Remitted

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSIB/973/99

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

ORAL HEARING

Appellant: [redacted]

Respondent: [redacted]

Tribunal: [redacted]

Tribunal Case No: [redacted]

57196
(4-2)

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the appeal tribunal given at Glasgow on 29 September 1998 is erroneous upon a point of law. I set it aside. I make the decision that the tribunal ought to have made that is that the decision of 4 October 1995 should have carried out a review of the transitional award awarding incapacity benefit on a change of circumstances that being that the claimant has been assessed for and satisfied the all work test and was incapable of work from and including 4 October 1995. Thereafter the decision of 4 October 1995 is reviewed upon a change of circumstances namely that the decision of 4 October 1995 awarded benefit for days after the date of claim and the requirements for entitlement are not satisfied. The relevant change of circumstances since the decision was given was that the claimant was capable of work from and including 6 August 1997. The revised decision from and including 6 August 1997 is that the claimant is not entitled to incapacity benefit. There has been a change of circumstances. He no longer satisfies the all work test and is capable of work from and including 6 August 1997.

2. This case came before me for an oral hearing on 18 May 2000. The claimant was represented by Mr Orr, a Welfare Rights Officer with the City of Glasgow Council. The claimant was represented by Miss McLaughlin, Advocate instructed by Miss Ferrier of the Office of the Solicitor to the Advocate General.

3. The claimant appealed against the decision of the tribunal made on 29 September 1998. That dismissed his appeal against the decision of the adjudication officer dated 6 August 1997. The decision of the adjudication officer of that date was confirmed. His decision is recorded at pages 52Q and 52R of the bundle.

4. It was accepted by both parties to the appeal that there was a technical error in law on the part of the decision of the tribunal. That was because the tribunal did not carry out their own review along the lines set out by Mr Commissioner QC in CSIB/401/99. Both parties were agreed that if I otherwise did not find the tribunal's decision to be erroneous in law the decision that the tribunal ought to have given was along the lines set out in the substituted decision I have given in paragraph 1. It will be seen from my decision in paragraph 1 that I did not consider that the tribunal otherwise erred in law. The grounds upon which it was asserted that the tribunal erred in law by Mr Orr and the basis for my rejection of these submissions are set out below.

5. The claimant's grounds of appeal is set out at page 87. I will deal with the second ground of appeal first. That was as follows:-

> "ii) The Tribunal have applied the wrong test in respect of hearing. There is no requirement that there be evidence to support what the claimant said (R(SB)33/85). The Tribunal have not raised any question as to the claimants credibility on this matter.....And from the record of proceedings, this point seems not to have been put to the claimant at the hearing. In addition, of course this contradiction between what is in the questionnaire and what might be said at the hearing has to be seen in the light of facts that the questionnaire was filled in on 12/05/97, but the hearing did not take place until 29/09/98."

In respect of the activity of hearing the tribunal dealt with this in their statement of facts and reasons as follows:-

> "11. Hearing – no significant limitation. The appellant claimed to have a hearing difficulty at the tribunal hearing however there was no evidence to support this and no reference to such a difficulty or any investigation or treatment from his GP. The appellant had not claimed to have a difficulty with hearing in either questionnaire."

The claimant's evidence in respect of hearing given orally before the tribunal was as follows:-

> "Hearing – sometimes not good. If talking – don't catch everything.
>
> on street
>
> need to be quite close – if standing back – might not. Had them cleaned out couple o times – wax."

6. It is clear from what the tribunal said that they did not accept the claimant's evidence given at the tribunal hearing in this regard. That was within their province and they have set out a reasoned basis for their rejection of that evidence. Mr Orr submitted that the tribunal failed to take into account all the evidence in respect of hearing which was before them. He referred me to page 21 which was the incapacity for work questionnaire. In that questionnaire the claimant indicated that he did not normally wear a hearing aid or some similar device. He also did not indicate on that form that any of the points scoring descriptors applied to him. He did however say:-

> "My hearing is not 100%. I have to ask people to repeat sometimes."

It was also said that the tribunal did not take into account the evidence at page 41 where the claimant said:-

> "Occasionally finds his hearing might be affected."

However it is significant that the examining medical practitioner noted that the claimant had no hearing aid was not referred to ENT, had no apparent difficulty at interview. He also noted:-

> "Review – windows open – noise of traffic claimant able to..... from required distance."

The examining medical practitioner noted that there was no confirmation of hearing disability and this was not obvious clinically today. It will also be noted that the claimant's general practitioner provided a report in relation to the claimant which was dated 11 September 1998. The general practitioner noted that the claimant is appealing against the decision to find him fit for work and indicates that he had been asked to provide a medical report detailing his current state of health. There is nothing in that report in relation to the activity of hearing.

7. It was Mr Orr's submission that the claimant's assertion was that descriptor 11(e) applied to the claimant. However I do not consider that the evidence by the claimant referred to at pages 21 for 41 gives support to the satisfaction of that descriptor. The only evidence in support is that contained in the record of proceedings to which I have referred and for reasons set out above the tribunal gave a reasoned basis for not accepting it. Thus I can see no fault with the tribunal's decision in respect of their treatment of this activity and do not consider that they erred in law. It will be noted that the Secretary of State did not support this aspect of the appeal.

8. In relation to facts and reasons Mr Orr both in a supplementary written ground of appeal and in a submission to me at the hearing asserted that the tribunal also err in law in their treatment of the sum of the mental health descriptors. In the written grounds of appeal it is said:-

> "I would add in addition that the Tribunal have erred in law n [sic] respect of completion of tasks by appearing to take the view that reliably taking a message includes writing it down to remember it.
>
> I would suggest that the use of something other that [sic] memory would count as an aid, which is not specifically indicated in either the activity or the descriptor. Given the general scheme of the regulations, should not therefore be allowed to be taken into account."

It was also submitted before me that the tribunal did not deal with or did not deal with adequately descriptors 15(b), 15(e), 15(f) and 17(a). These grounds of appeal were not supported by the Secretary of State. It should further be noted that in respect of these descriptors if the tribunal had made an award in respect of them the total points score would have been four which given with the two awarded by the tribunal would have made six. Standing my view that the tribunal did not err in law in relation to the activity of hearing even if any error in law was established it would have made no difference to the result.

9. In respect of descriptor 15(a) what the tribunal said was:-

> "a. The appellant claimed to be unable to answer the telephone and reliably take a message. This claim did not appear to be consistent with the claim that he was compulsive and obsessive and the appellant did confirm that he would write a message down if he wanted to remember it."

I do not consider that there is any merit in the written ground of appeal as the descriptor is related to answering the telephone and taking a message. Whether for the purposes of remembering it the claimant actually wrote it down does not affect the ability to perform the descriptor. Further as Miss McLaughlin pointed out it is quite clear that the claimant told the BAMS doctor that he used the telephone regularly. That can be seen at page 45. In his oral submission Mr Orr made reference to descriptor 15(d). It was asserted that the tribunal did not deal with this descriptor though there had been evidence about it before the tribunal. I was directed to evidence recorded at the bottom of page 89 on the top of page 90. However that evidence when read as a whole does not suggest that the claimant cannot use a telephone book or other directory to find a number. What he said was:-

> "If can't find it annoys me probably phone directory enquiries."

In respect of descriptor 15(e) it is said that the tribunal did not deal with this descriptor properly. What the tribunal said was:-

> "The appellant claimed to be unable to organise his football memorabilia collection. He did not claim that his mental condition prevented him from collecting football memorabilia."

The descriptor is:-

> "Mental condition prevents him from undertaking leisure activities previously enjoyed."

It is quite clear from the BAMS report that the doctor took the view that he did not satisfy that descriptor and notes:-

> "Watches football, collects memorabilia."

That information can only have come from the claimant himself.

The only evidence in support of him satisfying this was:-

> "Wanted to organise".

That in my view is not evidence which demonstrates satisfaction of the descriptor and I am satisfied that the tribunal dealt with it adequately.

10. It was said that the claimant had given evidence that he satisfied descriptor 15(f) which is:-

> "Overlooks or forgets the risk posed by domestic appliances or other common hazards due to poor concentration."

The evidence said to support this was said to be at the top of page 91 where it is noted:-

> "In shops – touching things cut finger/chain on door [illegible].
>
> Touching/not just checking frying pan/teapot."

It was Miss McLaughlin's submission that the evidence has to be taken as a whole and that is what the tribunal did. She referred me to what was said at page 46 where the BAMS doctor noted that the claimant constantly checks things and that he did not satisfy this descriptor. That indeed was the import of his oral evidence given at page 91. Therefore even although the tribunal did not specifically refer to it evidence is lacking for satisfaction of the descriptor. Further standing the view taken in respect of the whole case the matter is not material in any event.

11. The last descriptor referred to was 17(a) which is that mental stress was a factor in making the claimant stop work. It was said that at pages 91 and 92 there was evidence given that he had difficulty coping with his job. Further that is not what the descriptor specifically

identifies and the claimant did not specifically say that it was a factor in making him stop work. The tribunal did deal with the activity of coping with pressure in respect that they were prepared to accept that he satisfied descriptor 17(b) but not the others. I consider that that decision is adequately reasoned in that regard. In any event standing the view taken in respect of hearing and the other mental health descriptors it is not material.

12. The claimant's initial ground of appeal was as follows:-

> "i) Delaying the issuing of the full decision for so long that it is a reasonable assumption that this is in fact not a record of the Tribunals decision, but a recollection of the Tribunals decision."

This ground of appeal was not supported and in response it was further stated:-

> "a) The Adjudication Officer has made no detailed comments on the dates outlined by the Commissioner at P105, in the absence of any other explanation it would seem that my suggestion in the application for leave is the correct one.
>
> b) I would suggest that the discretion of the Chair on to the date of the issuing of the statement cannot be completely unfettered otherwise continued failure by the Chair to issue the statement would leave the claimant without a remedy. In the case of failure to issue, or long delay, I would suggest that there is error of law. I would suggest that in taking account of this matter, reference can only be made to Article 6(1) of the European Convention on Human Rights which ensures that civil proceedings be heard and determined within a reasonable period."

13. To put the grounds of appeal in context it is necessary to notice the following facts:-

"Statement request received	1 October 1998
Request sent to Chairman	20 February 1999
Statement from Chairman sent	31 May 1999
Statement received by ITS	9 June 1999
Statement issues by ITS	9 June 1999
Statement dated	"29 September 1998""

There are two matters pertinent to this ground of appeal. The first is that Mr Orr conceded that it is in essence a "natural justice" point. It was his submission that what the claimant was given by way of a statement of facts and reasons, standing the time lag involved between the request for it and the receipt of it, was not a statement of facts and reasons but merely a recollection by the chairman of the facts and reasons. Miss McLaughlin said that inevitably any statement of facts and reasons not prepared at the time is to an extent a recollection. Further Mr Orr did concede that it was speculation on his part that the statement of facts and reasons was not such but merely a recollection. He did say that he had no reason to say that it was just a recollection but on the other hand he could not say that it was not.

14. I do not consider that Mr Orr has demonstrated any error in law on the part of the tribunal due to the delay in issuing the statement of facts and reasons to the claimant. There is nothing on the face of it to demonstrate that the statement of facts and reasons is not what it

bears to be. The regulations as Miss McLaughlin pointed out do not set any time limit for their preparation and production. Further the claimant has been able to identify and articulate from the statement asserted errors in law which the tribunal has said to have made. He has thus in no way been disabled from presenting his appeal on material points which he wished to make. I thus consider that there is no substance or basis for the appeal on these grounds. I should however perhaps note that while the word "Service" is attached to the name of the Independent Tribunal Service and its successor the Appeals Service that is not what the claimant received in this case. It is quite extraordinary that it took almost four months to send a request to the chairman of the tribunal for a statement of facts and reasons; and that there were subsequent delays including one of over two months while the chairman prepared the statement. It is a poor reflection on the operation of the Appeals Service and one which they may care to investigate.

15. The associated matter raised in this ground of appeal was the reference to an asserted breach of Article 6(1) of the European Convention on Human Rights. It was accepted by Mr Orr that the convention had not yet been incorporated into British domestic law and he accepted that the point raised was essentially a natural justice point. He made reference to two Commissioners' decisions – CDLA/4734/99 and CDLA/5413/99 but in the event accepted that nothing said in these cases assisted his argument in the present case. The first case was related to the interpretation of the statute and the second case was also related to general principles of fairness and the exercise of discretion. I refer to what was said in paragraph 38 of the latter decision. Miss McLaughlin in reply made reference to Abdadou v the Secretary of State for Home Department 1999 SLT at page 229. That case is also of no assistance in the present case in respect of that also related to the exercise of a discretion. In this case on the facts the tribunal decision was either erroneous in law or it was not. That was the issue I had to determine and therefore the exercise of a discretion forms no part of it.

16. Whilst it was accepted before me by Mr Orr that there was no application of the Convention in the event in this case I am uneasy that the issue was raised in the grounds of appeal without being properly focused. It was said by the Master of the Rolls, Lord Woolf in Daniels v Walker a decision of the Court of Appeal dated 3 May 2000:-

> "Article 6 had not been appropriately raised in the appeal. Quite apart from the fact that the Act was not in force, if the Court was not going to be taken down blind alleys it was essential that Counsel, and those who instructed Counsel, took a responsible attitude as to when it was right to raise a Human Rights Act point."

In this case I do not consider that a responsible attitude was taken by Mr Orr, who is a very experienced and capable Welfare Rights Officer, in taking the point nor in the manner in which it was taken or thought through. There was no attempt to analyse the issue in the context of the appropriate case law and jurisprudence. There is no substance in the ground as stated. It was in the nature of a wrap up omnibus ground of appeal placed before the Commissioners no doubt in the hope that there was something in the point and if so Commissioners would take it and the claimant if he otherwise failed would thereby get "another shot" before a different tribunal Not only was the Act not in force but the point which the claimant sought to raise was not properly focused.

17. It is a matter of some surprise to me that there do not apparently appear to be in preparation regulations for the purpose of setting out the manner in which human rights points are to be taken before the Commissioners. The Court of Session and the High Court of

Justiciary in Scotland have made Acts of Sederant and Adjournal, which have the force of statutory instruments, in order to regulate the manner in which human rights issues are brought before the Court of Session, the High Court of Justiciary and the Sheriff Court. It seems to me that those acting on behalf of claimants and claimants themselves, if they wish to raise human rights points ought by regulation to have a statutory framework as to how this is to be done. In my view it is essential that such regulations should provide that the claimant be required to identify in the grounds of appeal the asserted breach of the Convention, the Article which is said is breached, the remedy which it is sought from the Commissioner in respect of the asserted breach, the legal principles and authorities relied upon and any error in law on the part of the tribunal which it is asserted was made consequent upon the breach. There ought to be provision for notice and intimation where appropriate to the Attorney General or the Advocate General if that is deemed to be thought appropriate by the Commissioner. It is also in my view important that there are regulations setting out appropriate time limits for making such points to avoid them being taken at the last moment, for example in the course of oral hearings. Unless there is a responsible attitude by those representing claimants in taking points, properly researching and focusing them and a statutory framework within which points are to be brought then the potential for substantial disruption to the proper work of the Commissioner is all too evident. This is not to the advantage of claimants as a whole. The incorporation of the Convention is an important innovation on our law into domestic law but the benefit accruing therefrom should not be abused by taking inappropriate and unsustainable points or by failing to present arguments in a proper and professional manner. This case I consider demonstrates how points should not be taken.

18. The appeal succeeds but that success is of no benefit to the claimant.

(signed)
D J MAY QC
Commissioner
Date: 23 May 2000