Bullets 176
[Stuart]

CJSA/3523/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with the leave of the chairman, against a decision of the Doncaster Appeal Tribunal made on 14 May 2002. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in s.14(8)(a)(ii) of the Social Security Act 1998 I make the further finding of fact set out in paragraph 15 below and substitute the following decision for that of the Tribunal:

   The Claimant's appeal against the decision made on 6 November 2001 is allowed. The Claimant is entitled to jobseeker's allowance for the period from 23 October 2001 to 4 November 2001 (both dates included).

2. At the Claimant's request I held an oral hearing of this appeal at which the Claimant was represented by Mr. Christopher Berry of the North East Doncaster Citizens Advice Bureau and the Secretary of State by Miss Deborah Haywood of the Office of the Solicitor to the Departments of Health and Work and Pensions.

3. The Claimant had been in receipt of jobseeker's allowance from 2 April 2001. He was required to sign the jobseeker's register fortnightly on a Monday. On 24 September 2001 he was notified, under Reg. 23 of the Jobseeker's Allowance Regulations 1996 ("the 1996 Regulations"), that he was required to attend an interview at the JobCentre on 8 October 2001. However, he gave notice that he was unable to attend that interview because he had contracted chicken pox. The Employment Service computer records that on 8 October 2001 there was generated a letter to the Claimant notifying him of a fresh interview date on 25 October 2001. On 22 October 2001 the Claimant "signed on" as normal, but nothing appears to have been said then about his impending interview on 25 October 2001. The Claimant did not attend the interview on 25 October, and his claim was "closed" with effect from 23 October. On 5 November 2001 the Claimant attended in order to sign on, but was told that his claim had been closed. This was the first that he had heard of this. He reapplied for jobseeker's allowance and requested that his claim be backdated for the period 23 October 2001 to 4 November 2001. On 6 November 2001 a decision was made that his claim could not be backdated. The Claimant appealed.

4. Reg. 25(1)(a) of the 1996 Regulations provides that, subject to regulation 27, entitlement to a jobseeker's allowance shall cease if a claimant fails to attend on the day specified in a notification under regulation 23. Under regulation 27 entitlement shall not cease if the claimant shows, before the end of the fifth working day after the day on which he failed to comply with the notification under regulation 23, that he had good cause for the failure. The Claimant's ground of appeal was that he had never received the notification under regulation 23 (i.e. the letter dated 8 October 2001 requiring him to attend for interview on 25 October). However, he could not rely on regulation 27 because, although that non-receipt would have amounted to "good cause" for not attending, he had not shown that good cause within the 5 working days allowed. He said that he had had no opportunity to do so because by the time that he had discovered that his claim had been closed the 5 days had already passed. There is, however, no provision in the legislation which requires a claimant to be notified immediately that his entitlement has ceased under regulation 25.

5. The Tribunal found that none of the statutory grounds for backdating the Claimant's fresh claim were applicable, and in my judgment it was plainly right so to decide.

6. The Tribunal considered that the Claimant's appeal should also be treated as an appeal against the decision that entitlement under his previous award of jobseeker's allowance had ceased under Reg. 25 with effect from 22 October 2001. It was right to do so: see the analysis of Mr. Commissioner Jacobs in CJSA/2327/2001, which I gratefully adopt.

7. The Tribunal's decision on that part of the appeal was based on the footing that the provision governing the validity of the service of the letter dated 8 October 2001 was Reg. 2(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That has the effect, where it applies, that any notice or other document which is required to be "sent" shall "if sent by post to that person's last known address, be treated as having been ... sent on the day that it was posted." The Claimant sought to persuade the Tribunal that it should find that the letter dated 8 October 2001 notifying him of the interview had not been posted. The Tribunal, however, found as a fact that it had been posted. The Tribunal made no finding as to whether the Claimant had actually received the letter, because it considered that, the letter having been duly posted, Reg. 2(b) rendered the question whether he had actually received it irrelevant.

8. The Secretary of State accepts that the Tribunal's decision was wrong in law in that Reg. 2(b) of the 1999 Regulations was not applicable. By its terms it applies only to notices or other documents which are required to be given or sent by any provision of the Social Security Act 1998, the Child Support Act 1991 or the 1999 Regulations themselves. It does not apply to documents (such as the letter dated 8 October 2001) required or permitted to be sent under provisions of the 1996 Regulations.

9. Reg. 23 of the 1996 Regulations, under which the letter dated 8 October 2001 was sent, provides:

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

10. The governing provision relating to service by post of the letter dated 8 October 2001 was in my judgment s.7 of the Interpretation Act 1978 (which by virtue of s.23 of that Act applies equally to subordinate legislation). S.7 provides as follows:

> "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve", or the expression "give" or "send", or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

In my judgment it is clear that the fact that under Reg. 23 a notification may be "sent" to the claimant means that service by post is authorised, so that s.7 applies. The issue which now arises is whether s.7 of the 1978 Act, when applied to the word "sent" in Reg. 23, permits a claimant to prove non-receipt of a notification which is proved to have been

posted. In other words, is a notification "sent", within the meaning of Reg. 23, as construed in accordance with s.7, if it is posted but does not arrive? Looking first simply at the wording of s.7, without regard to authority, it is plain that the last part of the section, which deals with the time at which service is deemed to have been effected, expressly permits proof that the letter was in fact received at a different time. However, the earlier part, which appears to deal separately with whether service has been effected, contains no such express qualification, and arguably at least therefore does not permit proof that the document was not received at all. However it would seem very strange if the position were that, in the case of a document required to be served by a particular date, the addressee were permitted to prove that it was not in fact received until a later date (and so was not validly served), but yet were not permitted to prove (however conclusive the proof might be) that it was not in fact received at all. That difficulty has long troubled the courts.

11. In *R. v. London (County) Quarter Sessions Appeal Committee, ex parte Rossi* [1956] QB 682 Parker L.J., in a passage which has been relied upon in a number of subsequent cases, suggested that the effect of s. 26 of the Interpretation Act 1889 (the predecessor of s.7 of the 1978 Act) was as follows:

> "The section, it will be seen, is in two parts. The first part provides that the dispatch of a notice or other document in the manner laid down, shall be deemed to be service thereof. The second part provides that, unless the contrary is proved, that service is effected on the day when in the ordinary course of post the document would be delivered. This second part, therefore, dealing as it does with delivery, comes into play, and only comes into play, in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case "the contrary is proved", i.e. that the document was not received by that time *or at all,* then the position appears to be that, though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time." (My emphasis).

12. In that case the document which had not been received was a letter notifying the defendant of an adjourned hearing date. Parker L.J. went on to hold that the statutory provisions relating to the service of notice of hearing dates required the notice to be received in time to enable the recipient to prepare for the hearing, and therefore that it was open to the defendant to prove, notwithstanding the first part of s. 26 of the 1889 Act, that he had not in fact received the letter at all. I think that it is fair to say that the courts have been willing to rely on slight indications in the particular legislation under consideration that the time of receipt is important and that non-receipt (as well as late receipt) can therefore be proved.

13. In *Maltglade v. St. Albans RDC* [1972] 3 All ER 129, for example, a building preservation notice was posted by the council on 3 May but returned as undelivered. Meanwhile, however, the building owner demolished the building on 8 May. The owner was convicted of demolishing of a building in respect of which a building preservation order was in force. The relevant legislation provided that a building preservation notice should come into force as soon as it had been served on the owner of the building, and that notices under the relevant Act might be served by sending them in a registered prepaid letter. The Divisional Court quashed the conviction. Lord Widgery C.J., having cited the passage from *ex parte Rossi* which I set out above, said (at p.136):

"In my judgment this is a case in which one should regard the notice in question as being one which had to be received by a certain time. True it did not have to be received by a particular date on the calendar. But its effectiveness depended on it being received before the bulldozers came in, and actual demolition began. It seems to me, although I confess I find the authorities somewhat unsatisfactory, and the conclusion is not wholly logical, that we should follow *Rossi* in this case, and say that it was open to the alleged recipients of this notice to say that they had not been served in time, and once that door is opened, as I said before, it is permissible for them to say that in truth the notices were never served at all."

14. It seems to me that the same applies in the present case. The notice under Reg. 23 calling the Claimant for an interview on 25 October, in order to be effective, in my judgment had to be received by that date at the latest. I therefore think that a claimant who proved that the notice of interview in fact arrived after the date of the interview would be entitled to say that it had not been "sent" to him as required by Reg. 23, and therefore that he had not "failed to attend" the interview within Reg. 25(1)(a). His entitlement to benefit could therefore not be terminated under Reg. 25 even if he had not shown good cause within the 5 day period permitted by Reg. 27. If that is so, it follows, applying *Ex parte Rossi,* that a claimant is also permitted to prove non-receipt of the notification of the interview date.

15. If the conclusion in the present case were otherwise it would mean that, even in a case where non-delivery was conclusively proved (e.g. by the letter having been returned through the postal system as undelivered), service of the notification would be deemed to have been effected. Unless the claimant in such a case were to discover by some other means within the 5 day period allowed by Reg. 27 that he had missed the interview, he would also have no opportunity to establish "good cause" under that provision.

16. In the present case I find, on a balance of probability, that the Claimant did not in fact receive the letter dated 8 October 2001. There was evidence that he had attended at least one interview previously. He had responded to the previous notification on 24 September, saying that he had chicken pox. There is nothing in the history which suggests that he would have tried to evade his obligation to attend, had he been aware of it. The Claimant gave evidence of an orderly system in his household for dealing with mail when it arrives. I was also impressed with the straightforward way in which he briefly addressed me at the hearing at the invitation of his representative. This finding, combined with the Tribunal's finding that the letter was sent, amounts in effect to a finding that it was lost in the post. The vast majority of letters do not of course get lost, and in the absence of conclusive evidence (e.g. return of the letter as undelivered) fact finders will be very reluctant to make such a finding. But in the present case I do so.

17. It follows that I allow the appeal and make the decision set out in paragraph 1 above.

(Signed) Charles Turnbull
Commissioner

20 March 2003