

Bulfinch 164

Cohen J

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CJSA/3979/99

Starred Decision No: 67/01

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(1) 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:

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 10th August 2001

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 allowed. The decision of the Reading social security appeal tribunal dated 9 April 1998 is erroneous in point of law, for the reasons given below, and I set it aside. The case is referred to an appeal tribunal constituted under the Social Security Act 1998 for determination in accordance with the directions given in paragraphs 28 to 31 below (Social Security Act 1998, section 14(8)(b)).

2. This case involves only a few weeks of benefit, now unfortunately quite a long time ago. However, it raises rather difficult issues of principle and it is perhaps not surprising that there have been confusions about the proper approach.

3. The claimant was in receipt of income support as an unemployed person. The latest decision on the award seems to have been made with effect from 13 April 1995 (page 8). In October 1996 that award was converted into an award of income-based jobseeker's allowance (JSA) from the first benefit week beginning on or after 7 October 1996 "and continuing until such time as he fails to satisfy, or in respect of which he ceases to be treated as satisfying, any condition of entitlement to a jobseeker's allowance" (Jobseeker's Allowance (Transitional Provisions) Regulations 1996, regulation 7(1)).

4. On 3 September 1997 the claimant was interviewed by an investigating officer of the Benefits Agency. At the interview he admitted that he had done work in the past which he had not declared and had most recently worked on a casual self-employed basis for a particular market research firm. He signed a statement to that effect. He also signed this declaration on page 19 of booklet ES40:

"I wish the last day of my JSA claim to be Wednesday 3.9.97"

In the box on page 18 headed "If your claim for JSA is stopping for some other reason please tell us why in the box below" was written:

"I no longer wish to sign, as I have been working".

5. There is some dispute whether the claimant attended the Jobcentre on 10 September 1997 or on 17 September 1997 and whether he was prevented from signing or did not sign because of confusion about the situation. What is clear is that he made a new claim for JSA on a form signed on 9 October 1997 in which it was expressly stated that he wished to claim from 3 October 1997. Benefit was awarded from that date.

6. A letter dated 11 September 1997 was sent to the claimant from the Jobcentre, headed "Your claim for Jobseeker's Allowance". The first two paragraphs are:

"We have looked at your claim again following a recent change.

I am sorry to tell you that we cannot pay Jobseeker's Allowance from 04/09/97. This is because:

you do not want to claim Jobseeker's Allowance any more."

This letter was not part of the documents supplied to the social security appeal tribunal (SSAT). The first page was produced as part of the application for leave to appeal to the Commissioner, but no more. Thus I do not know who signed the letter in what capacity and whether any adjudication officer's decision was attached.

7. In a letter dated 30 October 1997 from Basingstoke Citizens Advice Bureau (the CAB) an appeal was made "against your decision that [the claimant] was not entitled to JSA from 4/9/97 because he did not want to claim JSA any more". It was said that during the interview on 3 September 1997 the investigating officer "stopped his benefit even though he had told her he was unemployed at the time, and had no other source of income". By this time an overpayment decision had been issued for the period from 2 June 1995 to 13 August 1997. Information dated 5 September 1997 from the market research company showed the last date of work as 27 July 1997.

8. The appeal was treated as an appeal against an adjudication officer's decision issued on 11 September 1997. On the form AT2 the decision was set out as follows:

"[The claimant] is not entitled to Jobseekers Allowance from 4.9.97 to 2.10.97 as he does not satisfy the conditions of entitlement."

The adjudication officer's written submission on the form AT2 was that no claim for benefit existed for that period, as the previous claim was brought to an end by the claimant's statement of withdrawal on 3 September 1997. There was also a mention of having failed to attend the Jobcentre to sign on, but the basis of the submission was the absence of a claim.

9. The claimant attended the SSAT hearing on 9 April 1998 with a representative from the CAB and gave evidence. The investigating officer also gave evidence. According to the chairman's note of evidence the claimant's evidence was that at the interview on 3 September 1997 he was told before he signed the statement and declaration that if he continued to sign on, more investigations would be made, but that if he signed off there would be no investigations. The officer's evidence was that she had invited the claimant to consider whether to continue signing on. The notes made by the CAB representative after the hearing suggest that the evidence went further. The notes are that the officer's evidence was that she had suggested that the claimant should sign off because he had admitted to working for other companies before the most recent market research company and if he continued to claim she would have had to investigate those as well. The representative's notes also included that the officer had said that she had not asked the claimant whether he was working at the time of the interview, but that the adjudication officer on review had assumed that he was.

10. The SSAT disallowed the appeal. Its decision on the decision notice was:

"[The claimant] is not entitled to JSA from 4.9.97 to 2.10.97 as he does not satisfy the conditions of entitlement."

The summary of grounds was as follows:

"Having read all the documents and given full consideration to the oral evidence bearing in mind his age, education, work experience and knowledge of the system we find nothing to contradict the AO's decision."

No full statement of findings of fact and reasons has been produced, as the requests from the adjudication officer and the CAB were made outside the 21-day limit.

11. The CAB applied for leave to appeal on the claimant's behalf, on the grounds that his withdrawal of his claim was invalid as it was made under duress and based on incorrect advice from the investigating officer and that the adjudication officer's decision might have been different if he had not wrongly assumed that the claimant was working at the time of the interview. I granted leave to appeal on 14 September 2000, after having considered written submissions which I had directed.

12. The representative of the Secretary of State, in the submissions dated 14 April 2000 and 18 October 2000, supports the claimant's appeal. The main point of substance was put this way in paragraph 8 of the submission of 14 April 2000:

"8. In my submission, the tribunal has erred in law in upholding the adjudication officer's decision that the award previously subsisting in the claimant's favour fell to be terminated from 4.9.97 on the ground that the claimant had said that he no longer wished to claim. A claim cannot be withdrawn once it has been adjudicated on: see regulation 5(2) of the [Social Security (Claims and Payments) Regulations 1987], R(U) 2/79 (paragraph 10), and R(U) 7/83 (paragraph 7). Furthermore, in my submission, it is not possible for a claim that has been treated as made for an indefinite period to be converted to a definite period claim for the purposes of regulation 17(3) of the Claims and Payments Regulations. The scope of a claim is established at the outset of a claim (R(IS) 8/95, Appendix, paragraph 4) and cannot be altered retrospectively by subsequent events; rather relevant changes of circumstances after an award is made fall to be dealt with by way of review under sections 25(1)(b) or (c) of the [Social Security Administration Act 1992]. In following the adjudication officer's decision, the tribunal has applied a false proposition of law."

13. In the submission dated 18 October 2000, in answer to some questions which I had posed when granting leave to appeal, the Secretary of State's representative maintained the view that a statement that the claimant no longer wished to claim was not a change which ended entitlement without a review. It was also submitted that this was not a relevant change of circumstances because it did not in itself raise any question about the claimant's entitlement to benefit. There would have to be some evidence that some condition of entitlement was not, or was not going to be, satisfied. On the failure to sign on, attention was drawn to the specific provisions in regulations 23 to 30 of the Jobseeker's Allowance Regulations 1996 (the JSA

Regulations), but it was submitted that where a claimant stated in advance that he was not going to sign on it could be anticipated that good cause for not signing on would be not shown under regulation 27. Review could then be justified under section 25(1)(c) of the Social Security Administration Act 1992. It was submitted that the case should be remitted to a new appeal tribunal for rehearing on the question of whether the conditions of entitlement for JSA were satisfied from 4 September 1997, as there could be further review under section 25(5)(b) if the anticipated change of circumstances did not occur.

14. The CAB in reply submitted that the anticipated change of circumstances ground could not apply to displace the specific provisions in the JSA Regulations. It was submitted that there were no grounds to terminate the claimant's JSA claim and no mechanism by which the claim could legitimately have been terminated.

15. I cannot accept the submissions of either party. Before I explain why not, I should state briefly where I agree with the Secretary of State that the SSAT went wrong in law.

16. The decision notified on 14 September 1997 could not possibly have been in the form set out on form AT2. An adjudication officer on that date could not possibly have known that the claimant was going to make a new claim for JSA with effect from 3 October 1997. I have no doubt that, as was submitted for the Secretary of State, what was written on form AT2 was a "reconstruction" from computer records. Since, when the submission was written, it was known that the period in issue ended on 2 October 1997, that was mistakenly added to the decision. The practice of reconstructing decisions (and, even worse, "improving" them) in the drafting of written submissions to appeal tribunals is wrong and should stop. One of its consequences is that there are dangers in appeal tribunals confirming or adopting an adjudication officer's or a decision-maker's decision, when what is written on the AT2 may not be the same as what was actually decided. In the present case, since the SSAT set out the terms of its own decision separately, and there was no doubt about the period in issue on the appeal, I would not find an error of law in leaving it unclear which of a number of decisions had been adopted. However, as a matter of good practice appeal tribunals should investigate the circumstances where there is a suspicion that the decision under appeal has not been accurately reproduced in the documents.

17. Where the SSAT did go wrong was in resting its decision on the non-satisfaction of the conditions of entitlement to JSA. There was perhaps some confusion in the written submission to the SSAT about whether the withdrawal of the claim was said to operate independently of any consideration of the conditions of entitlement set out in the specific JSA legislation. Nor was there any attempt in that submission to grapple with the question of whether entitlement could be brought to an end without the identification of a ground of review. The SSAT's decision did not resolve the confusion and did not (in a situation where the point was in doubt) identify the legal basis of the decision which it made. That was an error of law which requires the setting aside of its decision.

18. I am satisfied that that error can be identified in the absence of a full statement of findings of fact and reasons. Where there is no such statement, a Commissioner cannot consider the adequacy of findings of fact or reasons, since there was no obligation on a

chairman to supply an adequate statement on the decision notice. However, in the present case there was a more fundamental failure to identify a legal basis for the decision made by the SSAT.

19. I can now turn to the main points in the submissions on behalf of the Secretary of State. There is obviously force in the submission quoted in paragraph 12 above. Regulation 5(2) of the Claims and Payments Regulations does indeed provide that a person may withdraw a claim at any time before a determination has been made on it, and paragraph (1) provides that a claim can be amended under the same condition. The provision about withdrawal did not appear in the previous form (1979) of the Claims and Payments Regulations applying to contributory benefits. It appeared for the first time in the 1987 Regulations. In Commissioners' decisions R(U) 2/79 and R(U) 7/83 it had been held that, in accordance with basic legal principles, a claim for benefit could not be withdrawn once it had been adjudicated on, at least in the circumstances of those cases (see the careful statement in paragraph 10 of R(U) 2/79, quoted below). That general rule must be accepted, but its limits must also be established.

20. In R(U) 2/79 the claimant claimed unemployment benefit on 8 December 1995. On 11 February 1996 a decision was made that he was not entitled for the period from 8 December 1995 to 4 February 1996 as he did not satisfy the contribution conditions. On a further claim on 3 May 1976 the claimant did satisfy the contribution conditions, but a question arose as to his entitlement to earnings-related supplement. If he was treated as having made a claim for benefit in respect of days before 5 January 1976 he was not entitled to the supplement. The Commissioner held that "a person such as the claimant in the present case" was not entitled in his appeal to the Commissioner to withdraw his claim for the period from 8 December 1975 to 4 February 1976.

21. In R(U) 7/83 the claimant made a late claim for unemployment benefit for the period from 1 July 1980 to 5 August 1981 as well as for a forward period from 6 August 1981. An appeal tribunal found good cause back to 1 January 1981. Since that date fell within the benefit year starting on 6 January 1980, the relevant contribution year was April 1978/April 1979, in which the claimant did not satisfy the contribution conditions. She appealed to the Commissioner seeking to have the period of good cause reduced. The Commissioner held that that was an abuse of the appellate procedure:

"[H]aving made a claim for a specific period and having had that particular claim adjudicated on, it was not open to her to withdraw it (R(U) 2/79) and substitute for it another period altogether."

Nor could she achieve that result indirectly by appealing against a decision which was favourable to her and asking for a less favourable decision.

22. There is no reason to doubt the results of both those decisions. Where the claimant was seeking, after a decision had been made, to withdraw a claim for a period before the date of the decision, basic legal principles would point against allowing such a withdrawal. But that does not necessarily apply where a claimant seeks to withdraw a claim prospectively, not

retrospectively, or to put it another way, seeks to withdraw a future period from the claim. That was the approach adopted by the Tribunal of Commissioners in paragraph 11 of its decision in R(S) 1/83. The Tribunal was concerned with cases where an open-ended claim had been disallowed and the decision was under appeal. It held that the submission of a new claim in such a period did not automatically terminate the running of the original claim, but that that could happen in certain circumstances. Thus where:

"there has been no adjudication under the original claim upon the period covered by the new claim, the termination of the running of the original claim could be regarded as effected by the withdrawal, express or implied, of that period of claim from the original claim."

23. That approach gives rise to no difficulties in the circumstances the Tribunal of Commissioners was considering. Although the original claim had been adjudicated on, the disallowing decision would cover only the period from the date of claim down to the date of the decision. Thus, there was nothing in the principle against the existence of two decisions for overlapping periods (see R(I) 9/63) to prevent a new claim being made and the period of the new claim being withdrawn from the original claim. To that extent, there is a qualification to the principle laid down in R(U) 2/79 and R(U) 7/83. But can a similar qualification apply where there has been an award of benefit for an indefinite period?

24. I accept that the nature of the original claim sets the nature of the award, as I said in decision R(IS) 8/95. If the original claim is for an indefinite period, so that the award is for an indefinite period, I do not think that the claim can later be converted into one for a definite period. The original claim cannot be unmade or amended. If the running of the award was to be stopped it had, by virtue of section 60(1) of the Social Security Administration Act 1992, to be by the operation of the provisions on the review of decisions (although the result may not be the same under the new regime of the Social Security Act 1998 in cases of relevant changes of circumstances: see CI/1132/2000). However, it does not necessarily follow from that that a claim cannot be withdrawn for a prospective period even though there is a current indefinite award. In a sense there has already been an adjudication on that period, through the making of the indefinite award, but only in a fairly technical sense. If a claimant unequivocally says that he wishes his claim to stop at the current date or that he wishes to withdraw his claim for the future, why should that not be given effect? Some regard should be had for the autonomy of claimants. If a claimant freely chooses to renounce a claim for the future (I come back to freedom of choice below), does that not remove the basis for the continuance of the award of benefit? I conclude that even where there is a current award of benefit, a claimant may withdraw a claim on a prospective basis.

25. The nature of an existing award on an indefinite basis (or a definite award extending into the future) and the finality of the decision making that award have importance at the next stage. In my judgment, under the Social Security Administration Act 1992 regime, such an award could not be brought to an end automatically by a prospective withdrawal of the claim. There is too much danger of abuse for such an approach to be adopted. There had to be some formal and proper mechanism to bring the existing award to an end. The only mechanism available was that of review. However, it seems to me that a withdrawal of a claim for the

future (once that is accepted as legally permissible) is a relevant change of circumstances within section 25(1)(b) of the Social Security Administration Act 1992, because the basis on which any award of benefit has been removed. I reject the submission to the contrary for the Secretary of State. And if that ground of review is made out, revision of the decision making the award has to follow. The particular advantages of requiring a revision on review to bring the existing award of benefit to an end are that there had to be a decision of an adjudication officer against which the claimant had a right of appeal and that on such an appeal the question of whether there had in fact been a genuine withdrawal of the claim could be examined.

26. In approaching that last question, the first task would be to construe the words which are said to constitute a withdrawal of a claim. There may be circumstances in which the words used do not, properly construed, constitute a withdrawal or an expression of intention to bring a claim to an end. However, in the present case, the words used were unequivocal. It must therefore be asked whether there is any factor which deprives what on its face is a withdrawal of the claim of its apparent effect. Such a conclusion could not be reached lightly. The sort of factors which I have in mind would include the inducement of the withdrawal of the claim by fraud, misrepresentation of fact or law, or duress. I have not had any submissions on this point and it would be wrong for me to attempt to lay down any precise or exhaustive rules. The factors mentioned above are only examples and other factors may be relevant in other circumstances (eg most obviously in cases where claimants are vulnerable for some reason or not fully capable of dealing with their affairs). The essence, in my judgment, is that an ostensible withdrawal of a claim should not be given effect where it would be wrong for it to be treated as a genuine expression of the claimant's intention at the time. Nothing which I say below should be taken as detracting from that central principle or from the need to consider each case on its own circumstances.

27. I should though, subject to that qualification, give some general guidance to the new appeal tribunal which will have to conduct a rehearing. Since I have stressed the general principle involved, I have refrained from any analysis of the meaning of any particular factors, or reference to concepts from other areas of law. I have specifically mentioned misrepresentations of law, because it seems to me that it might be wrong to give effect to a withdrawal of a claim induced by a representation that past concealment of material facts by a claimant means that there can be no current entitlement to benefit. And the notion of duress can extend beyond physical threats or pressure to include illegitimate threats of other kinds, but it will be a matter of judgment when such threats are sufficient to undermine the genuineness of the claimant's expression of intention. In some circumstances, an important line may need to be drawn between passivity or omission by another person (eg in omitting to correct a mistaken impression formed by a claimant) and positive acts such as the making of misrepresentations or threats. It must also be the case that the mere realisation by a claimant after the event that he has acted unwisely will fall a long way short of showing that a withdrawal of a claim is not to be given effect.

The Commissioner's decision and directions to the new appeal tribunal

28. For the reason given in paragraph 17 above, the SSAT's decision of 9 April 1998 must be set aside as erroneous in point of law. I have concluded that I cannot substitute a decision

because there are issues of fact still to be decided on which it is fair to give the parties the opportunities to put forward further evidence and submissions. Accordingly, I refer the case to an appeal tribunal constituted under the Social Security Act 1998 and regulation 36(6) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 for determination in accordance with the directions below. No-one who was a member of the SSAT of 9 April 1998 is to be a member of the new appeal tribunal. The new appeal tribunal will not be bound in any way by any findings made or conclusions expressed by the SSAT of 9 April 1998.

29. The new appeal tribunal must first determine whether the decision notified in the letter dated 14 September 1997 was made by an adjudication officer. The Secretary of State should provide to the new appeal tribunal the best evidence available on that issue, if possible including a full copy of that letter. If that is not produced, then the claimant or the CAB should produce a full copy if it is available. If it emerges that there was no decision by an adjudication officer, but rather a notification of administrative action on behalf of the Secretary of State, there will be nothing against which a valid appeal could be before the new appeal tribunal. But by the same token there will have been no decision validly bringing the indefinite award of JSA to an end on 3 September 1997. If the Secretary of State then did not wish to make payment for the period from 4 September 1997 to 2 October 1997, he would need to take action to supersede the existing decision under the powers available under the Social Security Act 1998.

30. If there was a decision of an adjudication officer notified on 14 September 1997, the new appeal tribunal must address the issues of review and revision, adopting the approach set out in paragraphs 24 to 27 above. The new appeal tribunal will need to make clear findings of fact as to exactly what happened and was said at the interview on 3 September 1997. If it were to be found that the investigating officer went no further than inviting the claimant to consider whether to continue signing on, it would be difficult to find any factor vitiating the withdrawal of the claim. If it were to be found that the investigating officer had given the claimant the alternatives that he described in his evidence to the SSAT of 9 April 1998, then the new appeal tribunal would need to consider whether there was such a factor. These are of course not the only two factual possibilities and the new appeal tribunal must consider all the evidence and all its relevant findings of fact.

31. If the new appeal tribunal concludes that the claimant did withdraw his claim for JSA on 3 September 1997, then it may revise the existing decision in relation to the period from 4 September 1997 to 2 October 1997. If the new appeal tribunal concludes that the claim was not to be treated as having been withdrawn, there cannot be review and revision on that basis. But it will have to go on and consider the questions of whether the claimant failed to attend the Jobcentre on a day specified in a notice under regulation 23 of the JSA Regulations and whether entitlement therefore ceased on some date before 2 October 1997 under the provisions of regulations 25 to 30.

(Signed) J Mesher
Commissioner
Date: 21 May 2001