

**SOCIAL SECURITY ACT 1986
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 SOCIAL
SECURITY ADMINISTRATION ACT 1992**

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 11 June 1993 which confirmed a decision issued by the adjudication officer on 5 February 1993. My own decision is as follows:

- (1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.
- (2) Pursuant to section 23(7) of the Social Security Administration Act 1992, the case is referred to the appeal tribunal for determination in accordance with the principles of law set out in this decision.

2. I held an oral hearing of the appeal. The claimant was represented by MS M Kalsi, of counsel, instructed by Mr M Hemingway, solicitor, of the Coventry Legal & Income Rights Service. The adjudication officer was represented by Ms N Yerrell, of the Office of the Solicitor to the Departments of Health and Social Security. I am much indebted both to Ms Kalsi and to Ms Yerrell for the very real assistance which each afforded to me. It is not the most straightforward of cases. Each advocate had taken the trouble to acquaint herself with the documentation and to give constructive thought to the resolution of the issues before the Commissioner. I think that by the end of the hearing Ms Kalsi and Ms Yerrell were at one as to the decision which I should give and as to the directions which I should furnish by way of assistance to the fresh tribunal.

3. The case raises the familiar question of whether a course of study at an educational establishment is full-time or part-time. I should have liked to be able to give a decision which

would have brought these proceedings to finality. The findings of fact recorded by the appeal tribunal were of themselves far too jejune to permit of that. But I had hoped that it might be possible to obtain at the hearing such clarification and amplification as would allow me confidently to assess the overall situation. But by the end of the hearing we were all agreed that that had not proved possible. The claimant himself was not expected to attend; but he arrived in the course of the hearing. He was able to assist me on one or two points of obscurity. Also present at the hearing was Mrs J Jones, the adjudication officer who had appeared at both of the appeal tribunal hearings. She too was able to assist on one or two issues. But at the end of the day there were still too many unanswered questions to permit of a final decision.

4. I set out so much of the narrative as will - I trust - render this decision intelligible to the reader. But I repeat that my understanding of the facts is less than complete. Everything will be at large before the fresh tribunal. I myself am recording nothing by way of findings of fact.

5. The claimant was born in December 1972. He lives with his parents. He last worked on 20 November 1991. On 14 January 1992 he claimed income support. He appreciated that his lack of qualifications prejudiced him in the depressed labour market. He embarked upon an HNC course in computer studies at Sutton Coldfield College. That was a part-time course, involving only 81 hours of study a week. (There, and hereafter in this decision, I use the word "study" as a portmanteau word to cover the activities specified in the definition of "course" in regulation 9(3) of the Income Support (General) Regulations 1987.) The attending of that course in no way prejudiced the claimant's entitlement to income support. Income support was awarded and paid.

6. Later that year the claimant changed both courses and colleges. On 14 September 1992 he embarked upon a two years course at Coventry Technical College. His object was to obtain a BTEC National Diploma in Computer Studies. There seems no doubt but that that was a full-time course. Early in December 1992 the claimant's local social security office received from the unemployment benefit office notification that the claimant was attending the BTEC course for more than 21 hours a week. A form A160 was completed by the claimant. His answers indicated that he was doing 21¾ hours of study a week. The claimant's entitlement to income support was jeopardised. Section 124(1)(d)(i) of the Social Security Contributions and Benefits Act 1992 provides that a person in Great Britain is entitled to income support if, except in such circumstances as may be prescribed, he is available for, and actively seeking, employment. Regulation 10 (1) of the General Regulations sets out circumstances in which claimants are not to be treated as available for employment. Sub-paragraph (h) opens: "he is a student during the period of study, other than . . .". (None of the exceptions is material to this case.) Regulation 2 (1) of the General Regulations sends us to regulation 61 for the definition

of "student". I set out the definition there given.

" 'student' means a person, other than a person in receipt of a training allowance, aged less than 19 who is attending a full-time course of advanced education or, as the case may be, a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment; and for the purposes of this definition -

- (a) a person who has started on such a course shall be treated as attending it throughout any period of term or vacation within it, until the last day of the course or such earlier date as he abandons it or is dismissed from it;
- (b) a person on a sandwich course shall be treated as attending a full-time course of advanced education or, as the case may be, of study;"

7. The legislation furnishes no definition of "full-time". Similar - although not identical - wording featured in the supplementary benefit legislation. Many decisions of the Commissioner have been devoted to the topic - and copies of four such decisions are in the papers. It has been emphasised from the outset that it is to the relevant course itself that attention must be directed and not to the degree of attendance of the individual claimant. In other words, if the course is a full-time course, it avails a claimant nothing to demonstrate that he himself devotes not a single hour a week to his studies. Such a claimant will remain a "student" until he abandons the course or is dismissed from the course. I am well aware that the meaning of "abandons" in this context is the subject of appeals pending before the Court of Appeal; but the determination of this case is in no way dependent upon the outcome of those appeals. It has also been established by the Commissioner that -

- (a) whether a person is a person attending a course of full-time education is a question of fact for determination having regard to the circumstances in each particular case;
- (b) account ought to be taken of the description of the course given by the relevant education authorities; and
- (c) although such evidence is not conclusive, evidence adduced in rebuttal should be weighty in content.

8. Faced with the prospect of losing his income support, the claimant modified his educational pursuits. I employ that imprecise terminology because, of course, crucial to the determination of this case is the question whether the claimant -

- (a) continued to attend the same course but in a different manner, or

(b) ceased to attend one course and started to attend another.

The fresh appeal tribunal may or may not be already acquainted with the general format of the esoteric language (I hesitate to say jargon) of current computer studies. I must confess that when I first read the papers in this appeal, I myself was not thus familiar; and even now I feel somewhat fogbound. For example, the papers are replete with the concept of "accessing a module". Although I myself enjoyed my full share of formal education, I have at no time been aware that I was accessing any module. But both Ms Kalsi and Ms Yerrell essayed their explanations of the term; and both assured me that I must, in my time, have accessed many modules. I think that in this context "module" means a component of a course; and that "access" means to engage in the activities relevant to that component. But under no circumstances should the fresh tribunal accept my diffident and tentative explanation. If the tribunal does not already know what "accessing a module" means, it must do its best to find out for itself.

9. The papers contain a number of letters written by the Director of Student Services at the College. I shall not refer to her as the "DSS" because those three initials normally mean, in this jurisdiction, the Department of Social Security. shall, accordingly, refer to the Director as "Ms A T". Since I cannot trust myself accurately to paraphrase what Ms A T has written, I set out certain verbatim quotations:

"Within most of the programmes we offer students they access either the whole or part of the qualification. Credits can be accumulated so that the full qualification can be obtained when all required modules have been completed.

The main distinction between the full and part-time student is that full-time students are required to access all the modules to complete the full award. In addition to this many of our full-time courses include access to additional qualifications in support of the main qualification route chosen. A part-time student may undertake any number of modules within a course.

With the development of NVQs and GNVQs the distinctions between full and part-time will become increasingly blurred. NCVQ have established that GNVQs should be accessible by any mode of study, including full and part-time routes.

I confirm that the National Diploma/Certificate Course is equivalent to NVQ level 3 which is broadly equivalent to 'A' levels." (Fax of 24 March 1993)

"I confirm that [the claimant] is a bona fide student at the College, following the BTEC National Diploma in Computing. I understand that [the claimant] does not

attend the College on Thursdays and is therefore not accessing all the modules required to complete the full award this year. He will of course be accredited for the modules successfully completed and will be in a position to claim the full award once he has completed the outstanding work. In my opinion [the claimant] should be deemed to be a part-time student because he is not completing the required modules on his course.

[As I have indicated in paragraph 7 above, it is the course and not the student which has to be part-time.]

I would also like to take this opportunity to reiterate an earlier statement I made concerning the use of the classification of a course as either full or part-time. Many of our courses, including those in our full-time prospectus, can be accessed by both full or part-time students. This is increasingly becoming the norm and with the development of NVQs and GNVQs the distinctions between full and part-time will become increasingly blurred.... All routes will lead to the same award. The classification of the course and payment is made on the basis of the number of modules undertaken. At present a concession of 75% of course fees is also available for the registered unemployed." (Letter of 6 April 1993)

10. By a letter dated 14 April 1993 the Benefits Agency put four questions to Ms A T. She answered those questions in her letter of 27 April 1993. For convenience, I here conflate the questions with the answers:

"Q. On what date did [the claimant] withdraw from the full-time course?

A. With effect from 1 January 1993.

Q. From what date were the course fees adjusted? What fees are now charged?

A. Course fees were not adjusted. In the event of withdrawal after the start of the course we are not required to refund. Refund of fees is at our discretion.

Q. When will [the claimant] complete the outstanding work in order to obtain his Diploma?

A. [The claimant] may complete the outstanding work at any time in the next 5 years if he wishes to claim his Diploma.

Q. Does the part-time course appear in the College prospectus?

A. The College has not had a part-time prospectus for some years. We are currently preparing this for 1993/4."

I quote further from Ms A T's letter of 27 April 1993:

"However it is Possible to enrol on any number of modules on any of our full-time courses.... in response to your reference to the fact that it is the course, not the students attendance with is the deciding factor, I must reiterate my earlier comments. Given the nature of the changes in further education over the past five years and the move towards more accessible and flexible training, it simply will not be possible to determine whether a course is full or part-time by using its title. NVCQ have established that GNVQs (the replacement for BTEC National Diplomas/Certificates), for example, should be accessible by any mode of study, including full and part-time routes. All routes will lead to the same awards

1 From what I have set out so far in this decision, it will be clear that there has in recent years been a significant measure of rearrangement of educational courses with the aim of achieving - for the benefit of the relevant students - much greater flexibility. As an ordinary citizen, I in no way deplore that; indeed, I applaud it. As a Commissioner, however, I recognise that some of the relatively straightforward guidance which the Commissioner has hitherto been able to give in respect of the full-time/part-time distinction is no longer of itself sufficient. The adjudicating authorities must take note of changes in the approach of educational authorities. Even closer inspection must be made as to the full circumstances of any given case.

12. It seems clear that in the case now before me the course upon which the claimant embarked at Coventry Technical College involved 7 modules - and was designed to lead to a Diploma. In January 1993 the claimant reduced the modules to 5; and all the evidence before me indicates that although that could lead to a Certificate, it would not lead to a Diploma unless and until the claimant - at a later date, but within 5 years of enrolment accessed 2 more modules. It would appear that that reduced his hours of study to 15 a week, although no finding to that effect has so far been recorded. One thing is clear, however. There was nothing underhand about the claimants re-adjustment of his studies. Everything was done with the full knowledge of the college. Everything was done in accordance with the College's own provisions in respect of such course or courses.

13. By the decision issued on 5 February 1993 the adjudication officer decided that from 12 January 1993 there was no entitlement to income support because the claimant was "a student during the period of study". (It was, of course, a reviewing decision, although it does not seem to have said so.) The claimant appealed. The case first came before the appeal tribunal on 24 March 1993. Evidence and argument were heard. Manifestly, that appeal tribunal gave the case careful and fruitful consideration. That tribunal recognised that there was not before it sufficient information to enable it satisfactorily to determine the appeal. It adjourned. It expressly recorded

that it had not made any findings of fact. It set out clearly four aspects of the case in respect of which it required further information and/or further documents. The local adjudication officer then added further documents to the papers and made a further written submission. It was still her submission that the claimant was attending a full-time course and, consequently, not entitled to income support.

14. The appeal tribunal which sat on 11 June 1993 was constituted entirely differently from the tribunal which had sat on 25 March 1993. Properly, it reheard the appeal de novo. The claimant attended and presented his own case. [It was recorded that his representative "could not make it today".] There is a relatively full record of the evidence and argument - although I find parts of that record to be a little difficult to follow. But at the hearing before me Ms Yerrell readily agreed with Ms Kalsi's submission that the manner in which the appeal tribunal recorded its findings of fact and its reasons was so inadequate as to amount to error of law. The appeal tribunal confirmed the decision which the adjudication officer had issued on 5 February 1993. But its recorded findings of fact ran to no more than this:

"[The claimant] is a full-time student."

That one sentence, of course, errs in applying "full-time" to the student instead of to the course (cf my comment in paragraph 7 above). But it is somewhat extraordinary that the appeal tribunal saw fit to record no other findings of fact. Anyone who has read paragraphs 5 to 12 of this decision will appreciate that there were a number of important questions of fact upon which findings fell to be made before an answer could be given to the question of whether, at the material time, the claimant had been attending a full-time course or a part-time course. The recorded reasons were somewhat more expansive than the recorded findings of fact:

"The tribunal has much sympathy with [the claimant] but as explained to him we had to apply the regulations as they are, not as he wished.

In this case [the claimant] registered for a full-time course in September 1992 and although he adjusted this downwards in January 1993 this did not make him available for work. He remains a full-time student [my underlining] until the end of the course. The regulations and Commissioners decision are clear. See General Regulations and RSB 40/83, RSB 41/83."

As Ms Yerrell submitted, those reasons make no attempt to grapple with various crucial facets of the case. (Several of those facets had been identified in the reasons which the earlier appeal tribunal had given for adjourning.) The "reasons" set out in the decision which was given on 11 June 1993 do little more than state a conclusion.

15. As Ms Yerrell put it, it is no longer sufficient to say "look at the course". Relatively recent changes in the approach of educational authorities render such advice inadequate. The overall circumstances must be examined so that the realities of the situation may be ascertained. Very helpfully, Miss Yerrell suggested that the fresh tribunal should record findings of fact in respect of the following issues:

- (1) Was the course upon which the claimant embarked in September 1992 a full-time course?
- (2) In the ('Likely) event that question (1) should be answered affirmatively, did the claimant in January 1993 change from that course to a part-time course?
- (3) Before answering question (2), consideration should be given to and findings recorded in respect of -
 - (a) the number of modules being accessed by the claimant in 1992 and the number of modules being so accessed in 1993;
 - (b) the number of hours of study in 1992 and the number of hours of study in 1993;
 - (c) whether, in the light of the correspondence from the College, it can properly be concluded that the course in issue was one which could be attended either full-time or part-time according to the arrangements made between the relevant student and the College;
 - (d) the length of time it would normally take the claimant (i) to obtain a Diploma on the basis of 7 modules (ii) to obtain a certificate on the basis of 5 modules and (iii) to obtain a Diploma on the basis of a maximum of 5 modules at any given period in his studies;
 - (e) the fees payable by the claimant in respect of a 7 modules course and (ii) a 5 modules course; and
 - (f) the assistance - if any - to be gained from the College's prospectus.

I have no hesitation in endorsing that list. I asked Ms Kalsi if she wished to suggest any additions thereto. She said that she did not.

16. The appeal tribunal which adjourned on 25 March 1993 recognised the urgency of the claimant's situation. It directed that the further hearing should be "relisted as quickly as possible once the steps set out below have been taken". Matters must be much more urgent now. I myself hope that the rehearing by the fresh appeal tribunal can be appointed as soon as can be

conveniently arranged.

17. The claimant's appeal is allowed.

(Signed) J Mitchell
Commissioner

Date: 25 November 1994