DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER

Decision

1. I allow the appeal. I hold the tribunal erred in law. I remit to a differently constituted tribunal to re-hear the appeal taking into account the directions given hereafter.

Background

2. This is a claim by the claimant for a back dating of JSA. The relevant facts are taken from the decision of the tribunal as follows:

> "[The claimant] was employed up until 19 May 2006. He intimated his intention to make a claim for Jobseekers Allowance on 31 May 2006.
>
> On 20 May 2006, he travelled from London to Islay in search of work. On Tuesday 23 May 2006, he made enquiries at an Information Centre (not Job Centre) and decided that he would return to Glasgow before making his claim for Jobseekers Allowance. He did not have the funds to return to Glasgow until Friday 26 May 2006. As the Job Centre in Glasgow was closed for a Bank Holiday on Friday 26 and Monday 29 May, he was not able to intimate his intention to claim Jobseekers Allowance until Tuesday 31 May 2006."

Tribunal's decision

3. On 7 September 2006 the tribunal held that the claimant was not entitled to a back dating and, on request, issued a Statement of Reasons. The paragraph of the Statement of Reasons that is relevant to this appeal is in the following terms:

> "It was further argued that circumstance, sub-paragraph (b) applied in that the Claimant was unable to attend the appropriate Office due to difficulties with his normal mode of transport and there was no reasonable alternative available. The only difficulty identified by the Representative was the lack of funds to pay the ferry fare. There was no suggestion by the Appellant that there was any disruption to public transport due to adverse weather conditions. His only difficulty in making the journey to the appropriate Office was his lack of funds."

Appeal to Commissioner

4. On 14 December 2007 Commissioner Mr May granted leave to appeal. The ground of appeal was:

> "The tribunal have erred by importing into the paragraph a text that only things such as disruption of public transport due to adverse weather conditions as there is no such restriction in the regulation and the tribunal give no further reason as to why 'lack of funds' cannot apply."

5. The Secretary of State did not support the appeal. The Submissions are at page 78. The submission relevant to the ground of appeal is in the following terms;

> "11. I further submit that the tribunal was correct in determining that the claimant's lack of funds to purchase the fare for the island ferry did not allow him to fall within the circumstances in regulation 19(7)(b), namely that of having difficulties with his normal mode of transport, as it was clear that the transport system itself was operating normally throughout the whole period. The claimant argues that, by applying a 'bad weather consideration' to the transport difficulties, the tribunal was restricting the circumstances contained in regulation 19(7)(b). I submit however, that, in making such a finding in this matter, the tribunal was not bringing that consideration within paragraph (7)(b), but was in fact considering it as a separate issue that fell within the provisions of regulation 19(5)(h) of the Regulations."

6. The Secretary of State also submitted that the claim could have been made by telephone and the claimant ought to have known that he could make the claim in this way.

Regulations

7. In terms of paragraph 19(6) of the Social Security (Claims and Payments) Regulations 1987 the claimant's claim could be back dated for one month is any one or more of the circumstances in Regulation 19(7) applied and the only one relied upon in this appeal is sub-paragraph (b):

> "19(7)(b) – the claimant was unable to attend the appropriate office due to difficulties with his normal mode of transport and there was no reasonable alternative available".

Discussion

8. The issue in this case therefore is whether lack of funds to pay for the ferry fare amounts to "difficulties with his normal mode of transport" or if the regulation really only applies to difficulties with the transport itself as suggested by the tribunal with the example of disruption to public transport due to adverse weather conditions.

9. In my opinion where the normal mode of transport is one for which a payment is required, then an inability to pay is something that can fall within the word "difficulties". The word "difficulty" is defined to include "an embarrassing situation, esp. of financial affairs" or "a cause of trouble" or an "impediment". Where benefits are directed towards those who are vulnerable in society because of lack of funds, I consider it is only reasonable that a difficulty in paying for public transport, if that is the normal mode of transport, must be a "difficulty" within the regulation, particularly where the exception is dealing with the ability to attend the office. An inability to pay a fare is a difficulty arising from an embarrassment in financial affairs and is an impediment to using the normal mode of transport.

10. However, the Regulation goes on to state "and there was no reasonable alternative". The question is whether this refers to no reasonable alternative transport to allow attendance at the office or refers to no reasonable alternative to making the claim. In my opinion it refers to no reasonable alternative transport to help the claimant to attend the office. The word "alternative" appears to me to qualify "transport", so the regulation is referring to alternative transport.

11. However, Regulation 19(6) gives a one month back dating "where the claim is not made within the prescribed time" and (a) one of the circumstances in (7) applies **and** [my emphasis] (b) "as a result of that circumstance ... the claimant could not reasonably have been expected to make the claim earlier".

12. It is argued that the claimant could reasonably have been expected to make the claim earlier by telephone. It is argued that ignorance of security law and the method of making a claim does not exonerated a claimant and justify a back dating; CIS/3986/2001. In so far as the tribunal accept that there was no clear information available to the claimant that he could have made his claim by telephone and held that non of the exceptions applied I consider the tribunal erred. The tribunal ought to have considered 19(6)(b) to confirm whether or not the claimant could not reasonably have been expected to make the claim earlier.

13. In so far as the Secretary of State relies on the Deputy Commissioner in CIS/3986/2001 that "9 ...ignorance of the benefits system is not a ground which can justify back dating ...10 ... because a person can reasonably be expected to make enquiries as to his or her entitlement", as applying a universal rule that ignorance of the law is never a ground for backdating I consider that a wrong interpretation of the decision. While ignorance of the law is no excuse in a criminal case, in civil matters members of the public are not always expected to know the law. In my opinion ignorance of the law is but one of the factors, but a very important factor, to be taken into account in determining whether or not someone has acted reasonably. The Deputy Commissioner's decision qualified by the presumption that a person could reasonably be expected to have made enquiries. However, if it was not reasonable in the circumstances of that case to make enquiries then I consider that ignorance of itself would not necessarily preclude a backdating. I consider the test is whether in the whole circumstances the claimant can show that he did what any reasonable person would have done to ascertain his rights. If having done that he remained in ignorance of the law, then it could be said that "the claimant could not reasonably have been expected to make" the claim by telephone.

14. There is a similar approach in a Canadian case, *AG of Canada v Albrecht* (1985) A-172-85[1] regarding showing good cause for making a late benefits claim where the court said;

> "It seems to me that logic alone does not permit one to pass from the proposition that ignorance of the law does not constitute good cause - the only proposition for which the ***Pirotte*** decision strictly stands -, to a proposition that ignorance of the law **excludes** good cause. This second proposition does in no way derive from the first. It is, it must be realized, the second proposition that is behind the interpretation defended by the Applicant, so much so that the explanation given as to why ignorance induced by the Commission would be treated differently is that it would then be superseded by the principle that the Commission must be held responsible for its own fault (en explanation incidentally somewhat surprising when it is considered that we are dealing with a rule in no way related to administrative liability). To say, as the Applicant does in effect, that ignorance of the law excludes good cause seems to me to defeat the whole purpose of the legislation since, apart from instances of physical incapacity and leaving aside possible cases of indifference or lack of concern,

[1] http://www.ei-ae.gc.ca/policy/appeals/Federal-Court/A017285e.html

ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time. The submission of the Applicant appears to me unacceptable.

The Umpire in her reasons for judgment correctly reminds us that it is to the claimant's conduct that the requirement of showing good cause for delay is directed". There is, indeed, an obligation which imports a duty of care required of a claimant and I readily agree that, to assure the prompt filing of claims, so important in the eyes of Parliament, that obligation and duty must be seen as being very demanding and strict. Of course, I have no doubt that it would be illusory for a claimant to cite "good cause" if his conduct could be attributed only to indifference or lack of concern. I readily agree, too, that it is not enough for him simply to rely on his good faith and his total unfamiliarity with the law. But an obligation, with its concomitant duty of care, can be demanding only to a point at which the requirements for its fulfillment become unreasonable. In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the reason for his failure, he ought to be able to satisfy the requirement of having good cause", when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and, in my opinion, this is what justice requires." [my underline]

15. In these circumstances I remit to a differently constituted tribunal to rehear the appeal. The tribunal will first have to have regard to whether or not the claimant was unable to pay for the ferry off the island so as to bring himself within Regulation 19(7)(b) and if that is established to go on to determine whether, under Regulation 19(6)(b) "the claimant could not reasonably have been expected to make the claim earlier"; ie by telephone. This will require a consideration of why the claimant did not know that he could make the claim by telephone having regard to the case law cited above. There appears to be a difference as to the nature of the office from which the claimant sought advice in Islay – the Secretary of State saying it was a tourist office, but the claimant saying it was an information office. The tribunal should investigate if there was any link between the DWP and the office; ie had it been asked to distribute benefit information by the DWP or was there no official connection. The tribunal should also note that the claimant appears to have claimed JSA in 2005 and what he knew or ought to have known from that claim would also be relevant.

(signed)
Sir Crispin Agnew of Lochnaw Bt QC
Deputy Commissioner
Date: 22 February 2007