

JNBP/LS

COMMISSIONER'S DECISION  
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Commissioner's File: CU/18/1985

C A O File: AO 3559/UB/84

Region: South Western

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal

Case N

1. My decision is that unemployment benefit is payable from 2 April 1984 to 6 April 1984 and 9 April 1984 to 10 April 1984 (all dates included). The forward disallowance imposed by the adjudication officer in respect of Mondays to Fridays falling in the period 11 April 1984 to 5 April 1985 (both dates inclusive) is discharged.
2. This is an appeal brought by the claimant with the leave of the chairman of the Torbay social security appeal tribunal ("the tribunal") against the decision of the tribunal dated 21 August 1984 which, varying the ground of the decision of the local adjudication officer issued on 11 April 1984, disallowed unemployment benefit for the period for which I have allowed it and imposed a forward disallowance.
3. The facts of the case are set out in the submission to the tribunal by the local adjudication officer and the submission (as amended) in the present appeal by the adjudication officer now concerned with the case and it is not necessary for me to set them out again here.
4. Section 14 of the Social Security Act 1975 provides for entitlement to unemployment benefit subject to the conditions specified (which do not fall to be considered in the present case) in respect of any day of unemployment which forms part of a period of interruption of employment.

Section 17(1)(a)(i) provides as follows:-

"(1) For the purposes of any provisions of this Act relating to unemployment benefit, sickness benefit or invalidity 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; or

(ii) as a day of incapacity for work.....  
....."

And section 17(2)(a) provides for the making of regulations making provision (subject to subsection (1) ) as to the days which are or are not to be treated for the purposes of unemployment benefit [and certain other purposes] as days of unemployment. The relevant regulation made under section 17(2)(a) is regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, which so far as relevant to the present case, provides as follows:-

"7. (1) For the purposes of unemployment, sickness and invalidity benefit -

(a).....  
.....

(g) Subject to regulations 9, 10, 11 and 12, a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless -

(i) the earnings derived from that employment, in respect of that day, do not exceed £2.00, or, where the earnings are earned in respect of a longer period than a day, the earnings do not in the daily average exceed that amount; and

(ii) he is available on that day to be employed full-time in some employed earner's employment; and

(iii) (not relevant in the present case). "

5. On 3 April 1984 the claimant declared that he had commenced work on 2 April 1984 assisting Mr K. Lightfoot (his step-father) with van deliveries of cooked meat and provisions and that he was receiving "No payment at moment". That statement was at first interpreted as meaning that he had received no payment because he had just started the job and had not yet received his first wage. The claim was consequently disallowed by the local adjudication officer on the ground that the claimant was engaged in employment, that he had failed to prove that his earnings therefrom did not exceed £2 a day and that he had therefore not brought himself within regulation 7(1)(g).

6. However, in his written submission to the tribunal the adjudication officer put forward different grounds for the disallowance of benefit although still relying on regulation 7(1)(g). He argued that the first question to be decided was whether the claimant should be regarded as engaged in employment. It is well settled that for the purposes of regulation 7(1)(g) a person is employed if he is gainfully occupied in an employment and that a person is gainfully occupied if he works in hope or expectation of remuneration or profit, even if that hope or expectation is not fulfilled. The adjudication officer submitted that the claimant was gainfully occupied because the work that he did for his step-father was done in the hope that the business would one day be profitable and that he would obtain remuneration from it. He then went on to submit that as the claimant was not actually receiving any remuneration, as had been revealed by further information, condition (i) of regulation 7(1)(g) was satisfied but that condition (ii) was not. Although the claimant had declared that he was available for work from 8.30 to 5.00, Monday to Friday, he submitted that a letter from the step-father indicated that the claimants' activities were essential for the continuation and building up of the business with a view to the permanent employment of the claimant in the business, rather than as merely something to occupy his time until he found another job. He observed that it seemed probable that if the claimant could see the prospect of secure employment with his step-father but knew that that would be possible only if he assisted for a time without pay, he might have been unwilling to put the long-term viability of the business in jeopardy by accepting other employment and that as it appeared that the step-father could not cope with the lifting and loading it seemed that if the claimant did not undertake that work either the business would have to cease or somebody other than the claimant would have to be engaged, presumably on a more regularised and paid basis, to do the work. For those reasons he submitted that the claimant had not proved that he was available for work and that regulation 7(1)(g) was not satisfied.

7. The tribunal's decision in effect accepted the written submission by the adjudication officer and decided the appeal against the claimant on the ground that he had not proved availability for work. The tribunal did not record any findings as regards availability under the head of findings of material facts but recorded their reasons for their decision as follows:

"The Tribunal were satisfied that at the time of the claim the claimant was engaged in gainful employment because, although he was not paid, he was provided with board and accommodation and had the desire, hope and intention of subsequently being remunerated for his efforts (Commissioner's decision CP7/49 considered).

The Tribunal decided that the earnings from the employment did not exceed £2 per day and that the employment was not the claimant's main occupation.

However, the Tribunal decided that the claimant was not available for full time employment because by not registering at the Job Centres, visiting the Unemployment Centre or making any active enquiries as to vacancies between February and April he had not shown his availability as prescribed by Commissioner's Decision R(U)5/80 para 14. He had not taken sufficient active steps."

Thus the tribunal's findings as regards availability were included in their reasons. The evidence on which the findings were based was recorded in the chairman's note of evidence as follows:-

"The claimant stated that today was his 18th birthday. He had been an apprentice body builder in Stoke-on-Trent. He had moved to Newton Abbot with his mother and step-father, Mr Lightfoot on 24.2.84. It was not practicable for him to remain at Stoke-on-Trent as he had nowhere to live there after his parents left. He went to Benefit office at Newton Abbot on 28.2.84. He told them he was unemployed and received benefit for 4 weeks. He was not told to register at the Job Centre. He visited the Job Centres at Newton Abbot and Torquay but found no suitable jobs available. He did not leave his name and address there or tell them how he could be contacted. He started work for Mr Lightfoot on 2.4.84. He received no pay but was told he would be paid later when work justified it. He was not promised any back pay. He was never told he would be turned out of home if he did not work for Mr Lightfoot or that he must be available to do his bidding at all times. He had never lived anywhere except at 130 Oakland Park Road since coming to Devon. He notified Benefit office on 3.4.84 that he was working for Mr Lightfoot without pay. He started being paid on 23.5.84 and he notified the Benefit office of this. He had not visited the Unemployment Centre at Newton Abbot and had not taken any other steps to find employment in his former occupation between February and April. He had recently failed his driving test. Mrs Lightfoot said her brother worked in the Finance Department of Reads of Torbay. He knew the situation and would have told the claimant if he had heard of any suitable vacancy. The claimant told the Benefit office on 3.4.84 that he was still available for work similar to his former work."

8. On the present appeal the adjudication officer now concerned with the case makes an open submission on the question whether the claimant was engaged in gainful employment. He observes that there is no indication that the claimant was or was likely to become a partner in his step-father's business or that he was to be paid a share of profits in the event that the business became profitable and that the evidence was that he was not paid for the work that he did during the period 2 April 1984 to 22 May 1984. I would add that the evidence was that he was not going to be paid later for the work he did during that period;

if he was paid later it was going to be for the work that he did later. In view of the foregoing I do not consider that the claimant was engaged in gainful employment during the period in issue. It follows that his case does not fall to be considered under regulation 7(1)(g).

9. However, as the adjudication officer now concerned points out, although the claimant does not have to prove that he was available for employment in order to meet the requirements of regulation 7(1)(g), he does have to prove availability in order to meet the requirement of section 17(1)(a)(i) of the Act (set out in paragraph 4 above). The meaning of availability for that purpose is the same as it is for regulation 7(1)(g) and the adjudication officer submits that the claimant has not proved that he was available. I have reached the conclusion that I must reject that submission. The claimant professed that he was available for work and declared that he was available from 8.30 to 5.00, Monday to Friday. In the circumstances I think that I must accept that he was available unless there is anything in what he has said or done that outweighs his profession of availability. I agree that he might have been unwilling to put the long-term viability of his step-father's business in jeopardy by accepting other employment and I would agree that his step-father might have at any rate hoped and possibly expected that he would continue to work for nothing until the business became profitable. However, drawing the inference that he would have refused an offer of other employment would amount to deciding that he never had any intention of accepting any offer that might be made while he was working for his step-father for nothing and I do not consider that such a conclusion would be justified. My decision is therefore that he was available for employment during the period in issue.

10. For the foregoing reasons the appeal is allowed and as there is no other bar to the payment of benefit my decision is as set forth in paragraph 1 above.

11. I think I should add that, although I can understand the claimant's annoyance at the fact that the ground on which his claim was opposed was twice changed, I am quite satisfied that there was no impropriety in the part of either of the adjudication officers concerned. It was the duty of each to apply the law as he considered it to be and the fact that I have taken a different view in no way reflects unfavourably on the integrity of either.

(Signed): J N B Penny  
Commissioner

Date: 6 December 1985