

Memorandum of 'Failure To Attend' in
Re: NIA vs Reu

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DJM/JMT/T/CH

Commissioner's File: CSIS/38/94

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SOCIAL SECURITY ADMINISTRATION ACT 1992

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY
APPEAL TRIBUNAL UPON A QUESTION OF LAW**

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Irvine

Case No: 564 69125

1. My decision is that the decision of the social security appeal tribunal given at Irvine on 3 December 1993 is erroneous upon a point of law. I set it aside. I remit the case to a freshly constituted social security appeal tribunal for a re-hearing.

2. An oral hearing of this appeal was heard by me on 7 December 1995. The claimant did not appear at the oral hearing. The adjudication officer, who is the appellant in this case, was represented by Mr Bevan, Advocate instructed by Mr Beveridge of the Office of the Solicitor of the Secretary of State for Scotland.

3. It is accepted as fact in this case that the claimant had been unemployed since March 1991 and had no entitlement to unemployment benefit. He had been in receipt of income support. The claimant was directed by the employment services to attend a restart course from 21 June 1993 to 25 June 1993. Following upon this direction the adjudication officer issued the following decision on 1 July 1993:-

"The claimant is entitled to a reduced rate of Income Support for the period 7 7 93 to 13 7 93 because he failed to attend a restart course."

4. The claimant appealed against this decision to a social security appeal tribunal. The claimant's appeal was heard on 3 December 1993. The decision of the tribunal was as follows:-

"To overturn Adjudication Officer's decision and to find that the appellant's entitlement to Income Support should not be reduced from 7.7.93 to 13.7.93."

The findings of the tribunal on questions of fact material to their decision were as follows:-

"Finds summary of facts to be correct except for 5.7. Finds [the claimant] attended the Job Centre at 9.30 with a reasonable enquiry. Finds he waited until 9.50. Finds he accepted that he was required to attend the restart course. Finds when he arrived at the restart course, other people were still arriving. Finds the instructions to attend were 9.30 or as near as possible. Finds [the claimant] was advised there was no place for him."

The summary of facts referred to were as follows:-

5.1 [The claimant] is a married man aged 36. He lives with his wife and 3 children in local authority accommodation.

5.2 The claimant has been unemployed since March 1991 and he has no entitlement to Unemployment Benefit.

5.3 On 15 6 93 [the claimant] was directed by the Employment Services to attend a Restart Course from Monday 21 June 1993 to 25 June 1993.

5.4 On 30 6 93 notification was received that [the claimant] had failed to attend the course on 21 6 93. At the follow-up interview on 29 6 93 [the claimant] stated that he was late in turning up for the course, and was told he would be re-scheduled for the next course.

5.5 The Adjudication Officer decided that as the claimant had failed to attend the course on 21 6 93 to 25 6 93 and had not shown good reason for not attending the course, that Income Support be paid at a reduced rate from 7.7.93 to 13.7.93.

5.6 [The claimant] appealed against the decision and in his letter of appeal he stated that he was 30 minutes late and was advised that he could not join the course as it was full."

The reasons given by the tribunal for their decision were as follows:-

"On all of the evidence from the appellant, the tribunal came to the conclusion that he did not fail to attend the restart course. He went with a reasonable enquiry about voluntary work which would have led to possible future employment. He waited 20 minutes at the Job Centre. He accepted the decision that he had to attend the restart course. When he arrived, other people were also still arriving. The course complement had been completed by volunteers. The tribunal considered that [the claimant] had complied with the Requirements and that Regulation 21A, paragraph 4(a)(i) applies in that [the claimant] was not able to attend the relevant course in question because it was full."

5. The adjudication officer has appealed against the decision of the tribunal. The grounds of appeal are in the following terms:-

"I wish to appeal on the following point of law the tribunal has not applied the regulation 21A paragraph 4 a) i) correctly. They stated the claimant could not attend the Restart Course as it was full, but this is not one of the exemptions listed in Regulation 21A paragraph 4."

6. I consider that the adjudication officer's appeal has substance and that the decision of the tribunal erred in law and must be set aside. It states clearly in the reasons that paragraph 4(a)(i) of Regulation 21A of the Income Support (General) Regulations 1987 applied to the claimant. This is not the case for the reasons I set out in the following paragraph.

7. Regulation 21A of the Regulations provides that there can be reductions in applicable amounts in certain cases of failure to attend courses. Paragraph 1 of that regulation provides that the weekly applicable amount for the claimant to whom paragraph 3 of that regulation applies shall be reduced in accordance with the stated formula. In paragraph 3 of that regulation it states that except where paragraph 4 applies that paragraph applies to a claimant where a list of factual situations stated in the paragraph apply. These include sub-paragraph (a) where a claimant has been notified of a relevant course and (e) a claimant has failed to attend the whole or any part of that course. It is implicit in the decision of the tribunal, standing the last sentence of the reasons, that the claimant did not attend the relevant course. However it was the tribunal's position that the claimant fell within the exemption from attendance set out in paragraph 4(a)(i) of Regulation 21A.

That regulation is in the following terms:-

"(4) This paragraph shall apply where the claimant's failure to attend a relevant course is attributable to any of the following circumstances -

(a) The claimant in question was suffering from some disease or bodily or mental disablement, on account of which -

(i) He was not able to attend the relevant course in question; or"

That exemption is dependent upon the claimant suffering from disease or bodily or mental disablement which resulted in him being unable to attend the course. There are no findings in fact in respect of any disease or bodily or mental disablement. Further the fact that the course was full is not something which falls within the ambit of the paragraph, namely paragraph 4 that the tribunal relied upon. Thus their decision erred in law and must be set aside.

8. It was Mr Bevan's submission that I remit the case to a freshly constituted tribunal for a re-hearing. The facts of this case do not appear to disclose any situation whereby the claimant fell within the exemptions from failure to attend the whole or any part of the course set out in paragraph (4). It does not appear to be in dispute that the claimant is in the position set out in sub-paragraph (a), (b), (c) and (d) of paragraph (3) of Regulation 21A though that does not absolve the fresh tribunal in making appropriate findings in fact in relation to these matters. The issue in the case is related to whether the claimant failed to attend the whole or any part of the course. That exercise will involve consideration of what the words "failed to attend" mean in the context of the regulation.

9. That phrase was considered a case cited to me by Mr Bevan namely CIS/292/1994. In paragraph 9 of that decision the Commissioner said:

"9. Mr Latter initially argued that "he has failed to attend" meant the same as "he did not attend" and that nothing said in R(SB) 21/82 was of any relevance to regulation 21A(3)(e) of the 1987 Regulations. However, in the course of the hearing, he softened his approach somewhat, without deviating from his stance that the claimant in this case had "failed" to attend the course. In R(SB) 21/82, the Commissioner was considering the circumstances in which a person could be said to have failed to disclose a material fact for the purpose of section 20(1) of the Supplementary Benefits Act 1976 (a

predecessor of section 71(1) of the Social Security Administration Act 1992). At paragraph 4, he said:-

" (2) [...] I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal - i.e. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see amongst the definitions of 'failure' in the Shorter Oxford English Dictionary:-

'1. non-performance, default; also a lapse'

(3) However, the reference to 'fraudulently or otherwise' necessarily extends to scope of the provision beyond fraudulent [...] failure to disclose to wholly 'innocent' [...] failure to disclose - for instance, by reason of forgetfulness."

Although no words such as "fraudulently or otherwise" appear in regulation 21A, I agree with the tribunal that the approach suggested in R(SB) 21/82 applies to regulation 21A of the 1987 Regulations as it applied to section 20 of the 1976 Act. However, in view of the width of paragraph (4) of regulation 21A, it will seldom be necessary to rely on a liberal construction of the word 'failed' in any case where such reliance is likely to be successful."

10. The Commissioner recorded the tribunal's own approach in that case in paragraph 8 of his decision they said:-

"There was no legal obligation on [the claimant] to attend this course. We are left with the moral obligation. Self-interest might have caused him cynically to attend, expecting the course to be useless to him - as indeed he did, later, his expectations being fulfilled. This is hardly a "moral obligation". We could find no moral obligation of which he was in breach, when he did not attend the course. Moreover, his non-attendance did not occur in "circumstances in which ... [attendance] by the person in question was reasonably to be expected". [The claimant's] case was a peculiarly vivid example of the irrelevance of the notified course to a claimant's personal circumstances. It was, we held, unreasonable to expect him to attend it."

I think that the tribunal in that case were correct in the conclusion they reached that there was no breach of any moral or legal obligation in the failure on the part of a claimant to attend a course. Thus I find myself in disagreement with the Commissioner in that case. I do not consider that the approach suggested in R(SB) 21/82 has any application in the approach to be adopted when considering Regulation 21A. In "failure to disclose" cases, in relation to the overpayment of benefit, the situation, which has arisen is one where benefit has been paid in circumstances where if facts had been disclosed to the appropriate authorities payment would not have been made. Disclosure in these circumstances quite clearly imports a legal duty on the claimant to make such disclosure to the authorities. I would refer in particular to regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987, I think it could also be said that there was a moral obligation as well. It is in the context of the issue of disclosure that the word "failure" comes to be considered with the consequent imposition of the obligation.

11. Considering "failure" in the context of "attendance at a course" does not give rise to such considerations. It appears to me that the views of the Commissioner in CIS/292/1994 were obiter in the sense that the decision in that case proceeded upon the basis that the course was not a relevant course as defined in paragraph 6 (of Regulation 21A).

12. It was quite clear from Mr Bevan's submission to me that in considering the word "failure" in the context of attendance at a course that he was asserting that failure to attend is not the same as simple non-attendance. It was said by Mr Bevan that failure indicates some shortcoming on the part of the claimant. I consider that this must be correct. The dictionary definition quoted by the Commissioner in R(SB) 21/82 of the word "failure" includes "default" and a "lapse" and it is upon that basis that the word failure in my opinion falls to be construed. Mr Bevan submitted for example that if the claimant had turned up for the course on the date, place and time specified for it and he was at the end of the queue and all the available places were allocated before he got to the head of the queue then that would not be a failure. I agree with that. Mr Bevan however submitted that in the instant case because the claimant had turned up so late that there were no places left for him he had failed to attend. He then submitted that I would require to send the case to a freshly constituted tribunal because of the tribunal's finding that the claimant attended the Job Centre at 9.30 on the relevant date with a reasonable enquiry. I accede to that submission.

13. I do not consider that it would be appropriate for me to make my own findings in fact in this case and I would not feel confident of accepting the tribunal's findings as they stand. As the decision of the tribunal which heard the case has to be set aside I consider that a remit for a fresh tribunal hearing is the only course open to me. The tribunal will require to determine whether there was a failure to attend on the part of the claimant upon the basis of the views I have expressed as to what is imported by the word "failure" in the relevant regulation.

14. The appeal succeeds.

(signed)

D J May

Commissioner

Date: 9 January 1996