MJG/SH/4/TP **Commissioner's File:** CIS/050/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. I allow the claimant's appeal (but only to the extent indicated below) against the decision of the social security appeal tribunal dated 25 May 1989 as that decision is erroneous in law and I set it aside. My decision is that from 16 January 1989 and for such time as the claimant was attending the K.P. Training Centre for instruction in typing and shorthand for the Royal Society of Arts' qualifications she was not entitled to income support. That is because during that period she was a "student", i.e. a person aged 19 or over but under pensionable age attending a full-time course of study at an educational establishment: Social Security Act 1975, section 101; Social Security Act 1986, section 20(1)(d); Income Support (General) Regulations 1987 (S.I. 1987 No. 1967) regulations 10(1)(h) and 61.

2. This is an appeal to the Commissioner by the claimant, a single woman aged 25 at the relevant time. The appeal is against the unanimous decision of the social security appeal tribunal dated 25 May 1989 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 20 January 1989 in the following terms,

> "The claimant is not entitled to Income Support from 16 January 1989. This is because she is a student attending a full-time course of study and she is not available for employment."

3. The appeal was the subject of two oral hearings before me, the first on 30 August 1990, the second on 8 November 1990. At both of those hearings the claimant was not present but was represented by her father. At the first of the hearings the adjudication officer was represented by Mr T Parke and on the

second occasion the adjudication officer was represented by Mr L Scoon, both of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant's father, to Mr Parke and to Mr Scoon for their assistance to me at the hearings.

4. I have by my decision in paragraph 1 above set the social security tribunal's decision aside but have effectively given the same decision as the tribunal and the local adjudication officer did. However, I have felt impelled to set the social security appeal tribunal's decision aside on an entirely separate matter, namely that I accept the contentions of the claimant's father that there was a breach of the rules of natural justice in the events immediately preceding the commencement of the tribunal hearing, such as to cause a reasonable person to have an apprehension that justice might not fully have been done.

5. Shortly after the hearing, the claimant's father complained to the Regional Chairman of Social Security Appeal Tribunals that when the clerk of the tribunal took the claimant's father to the tribunal room, the door of the tribunal room (which was an improvised room) was wide open and the chairman and members were sitting at a table inside. Just outside the door of the tribunal in the corridor and either standing or sitting (it is not quite clear which) was the adjudication officer, Mr L, who was acting as presenting officer on that day. The hearing was the first for that day and was scheduled to start at 10.00 am. The hearing did not in fact however commence, nor was the claimant called up to the tribunal room, until between 10.10 am and 10.15 a.m. The claimant's father did not know how long Mr L had been waiting outside the open tribunal room door. The Chairman of the tribunal did not offer any explanation for the late start.

6. The regional chairman caused statements to be obtained from the chairman, the clerk of the tribunal and also from the presenting officer, Mr L. The tribunal clerk (Mr P S) stated,

> "[The claimant's father] attended on time, to represent his daughter; he was initially seen by [another clerk Mr D.W.], who was clerking one of the 2 tribunals taking place that morning. I was responsible for clerking the tribunal using the 'spare' room. When the 3 members were present I went to collect [the claimant's father] and the Presenting Officer (Mr L-). I saw Mr L- first and asked him to wait by the lift while I escorted [the claimant's father] from the waiting room. The presenting officer, in fact, went ahead and I made a comment to [the claimant's father] along the lines of 'Mr L- must have gone ahead to wait for us '.....' the other tribunal room is on the other side of the building'. When [the claimant's father] and I arrived at the tribunal room Mr L. was waiting outside; the tribunal door was wide open - as I had left it earlier. After checking that the tribunal members were ready I took [the claimant's father] and Mr L. in and the hearing commenced. It was the first case of the morning and they started it about 10.10 am. Due to a problem caused by the

non-attendance of the other chairman I spent less time than usual in the tribunal room. I was in the room for the last half hour or so. The hearing finished about 11.45 am. I escorted Mr L. and [the claimant's father] out. Mr L. waited outside for the next case and I saw [the claimant's father] to the main door on my way back to the waiting room. Nothing was said to suggest that [the claimant's father] was unhappy with the hearing of his daughter's appeal."

7. That statement is in fact contained in a letter dated 12 July 1989 from the Regional Chairman to the claimant's father. In that letter the Regional Chairman also states as follows,

> "The chairman includes the following in his report to me:-
> 'Mr L. was not present in the room prior to the arrival of [the claimant's father]. Had Mr L. been in the room I would certainly have been aware of his presence...'
>
> I am, accordingly, satisfied that the tribunal, the clerk and the Presenting Officer acted entirely correctly, in accordance with established advice and procedure, in accordance with the parties' entrance to ... the tribunal room."

8. The statement from the presenting officer, Mr L, dated 30 August 1989 (in connection with an unsuccessful application by the claimant to have the tribunal decision set aside), states on this point,

> "I did not enter the tribunal room before [the claimant's father]. I waited on a chair in the corridor outside until he arrived, as is my normal practice when the 'supplementary' Tribunal room is in use."

9. I have given serious consideration to these statements of fact and to the claimant's father's contention that he reasonably feared that Mr L. could have addressed the tribunal before the father arrived, or could have heard the preliminary discussions of the tribunal. It is apparent to me that the social security appeal tribunal took the utmost care with this case, as becomes clear from the length of time that the hearing took and also from their record of decision on Form AT3, which is completed in exemplary detail. Nevertheless I have to bear in mind the well known dictum in R v Sussex JJ. ex parte McCarthy[1924] I K. B. 256 at 259 that it is, ".. of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". This is of course not the type of case that has occasioned setting aside by Commissioners in the past, where the presenting officer has already been in the tribunal room itself before the claimant arrives. However, I have to consider the particular geographical circumstances of this case. The tribunal room door was wide open. It was an improvised room with the tribunal chairman and members already sitting at a table in that room. The presenting officer was already waiting just

outside the open door. I consider that it would be unsafe to allow this decision to stand.

10. Breaches of the rules of natural justice are considerable in their factual variety. Moreover they can occur from sheer inadvertence. In my view this is one such case and my having set the tribunal's decision aside on this ground implies no criticism, neither of the members of the tribunal nor of the presenting officer, Mr L. However it is clear that where this particular situation arises the clerk of the tribunal should preferably make sure that he takes both the presenting officer and the claimant into the room together. Moreover the tribunal members should normally, I think, not leave the door of the tribunal room open if they are already sitting in the room but should have the door closed until such time as the parties are brought in together.

11. The claimant's father did complain of certain other aspects of the hearing but, having given detailed explanations to him at the two oral hearings before me, I think there is no need for me to deal with any other matter except to say briefly that the father does complain of the fact that the presenting officer, Mr L, cited from the "Adjudication Officer's Guide". That is a departmental publication used by presenting and adjudication officers. That guide is not of course an authoritative statement of the law and it may well contain indications of departmental views or policy. It must therefore be cited with the utmost caution to social security appeal tribunals. It must be made clear by all concerned that any views expressed therein, as distinct from references to statutes regulations or reported cases, are not in any sense binding on the tribunal.

12. I now turn to the substantive facts and law in this appeal. Shortly the facts are these. The claimant is a young woman who has high musical qualifications, being a graduate of the Royal Northern College of Music and having a postgraduate diploma of the Royal College of Music (after a further year in advanced 'cello studies). However, unfortunately, she was not able to obtain a full-time job as a 'cellist and she decided to take an intensive course in secretarial work. On 16 January 1989 she therefore started on what she described in a letter dated 27 February 1989 to the Department as, "an intensive course for graduates in secretarial work at the K.P. Secretarial School .. I am there for 30 hours per week, and as I do not get a grant, my father has paid the fees for the course." The correct name is, apparently, "K.P. Training Centre". In replies to a form of questionnaire given to her by the Department on her application for continuing income support (she having received income support before she started secretarial study), she indicated that the fee was £600 approximately and that the "course of training will last ... 12 weeks. Starting 16.1.89". That training was given from 9.30 to 12.30 and from 1.30 to 4.30 Mondays to Fridays. She indicated that outside those hours she was both ready and willing to take employment and would be prepared and able to interrupt the studies or confine them to evening or spare time if necessary

to take employment. She has also stated that there was no homework to do and that she was a free agent when she was not at the Training Centre.

13. The relevant law on the subject is as follows. Section 20(3)(d)(i) of the Social Security Act 1986 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 employment." [The words "and actively seeking" were inserted by the Social Security Act 1989 in this provision but only after the time with which I am concerned].

It is important to realise in cases such as this that that is the overall rule as to the necessity for availability for employment as a condition of entitlement to income support. The various regulations in the Income Support (General) Regulations 1987 'flesh out' that basic rule.

14. Regulation 9 of the Income Support (General) Regulations 1987 deals with "persons treated as available for employment" and contains the general rule that any claimant for income support must be "available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act [1975]". That regulation also contains certain dispensations for those who are attending the courses of education therein specified for periods not exceeding 21 hours a week. Those provisions are not directly applicable here, if for no other reason that the claimant was attending at the Training Centre for more than 21 hours a week.

15. The relevant regulation in fact is regulation 10 of the 1987 Regulations dealing with "circumstances in which claimants are not to be treated as available for employment". Regulation 10(1)(h) provides as follows,

> " 10. (1) A claimant shall not be treated as available for employment if he is a person to whom any one of the following sub-paragraphs applies -
>
> .....
>
> (h) he is a student during the period of study other than [a number of specified cases which it is accepted are not applicable in the present circumstances]."

16. That means that, if the claimant was a "student" then during "the period of study" (there is a definition of "period of study" in regulation 2(1) of the 1987 Regulations but it does not assist in resolving the present problems) she would not be entitled to income support. It is therefore important to consider the definition of "student" which is to be found in regulation 61 of the 1987 Regulations, reading as follows,

" 61. .....

'Student' means ... 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 end 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;"

17. The claimant's father has strenuously contended that his daughter was not a "student" within this definition during the time of her attendance at the K.P. Training Centre. He contends that there was no "course of study at an educational establishment", in that his daughter was merely acquiring technical skills in shorthand and typing of a mechanical nature; if that is wrong, then he contends that there was no "course of study" because his daughter was under no obligation to go on for any longer than it took her to attain the relevant Royal Society of Arts certificates.

18. The claimant's father also indicates that should his contentions not be acceptable on those points, then he contends that the course was not "full-time", being only 30 hours a week. I can deal with that last contention straightaway. There is in my view no doubt that a 30 hours' per week attendance is to be regarded as "full-time", an expression which is not defined either in the Act or regulations. I accept what is said about there being no homework or practice to be done after the hours spent on the course but even then, in my judgment, 30 hours is to be regarded as "full-time". Traditionally courses of 21 hours or less have been regarded as part-time (see now regulation 9 of the 1987 Regulations) but 30 hours in my view is clearly well into the range of full-time courses. I appreciate that the claimant's father, who is a doctor, has some difficulty in understanding that a mere 30 hours per week could be regarded as "full-time" but nevertheless in the context of an educational course that undoubtedly is so.

19. Equally, I consider that there is no doubt that the claimant by enrolling at the K.P. Training Centre had entered upon a "course". The fact that she was at liberty to leave at any time after attaining the certificates and could leave if she attained the certificates in under the 12 weeks period referred to by her does not in my view in any way prevent this being a "course". Not all courses need have a definite termination date. "Course"

means no more in my view than that she was being taught over a period, greater or shorter, to acquire certain qualifications.

20. I have therefore, lastly, to consider the rather more difficult question of whether the full-time course that the claimant had embarked on was a "full-time" course of study at an educational establishment". The wording of this definition is different in some respects from the definition in the earlier Supplementary Benefit Legislation and therefore such reported decisions on this point as R(SB) 40/83 and R(SB) 41/83 may not be altogether of binding authority. However I have found helpful a more recent reported Decision on supplementary benefit, R(SB) 25/87, which deals with a claimant who had commenced six months' pupillage as a barrister. In that case the learned Commissioner cited the then definition of "student" as "a person aged 19 or over, ... who is attending a course of full-time education ..." (regulation 2(1) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981). The wording is of course different from the wording of the definition of "student" in the Income Support (General) Regulations 1987 but in my view in the present context, the overall tenor is the same, despite the use of the word "study" in the Income Support Definition (regulation 61).

21. At paragraph 9 of his decision in R(SB) 25/87, the learned Commissioner states as follows,

> "[The claimant's representative] argued that pupillage did not involve a course nor was it educational. To constitute a course, there had to be some set form of curriculum, but pupillage involved the assimilation of ad hoc material at the discretion of the pupil-master. Attendance on a pupil-master was not, therefore, participation in a course. Moreover, pupillage was not educational in essence. Education called for the acquisition of knowledge and learning in isolation from the assimilation of specific vocational skills directed to a particular trade, service, professional calling. Pupillage constituted training for the due performance of the profession of a barrister. Moreover, a course to fall within regulation 2(1) had to be implemented through an organisation whose primary purpose was educational and pupillage failed to fulfil that criterion. I accept that submission."

22. I must therefore take the learned Commissioner as having laid down rules conforming with the submission that had been made to him. At first glance, what was said there does support the claimant's father's arguments in this case. However, in my view, there are vital distinctions between the case of a pupil barrister and the claimant attending her typing and shorthand course at the K.P. Training Centre. The pupil barrister would merely be gaining knowledge and experience by watching his Master at work in court or otherwise. But there would be no systematic teaching as such by the Master nor in the terms of the present Income Support Regulation(Reg 61) would there be a "course o study". But at the K.P. Training Centre there would throughou

the 30 hours per week be active tuition for the claimant. The case of a pupil barrister is somewhat special and must not in my view be extended to persons such as the claimant.

23. I have considered the detailed written submissions of the claimant's father and of the adjudication officer now concerned on this point. The latter, dated 8 May 1990, cites definitions of "educate", "study", "training", and "train" from the Shorter Oxford English Dictionary. In my view there is nothing in those definitions, nor indeed in the claimant's father's submissions as to the mere technicality of shorthand and typing skills, to derogate from what I have said above. There is no doubt in my view that what the claimant was engaged in was "study". The expression "educational establishment" in regulation 61 is not circumscribed in any way. It must in my view include a Training Centre such as the present. Moreover, one cannot, in my view, make a distinction between instruction in mere manual skills or dexterities on the one hand, and in more academic faculties or skills on the other. Instruction in all skills, etc., whatever their nature, constitutes "education" in this context, in contrast to the mere exercise or practice of such skills.

(Signed) M.J. Goodman
Commissioner

(Date) 26 November 1990