Bulletin 168
[SHnT]

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CJSA/2838/2001

JOBSEEKERS ACT 1995
SOCIAL SECURITY ACT 1998

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The applicant's appeal is allowed. The decision of the Maidstone appeal tribunal dated 22 March 2001 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute the decision on the applicant's appeal against the decision given on 30 August 2000 (Social Security Act 1998, section 14(8)(a)(ii)). My decision is that the applicant is entitled to a back to work bonus in accordance with regulation 7 of the Social Security (Back to Work Bonus) (No 2) Regulations 1996. My decision is limited to that issue, as explained in paragraph 15 below. It now remains for the Secretary of State to determine the amount payable.

2. This case is about the back to work bonus introduced under section 26 of the Jobseekers Act 1995. This is an unusual kind of benefit, with several special features of its own in the Social Security (Back to Work Bonus) (No 2) Regulations 1996 (the No 2 Regulations). In brief, there can be entitlement to a lump sum payment when a person who has been in receipt of jobseeker's allowance (JSA) or income support while working part-time for a sufficient period ceases to be entitled to benefit because of an increase in the hours worked or in earnings. That is the central case of entitlement, which is all that needs to be looked at in the present case. The bonus is then paid either as JSA or income support, according to which was the qualifying benefit.

3. Regulation 7(1) provides that a person who has served a waiting period is entitled to a bonus if one of the conditions in paragraphs (2) to (5) is satisfied. Paragraph (2) provides:

> "(2) The first condition is that--
>
> (a) he or his partner has or had earnings of which a part only has been disregarded in determining the amount of those earnings for the purposes of qualifying benefit;
>
> (b) he or his partner takes up or returns to or increases the number of hours in which in any week he or his partner is engaged in employment or the earnings from an employment in which he or his partner is engaged are increased (`the work condition'), and--
>
> (i) that employment results; or
>
> (ii) those earnings result; or
>
> (iii) the increase in the number of hours and an increase in earnings together result,
>
> in entitlement to a qualifying benefit (other than a partner's entitlement to a contribution-based jobseeker's allowance) in respect of himself, and where he has a partner, his family, ceasing;
>
> (c) he claims the bonus before the end of a period of 12 weeks immediately following the day in respect of which entitlement to the qualifying benefit ceased as mentioned in sub-paragraph (b); and

(d) in a case where the qualifying benefit to which the applicant was entitled--
(i) was income support, he has not attained the day before the age of 60; or
(ii) was a jobseeker's allowance, he has not attained the day before pensionable age,
at the time the work condition was satisfied."

4. In the present case, there was no dispute that the applicant satisfied sub-paragraphs (a), (b) and (d) of regulation 7(2). That was stated in the Secretary of State's written submission to the appeal tribunal. The applicant was 45 in July 2000. He had been in receipt of income-based JSA since 1999, apparently while having some part-time earnings taken into account in the calculation of the amount. Entitlement to JSA ceased after 11 May 2000 because from that date his earnings exceeded his applicable amount, although no more details are given in the papers. The applicant continued to sign on at the Jobcentre to get national insurance contributions credited. On 27 July 2000 he signed off because he was starting work on 31 July 2000. He was given a back to work bonus claim form at that stage and told that he would have to return it by 3 August 2000 to be within the 12 week limit.

5. The applicant signed the claim form on 28 July 2000 and it was received on 31 July 2000. On the form he ticked the box that he was claiming because he worked or was about to start work for 16 hours or more a week. The instruction on the form was then to go to 'about the employer' on the next page. The applicant filled in the details of his employer, a supply teachers' agency. The form instructed that the employer was to fill in an employer's declaration on the form if the applicant did not have any other written proof. That declaration was left blank, but the applicant included a copy of a letter dated 16 May 2000 from the employer. The letter welcomed the applicant and thanked him for accepting his first assignment, but gave no more details. On 11 August 2000 an officer of the Benefits Agency wrote to the applicant saying that he could not be paid a back to work bonus without confirmation that his job involved working 16 hours or more a week and returning the form for completion by the employer. On 16 August 2000 the applicant telephoned to say that he had not worked 16 hours or more for the employer since 11 May 2000 and would not have any more work available from them until the start of the autumn term.

6. A decision was then given on 30 August 2000 that the applicant was not entitled to a back to work bonus because he did not satisfy the requirements. He appealed, saying that in the week beginning 31 July 2000 he did 18 hours casual work on a farm and in the week beginning 14 August 2000 27 hours. The written submission to the appeal tribunal was that the applicant had not satisfied the condition in regulation 7(2)(c) of the No 2 Regulations because the claim was not fully completed within 12 weeks of the final payment of JSA.

7. The applicant opted for a paper hearing. The appeal tribunal on 22 March 2001 dismissed the appeal. It referred to regulation 22(3) and (4) of the No 2 Regulations:

"(3) If a claim is defective when it is received, the Secretary of State may refer the claim to the person making it and if the form is received properly completed within one month, or

such longer period as the Secretary of State may consider reasonable, from the date on which it is so referred, the Secretary of State may treat the claim a though it had been duly made in the first instance.

(4) A claim which is made on the form approved for the time being is, for the purposes of paragraph (3), properly completed if it is completed by the applicant in accordance with instructions on the form and defective if it is not."

The appeal tribunal concluded that, because the claim form had not been returned with the employer's declaration completed, neither the month nor any longer period could have been considered under regulation 22(3). No claim had been made to meet the condition in regulation 7(2)(c).

8. The applicant now appeals against that decision with my leave. When granting leave I made a suggestion that a claim might not be defective under regulation 22(3) and (4) if the part of the form uncompleted should have been filled in by an employer rather than the applicant. In the submission dated 30 November 2001 the representative of the Secretary of State accepted that suggestion and submitted that the appeal tribunal erred in law in treating the claim made on 31 July 2000 as defective.

9. I agree. The instructions on the claim form were that the employer had to fill in the employer's declaration. The applicant could not be said not to have properly completed the form by not filling in a part which he was instructed not to fill in. Therefore, the claim was not defective and there was no reason not to treat the claim as having been made on the date on which the form was initially received. A failure by an applicant to get the declaration filled in by an employer would, it seems to me, fall within regulation 22(5). This imposes a duty on an applicant to furnish such information, evidence etc in connection with the claim as may be required by the Secretary of State within one month or such longer period as considered reasonable. However, there is no sanction for a failure to comply with such a requirement, beyond the claim having to be determined without the information or evidence etc required (see R(IS) 4/93). And a failure to comply does not render the claim defective or affect the date on which it is to be treated as made.

10. I note in passing that no argument could be made that a Secretary of State's determination that a claim is defective cannot be challenged before an appeal tribunal. Although Schedule 2 to the Social Security and Child Support (Decisions and Appeals) Regulations 1999 prescribes many decisions of the Secretary of State under the Social Security (Claims and Payments) Regulations 1987 as decisions against which no appeal lies to an appeal tribunal, there is no mention there or in Schedule 2 to the Social Security Act 1998 of decisions under the No 2 Regulations.

11. A decision based on the above could have been given quite briefly. However, on looking at the case as a whole it seems to me that there has been a more fundamental error. The "work condition" in regulation 7(2)(b) is attached to what it is that has caused the applicant's entitlement to qualifying benefit to cease. And one of the causes which count is an increase in earnings. In the

present case, the applicant's entitlement to JSA came to an end on 11 May 2000 because of the increase in the amount of his earnings. As noted above, I do not have the details of those earnings, but it must have been accepted that the earnings for the week in question equalled or exceeded the applicant's applicable amount for a decision to have been given that he was no longer entitled to JSA. Thus at that point all the tests in regulation 7(2) were satisfied apart from that of making a claim within the 12 weeks specified. It did not matter if the earnings immediately went down again or that the applicant was not working for 16 hours a week, providing that he did not become entitled to qualifying benefit again before claiming.

12. The difficulty then arose from the applicant's not having been given a back to work bonus claim form at that stage. He was not given the form until he later "signed off". He then, quite reasonably, filled in the form on the circumstances as they were at the time. A person with a detailed understanding of the conditions of entitlement would not have ticked that he worked or was about to work for 16 hours or more a week, although that was true, but would have ticked a box below, to say that he was claiming because his benefit had stopped because of his pay increase. If that box was ticked, the form did not require an employer's declaration to be completed. But the form suggested that only one box should be ticked and the applicant may well have thought that the box which reflected the current circumstances was the right one. When the case was considered by an officer of the Benefits Agency, it should have been realised that the focus should be on what caused entitlement to JSA to cease on 11 May 2000 and that the 16 hour issue was a red herring. The evidence about earnings and the ending of entitlement was already available and known to the Benefits Agency. The appeal tribunal also erred in law in not considering the point arising on regulation 7(2)(b)(ii) and the effect on the question of whether a claim had been made within the prescribed time.

13. For those reasons, the appeal tribunal's decision was erroneous in point of law and must be set aside. The Secretary of State's representative submitted that the case should be referred to a new appeal tribunal to consider further qualifying conditions and matters of calculation. But that is unnecessary.

14. It was accepted and agreed on behalf of the Secretary of State before the appeal tribunal that sub-paragraphs (a), (b) and (d) of regulation 7(2) of the No 2 Regulations were satisfied. I have explained above that the satisfaction of sub-paragraph (b) rests on the ceasing of entitlement to JSA after 11 May 2000 as the result of the increase in the applicant's earnings. The submission dated 30 November 2001 on behalf of the Secretary of State, which I have accepted, entails that the claim form received on 31 July 2000 was not to be regarded as not properly completed and as defective by reason of the employer's declaration not having been filled in. Nor does the failure by the applicant to tick the "pay increase" box make the claim defective within regulation 22(4). The form was completed in accordance with the instructions. Even if that failure is regarded as a mistake it does not render the claim defective. Accordingly, the claim was made on 31 July 2000, within 12 weeks of 11 May 2000 and sub-paragraph (c) of regulation 7(2) is satisfied along with sub-paragraphs (a), (b) and (d). I can therefore give the decision that the applicant is entitled to a back to work bonus.

15. My decision is limited to the issue of entitlement under regulation 7 of the No. 2 Regulations. That was the issue raised by the appeal against the decision of 30 August 2000, and I consider that, when a Commissioner gives a decision under section 14(8)(b)(i) of the Social Security Act 1998, section 12(8)(a) applies. Thus I need not consider any issue not raised in the appeal. I conclude that I should not consider the issue of the calculation of the amount payable under regulation 8 of the No 2 Regulations. That issue depends on evidence of earnings during the bonus period, which I do not have. Accordingly, the issue of the amount payable remains to be determined by the Secretary of State. If the applicant disagrees with the decision on the amount payable, he will have a separate right of appeal against that decision.

(Signed) J Mesher
Commissioner

Date: 18 February 2002