Rules of Natural Justice — What a Tribunal should do relating to Evidence CPAG 89/94

JMH/1/MB/LM

Commissioner's File: CU/047/93

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal was erroneous in point of law. I set it aside and remit the case for rehearing in front of a differently constituted tribunal.

2. This is an appeal with the leave of the chairman from the decision of an appeal tribunal dated 13.8.92 disallowing the claimant's appeal from the decision of the adjudication officer. The tribunal held:

> "The Appeal is disallowed.
>
> (1) Unemployment Benefit is not payable to the claimant from 1 July 1991 to 21 October 1991 (both dates included).
>
> (2) An overpayment of unemployment benefit has been made to the claimant from 1 July 1991 to 21 October 1991 (both dates included) amounting to £1,082.36.
>
> (3) Unemployment Benefit overpaid from 1 July 1991 to 23 September 1991 (both dates included) amounting to £814.56 is recoverable from the claimant by the Secretary of State."

The reason why the overpayment was not recoverable after 23 September 1991 was that on 24 September 1991 the Department was informed that the claimant was in receipt of a pension from Courtaulds, which was the relevant material fact for the purposes of section 71 of the Administration Act 1992 (formerly section 53 of the 1986 Act). This information was received after inquiries as a result of the benefit office having received a P43(T) form from the Inland Revenue which alerted them to the fact that the claimant was in receipt of an income.

3. I do not know when the claimant was born but at all material times it was accepted that he was over 55.

4. The claimant had been employed by Courtaulds and had earned a pension, which, as I understand it, he could take whenever he wished. At some time, irrelevant for present purposes, but I think in September 1979, he left Courtaulds and started his own company, Circaprint Holdings Ltd. Unfortunately, that company went into receivership in, I think, probably the Spring of 1991. Again the precise date is irrelevant.

5. On 16 April 1991, the claimant paid a visit to the local office of the employment service and saw a Mrs. Davey. On 16 March 1992, she recorded her recollections of that visit (T5) –

> "(1) I remember taking [the claimant's] claim in April last year and questioning him about the pension referred to on 461 which he stated that he may or may not get because of company problems. He did not at that time mention any other pension and because of his situation regarding the one on 461. I prepared a statement on a UB589 which he signed.
>
> "(2) There is no trace of the UBL Pen form issued 16/4/91 having ever been returned."

The company referred to was Circaprint. The claimant made a claim for unemployment benefit which was granted. The relevant part of the claim form UB 461 appears at T16 where in answer to the question: "Do you get or expect to get in the next 12 months a pension from any past employment ...". He answered "Yes". Mrs. Davey then had him sign a form UB589 (T17) in which he undertook to repay should his pension – that was to say his Circaprint pension – cause any overpayments in benefit. At the same time he was issued with a pamphlet (T18) which states inter alia:

> "So you must tell us at once if ... you reach the age of 55 and receive an occupational pension (from a previous employer) or personal pension."

Finally, at that meeting the claimant was issued with a form UBL 81 (Pen). That is the relevant form which should be completed when a claimant is over 55 and receives a pension. In her statement (T5) Mrs. Davey had said that the form she issued was never returned. However, a form UBL 81 (Pen) was received in the Office on, I think, 15 November 1991 and in her evidence to the tribunal Mrs. Davey said that that was the form she had issued at the April interview. She said, "I know this because it has my writing on it." However, someone called P.E. Fraser sent the claimant a form on 14 November 1991 (Document 61) which he returned on 15th. I do not however think that anything turns on which form was the form the claimant completed, whether that issued by Mrs. Davey or that issued by P.E. Fraser. In any event, the original form has been lost.

6. Some time in May 1991 the claimant decided to take the Courtaulds pension and, according to a letter from the Pensions Administration at Courtaulds, he was paid this as from 1 July 1991. This was a pension at the rate of £755.73 per month, or £174.40 or thereabouts per week. The pension was therefore in excess of £35 and clearly unemployment benefit would have abated under section 31 of the Contributions and Benefits Act 1992 (formerly section 5 of the Social Security (No. 2) Act 1980).

7. On 12 July 1991, the claimant called at the Unemployment Benefit Office at Ashford. In evidence before the tribunal, the claimant stated that he told the officer he was receiving the Courtaulds pension and was told not to bother about that pension until he knew what he was going to get by way of a Circaprint pension. He said at the hearing before the Tribunal, "I strongly dispute that I was told the effect on Unemployment Benefit of receiving an occupational pension". Yet, I note, by way of comment, he had been given the pamphlet (T18) to which I have drawn attention above, which sets out the point clearly.

8. He made a further call at the Office on 18 October 1991 at which he says he was given similar advice.

9. The tribunal's record of the claimant's evidence appears in para 4 of box 4 of the record of their proceedings (T45):

> "The claimant's evidence is that on 12 July 1991 and again on 18 October 1991 at Kent House Ashford he told a young female clerk who did not appear to him to be very knowledgeable that he was taking one of his pensions from a company he had left 12 years ago but was still waiting to receive his pension from the last company, and that he was told by the clerk to wait until he received the second pension and then advise the Department. The claimant in his evidence to the tribunal said that he is sure he stated that the amount of the Courtaulds's pension as about £10,000 a year. <u>The claimant said that he had made a written note of the conversation at the time."</u> (My underlining)

Since the claimant lived some little distance from the Ashford Office, his claim was dealt with by post. During the period July to October 1991, a Miss Brightling and a Miss Everitt were the clerks normally dealing with postal claimants at that office and neither could remember interviewing the claimant on either of the dates but "other clerks would occasionally help out". It may well be that someone else saw the claimant. This is the gist of Miss Everitt's evidence and apparently Miss Brightling only added the information that when a person came in for any reason it was normally recorded on the claimant's records.

10. The Department's evidence is summarised in box 4 at T45 by the tribunal thus:

> "For the Department it is said that neither of the two

regular postal clerks could recall seeing [the claimant] on 12 July 1991 or 18 October 1991 and they stated the procedures they would have followed had they been told by the claimant that he was receiving an occupational pension. The Department say they have no record of the claimant's visit on 12 July 1991 or 18 October 1991 or of the conversation referred to by the claimant."

The tribunal then gives their conclusions as follows:

"The tribunal has considered the possibility that on the two occasions in question the claimant or a clerk or clerks other than the two regular clerks who, having been told that the claimant in receipt of unemployment benefit, was receiving an occupational pension of about £10,000 a year, gave the same advice on each occasion to wait until the other pension was received and then advise the Department, and made no record of the interviews as would be required by the normal practice.

"The tribunal considers that the probability that any clerk entrusted with interviewing the public, however inexperienced, would give serious and prompt attention to arranging for suspending the unemployment benefit of someone who stated that they received an occupational benefit of about £10,000 a year, would report the matter to their superior officer for that purpose, and would make a record of the interview on the claimant's file.

"The tribunal finds that on the balance of probabilities that the claimant did not disclose the material fact that he was receiving the Courtauld's pension, and the amount of that pension, in accordance with his recollection of events and that he first disclosed those matters when he completed form UB81 (Pen) in November 1991."

11. Before me, the claimant appeared in person and the Department was ably represented by Miss S. Churaman. She put the case on both a misrepresentation and a failure to disclose basis. It was accepted in the adjudication officer's submissions to the Commissioner (Document 64) that the declaration on the giro cheque did not amount to misrepresentation but the declaration on the various UB 25(TF's) did (T26/29). It was submitted that this was a case like Jones v Chief Adjudication Officer (C.A.) (1 July 1993). There was no qualification as there was in Sharples v. Chief Adjudication Officer (same date). I accept the submission. The question of disclosure is a straight question of fact. Which side is to be believed? But that question is common to a claim for recovery whether based on misrepresentation or failure to disclose for, if the Department knew the true state of affairs, they knew that the alleged misrepresentation was false and they were not misled. Miss Churaman accepted this.

12. I now turn to the crunch point. The claimant says, and, as I have noted, he is recorded by the tribunal as saying, that he had made a written note of the conversation at the time. He told

me that at the hearing before the Tribunal he had had the notes in the file and said something like this, "Look, I've got proof here". To my mind it, stands out a mile that these notes are of crucial importance, but I say that as a lawyer and a lawyer possibly sees things in a rather different light from a layman. In any event, I think it was extraordinary that the notes were not put in evidence by the claimant or asked for by the tribunal. When asked by me, Miss Charaman conceded that the tribunal should have asked some such question as, "Is that document still in existence? Do you have it?" But she says that the failure to ask that question does not amount to an error in law. The tribunal knew of the existence of the note but, all in all, on the balance of probabilities, having heard all the evidence, they decided that the conversation had not taken place as alleged by the claimant and accordingly found against him. They did not, however, know precisely what the note said since they did not see it.

13. The relevant note is a scrappy piece of paper (59) which reads as follows:

> "12.7.91 Conf. taking Courtaulds P. BGS to complete this form once final pension arrangement agreed."

"Conf" means I think "confirm", and BGS is a reference to the claimant. The note continues as follows:

> "Again
>
> At meeting at Kent House on 18.10.91 Agreed don't fill this form in until CP Pension agreed & paid thus include with Courtaulds pension which I stated had started on 31.7.91."

The CP Pension referred to was the pension he hoped to receive from Circaprint. The Courtaulds pension had in fact started on 1 July 1991 and not on the 31st.

14. Now I put to Miss Churaman the proposition that the tribunal was seised of an inquisitorial jurisdiction and should have asked for the document, and, in failing to do so, erred in law. I cited to her R(S) 6/83 where the Commissioner said at paragraph 7:

> "7. ... It must never be forgotten that this jurisdiction is inquisitorial, not adversarial. I am predominantly concerned that justice is done, that it is manifestly seen to be done and that no unfair or arguable unfair advantage is taken of the claimant. Admittedly in this case, the claimant had Counsel acting for him in the appeal, and a higher degree of expertise would naturally be expected of him than of a layman. But, in any event, even if Counsel was at fault, this must not be allowed to undermine the fundamental principle operative in this jurisdiction that, as far as reasonably possible, the claimant's interests shall not be put in jeopardy through inadequate

representation."

That is, I think, a passage helpful in its general guidance but of course it must be viewed against the facts of that case. They are simply that Counsel, who had drafted the application for an oral hearing, had not specifically asked for an oral hearing by inserting the word "Yes" in the appropriate space but had used that space to deploy various far reaching arguments. Counsel had also written, "Should an oral hearing be refused I would like to reserve the right to submit further observations."

Unfortunately that was overlooked. The Commissioner therefore set the decision aside on the grounds that there had been a breach of natural justice. It was then considered implicit that that power existed, although absent from express mention in regulation 3(1) of the Social Security (Correction and Setting Aside of Documents) Regulations 1975. That omission has been rectified in regulation 11(1)(c) of the Adjudication Regulations 1986 (and so far as a Commissioner is concerned in regulation 25(1)(c) of the Commissioners Procedure Rules) by the insertion in regulation 11(1)(c) of a power to set aside the decision where "the interests of justice so require". I must emphasise however that R(S) 6/83 concerned a Commissioner setting aside his own decision. In this case I am not setting aside my own decision but am being asked by the claimant to set aside the decision of the Tribunal.

15. There has been further authority to the effect that para (c) "the interests of justice so require" has a very narrow ambit. And in R(S) 3/89 the Commissioner said:

> "I do not consider that the phrase "the interests of justice so require" in regulation 25(1)(c) of the Social Security Commissioners Procedure Rules alters this conclusion at all. In my view that phrase must be confined to cases whether there have been obvious mistakes or procedural mishaps, major or minor, where there is no real debate as to fact or law and where clearly something has gone wrong with the Commissioner's decision. That is not the same as one party's contention (not conceded by the other party) that he does not agree with either the factual or legal conclusions of the Commissioner in his decision."

That was also followed by the Commissioner in R(U) 3/89. Recently a Tribunal of Commissioners in CI/79/90 (starred 79/94) said:

> "We cannot leave the present appeal without making some general observations on the nature of the setting aside procedure. We wish to emphasise as strongly as we can that decisions of appeal tribunals and adjudication officers may only be set aside under regulation 11 of the Adjudication Regulations [i.e. by themselves] where one of the carefully defined conditions in paragraph (1) exists and where the adjudicating authority is satisfied that it is just to set the decision in question aside. It is a judicial

procedure, not an administrative procedure to be invoked whenever it appears convenient or where some doubt is felt about the merits of the decision in question. It is intended to provide a short, simple and speedy alternative to the inevitably slow and complex process of appeal, where something has gone wrong with the procedure leading to the decision in question. But in order to maintain the proper division between the two processes, setting aside under regulation 11 must be kept within its narrow bounds."

Now I have made the point, and I make it again, that I am not considering the case of an authority, whether a tribunal or me, setting aside their or my decision under the appropriate - and narrow - statutory provisions. I am considering an appeal from an appeal tribunal on the grounds - and these are the sole grounds which I think can stand up - that the tribunal should have exercised its inquisitorial jurisdiction, called for the notes and by not doing so erred in point of law by being of breach of the rules of natural justice. I am not bound by regulation 11 or regulation 25 of the Social Security Commissioners Procedure Rules. I am concerned only with the provisions of section 23 of the Administration Act 1992. And I come back to the question "Was, in the wider circumstances of section 23, the appeal tribunal in breach of the rules of natural justice?" Now in considering that question I think I am justified in going back to Diplock LJ's dicta in R v Deputy Injuries Commissioner ex parte Moore 1965 1 QB 450. At pps 487-8 he said:

"Where, as in the present case, a personal bias or mala fides on the part of the Deputy Commissioner is not in question the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing."

And at pages 489-90 he considered further the second rule:

"The second rule simply requires that a deputy commissioner, in determining an appeal, must give fair consideration to the contentions of all persons who are entitled under the Act and regulations to make representations to him ...

"Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as the person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to

comment upon any such "evidence" and, where "evidence" is given orally by witnesses, to put questions to the witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen, to fairly to all sides ... "

Now this case turns on a question of evidence and the credibility of both sides. The claimant's contentions were that on two occasions he had told someone in the local office at Ashford that he had a Courtaulds pension. He said that he had recorded the conversation. I appreciate Miss Churaman's point that the tribunal was told that the notes contained a record of the conversation, and therefore the Tribunal was not ignorant about that. But the tribunal rejected the claimant's contentions and I do not see how they could have fairly considered the claimant's contentions to the degree that they decided to reject them, without satisfying themselves as to what the notes actually did contain. Contemporaneous documentation is always significant evidence. If the notes had no longer been available that would have been a different matter. But I come to the conclusion, bearing in mind the nature of the jurisdiction that the tribunal exercises that the sort of question that Miss Churaman suggested (see paragraph 12 above) was one which I think stands out a mile and should have been asked by the tribunal. In exercising their inquisitorial jurisdiction I do not for one moment suggest that they must root out everything: if however an obvious question arises which should be asked then, they should ask it. In my judgment, the tribunal should have asked for the notes and I do not see that they could fairly have considered the contentions of the claimant and fairly rejected them without having seen the notes, if they were available - as they were.

16. My decision is therefore as set out in paragraph 1 above. The new tribunal is to examine the notes and consider them in the light of all the other evidence. For all I know it may well be that they may reach the same conclusion but that is not a matter on which I express any view nor would it be proper to do so. In considering the notes, they should make a finding as to whether they were made contemporaneously, for obviously notes made after the event lost credibility.

(Signed) J M Henty
Commissioner

Date: 26 August 1994