

Decision No: C7/89(IS)

Ballymena decision -- cut had on-going contact with tutors & was ~~expected~~ to re-sit an exam before re-joining the course / cut lost appeal she did intend to return.

SOCIAL SECURITY (NORTHERN IRELAND) ACTS 1975 TO 1986

INCOME SUPPORT

Application for leave to appeal and appeal
on a question of law from the decision of
Ballymena Social Security Appeal Tribunal
dated 30 November 1988

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. In this case the claimant seeks leave to appeal against the majority decision of Ballymena Social Security Appeal Tribunal, whereby it was held that she was not entitled to income support. I grant leave to appeal and, the necessary consents having been given, I proceed to determine the questions of law arising on the application for leave as though they arose on appeal and as though the application were an appeal.
2. The background facts are not in dispute. Briefly, the claimant commenced a 4 year BA Joint Honours Degree Course in English and Religious Studies at Chester College, Liverpool University, in September 1986. During the summer vacation in 1988 she registered for employment and was awarded income support up to 28 September 1988. At the start of the new term she notified the Social Security Office that she would not be returning to College until October 1989, because she had not attained the necessary standard in part of her course. She had been informed by the Progress Committee of the Board of College Studies that she could continue her studies; but that in session 1988/89 she would be required to repeat one subject without further attendance at lectures and classes. The claimant did not qualify for a student grant for the 1988/89 session, and intended to return to Chester College in September/October 1989 if her results were favourable.
3. Having considered the matter, the Adjudication Officer decided that the claimant was not entitled to income support from 29 September 1988 because she was classed as a student and was not therefore available for employment. In reaching this decision the Adjudication Officer had regard to a number of the provisions of the Social Security (Northern Ireland) Order 1986 and of the Income Support (General) Regulations (Northern Ireland) 1987. I do not propose to set out all of those provisions in full. Shortly stated they were as follows:-

(i) Paragraph (3)(d)(1) of Article 21 of the Order provides that a person in Northern Ireland is entitled to income support if he is available for employment and paragraph (12)(d) empowers the making of regulations as to the circumstances in which a person is or is not to be treated as available for employment.

(ii) By regulation 10(1) of the General Regulations, subject to certain exceptions which are not relevant to this case, a claimant who is a student is not to be treated as available for employment during the period of study.

(iii) Regulation 61 of the General Regulations, so far as relevant, provides as follows:-

"student" means ... a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment; and for the purposes of this definition -

(a) a person who has started on such a course shall be treated as attending it throughout any period of term or vacation within it, until the end of the course or such earlier date as he abandons it or is dismissed from it;

(b) ...

(iv) Regulation 2(1) of the General Regulations states:-

"Period of study" means -

(a) in the case of a course of study for one year or less, the period beginning with the start of the course to the end;

(b) in the case of a course of study for more than one year, in the first or, as the case may be, any subsequent year of the course, the period beginning with the start of the course or, as the case may be, that year's start and ending with either -

(i) the day before the start of the next year of the course in a case where the student's grant is assessed at a rate appropriate to his studying throughout the year, or, if he does not have a grant, where it would have been assessed at such a rate had he had one, or

(ii) In any other case the day before the start of the normal summer vacation appropriate to his course.

and for the purposes of this definition, any period of attendance at the educational establishment which is outside the period of the course shall be treated as part of the period of study."

4. The claimant appealed against the Adjudication Officer's decision and at the hearing before the Appeal Tribunal it was submitted by the Adjudication Officer that the claimant was considered a student and could not therefore be treated as available for employment. On the claimant's behalf, her father stressed that she did not have to attend lectures while waiting for her re-sit and pointed out that at the date of the hearing she was in fact employed by the DHSS. He also referred the Tribunal to the letter of 28 September 1988 from Liverpool University in which the claimant was informed of the likely consequences of failure to pass her examinations in June 1989. In disallowing the claimant's appeal by majority decision the Tribunal recorded the following findings of fact:-

"The claimant had commenced a University course in Sept 1986.

She was informed by University by letter dated 28.9.1988 that she was required to repeat without further attendances at lectures and classes one subject.

Re-sit examination in June 1989. The letter also made it clear that if she failed that exam it was unlikely she would be allowed to continue her studies beyond that date. The Chairman and one member considered that she had not abandoned the course which she had commenced nor had she been dismissed from it.

The other member dissented."

The reasons for decision were:-

"The claimant was at that particular time a student within Reg 61 of Income Support (General) Regulations 1987 and was still within a period of study Reg 2(1). She was therefore not entitled to Income Support since she was not available for employment Art 21(3)(d)(i)."

5. The claimant's application for leave to appeal to the Commissioner was stated to be on the following grounds:-

"The Tribunal erred in law by:

- (1) failing to give an adequate statement of the reasons for such a decision as required under the Adjudication (NI) Regulations 1987.

(ii) failing to record reasons for one member dissenting for the decision as required under the Adjudication (NI) Regulations 1987.

(iii) reached a decision that no reasonable tribunal acting reasonably and judicially could reasonably have made.

No reasons have been recorded as to the basis on which the decision was made to hold that M/s Mullan was a student within Regulation 61 of the Income Support (General) Regulations (NI) 1987.¹

No Tribunal could reasonably hold that a person is 'attending a full-time course of education' when the course is in England and the young person remains throughout the academic year in N. Ireland."

6. I held an oral hearing at which the claimant was represented by Mr Allamby of Belfast Law Centre and the Adjudication Officer was represented by Mr Kelly, Solicitor.

Mr Allamby submitted that, although it was not perhaps a matter of major importance, there had been a clear breach of the duty to record the reasons for dissent where, as in this instance, the decision of the Appeal Tribunal was not unanimous. He further argued that in relation to the majority decision, the Tribunal's reasons and findings on questions of fact had not been adequately recorded. There should, he said, have been a clearer explanation of why the claimant had been deemed to be a student. Mr Allamby indicated, however, that these were subsidiary points and that the real issue, upon which the outcome of the case depended, was whether the claimant came within the definition of "student". In his submission, the majority decision that the claimant was a student was one which no reasonable Tribunal could have reached, and he pointed to the findings of fact which had been recorded. The claimant was required to repeat one subject without attendance at lectures and classes. She had a small number of essays to write and all her work could be done at Ballymena. Clearly the claimant was available for work and, as such, should automatically have fallen outside the definition of "student". Mr Allamby referred to the definition in regulation 61 of the Income Support (General) Regulations and submitted that the claimant was clearly not attending a full-time course of study. So far as the second part of the definition requiring certain persons to be treated as attending such a full-time course was concerned, Mr Allamby argued that this should not be interpreted as meaning that anyone who started a full-time course must be regarded as remaining on it until dismissal or abandonment. Any such interpretation could, he said, lead to anomalies and he gave as an example the student who was called back home from University because of a family emergency of uncertain duration. Such a student might be permitted to absent himself from his course on the understanding that he could resume his studies at a later date if the emergency were overcome. Mr Allamby further submitted that the real purpose of this part of the definition was to prevent students who finished their examinations early from returning home weeks before the end of the term and claiming income support while others were still attending the University. The intention was not, he said, to exclude someone in the claimant's position, and it would be unjust if she were to be caught by a provision which was not designed for such

a case. In conclusion, Mr Allamby suggested that the usual degree course at University could be sub-divided into a number of separate yearly courses, each of which had to be satisfactorily completed before the next was embarked upon. Viewed in this light, every year was a separate course of study which ended on the day before the start of the summer vacation.

7. Mr Kelly acknowledged that the reasons for dissent had not been stated in the record of the Appeal Tribunal's decision. He suggested, however, that it was clear from the findings of fact that one member of the Tribunal had not agreed with the finding that the claimant had neither abandoned her University course nor been dismissed from it, and that this was the reason for dissent. Turning to the question of the alleged inadequacy of the Tribunal's reasons for decision and findings of fact, Mr Kelly submitted that there had not been any failure to explain why the majority had reached the conclusion that the claimant was not entitled to income support. It had been recorded that the claimant was a student within the meaning of regulation 61 of the Income Support (General) Regulations and that she was still within a period of study as defined in regulation 2(1). There were also findings of fact to the effect that the claimant had commenced a University course in September 1986 and that she had not abandoned the course nor been dismissed from it. On Mr Allamby's principal submission that the Tribunal had been wrong to hold that the claimant fell within the definition of "student", Mr Kelly referred to the wording of the regulation and in particular to that part of the definition which concerned a person who had started a full-time course of study and had not abandoned it or been dismissed from it. The claimant had started a course and at the end of 2 years she had been told by the University authorities that she could continue it; but on certain terms. It was, said Mr Kelly, clear beyond doubt that the claimant had not abandoned her course or been dismissed from it, and in his submission the Tribunal were bound to hold that she was a student within the terms of regulation 61. The fact that the claimant resided in Northern Ireland and the College was in England did not affect the situation. The claimant must nevertheless be treated as attending her course of study, and here Mr Kelly referred to the wording of the letter from Liverpool University. Mr Kelly rejected any suggestion that the interpretation which he placed on the definition of "student" could lead to anomalies of the kind mentioned by Mr Allamby. If a student were called home in an emergency it could be determined as a question of fact whether he had abandoned his course of study. In the event of the emergency ending it might be possible for him to resume his studies. It would all depend upon the facts of that particular case. Mr Kelly further stated that if the intention had been merely to prevent students from returning home before the end of term and claiming income support while others were still at University, this could have been achieved without any reference to abandonment or dismissal. The definition, he submitted, was intended to cover a student until the end of his course and it was wrong to suggest that a 3 or 4 year course of study could be regarded as comprising a series of one year courses. In the present instance the claimant started a full-time course of study and had neither abandoned it nor been dismissed from it. She was accordingly a student within the meaning of regulation 61. As such she was not to be treated as available for employment and was not entitled to income support.

Mr Kelly agreed with Mr Allamby that the outcome of the case depended upon whether the claimant fell within the definition of a student. If she did not, Mr Kelly conceded that she was otherwise available for employment.

8. I have considered this matter and taken account of the points raised on both sides. Although, as Mr Allamby has conceded, it is not an error of major importance, there can in my view be no doubt that the Chairman of the Appeal Tribunal failed to comply with the provisions of regulation 25(2)(c) of the Social Security (Adjudication) Regulations (Northern Ireland) 1987 which require him to record the reasons for dissent if a decision is not unanimous. I accordingly hold that in this respect the decision of the Tribunal was erroneous in point of law. I do not however consider that there was any failure on the part of the Chairman of the Tribunal to explain the majority decision in adequate terms. In my view the combination of the Tribunal's findings of fact and reasons for decision, as recorded by the Chairman and set out in paragraph 4 above, indicated with sufficient clarity why the appeal was disallowed, and represented reasonable compliance with the provisions of regulation 25(2)(a) and (b) of the Adjudication Regulations. On the substantive issue in this appeal, I have also reached the conclusion that the Tribunal's majority decision that the claimant was a student within the meaning of regulation 61 of the Income Support (General) Regulations was not erroneous in point of law. In my view the wording of the definition is clear, and although at the relevant time the claimant may not have been in actual attendance at an educational establishment, she was in my opinion unquestionably a person who had started a full-time course of study and had not reached the end of it; neither had she abandoned it or been dismissed from it. She was therefore, for the purposes of the definition, to be treated as attending a full-time course. On the undisputed facts of this case I consider that the majority of the Tribunal were fully entitled to reach the conclusion which they did, and indeed I agree with Mr Kelly that they were bound to do so. In so deciding I have had regard in particular to the contents of the letter of 28 September 1988 from the Board of College Studies of the University of Liverpool which reads as follows:-

"Dear Miss

Your progress was considered at the recent meeting of the Progress Committee of the Board of College Studies where it was agreed that you be permitted to continue your studies but that in Sessions 1988-89 you be required to repeat, without further attendance at lectures and classes, the B.A. (General) with Honours Final Part I Year courses and examinations in the following subjects:

English Literature.

Your progress will be reviewed in July, 1 1989 and you will be expected to have passed the examination. If you fail to satisfy the Examiners on that occasion, it is unlikely that the Committee will be prepared to recommend that you continue your studies beyond that date.

As an external student you should keep in touch with your tutors and also contact the Board's Administrative Assistant (Examinations) before 1st October, 1989 with a view to entering yourself for re-examination.

Yours sincerely,"

In my opinion the references to the continuation of the claimant's studies afford the clearest possible proof that she had not abandoned her course nor been dismissed from it. Mr Allamby may be correct in stating that the definition was designed to prevent students from returning home early before the start of the long vacation and claiming income support while others were working; but I would find it difficult to accept that that was the only intention, and in any event I am satisfied that the wording used has considerably wider effect. Again, I cannot accept that the definition of student, as interpreted by the majority of the Tribunal, would create anomalies as suggested by Mr Allamby. I am also unable to agree that the claimant could derive any assistance from the proposition that a 3 or 4 year course of study could be sub-divided into a series of one year courses. It is right to say that the normal summer vacation is not included in the definition of a "period of study" in the case of a course of study for more than one year. However, a new period of study begins at the start of each academic year and there can in my view be no doubt that in the present instance, so far as the claimant was concerned, the period in question which commenced on 29 September 1988 was a "period of study" within a course of study for more than one year. The majority of the Appeal Tribunal were accordingly in my view correct in holding that the claimant was a student as defined in regulation 61 of the General Regulations and at the relevant time was within a period of study as defined in regulation 2(1).

9. I can well understand the claimant's surprise and dismay at finding herself denied income support because she was classed as a student and was not therefore available for employment. It is however important to bear in mind that it is not "availability for employment" in the ordinary or general sense which must be considered; but "availability for employment" within the meaning of the Income Support Regulations, and these provide that a student is not to be treated as available for employment. Similarly the term "student" as defined in the Regulations is not restricted to someone who is in actual attendance at an educational establishment.

10. As stated in paragraph 8 above, I hold that the decision of the Appeal Tribunal was erroneous in point of law in that, although it was not unanimous, the reasons for dissent were not recorded. I consider, however, that that is the only respect in which the Tribunal erred in law and I do not find it necessary to refer the case to another Tribunal. In my opinion the majority were correct in finding that the claimant was a student within the definition set out in regulation 61 of the Income Support (General) Regulations, in that she had started on a full-time course of study which had not ended and that she had neither abandoned the course nor been dismissed from it. I am further of the opinion that the majority were correct in holding that, at the material time, the claimant was within a period of study as defined in

regulation 2(1) of the General Regulations. This part of the Tribunal's decision was included in the record of the proceedings among the "reasons for decision" and for the avoidance of doubt I adopt it as a further finding of fact; considering it expedient that I should do so. On the basis of these findings of fact the claimant was, by virtue of the provisions of regulation 10(1)(h) of the General Regulations, to be treated as not available for employment and accordingly not a person who was at the material time entitled to income support under the provisions of Article 21(3) of the Social Security (Northern Ireland) Order 1986. For these reasons I hold that income support is not payable to the claimant from 29 September 1988.

(Signed):

L. R. Chamberlain
CHIEF COMMISSIONER

(Date):

13TH JUNE 1989