

MJG/CW/LB/3

Commissioner's File:

CI/14111/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 10 January 1996 as that decision is erroneous in law and I set it aside. My decision is nevertheless to the same effect as that of the tribunal, namely that the accident which the claimant suffered on 11 July 1995 arose out of and in the course of her employment, being employed earner's employment. Accordingly I grant her a declaration of an industrial accident: Social Security Contributions & Benefits Act 1992, section 94(1); Social Security Administration Act 1992, section 23. I direct the adjudication officer to refer to the appropriate adjudicating medical authority the consequent disablement question: Social Security Administration Act 1992, section 46; Social Security (Adjudication) Regulations 1995, S.I. 1995 No. 1801, regulation 45(6).

2. This appeal by the adjudication officer was the subject of an oral hearing before me on 26 November 1996 at which the claimant was present, but unrepresented. She addressed me on the issues in this appeal. The adjudication officer was represented by Mr J. Heath of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant and to Mr Heath for their assistance to me at the hearing.

3. The adjudication officer's appeal is against the majority decision of a social security appeal tribunal dated 10 January 1996 which allowed the appeal of the claimant, a

married woman born on 16 July 1953, against the decision of an adjudication officer issued on 17 October 1995 refusing the claimant a declaration of an industrial accident. The accident happened to her when she was home on sick leave from her employment as a Clerical Officer at the local office of the Benefits Agency, when she was assaulted by her next door neighbour. There is no doubt that the assault was connected with her employment as a Clerical Officer, for the reasons which are set out below. In effect the only issue in this case is whether the accident arose "in the course of" that employment (Social Security Contributions & Benefits Act 1992, section 94(1)). If it did, it undoubtedly "arose out of" the employment.

4. The tribunal clearly took considerable care with the case. Their record of decision (on form AT3) is completed in exemplary detail. No adverse criticism of the majority on the tribunal is implied in my having set their decision aside, but I do not consider that the reasons given by the majority were correct in law. However, for different reasons, as is explained below, I have come to the same conclusion as the tribunal, namely that on the particular facts of this case the accident arose "in the course of" the claimant's employment.

5. The original tribunal made the following findings of fact (words in square brackets inserted by me) which were confirmed as correct by the claimant at the hearing before me and which are not disputed by the adjudication officer; -

"1. [The Claimant] is employed by the Benefits Agency...and in July 1995 would have been working in the disablement section.

2. However, on 11 July 1995 she was off sick, suffering from ulcerative colitis [and had in fact been off sick since 24 May 1995], and was at home.

3. Her home address is...and she lives there with her husband and son. She has been there about 15 years. [The claimant has since moved her address because of the problems with the neighbour].

4. In about January 1993 Mr O. and Miss R. (cohabitee) moved in next door.

5. Initially there were no problems with the neighbours and there were never any 'neighbour' type problems e.g. over boundaries.

6. Mr O. happened to tell [the claimant] that he worked away a lot. [The claimant] happened to see him at [the] Benefits Agency while she was there working. She discovered he was claiming benefit and reported him. Mr

0. happened to see her coming out of [the] Benefits Agency premises.

7. Very soon afterwards [the claimant] started to encounter problems - receiving abuse from Mr O. and threats, and for example losing tools from her shed.

8. On 11 July 1995 she was assaulted by Mr O. at her home address and received injuries. She was on her property at the time, walking down her drive, when Mr O. and Miss R. came on to her drive uninvited. Mr O. called her a DSS spy prior to and during the assault."

6. There is no doubt (as was rightly conceded by Mr Heath) that the assault was connected with the claimant's employment because Mr O. suspected the claimant of having reported him to the Benefits Agency for claiming income support whilst he was working. Apparently he was investigated by the Departmental Fraud Section. The only question in this case is whether the accident arose "in the course of" the employment. As to that, the adjudication officer's appeal is on the following ground,

"By deciding that the assault on the claimant arose in the 'course of' her employment the tribunal have made a decision which no person acting judicially and properly instructed as to the law would have reached. This is because the claimant was in her own home on the day of the assault and had been off work due to illness for the previous 6 weeks."

7. I reject that ground of appeal, framed as it was, because in fact my decision is the same as that of the tribunal but on different grounds (see below). I should in fairness to the adjudication officer say that there has also been a further and more lengthy written submission (of 25 April 1996), in which the adjudication officer fairly puts before the Commissioner what he considers to be the relevant authorities. He cites for example paragraph 12 of decision R(I)67/52 where the learned Commissioner said,

"The definition of an industrial accident as one 'arising out of in the course of' a person's employment means, briefly, an accident arising while he is doing what his contract obliges him to do, and because of a risk created by what his contract obliges him to do. The accident must, therefore, be one which happens while he is within what has been called the scope or ambit of his work."
(My underlining).

8. The majority reasons for decision of the original tribunal are lengthy and show considerable thought. They refer to the decision of the Court of Appeal in Nancollas v. Insurance Officer, R(I)7/85(Appendix): [1985] 1 All E.R.833,

but it should be borne in mind that certain aspects of the Nancollas decision have been now overtaken by the decision of the House of Lords in Smith v. Stages [1989] A.C.928. It also has to be remembered that ultimately a decision as to whether or not a person is "in the course of" their employment is a decision on fact, though legal issues may arise, as in this case. In their reasons the majority said,

"Following the guidelines given and particularly those in the Nancollas case the tribunal felt that the circumstances leading up to and particularly during the assault pointed towards the claimant being in the course of her employment. Because of her work, her home became equivalent to her place of employment at the time the assault occurred. (My underlining).

9. The dissenting member of the tribunal gave the following reasons for dissent,

"The dissenting member considered the line between being in the course of employment or not had not been crossed: that as [the claimant] was at home off sick the circumstances were too remote from her employment to say the accident arose in the course of it. Further [the claimant] had said she reported Mr O. both because of her loyalty to work but also as a member of the public."

10. I have set the majority decision aside because I do not think it correct simply to say "Because of her work, her home became equivalent to her place of employment at the time the assault occurred". This lady was not like a police officer or fireman who may be on constant call even at home and therefore while at home can be regarded in the course of his employment. In my view, there are two the real reasons why she can be treated as "in the course of her employment". The first is this. Had she not been sick on the day of the assault (a Tuesday), she would have been at work at the office. The question then arises whether though at home sick, she can be said to have been "..In the course of her [employment], being employed earner's employment." (1992 Contribution Act, s.94(1) - my underlining).

11. "Employment" is defined by section 122(1) of the 1992 Contributions Act as including a number of matters including "vocation". That section refers, for definition of "employed earner", to section 2(1)(a) of the 1992 Contributions Act, which provides,

"Categories of Earners

2(1) In this Part of this Act and Parts II to V [Part V relates to benefit for industrial injuries] below -

- (a) 'employed earner' means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E;"

12. Bearing those definitions in mind, the position undoubtedly is that the claimant although not at the Benefits Agency Office on the day in question because she was off sick was nevertheless still serving under her contract of service. As I have explained in paragraph 14 of a decision on file CG/011/94 (to be reported as R(G)2/95), when an employee is off sick, he or she is absent only with the consent and authority of the employer and subject to any qualifications to that consent and authority. See for example, the case of Marshall v. Alexander Sloane and Co. Ltd. [1981] I.R.L.R. 264, E.A.T., cited therein. Consequently in the present case the claimant was in my view, still in "employed earner's employment" when she was at home sick. She was subject to the control and direction of her employer, saving only the waiver of the need to be physically present in the Benefits Agency Office. Consequently, although the majority of the tribunal were wrong in saying "her home became equivalent to her place of employment at the time the assault occurred", nevertheless she was in fact forced to be at home because of illness and was at home only with the consent and authority of her employer. Therefore she can still be regarded in my judgment as "in the course of" her employment while on authorised sick leave. When she was assaulted, the assault having direct reference to her employment as a Benefits Agency employee, all of the elements of section 94(1) of the 1992 Act were fulfilled.

13. Lastly, I ought to refer to the second ground on which I hold her to have been in the course of her employment. At the hearing before me, she gave evidence that she had to do "preparation work" at home and was credited by the Benefits Agency under their "flexitime" system for the hours she spent at home doing that work. That evidence was not, I think, before the tribunal. It does, however, mean that ad hoc her home could, indeed, become her place of work and she came within the broad sense of "in the course of" to which Mr Heath referred (citing R(I)41/51 and R(I)7/80).

(Signed)

M J Goodman
Commissioner

(Date)

15 JAN 1997