

Very good reading of the new provisions
Commissioner's Case No: CSIS/256/99 *hr*

DECISION OF SOCIAL SECURITY COMMISSIONER *reg 19*

1. My decision is that the decision of the social security appeal tribunal held at Glasgow on 12 August 1998 is erroneous on a point of law. I set it aside. In the exercise of my power under section 22(7)(a)(ii):-

(1) I substitute for the second sentence of the tribunal's finding of fact number 3 ("on that date she telephoned....."), "on 19 January 1998 she telephoned the local office of the DSS in Springburn"; and in finding in fact number 4, for "Friday, 16 January 1998", I substitute, "Monday, 19 January 1998".

(2) I allow the appellant's appeal against the adjudication officer's decision, to the extent of finding that the claim for income support should be treated as having been made on 19 January 1998.

1 I also direct the adjudication officer to draw this decision to the attention of the Secretary of State to consider whether the provisions of regulation 19(6) and (7) of the Social Security (Claims and Payments) Regulations 1987 should be applied to the appellant's claim in relation to 17 and 18 January 1998.

1 2. On Friday 16 January 1998, the appellant, who had been working since July 1997 although for most of the time also in receipt of disability working allowance, stopped work due to illness. Although the documents before me do not set out the details of her illness, her illness has never been in doubt. She was awarded income support but appealed to the tribunal in relation to 2 aspects of the award: first, the starting date, which the adjudication officer fixed at 23 January 1998, on the view that that was date on which she had made her claim; and second, the failure of the adjudication officer to award a disability premium with the award of income support, considering that she had been in receipt of disability working allowance from 12 January 1997 until 12 January 1998. The tribunal decided against her on both counts. She appeals with leave of the tribunal chairman in respect of the first part of the decision, that relating to the date of her claim. The second issue which was before the tribunal does not arise in this appeal and it is not necessary for me to consider it further.

3. The appellant wished to claim benefit from 17 January 1998, the day after she stopped work. The tribunal has clearly made an erroneous finding of fact in relation to the appellant's initial telephone call to the DSS office. They found that that took place on Friday 16 January, the day on which the appellant stopped work, whereas it is quite clear from the papers that she never claimed that she telephoned on that day, but rather claimed that she telephoned on the Monday, 19 January 1998. As this is of some significance in working through the application of the relevant regulations, and as I am upholding the appeal and myself giving a decision, I have directed the necessary amendment of the findings of fact to make it clear that the appellant in fact first telephoned the DSS office on Monday 19 January 1998.

4. With the correction which I have made, the tribunal's findings of fact dealing with the problem which arose will read as follows:-

3. The appellant stopped work due to illness on 16 January 1998. On Monday 19 January 1998 she telephoned the local office of the DSS in Springburn. She was put through to the Incapacity Benefit Section and was sent out an Incapacity Benefit form which she received on or about Monday, 19 January 1998. Later in the course of that week she had contact with officials in the Housing Department who advised her to claim Income Support. As the result of that advice she obtained an Income Support form and completed it on 23 January 1998.

4. In her telephone conversation with the Department nothing was mentioned in regard to Income Support by the official with whom she spoke. Only an Incapacity Benefit form was sent out to her. No Income Support form was sent out to her in response to her phonecall on Monday 19 January 1998.

5. The appellant also claimed Incapacity Benefit by completing the form sent out to her but the contributions conditions for that benefit were not fulfilled. No award of Incapacity Benefit can be made in this case.

7. Prior to commencing work the appellant had been in receipt of Income Support.....

8. In her telephone conversation with the Incapacity Benefit Section the appellant mentioned that she had previously been an Income Support claimant."

5. It will be seen that the principal problem which the tribunal had to consider with regard to the date of the claim arose out of the fact that, whatever precisely the appellant said when she telephoned the DSS office on the Monday after having ceased working on the Friday, she was supplied with forms to apply for incapacity benefit when in fact she should have been claiming income support. Later that week, in the Housing Department, she learnt about the mistake, obtained application forms for income support and lodged the correct application, which in due course led to the award of income support, on 23 January 1998. The tribunal agreed with the adjudication officer's decision that in those circumstances her claim had to be treated to have been made on 23 January 1998, with the result that she did not receive benefit for the period from 17 January to 22 January inclusive. She appeals against that part of the tribunal's decision with leave of the tribunal chairman.

6. In reaching its decision in relation to the date of the claim, the tribunal noted and sought to apply the amended rules with regard to the back-dating of claims, contained in regulation 19 of the Social Security (Claims and Payments) Regulations 1987, as amended. They noted the Secretary of State had not exercised powers available to him under regulation 19(6) and (7) (which I shall consider later) and then asked themselves whether any of the circumstances specified in regulation 19(5), setting out certain specific circumstances which may allow back-dating for up to three months, could apply in the case of the appellant. They noted that they had considerable sympathy with her situation but felt obliged because of the terms of the regulations to uphold the adjudication officer's decision.

7. The basic effect of regulation 19 is to prescribe that income support has to be claimed on the first day of the period in respect of which the claim is made. The circumstances, under

regulation 19(5), in which the claim can be "backdated" (technically, the prescribed time for claiming extended), include:-

"(5)(b) Except in the case of a claim for jobseeker's allowance, the claimant was ill or disabled, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim.....

(d) the claimant was given information by an officer of the Department of Social Security or of the Department for Education and Employment which led the claimant to believe that a claim for benefit would not succeed."

The tribunal considered and gave reasons for their view that neither of the circumstances applied (and nor did any of the other circumstances laid down in regulation 19(5)).

8. With regard to regulation 19(5)(b), the tribunal accepted that the appellant was ill, but pointed out that she could have received a degree of assistance from her husband and indeed had been able herself to telephone. No appeal is taken, nor I think could be, in relation to the tribunal's reasons for rejecting the application of regulation 19(5)(b).

9. The tribunal's reasons for rejecting the application of regulation 19(5)(d) were as follows:-

"In our view the appellant was probably given insufficient information about the totality of her claim to benefit in that she was given no information at all about a claim to income support and only information in regard to a claim for Incapacity Benefit. It would have been better no doubt had she been advised by the officer of the Department with whom she spoke about a possible claim to both these benefits. However, we are not satisfied that she received any information from an officer of the Department of Social Security which led her to believe that a claim for Income Support would not succeed. It was rather simply the case that she did not receive any information about Income Support at all. She was given no misleading information in our view and, therefore, her claim cannot be backdated either under regulation 19(5)(d) of the said Regulations."

10. The appellant challenges those reasons as mis-direction. It is claimed on her behalf that "the tribunal have misinterpreted the law by deciding that being told nothing about income support when making a general enquiry does not satisfy regulation 19(5)(d)".

11. In her submission in this appeal, the adjudication officer supports the appeal but on slightly more elaborate grounds than those advanced on behalf of the appellant. She draws attention to regulations 4(5) and 6(1A) of the 1987 Regulations, and argues that, as the claim form was in fact returned within one month of the original telephone call that call amounted to a notification of the intention to make the claim and accordingly the effect of regulation 6(1A) was that the date of the claim (without any question of back-dating) was in fact the date of the telephone call, which the adjudication officer correctly identified as 19 January. In the view of the adjudication officer, the original adjudication officer had never made a decision on back-dating the claim and the decision was accordingly erroneous on that basis also. I was invited to set aside the decision of the tribunal and remit the case to a

differently constituted tribunal. The adjudication officer also draws attention to the power of the Secretary of State to consider whether the circumstances came under regulation 19(7) and suggested that the new tribunal could if necessary refer the question to the Secretary of State to consider that issue.

12. In my view the effect of the regulations is that 3 issues require to be considered in this case. Firstly, applying regulation 6, what is the date on which this claim was treated as having been made? Secondly, can the date for applying be "backdated" by the operation of regulation 19(4) and (5)? Thirdly, is there an issue under regulations 19(6) and (7) which the Secretary of State, rather than the tribunal or myself in this appeal, should consider? The tribunal only considered the second of these issues. My decision, in short, is that in the circumstances the appellant is entitled to succeed on the first issue, the effect of regulation 6 being that her claim is treated as having been made on 19 January; and, even if I were wrong on the first issue, the appeal would also succeed on the second issue, because the tribunal mis-directed itself on the application of regulation 19(5)(d) and, further, that there is also an issue for the Secretary of State to consider as to whether her claim can be further backdated to 17 January.

The First Issue: Date of Claim (Regulation 6)

13. Regulation 19(6)(1A) provides as follows:-

"(1A) In the case of a claim for income support -

- (a) subject to the following sub-paragraphs, the date on which a claim is made shall be the date on which a properly completed claim is received in an appropriate office or the first day in respect of which the claim is made if later;
- (b) where a properly completed claim is received in an appropriate office within one month of first notification of intention to make that claim, the date of claim shall be the date on which that notification is deemed to be made or the first day in respect of which the claim is made if later;
- (c) a notification of intention to make a claim will be deemed to be made on the date when an appropriate office receives -
 - (i) a notification in accordance with regulation 4(5); or
 - (ii) a defective claim".

14. The original adjudication officer took the date of first notification as being 23 January, the date on which notification of claim to income support was made and indeed the claim for that benefit was received. The adjudication officer in the submission in this appeal suggests that the original telephone call on 19 January notifying the Benefits Agency that the appellant was now unemployed due to ill-health, amounted to the first notification. I agree with the latter view, as a matter of interpretation of the provisions.

15. Reading regulation 6(1A)(b) on its own naturally leads to the view that to qualify as notification of intention, such a telephone call to the office must indicate an intention to make "that claim", ie a claim to the same benefit, ie here income support. Such a reading, however, ignores the "deeming" provision. The reference in 1A(b) is to the "date on which that notification is deemed to be made", (my underlining), and 1A(c) provides that a notification will be deemed to be made on the date when the office receives a notification in accordance with regulation 4(5). Regulation 4(5) provides as follows:-

"(5) Where a person who wishes to make a claim for benefit and who has not been supplied with an approved form of claim notifies an appropriate office (by whatever means) of his intention to make a claim, he shall be supplied, without charge, with such form of claim by such person as the Secretary of State may appoint or authorise for that purpose."

That is looked for there is notification (which can be by telephone) of intention to make a claim. Regulation 6(1A) relates only to cases of claims for income support. It appears to me entirely natural, and it appears to fit in with the other admittedly somewhat complex provisions regarding the claim procedure and the date of claim, that in the case of income support a person who has telephoned indicating an intention to make a claim, can have the subsequent claim for income support dated from the date of that telephone call even if, for whatever reason, either the claimant or the office think at that time that another form of benefit, such as incapacity benefit, may be appropriate.

16. I therefore consider, agreeing with the submission of the adjudication officer in this appeal, that on a proper application of regulation 6(1A), the correct date of the claim could be Monday 19 January. The tribunal erred in failing to consider this issue which properly arise in the appellant's appeal. Further, since it is clear that the original telephone call was all about making a claim for benefit in the new circumstances in which the appellant found herself, further enquiry into the facts is not necessary and I can myself decide, on a consideration of this issue, that the correct date of the claim was 19 January. As I have already indicated, correction of the tribunal's finding as to the actual date of that telephone call is required, and I consider that to be expedient. I have decided the appeal, to the extent of finding that 19 January was the date of the appellant's claim, on this basis.

The Second Issue: "Back-dating" (Regulation 19(4) and (5))

17. I consider that the appeal also succeeds on the second issue. In my opinion regulation 19(5)(d), the specific back-dating provision dealing with mistaken information given by the Department, need not be so restrictively interpreted as the tribunal have interpreted it. The tribunal has acknowledged that the appellant was in that telephone call given insufficient information about her claim because she was only given information in regard to a claim for incapacity benefit. They consider, however, that because she did not receive any information about income support, what she was told was not information "which led the claimant to believe that a claim for benefit would not succeed". In other words, if a claimant is given information which leads him or her to claim the wrong benefit, he or she cannot come within this provision and cannot have the claim back-dated. I do not think this is a necessary or appropriate interpretation. In my view, if a person is told to apply for one

benefit, that person may think it is inappropriate to apply for some other benefit (for which, in any event, he or she will not be given the appropriate application form) and in that sense will think that an application for another benefit will not succeed.

18. I am assisted in reaching that view as to the proper interpretation of this provision by a decision of Mr Commissioner Williams in CIS/610/1998, at paragraphs 11 to 13, although the circumstances of that case were not quite the same. There, the claimant had been in receipt of jobseeker's allowance but became incapacitated for work. He said he was told at the Department that he did not need to fill anything in and it was sufficient for him to hand his medical certificate in. The Commissioner felt that that information could be interpreted to mean that he did not need to make another claim, ie another claim would be a waste of time and would in that sense not succeed. It could not be right that if the information to the claimant is that he or she does not need to fill in a claim form because the claim will not succeed the provision applies, but it does not apply if the information is that he or she does not need to fill in a claim form because the claim will succeed in any event. I think similar reasoning can apply where a claimant is given information which leads him or her to claim the wrong benefit, and I agree with Mr Commissioner Williams' observations that while regulation 19(5) is clearly intended to restrict late claims to limited situations, the intention cannot have been to restrict this provision as narrowly as that.

19. I therefore consider that the tribunal mis-directed itself in relation to regulation 19(5). On this issue, I would have had to remit the case back to a fresh tribunal to consider the evidence about the telephone call further in the light of this interpretation of the provision. The tribunal would also have had to consider whether regulation 19(4)(b) was satisfied, ie if the circumstances specified in 19(5)(d) did apply, was it satisfied that as a result of that the claimant would not reasonably have been expected to make the claim earlier? Having regard to my decision on the first issue, however, that is not necessary.

The Third Issue: "Backdating" by Secretary of State (Regulation 19(6) and (7))

20. That brings me to the third issue. Understandably, the claimant sought the benefit not from the Monday on which she first telephoned the office, but from the Saturday (17 January). Neither regulation 6 nor regulation 19(4) and (5) enable this to be done, but regulation 19(6) and (7) would enable the Secretary of State so to treat the appellant's claim if he considers this consistent with the proper administration of benefit and if the case falls within another list of specified circumstances, set out in 19(7). 19(7)(a) applies where the office where the claimant would be expected to make the claim was closed and there were no alternative arrangements. That might be thought to cover a weekend situation, once it is established that the claim may properly be dated from the Monday after the weekend. This is, however, a matter for the Secretary of State, and not me, to decide. Accordingly, I direct the adjudication officer to refer this case to the Secretary of State to enable that matter to be considered.

21. For these various reasons, I have allowed this appeal, substituted my own decision to the extent set out in paragraph 1, and also directed the adjudication officer to refer the matter to the Secretary of State as indicated.

(signed)

J N WRIGHT QC

Deputy Commissioner

Date: 17 September 1999