THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case no: CJSA/3411/1998

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992
JOBSEEKERS ACT 1995

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Mr Commissioner David Williams

Oral Hearing: 9 February 1999

Claimant	:
Benefit	:
Tribunal	:
Date of hearing	:
Register no	:

1 I allow the claimant's appeal against the decision of the Oxford social security appeal tribunal. It was brought by leave of the chairman. The decision was that the sum to be taken into account as weekly income in the calculation of jobseeker's allowance from 9 September 1997 is £38.07. For the reasons given below, the decision is erroneous in law. I therefore set it aside. I substitute for that decision my own decision which is at paragraph 2.

2 My decision is that the weekly amount to be taken into account as income in the calculation of jobseeker's allowance for the claimant from 9 September 1997 is £15.37.

Background to the appeal

3 The appeal was subject to an oral hearing by me on 9 February 1999. The claimant attended the hearing and put his own case. The adjudication officer was represented by Mr MacEvilly of the Office of the Solicitor to the Department of Social Security. I am grateful to both for their help. I indicated at the beginning of the oral hearing that, unless I heard persuasive indications to the contrary, I had formed the provisional view that the decision of the tribunal was in error of law for the reason given in paragraphs 6 - 8 of the submission of the adjudication officer now acting. This was that the tribunal had not properly considered if there were grounds for the adjudication officer to act in this case. The decision in question was a review decision, but it had not been treated as such. Having heard the comments of both parties, I confirmed that this was my view. It is for that reason that the tribunal's decision must be set aside.

4 The issue of review was not the main point of the appeal. That was the level of jobseeker's allowance to which the claimant was entitled during his course. But as the tribunal had erred in law, and its decision must be set aside, all aspects of the claimant's appeal were open for consideration, including issues of fact as well as law.

5 Subject to one key set of issues, the facts were not in dispute. The claimant claimed income-based jobseeker's allowance in connection with his attendance at a one year residential diploma course at a private college. While there was some initial confusion about the nature of the course and the status of the claimant, it was decided that the course was a training course and that the claimant was entitled to claim jobseeker's allowance as he was not a student. Mr MacEvilly confirmed that this was now the view of the adjudication officer at the hearing, and I regard that as no longer in dispute. Nor is it in dispute that the claimant is also entitled to the £10 a week training allowance in addition to his jobseeker's allowance entitlement, any refund of travel expenses and any other payments to which he is entitled by reason of successful completion of the diploma. These are covered, as the tribunal noted, by the disregard in paragraph 14 of Schedule 7 to the Jobseeker's Allowance

Regulations 1996, as applied by regulation 103(2). I also mention that the fees paid to the College do not count in any way as the actual or notional income of the claimant , as there is no provision treating them as income of the claimant.

The relevance of the bursary to jobseeker's allowance

6 The claimant made a number of points in his written submission by relation to income support. This benefit seems to have become involved when it was thought that he was a student. However, it is now clear that the claimant should claim jobseeker's allowance and not income support. The dispute is therefore governed by the Jobseekers Act 1995 and Jobseeker's Allowance Regulations 1996 not the Income Support (General) Regulations 1987. As I emphasised at the hearing, these two sets of rules are not the same (although they are often similar, as I shall comment below for other reasons). I do not therefore deal in any detail with the grounds of appeal or arguments raised by the claimant that relate specifically to income support and the Income Support (General) Regulations 1987.

7 The claimant was awarded an adult education bursary for his chosen course. Full details are in the case papers (document 61). Its total value was the payment of tuition fees and other approved fees, plus a maintenance grant of £3,021.40. This was for the claimant himself as he has no dependants. Of this sum the claimant only received £641.40 direct as the rest was paid to the College. The claimant's claim for jobseeker's allowance is not based on his NI contributions. Under the Jobseekers Act 1995 and Jobseeker's Allowance Regulations 1996 his earnings and other income must be taken into account in calculating his entitlement to the allowance. It therefore has to be decided how much, if any, of the claimant's bursary should be taken into account for this purpose.

8 Having heard both parties, my view is that the submission of the adjudication officer now acting (as supported by Mr MacEvilly) was right on the general approach to this issue, and the approaches of the adjudication officer's submission to the tribunal, the decision of the tribunal and the submission of the claimant were wrong. Regulation 103 requires that full account be taken of the claimant's actual income from the bursary. That was not disputed at the hearing by the claimant, nor was the amount, which was £641.40. The larger part of the bursary was paid to the College not the claimant. Regulation 103 cannot apply to that, and the tribunal was wrong in treating the amount paid to the College as actual income. But the claimant was also wrong in stating that it should be completely ignored because it was not actual income.

Regulation 105(10) of the Jobseeker's Allowance Regulations 1996

9 Sums paid to a third party for the benefit of a claimant are treated in some circumstances as notional income of the claimant. This is provided by regulation 105 of the Jobseeker's Allowance Regulations 1996. That regulation lists a number

of specific situations where notional income is treated as arising. The tribunal erred in considering the part of the bursary paid to the College under regulation 103 and the disregards of paragraphs 14 and 15 of Schedule 7. The claimant submitted that as he had not received any of the larger part of the bursary, it was not to be taken into account at all. I agree with him that it was not to be included under regulation 103. I explained to him at the hearing that he was wrong in basing his further arguments on that point on the Income Support (General) Regulations 1987 as it is the Jobseeker's Allowance Regulations 1996 that we must consider. Under the Jobseeker's Allowance Regulations 1996 provision is made by regulation 105 to deem various kinds of income to be "treated as possessed" by him. On the undisputed facts, it is regulation 105(10)(a)(ii) that applies here. But that only includes some elements of the total received by the College.

10 The sums to be included by regulation 105(10)(a)(ii) are:

"any payment of income ... made to a third party in respect of a single claimant .... to the extent that it is used for" ...

- food
- ordinary clothing or footwear
- household fuel
- rent for which housing benefit is payable
- housing costs met under regulation 83(f) [which refers to Schedule 2]
- council tax for which the claimant is liable, and
- water charges for which the claimant is liable.

11 Of those, only "food" is relevant to this claim. The power supplies used in the College, although there is an obvious if marginal advantage to the claimant from them, are not "household fuel" in any ordinary sense of the words. The claimant is not a household or a member of a household when living in the College. Nor is the provision of fuel to a large multi-purpose institution to be regarded as household fuel. I note that the guidance given on this provision in the Adjudication Officer's Guide (at paragraph 33661) refers to "fuel, for the household that the claimant normally occupies". In this case, the College is not a household - and in any event the claimant had another home at all relevant times - so on that reading also there should be no addition to the claimant's notional income for fuel. It was not in dispute that the claimant was not liable for council tax or water charges on the established facts.

Payments in kind

12 The claimant argued that the food was to be left out of account because he received it in kind. That argument can be based on the concluding words of regulation 105(10): " ... but ... this paragraph shall not apply to any payment in kind". But it may also be argued that the "payment" to which these concluding words refer is the "any payment of income" to which the opening words of the paragraph refer. In other words, the closing words only apply where the payment in kind is *to* the third

party, not *by* the third party to the claimant. This appears if the paragraph is examined with irrelevant words missing:

" Any payment of income ... made ... but ... this paragraph shall not apply to any payment in kind."

These is identical phraseology in regulation 42(4) of the Income Support (General) Regulations 1987. [Regulation 26(3) of the Family Credit (General) Regulations 1987, which is broadly similar in substance, does not include this final phrase nor does regulation 29(3) of the Disability Working Allowance (General) Regulations 1991. However, the reason for those exclusions is noted below and is not inconsistent with the view taken here.].

13 In this case, the food was in the form of prepared meals provided by the College to the claimant when he was in residence. That is clearly provision in kind by the College to the claimant, and equally clearly is a benefit with no market or cash value. Had the meals been provided direct to the claimant by those providing the bursary rather than through the intermediary of the College, or had the benefit of the meals come from the College unfunded from a third party, the benefit of the provision of food would not have been relevant to the claimant 's actual income. This is because the provision of the meals would then have been regarded as actual income, not notional income, and regulation 103 would have applied. However, paragraph 22 of Schedule 7 to the Jobseeker's Allowance Regulations 1996 then requires the disregard of "any income in kind" subject to a condition : "except where regulation 105(10)(a)(i) applies". Nor can a payment in kind be regarded as earnings: regulation 98(2)(a). Similar provisions are found in the Income Support (General) Regulations 1987 , in paragraph 21 of Schedule 9 and in regulation 35(2)(a); and in the Family Credit (General) Regulations 1987, in paragraph 20 to Schedule 2 and in regulation 19(2).

14 For the sake of completeness of the analysis, the exclusion of payments in kind in the Family Credit (General) Regulations 1987, Schedule 2, paragraph 20 is unconditional. This would appear to be because there is no equivalent in those regulations of the provision in regulation 105(10)(a)(i) (see specifically regulation 26(3)), and therefore no need for a protective cross-reference in paragraph 20 or a proviso at the end of regulation 26(3). The Disability Working Allowance (General) Regulations 1991 follow the same form as the Family Credit (General) Regulations. The absence of the proviso from those provisions does not therefore change the policy approach taken in the regulations read together.

15 It is clear from these provisions that there is a general policy for the purposes of all the income-related benefits of ignoring payments in kind to an employee in the calculation of earnings and also of ignoring income in kind in calculating income other than earnings paid to a claimant from a second party. Should this policy be followed or ignored when it is notional income that is being calculated, for example if the payments are made in money by an employer or the second party to a third party, and the third party provides the income in kind? A literal reading of regulation

105(10) would suggest that it be ignored. It would also suggest that the words of exception at the end of that paragraph apply only if it is the employer or second party that make a payment in kind to the third party, regardless of how the third party gives the benefit to the claimant. I think it should not be restricted in this way, but in a broader way that ensures consistency with the more general policy of ignoring payments in kind to a claimant. There is no consistency between that narrow reading and the general approach in the other provisions. I therefore take the reference to payments in kind to be to payments in kind to claimants.

16 That broader approach is, in my view, confirmed by the drafting of paragraph 22 of Schedule 7 to the Jobseeker's Allowance Regulations 1996. AS noted above, the drafter dealt expressly with the interaction of actual income other than earnings and notional income in connection with income in kind (as did the drafter of paragraph 21(1) of Schedule 9 to the Income Support (General) Regulations 1987) . While regulation 105(10)(a)(i) was to be considered as an exception to the rule about payments in kind, regulation 105(10)(a)(ii) was not, and I assume that that sub-paragraph was deliberately excluded. That result is consistent with the view I have taken on the meaning of the final phrase, but not with the narrower meaning. [I take this to be further confirmed in principle by the comparison of the Jobseeker's Allowance Regulations 1996 and Income Support (General) Regulations 1987 with the somewhat different provisions applying to family credit and disability working allowance.]

17 I also assume from the contexts in each of these sets of regulations that the drafter did not intend any significant difference between the phrases "payment in kind" and "income in kind". Clearly the terms focus respectively on the payer and the recipient of the amount. But it not easy to consider situations of relevance to cases such as the present one where a "payment in kind" is not also "income in kind". Either the object of a transaction is, or is immediately convertible into, money, or it is not. I take it therefore that the "any payment" in the final words of regulation 105(10) refers to any payment to, or income of, the claimant in kind and not (or not only) to payment to the third party in kind.

18 On that analysis, the provision of meals by the College to the claimant is a payment in kind within the meaning of the final words of regulation 105(10) and therefore falls to be excluded from the calculation of notional income. If "food" is excluded on the facts of this case, then it follows that there are no forms of income within the scope of regulation 105(10) to be included as the claimant's notional income.

My decision

19 Having considered those issues, I take the view that I can decide all the necessary questions of fact to decide the matter fully. It is clearly expedient that I do so, particularly in the light of the oral hearing and the direction for expedition.

20 I must first deal with the question of review, which was ignored by the tribunal. This was, as noted above, also not dealt with by the adjudication officer in the original decision or in submission to the tribunal. But I agree with the adjudication officer now acting that the decision of the adjudication officer that was under appeal in this case could only have been undertaken if it were shown that one of the grounds in section 25 of the Social Security Administration Act 1992 applied. Section 25(2) is satisfied if the adjudication officer based the decision on an erroneous view of the law.

21 As the parties noted, there is some confusion about who took what decision in the early stages of this case. The claimant had apparently first been given a decision that he was a student. He appealed against this, and the revised decision in the letter of 28 November 1997 (document 65) was then issued. This accepted that the claimant could claim jobseeker's allowance but then took deductions into account. Both the underlying decision and that decision were wrong in law, and grounds to review clearly existed. Further, as an appeal had been made, it is at least arguable that section 29 of the Social Security Administration Act 1992 applied to the second decision and that, as the claimant did not get everything he wanted from the revised decision, it was invalid. On either basis, it is clear that there were errors of law in both decisions, and that grounds for review exist. That being so, I must conduct that review.

22 I find as fact that the amount of actual income within the bursary to be regarded as the income of the claimant by reason of regulation 103 of the Jobseeker's Allowance Regulations 1996 is £15.37 a week. I adopt this from the decision of the tribunal, as a weekly equivalent of the sum of £641.60 received in cash by the claimant, noting that this part of the decision was not in dispute before me. For the reasons above, I find that there is nothing to be taken into account under regulation 105(10), and therefore no notional income relevant to the claimant's claim for jobseeker's allowance. My decision is therefore as set out in paragraph 2.

Unfairness?

23 The claimant also submitted to me that the decision of the tribunal was unfair. He based this on the treatment given to other trainees that went to another College to study a similar course. He told me at the hearing that he had chosen to go to the College he did because that course started earlier than another course at a nearer college. Apparently the students who went on that other course were funded through a different mechanism. The result, he understood, was that they had no deductions against their claims for jobseeker's allowance while attending that other college.

24 I have in this appeal decided that the claimant was in large part right in the conclusion for which he argued, although not for the reasons he put forward. Nonetheless, the practical result is to remove much of the basis for the claimant's arguments about discrimination and unfairness as he presented them to me. I do not see any other issue raising evidence of either unfairness or discrimination. If differences of treatment emerged between the claimant and other claimants, I can understand why he might consider that unfair. But any differences that remain in the light of this decision are differences that arise from the rules themselves, not from the decisions of those applying them. I can see nothing in the case papers that suggest any kind of personal prejudice or discrimination against the claimant as an individual (or on any other basis). There were mistakes, but I see nothing to suggest that these were other than well-intended if at times misguided attempts to apply some extremely complex and ambiguous rules. I do not therefore see any basis for agreeing with this aspect of the claimant's appeal.

David Williams
Commissioner

15 February 1999