

*Latedam-Income Support - Good cause
for late claim.*

COAG.



50/94

MR/SH/1

Commissioner's File: CIS/021/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the Rotherham social security appeal tribunal dated 14 September 1992 is erroneous in point of law. I set that decision aside and I substitute for it the following decision:-

- (1) The claimant is not entitled to income support from 13 October 1990 to 31 March 1991;
- (2) the claimant had continuous good cause for his delay in claiming income support from 13 October 1991 to 29 May 1992 and accordingly he is entitled to income support from 13 October 1991 to 20 May 1992, except during the part of that period when he was in receipt of a training allowance.

2. If there is any dispute as to the amount of income support to which the claimant is entitled as a result of my decision, the matter must be restored before me or another Commissioner.

3. At the oral hearing of his appeal the claimant appeared in person and the adjudication officer was represented by Mr Lewis Varley of the Office of the Solicitor to the Departments of Social Security and Health. I am grateful to both of them for the help they gave me and also to the adjudication officer himself for the helpful written submission dated 22 February 1994 upon which Mr Varley based his oral submissions.

4. The facts of this case are not in dispute. The claimant was in work until 12 October 1990. He had been paying Class 2 contributions as a self employed earner and so believed that he was not entitled to unemployment benefit. He therefore did not claim unemployment benefit when he ceased work. He also did not

claim income support but instead he lived off his savings until they ran out. He then made a claim for income support which was treated as having been made on 1 April 1991. In September 1991 the claimant was informed that the Secretary of State had decided that he had been an employed earner and should have been paying Class 1 contributions until 12 October 1990. The necessary payment having been made, the claimant claimed unemployment benefit which was awarded from 4 April 1991. That had the effect of extinguishing his entitlement to income support, the income support that he had already received being treated as having been paid on account of unemployment benefit. The claimant therefore derived very little advantage from the decision to award unemployment benefit from 4 April 1991.

5. However, he then claimed unemployment benefit from 13 October 1990 and, on 27 April 1992, a social security appeal tribunal ("the first tribunal") held that the claimant was entitled to unemployment benefit from 13 October 1990 to 30 March 1991 because he had continuous good cause for the delay in claiming in respect of that period. The proper dates of the award of benefit should probably have been 17 October 1990 to 3 April 1991 (allowing for "waiting days") but I am not concerned with the merits of that decision. I am concerned only with its consequences.

6. Following the decision of the first tribunal, the claimant received a payment of unemployment benefit in respect only of 24 days (identified as 13 October 1990 to 9 November 1990). The reason for that was that, under section 18(1) of the Social Security Act 1975 (now section 26(1) of the Social Security Contributions and Benefits Act 1992), unemployment benefit was payable in respect only of 312 days (excluding Sundays) in any one period of interruption of employment and, by the time the adjudication officer came to implement the decision of the first tribunal, the claimant had received unemployment benefit for 288 days up to 20 May 1992. (There had been a break in entitlement between 4 December 1991 and 20 February 1992 but that did not break the period of interruption of employment because the claimant was attending a training course.) Regulation 9(5) of the Social Security (General Benefit) Regulations 1982 provides:-

"Where a person who has received unemployment benefit in respect of certain days in a period of interruption of employment is subsequently awarded unemployment benefit in respect of earlier days in the same period and by virtue of section 18(1) (duration of unemployment benefit) benefit would become overpaid if the benefit due under the subsequent award were paid -

- (a) the benefit which would become overpaid shall be treated as having been paid in respect of an earlier period within that same period of interruption of employment, and the amount due to be paid under the subsequent award shall be reduced accordingly; and

(b) ..."

That was the provision under which the payment of unemployment benefit to the claimant was limited. Furthermore, the payments of unemployment benefit made in respect of the periods 13 October 1991 to 4 December 1991 and from 20 February 1992 to 20 May 1992 were treated as having been paid in respect of the period 10 November 1990 to 3 April 1991. The overall effect was that unemployment benefit was paid, or treated as having been paid, in respect of the period 13 October 1990 to 12 October 1991 which is the period which would have been covered had the claimant originally claimed from 13 October 1990 (forgetting, as the first tribunal did, about "waiting days").

7. The practical result of his victory before the first tribunal was therefore that payment of unemployment benefit to the claimant immediately ceased and, instead of receiving approximately 24 weeks arrears, he received only four weeks. Consequently, on 29 May 1992, he made a new claim for income support. The unemployment benefit office wrote a memo to the income support section of the Department of Social Security attempting to explain the situation and stating that the claimant "would like to make a claim to income support for 10.11.90-3.4.91 and from 21.5.92 onwards". Income support was duly awarded from 21 May 1992 but the adjudication officer refused to award income support in respect of the earlier period.

8. The adjudication officer's decision in respect of the period before 1 April 1991 (from when income support had been awarded on the first claim) was in the following terms:-

"The claimant is entitled to income support from 1.4.91. He is not entitled for the period 13.10.90 to 30.3.91, or for any period commencing with a date later than 13.10.90 and ending 30.3.91, because he has not shown good cause throughout the period 13.10.90 to 30.3.91 or throughout any period commencing after 13.10.90 and ending 30.3.91 for his failure to claim before 1.4.91."

The claimant appealed. On 14 September 1992 the Rotherham social security appeal tribunal ("the second tribunal") dismissed the claimant's appeal, holding that the claimant had not shown continuous good cause for failing to make a claim before 1 April 1991. The claimant now appeals against the second tribunal's decision with the leave of the tribunal chairman. Effectively the ground of his appeal is that he has been prevented from enjoying the fruits of his victory before the first tribunal.

9. I do not consider that the second tribunal can be criticised for the way they approached the issue which was the subject of the adjudication officer's decision. They were quite entitled to find that the claimant did not have continuous good cause for failing to claim income support before 1 April 1991 and, in particular, they were entitled to distinguish the decision of the first tribunal on the ground that the confusion over the type of

contributions payable to the claimant was relevant to the delay in claiming unemployment benefit but not to the delay in claiming income support. The adjudication officer now concerned with the case submits that the tribunal should have considered whether the claimant had good cause for the delay in claiming over the whole period from 10 November 1990 to 29 May 1992, rather than just the period up to 1 April 1991. I reject that submission. If the relevant date of claim were 29 May 1992, any claim in respect of a period before 1 April 1991 would be doomed to failure simply because 1 April 1991 was more than 12 months before the date of claim. That is presumably why the adjudication officer originally concerned with the case, and the tribunal, considered the relevant claim to be that made in April 1991. Although that claim did not specifically include a claim in respect of an earlier period, in my view the adjudication officer and the tribunal were entitled to treat it as doing so in view of what was said in paragraphs 11 and 12 of R(SB) 9/84.

10. However, in my view neither the adjudication officer originally concerned with the case nor the tribunal were looking at the correct period. The adjudication officer was, I think, misled by the memo from the unemployment benefit office and failed to appreciate the full significance of the decisions made in respect of unemployment benefit following the decision of the first tribunal. The second tribunal were similarly misled and they had before them an inaccurate and incomplete statement of facts in respect of the history of claims for unemployment benefit and income support. Neither the adjudication officer nor the tribunal considered the implications of the adjustments made to the claimant's entitlement to unemployment benefit under regulation 9(5) of the Social Security (General Benefit) Regulations 1982. If payments of unemployment benefit in respect of the periods 13 October 1991 to 4 December 1991 and 20 February 1992 to 20 May 1992 were to be treated as having been paid in respect of the period 10 November 1990 to 3 April 1991, then it must follow that they were no longer to be treated as having been paid, or payable, in respect of the later periods. For income support purposes, unemployment benefit is taken into account on the basis that it "shall be treated as paid on the day of the benefit week in respect of which it is payable" (regulation 31(2) of the Income Support (General) Regulations 1987). Therefore, when regulation 9(5) of the 1982 Regulations is applied, it has the effect of altering the period in respect of which unemployment benefit must be taken into account for income support purposes. In the present case, the adjudication officer and the second tribunal were looking at a period to which unemployment benefit had been attributed and in which the claimant could not have been entitled to income support, even if he had had good cause for his delay in claiming, because of the rate at which unemployment benefit was payable. The period in respect of which the claimant was to be treated as not having received a benefit was 13 October 1991 to 20 May 1992, although he did receive a training allowance for part of that period.

11. I therefore agree with Mr Varley that the adjudication

officer originally concerned with the case should have considered whether the claimant had good cause for failing to claim income support in respect of the period from 13 October 1991 to 20 May 1992. Although the claim on 29 May 1992 did not itself specifically include a claim in respect of an earlier period, the adjudication officer could treat it as doing so in the light of R(SB) 9/84. I also agree with Mr Varley that the claimant did have continuous good for failing to claim income support from 13 October 1991 to 29 May 1992. He did not have any potential entitlement to income support in respect of that period until the decision of the first tribunal and he made his claim promptly after being informed of the consequences of that decision.

12. Mr Varley submitted that the tribunal had erred in law in failing to consider the claimant's entitlement to income support between 13 October 1991 and 20 May 1992. The difficulty with that argument is that the claimant's letter of appeal to the tribunal referred specifically to the period between 13 October 1990 and 31 March 1991 and the tribunal had before them only the adjudication officer's decision in respect of that period. The adjudication officer had never considered entitlement between 13 October 1991 and 20 May 1992. Nevertheless, Mr Varley submitted that the tribunal should have considered entitlement during that period. He first suggested that the tribunal had jurisdiction to deal with that period because the whole of the claimant's entitlement to benefit up to the date of the tribunal hearing was in issue before them and he referred to R(S) 1/83. I take the view that that case is distinguishable from the present case and does not support Mr Varley's argument which I reject. On the other hand, I accept his alternative argument that the tribunal in the present case could have considered entitlement in respect of the period from 13 October 1991 to 20 May 1992 under section 36(1) of the Social Security Administration Act 1992 which provides:-

"Where a question which but for this section would fall to be determined by an adjudication officer first arises in the course of an appeal to a social security appeal tribunal, a disability appeal tribunal or a Commissioner, the tribunal, subject to subsection (2) below [which is not relevant to this case], or the Commissioner may, if they or he think fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer."

13. It will seldom be possible to say that a tribunal has erred in law in failing to determine a question under section 36(1), because it will always be possible for them to leave the matter to be determined by an adjudication officer. Nevertheless, there are cases where a new question which is not actually before the tribunal is so clearly tied to the matter they are considering that they should identify it and either determine it under section 36(1) or satisfy themselves that the adjudication officer will consider it. This is an inquisitorial jurisdiction and it is full of procedural pitfalls. Claimants cannot always be expected to take the right points and section 36 exists to

introduce some flexibility in the interests of justice.

14. In the present case, I appreciate that the tribunal did not have the full history before them, that they may have been handicapped by the unfortunate fact that income support adjudication officers often have little knowledge of unemployment benefit procedures and that they were not specifically referred to regulation 9(5) of the 1982 Regulations. Nevertheless, I accept Mr Varley's submission that consideration of the claimant's complaints should have suggested to the tribunal that something had gone wrong in his case and they should have investigated the matter further even though that would probably have required an adjournment. It was relevant that the adjudication officer's consideration of the period from 13 October 1990 to 31 March 1991 arose out of the same background as the new claim made on 29 May 1992 and, although they were technically separate matters, they were closely linked. Awarding income support from 13 October 1991 to 20 May 1992 is the real answer to the complaint underlying the claimant's appeal in respect of the period from 13 October 1990 to 31 March 1991.

15. I therefore accept Mr Varley's submission that the tribunal erred in law in failing to consider the claimant's entitlement to income support between 13 October 1991 and 20 May 1992. Rather than refer the case to a differently constituted tribunal, it is expedient for me to give the decision set out in paragraph 1 above.

(Signed) M. Rowland
Commissioner

(Date) 17 June 1994