

CPAG

JBM/SH/13

Commissioner's File: CIS/431/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Bath social security appeal tribunal dated 8 August 1989 is erroneous in point of law. Accordingly I set it aside and remit the case for rehearing to a differently constituted appeal tribunal.

2. This is an appeal by the claimant to the Commissioner with the leave of the tribunal chairman against the unanimous decision of the appeal tribunal confirming the decision of the adjudication officer first involved in these appeals.

3. The facts of the case are dealt with in box 5 of the written submission of the adjudication officer first involved in these appeals to the appeal tribunal. In respect of those matters and of the submission dated 30 October 1990 of the adjudication officer now involved in these appeals the claimant through her representatives has had the opportunity to comment and I have the observations to me dated 30 November 1990. No useful purpose would be served by my setting out these matters afresh here.

4. The relevant statutory provisions are referred to in paragraph 2 of the submission of the adjudication officer now involved in these appeals. Nothing is to be gained by my setting out those references afresh here.

5. In my judgment the decision of the appeal tribunal is erroneous in point of law. The question arises on what evidence before them as shown on the case papers and found as fact by them did the appeal tribunal reach the conclusion which they did at (e) of their reasons for decision:-

"If a person reported commencement of work, it is of such importance that an officer of DSS would normally make a

record of it."

This to my mind is mere surmise of the appeal tribunal supported by no evidence from the face of their record as found in their findings of fact before them. I have not before me the chairman's notes of evidence. I have merely a note "copy of handwritten notes of evidence available on request." However from their findings of fact on the face of their record the appeal tribunal state:-

"The facts are fully stated in paragraph (1) to (6) of Box 5 [Summary of Facts] of the written submission accepted as being true."

That Summary of Facts as contained in the written submission of the adjudication officer first involved in these appeals is as follows:-

" 5. (SUMMARY OF FACTS)

- (1) Mrs Davies' is a single parent aged 34 who lives in an owner-occupied house with her 3 children .. Mrs Davies had been receiving income support since 15.7.88 until she returned her order book on 23.12.88. She is currently in full-time employment.
- (2) On 23.12.88 Mrs Davis returned her order book to the office together with a letter stating that she was temporarily employed in the locum post until 28.2.89.
- (3) A letter was therefore sent to Mrs Davies to ask her when she had commenced work and how many hours per week she was working.
- (4) Mrs Davies replied to the letter on 5.1.89 stating she had commenced work on 28.11.88 and was working 39 hours per week.
- (5) The adjudication officer therefore decided that because Mrs Davies was working for an excess of 24 hours weekly, she was engaged in remunerative full-time employment and was therefore excluded from receiving income support from the day she commenced work [28.11.88]. An overpayment was subsequently calculated and the amount was notified to Mrs Davies on 1.3.89. The overpayment is the subject of the appeal.
- (6) In her letter of appeal Mrs Davies has stated that she has contacted the Department's office in Bath by telephone to ask if she could still cash her order book up until the date she expected to receive her first salary. She states she was advised to do this and to return her order book

once she had received her first pay. A check of Mrs Davies' case papers has revealed no evidence of any telephone call. Mrs Davies has provided a photocopy of her diary of 28.11.88 on which she has recorded making a telephone call to the Department."

The appeal tribunal have made no findings of fact (on whatever evidence they had before them) as to the practice of the DSS staff at the office in question in keeping records of telephone calls. I refer to CSB/347/1983 and R(SB) 10/85 where it is stressed that no weight should be given to the fact that there is no official record of a change of circumstances unless the adjudication officer produces evidence to show how the procedures for recording information are carried out in practice. There are no findings of fact as to the procedures for recording telephonic communications in the instant case. Where a claimant's truthfulness (or indeed a witness before an appeal tribunal) is in issue that appeal tribunal should on the face of their record seek to make it clear whether or not they accepted the claimant (or witness) as a witness of truth.

6. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I direct that the new tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred in paragraph 5 above of this decision. Further they shall consider carefully the exact wording of the relevant statutory provisions and make and record their findings on all the material facts and give reasons for their decision. Specifically the new tribunal should on evidence properly before them make findings of fact as to the procedures normally involved in the particular office for recording telephonic communications.

7. Accordingly the claimant's appeal is allowed.

(Signed) J.B. Morcom
Commissioner

(Date) 3 April 1992