

copy

*Unsuccessful Dismissal Hearing - Unsuccessful
Appeal to the Commissioner Decision*



4/1/93

Commissioner's File: CU/011/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 26 November 1991 as that decision is erroneous in law and I set it aside. My decision, however, is the same as that of the tribunal namely that the claimant is not entitled to unemployment benefit from 15 January 1991 to 22 January 1991 inclusive because she was not available, and cannot be deemed to be available, to be employed on the days in that period: Social Security Administration Act 1992, section 23.

2. On my direction, this appeal by the claimant was the subject of an oral hearing before me. In fact there were two hearings because at the first hearing on 14 January 1993 the claimant was unable to attend owing to illness. She indicated that the hearing could proceed without her and I heard legal and factual submissions from Mr. R. Dowdall of the Central Adjudication Service. However at the conclusion of that hearing I gave a direction indicating that it was desirable for me to hear oral evidence from the claimant. A further hearing was therefore held on 6 May 1993 at which the claimant was present, addressed me, and gave evidence to me. The adjudication officer again was represented by Mr. R. Dowdall who reiterated his earlier submissions.

3. The claimant is a married woman. She appeals to the Commissioner from the unanimous decision of the social security appeal tribunal dated 26 November 1991, which dismissed the claimant's appeal from a decision of the local adjudication officer in the same terms as my decision in paragraph 1 above.

4. ~~The claimant had been dismissed from her employment as a Community Care Officer. She instituted proceedings in an Industrial Tribunal for unalleged unfair dismissal. In her~~

Application she stated that she was asking the Industrial Tribunal to make an order for reinstatement of her in her employment. Some 8 to 9 months after her dismissal the case came on for hearing. The notice of hearing had stated that the case was to be for one day only but it became apparent on the first day that the hearing would go on for longer than that. Indeed it went on for the days (apart from the week-end) from Tuesday 15 January 1991 to Tuesday 22 January 1991. It started at 10.00 on Tuesday 15 January and ended at 1.00 pm on Tuesday 22 January.

5. The Industrial Tribunal apparently made a finding of unfair dismissal but made neither an order for reinstatement nor an award of compensation to the claimant. The claimant has appealed to the Employment Appeal Tribunal against the Tribunal's decision. The claim for reinstatement was actively in consideration by the claimant throughout the whole of the hearing. Indeed it was the primary purpose of making the claim.

6. On Tuesday 22 January 1991 after the Tribunal hearing had finished, the claimant attended at the Unemployment Benefit Office to 'sign on'. She was signing on fortnightly on Tuesdays. She was asked whether she had been available for employment and she then told the office about her attendance at the Industrial Tribunal. She was asked to fill in Form UB674 headed "Going away from home" though this form was not entirely apposite. It is normally used for claimants who are going away on holiday. In any event the claimant was not going away from her home. She lived in suburban Kent and the Industrial Tribunal was in London, about $\frac{3}{4}$ of an hour from her home.

7. The claimant gave the following answers to questions on the form:

"Why are you going away from home?"

Attending industrial tribunal for 6 days.

Please give the address and telephone number where you can be contacted while you are away.

Home address and telephone (evenings) Tribunal is in Ebury Bridge Road, London SW1.

What arrangements have you made to be told about work opportunities while you are away?

Not applicable. Application is for reinstatement in former post.

If you are offered employment, will you return immediately to accept it?

No. Not able to because

hearing is
pre-set.

Will you actively look for
employment while you are away?

Yes, part of
the time.
Evenings."

As a result of those answers on Form UB674, the claimant was held to be disentitled for unemployment benefit for the whole week that she was at the Industrial Tribunal on the ground that she was not available for employment during that week.

8. The only reason I have set aside the social security appeal tribunal's decision of 26 November 1991 is because I cannot see that they investigated or took into account the circumstances of the Industrial Tribunal and the fact that Form UB674 was filled in, only after the claimant had attended the Industrial Tribunal. I have therefore set their decision aside as being erroneous in law, in that it is in a sense incomplete, though I should add the tribunal took considerable care with this case and have in fact completed their record of decision (on Form AT3) in commendable detail.

9. It follows however from my having set their decision aside that I can exercise my power to find facts and give my decision on them. Both the claimant and Mr. Dowdall indicated at the hearing before me that they would wish me to do this and not to remit the case for rehearing to another social security appeal tribunal.

10. The law on the matter is comparatively clear. Section 17(1) of the Social Security Act 1975 (now replaced in the same terms by section 57(1) of the Social Security (Contributions and Benefits Act 1992)) provided as follows:-

"Determination of days for which benefit is payable

70(1) For the purposes of any provisions of this Act relating to unemployment benefit ... -

(a) subject to the provisions of this Act, a day shall not be treated in relation to any person -

(i) as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, available to be employed in employed earner's employment and that day falls in a week in which he is, or is deemed in accordance with regulations to be, actively seeking such employment; or

(ii) [relates to days of incapacity for work - not relevant here],

('work', in this paragraph, meaning work which the person can reasonably be expected to do);"

11. There are a number of regulations deeming availability for work but none of them are directly in point here. They are regulations 9 - 12D inclusive of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983 No. 1598.

12. Regulation 12, headed "Availability of persons requiring 24 hours' notice of job opportunities" seems as if it might have some application. It reads,

"12(1) Where on any day a person is engaged, whether by contract or otherwise, in providing a service with or without remuneration and the circumstances are such that it would not be reasonable to require him, as a condition of qualifying for unemployment benefit, to make himself available at less than 24 hours' notice -

- (a) for employment in employed earner's employment;
- (b) for interview in connection with any such employment for which an opportunity arises; or
- (c) for interview by an officer of the Manpower Services Commission, the Department of Employment, a local education authority or the Department of Health and Social Security in connection with his availability for employment generally or in any particular case;

he shall be deemed on that day to be available for employment in employed earner's employment if ready on being given not less than 24 hours' notice to undertake suitable employment or attend for interview, as the case may require."

13. However that regulation would not apply here because the claimant by attending an Industrial Tribunal was not "providing a service with or without remuneration". Moreover it is not contended that during the time of that Tribunal she would be ready on 24 hours' notice to attend for interview or undertake suitable employment.

14. Regulation 12A headed, "Persons deemed available where a doubt has arisen about availability" again seems as if it might apply. It is in fact, however, excluded by the provision of regulation 12A(4)(b) that if a person has given notice of non-availability for employment to an Office of the Department there would be no deemed availability after the first day given in that notice. In the present case the claimant gave 15 January 1991 as the first day of non-availability on Form UB674 (see above) and this therefore excludes regulation 12A.

15. The result is that in dealing with this case one has to fall

back on the general expressions, "available to be employed" and "actively seeking such employment" in section 17(1) of the Social Security Act 1975 (now section 57(1) of the Social Security Contributions and Benefits Act 1992) The case law is well known and does not need reiteration here (see e.g. R(U) 5/80). The onus of showing availability is upon the claimant - R(U)44/53. In the present case the claimant with some force argues that by trying to get her old job back by reinstatement proceedings in the Industrial Tribunal she was doing her best to ensure that she was no longer unemployed and was indeed actively seeking employment in her old employment. However, section 17(1) of the 1975 Act (section 57(1) of the 1992 Act) requires a claimant to be "available to be employed in employed earner's employment". In the present case, the claimant was not available to be employed in employed earner's employment in the general sense but confined herself to trying to get her old job back. In R(U)23/52 an employee was awaiting the result of an internal appeal from his dismissal. It was held that while thus waiting, hoping to get his job back, he was not available for employment. My judgment is that in the present case, under the general law as to availability, the claimant has not demonstrated availability for "employed earner's employment", in the general sense.

16. I have already pointed out that there is no specific regulation deeming availability for unemployment benefit purposes. I note however that where a claim is made for Income Support there is a precise provision as to this matter in paragraph 17 of schedule 1 to the Income Support (General) Regulations 1987, S.I. 1987 No. 1967. Schedule 1 is headed "Persons not required to be available for employment". The inclusion of an item in this Schedule therefore is an indication presumably that the description in such an item is of a situation where there would not otherwise be availability for employment. Be that as it may, paragraph 17 of Schedule 1 provides that one of the categories of persons not required to be available for employment is as follows,

"17. A person who is required to attend court as a justice of the peace, a party to any proceedings, a witness or a juror."

17. The word "court" in that paragraph is not defined anywhere in the legislation. The word "court" is spelt with a small "c". I would suggest that it has a wide meaning in this context. An analogy is to be found in the definition of "court" in section 18(2) of the Civil Evidence Act 1968 which defines "court" as follows -

"18(2) In this Act -

'court' ... in relation to an arbitration or reference means the arbitrator or umpire and in relation to proceedings before a tribunal (not being one of the ordinary courts of law), means the tribunal;"

18. There is, however, no corresponding provision as to

unemployment benefit. On the general law of availability, for the reasons that I have given above, I am satisfied that the claimant is unable to show that, during the actual week that she was attending the Industrial Tribunal, she was available for employment. If this is thought to be an inequitable result (and I am told that members of the Department's policy branch were present at the first oral hearing) then in my judgment the matter must be dealt with by an amendment to the legislation.

(Signed) M.J. Goodman
Commissioner

(Date) 25 May 1993