Bulletin (7)
170 [5th]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CJSA/3869/99

Starred Decision No: 147/01

*Commissioners' decisions are identified by **case references** only, to preserve the privacy of individual claimants and other parties.*

***Starring** denotes only that the case is considered to be of general interest or importance. It does not confer any additional status over an unstarred decision.*

***Reported** decisions in the official series published by DSS are generally to be followed in preference to others, as selection for reporting implies that a decision carries the assent of at least a majority of Commissioners in Great Britain or in Northern Ireland as the case may be. Northern Ireland Commissioners' decisions are published by The Stationary Office as a separate series.*

*The practice about official reporting of Commissioners' decisions in **Great Britain** is explained in reported case R(I) 12/75 and a Practice Memorandum issued by the Chief Commissioner on 31 March 1987. The Chief Commissioner selects decisions for reporting after consultation with Commissioners. As noted in the memorandum there is also a general standing invitation to comment on the report-worthiness of any decision, whether or not starred for general circulation. However, a decision will not be selected for reporting if it is known that there is an appeal pending against it. The practice in **Northern Ireland** is similar, decisions being selected for reporting by the Northern Ireland Chief Commissioner.*

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

Ms Kimberli Jones,
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 6th March 2002

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is unsuccessful. I set aside the decision of the Workington social security appeal tribunal dated 17 February 1999 but I substitute a decision that, if the claimant had any underlying entitlement to jobseeker's allowance, the amount of jobseeker's allowance to which she was entitled from 24 October 1998 to 1 November 1998 was nil.

REASONS

2. I held an oral hearing of this case. The claimant did not appear and was not represented. The Secretary of State was represented by Mrs Jill Swainson of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions. I am very grateful to her for her helpful submissions.

3. The facts of this case are not in dispute. The claimant was employed from 1 September 1998 by a child care centre as a part-time trainer. Her salary was based on £15 per hour for a 12 hour working week during term time only. She was paid monthly and at the end of September 1998 she received £676.28 after deductions. She made a claim for contribution-based jobseeker's allowance in the autumn half-term holiday from 24 October 1998 to 1 November 1998 but was refused benefit on the ground that her income exceeded her applicable amount. She appealed, arguing that she was not an employed earner during the half-term and therefore her earnings were not to be taken into account as income. The Workington social security appeal tribunal decided that she was an employed earner during the holiday and dismissed her appeal. The claimant now appeals with the leave of a Commissioner.

4. By section 1(2)(e) of the Jobseekers Act 1995, it is a condition of entitlement to jobseeker's allowance that the claimant should not be engaged in remunerative work. By regulation 51 of the Jobseeker's Allowance Regulations 1996, remunerative work is work in which the claimant is engaged on average for not less than 16 hours per week. Regulation 51(2)(c) provides that the number of hours for which a person is engaged in work is to be determined –

> "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".

Thus the number of hours worked is calculated by looking only at the number of hours worked during term time. In *Banks v. Chief Adjudication Officer* [2001] UKHL 33, [2001] 1 W.L.R. 1411, the House of Lords held that, where a calculation under regulation 51(2)(c) showed that the claimant was engaged in work for at least 16 hours per week, the claimant was to be regarded as being engaged in remunerative work during the school holidays or similar vacations as well as during term time.

5. I will assume for the purposes of this appeal that the claimant in the present case was correctly regarded as being engaged in employment for only 12 hours a week during term-time, notwithstanding the fact that that figure represents only contact time with students and does not take any account of preparation time. It follows that she was not to be treated as being in remunerative work. However, had she been engaged in work for 16 hours a week or more during term time, regulation 51(2)(c) would have applied to her with the effect that she would have been treated as engaged in remunerative work during holidays as well. If the child care centre was neither a school nor some other educational establishment, it was "some other place of employment" and the claimant had a cycle of work consisting of a year with school holidays or similar vacations during which she did no work. The relevance of this will become apparent later in this decision.

6. The Jobseekers Act 1995 provides for both contribution-based jobseeker's allowance and income-based jobseeker's allowance. The claim in the present case was for contribution-based jobseeker's allowance. Although most forms of income are not relevant to entitlement to contribution-based jobseeker's allowance, a claimant's earnings are. By section 2(1)(c) of the 1995 Act, it is a condition of entitlement to contribution-based jobseeker's allowance that the claimant should "not have earnings in excess of the prescribed amount". Section 4(1) provides that the amount of contribution-based jobseeker's allowance is calculated by:

> "(a) determining the age-related amount applicable to him; and
>
> (b) making the prescribed deductions in respect of earnings and pension payments."

Section 4(2) provides for the age-related applicable amount to be determined in accordance with regulations. In this case, the age-related amount applicable to the claimant was £50.35, by virtue of regulation 79(1)(c) of the 1996 Regulations.

7. By regulation 56(1) of the 1996 Regulations,

> "[t]he prescribed amount of earnings for the purposes of section 2(1)(c) (the contribution-based conditions) shall be calculated by applying the formula –
>
> (A + D) – £0.01
>
> where –
>
> **A** is the age-related amount applicable to the claimant in accordance with section 4(2); and
>
> **D** is any amount disregarded from the claimant's earnings in accordance with regulation 99(2) (calculation of net earnings of employed earners) or regulation 101(2) (calculation of net profit of self-employed earners) and Schedule 6".

This has the effect of linking section 2(1)(c) with section 4(1) to the extent of making the age-related applicable amount relevant to both provisions. Furthermore, if D is

the amount disregarded from the claimant's earnings for the purpose of the deduction under section 4(2) and the "earnings" for the purpose of section 2(1)(c) are the same as those that would be deducted under section 4(1)(b) if no part of them was disregarded, there would be a further link because section 2(1)(c) would have the effect that any person whose amount of jobseeker's allowance would by virtue of section 4(1) be less than nil would not entitled to jobseeeker's allowance at all. That, however, is not necessarily what was intended because it might have been considered important – e.g. for the purposes of deciding when jobseeking periods can be linked – to enable a person to have an underlying entitlement to a benefit notwithstanding that the amount of earnings means that no benefit is in fact payable. A desire to keep that distinction may explain the extraordinarily convoluted drafting of regulation 56.

8. In any event, the question for the tribunal was whether the claimant had earnings relevant to either section 2(1)(c) or section 4(1)(b). That is not quite the same as the question posed by the adjudication officer because he or she considered what "income" the claimant had and regarded earnings as just a form of income. That is appropriate for income-based jobseeker's allowance but not contribution-based jobseeker's allowance. Nor was it the question considered by the tribunal because they considered whether or not the claimant was an employed earner in the week of her claim. It was not in issue that the claimant did have earnings and that those earnings were from employed earner's employment. The tribunal were plainly right to consider that the claimant's contract of employment subsisted during the half-term holiday but that was not the question they had to decide. The question posed by the legislation and by the facts of this case was whether any of the claimant's earnings fell to be attributed to the period in respect of which the claimant claimed. It is not as easy to find the answer to that question as one might have hoped.

9. Section 35(3) of the 1995 Act provides that:

> "[s]ubject to any regulations made for the purposes of this subsection, "earnings" is to be construed for the purposes of this Act in accordance with section 3 of the [Social Security Contributions and Benefits Act 1992] and paragraph 6 of Schedule 1 to this Act."

Paragraph 6 of Schedule 1 to the 1995 Act has no bearing on this case. Section 3(1)(a) of the 1992 Act provides simply that "'earnings' includes any remuneration or profit derived from an employment". Section 3(2) provides for the making of regulations for the computation of earnings for the purposes of the Parts I to V of that Act. The relevant regulations are the Social Security (Contributions) Regulations 1979 and the Social Security (Computation of Earnings) Regulations 1996. Both those sets of Regulations make provision for the attribution of earnings to particular periods. If the scope of Parts II and III of the latter Regulations is limited by the terms of regulation 3(1), as I think is intended, they do not apply for the purposes of Jobseeker's Allowance. Nor do the former Regulations. It is therefore necessary to look in the Jobseeker's Allowance Regulations 1996.

10. There is provision in Part VIII of the Jobseeker's Allowance Regulations 1996 for the calculation of earnings, but that is only in relation to calculating a person's "income" for the purposes of income-based jobseeker's allowance, save to the extent to which the provisions are expressly applied for the purposes of section 4(1)(b) by

regulation 80(1). There is nothing to show that those provisions are "made for the purposes" of section 35(3) generally or that they apply for the purposes of section 2(1)(c). It therefore appears that there is no statutory provision for attributing earnings to any particular period for the purposes of section 2(1)(c). That leaves entirely open the question whether, for those purposes, a person "does not have earnings in excess of the prescribed amount" in respect of a period when he or she does no work. I prefer not to express a view on this question because it was overlooked by me until after the oral hearing and because it does not matter for the purposes of the present claim whether or not the claimant had any underlying entitlement to jobseeker's allowance.

11. As I have indicated, regulation 80(1) of the Jobseeker's Allowance Regulations 1996 provides that:

> "[t]he deduction in respect of earnings which falls to be made in accordance with section 4(1)(b) from the amount which, apart from this regulation, would be payable by way of contribution-based jobseeker's allowance for any benefit week is an amount equal to the weekly amount of the claimant's earnings calculated in accordance with Part VIII (income and capital)."

The provisions of Part VIII are similar to provisions in the income support legislation in respect of which it has been held in R(IS) 10/95 that, where a person is paid monthly, the earnings are paid "in respect of" a month. The same approach must apply here. Therefore, by virtue of regulation 94(2)(a), the claimant's earnings for the purpose of the deduction under section 4(1)(b) were to be taken into account over a period of a month beginning with the first day of the benefit week in which the earnings were due to be paid.

12. However, regulation 99(2) of, and paragraph 2 of Schedule 6 to, the 1996 Regulations provide that there shall be disregarded:

> "[i]n the case of a claimant who, before the date of claim –
>
> (a) has been engaged in part-time employment as an employed earner ..., and
>
> (b) has ceased to be engaged in that employment, whether or not that employment has been terminated,
>
> any earnings in respect of that employment except earnings to which regulation 98(1)(b), (c), (d), (f), (ff) or (g) applies; but this paragraph shall not apply where the claimant has been suspended from his employment."

If the claimant was to be regarded as having ceased to be engaged in part-time employment during holidays without the employment being terminated, the consequence of paragraph 2 of Schedule 6 would be that, because the claimant's earnings did not fall within the exceptions, her earnings were to be disregarded for the purposes of any claim during the holidays.

13. Mrs Swainson submitted that the claimant had not ceased to be engaged in part-time work because she had an obligation to return to work at the end of the half-term holiday. I do not accept that submission. Paragraph 20 of Schedule 6 to the Jobseeker's Allowance Regulations 1996 provides that:

> "[i]n this Schedule 'part-time employment' means employment in which the claimant is not to be treated as engaged in remunerative work under regulation 52 or 53 (persons treated as engaged, or not engaged, in remunerative work)."

That paragraph is not well drafted but the reference to regulation 52 seems to me to make it plain that a person is to be regarded as engaged in part-time work in circumstances where he or she would be regarded as engaged in remunerative work if a greater number of hours per week were worked. Regulation 52(1) provides:

> "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".

That provision would be unnecessary if a person on holiday were to be regarded as engaged in remunerative work purely because there was an obligation to return to work. So, too, would be the reference in paragraph 2 of Schedule 6 to a person who is suspended from employment. Furthermore, Mrs Swainson's approach would mean that a person was engaged in work during periods of sickness apart from during holidays and that would be wholly inconsistent with the approach taken in relation to other income-related benefits. A person absent from work during a period of incapacity has always been eligible for income support or its predecessors. I regard it as being clear that, except where provision is made to the contrary, a person is engaged in remunerative work or part-time employment in a period only if actually working during that period.

14. Contrary provision is made in respect of holidays but it is unnecessary for me to decide whether school holidays can properly be regarded as holidays in respect of a part-time trainer like the present claimant. That is because the effect of *Banks v. Chief Adjudication Officer* is that a person is to be regarded as engaged in employment during the whole of a cycle of work to which regulation 51(2)(c) applies. During these proceedings, the Secretary of State for a long time maintained a stance that regulation 51 was concerned only with remunerative work and not with part-time work. However, at the hearing, Mrs Swainson resiled from that approach. I think she was right to do so. It would be odd if "engaged in ... employment" had a different meaning in paragraph 2 of Schedule 6 from the meaning it has in paragraph 1 (which provides for earnings to be disregarded where a person has ceased to be engaged in remunerative work) and I do not consider that paragraph 20 contemplates any overlap or gap between remunerative work and part-time employment.

15. It follows that the claimant in this case was to be treated as engaged in part-time employment during the school half-term in respect of which she claimed benefit. Therefore, the earnings that were attributable to that period did not fall to be disregarded under paragraph 2 of Schedule 6 to the Jobseeker's Allowance

Regulations 1996. The amount of those earnings, calculated as a weekly figure, greatly exceeded the age-related amount applicable to the claimant. Consequently, even if the claimant was not prevented by section 2(1)(c) of the Jobseekers Act 1995 from having an underlying entitlement to jobseeker's allowance during the half-term holiday in respect of which she claimed, the amount of benefit to which she was entitled under section 4(1) was nil.

16. The tribunal did not ask themselves the right question and I must therefore set aside their decision as being erroneous in point of law. However, I can substitute my own decision, which is to the same practical effect.

(signed) **M. ROWLAND**
Commissioner
23 November 2001