Bulletin 176

CSHeld

CJSA/3875/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Norwich Appeal Tribunal made on 28 May 2002. For the reasons set out below I dismiss the appeal.

2. The Tribunal's decision was to dismiss the Claimant's appeal against a decision, made on 28 December 2001, that the Claimant should be "sanctioned" in respect of (i.e. not entitled to) jobseeker's allowance for a period of 26 weeks (from 1 January 2002 to 1 July 2002) on the ground that he had failed without good cause to apply for a vacancy.

3. The Claimant is a man now aged 44. He had claimed (and been awarded) jobseeker's allowance from 6 March 1999. Immediately prior to that he had been employed for about 2 months by a charity collecting donations of stock, a position from which (according to the application form mentioned below) he had resigned when the employer would not pay him for "unavoidable overtime." His last employment before that had ended in June 1993.

4. At an advisory interview at the JobCentre on 22 October 2001 the Claimant was handed details (on a form ES12) of a vacancy as a parts delivery driver. This stated that an application form should be forwarded to the JobCentre by 18 October 2001, but also stated: "no closing date." The Claimant was handed an application form, and the written (p.1Q) evidence to the Tribunal of the interviewer was that he was told to return the completed form directly to the employer.

5. On that same day, 22 October, the Claimant completed and signed the form at home. He completed it in a manner which, as the Claimant accepted before the Tribunal and as the Tribunal found, could only have resulted in his application being rejected. For example, he gave no details of the schools which he had attended, but in the space for college or university attended wrote: "University of Life". The form required the names and addresses of two referees to be given, in response to which the Claimant wrote: "I can't think of anyone who would give an open, honest and unbiased reference! A sad reflection of human nature. .... No personal reference. I don't have any friends. As part of the underclass I am isolated from society. I do not socialise anywhere."

6. The Claimant did not send the form to the employer or to the JobCentre. On 12 November 2001 the vacancy was closed, having by then been filled. At his next full interview at the JobCentre on 19 November 2001 the Claimant was notified that the vacancy had closed, and was handed a form ES 195 on which to explain why he had failed to apply for it, which he completed on 20 November. Having considered that explanation, the decision maker made the decision under appeal to the Tribunal.

7. The Tribunal had before it evidence from the Claimant as to why he had not sent a properly completed form to the employer. That evidence was contained in (a) the ES 195 completed by the Claimant (b) detailed reasons which he put forward in support of an application to have the decision revised (pages 29 to 32)(that application was

refused on 21 January 2002) (c) his Appeal Form and (d) his oral evidence to the Tribunal.

8. The points variously made by the Claimant in that evidence can be summarised as follows:

   (1) That he was not told on 22 October to send the completed form to the employer, but rather assumed that it should (as stated on the ES 12) be returned to the JobCentre.

   (2) That when he returned home on 22 October he noticed that the ES 12 said that the application form should be forwarded by 18 October 2001, and telephoned the Jobcentre to ask for an explanation, but was simply told to send it in anyway (but without any more precise details being given as to where or when to send it).

   (3) That, being aware that there was no closing date for the vacancy, he did not think that there was any particular urgency in returning the completed application form. He therefore decided to wait until his next interview at the JobCentre on 5 November 2001 (which he had been told would be with a "Fastflow adviser" because his personal adviser would be absent) because he wanted to seek advice as to whether the manner in which he had completed it would be "allowable under JSA Rules" (p.13).

   (4) When he attended on 5 November 2001 the fastflow adviser did not have time to discuss the form with him, so he decided to wait until his next proper interview on 19 November 2001 (by which time, as I have said, the vacancy had been closed).

   (5) That he was entitled to complete the form in the manner he had, since he was merely being honest and trying to "convey the fact that, at the minimum wage being offered, if I was offered the job, I would feel no sense of being grateful or loyal, but rather would be resentful and demoralised and demotivated and would take a better paid job at the first opportunity." (p.13).

   (6) That he had previously been permitted to turn down a vacancy on the ground that the distance to travel was too great, and the distance in that case was less than in the case of the present vacancy.

9. By s.19(6)(c) of the Jobseekers Act 1995 ("the 1995 Act") a sanction may be imposed if a claimant "has, without good cause, after a situation in any employment has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him."

10. The Tribunal held that the Claimant did not have good cause for failing to apply for the vacancy.

11. The Tribunal's findings included the following:

(1) That the Claimant was told on 22 October 2001 to send the completed application form to the employer.

(2) That common sense dictated that, if there was no closing date, the sooner an application is made the better, and a reasonable person would have applied promptly knowing that with no closing date the vacancy would be closed as soon as a suitable candidate was found.

(3) That there was no reason why the Claimant should have needed to get any advice as to whether the manner in which he had completed the form was satisfactory. On the contrary, he had completed it "in such a way that no reasonable employer would be likely to employ him as a result."

12. The Claimant's grounds of appeal, and submissions in support of the appeal, essentially repeat at somewhat greater length the points which he had made to the Tribunal, which I have summarised in para. 8 above. An appeal to a Commissioner lies only if the Tribunal's decision was in some respect wrong in law. However, in my judgment the the Claimant is in this appeal seeking to dispute the Tribunal's findings of fact. In my judgment the Tribunal made no error of law in arriving at its decision on the issue of whether the Claimant had good cause for not applying for the vacancy. It set out its findings clearly and explained the reasons for them. It was on the evidence amply justified in reaching those findings.

13. The one point which the Claimant had made which the Tribunal did not specifically deal with was the point which I labelled (6) in para. 8 above. It is clear, however, that the Tribunal could not properly have decided that this amounted to "just cause" for not having applied for the vacancy. First, the Claimant had not mentioned this point at all in his ES 195 form on 20 November 2001. It was first mentioned in his application for a revision on 15 January 2002 (p.31, point 10). Secondly, by Reg. 72(b) of the Jobseekers Allowance Regulations 1996 ("the 1996 Regulations") travel time cannot be taken into account for this purpose unless that time is normally at least an hour each way. The Secretary of State's evidence to the Tribunal (p.1F, para. 38) was that travel by public transport would have taken 45 minutes each way.

14. At the time of giving permission to appeal I made clear that I did not consider that it was arguable that the Tribunal had erred in law in dealing with the issue of good cause, but that I was granting permission to appeal because it might be arguable that the Tribunal had erred in law in relation to the period of sanction. I now turn to that issue.

15. The Secretary of State, in opposing this appeal, submits that the Tribunal properly considered all the circumstances of the case and properly decided that the sanction should be the maximum one of 26 weeks.

16. In its Decision Notice the Tribunal said:

> "The period of sanction was approved and upheld by the Tribunal because it found that [the Claimant] had no good cause for the course of conduct he had adopted and

his method of applying for the job, had he sent it in would have been most unlikely to succeed as he himself acknowledged."

In its reasons it said:

> "The Tribunal found no good cause for the failure to apply for this vacancy and considered the sanction imposed correct because this application was indicative of [the Claimant] pursuing his own agenda; expressing himself so as to make employment unlikely and not behaving in a manner consistent with the Jobseeker's Agreement or the Jobseeker's Allowance rules."

17. By s.19(3) of the 1995 Act the period is to be such period (of at least 1 week but not more than 26 weeks) as may be determined by the Secretary of State. By Reg. 70 of the 1996 Regulations "in determining a period under section 19(3) ..... a decision maker shall take into account all the circumstances of the case and in particular, the following circumstances ....." None of the specified circumstances apply in this case.

18. I indicated when giving permission to appeal that the particular concerns which I had were whether the period of 26 weeks was one which no reasonable tribunal could have imposed, bearing in mind (a) that there was no evidence that the Claimant would have obtained the job, even if he had applied for it properly and (b) that there was no evidence of persistent misconduct in this respect.

19. It was said in a number of early decisions that the purpose of the sanction provisions is not to punish the claimant, but rather to protect the national insurance fund against claims by those who have brought about their unemployment through their own wrongful or unreasonable act: see e.g. the decision of the Umpire in U.D. 6279/33, para. 4. However, that does not mean that the decision maker is limited to considering factors related to the loss which the fund may be considered in fact to have suffered (which will in any case often be impossible to assess). There is no doubt that the degree of blame which attaches to the claimant's conduct can be taken into account. If it could not, there could be no difference, as regards period of sanction, between (for example) a case where a claimant failed to apply for a vacancy owing to mistake or forgetfulness and one where he did so deliberately. Yet it had been said in many cases before the 1995 Act, and was confirmed by a Tribunal of Commissioners in the leading case of R(U) 8/74, that considerations of that nature can be taken into account. That is now further confirmed by the inclusion (for the first time in the sanctions provisions) of the express provision in s.19(5) of the 1995 Act that all the circumstances are to be taken into account.

20. It in my judgment remains the position that the rationale of the sanctions provisions is to protect the national insurance fund. The justification, consistently with that rationale, for taking the seriousness (in the sense which I have just described) of the claimant's conduct into account is in my judgment that protection to the fund is provided partly by means of the deterrent effect of the sanctions provisions. The more blameworthy the conduct, the greater the deterrent that is needed. To that extent the sanctions regime does share a common rationale with penalties for criminal offences. That is in my judgment probably what the Tribunal of Commissioners had in mind when it said (in para. 16 of R(U) 8/74):

"We think that the references to disqualification not being a penalty may have been misunderstood. In the cases the subjects of U.D. 6279/33 and U.D. 98/28 referred to in it, which were both misconduct cases, the claimant had been convicted of a criminal offence and fined, and it was the circumstances of those offences that constituted the misconduct in each case. It was argued on behalf of the claimants that as they had been fined they ought not to be penalised further by being disqualified for the full period. It was in the course of explaining why this contention could not prevail that the word penalty was mentioned."

21. Nevertheless, the fact that the rationale is to protect the national insurance fund means that the loss which the fund would (if no sanction were imposed) suffer is, to the extent that any assessment of it can be made, also an important circumstance. That is confirmed by the fact that Reg. 70(a) expressly requires that, where the employment would have lasted less then 26 weeks, that is to be taken into account. That may in my judgment indicate a significant difference (other things being equal) between the sanction appropriate in cases under s.19(6)(c) where the claimant has merely failed to apply for a vacancy, on the one hand, and cases under s.19(6)(c)where he has failed to accept a vacancy when offered or cases under the other heads of s.19(6) (loss of employment through misconduct etc.), on the other hand. In the absence of specific evidence on the point a decision maker or tribunal will be unlikely to be able to assess the chances that, if he had applied for it, the claimant would have obtained the employment. If he would not have obtained it, the fund has not in fact suffered any loss at all, however reprehensible the claimant's conduct. That is not true in the case of a claimant who lost or left his employment.

22. In this case there was no evidence as to the likelihood that the Claimant would have obtained the employment, had he applied for it properly. Further, although the claimant mentioned that he had previously been sanctioned (albeit that this may have been reversed) there was no proper evidence before the tribunal of any previous default.

23. I have, nevertheless, come to the conclusion that the Tribunal's decision to uphold the decision imposing the maximum sanction was not erroneous in law. I am unable to say that it was a decision which no reasonable tribunal could have reached, and the Tribunal in my judgment adequately indicated the circumstances which it took into account. I have no doubt that the Tribunal would also have taken into account, as indeed it would have been required to do, the fact that the Claimant did as a result of the sanction become eligible for hardship payments under Part IX of the 1996 Regulations. As the Claimant himself had pointed out in evidence before the Tribunal (p. 13), his net loss as a result of the sanction was about £20 per week.

24. For the above reasons I conclude that the Tribunal's decision was not wrong in law and I must therefore dismiss this appeal.

(Signed) Charles Turnbull
Commissioner

3 March 2003