[2013] AACR 16

**(Saunderson v Secretary of State for Work and Pensions
[2012] CSIH 102)**

**CS (Lord Eassie, Lord Mackay of Drumadoon, Lord Brodie) CSJSA/577/2009
28 December 2012**

Remunerative work – self-employed seasonal worker – whether or not in work after the end of a cycle of work

The appellant worked as a self-employed golf caddie at St Andrews for which he required authorisation from the Trust which managed the course. The appellant's authorisation was withdrawn in October 2007, because of a fall in demand during the winter months, and the Trust was under no obligation to allow him to work as a caddie in the future. The appellant applied for jobseeker's allowance. The Secretary of State calculated that the average number of hours for which the appellant had worked during 2007 exceeded the 16 hours exception in regulation 51(1)(a) of the Jobseeker's Allowance Regulations 1996. The appellant's appeal was disallowed by the First-tier Tribunal (F-tT): it decided he was a self-employed seasonal worker with a recognisable cycle of work of one year and so he was either in remunerative work or his average earnings exceeded the applicable amount for benefit purposes (or both). The Upper Tribunal dismissed the appellant's subsequent appeal holding that, as he could reasonably expect to be authorised by the Trust in the future, the F-tT's decision was reasonable. Both parties to the appeal accepted that the primary question in determining the claim was whether or not the appellant was "in work". It was submitted on behalf of the Secretary of State that self-employed seasonal workers were different from employed seasonal workers as self-employment was an annual activity which might entail extensive periods without remunerative work.

Held, allowing the appeal, that:

1. the notion that a "seasonal worker" is engaged in an annual cycle of work with the consequence of his earnings being averaged over a 12-month period, as set out *obiter* in R(JSA) 1/03, was misplaced or open to misunderstanding (paragraph 14);

2. the primary question to be addressed at the outset, when considering any claim for jobseeker's allowance, was whether the person concerned was "in work" and that question raised a matter of fact, giving the notion of being "in work" its ordinary meaning (paragraph 19);

3. the Court was unable to accept that there was an unqualified distinction between the employed and the self-employed; there is no textual warrant in the legislation for any distinction to be drawn between previously employed or self-employed claimants. There will be seasonally pursued activities which, although treated as "self-employed" activity for contractual or fiscal reasons, are in their substance little different from employment. Such *quasi employed* activities include those where the individual has no significant capital investment and his technically self-employed activity was dictated by seasonal factors affecting the demand for his services. In that context any distinction between self-employment and employment may be of little or no materiality when addressing the question whether the claimant is in work. The categorisation of a claimant's limited seasonal activity as being "self-employed" does not in itself detract from the need to reach a proper answer on the primary question whether, the seasonal activity having come to an end, the claimant may be said to be "in work" (paragraph 20);

4. the F-tT judge erred in treating the primary issue in regulation 51(1) as being determined by a subordinate reference within a later paragraph of the regulation to an annual cycle of work. He further erred in considering that the particular arrangements of the appellant's work, resulting in it being treated as a self-employed status, was of itself determinative of the issue. The Upper Tribunal essentially endorsed the F-tT's approach (paragraphs 21 and 22).

The Court of Session remitted the case to the F-tT to consider the primary question which it ought to have considered.

OPINION OF THE COURT

Introductory

1. This is an appeal under section 13(2) of the Tribunals, Courts and Enforcement Act 2007 against a decision of a judge of the Upper Tribunal (Administrative Appeals Chamber) of 20 March 2009. There has, unfortunately, been delay in the hearing of this appeal. Leave to appeal to the Court of Session was refused by the Upper Tribunal on 16 June 2009. The

appellant, appearing in person, then sought leave from this court, which was granted on 21 October 2009. The appellant thereafter succeeded in obtaining legal representation and service of the appeal on the respondent was appointed on 16 December 2009. Answers to the appeal were lodged in due course. The appeal was eventually set down for a hearing on the summar roll on 19 October 2011. However, in the course of its deliberations after that hearing, and perceiving that the appeal raised issues of potential general importance, the court came to the view that fuller submissions on the proper construction of the legislative texts in issue was required. On 18 November 2011, the appeal having been put out by order, the parties were invited to provide written submissions on that matter prior to hearing further oral argument. Regrettably, for reasons into which it is unnecessary to go in detail, yet further delay ensured in re-opening the oral hearing, which took place on 24 October 2012.

2. The appeal is concerned with one of the conditions respecting entitlement to a jobseeker's allowance, but it appears from what we were informed at the renewed oral hearing on 24 October 2012 that the relevant regulatory texts are also to be found, or mirrored, in a number of other regulations in the general field of social security and employment.

3. The factual background to the appeal may be stated relatively shortly. During the spring and summer of 2007 the appellant worked, as he had done in the spring and summer of some previous years, as a golf caddie at the Old Course in St Andrews. In order to work there as a caddie, he required authorisation from the body owning and managing the Old Course (and, we understand, other courses in St Andrews) namely the St Andrews Links Trust. The appellant's authorisation to work as a caddie in St Andrews was withdrawn in October 2007 for the reason that the demand for caddies is much reduced in the winter months. Caddies at St Andrews, though requiring authorisation from the St Andrews Links Trust, are self-employed in the sense that they receive no salary from the manager of the golf course. The golfer engaging the caddie pays a fee (£40 in 2007) for the round for the services of the caddie, which fee, after deduction of a sum payable to the St Andrews Links Trust, is then paid over to the caddie. The Trust was not under any commitment to allow the appellant to work as a caddie on the golf courses in St Andrews in the following, or any other future year.

4. Following the withdrawal of his authorisation to work as a caddie in October 2007 the appellant, on 29 October 2007, applied to the Department for Work and Pensions for a jobseeker's allowance. That application was rejected on 14 December 2007. The appellant, among others, appealed to the First-tier Tribunal which in June 2008 disallowed the appeal. The essence of the reason for that disallowance was expressed thus:

> "The Tribunal at Kirkcaldy found that in all of the cases before it, the appellants were self-employed seasonal workers with a recognisable cycle of work of one year and were either in remunerative work or their average earnings over the course of a year were in excess of their applicable amount or both of these. That fact or these facts disentitled the appellants to the benefit claimed and the appeals were accordingly disallowed."

That ground of decision was endorsed by the judge of the Upper Tribunal, against whose decision this appeal proceeds.

The legislation

5. The primary legislation governing jobseeker's allowance is the Jobseekers Act 1995. Section 1(2) of that Act provides:

> "(2) Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he –
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> (a) is available for employment;

(b) has entered into a jobseeker's agreement which remains in force;

(c) is actively seeking employment;

(d) ...

(e) is not engaged in remunerative work;"

It is not in dispute that when the appellant applied for jobseeker's allowance in October 2007 he met the criteria in heads (a), (b) and (c), that is to say, he was available for employment, actively seeking employment and had entered into a jobseeker's agreement. The refusal of his application flowed from the terms of head (e); namely, it was maintained that he failed the test of not being engaged in remunerative work. Or in words which avoid a double negative, he was held to be engaged in remunerative work.

6. For the notion of "remunerative work" one has to go the Jobseeker's Allowance Regulations 1996 (SI 1996/207). The relevant provisions are to be found in regulation 51(1) and 51(2) which reads:

"**51. –** (1) For the purposes of the Act 'remunerative work' means –

(a) in the case of a claimant, work in which he is engaged or, where his hours of work fluctuate, is engaged on average, for not less than 16 hours per week; and ...

... and for those purposes 'work' is work for which payment is made or which is done in expectation of payment.

(2) For the purposes of paragraph (1), the number of hours in which a claimant 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, and sub-paragraph (c) does not apply, the period of one complete cycle (including, where the cycle involves periods in which the person does not 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 such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately;

(c) where the person works at a school or other educational establishment or at some other place of employment and the cycle of work consists of one year but with school holidays or similar vacations during which he does no work, by disregarding those periods and any other periods in which he is not required to work."

The tribunal decisions

7. At this point it is convenient to set out more fully the basis of the initial decision and the decisions of both the First-tier Tribunal and the Upper Tribunal.

8. The officer in the Department for Work and Pensions who took the initial decision on the appellant's application calculated that if the hours for which the appellant had worked as a

caddie over the spring and summer of 2007 were averaged throughout an entire year, that average number of hours came to 19.07 hours per week, which was thus greater than the 16 hours exception, for those otherwise engaged in remunerative work, contained in regulation 51(1)(a). That approach plainly proceeds upon the basis that working for a part of a year implied, in the appellant's case, that he was in that work for the whole of the year.

9. The First-tier Tribunal, in upholding that decision, founded particularly upon the decision of the Commissioner (Mr Rowland) in a decision R(JSA) 1/03 albeit by reference to a later decision of the Commissioner (Mr Henty) in CJSA/1028/2005 in which Mr Henty effectively endorsed what had been said by Commissioner Rowland. That included these observations by Commissioner Rowland:

> "People may be engaged in work when not carrying out activities in connection with the employment in cases where periods of no work are ordinary incidents of their employment. That is particularly so in the case of self-employed earners. It is also true of those who work cycles that include periods of no work. Where the claimant is a seasonal worker, there is likely to be a cycle of work, consisting of one year ..."

The First-tier Tribunal judge also noted a decision of another Commissioner (Mr Howell) in R(JSA) 1/07, which concerned three claimants employed for the summer season in tourism-related jobs in Skegness. Put shortly, Commissioner Howell found that an employee in a seasonal summer job, who was then left without employment in the winter months, was not engaged in remunerative work during those winter months. The First-tier Tribunal judge distinguished that decision on the basis that it was concerned with those who were employees. He therefore pronounced the conclusion already quoted in [4] above which, for convenience, we repeat:

> "The Tribunal at Kirkcaldy found that in all of the cases before it, the appellants were self-employed seasonal workers with a recognisable cycle of work of one year and were either in remunerative work or their average earnings over the course of a year were in excess of their applicable amount or both of these. That fact or these facts disentitled the appellants to the benefit claimed and the appeals were accordingly disallowed."

10. The Upper Tribunal judge (Judge May QC) essentially endorsed that finding. He held that, notwithstanding that there was no guarantee of work as a caddie in the following spring, there was a reasonable expectation of re-engagement. In his view, the First-tier Tribunal was thus entitled to find that there was "an established cycle of work over a period of one year". The Upper Tribunal judge also invoked, as respects R(JSA) 1/07, the distinction that the appellant had been self-employed, as opposed to his having been an employee.

Parties' submissions

11. In brief summary, counsel for the appellant contended that the question which had to be addressed in considering the appellant's application for a jobseeker's allowance was whether at the time of his application (October 2007), the appellant was in work. It was an error to look for some possible annual cycle in his activities. It was clear that when the appellant applied for a jobseeker's allowance he was not in any work. He was unquestionably looking for work, and available to take up such work. There was no obligation on the St Andrews Links Trust to allow him to work as a caddie in the future. And no reason to think that were he to find more congenial or better remunerated employment he would nonetheless give that up in order to go back to working as a caddie. Counsel added that in a later year, the appellant had indeed found employment in the winter months; and, when in the course of those months that employment ended, he was granted a jobseeker's allowance. The fact that the so-called annual cycle could thus be interrupted by the claimant's finding the work which he sought in the winter months,

demonstrated that the notion of an annual cycle rendering the claimant "in work" was misconceived. It was to ignore the leading provision in regulation 51(1).

12. At the resumed hearing in October 2012 the court had the benefit of written and oral submissions on behalf of the Secretary of State from Mr Webster, who had not been instructed for the earlier hearing on the summar roll. Again, by way of brief summary, Mr Webster submitted that the test was not simply whether the applicant, at the time of his or her application, was looking for work. There were three components to the notion of being engaged in remunerative work – (a) being "engaged in work"; (b) for "remuneration"; and (c) being so engaged for more than 16 hours per week. In many, if not in most cases – for example those who had been made redundant or who were released prisoners – no problem arose. But there were, counsel for the respondent submitted, difficult cases. Counsel exemplified off-shore workers, who, while still under an ongoing contract, had periods of on-shore inactivity in which they might claim to be available, and looking, for other work. Or those employed in education, where their employment on an annual basis might allow them nevertheless to seek supplementary employment during the long vacations. The self-employed might share some characteristics with those employments. But, said counsel, many engaged in a self-employed business or profession will have periods of inactivity resulting from the very nature of that business or profession, which they choose to accept as part of their choice to engage in self-employment in their business or profession. Counsel sought to stress that the self-employed were thus in a very different position from the employed. In the appellant's case, the First-tier Tribunal had been entitled to come to the view that being without any other gainful employment during the winter months was a normal feature of the pursuit of self-employment as a golf caddie on an annual basis and to conclude that the appellant was engaged in work.

Discussion

13. We begin with the observation that from what was presented to us it emerges that the notion that a "seasonal worker" is on that account engaged in an "annual cycle of work", with the consequence that his or her seasonal hours or earnings fall to be averaged over 12 months, has its origin in the *obiter dictum* of the Commissioner (Mr Rowland) in the decision R(JSA) 1/03. Those observations have plainly caused difficulty in subsequent tribunal decisions.

14. We have come to the view that those *obiter* observations, which received that subsequent currency, were misplaced, or at least open to misunderstanding. The references to a "recognisable cycle of work" in regulation 51 appear in the second paragraph of that regulation, which paragraph is concerned simply with ascertaining the number of hours in a week for which a person, who is in work, is actually engaged in working. It thus proceeds upon the important hypothesis, which is the subject of paragraph (1) of regulation 51, that the person concerned is "in work" (which is remunerated, or done with the expectation of remuneration) at the time of his application for a jobseeker's allowance. That is, in our view, evident from the structure of the regulation and particularly the opening sentence of paragraph (2).

15. The provisions of regulation 51(2) which follow thereafter are not free from difficulty. It is unclear whether the legislator intended the obviously recognisable weekly cycle of work for many workers of a Monday to Friday working week as being something other than a regular cycle of work. Paragraph (a) might suggest that view. Paragraph (b) – which alone deploys in paragraph (b)(i) the notion of a "recognisable cycle of work" – is postulated upon the notion of fluctuation in the number of hours (*scilicet* per week) upon which the person concerned is engaged in working and then applies an averaging exercise to the period of "one complete cycle". Failing the detection of a "recognisable cycle of work", paragraph (b)(ii) directs the averaging exercise to be conducted over the five weeks preceding the date of claim or the date of

suppression, or such other period as may, in the particular circumstances of the case, enable "the person's average hours of work to be determined more accurately".

16. It is however not necessary for us to attempt to resolve comprehensively the problems of interpreting and applying the provisions of regulation 51(2) devoted to determining the weekly average number of hours of a person who is "in work". The point to be noted is that the notion of a "recognisable cycle of work" comes into play for the particular purpose of averaging the weekly hours of work of the person concerned only once one has made the primary, or leading, finding that the person concerned is "in work". It is therefore, in our view, not legitimate to seek to identify some "recognisable cycle of work" as being the test for that primary criterion whether the person concerned is "in work".

17. Avoiding that erroneous approach to the question is, in our view, important in the case of those roughly described as seasonal workers. From want of other employment opportunities, many may have little choice but to take up seasonal employment; in other cases an individual may prefer to work in, say, the summer months in some tourism-related job in a seaside resort where financial or personal rewards are greater. But the fact that an individual has previously, even repeatedly, been engaged in an activity for a part of the year, which might be described as a seasonal activity, does not mean that he or she has made a choice to treat that part-year activity as an enduring annual activity with the rest of the year being fallow.

18. The error was pointed out by Commissioner Howell in R(JSA) 1/07 (which was concerned with the three claimants employed for the summer in tourism-dependant employments in the Skegness area). At paragraphs 22 to 23 of his decision the Commissioner wrote:

> "22. The only thing that can be pointed to is the fact that each of these claimants has managed to obtain some casual employment for a limited period in each year though being out of a job for the rest of the year, and that this has occurred more than one year in a row. I do not see how the recurrence of an inability to get work at all during the winter months can turn the whole calendar year into one continuous period of the claimant being 'engaged in work' for the purposes of regulation 51 so as to be able to call the whole year a 'recognisable cycle of work' as the Secretary of State's argument suggests. It may be a recognisable cycle of something, such as bad luck or a badly planned economy, but it is not in my judgment a recognisable cycle of work in the sense relevant for regulation 51(2), which is concerned with the calculation of a numerical average of hours **at** work over a period while a person continues to be **in** work.
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> 23. The point is irresistibly answered by the decision of another tribunal chairman, Mr A N Moss, in a separate case supplied to me for information in these appeals, where he said:
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> > 'The regulations make no reference to seasonal work – it [the argument now pursued by the Secretary of State] is the interpretative gloss on the regulations that has arisen as a result of Commissioners' decisions. The DWP have taken the approach that all seasonal workers have a recognised cycle of the year if they have worked two cycles. This is an incorrect interpretation of the regulations. On their definition Santa Claus and the Easter Bunny would have a recognised cycle of work of a full year despite only working one day a year – because they do it every year.'
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> Without delving too far into the employment status of those particular individuals, the chairman's answer to the 'recurrence' argument as regards a casual employee wholly out of a job for part of the year is in my view a valid one."

19. Mr Webster, for the Secretary of State, accepted that the primary question which had to be addressed at the outset of the consideration of any claim for a jobseeker's allowance was that prompted by the first paragraph of regulation 51, namely whether the person concerned was "in work"; and that that question raised a matter of fact, giving the notion of being "in work" its ordinary meaning. As we understood him, counsel also accepted that those who had been employed in seasonal work – such as the Skegness claimants – should not be treated as being "in work" following the ending of their seasonal contracts of employment on the basis that it was possible to discern a previous pattern of seasonal employment and hence an "annual cycle". However, counsel for the Secretary of State submitted, with some emphasis, that those whose seasonal activity was a self-employed activity were to be seen as being in a very different category from those were engaged seasonally as employees; self-employment was an annual activity, albeit that it might entail extensive periods of no actual earning activity.

20. We are unable to accept that the sharp, unqualified distinction which we understood counsel for the Secretary of State to be seeking to make between the employed and the self-employed is a valid distinction. There is, of course, no textual warrant in the legislation for any distinction to be drawn between previously employed or self-employed claimants. Plainly there may be many self-employed trading or professional activities in which it is not difficult to say that the professional or trading activity continues notwithstanding an idle period. An example might be the arable farmer who, having ploughed and sowed the winter wheat in the autumn, has relatively little to do until the arrival of the spring. In some respects, one might draw an analogy with a schoolteacher whom one would readily say was in work albeit that his teaching duties are punctuated by school holidays in which he has little by way of professional activity to perform. But conversely, there will be seasonally pursued activities which, while treated in their exercise for contractual or fiscal reasons as a "self-employed" activity, are in their substance little different from employment. Typically (but not exclusively), such *quasi* employed activities might be those in which the individual has no significant commercial capital invested and the temporal limit on his exercise of that technically self-employed activity is dictated by seasonal factors affecting demand for the person's services. In that context, any distinction between self-employment and employment may be of little or no materiality when addressing the question whether the claimant is in work. Thus the categorisation of a claimant's limited seasonal activity as being "self-employed" does not in itself detract from the need to reach a proper answer on the primary question whether, the seasonal activity having come to an end, the claimant may yet properly be said to be "in work".

21. In the present appeal we are satisfied that the First-tier Tribunal judge did not address himself to the correct question, but fell into the error of treating the primary issue in regulation 51(1) as being determined by the subordinate reference in the later paragraph of the regulation to an annual cycle of work. In our view he further erred in considering that the particular arrangements of the appellant's work, resulting in it being treated as a self-employed status, were of themselves determinative of the issue, in so far as he may have sought to address it.

22. Since the Upper Tribunal essentially endorsed the approach of the First-tier Tribunal judge, the error which we have detected in the latter's decision plainly affects the former.

23. In these circumstances, we allow the appeal and remit to the First-tier Tribunal to consider the primary question which it ought to have considered.