

Bulletin 164

[OTHER]

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CU/2604/1999

Starred Decision No: 44/01

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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 17th July 2001

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

1. This appeal by the claimant succeeds. In accordance with the provisions of section 14(8)(a) of the Social Security Act 1998 I set aside the decision of the Aldershot Social Security Appeal Tribunal of 14th April 1999. I substitute my own decision. This is to the effect that the claimant is entitled to unemployment benefit in the sum of £190.85 for the period 27th December 1989 to 3rd February 1990 inclusive and that entitlement to this sum has not been extinguished. I remit to the Secretary State further questions relating to the actual payment of this amount.

2. Some years ago there was a dispute over the claimant's entitlement to unemployment benefit. There were adverse decisions by both the adjudication officer and the social security appeal tribunal. The claimant appealed to the Commissioner and on 9th February 1994, in CU/0037/1992, Mr Commissioner Mitchell allowed the claimant's appeal. The Commissioner substituted his own decision for that made by the tribunal. The legal analysis and reasons for that decision are not relevant to the issue before me. What is relevant is the wording of the substituted decision. This was that:

“Unemployment benefit is payable to the claimant for the inclusive period from 27th December 1989 to 3rd February 1990”.

The Commissioner did not quantify the amount of benefit which was payable, did not set out any principles or mechanism by which it should or could be calculated, and did not explicitly refer these questions to any other authority.

3. It was accepted by the adjudication officer (in paragraph 4.7 of the submission to the tribunal) that payment was not in fact made to the claimant. There is on the file evidence of the various operating systems but there is no evidence that the amount due was in fact quantified, let alone paid. In the summer of 1998, an official acting on behalf of the Secretary of State for Employment indicated that she was unable to confirm whether the benefit had been paid, or the rate of benefit that would have been due, because the relevant documents would have been destroyed after three years (page 17 of the bundle of papers before me).

4. The claimant did not query what was going on until 10th February 1998, when he telephoned the Benefits Agency. I do not know what advice he was given. Then on 13th February 1998 he wrote to the Court Service asking for payment. On 19th February 1998 the Court Service replied to the effect that it was not responsible for payment and that the claimant should direct his enquires to the Benefits Agency. The matter was eventually placed before an adjudication officer. The official acting on behalf of the Secretary of State for Employment (see paragraph 3 above) indicated in writing that “The right to payment arose on 17.3.1994” (page 17). It seems that this is the date on which the Commissioner's decision was sent to the claimant.

5. The adjudication officer decided that unemployment benefit could not be paid for the relevant period, on the (curious) ground that the claimant did not have good cause for the delay in “making your claim”. That decision was upheld on review by a different adjudication officer on 7th September 1998. On 24th August 1998 the claimant appealed to the social security appeal tribunal against the decision of the adjudication officer.

6. In a submission to the tribunal the adjudication officer said that the wrong decision had been made. The decision should have been that the right to payment of unemployment benefit for the relevant period had been extinguished because the sum had not been obtained within the period of 12 months "from the date on which the right to it is treated as having arisen". This is the "revised decision" to which reference is made below. The adjudication officer relied on regulation 38 of the Social Security (Claims and Payments Regulations) 1987 but, as I have indicated above, accepted that payment had not in fact been made.

7. Regulation 38(1) states the general rule that the right to payment of any sum by way of benefit shall be extinguished where payment of that sum is not obtained within the period of 12 months from the date on which the right is to be treated as having arisen. It then states when this right is to be treated as having arisen. Regulations 38(1)(a) and (aa) apply where there is an instrument of payment. Regulation 38(1)(b) deals with the case where notice is given that a sum is available for collection. None of these provisions apply to the present case. Regulation 38(1)(c) provides that where none of these other situations arises, the right to payment shall be treated as having arisen "on such date as the Secretary of State determines". Regulation 38(1) is subject to the provisions of regulation 38(2A), but the latter can only apply when the Secretary of State has issued a certificate, which has not happened in this case.

8. The matter came before the tribunal on 10th March 1999 but was adjourned because of shortness of time. The tribunal finally considered the matter on 14th April 1999 and confirmed the revised decision. The chairman of the tribunal granted the claimant leave to appeal to the Social Security Commissioner against the decision of the tribunal. There was some doubt about the validity of this grant. For the avoidance of doubt, the grant of leave was confirmed by Mr Commissioner Powell on 20th August 1999.

9. The tribunal accepted that the normal procedure after a decision by a Commissioner such as the one in this case would be for the adjudication officer to review the decision that had been set aside. The tribunal stated that review "was essential because the Commissioner's decision did not state unequivocally that [the claimant] was entitled to benefit during the claim period, merely that one particular bar to entitlement had been removed". I cannot read the Commissioner's decision in this way. The words from the decision that I have quoted above seem to me to be unambiguous and not to leave room for any further decision on entitlement as such. However, what was needed from the adjudication officer was a quantification of the amount of benefit due as a result of the Commissioner's decision.

10. The tribunal did, helpfully, make a finding that the rate of unemployment benefit to which the claimant had been entitled was £34.70 weekly, making a total of £190.85. I adopt that finding. The tribunal doubted the accuracy of the date stated on page 17 of the bundle (see paragraph 4 above), and indicated again that the Commissioner had not made an award of benefit. As I stated above, I do not agree with this. It was, however, true that the Commissioner had not quantified the amount.

11. The tribunal's full statement included the following:

"The absence of evidence makes it impossible to decide what action, if any, the Job Centre took as a result of the [claimant's] success before the Commissioner."

"It is worth saying at the outset that the regulation was probably not intended to cover the sort of situation in which [the claimant] finds himself. It is clearly intended to refer to current benefit claims, and to deal with cases where order books or giro's are left uncashed, or giro's do not reach the intended recipient."

"The tribunal is in a quandary here, since it is apparently for the tribunal to determine the date [on which the right to payment arose], but on the facts the only way in which the date can be determined is by the Secretary of State under regulation 38(1)(c). This tribunal, however arbitrary and illogical we think that decision is, cannot challenge a determination by the Secretary of State."

12. The tribunal does seem to have accepted (although not unambiguously) that even if a payment was in fact issued to the claimant, he did not receive or did not cash it. I find that the amount of benefit was probably never quantified and that payment was probably never sent and certainly never received. Although I note the evidence of the normal procedures, I also take account of the fact that the Commissioner did not quantify the amount and that no records exist to show that payment was ever issued. I appreciate that case records were destroyed after three years but I do not accept that if a payment had been made (and certainly if it had been cashed) there would be no record of it anywhere in the government labyrinth. It is certainly my experience in overpayment cases that, when necessary, records of payment can be produced going back many years.

13. The tribunal canvassed the possibility that, as a matter of law, if the original decision was never reviewed then the right to payment had never arisen. However, it thought it unlikely that nothing at all happened as the result of the promulgation of the Commissioner's decision, which would surely "receive special attention and be particularly unlikely to be left without follow up". I am bound to say that my own experience would not incline me to this degree of sanguinity.

14. In a submission to the Commissioner dated 12th October 1999 (pages 72-3) the adjudication officer then concerned with the matter opposed the appeal, supported the decision of the tribunal and relied on regulation 38(1)(c). The adjudication officer also cited my decision in CIS/0786/1998 to the effect that, in the absence of the certificate required by regulation 38(2A), regulation 38(1) must take effect and the claimant's right to payment is extinguished. However, that only applies once the right to payment has arisen. In that case payment orders had actually been issued but had not been cashed.

15. On 20th December 2000 I asked the parties to address the issue of whether, in the absence of any quantification of the amount of benefit, there could be a "sum" to which regulation 38 could apply. The Secretary of State (who has now taken over the conduct of this matter) takes the view that "it cannot have been contemplated that the

adjudicating authorities must always quantify the sum at issue before a decision can be made that the right to payment has been extinguished". A decision that provides a sufficient basis for the identification of the payments and quantification can relate to a "sum by way of benefit". It is argued that I have no jurisdiction to interfere with the decision of the Secretary of State given under regulation 38(1)(c) as evidenced on page 17.

16. The Secretary of State has also cited CSB/0080/1992, although I am not really sure why. I dissociate myself from the comments made by the Commissioner in paragraphs 2 and 5 of that decision. In any event, win or lose, by no stretch of the imagination is this case a "hopeless appeal" of the type to which the Commissioner refers.

17. The subject of regulation 38 is the "right to payment of any sum". The regulation sets out various rules for ascertaining the date on which that right is to be treated as having arisen. This includes the rule in regulation 38(1)(c). However, there must first be a right to payment of a sum. The word "sum" means something otherwise it could have been omitted and left the provision meaning something slightly different. I suspect this is why the tribunal had such difficulty in trying to apply the provisions to a situation that was not contemplated when the provision was drafted. In my view, if the amount has not been quantified, there is no "sum", even if there has been identified a basis for quantifying it. Contrary to what has been argued on behalf of the Secretary of State, the fact that the tribunal later quantified the amount does not affect the fact it had not been quantified at the time that the adjudication officer sought to extinguish the right to payment. If there is no sum, then the right to payment of it cannot arise, and cannot be extinguished under regulation 38.

18. For the above reasons this appeal by the claimant succeeds.

H. Levenson
Commissioner

13th March 2001