the reasons he gave for being absent were not consistent with that argument. If he could not attend, he surely could not have carried out the activities he said he was doing in preference. Nor was there any evidence to suggest, let alone to show, that the claimant satisfied any of the conditions set out in regulation 73(2)(a). Tinnitus of itself does not satisfy those conditions.

11. The claimant also argues that the course was not suitable for him. The tribunal rejected the argument that that amounted to good cause. I assume that the claimant is referring to regulation 73(2B) of the 1996 Regulations. That does not apply in this case; it only applies if the claimant is a full-time student. Anyway, since the claimant did not attend for part of the course, he is not in a good position to know whether the parts that he missed were not suitable for him.

12. The claimant criticises the tribunal for basing its decision on his absence during an afternoon instead of during a morning. I find nothing to support that. Anyway, it makes no difference whether he failed to attend in the morning or in the afternoon. What matters is that he did not attend.

13. I find no error of law in either the tribunal's analysis of the evidence or its explanation of its reasoning on the facts. So, I accepted the tribunal's conclusions on the facts.

**Disqualification**

14. The claimant has made a number of criticisms of the procedure when the disqualification decision was given. He has also criticised events following the disqualification. Neither of those sets of complaints affects the validity of the disqualification decision. Nor do they show that the tribunal's decision was wrong in law.

15. The claimant has argued that he is entitled to the benefit of regulation 9 of the Social Security (New Deal Pilot) Regulations 1998. Under that regulation, a person who has already completed the period of intensive activity has good cause for not attending a further course. That regulation does not benefit the claimant in this case. It only applies to non-attendance once the period of intensive activity has come to an end. It does not apply retrospectively to remove the power to disqualify for non-attendance before the period came to an end.

*The effect of the removal of the 2 week disqualification*

16. The disqualification for 4 weeks was only authorised because of the previous disqualification for 2 weeks. At the date when the 4 week disqualification was made, there had been a disqualification for 2 weeks. But by the date of the hearing of the appeal, the earlier disqualification had been removed.

17. *What should the Secretary of State have done once the earlier disqualification had been removed?* The proper course of action was for the Secretary of State to revise the 4 week disqualification and reduce it to one of 2 weeks. That is authorised by regulation 3(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. This is an exception to the prohibition on revising to take account of a change of circumstances. That prohibition is in regulation 3(9) and only limits the scope of regulation 3(1) – the power to revise in this case is not in regulation 3(9), but in regulation 3(6).

18. *What would have happened to the appeal?* The basic rule is that an appeal lapses when the decision under appeal is revised: see section 9(6) of the Social Security Act 1998. There is an exception that applies if the decision as revised is more advantageous to the claimant that the original decision. The reduction of a period of disqualification produces a more advantageous decision: see regulation 30(2)(c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. So, the appeal would not have survived. But the claimant would have a fresh right to appeal against the revised decision.

19. Unfortunately, the proper course of action was not followed. The appeal tribunal confirmed the disqualification for 4 weeks. The tribunal's decision is now the operative decision, despite the fact that it is in the same terms as the Secretary of State's decision: see the decision of the Tribunal of Commissioners in R(I) 9/63, paragraph 19. There is no power for the Secretary of State to revise a decision of a tribunal. There is power to supersede a tribunal's decision. It may be superseded on a change of circumstances since the decision was made (regulation 6(2)(a)), but the change here occurred before the tribunal's decision, not after it. It may also be superseded for an error of fact (regulation 6(2)(c)), but in this case the tribunal did not make a mistake on the facts. The only possible error that the tribunal made is one of law and that is not a ground for supersession. So, it is now too late for the Secretary of State to take the removal of the first qualification into account.

**Was the tribunal's decision wrong in law?**

20. Yes, it must be.

21. There must be a way under the legislation that allows the removal of the first disqualification to be taken into account. There are two possibilities. The first possibility, is that the tribunal should have adjourned to allow the Secretary of State to revise the decision under appeal. The second possibility is that the tribunal should have taken into account the removal of the earlier disqualification. Those are the only possibilities that I can think of. One of them must be right. Whichever it is, the tribunal did not do it and that makes its decision wrong in law.

22. So, it is not necessary to identify which is the right one in order to show that the tribunal's decision was wrong in law. However, the issue is relevant to the decision that I can give. If the tribunal could have taken the change into account, I can give the decision that the tribunal should have given. If the tribunal could only have adjourned, I must refer the case for rehearing.

**Section 12(8)(b) of the Social Security Act 1998**

23. The tribunal did not say why it took no account of the removal of the earlier disqualification. I assume that it believed it was prevented from doing that by section 12(8)(b) of the Social Security Act 1998:

> '(8) In deciding an appeal under this section, an appeal tribunal-
>
> ...
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

24. In the original observations on the appeal, the Secretary of State invited me to give my own decision. However, the observations did not refer to this provision. I issued a Direction raising the issue. In response, the Secretary of State now submits that the provision prevents me, as it prevented the appeal tribunal, from taking account of the removal of the earlier disqualification. I confess that I find the Secretary of State's reasoning difficulty to follow.

25. Section 12(8)(b) is a difficult one to apply. I am not going to try to define either 'circumstances' or 'obtaining'. It is better for an understanding of the operation of this provision to emerge from the cumulative consideration of its application in different cases. I approach the application of the provision in this case like this.

26. Many decision made by the Secretary of State involve considering past events or past periods.

27. In some cases that period will include the date of decision. For example: a decision on a claim will seldom be made on the day it is received. The Secretary of State will have to consider the whole of the period from the date of claim down to the date of decision. The position (to use a neutral word) at the date of decision may not have applied throughout the whole of the period.

28. In other cases, the period considered will not include the date of decision. For example: a supersession of a decision to take account of a change of circumstances that was not reported by the claimant. In this example, the position at the date of decision may not have held true for any part of the period covered by the decision.

29. (The Secretary of State does not usually have to consider the future, because regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987 implies into an award that it conditional on the claimant continuing to satisfy the requirements for entitlement. There are cases in which the Secretary of State has to consider the future, but I am not here concerned with those cases.)

30. Clearly, section 12(8)(b) must be interpreted in a way that allows it to operate sensibly in cases where the Secretary of State has considered the position over a period as well as cases where only the day of decision has been considered. See my analysis in CDLA/4734/1999, paragraph 55 and my comment on recoverable overpayment decisions in CDLA/1212/1999, paragraph 17.

31. My conclusion is this. In a case like this, an appeal tribunal is entitled to take account of any factor known to it that relates to a past period or past event that was relevant to the decision under appeal, even if the position at the date of the hearing is different from that at the date of the decision. This gives section 12(8)(b) a sensible operation. It allows an appeal tribunal to substitute a decision on factors relevant to the period that the Secretary of State had considered. But it prevents the tribunal from trespassing into the period after that date by taking account of factors that are only relevant to that later period.

32. I repeat that I have not defined the words used in section 12(8)(b). I have simply tried to give them a sensible operation in circumstances like those involved in this case. I emphasise that I have been concerned in this decision with past periods or events. I have not been concerned with cases where the Secretary of State has had to speculate on the likely future course of events, such as the qualifying period for a disability living allowance, which I considered in CDLA/4734/1999.

**Summary**

33. As I have decided that the tribunal's decision is erroneous in law, I must set it aside. It is not necessary for me to direct a rehearing or to make further findings of fact, as I can give the decision which the tribunal should have given on its findings of fact. That decision is set out in paragraph 1.3.

**Signed on original**

**Edward Jacobs**
**Commissioner**
**23rd March 2001**