CS 513/1980

MJG/BDS

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.S. 4/81

1. The decision dated 5 July 1979 of the local tribunal is set aside and the appeal is remitted to a differently constituted tribunal for rehearing because of the local tribunal's non-compliance with the Social Security (Determination of Claims and Questions) Regulations 1975, S.I. 1975 No. 558, regulation 10, concerning adjournments.

2. The claimant appealed to the local tribunal from a decision of the insurance officer, dated 9 May 1978, that sickness benefit was not payable to the claimant from 9 January 1978 to 11 April 1978, because the claimant was not incapable of work during that period, and requiring the claimant to repay £518 sickness benefit. A hearing of the appeal was fixed for 29 March 1979 but on 20 March 1979 the claimant's solicitor wrote to the clerk to the local tribunal stating that he had only recently received instructions to act and, in view of the complicated issues involved, asked for an 'adjournment' of 21 days to enable him to take further instructions.

3. It appears that the claimant's solicitor may not have received a reply to that letter. Indeed it appears from the Department's date stamp on the letter that it may have been received after the hearing date of 29 March 1979. However, there is a memorandum by an officer of the Department dated 28 March 1979 of a telephone call from the claimant's solicitor, stating:

> "The claimant has instructed a solicitor to act on his behalf and unfortunately the solicitor will be in court tomorrow afternoon and is therefore requesting an adjournment."

4. The appeal was nevertheless brought before the tribunal at its sitting on 29 March 1979 and the chairman of the tribunal completed a form LT3, "Report of proceedings of local tribunal" in which the chairman noted, "Telephone call from solicitor requesting an adjournment" and gave as the unanimous decision of the tribunal, "Adjourned

for date to be fixed". On 3 April 1979 the claimant's solicitor again wrote to the clerk of the local tribunal asking for a new hearing date. A memorandum by an officer of the Department dated 13 June 1979 indicates that the Department had telephoned the claimant's solicitor and arranged a fresh hearing date for 5 July 1979.

5. Form LT6 in connection with that hearing date of 5 July 1979 was completed by the claimant personally and dated by him 25 June 1979. The printed questions on the form and the claimant's answers were as follows:

> "1. Do you intend to be present at the hearing of your case? Answer: NO.
>
> 2. Do you intend arranging to be represented at the hearing? Answer: NO.
>
> 3. If the answer to questions 1 and/or 2 is 'YES' but for some reason neither you nor your representative attends, do you wish the tribunal to proceed with the case in your absence? Answer: "NO"
>
> 4. If the answer to question 3 is "NO" and the date shown above is not convenient to you and/or your representative, please say why it is not convenient and state on what date(s) you and/or your representative will be able to attend. Answer: I request for further adjournment due to my health. Kindly send me another date after July 1979."

6. As to form LT6, it should be observed first that the format of the questions is such that if a claimant replies, in answer to questions 1 and 2, that he does not intend to be present or to be represented at a hearing, he is not in theory able to say, in answer to question 3, whether or not he wishes the tribunal to proceed with the case in his absence. It appears to me that the form may need modification to enable a claimant to indicate whether he wishes the tribunal to proceed with the case in his absence, independently of whether he intends to be present or to be represented at the hearing. At all events it does not matter in this case because the claimant treated the form in that way and stated that he did not intend to be present or to be represented but still answered question 3 (which in theory was inappropriate) to indicate that he did not wish the tribunal to proceed with the case in his absence.

7. However, the comment I have made about the wording of the form becomes more important when one realises that the kind of request for adjournment that the claimant made in this case can occur only in answer to question 4 but that depends on an answer "NO" to question 3, which question cannot in theory be answered if a claimant does not intend appearing or being represented. That in my view cannot be a correct way of phrasing the form and possibly may deter claimants from asking for adjournments, when they know that they cannot be present at a hearing. I do not see why question 3 on form LT6 should not simply

be phrased "Do you wish the tribunal to proceed with the case in your absence?", and I commend a consideration of possible revision of the form. The importance of the request for the adjournment of this case is apparent from the fact that the claimant not only answered question 4 in the manner indicated above, but also in the place on form LT6, marked for submission of further evidence or observations, he again asked for an adjournment in the same terms as above.

8. On 26 June 1979 a memorandum by an officer of the Department states, "The solicitor's secretary phoned to say that the solicitor was no longer acting for [the claimant]". On 29 June 1979 a memorandum by the same officer of the Department states that the local office had telephoned to say that the inspector of the Department who had made observations on, interviewed and taken a statement from, the claimant was ill in hospital and unable to attend the hearing on 5 July 1979.

9. At the hearing on 5 July 1979 the chairman's note of evidence on form LT3 indicates that the tribunal had noted the claimant's replies on form LT6, the telephone conversations by the Department with the claimant's solicitor and the memorandum of the telephone call concerning the Department's inspector. Nevertheless, the tribunal proceeded to hear the appeal in the absence of both the claimant and the Department's inspector. The inspector was of course a most material witness if the facts were disputed and the claimant's grounds of appeal to the local tribunal (set out in box 2 on form LT2 in connection with the first hearing) indicated that they were disputed. Even if the legal position then were that the tribunal had an unfettered discretion as to whether to adjourn the hearing of 5 July 1979 to a future date or not, I consider that it was not a proper exercise of the discretion on the facts as I have outlined above for the tribunal to proceed to hear the case in the absence of (i) a claimant who had indicated that he wished to be present and had asked for an adjournment and (ii) a witness who could have been questioned by the claimant on a matter of considerable importance both in principle and financially. However, as I indicate below, I do not consider that the tribunal had an unfettered discretion in the circumstances, because of the provisions of regulation 10 of the Social Security (Determination of Claims and Questions) Regulations 1975, S.I. 1975 No 558, and my holding that they were obliged to grant the adjournment.

10. Regulation 10 of the 1975 regulations provides as follows:

> "10(1) Reasonable notice of the time and place of any hearing before the local tribunal shall be given to the claimant ..... and, except with the consent of the claimant, the local tribunal shall not proceed with the hearing of any case unless such notice has been given;

(2) If a claimant or other person to whom notice of hearing has been duly given in accordance with these regulations should fail to appear at the hearing the tribunal may proceed to determine the case notwithstanding his absence, or may give such directions with a view to the determination of the case as they may think proper having regard to all the circumstances including any explanation offered for the absence.

Provided that, if a reasonable explanation for his absence has been given by him or on his behalf, the tribunal shall not, without his consent, determine the case in his absence, unless the hearing has first been adjourned for at least one month and reasonable notice of the time and place of the adjourned hearing has been given to him."

I need only say about regulation 10(1) that, by its emphasis on the giving of reasonable notice of the time and place of a hearing and forbidding the tribunal to proceed with the hearing unless such notice has been given, the regulation makes clear the importance of giving the claimant an opportunity to attend a hearing.

11. However regulation 10(2) is directly in issue in this case. In order to understand its application to this case and indeed to others it is instructive to examine the history of the regulation. In its present form it dates back to the National Insurance (Determination of Claims and Questions) Amendment Regulations 1967, S.I. 1967 No 154, which by regulation 3 introduced the wording which is now to be found in regulation 10(2) of the 1975 Regulations. Prior to that the wording of the relevant provision was to be found in regulation 12(2) of the National Insurance (Determination of Claims and Questions) Regulations 1948, S.I. 1948 No 1144, which provided as follows:

"12(2) If a claimant or other person to whom notice of hearing has been duly given in accordance with these regulations should fail to appear at such hearing and has not given a reasonable explanation for his absence, the tribunal may proceed to determine the case notwithstanding the absence of the claimant or that other person, or may give such directions with a view to the determination of the case as they may think proper."
(My underlining).

12. The words which I have underlined in that regulation make it clear that, provided a claimant gave a reasonable explanation for his absence, the tribunal had no power to hear an appeal in the absence of the claimant and might have to adjourn a case indefinitely where a claimant could continuously give a reasonable explanation for his absence, eg that he was bedridden with a chronic illness. This would give rise to

an unsatisfactory state of affairs in that the appeal would be outstanding indefinitely and, if (as in this case) a question of a direction for repayment of a sum of benefit allegedly overpaid was involved, the Department would have no means of recovering the overpaid benefit, if in truth it were overpaid.

13. Consequently the 1967 Amendment Regulations (cited above), as first drafted and presented to the National Insurance Advisory Committee changed the wording of the 1948 regulation in two respects. First, the words which I have underlined (see paragraph 11 above) were deleted, so that the claimant's giving a reasonable explanation for absence no longer prevented the tribunal from having a power to adjourn. Secondly, in place of the deleted words,"any explanation offered for the absence" was simply made one of the circumstances which a tribunal could take into account in deciding whether or not to adjourn. It would not be obliged to adjourn simply because an explanation, even a reasonable one, had been offered for the absence. As the 1967 amendment regulations were originally drafted, that was the sole provision.

14. However, the National Insurance Advisory Committee (by its report dated 21 November 1966 - House of Commons paper No 343, session 1966/67) commented on the draft regulation as follows: (paragraphs 6 and 7 of their report) -

> "Circumstances can, however, arise in which a person can give a reasonable explanation for his absence continuously, for instance that he is bedridden and unable to move. In such instances the regulations do not permit the tribunal to proceed to determine the case and the appeal may remain undetermined indefinitely. In order to break the state of deadlock which can thus arise, an amendment to the regulations was submitted to us which would give the tribunal power to determine the case in the person's absence or give such directions with a view to the determination of the case as they may think proper having regard to all the circumstances including any explanation offered for the absence.
>
> Two representations were submitted to us expressing apprehension that if the proposed amendment were made some claimants or other persons might be denied a hearing through no fault of their own. We think that there is some substance in this apprehension, and that where an appellant or his representative has given a satisfactory explanation for not appearing at a hearing he should have a further opportunity of either attending or making arrangements to be represented at an adjourned hearing. We also consider it important that the regulation should allow explanation for absence to be given not only by the appellant, but also on his behalf by some other person. We therefore recommend that the draft regulation should

> be amended so that where a reasonable explanation is given either by the claimant or other person to whom notice of hearing has been given, or on his behalf, a tribunal shall not, without his consent, determine the case in his absence, unless the hearing has first been adjourned for at least a month and reasonable notice of the time and place of the adjourned hearing has been given."

It was in accordance with that recommendation that the final version of the 1967 amending regulations not only included the amendments that I have cited above but also added a proviso in the terms which are now to be found in the proviso to regulation 10(2) of the 1975 Regulations (ie the "at least one month's adjournment" provision).

15. It is in my judgment clear from the material set out above, and indeed from the wording of the present regulation 10(2), that a local tribunal was given by the 1967 Regulations a power in all circumstances to hear a case in the claimant's absence even though he had offered an explanation (reasonable or unreasonable) for that absence (in order to "break the deadlock"), unless the explanation was reasonable and all the conditions for the operation of the proviso to regulation 10(2) were fulfilled. As to those conditions, I am satisfied that in the context of the regulations generally and their history, the proviso (which gives a 'statutory' right to a claimant to have at least a month's adjournment if he gives a reasonable explanation for his absence) is intended to operate only once and not repeatedly. I do not, however, consider that the word "first" in that phrase has the same meaning as "once" but merely means that an adjournment for at least one month is a pre-condition to a hearing of the appeal on its merits in the absence of the claimant.

16. It follows that, once the claimant has taken the benefit of the proviso, thereafter the tribunal has a complete discretion under the main part of regulation 10(2) as to whether or not to grant any further adjournments even though the claimant adduces further reasonable explanations for his absence. That discretion must of course be exercised judicially and in accordance with the rules of natural justice, which would normally require that a claimant should know the full substance of the 'case against him' and be given the opportunity of a hearing. However, in the proper exercise of their discretion, a tribunal might well on a subsequent occasion decide to hear the case in a claimant's absence and despite his objection, with a view to breaking the kind of deadlock referred to above.

17. It now remains to ascertain whether the local tribunal in this particular case observed the provisions of regulation 10(2) of the 1975 Regulations. The insurance officer now concerned (in paragraph 3 of his submission) submits that the local tribunal acted in accordance with regulation 10(2) but I regret that I cannot accede to that submission. The application of the regulations to a situation like this is difficult and no blame attaches to the local tribunal for their

misapprehension as to the regulation, though on the principles of general discretion as to whether or not to grant or refuse an adjournment I have already indicated that I consider that they ought to have granted an adjournment of the hearing on 5 July (see paragraph 9 above.)

18. The reason why I consider that the local tribunal did not comply with regulation 10(2) of the 1975 Regulations is that the claimant was entitled to the benefit of one application of the proviso to regulation 10(2) when he gave a reasonable explanation for his absence from the hearing on 5 July 1979. The earlier adjournment at his solicitor's request does not count for this purpose (see paragraphs 20 and 21 below). It is true that the only explanation the claimant gave was on form LT6 where he stated "I request further adjournment due to my health". Although a specious excuse about health would not, in my view, be "a reasonable explanation" within the proviso, nevertheless the background to this case was such that the local tribunal should realise from the appeal papers that there might well be a genuine question of health involved. Indeed that was the whole question at issue in the appeal. There is in the papers before me, though not in the papers that were before the local tribunal, a medical statement (on form Med 3) signed by the claimant's doctor on 15 June 1979 advising the claimant to refrain from work for 13 weeks because of "depression". The local tribunal did not know about that but nevertheless the papers that were before the local tribunal and the general background to the case were such that for the claimant simply to ask for an adjournment due to his health was in my view, at least on this the first occasion, giving "a reasonable explanation for his absence", within the proviso to regulation 10(2).

19. The local tribunal may well have taken the view that by granting at the claimant's solicitor's request an adjournment on 29 March 1979 of the hearing scheduled for that day the tribunal had already given the benefit to the claimant of the proviso to regulation 10(2) and that he had therefore so to speak exhausted his entitlement to the benefit of the proviso. However I do not agree that that was the position. It is true that the first hearing on 29 March 1979 was adjourned, and not merely administratively postponed, and the decision to adjourn was the unanimous decision of the tribunal.

20. However, in granting that adjournment, the local tribunal were in my view granting the adjournment under their general power in the first part of regulation 10(2) ie "having regard to all the circumstances including any explanation offered for the absence". They were not granting the adjournment under the proviso to regulation 10(2) which refers to granting an adjournment "if a reasonable explanation for /the claimant's/ absence has been given by him or on his behalf". In my judgment that latter expression refers only to circumstances which affect the claimant personally eg his illness or absence from the area and does not apply to adjournments, which are really in the nature of postponements, requested by the claimant's representative in order to take instructions from his client. It follows that in granting the

adjournment on 29 March 1979 the tribunal did not operate the proviso to regulation 10(2), so that the claimant was still entitled to the benefit of that proviso in relation to his request to adjourn the hearing of 5 July 1979. It also follows that a local tribunal is not obliged even on the first occasion of a request for an adjournment or postponement for the convenience of a claimant's representative to grant that adjournment, though, depending on the facts, the tribunal might in its discretion consider it right to grant such an adjournment.

21. As a result, the local tribunal infringed the provisions of regulation 10(2) of the 1975 Regulations and in particular the proviso to regulation 10(2). In reported Decision R(U) 3/63, a Tribunal of Commissioners considered the courses that a Commissioner might take where he makes a finding that a local tribunal has committed a breach of the Determination of Claims and Questions Regulations justifying the setting aside of the tribunal's decision, as undoubtedly is the case here. In paragraphs 14-16 of R(U) 3/63 detailed guidance was given and it was pointed out that the Commissioner has a discretion either to give a final decision himself or to remit the matter to the local tribunal for a fresh hearing.

22. I bear in mind here that the claimant himself has not in his appeal to the Commissioner taken the point about being denied a hearing; that the case (which involves possible repayment) has now been outstanding a long time; and also that after the claimant made his appeal to the local tribunal he ultimately pleaded guilty in a criminal court to a charge concerned with the representation made to obtain the sickness benefit the subject of this appeal. However in paragraph 14 of R(U) 3/63 the Tribunal of Commissioners stated "As a general rule the practice is that, where the claimant has a statutory right to a hearing by the local tribunal and has not received it in accordance with the regulations, a fresh hearing by the local tribunal will normally be ordered, especially if the claimant asks for it". In this case the claimant has not asked for a fresh hearing but it clearly was of great importance to him to have a hearing when he completed form LT6 in June 1979 (some considerable time after the date of his criminal conviction). In my judgment, it cannot be said in this case either that the claimant's appeal cannot possibly succeed or alternatively that it must succeed (see paragraphs 15 and 16 of R(U) 3/63) and I come therefore to the conclusion that the proper course must be to

set aside the decision of the local tribunal on 5 July 1979 and to order a rehearing. In accordance with the general practice I have directed that the rehearing should be by a differently constituted tribunal.

(Signed) M J Goodman
Commissioner

Date: 18 February 1981

Commissioner's File: C.S. 513/1980
C I O File: I.O. 1978/S/79
Region: West Midlands