(162)

Claimant not receiving clerk's direction or oral hearing - breach of natural justice

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CIB/5227/1999

Starred Decision No: 34/01

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34/01

CIB/5227/1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, brought by the claimant with my leave, against the decision of the Liverpool social security appeal tribunal dated 28 January 1999, whereby they dismissed his appeal from a decision of an adjudication officer to the effect that he was not entitled to incapacity benefit from 11 November 1998 because he did not satisfy the all work test. I held an oral hearing of the appeal at which the claimant was represented by Ms Njideka Agwuna of Mersey Welfare Rights Resource Centre (MWRRC) and the Secretary of State for Social Security, who has succeeded to the functions of the adjudication officer, was represented by Ms J Anderson of Counsel.

2. On the all work test assessment, the adjudication officer had awarded 5 points under the mental health descriptors (including one on the basis that the claimant frequently found there was so many things to do that he gave up because of fatigue, apathy or disinterest) and no points under physical descriptors. The claimant's appeal was made to the local office of the Department of Social Security, as required by the Social Security (Adjudication) Regulations 1995, and it was received on 7 December 1998. The appeal was made in a letter from MWRRC accompanied by a letter of authorisation signed by the claimant. The fact that the claimant was represented by MWRRC was recorded on form AT43 when the Benefits Agency forwarded, on 11 December 1998, the appeal documents to the clerk to the tribunal who received them on 16 December 1998.

3. Meanwhile, on 9 December 1998, the claimant had, according to the GAPS record, been sent the clerk's direction which, among other things, directed the claimant to state whether he wished there to be an oral hearing (see regulation 22(1) of the 1995 Regulations). Presumably, the Benefits Agency had notified the Independent Tribunal Service of the appeal, even though the bundle of documents and the submission had not been sent to the clerk. On 13 January 1999, the submission was issued to the claimant. On 28 January 1999 the case was listed for hearing on that very day and the claimant's appeal was dismissed. A copy of the decision notice was issued to him. On 24 March 1999, he took a copy of the covering letter to MWRRC who communicated with the Independent Tribunal Service and then, on 6 April 1999, applied for the decision to be set aside on the ground that the case had been heard without notice being given either to the claimant or to them. Also, on 13 April 1999, they sought leave to appeal on the claimant's behalf. On 13 May 1999, the regional chairman decided that "the interests of justice do not manifestly require a set aside" and he recorded the following findings that have led to that conclusion:-

> "The clerk's direction was sent to [the claimant] on 9.12.98 but he did not reply.
>
> The tribunal papers were sent to [the claimant] on 13.1.99 but he did not reply.
>
> There were no procedural errors.
>
> There was no notice because the hearing was paper."

Leave to appeal could not be granted by the tribunal chairman because the claimant had not obtained a full statement of the tribunal's decision (R(IS) 11/99) and therefore the claimant made the application to me.

4. In the application made to me, it was asserted that the claimant had not received the clerk's direction. This point had not been made before. However, it seems very clear that it was only on receipt of the regional chairman's decision on the set aside application that MWRRC realised that the reason neither they nor the claimant had received notice of the oral hearing was that no notice had been issued because the clerk to the tribunal had not received any response to the direction apparently issued on 9 December 1998 and so it had been assumed that the claimant wished there to be a paper hearing. Plainly MWRRC did not realise that the claimant had not asked for an oral hearing when he took the tribunal papers to them because, had they done so, they would have contacted the clerk to arrange such a hearing and it seems to me that they would have made the point to the regional chairman when applying for the set aside had they realised it at that stage. (Indeed, had they done so, the regional chairman would probably have granted the application and this case perhaps illustrates one of the disadvantages of not having oral hearings on set aside applications because, had there been a hearing attended by the claimant and his representative, it would surely have emerged that the claimant's case was that he had not received the clerk's direction).

5. The first question that arises on this application is whether or not the claimant did actually receive the clerk's direction. If he did, his own failure to reply is the reason there was no oral hearing of his appeal. (I accept Ms Anderson's submission that there was no statutory duty to communicate separately with a representative, although I was pleased to learn from Ms Agwuna that that is now a practice.) If on the other hand he did not receive the clerk's direction, he was deprived of the opportunity of an oral hearing through no fault of his own.

6. I heard evidence from the claimant and he said that he had not received any documents before the bundle of documents with the adjudication officer's submission to the tribunal. In reply to a question from Ms Anderson, he said that he could not remember anything else having gone astray but that there were a lot of flats in the house where he lived and everyone picked up their own post. He said that he felt at the time unable to cope with formal documentation and would have taken any letter to his representative and he did with the bundle of papers that arrived with the adjudication officer's submission. It is, of course, conceivable that the claimant received the clerk's letter and did not appreciate its significance or simply failed to act on it (and it may be thought that the requirement for the person to opt into an oral hearing, rather than opt out, is capable of acting unfairly in respect of those claimants with mental health problems) but, on balance, I am satisfied that the claimant did not receive the direction. Whether that was due to an administrative fault within the tribunal service showed that, although the letter was issued by the computer, it was not actually posted, or whether it was due to a fault in the postal service or due to another occupier taking the letter when it arrived in the house where the claimant lived, I cannot tell, although the former seems to be least likely.

7. The next question that arises is the legal significance of the non-receipt by the claimant of the clerk's direction. The Secretary of State simply submitted in the written submission on this appeal that, as the clerk to the tribunal had not received a reply to the direction, the tribunal were entitled to proceed without an oral hearing. That, of course, is

true. No blame can be attached to the tribunal for the claimant's non-receipt of the clerk's direction and, on the evidence that presented itself to them, they were quite entitled to proceed as they did. However, the question on this appeal is not whether the *tribunal* themselves were at fault but is whether their *decision* is erroneous in point of law (see, now, section 14(1) of the Social Security Act 1998) and a decision is erroneous in point of law if reached in breach of the rules of natural justice (R(SB) 11/83). In R(S) 4/82, to which the Secretary of State's representative has referred, the Tribunal of Commissioners said:-

> "26. Natural justice requires that the procedure for any tribunal which is acting judicially shall be fair in all the circumstances. It has been described as 'fair play in action' and its requirements depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so on: see *Wiseman v. Borneman* (1971) A.C. 297 at pages 308, 309, 311, 314, 315 and 320 (per Lords Reid, Morris, Guest, Donovan and Wilberforce). There are accordingly no hard and fast rules that apply to all tribunals. But, in the case of an appeal by a claimant for benefit to a local tribunal, for practical purposes these requirements can be reduced, as indicated by Lord Justice Diplock (as he then was) in *Regina v. Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 Q.B. 456 at pages 486 et seq to three: an absence of personal bias or *mala fides* on the part of the tribunal, an obligation to base their decision on evidence and, whether or not there is an oral hearing, to listen fairly to the contentions of all persons entitled to be represented."

The claimant in the present case was entitled to an opportunity to require there to be an oral hearing at which he could put forward his contentions. He did not have that opportunity and the consequence was that the tribunal was unable to listen to those contentions. Regulation 1(3) of the 1995 Regulations provided that where "any notice or other document is required to be given or sent to him in person, that notice or document shall, if sent by post to that person's last known or notified address, be treated as having been given or sent on the day it was posted". That may have the effect that the claimant is deemed to have received the clerk's direction but such deemed receipt is not the same as actual receipt. The claimant is unable to reply to a document that he is merely deemed to have received. The effect of regulation 1(3) is that neither the tribunal nor the regional chairman can be criticised for the approaches they took on the evidence before them. However, had the tribunal been made aware that the claimant had not actually received the clerk's direction, it would have been wholly wrong for him to proceed with the appeal at a paper hearing. Equally, had the regional chairman been made aware of the full circumstances, he would have no doubt set aside the tribunal's decision. In my view, I, knowing what the facts are, can remedy the defects and allow this appeal.

9. Miss Anderson drew my attention to *Regina v. Secretary of State for the Home Department, Ex parte Al-Mehdawi* [1990] 1 A.C. 876. Lord Bridge made it plain in that case that the simple proposition that a party to a dispute who, through no fault of his own, has not in fact been heard has been denied justice was not correct but he identified the question arising in that case as being "whether a party can complain of a denial of natural justice when he has been afforded by the decision maker an opportunity of presenting his case but through the fault of his own advisers the opportunity has not been taken". In that case, the claimant's solicitors had been given notice of a hearing before an adjudicator but had written to the applicant at the wrong address and so he had been unaware of the hearing. When the decision of the adjudicator was received, the solicitors gave the applicant information about

appealing but again sent it to the wrong address so that, by the time the applicant knew of the dismissal of his appeal, it was too late to appeal further. That case is plainly distinguishable from the present case because here neither the claimant nor his representatives actually had the opportunity of seeking an oral hearing. At the time of the events relevant to this appeal, no letter was sent to a claimant telling him that his case would be considered on the papers and there was nothing in the covering letter sent with an adjudication officer's submission and the bundle of documents to indicate that there was to be a paper hearing.

10. In his speech in *Al-Mehdawi*, Lord Bridge considered a number of cases where a claimant had been denied an opportunity of calling evidence and said that in such cases there must be fraud, collusion, perjury or something analogous to those factors before it could be said that the loss of such an opportunity entitled the High Court to interfere with the decision of a court or tribunal. But, again, those cases are rather different from the present, where the claimant was deprived of any hearing at all, although they do show that fault on the part of the court or tribunal is not an essential pre-requisite of the High Court's power to quash a decision. (He also suggested that such cases were not correctly classified as cases involving breaches of the rules of natural justice but that merely suggests that the grounds upon which a decision may be held to be erroneous in point of law are more numerous than those listed in R(SB) 11/83 or even in R(IS) 11/99.) In this case, it is clear that, if, as I have found, the claimant did not receive the clerk's direction, there was a fundamental unfairness about the proceedings before the tribunal. I am quite satisfied that that unfairness renders the decision of the tribunal erroneous in point of law.

11. Accordingly, I allow the claimant's appeal. I set aside the decision of the Liverpool social security appeal tribunal dated 28 January 1999 and I refer the case to an appeal tribunal constituted under regulation 36 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 by a legally qualified panel member who was not the tribunal whose decision I have set aside and by a medically qualified panel member who was not the medical assessor at that hearing, for determination.

M. ROWLAND
Commissioner
22 February 2001