CPA 5.

DGR/SH/13

Commissioner's File: CU/001/1990

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons set out below, the decision of the social security appeal tribunal given on 11 October 1989 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 11 October 1989.

3. The question for determination by the tribunal was whether the claimant should be disqualified for a period for receiving unemployment benefit because he had lost his employment through misconduct (Social Security Act 1975, section 20(1)(a). In the event, the tribunal in substance upheld the decision of the adjudication officer, but reduced the period of disqualification to one of 25 weeks extending from 28 March 1989 to 17 September 1989.

4. The tribunal made the following findings of fact:-

> "Appellant claimed unemployment benefit on 3.4.89. Appellant employed as a driver and was dismissed on 28.3.89. Prior to dismissal Appellant had a bad time-keeping record. Prior to dismissal Appellant had been handed a warning dated 7 March 1989, handed to him on 9 March 1989 concerning his time-keeping. Appellant had requested to work on 24 March 1989 and had not attended for work at 7.30 that day. Appellant subsequently contacted the employer on 28 March 1989. Appellant told employer that he had slept in."

The tribunal preferred the evidence of the employer, and by implication rejected the claimant's contention that he had on 24 March been suffering from nausea. The tribunal accepted the employer's reasons for dismissal, namely the claimant's bad time-

keeping and his failure to attend work on 24 March as amounting to misconduct.

5. In his grounds of appeal the claimant complains that no explanation was given why his evidence was rejected and why that of the employer's representative was preferred. The adjudication officer now concerned supports the appeal on this ground, and submits as follows:-

> " 7. It is not in dispute that the claimant was absent from work on 24.3.89. The tribunal found that his absence led the employer to decide that the claimant would be dismissed, if he could not give a suitable explanation in view of the warnings he had received about his bad time-keeping. The reason for the claimant's absence from work was therefore crucial, I submit, to a finding of whether he had lost his employment through misconduct. If the tribunal had accepted that the claimant was ill on the day in question, then they would have had to go on to consider whether he had done everything necessary to inform his employer of the fact and cause of his absence (Commissioner's Decision R(U) 23/58 refers). In the event, the tribunal chairman recorded the claimant's statement that he had been suffering from nausea on that day .... However, the tribunal found as fact that the claimant told his employer he had slept in and went on to decide that he had lost his employment through misconduct. The tribunal have not explained why they preferred the employer's evidence on this point. In the absence of any explanation as to why his evidence was rejected, I submit that the claimant has been left to guess at the reasons his appeal failed. In the circumstances, I submit that the tribunal's decision is in breach of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and is therefore erroneous in law."

6. Both the claimant and the employer's representative appeared before the tribunal. As a result the tribunal were able to see and hear them, and were in a position to assess their respective credibility. In the event, the tribunal preferred the evidence of the employer's representative. Manifestly, the impression that the employer's representative conveyed was more convincing than that of the claimant; hence they preferred the version put forward by the former. Whilst it might have been helpful if the tribunal had spelt this out specifically, it is implicit in their decision. They had to accept the evidence of one of the witnesses and reject the other. It was a matter for them. It was implicit in their finding that they simply found the employer's representative more impressive as a witness. They were satisfied that his account represented the truth. Accordingly, I see no reason for my interfering with their decision.

7. The second ground relied upon by the claimant was that on the facts the tribunal should have reduced the period of disallowance more than they in fact did. On this point, the adjudication officer now concerned makes the following helpful

submission:-

> " 8. In a recent decision R(U) 4/87 at paragraph 11 the Commissioner held that appeal tribunals are likely to err in law if they do not indicate in their decision (a) that they have consciously exercised a discretion in imposing disqualification; and (b) stated the facts that they have taken into account in exercising it. The tribunal in this case considered that the fact that the claimant had attempted to contact his employer was a point which should be taken into account when deciding the period of disqualification. They have therefore, in my submission, exercised their discretion and explained the manner in which it was exercised. The assessment of the period of disqualification was a matter for them. They have paid attention to the matters which the law required of them and appear to have had in mind the elements relevant for that consideration. I submit therefore that their decision is not erroneous in law in this respect as suggested by the claimant in his second ground of appeal."

I accept that submission.

8. Accordingly, I do not see in what respect it could be said that the tribunal erred in point of law, and as a result I have no option but to dismiss this appeal.

(Signed) D G Rice
Commissioner

(Date) **4 February 1992**