Bulletin 183

CIB/1009/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the Leicester appeal tribunal dated 11 November 2003 and I refer the case to a differently constituted appeal tribunal. The constitution of the tribunal must also be different from the tribunals that sat on 12 March 2002, 6 November 2002 and 28 August 2003.

REASONS

The facts

2. The claimant became entitled to incapacity benefit on 23 May 2000. On 12 September 2001, the Secretary of State superseded the award upon receipt of a medical report from an examining medical officer. The claimant appealed. After one decision of an appeal tribunal had been set aside under section 14(7) of the Social Security Act 1998 by Mr Commissioner Bano on 28 August 2002 (CIB/2171/02) and a second in a reasoned decision by Mr Deputy Commissioner Paines QC on 7 July 2003 (CIB/416/03), the matter was listed for hearing before a third tribunal on 28 August 2003. As on both the previous occasions, the claimant was represented by an advocate from the Welfare & Employment Rights Advice Service of Leicester City Council ("WERAS"). A Mr Moore had represented him on the first occasion and Mr Andy Platt represented him thereafter, as he has done on this appeal. Mr Platt had informed the tribunal in writing that the claimant had made a further claim and been accepted as incapable of work but he also conceded that that was due to depression from which the claimant had not been suffering on 12 September 2001. At the hearing, he argued that the tribunal should consider all the descriptors in respect of which the claimant had challenged the Secretary of State's decision and not just the two in respect of which the Deputy Commissioner had held the previous tribunal had erred. One might have thought that that submission was uncontroversial but the tribunal adjourned the hearing with directions that the claimant's representative should supply a written submission in support of his argument, that the Secretary of State should supply a submission in response and that the Secretary of State should be represented at the next hearing if he did not support the claimant's representative's submission. Both parties supplied the required submissions – the Secretary of State unsurprisingly agreeing with Mr Platt that all issues were at large before the tribunal – and the case was listed for hearing again on 11 November 2003.

3. The chairman recorded a full note of what happened on that day. At 9.40 am, the clerk to the tribunal took a telephone call from WERAS to say that Mr Platt would be unable to attend the hearing at 10.00 am because he was ill. The chairman, who was present while the clerk was on the telephone, said that another representative would have to attend with the claimant if they wanted to request an adjournment. Her note explains that –

> "The chairman's view is that Leicester City Council Welfare Rights is an organisation offering assistance, advice and representation to clients and the absence of one member of the team should not prevent the hearing of the appeal at its time."

The person making the call refused to guarantee that there would be a representative and said that he himself was due to attend as a representative on a hearing at 12 noon. He asked the

clerk to tell the claimant to telephone him when he arrived. The claimant arrived at 10.00am and informed the clerk that he had visited WERAS on the preceding day and had been told that his representative was ill and there was no-one else to see him. He telephoned WERAS and was told to ask for an adjournment. He said to the clerk that he wanted to get the appeal out of the way. However, when the case was called on at 10.30 am, he applied for an adjournment. He said that his health was not good, that, when he had visited WERAS the day before, he had been told that Mr Platt "might be here tomorrow – you never know" and that he wanted his representative to speak on his behalf.

4. The tribunal decided not to grant the request for an adjournment. The chairman recorded in the record of proceedings that their reasons were that Mr Platt did not know the claimant at the date of the decision under appeal, that the claimant had some knowledge of tribunal procedure, having been at three previous hearings, that the tribunal had a written submission from the claimant's representative, that the tribunal had an inherent enabling role and that it was not in the interests of justice to delay the hearing of the appeal when the decision under appeal had been made over two years earlier. The tribunal had also observed the claimant walking into the room, pulling out the chair, getting into and out of the chair and carrying a carrier bag on his left arm, all without apparent difficulty. They duly heard the appeal and dismissed it.

5. After the decision had been given, a fax was received from WERAS, formally requesting the adjournment. The request was originally dated the previous day but its text suggests that it had been written that morning and at some time the date on the copy in the papers before me was changed. The chairman has recorded that, when the other representative of WERAS attended for his 12 noon hearing, there was some conversation about the present claimant's case and the representative "tried to mislead the [the tribunal] by intimating a letter requesting adjournment had been sent yesterday". If there was such a misrepresentation, it was highly reprehensible and would have justified a complaint to the representative's employers. However, I make no finding on the point because I have not investigated it and it is not relevant to this appeal.

6. A week after the hearing, Mr Platt asked for the tribunal's decision to be set aside. He said –

> "The grounds for this request are that it is just to do so because I, as [the claimant's] representative, was ill on the day of the hearing and was therefore unable to represent him. I obviously did not know that I was going to be ill until the morning of the hearing and it was not possible to make arrangements for another team member to represent [the claimant] at such short notice, not least because of the complexity of the case.
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> In addition, this complexity makes it all the more important that [the claimant] has a representative."

Another chairman, having read the tribunal chairman's record of proceedings, refused the request.

7. The tribunal chairman produced a lengthy statement of reasons for the tribunal's decision, running to seven pages and 46 paragraphs. She alluded to the request for setting

aside and suggested that it implied that the representative had not been ill until the day of the hearing, which was not what the claimant had understood. She also reiterated, and enlarged upon, the grounds for refusing the application for an adjournment.

> "The tribunal was aware that [the claimant] had attended an oral hearing of the tribunal of an Appeal Tribunal [sic] on 2 previous occasions. He was therefore already acquainted with the procedure, the venue, the roles of the different personnel, the powers of the tribunal. It was not a new experience for him as he had prior knowledge of how an Appeal Tribunal operates. The tribunal has an inherent enabling role to assist the appellant make his case. His case had already been made to a certain extent by his representative who had submitted additional evidence in the form of a report from Dr V Lim and from other correspondence sent over the course of the appeal's progress. In this appeal the tribunal was looking at a set of circumstances obtaining 2 years previously. The tribunal had to ensure that evidence given directly by [the claimant] related to the period at the date of the decision. His oral evidence as to the facts obtaining at that time becomes less distinct as time passes. This is the case with all witnesses. To further delay the hearing of this appeal was not in [the claimant's] interest. The Welfare Rights Organisation representing [the claimant] refused even to attend to request an adjournment. The representative organisation is a large City Council with huge resources at its disposal. The tribunal is a judicial body also funded by large sums of public money. The role of the tribunal is not to remedy inefficiency in another organisation, but to carry out its judicial duties in accordance with the law. If a person seeks representation, then that person is entitled to have representation, but if the representation does not materialise when it is possible for representation to be secured, the tribunal is not in a position to make amends for this deficiency. It must guarantee a fair hearing; the tribunal had no doubt this could be achieved in the absence of a representative. The grounds of appeal have been originally stated and have been amplified over the history of this appeal. The issues are well known and do not have to be teased out by the tribunal. Even though Mr Andy Platt is the named representative, another representative, Mr Moore has had conduct of this case on behalf of Leicester City Council. All Welfare Rights Organisations are employees of a single body [sic]. The fact that Mr Platt was absent from work the day prior to the hearing was known to the organisation. Preparations to guarantee representation could have been made the day before contingent on the ill health of Mr Platt continuing into the following day. No such preparations were made."

The chairman also referred to the written material before the tribunal.

8. The claimant applied for leave to appeal, his representative submitting that the refusal to adjourn involved a breach of the rules of natural justice and that, in any event, the tribunal had not given adequate reasons for their preference for certain medical evidence rather than other such evidence. The tribunal chairman refused leave to appeal. On a renewed application, I granted leave to appeal. After a little confusion, it has become clear that the Secretary of State supports the first ground of appeal but not the second.

The Commissioner's jurisdiction

9. It is axiomatic that whether or not a hearing should be postponed or adjourned is a matter within the discretion of the chairman or the tribunal but that the discretion must be

exercised judicially. Thus, provided a tribunal's decision to adjourn or not to adjourn is rational and relevant considerations have been taken into account and irrelevant considerations have not been taken into account, the decision cannot be successfully challenged either on judicial review or on an appeal against the tribunal's decision on the appeal (see CIS/2292/00). In the present case, both parties challenge the tribunal's reasoning.

The parties' submissions

10. Mr Platt submits that the case was complex and that it was unreasonable to expect the claimant adequately to represent himself or for the case to be passed at short notice to another advice worker. He draws my attention to *Regina v. Social Security Commissioner, ex parte Bibi* (CO/2257/99, 23 May 2000), where Collins J said, at paragraph 18, that "it is hardly unreasonable that a party to proceedings which are of importance to that party should want the person with whom she has been dealing to represent her". He also submits that the tribunal overestimated the resources available to WERAS and points out that Mr Moore had been transferred to another part of the council and no longer worked for WERAS. Mr Platt further says that "the tribunal's comments are indicative of a clear hostility to the representing organisation" and he points to incidents that he suggests show double standards being applied. First, the tribunal had adjourned on 28 August 2002 when he and the claimant had been ready to proceed. Secondly, in a case involving another client, a hearing had been adjourned against his clients' wishes so that the Department's presenting officer could pick up his children, which was, he says, an event more foreseeable than illness.

11. Ms Denise Taylor, on behalf of the Secretary of State, refers to a ruling in CIB/24/97, in which Miss Commissioner Fellner referred to CDLA/5580/97 (wrongly cited as CSDLA/5580/97) and CSDLA/90/98 when refusing to set aside her decision made in the absence of a representative, and she submits that a person is not necessarily entitled to an adjournment because a representative is unavailable but that an adjournment should have been granted in this case due to its complexity. She also submits that the tribunal took into account an irrelevant consideration in regarding it as significant that Mr Platt did not know the claimant at the date of the decision under appeal and that they gave too much weight to the fact that the decision under appeal had been two years previously, when an adjournment would have led to a further delay of only about six weeks.

The right to be treated fairly

12. If a claimant is accompanied by a representative, he is entitled to have that representative heard, by virtue of regulation 49(8) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. However, in *Bibi*, it was made plain that there is no absolute right to representation and therefore, if a person is not accompanied by a representative, a tribunal is not bound to adjourn to enable him to obtain one merely because he wishes to do so. Thus, regulation 49(8) does not prevent a tribunal from proceeding in the absence of a representative and, *a fortiori*, as was held in CIB/24/97, the absence of a particular representative. On the other hand, it was also held in *Bibi* that there is an absolute right to be dealt with fairly and that not only must a desire to be represented be taken into account in considering whether a hearing is to be adjourned but it is also not unreasonable to take account of a desire to be represented by a particular representative. In that case, the tribunal did not act fairly in hearing the claimant's appeal on a date on which the claimant's solicitor had given due warning he personally would not be available.

Relevant considerations

13. A tribunal will always require to be persuaded that an adjournment is necessary – because there is always a potential disadvantage in adjourning a case – but the arguments against an adjournment in tribunal proceedings in a social security case may not be quite the same as those applicable in adversarial proceedings in the courts. In particular, the interests of the parties are not usually as closely balanced. In an ordinary social security case, where the Secretary of State does not provide a representative or have witnesses in attendance, there is very little disadvantage to the Secretary of State in granting the claimant an adjournment. It is usually the claimant himself who suffers the principal disadvantage of delay. If the claimant judges that disadvantage to be less than the disadvantage of proceeding without representation, a tribunal should not too readily substitute its own judgment on the relative weight of those two factors. The main consideration for the tribunal will therefore be whether the adjournment can be justified in the light of the substantial cost of a further hearing and the delay in the determination of another case whose place the adjourned hearing will take. Thus the interests of taxpayers and claimants in general need to be balanced against the interests of the particular appellant.

14. If the claimant is to blame for need to request an adjournment, his interests are likely to be given correspondingly less weight. A claimant's interests may also be given less weight where his representative's fault has led to the request for an adjournment. By agreeing to act for a claimant, a representative takes some responsibility for the case and tribunals are entitled to exert pressure on representatives to behave properly. However, in an environment where most representatives are not qualified lawyers and where most claimants are not paying for the services of their representatives, some care must be taken not to cause injustice to a claimant by visiting upon him the sins of his representative. The tribunal's response must be proportionate, having regard to the consequences for the claimant of possibly losing his appeal.

The duties of representatives

15. As the tribunal in the present case clearly regarded WERAS as having been at fault, the first question that arises is whether they were entitled to do so. This case throws up once again the question of what it is reasonable to expect from a representation service provided by a local authority in a situation where a representative is ill. Insofar as the tribunal in this case expected the local authority to mobilise their wider resources, their approach was consistent with that of Mr Commissioner May QC, who said in CSDLA/90/98 –

> "When representation is undertaken by a local authority, the claimant is entitled to expect to be fully represented by the authority till disposal of the appeal. ... Having undertaken representation, if difficulties arise in the provision of that representation by virtue of illness of other reason, then it is incumbent upon the local authority, in the event that there is no-one else from the welfare rights part of their organisation to represent the client, to arrange representation through their legal department or contract it out."

I regret that I cannot wholly agree with that statement of a local authority's duties. A local authority is under no statutory duty to provide representation before tribunals. If, in exercise

of broad powers to provide social services, a local authority creates a representation service, the authority is quite entitled to limit the budget of the service and its powers to call upon other resources. It follows that the representation service is quite entitled to undertake to provide representation only insofar as it can do so within its budget and the resources available to it.

16. However, it does not follow that a local authority representation service is entitled to expect a case to be adjourned merely because a representative who has been handling a case is ill. The service can reasonably be expected to act responsibly, having due regard both to the interests of the individual claimant and the broader interests of taxpayers and claimants in general. That implies that reasonable efforts will be made to secure alternative representation for the claimant, even if that means another adviser cancelling some appointments that can reasonably be deferred, which is what a lawyer would consider doing in those circumstances. A tribunal can be expected to be sympathetic to a request for a short adjournment while a new representative takes instructions. On the other hand, it has to be recognised that the competence of non-lawyer representatives varies and that it is not always reasonable to expect such a representative to pick up the details of a new case as quickly as a lawyer might. It also has to be recognised that some cases require more preparation than others.

17. In any event, the implication of a representation service's duty to act responsibly implies that, where the representation service employs several people, a request for an adjournment should normally contain a clear indication that consideration has been given to another representative taking the case and an explanation (which need not necessarily be detailed) for that not being practical. In the absence of such an explanation, a tribunal may be entitled to infer that the representation service has not acted reasonably.

18. In the present case, Mr Platt complains that the chairman's request for a representative to attend to ask for an adjournment was unreasonable. However, the point of having a representative present to ask for an adjournment was presumably that that representative would have been able to consider representing the claimant on the appeal or giving an explanation as to why that was not practical. Had the person who spoke to the clerk explained on the telephone why no-one was able to represent the claimant and, in particular, why he himself was unable to do so, the chairman might well not have asked him to attend to make the application for the adjournment. As it was, WERAS's inability to cover for Mr Platt was left unexplained and there was *prima facie* evidence that there was in fact someone available (i.e., the person who had telephoned the clerk – there was no evidence that Mr Moore was available) and that, in any event, contingency plans could have been made the previous day.

19. Mr Platt's submissions also imply that the tribunal unreasonably had regard to the possibility of Mr Moore acting for the claimant. Had the tribunal been suggesting that Mr Moore should have acted for the claimant, I would accept that they would have erred in law because there was no evidence that Mr Moore was still employed by WERAS. However, it seems to me that the tribunal's reference to him was merely to make the point that it had been possible to transfer the claimant' case from one representative to another on a previous occasion. Mr Platt is on stronger ground in pointing out that the circumstances were different and, in particular, there had been proper time for an orderly transfer of the case. On the other hand, he has not answered the tribunal's point that, on this occasion, contingency plans could have been made the previous day. There was clearly some doubt about WERAS's

circumstances but that was due to their failure adequately to explain their need for an adjournment.

20. In my judgment, the tribunal were entitled to consider there to have been some fault on the part of WERAS. They were entitled to conclude that WERAS had not given adequate consideration to transferring the case to another representative. However, they erred in considering that all the council's resources were necessarily at WERAS's disposal and so their apparent certainty that another representative could have been found was unjustified, although they were entitled to take the view that there was a representative who might have been available.

The balancing exercise

20. I do not accept Ms Taylor' point that the tribunal had regard to an irrelevant consideration when referring to the fact that Mr Platt had not known the claimant at the date of the decision under appeal. It is true that no-one had ever suggested that Mr Platt had been going to give evidence in this case but the tribunal were entitled to distinguish this case from the many cases where representatives are also witnesses and I do not consider that the tribunal were doing more than that.

21. I do accept Ms Taylor's submission that it was unreasonable for the tribunal to cite as a reason for refusing the adjournment the fact that over two years had passed since the decision under appeal, because, while as a general rule a tribunal is entitled to have regard to the possibility of witnesses becoming less reliable as time passes, the additional delay of six weeks or so before a new hearing could be arranged would have been neither here nor there in the context of the two years that had already elapsed. It was not suggested that any of the previous delay was attributable to the claimant or his representatives. Indeed, given that the principal balance to be considered was that between the interests of the claimant and the costs to the tribunals of a further hearing, it might have been thought relevant that much of the delay had actually been caused by tribunals.

22. However, by far the more important point is that the tribunal plainly did not properly have regard to the value of representation. It ought always to be possible for a tribunal to guarantee a fair hearing to a claimant who is not represented and it was no doubt true that the claimant's previous experience meant that he would find the hearing less daunting than some claimant's would, but it does not follow that representation would have had no value. There was no reason to suppose that the claimant's previous experience had qualified him to analyse medical evidence and advance the arguments required in his case. I accept that the tribunal had written submissions before them, but they are never a complete substitute for oral argument. In particular, if a representative is not present at a hearing, he cannot be given the opportunity to answer reservations the tribunal may have about the written arguments.

23. Plainly, if a tribunal is prepared to allow an appeal in a representative's absence or if an appeal is so hopeless that it cannot be rescued by advocacy, there is no point in adjourning to enable the claimant to be represented and it is in the claimant's interests for the adjournment to be refused. There are, indeed, cases where it is sensible for a tribunal to hear some evidence before deciding whether or not to adjourn, because the evidence may reveal a very clear answer to the appeal. There are also cases which, although not open and shut, are

nonetheless straightforward and can be said to be ones where advocacy is unlikely to make any difference.

24. This, though, was not a case where advocacy could not have made any difference. As both parties submit, it was obviously not straightforward and the claimant was not bound to lose it. The tribunal's observations of the claimant were not conclusive. There was conflicting medical evidence. An advocate's submissions might well have assisted the tribunal to reach a conclusion favourable to the claimant. In those circumstances, it was simply perverse for the tribunal to say that to adjourn "was not in [the claimant's] interest", unless they were prepared to allow the appeal.

25. Perhaps it was the tribunal's apparent belief that the claimant was better off not having an adjournment that led to them failing also to take account of the amount of money at stake. It is not clear from the papers exactly how much that was but the tribunal could have obtained a better idea from the claimant and it might have been almost two years' worth of incapacity benefit.

26. The claimant himself was blameless in the matter of the adjournment. He had made proper attempts to secure representation and had attended in person to seek the adjournment. The case was not simple and he was at a disadvantage in not being represented. Even if WERAS had failed to consider whether the case could be transferred to another representative, it was by no means certain that such a transfer would have been possible. The amount of money at stake was substantial. The tribunal had a duty to treat the claimant fairly. It is difficult to see how, if the tribunal had had proper regard to these considerations, an adjournment could properly have been refused.

Conclusion

27. I am satisfied that the tribunal's decision not to adjourn the case was flawed and that the claimant was not treated fairly. In consequence, the decision of the tribunal on the appeal from the Secretary of State was made in breach of the rules of natural justice and was therefore erroneous in point of law. So far as the other grounds of appeal are concerned, I agree entirely with Ms Taylor's submissions as to why the tribunal's reasons for holding that the claimant was not incapable of work at the material time were not flawed in the ways alleged in the grounds of appeal. Nonetheless, the decision must be set aside. Had the claimant been represented, it is possible different conclusions might have been drawn from the evidence. There must plainly be an oral hearing of the factual issues. I have considered whether I should hold one but have decided to accept the submissions of both parties that the case should be referred to yet another tribunal.

Comment

28. I sense that relations between WERAS and the tribunals are not all that they ought to be. I express the hope that those in a position to do so will take some steps to promote greater mutual understanding.

(Signed) **MARK ROWLAND**
Commissioner
1 October 2004