

one of JL's

RFMH/SH/13/MD

MASTER

Claimant repeating part of third year of a 3 yr degree course. Whether no longer attending course of full time education but now only studying part-time so as to come within Reg 7 C of E Regs.

Commissioner's File: CSSB/221/1986

C.A.O File: AO 2584/SB/1986

Region: Scotland

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Andrew Binns

Social Security Appeal Tribunal: Dundee

Case No: 05/005/03

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal dated 28 January 1986 is erroneous in point of law, and accordingly I set it aside. I direct that the matter be reheard by a differently constituted tribunal, who will have regard to the matters mentioned below.

2. This is the claimant's appeal on a point of law against the unanimous decision of a social security appeal tribunal dated 28 January 1986, leave having been granted by the tribunal chairman. The claimant's request for an oral hearing of the appeal was granted. The claimant did not attend the hearing held before me but was represented by Mr J Luba of the Child Poverty Action Group. The adjudication officer was represented by Mr M N Storey from the Solicitor's Office of the Department of Health and Social Security. I am indebted to them both for their helpful submissions.

3. On 14 October 1985 the claimant, a single man then aged 21, claimed supplementary allowance. In reply to an enquiry as to his reasons for claiming when he was due to return to university on 16 September 1985, the claimant stated that he attended St Andrew's University for 11½ hours per week; that he was a part-time student; that he did not receive a grant and had no income. An officer of the Department contacted St Andrew's University and was advised that the claimant was a medical science student and that his course was a full-time course.

4. On 11 November 1985 the adjudication officer rejected the claim on the grounds that as the claimant was attending a course of full-time education, he was a student in terms of regulation 2(1) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, as amended, so that by virtue of regulation 8(1)(a) of the said Regulations he could not be treated as available for employment for the purposes of section 5 of the Supplementary Benefits Act 1976. Thereupon the claimant appealed to the tribunal.

5. The claimant attended the hearing before the tribunal on 28 January 1986 and was represented. It was submitted that as the claimant was attending a course of part-time education, he satisfied the conditions of regulation 7 of the Conditions of Entitlement

Regulations and was entitled to supplementary allowance. In a written submission given to the tribunal, the claimant's position was explained as follows:-

"[The claimant] will gain the B.Sc Ordinary Degree in Medical Science at the end of the academic year 1985/86, i.e. after four years of study. The University Prospectus states that "the degree of Bachelor of Science (Medical Science .. leads to the ordinary degree of B.Sc, (Medical Science) in three years". The Education Authority Major Award is also given for three years full-time study only ... [The claimant's] fellow students attend courses in anatomy, pathology, physiology, pharmacology and microbiology. They will sit examinations in all five subjects. [The claimant], however, is attending only the anatomy and pathology courses, and will sit examinations in only those two subjects. The course attended by his fellow students will be completed after the normal three years and is therefore full-time. [The claimant's] course will be completed after four years and this year is substantially different in content from that of his fellow students."

6. In the event the tribunal dismissed the appeal. Their findings on questions of fact were:-

[The claimant] is aged 21, single and is a joint tenant with three others. He is not disabled, has no dependants, is not one of an unmarried couple and is in good health.

2. On 14.10.85 he claimed supplementary allowance by completing form B1. He had returned to university on 16.9.85.

3. He is attending a course of study leading to a BSc degree in medical science. His lectures and tutorials amount to 11½ hours weekly. He has had part-time jobs during term time.

4. St Andrew's University has confirmed that the BSc Degree is a full-time course."

The reasons for decision were:-

"The tribunal were agreed that although [the claimant] is repeating his third year and has to pass examines in only two subjects, the course attended is a full-time course leading to the degree of B.Sc, which is normally completed in three years, and [the claimant] is a student as specified in Reg 8(1)(a) of the Conditions of Entitlement Regulations and Reg 6(a), (i), or (j) of these Regulations do not apply to him. In making this decision the Tribunal had regard to Commissioner's decisions R(SB)40/83 and R(SB)41/83."

7. Regulation 19(2) of the Social Security (Adjudication) Regulations 1984 provides that every tribunal chairman shall record a statement of the reasons for the tribunal's decision and of their findings on material questions of fact. In the present case for the reasons stated below, the tribunal chairman failed to comply with the statutory requirements. As a result the tribunal's decision was erroneous in law and I have no alternative but to set it aside. I remit the matter to another tribunal.

8. Section 5 of the Supplementary Benefits Act 1976, so far as relevant to the present appeal, provides as follows:-

- "5. - (1) The right of any person to a supplementary allowance is subject -
- (a) except in prescribed cases, to the condition that he is available for employment; and
 - (b) ...

(2) Regulations may make provision as to -

(a)

(b) the circumstances in which a person is or is not to be treated for the those purposes as available for employment."

9. The regulations made pursuant to section 5 of the said Act are regulations 6, 7 and 8 of the Conditions of Entitlement Regulations. Regulation 6 describes the circumstances in which persons are not subject to the requirement to be available for employment. Regulation 7 prescribes the circumstances in which persons are to be treated as available for employment and regulation 8, to which regulations 6 and 7 are subject, prescribes the circumstances in which persons are not to be so treated. Regulation 8(1)(a), which is relevant to the present appeal, provides as follows:-

"8. - (1) A claimant shall not be treated as available for employment if he is a person to whom one or more of the following sub-paragraphs apply:

(a) he is a student and regulation 6(a), (i) or (j) does not apply to him;"

10. Mr Luba conceded that the relevant regulation 6(a), (i) or (j) did not apply to the claimant. The facts of the present case are not clear and Mr Luba was unable to assist. However, I presume that in September 1982 the claimant attended St Andrew's University and undertook the three year full-time course leading to a B.Sc, Ordinary Degree in Medical Science. The documentary evidence does not indicate whether he was granted an Education Authority Major Award during this period. It seems that at the end of the third year, the claimant did not satisfy the examiners in two out of the five subjects in which he was examined, so that he was required to attend the university for a further year and resit the final examinations in those two subjects. As a result he was required to attend only part of the normal full-time course. These are questions of fact and it will be for the new tribunal to establish precisely the reasons for the claimant undertaking a further year to complete the normal three year full-time course. If I am right in my presumptions of the facts it would seem that the claimant was a student for the purposes of regulation 8 (1)(a) of the Conditions of Entitlement Regulations up to the end of the academic year in July 1985.

11. The first question the tribunal had to consider was whether from 14 October 1985 the claimant was a student in terms of regulation 2(1) of the Conditions of Entitlement Regulations. The term "student" is defined as follows:-

"Student" means a person aged 19 or over but under pensionable age who is not a person to whom regulation 3(5) of the Supplementary Benefit (Aggregation) Regulations 1981 applies and who is attending a course of full-time education, or a person aged less than 19 attending a course of advanced education within the meaning of regulation 1(2) of the Child Benefit (General) Regulations 1976 but he shall not be deemed to be a student during these periods when he is not attending his course and is not engaged in a programme of studies;"

12. It will be seen that the definition of "student" falls into two parts. The first covers a person aged 19 or over but under pensionable age; the second a person aged less than 19. As regulation 3(5) of the Aggregation Regulations refers only to the second part, it has no relevance to the present case as it is not in dispute that the claimant was aged 21 at the material time.

13. In determining whether the claimant was a student in terms of regulation 2(1) of the

Conditions of Entitlement Regulations, the crucial question was whether from 14 October 1985 the claimant was "attending a course of full-time education".

14. Mr Luba submitted that the normal full-time B.Sc. course at St Andrew's University was completed in three years. However in the claimant's case the period was four years. This indicated that the claimant was attending a part-time as opposed to a full-time course of education. He found support for his conclusion in my Decision R(SB)41/83 in which I stated at paragraph 12:-

"Whether or not a person is a student attending a course of full-time education is a question of fact for determination by the tribunal having regard to the circumstances in each particular case. In so doing, the tribunal ought to take into account the description of the course given by the education authorities (ie the university or college) and the examining body. Such evidence is not conclusive (see paragraph 8 of the unreported decision C.S.B.15/82) but in my view any other evidence adduced in rebuttal should be weighty in content. All education authorities or examining bodies prescribe the period within which a course of education is to be completed. Their assessment is based on the amount of time (whether compulsory or voluntary) required to achieve the standard demanded. Part-time students are accordingly given such extensions as are deemed to be appropriate. Therefore, the normal period prescribed for completion of a course is a clear indication as to whether or not the student is attending a course of full-time education."

15. The facts in the present case differ from the facts envisaged in the above quotation with regard to part-time students. A university may offer a student an option of being a part-time student and completing a course over a longer period or being a full-time student and completing a course within a shorter period. The two courses are different and distinct and it follows that the hours of lectures and tutorials differ in each course. A student elects to undertake either the full-time course or the part-time course when he first registers for the course. The student will follow that course throughout the period specified for its completion. That is not the position in the present case. The evidence indicates that in September 1982 the claimant enrolled for a three year full-time course at St Andrew's University. However, because he failed to attain the required standard in two out of the five subjects in which he was examined during his third year, he was required to attend lectures and tutorials in those two subjects for an additional year. In other words he was required to repeat part of the full-time course. It will be for the new tribunal to determine from the evidence before them whether the fourth year was no more than an extension of the full-time course or whether it was sufficiently different in its nature and content so as to constitute a course on its own. It should be stressed that for the purposes of determining whether or not a claimant is a student in terms of regulation 2(1) of the Entitlement Regulations the focus is on the course, rather than simply on the hours of attendance. I should add for completeness that it does not automatically follow, as submitted by the presenting officer of the tribunal, that because the claimant was attending part of a full-time course, the course remained a full-time one. Conversely I do not accept the written submission on behalf of the claimant that the fact that the "normal period" was extended in consequence of repeat studies necessarily and by itself rendered that course, nor any part of it, part-time. As stated above the issue is a question of fact for determination by the tribunal based on all the evidence before them.

16. If the tribunal conclude that as from 14 October 1985 the claimant was a student in terms of regulation 2(1) of the Conditions of Entitlement Regulations, then by virtue of regulation 8(1)(a) he will not be entitled to supplementary allowance. If however the tribunal conclude that he was not, they should proceed to consider whether the claimant can avail himself of regulation 7 which so far as relevant to the present appeal provides as follows:-

"7. - (1) Subject to regulation 8, a claimant shall be treated as available for

employment if he is available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act (available to be employed for purposes of unemployment benefit) or regulations made under it, or if he is a person to whom paragraph (2) applies.

(2) A claimant who satisfies either of the conditions in paragraph (3) and who is attending -

(a) a part-time course of education at an establishment recognised by the Secretary of State as being, or as comparable to, a college or school; or

(b) ...

shall, if he is prepared to terminate the course immediately a suitable vacancy becomes available to him, be treated as available for employment.

(3) The conditions mentioned in paragraph (2) are -

(a) for a continuous period of not less than three months after the termination date and immediately before the commencement date the claimant was in receipt of qualifying benefit or on a course of training or instruction organised by or on behalf of a Manpower Services Commission as part of the Youth Opportunities Programme or the Youth Training Scheme; or

(b) ...

(4) For the purposes of this regulation -

(a) "a part-time course" means a course in the pursuit of which the time spent receiving instruction or tuition, under supervised study, examination or practical work or taking part in any exercise, expenditure or project for which provision is made in the curriculum of the course, does not exceed 21 hours a week, so however that in calculating the time spent in pursuit of the course no account shall be taken of time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment or place of instruction or training;

(b) "commencement date" means the date on which the claimant first attended the part-time course;

(bb) "terminal date" in respect that the claimant has the same meaning as in regulation 10;"

17. The tribunal should first consider the claimant's general availability for work under section 17(1)(a) of the Social Security Act 1975. This provides that it is a condition of entitlement to benefit that a claimant is, or is deemed in accordance with regulations to be, available to be employed earner's employment. Moreover, work is defined as meaning work which the person concerned can reasonably be expected to do. The work need not be full-time, part-time work is permissible. However availability for self-employment will not satisfy the condition. The new tribunal should have special regard to regulation 8(1)(f) as to

whether the claimant is available for employment having regard to the nature and hours of employment he is prepared to accept. In particular the new tribunal should consider whether the hours the claimant is required to attend the university for lectures and tutorials are compatible with regular employment.

18. It should be noted that regulation 7(1) of the Conditions of Entitlement Regulations falls into two parts. If the new tribunal conclude that the claimant is not available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act 1975 they should proceed to consider in the alternative whether he is a person to whom paragraph (2) applies. Sub-paragraph (a) is relevant in the present case subject to the claimant being able to satisfy either of the conditions in paragraph (3) and the overall proviso that "he is prepared to terminate the course immediately a suitable vacancy becomes available to him". In the written submissions on behalf of the claimant to the tribunal it was stated that he satisfied this proviso in that he had worked "from 18.10.85 to 21.10.85 when employment was available. [The claimant] is actively seeking work at present and has registered at St Andrew's Jobcentre." I do not consider this conclusive evidence. The burden is on the claimant to show that he was prepared to terminate the course immediately if a suitable vacancy became available to him. The tribunal should ascertain the claimant's general intention bearing in mind that he had completed three years of the course and only required a further year to obtain a B.Sc, Degree. If the new tribunal conclude that he satisfied the proviso, they should proceed to consider whether he was also able to satisfy either the conditions in paragraph 3. In my view sub-paragraph (a) is relevant.

19. The claimant's appeal is allowed and I give the decision set out in paragraph 1. The hearing before the new tribunal will of course constitute a complete rehearing and the claimant or his representative should submit in evidence all relevant documents in support of his claim. The record of the new tribunal's decision should ensure that the material facts and the reasons for decision are recorded by the chairman in accordance with regulation 19(2)(b) of the Adjudication Regulations.

(Signed) R.F.M. Heggs
Commissioner

Date: 8 September 1987