J. Reg 5 — Remunerative Work
Week on, Week off CIAG. ★ 52/94

JMe/1/LM Commissioner's File: CIS/267/93

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

[ORAL HEARING]

1. The adjudication officer's appeal is allowed. The decision of the Bolton social security appeal tribunal dated 2 February 1993 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to make further findings of fact and to give the decision on the claim (Social Security Administration Act 1992, section 23(7)(a)(ii)). That decision is set out in paragraph 2 below.

2. My decision is that the claimant is not entitled to income support for any week in the period from 5 October 1992 to the date of this decision, as he was engaged in remunerative work in all those weeks (Social Security Contributions and Benefits Act 1992, section 124(1)(c)).

The background

3. The claimant was at the date of claim, and so far as I know still is, an employee of Beloit Walmsley Ltd. He had for some time been working a regular 37 hour week. On 12 October 1992 he signed a B1 income support claim form. He wrote on the form that he was on short-time working, employed one week and unemployed the next, and gave his working hours in weeks of work as 37. The week commencing 12 October 1992 was the first week in which, under the arrangements imposed by the employer, he did not work. A certificate was given on behalf of the Secretary of State that the claim was to be treated as having been made on 5 October 1992.

4. On 20 October 1992 the adjudication officer decided that the claimant was not entitled to income support from 5 October 1992 because he was treated as engaged in remunerative work. The claimant appealed on the ground that he did no work in the weeks in which he was laid off and that averaging of hours was improper. A letter to Mr B Northey, the District Secretary of the

Amalgamated Engineering and Electrical Union, from the Personnel Manager of the employer dated 13 January 1993 was submitted. That letter included confirmation that:

> "1. Short time working, when necessary, has been agreed between Beloit Walmsley and the Trade Unions as a practical alternative to Redundancy.
>
> 2. Individual contracts of employment have not been amended and 37.0 hours per week is still the time that each employee must be available for work if required.
>
> 3. Short time working and the number of employees on short time in any week is determined purely on the amount of work available in that week consequently short time working does not follow any strict pattern. Decisions on who will work short time in any week is determined weekly.
>
> 4. On the grounds of equity the work available is shared as equally as possible amongst those available to do it."

There was also a letter dated 4 February 1993 showing the claimant's lay-off weeks as those commencing 12 October 1992, 26 October 1992, 9 November 1992, 23 November 1992, 7 December 1992, 21 December 1992, 11 January 1993 and 25 January 1993.

5. The claimant attended the hearing before the appeal tribunal on 2 February 1993, when he was represented by Mr Northey. The claimant gave evidence that although he had worked regularly every other week, colleagues had been called in on non-working weeks. Mr Northey argued that there was no recognisable cycle of work and that under regulation 5(2)(a) of the income Support (General) Regulations 1987 ("the Income Support Regulations") the number of hours which the claimant was expected to work in each week was the number notified to him at the end of the previous week.

The appeal tribunal's decision

6. The appeal tribunal allowed the claimant's appeal and determined that he was entitled to income support from 5 October 1992 for those weeks in which he had not worked any hours. It found that it was accidental that the claimant had not done any work in a lay-off week. Its reasons for decision were:

> "In view of the letter from Beloit SS3 in particular the tribunal is satisfied that no recognisable cycle of work has been established even though in fact and by accident [the claimant] has not worked every other week. The average of the hours which he has been specified to work in the weeks that he has been laid off has been nil. The Regulation makes no provision for determination of the average and it seems therefore that one must look at the words "expected to work in a week". This can only mean

looking at a particular week ie the week (or as the case is here weeks) in which he does no work. Since in those weeks the hours worked are less than 16 he is entitled to benefit for those weeks."

Subsequent proceedings

7. The adjudication officer applied for leave to appeal to the Commissioner, which was granted by the appeal tribunal chairman on 10 March 1993. In the submission dated 22 April 1993, the adjudication officer now concerned with the appeal submitted that the appeal tribunal erred in applying regulation 5(2)(a) of the Income Support Regulations, in that the reference there to an average showed that a calculation based on several weeks was contemplated and that in the claimant's case a two week average should have been taken in view of the evidence as to his future work pattern. In his observations in reply Mr Northey adopted the appeal tribunal's reasoning, and requested an oral hearing of the appeal. That request was granted by a nominated officer. The hearing took place together with those relating to two other claimants employed by the same employer. The other appeals are those on Commissioner's file CIS/488/1993 and CIS/563/1993. At the oral hearing, the claimant attended and was represented by Mr Northey. The adjudication officer was represented by Mr L Scoon of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for the care with which they had prepared their submissions and the clarity with which they dealt with the issues. Following discussion at the oral hearing I requested that further evidence should be obtained of the weeks of work and no work for the claimant since 4 February 1993. Unfortunately, the inevitable administrative process following the provision of that evidence has meant that I have not been able to give my decision as quickly as I would have wished.

8. Mr Scoon submitted that, since at the date of claim there was no history of short-time working, regulation 5(2)(a) was the appropriate provision and that, since the pattern of working was to be one week on and one week off, an average of hours over two weeks would give the most accurate figure. Mr Northey agreed that regulation 5(2)(a) was applicable. He submitted that, since one week on and one week off was the worst that any employee could expect, with the possibility of work being available in some off-weeks, the number of hours expected to be worked in any week could only be estimated on a week by week basis at the end of the previous week. Neither representative dealt initially with the question of the period to which the claim treated as made on 5 October 1992 related or the period for which any award of income support could be made on that claim. Mr Scoon, by concentrating on the date of claim, had seemed to assume that only the first week off was in issue. Mr Northey had assumed that all the weeks off from 12 October 1992 onwards were in issue. When that question was raised, Mr Northey submitted that it would be unrealistic and unfair to require the claimant to have made separate claims for each week off and that it should be accepted that the appeal tribunal had power to deal with any weeks off up

to the date of its decision. Mr Scoon did not make a contrary submission.

Was the appeal tribunal's decision erroneous in point of law?

10. I have concluded that it was, for failing properly to deal with the dates to which its decision related and for adopting an erroneous interpretation of regulation 5(2) of the Income Support Regulations. I have set out what in my view is the proper general approach to those questions in an appendix which is common to this and to the other two appeals heard with it, and is attached at the end of this decision. As explained there, it was open to the appeal tribunal to deal with all the weeks from 5 October 1992 down to the date of its decision, and to make an award of benefit for some weeks of that period, which it sufficiently identified by the references in its findings of fact. However, the form of the appeal tribunal's decision in box 3 of form AT3 suggested that it might have been purporting to award benefit for the future, but not an an indefinite basis, only for certain weeks. There were insufficient findings of fact or reasons to support such a decision, which accordingly embodied an error of law. It was not legally open to the appeal tribunal to apply regulation 5(2)(a) beyond the first few weeks of the period, after which there was sufficient evidence of recent working hours on which to determine that hours of work fluctuated. The appeal tribunal should then have applied regulation 5(2)(b), and its failure to do so was based on a misinterpretation of regulation 5(2). For the weeks governed by regulation 5(2)(a), the appeal tribunal also erred in concluding that an average of hours over a period longer than a week could not be used.

11. The appeal tribunal's decision dated 2 February 1993 must therefore be set aside. I have concluded that it is expedient for me to give the decision on the claim, after having made some further findings of fact, since there is no dispute between the parties as to the essential factual basis.

The Commissioner's decision on the claim

12. My decision is as set out in paragraph 2 above. The findings of fact on which that decision is based are that the situation up to the date of the appeal tribunal's decision was as described in paragraphs 3 and 4 above. In addition, I accept from the letter dated 4 February 1994 from Beloit Walmsley Ltd that the claimant was laid off in the weeks commencing 8 February 1993, 22 February 1993, 8 March 1993, 10 May 1993, 19 July 1993, 2 August 1993, 16 August 1993 and 4 October 1993. So far as I know the claimant has regularly worked for 37 hours a week since that week.

13. For the reasons given in the appendix, I am able to deal with the entire period from 5 October 1992 down to the date of this decision, on the basis of the claim made on 5 October 1992. On the facts as I have found them, I have concluded that the claimant is not entitled to income support throughout that period, so that there is no obstacle to treating the claim as

having been made for an indefinite period under regulation 17(1) of the Social Security (Claims and Payments) Regulations 1987.

14. In the week commencing 5 October 1992, I consider that the claimant was still engaged in work for 37 hours on the regular basis that had prevailed until the short-time working was announced. He is excluded from entitlement in that week by regulation 5(1) of the Income Support Regulations (see the end of paragraph 10 of the appendix). The week commencing 12 October 1992 was the first week off under the new arrangements. There was at that point insufficient evidence of the results of the new arrangements from which to determine the claimant's hours of work by looking at a past period, but it was clear that reference to the hours worked before the start of the short-time working was not appropriate. Thus, regulation 5(2)(a) of the Income Support Regulations applied. At that point the expectation was that the claimant would be working for one week on (at 37 hours) followed by one week off, and so on. His hours of work were likely to fluctuate from week to week, and the average of hours which he was expected to work could only sensibly be calculated over a two week period. The resulting figure is 18½ hours per week, which is over the 16 hour limit in regulation 5(1). I do not accept that the possibility that the claimant might have been called in to work in a week which would otherwise have been a week off, the decision being made at the end of the previous week on, alters that conclusion. The claimant's hours of work were still likely to fluctuate, since there was no evidence that he would be particularly likely to avoid the effect of the new arrangements. Although Mr Northey argued persuasively that it was simply not possible to say in advance of any week what hours the claimant was expected to work in it, the effect of the short-time arrangements was that the worst that the claimant could expect was one week on and one week off, averaging out at 18½ hours per week. If he had worked in a week off, that would have increased the average number of hours. In my view, the only conclusion possible as at 12 October 1992 was that the claimant was expected to work on average for <u>at least</u> 18½ hours per week. Thus he is not entitled to income support as being in remunerative work from 12 October 1992 as long as regulation 5(2)(a) continued to apply to him.

15. I consider that that was the case up until 8 November 1992. By 9 November 1992, there had been two two week cycles in which the claimant worked one week on and one week off. At that point regulation 5(2)(b)(i) came into play, since the evidence showed that his hours of work fluctuated and there was a recognisable cycle of work, over two weeks. The average again was 18½ hours per week, so that the exclusion from entitlement continued. That cycle continued for the claimant, with a possible blip around Christmas 1992, until 21 March 1993. On 22 March 1993 the claimant would on the existing cycle have started a week off. But he did not have a week off until week commencing 10 May 1993, and the next following week off commenced on 19 July 1993. On 22 March 1993, the evidence showed that the claimant's hours of work fluctuated, but the pattern of the recognisable cycle had been broken. Therefore, regulation 5(2)(b)(ii) came into play, but the

previous five weeks consisted of three weeks on and two weeks off, so that the average of hours over that period was 22.2 per week. As weeks of work continued up to 10 May 1993 the average would increase. It does not really matter whether one continues to deal with the situation under regulation 5(1)(b)(ii) or says that the claimant's hours had ceased by a certain date to fluctuate, so that when a week off intervened, regulation 5(2)(a) had to be applied to the new situation. All calculations, whether of past hours or of what was expected, indicate an average of at least 18½ hours. So far as I know, the claimant has not had a week off under the short-time arrangements since week commencing 4 October 1993. The claimant's exclusion from entitlement as being in remunerative work continues until the present date. If I am ignorant or mistaken about the recent circumstances my decision may be reviewed under section 25(1)(a) of the Social Security Administration Act 1992.

(Signed) J Mesher
Commissioner

Date: 1 June 1994

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CIS/563/93

APPENDIX

1. I set out in this appendix my conclusions of law on two matters which arise in all three cases listed above, the appeals in which were heard together.

The scope of the claim

2. The claims for income support were made either shortly after a period of what was described as short-time working had begun or shortly before such a period was expected to begin. The minimum extent of the working which was expected to occur in that period was one week in two. In a week of work (a "week on") 37 hours would be worked, the same number of hours as in the immediately preceding full-time working. The question arose at the oral hearing of the appeals whether the claims should be treated as claims for the first week of no working (a "week off") after the date of claim as a definite period, for all the weeks off after the date of claim as a series of definite periods or for an indefinite period. The question was one which the representatives of the parties had not considered in advance of the hearing. The general case for the claimants was that there was entitlement to income support in the weeks off, but not in the weeks on. Mr Northey, representing the claimants, submitted that it was open to a social security appeal tribunal or a Commissioner to award income support on the original claims for any week off in the period from the date of claim to the date of decision by the authority concerned. The general case for the adjudication officer was that there was no entitlement for weeks off or weeks on because the claimants were to be treated as in remunerative work throughout. Mr Scoon, representing the adjudication officer, submitted that it was not open to a social security tribunal or a Commissioner to make awards for definite periods in the future or, in the circumstances, for an indefinite period.

3. The governing provision is regulation 17 of the Social Security (Claims and Payments) Regulations 1987. In particular, paragraphs (1) and (3) are relevant. They provide:

> "(1) Subject to the provisions of this regulation and of section 37ZA(3) of the Social Security Act 1975 (disability living allowance) and section 20(6) and (6F) of the Social Security Act 1986 (family credit and disability working allowance) a claim for benefit shall be treated as made for an indefinite period and any award of benefit on the claim shall be made for an indefinite period.
>
> (3) If, in any case outside paragraph (2), it would be inappropriate to treat a claim as made and to make an award

for an indefinite period (for example where a relevant change of circumstances is reasonably to be expected in the near future) the claim shall be treated as made and the award shall be for a definite period which is appropriate in the circumstances."

[Paragraph (2) relates only to claims for unemployment benefit]

4. Where the claims were made in circumstances in which the claimants were asserting entitlement only for weeks off and not for weeks on (although none of the claims were expressly limited to those weeks) the question must be asked whether regulation 17(3) then requires the claim to be limited to the first definite period after the date of claim. If the situation was that entitlement might exist for a short period, to be followed by succeeding alternating short periods of non-entitlement and entitlement, it might be appropriate to treat the claim as made for definite periods. The terms of regulation 17(3) do not require the claim to be restricted to the first period of potential entitlement. By virtue of section 6(c) of the Interpretation Act 1978 (applied to statutory instruments by section 23) the singular includes the plural unless the context indicates the contrary intention. Regulation 17(3) may operate so that a claim is treated as made for a number of definite periods, and awards may be made for those periods. The question of what definite period or periods are appropriate should be determined, in my judgment, at the time at which the adjudicating authority, of whatever level, is making its decision on the claim. Thus, an appeal tribunal considering an appeal from an adjudication officer's initial decision on the claim may deal with any definite periods up to the date of its decision and make awards of benefit for those periods, even though some or all of those periods fall after the date of the adjudication officer's decision under appeal. It does not matter that the claimant has made no fresh claim following an initial disallowance of benefit by an adjudication officer. An adjudicating authority may also deal with a definite period which extends beyond the date of its decision if there is sufficient evidence from which the end to the definite period can be identified.

5. However, regulation 17(3) only comes into play when it is inappropriate to treat the claim as made for an indefinite period. If it is not, then the basic rule in regulation 17(1) must be applied. The deeming in regulation 17(1) is very strong. What is appropriate or inappropriate must be determined in the light of all the circumstances and of the legislative provisions governing entitlement to the benefit claimed. As is discussed in detail below, the Income Support (General) Regulations 1987 contain a provision which requires the averaging of hours of work over periods which may include weeks of no work in determining whether or not a claimant meets the test of employment for less than a prescribed number of hours per week and so meets the test of not being in remunerative work (Social Security Contributions and Benefits Act 1992, section 124(1)(c)). A claimant is not necessarily excluded from entitlement in a week merely because

in that particular week work is done for more than the prescribed number of hours. Although a claimant might have asserted entitlement only in respect of some weeks, or might even have expressly limited the claim to certain weeks, that does not in itself prevent an adjudicating authority from treating the claim as made for an indefinite period, or from making an award for an indefinite period if the conditions of entitlement are met. It is clearly established, at least where a claim for income support is to be treated as a claim for an indefinite period, that an adjudicating authority is entitled to deal with the entire period from the date of claim down to the date of the adjudicating authority's decision (CIS/85/1992, CIS/319/1992, CIS/417/1992, CSIS/28/1992 and CSIS/40/1992). For that to have any practical meaning it must be possible for the adjudicating authority to conclude that the claimant is entitled to benefit for only some of the weeks in that period, and to make an award limited to those weeks. Whether that is done by treating the claim as limited to those weeks under regulation 17(3) or whether regulation 17(1) authorises awards for definite periods on a claim made for an indefinite period, there should be no difficulty in relation to weeks before the date of the adjudicating authority's decision. So far as weeks after the date of the adjudicating authority's decision are concerned, an award for an indefinite period may clearly be made under regulation 17(1). However, I consider that an award for a definite period or periods in the future may only be made where the evidence is sufficient to enable the particular dates delimiting the period of any award to be defined. If an award is to be made for a definite period in the future, it must be for a period defined by particular dates. In the present cases, two of the appeal tribunals may have made awards which offended against that principle, for weeks in the future in which the claimant would not work.

The interpretation of regulation 5

6. The second question, which links with the first, is of the meaning and effect of regulation 5 of the Income Support (General) Regulations 1987. Paragraphs (1) and (2) of regulation 5 provide:

> "(1) Subject to the following provisions of this regulation, for the purposes of section 20(3)(c) of the [Social Security Act 1975 (re-enacted as section 124(1)(c) of the Social Security Contributions and Benefits Act 1992)] (conditions of entitlement to income support), remunerative work is work in which a person is engaged, or, where his hours of work fluctuate, he is engaged on average, for not less than 16 hours a week being work for which payment is made or which is done in expectation of payment.
>
> (2) The number of hours for which a person is engaged in work shall be determined--
>
> (a) where no recognisable cycle has been established in respect of a person's work, by reference to the number of hours or, where those hours are likely to

fluctuate, the average of the hours, which he is expected to work in a week;

(b) where the number of hours for which he is engaged fluctuate, by reference to the average of hours worked over--

(i) if there is a recognisable cycle of work, the period of one complete cycle (including, where the cycle involves periods in which the person does no work, those periods but disregarding any other absences);

(ii) in any other case, the period of five weeks immediately before the date of claim or the date of review, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately."

7. Mr Northey submitted that regulation 5(2)(a) applies in all circumstances in which no recognisable cycle of work can be identified, or at least cases where the contract of employment did not initially provide for fluctuating hours. Then the question of the hours expected to be worked each week has to be asked week by week at the beginning of each week. In the appeals under consideration, he submitted that the taking of an average was not appropriate. He considered that regulation 5(2)(b)(ii) might apply when a contract of employment was set up with fluctuating hours. Mr Scoon submitted that regulation 5(2)(a) applies where the number of hours worked can only be ascertained by looking forward, and that in all other cases of fluctuating hours regulation 5(2)(b) applies. Where at the date of claim no recognisable cycle can be identified, regulation 5(2)(b)(ii) requires that an average is taken over the five weeks immediately preceding the date of claim or some other period exceeding a week.

8. I cannot accept Mr Northey's submission. If his basic construction of regulation 5(2)(a) were right then it would have the effect that regulation 5(2)(b)(ii) could never apply, because all cases in which there was no recognisable cycle of work would already have been dealt with under regulation 5(2)(a). Such a construction could only be accepted if there was no alternative. Mr Northey attempted to avoid that result by the suggestion that regulation 5(2)(a) applies where there is some alteration to the contractually set pattern and that regulation 5(2)(b)(ii) applies where a contract of employment provides for fluctuating hours of work. However, I can see no warrant in the words of the regulation for such qualifications. Since, as appears below, I consider that there is an alternative construction which can give a sensible effect to the whole of regulation 5(2), Mr Northey cannot be right. My conclusion is thus much closer to Mr Scoon's submissions, but it is not enough simply to accept his approach. There are several difficulties which require detailed examination, mainly stemming from the very unsatisfactory

drafting of regulation 5. I feel bound to record my sympathy for social security appeal tribunals who have to attempt to extract some principle from the regulation, and even more so for claimants and their advisers who need to know where they stand. The present state of the regulation makes it very difficult for anyone to be certain of its effect even in relatively common circumstances. A substantial restructuring of the regulation, as has been carried out on the corresponding provision in the Family Credit (General) Regulations 1987, would enable the underlying policy intention to be clearly expressed.

9. The first difficulty is whether regulation 5(2) provides a rule for determining the number of hours worked per week in all circumstances. In my view it does not. It supplies alternative rules in the circumstances described in the opening words of sub-paragraphs (a) and (b). The primary words of regulation 5(1), which are directed to the number of hours for which a claimant is actually engaged in work in each week, or is engaged on average, need to be considered when regulation 5(2) does not apply. Thus, the meaning of regulation 5(2) must next be explored.

10. The appearance is that sub-paragraphs (a) and (b) of regulation 5(2) were intended to set up alternative rules in mutually exclusive circumstances. But the express words do not produce that result. Sub-paragraph (a) opens with the words "where no recognisable cycle has been established in respect of the claimant's work". Sub-paragraph (b) opens with the words "where the number of hours for which he is engaged fluctuate". Clearly, there may be circumstances in which hours of work fluctuate and no recognisable cycle of work exists. That point is reinforced by the terms of heads (i) and (ii) of sub-paragraph (b), which provide one rule for circumstances in which there is a recognisable cycle and another rule for other circumstances, and thus contemplate sub-paragraph (b) applying where there is no recognisable cycle of work. How then is it possible to determine whether it is sub-paragraph (a) or sub-paragraph (b) which applies in any particular circumstances? I conclude that Mr Scoon's approach is fundamentally correct. The terms of sub-paragraph (a) suggest to me that it is directed to the situation where there is no, or no sufficient, evidence of recent working hours on which to make a determination of the number of working hours for the week in question. The reference is not to there being no recognisable cycle of work, but to no recognisable cycle "having been established". Then the test applied varies according to whether hours are likely to fluctuate and is directed to the hours for which the claimant is expected to work in the week in question. All that points to a position where evidence about what has happened in the past does not establish what current working hours are, so that what is expected or is likely to happen in the future has to be looked at. Although the drafting is far from ideal, I conclude that in order to give regulation 5(2) as a whole a sensible and practical application, sub-paragraph (a) must be interpreted broadly in that way (although I deal with some more detailed matters below). The objection to that construction is that it makes the criterion of whether sub-

paragraph (a) applies or not a different and broader one than simply whether a recognisable cycle of work has been established, the criterion expressly mentioned in sub-paragraph (a). But in my view that is a relatively minor shift of emphasis which is justifiable in order to give effect to regulation 5(2) as a whole.

11. That leaves sub-paragraph (b) to apply to cases where there is sufficient evidence of recent working hours to establish the current position, and that evidence shows a fluctuation of working hours. I consider that it is not possible to lay down any simple rule about when the evidence of recent working hours is sufficient for the test to shift from a forward-looking one under sub-paragraph (a) to a backward-looking one under sub-paragraph (b). It must depend on the circumstances of each case and whether a sensible judgment can be made within the terms of sub-paragraph (b) or of regulation 5(1). Head (i) of sub-paragraph (b) then applies when that evidence shows that the fluctuating hours form a recognisable cycle, and head (ii) applies when it does not. The consequence of that interpretation is that where a claimant has been engaged for some time in work for regular hours, whether as defined in a contract of employment or not, which is continuing, the circumstances do not fall within either sub-paragraph (a) or sub-paragraph (b) of regulation 5(2). The primary words of regulation 5(1) must then be applied. It is also implicit in that general interpretation that a claimant's hours of work must be considered week by week throughout the period in issue before the adjudicating authority making a decision. The number of hours is not fixed at the date of claim or any other date, despite the reference to "the date of claim or the date of review" in regulation 5(2)(b). That is likely to be particularly important when a social security appeal tribunal or a Commissioner is considering a relatively long period on an appeal.

12. It is necessary to explore somewhat further the application of sub-paragraphs (a) and (b) of regulation 5(2) in the circumstances of the cases before me. In all three cases the claimants had worked for 37 hours per week for many weeks before short-time working was imposed. At the point of transition of the first week off for each claimant, there would be evidence of recent regular hours of work, but nonetheless sub-paragraph (a) should apply until sufficient evidence had built up that it was possible to say whether sub-paragraph (b) applied or not. Sub-paragraph (a) should be applied not only where a claimant starts work after a period out of gainful employment, where necessarily there would be no evidence of recent hours of work, but also where there is a change of working arrangements such that the evidence of recent working hours is no longer relevant to the current position. It would be unfair to the claimant to do otherwise. It is also necessarily implicit in the regulation as a whole that the question of whether hours of work fluctuate, or are expected to fluctuate, must be looked at over a period which is longer than a week, because the aim of the exercise is to reach a determination of the hours worked in a week. The length of the period to be looked at will depend on the circumstances of the particular case. It must also be the case that in

determining from evidence relating to the past whether a recognisable cycle of work exists what must be looked at is the pattern of working hours which has actually occurred for the particular claimant. It does not matter that the employer did not lay down a precise pattern to be followed and that decisions about hours to be worked in any particular week by a particular claimant were taken only just before the beginning of each week. If the result of those decisions is a recognisable cycle of work, in the sense of a recurring round of events, in which the end point of each round is identical to its start point and forms the start point of the next round, then it has to be accepted for as long as the cycle remains intact. A cycle may include weeks in which no work at all is done.

13. There are without doubt several other problems in the interpretation of regulation 5, some of which have been discussed in other Commissioners' decisions and some of which remain to be resolved. It has not been suggested that any existing Commissioners' decisions bear on the present appeals. Nor should I speculate on questions which do not arise on the present appeals. In particular, there are very difficult problems in distinguishing a recognisable cycle of work over a long period from a situation where periods of work for non-fluctuating hours are followed by periods of no work. However, such problems do not arise in the present appeals.