

C.U. 5/1982

MJG/BR

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.U. 3/82

R(U) 4/82

1. My decision is that unemployment benefit is payable to the claimant for the inclusive period from 15 August 1979 to 8 February 1980. That period is one in respect of which an industrial tribunal awarded compensation for unfair dismissal and the amount of that compensation included a sum representing remuneration which that tribunal considered the claimant might reasonably be expected to have had for that period but for the dismissal. Nevertheless, that amount is not "payable" to the claimant: Social Security Act 1975, section 17(2)(a); Employment Protection Act 1975, section 112 (since repealed, but nevertheless material to this decision) and the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, S.I. 1975 No 564 regulation 7(1)(1) (added by regulation 2 of S.I. 1976 No 328 and regulation 2 of S.I. 1976 No 677). The appeal of the insurance officer against the decision of the local tribunal is therefore dismissed.

2. The claimant is a man now aged 59. He was employed as an oxypropane burner by a limited company from 14 September 1977 to 8 March 1979, when he was dismissed by the company. On 10 August 1979 an industrial tribunal awarded compensation for unfair dismissal in favour of the claimant against the company. That tribunal specified part of its award as follows:-

"Bearing in mind the claimant's age and the evidence from him as to difficulties in finding employment, we decided to award an estimated future loss of wages for 26 weeks at £54.40 per week: £1,414.40".

That award ran from 11 August 1979 (the day following the industrial tribunal's decision) and expired on 8 February 1980 but the period from 11 to 14 August 1979 was the subject of a separate review decision by the insurance officer which was not the subject of an appeal to the local tribunal and is not, therefore, before me. The period with which I am concerned is therefore the residue of the 26 weeks' period, i.e. from 15 August 1979 to 8 February 1980.

3. For that period the local insurance officer held the claimant not to be entitled to unemployment benefit, by applying to the period regulation 7(1)(1) of the Unemployment, Sickness and Invalidity Benefit Regulations 1975 (cited in paragraph 1 above). The material

parts of regulation 7(1)(1) read as follows:-

"7(1)(1) - a day shall not be treated as a day of unemployment in relation to any person if it is a day in respect of which there is payable to that person -

(i) - (ii)

(iii) an amount awarded to that person as compensation for unfair dismissal where that amount includes a sum representing remuneration which the industrial tribunal considers he might reasonably be expected to have had for that day but for the dismissal, so however that this provision shall not apply to any day which does not fall within the period of one year from the date on which the employment of that person terminated." (my underlining).

4. In view of the breadth of regulation 7(1)(1) and the criticisms on behalf of the claimant of its effect, it is appropriate to consider whether it was validly made under statutory powers, i.e. whether it is *intra vires*. The regulation was made (by S.Is 1976 Nos 328 and 677), partly under the power in section 17(2)(a) of the Social Security Act 1975 to "make provision ... as to days which are or are not to be treated for the purposes of unemployment benefit ... as days of unemployment ..." and partly under powers conferred by section 112 of the Employment Protection Act 1975. That section was repealed by the Employment Protection (Consolidation) Act 1978, section 159 and Schedule 17, and corresponding provisions were re-enacted in section 132 and Schedule 16, paragraph 19 of the 1978 Act, the latter inserting a new section 139(2A) in the Social Security Act 1975. Section 139(2A) was in turn repealed by the Social Security Act 1980, sections 8 and 21 and Schedule 5, part II, and not replaced. However, as the relevant regulations (S.Is 1976 Nos 328 and 677) were made in 1976, the provisions of section 112 of the Employment Protection Act 1975, in force at the time, are those that should be first considered, when considering the vires of the regulations.

The above-cited provisions of the 1978 Act that replaced section 112 of the 1975 Act are not materially different, as the 1978 Act was only a consolidation. Had there been any material difference, regard might then have also had to be paid to the provisions of the 1978 Act (see Interpretation Act 1978, section 17(2)(b)).

5. Section 112(1) of the Employment Protection Act 1975 reads,

"112(1) - Section 139(1) of the Social Security Act 1975 (submissions of regulations in draft to the National Insurance Advisory Committee) shall not apply to regulations made under that Act and contained in a statutory instrument which states that the regulations provide only that a day in respect of which there is payable a particular description of any payment to which this section applies shall not be treated as a day of unemployment for the purposes of entitlement to unemployment benefit."

The statutory instruments (S.I.s 1976 Nos 328 and 677) which inserted regulation 7(1)(1) into the Unemployment, Sickness and Invalidity Benefit Regulations 1975 were not submitted in draft to the National Insurance Advisory Committee and do contain a statement in the terms of section 112(1) above. Consequently, they are intra vires only if they are within the terms of section 112(1) - if not, they are ultra vires.

6. That question on the facts of this case depends on whether an award by an industrial tribunal of compensation for unfair dismissal, consisting (among other elements) of a sum for loss of future wages, i.e. which would have been earned (but for the dismissal) after the date of the industrial tribunal's decision is "a particular description of any payment to which [section 112 of the Employment Protection Act 1975] applies" (1975 Act, section 112(1) - cited in paragraph 5 above). It is clear from section 112(2) that the payment must be "the subject of proceedings before an industrial tribunal" and the nature of the payment is defined by section 112(7)(a) as "a payment of wages or compensation for loss of wages".

7. The principal object of section 112 of the Employment Protection Act 1975 was to confer power to make regulations relating to "recoupment" (i.e. by Department from employer) and the regulations so made (the Employment Protection (Recoupment of Unemployment and Supplementary Benefit) Regulations 1977, S.I. 1977 No 674) do not apply to awards of compensation (as in this case) for loss of future wages in the sense defined in paragraph 6 above. Nevertheless the language of the whole of section 112 is sufficiently broad to make it clear that the "payments of wages or compensation for loss of wages", to which section 112(7)(a) refers, can include awards by an industrial tribunal of compensation for loss of future wages. Consequently, regulation 7(1)(1)(iii) of the Unemployment, Sickness and Invalidity Benefit Regulations 1975 (paragraph 3 above), which in my view, clearly extends to such future awards, is intra vires.

8. It follows therefore, that the industrial tribunal's award to the claimant in this case of 26 weeks' future loss of wages attracts the operation of regulation 7(1)(1)(iii) unless, as the majority decision of the national insurance local tribunal held, the sum of £1,414.40 awarded under that head was not, to quote from the opening words of regulation 7(1)(1), "payable" to the claimant. The question arose because it had become apparent at the date of the second hearing before the local tribunal (2 April 1980) that the company that had employed the claimant was likely to go into liquidation and, indeed, a compulsory winding-up order was made by the High Court on 20 October 1980. A letter dated 28 July 1981 to the claimant's Solicitors from the Assistant Official Receiver stated, "I am unable to state definitely that there will be no funds available for distribution to the non preferential creditors ... as the absence of the directors has hampered the Official Receiver's enquiries into the affairs of the company. On information available at present, however, and unless any assets are discovered in the future, there is no prospect of any funds becoming available for any distribution to the creditors."

9. It should be added that the industrial tribunal's award of £1,414.40 is a non-preferential debt (it is not included in the categories of priority or preferred debts in insolvency law) and, moreover (unlike the industrial tribunal's "basic award"), is not payable by the Secretary of State out of the Redundancy Fund (see Employment Protection (Consolidation) Act 1978, section 122(3)). Consequently, where (as here) a claimant is unable in fact to recover such an award from his employer, he is, if denied unemployment benefit for the period of the award, in a worse financial position for having obtained an industrial tribunal's award in his favour than he would have been if, for example, he had been validly dismissed for misconduct, had therefore been unable to make an unfair dismissal claim and had suffered only a disqualification for receipt of unemployment benefit of a maximum of 6 weeks (see Social Security Act 1975, section 20(1)(a)). Considerations like these clearly influenced the majority in the local tribunal who accepted submissions on the claimant's behalf, summarized by the insurance officer now concerned as being to the effect that "payable" means "a sum capable of being paid if there are sufficient funds". The majority added, "Any other interpretation would have resulted in a breach of natural justice". That latter sentiment can only be legally reflected in the present context in a finding that a regulation is ultra vires but I have already demonstrated above that I consider the regulation to be intra vires. If, correctly interpreted, an intra vires regulation produces an anomalous result, that can be cured only by amendment or revocation of the regulation, by or with the authority of Parliament.

10. However, I have concluded for the reasons set out below that, correctly interpreted, the word "payable" in regulation 7(1)(1) does not apply to the facts of this case. Clearly "payable" does not mean the same as "paid". If the regulation had intended to mean "paid" it would have used that word or a similar expression cf. regulation 7(1)(d), relating to payments in lieu of notice etc, where the expression used is "receives a payment". Equally, a sum of compensation is not "payable" just because it is awarded by an industrial tribunal's decision. Regulation 7(1)(1) clearly makes a distinction between "payable" and "awarded". Indeed, an industrial tribunal has no power to enforce payment of its own awards - that can only be done by the County Court (see paragraph 12 below).

11. The word "payable" is not defined in the Social Security legislation. Counsel for the claimant, in a written submission to the local tribunal, contends;

"... the word payable [should be] construed as incorporating two elements (i) the existence of a legal liability to pay and (ii) the existence of a legal person with funds which can properly be put towards meeting the debt the problem then becomes one of evidence."

I do not accept as correct part (ii) of Counsel's submission. It would involve speculation in each case as to the financial means of an employer, a task which the social security adjudicating authorities are ill-equipped to carry out. Moreover, the results of such speculation would be uncertain and quixotic in their effect. The word

"payable" must be given a precise legal definition.

12. In my judgment, a sum is "payable" if its amount is ascertained and cannot be disputed and it is legally due, in the sense that court remedies for its recovery are immediately and unconditionally available, e.g. execution or judgment summons, whether or not those remedies can actually produce any money. Before the winding-up order in this case, the sum of £1,414.40 awarded to the claimant was thus "payable". The claimant had 'registered' the industrial tribunal's award in the relevant County Court under the provisions of the Employment Protection (Consolidation) Act 1978, Schedule 9, paragraph 7, with the result that effectively he could immediately enforce the award as if it were an order of the County Court, i.e. by execution or otherwise (1978 Act, Schedule 9, paragraph 7 and the County Court Rules 1936 (then in force), Order 25, rule 7A). It is legally irrelevant to the interpretation of the word "payable" that such procedures could not 'get blood out of a stone'.

13. However, when the winding-up order was made by the High Court on 20 October 1980, there became applicable section 231 of the Companies Act 1948, which provides, "231. When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose".

That meant that the claimant could no longer enforce the industrial tribunal's award in the County Court, without the leave of the High Court, which had made the winding-up order. Whether or not such leave would be given (which in fact seems unlikely), the award to the claimant of £1,414.40 became no longer "payable" in the sense that I have defined it in paragraph 12 above, because the claimant no longer had an immediate unconditional right to use County Court remedies to enforce the award. His ability to do so was now subject to the discretion of the High Court as to the grant of leave to proceed, under section 231 of the Companies Act 1948.

14. Support for this conclusion may be found in the decision of Pennycuik V C in Re Howell's Application [1972] Ch 509, which concerned arrears of rent that could no longer be recovered by court action (though in other respects they were still legally due) because they were time-barred under the Limitation Act 1939. It was held that the arrears were not "payable" within the meaning of section 27(5) of the Leasehold Reform Act 1967, which Act did not define "payable", nor use the word in any special context. The learned Vice-Chancellor said, (at p 511, G-H)

"It seems to me that upon the proper construction of that subsection the words 'payable by way of rent' mean arrears of rent which the tenant is compellable to pay, i.e. is under an enforceable obligation to pay, and do not include arrears which have become statute-barred. It would not, I think, be natural upon the ordinary use of language to describe a statute-barred debt as 'payable' without qualification".

In my judgment, the same principle applies to a debt no longer enforceable by action against a company in liquidation by Court order, except with the leave (which may well not be given) of that Court.

15. Consequently, when the matter came before the national insurance local tribunal on 10 October 1981, nearly a year after the winding-up order was made, the industrial tribunal's award was no longer "payable" to the claimant and the tribunal's decision to that effect was correct though for incorrect reasons (see above). The fact that when the local insurance officer gave his decision, on 19 December 1979 the award was "payable" (because the winding-up order had not then been made) is immaterial because the hearing of an appeal to a local tribunal constitutes a re-consideration of the facts and law as at the date of the hearing. The local tribunal could deal with the case on an up to date basis even though the matter could have been alternatively dealt with by an application by the claimant to the insurance officer, under section 104(1)(b) of the Social Security Act 1975, for a review of his decision on the ground of "relevant change of circumstances". (Commissioner's Decisions R(S) 20/51 and R(F) 1/72).

16. It should be emphasised that my decision relates only to a situation where the employer against whom an industrial tribunal's award has been given is a limited company in compulsory liquidation by order of the Court. Situations where the employer is a company but in voluntary liquidation or where the employer is unincorporated (e.g. an individual or a firm) but is insolvent, as for example, under the definition in section 127 of the Employment Protection (Consolidation) Act 1978, must await further decision, though, if there are other restrictions on court enforcement of industrial tribunal awards against insolvent employers, the same result as in my decision might thereby be produced.

(Signed) M J Goodman
Commissioner

Date: 15 April 1982

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