CU 36/1980

MJG/BR

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.U. 1/81

1. My decision is as follows:-

(a) The days 8, 9 and 11 September 1978 were the first three days of a period of interruption of employment and therefore the claimant is not entitled to unemployment benefit for those days. Social Security Act 1975, section 14(3).

(b) The decisions of the insurance officer awarding unemployment benefit to the claimant for the inclusive period from 12 September 1978 to 13 October 1978 were properly reviewed as they were given in ignorance of a material fact, namely that the claimant had received from his former employer a sum of £50 as a compromise of the claimant's industrial tribunal claim for alleged unfair dismissal: Social Security Act 1974 section 104.

(c) The said decisions should not have been revised because the said payment of £50 was not in lieu either of notice or of the remuneration the claimant would have received had his employment not been terminated. Consequently, the period from 30 September 1978 to 3 October 1978 did not constitute the first 3 days of a period of interruption of employment, the claimant was entitled to unemployment benefit for those days, and earnings-related supplement was therefore payable for the inclusive period from 4 October 1978 to 13 October 1978: Social Security Act 1975, section 14(3) and (7) and the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, regulation 7(1)(d):

(d) the claimant is disqualified for receiving unemployment benefit for the inclusive period from 25 October 1978 to 14 November 1978 because he voluntarily left his employment without just cause: Social Security Act 1975, section 20(1)(a).

The claimant's appeal against the decision of the local tribunal is therefore allowed in part.

2. The claimant was employed as an inspector by an engineering company from 12 August 1975 to Thursday 7 September 1978, on which day the claimant left his employment of his own accord. In written representations to the local tribunal and to the Commissioner, the claimant has set out in considerable detail the reasons why he left his employment, alleging that he was required by his employers to do inspection work that was not within the terms of his contract of employment.

3. The claimant did not attend the hearing of his appeal by the local tribunal and, although I directed an oral hearing in this case, I subsequently cancelled it because (among other reasons) it appeared to me from a letter dated 8 December 1980 to the Commissioners' office from the claimant that he did not wish to attend an oral hearing. The general manager of the employers did attend the hearing before the local tribunal and the Chairman's note of his evidence reads "Patrol and final inspectors are of equal status. I consider final inspector carries less responsibility". The local tribunal took into account that evidence and also the claimant's detailed written representations, setting out logically his contentions in relation to the case. The tribunal found that the claimant had voluntarily left his employment without just cause.

4. On a consideration of all the evidence, including the material that has been put in after the hearing before the local tribunal on 22 March 1979, I come to the conclusion that the tribunal's finding that the claimant voluntarily left his employment is correct. I do not consider that there is any evidence that the claimant was in effect compelled by his employer to leave his employment, so that he could say that he had not voluntarily left his employment. I appreciate that the claimant felt a very considerable sense of grievance and indeed anger about his transfer from one inspection function to another, but I do not consider that that made involuntary his leaving his employment.

5. For the same reason I also consider that the claimant's leaving his employment has not been proved by him to be with "just cause", the onus of proof under section 20 of the Social Security Act 1975 being upon him, when once it is decided that he has voluntarily left his employment. It is clear that the claimant is a sincere and honest person who is very concerned indeed about his transfer from patrol inspection to final inspection, the latter apparently having less responsibility.

6. Nevertheless, the claimant's contract of employment, a copy of which has been put in evidence before the Commissioner, gives the claimant's job title simply as "inspector". Whatever the ultimate rights and wrongs of his transfer from one type of inspection to another, I consider that, by 'walking out' on Thursday 7 September 1978, the claimant 'jumped the gun' and, therefore, in social security law, cannot show that he had "just cause" for so doing (Social Security Act 1975, section 20(1)(a)).

7. However, I also agree with the decision of the local tribunal that the evidence discloses what the local tribunal described as "mitigating circumstances", namely the claimant's considerable and genuine feeling of grievance (whatever the true rights and wrongs of the matter). He had been transferred from one type of employment to another in circumstances which, one can deduce from the evidence of the employer and the employee, were such as were likely to give rise to a sense of grievance (whether legally justified or not) by the employee. In those circumstances, I therefore concur with the local tribunal's decision to reduce the period of disqualification from the maximum of 6 weeks to a period of 3 weeks. I have framed my decision accordingly (see paragraph 1(d) above).

8. A further problem arises from the fact that, on or about 26 October 1978, the claimant received from his former employer the sum of £50 as a compromise of an industrial tribunal claim for unfair dismissal which the claimant had made against the employer and which was due for hearing before the industrial tribunal on 6 November 1978. No doubt the claim for alleged unfair dismissal was made by an allegation by the claimant that he had been constructively dismissed, under the terms of what is now section 55(2)(c) of the Employment Protection (Consolidation) Act 1978, which provides that there is a dismissal where "the employee terminates /the contract of employment/, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct". However, I consider that there was no constructive dismissal in this case and that the claimant left his employment voluntarily (see paragraph 4 above).

9. The industrial tribunal never adjudicated on the issue of alleged constructive dismissal because the hearing was postponed indefinitely as a result of the settlement reached by which the employer should pay £50 to the claimant. In the standard form used for recording a settlement by the Advisory, Conciliation and Arbitration Service (ACAS) the receipt of the £50 was described as being "in settlement of the /the claimant's/ claim before the Industrial Tribunal for Unfair Dismissal and all other claims (if any) which the Applicant may have arising out of his employment with the respondent and his dismissal therefrom".

10. The industrial tribunal did not adjudicate therefore on the question whether the claimant had proved constructive dismissal and I do not regard the payment of £50 by the employer to the claimant as in any way constituting an admission by the employer of constructive dismissal. I have already indicated in this context that I consider that, in the context of social security law, the claimant's leaving his employment was "voluntary". The result was that he was not entitled to any notice from his employer, or remuneration in lieu of notice.

11. When the insurance officer learnt of this payment of £50 to the claimant by his employer, that officer then referred to the local tribunal the question whether his decision should be reviewed and that body reviewed his decisions awarding unemployment benefit to the claimant for the inclusive period from 12 September 1978 to 13 October 1978. I consider that it was proper for them to do so as those

decisions were made in ignorance of a material fact (Social Security Act 1975, section 104(1)(a)), namely that the claimant had received a payment from his former employer which had some connection with the termination of the employment.

12. The local tribunal also revised the insurance officer's decisions, so as to make unemployment benefit not payable to the claimant for the period of entitlement to notice of termination of employment under the provisions of what used to be the Contracts of Employment Act 1972 but which are now embodied in section 49 of the Employment Protection (Consolidation) Act 1978. Those provisions would, in the case of an employee with 3 years' service, give the employee entitlement to a minimum of 3 weeks notice if he were dismissed by the employer (and did not leave voluntarily - as in this case). The local tribunal made consequent revisions to the insurance officer's decisions to give effect to the starting of the 3 "waiting days" at the end of the 3 weeks' notice period and also the start of the earnings-related supplement period. Because I have held that the insurance officer's decisions should not have been revised at all, there is no need to consider whether the exact dates of those revisions were correct or not.

13. I have decided that the insurance officer's decisions should not have been revised because I do not consider that the 3 weeks from 8 September 1978 to 28 September 1978 (i.e. the statutory notice period) comprised days "... in respect of which /the claimant/ receives a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration which he would have received for that day had his employment not been terminated ...". Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, regulation 7(1)(d), the regulation under which the local insurance officer's decisions were revised by the local tribunal.

14. In his submission to the local tribunal the local insurance officer cited in this context reported Commissioners' Decisions R(U) 5/74, concerning the effect of a payment received by way of a compromise of industrial tribunal proceedings, and R(U) 7/73 (a Tribunal decision) which in effect holds that, if a payment in lieu of notice is received from an employer, it does not matter whether that payment is more or less than the amount the wages would have been for the notice period, and there is no entitlement to unemployment benefit for the notice period. If those two decisions were applied in the present case it would have the effect that, although the claimant received only £50 from his employers, he would be required to repay a larger sum than that (in fact £77.76 and not £82.08 as originally calculated) as unemployment benefit he had received for the 3 week notice period. However, if in truth the £50 received from his employer were a payment within regulation 7(1)(d), the fact that it was less than unemployment benefit for 3 weeks would not alter the position, in view of the above-cited Decision in R(U) 7/73. However, I have come to the conclusion that the £50 payment did not contain any element of payment in lieu of notice etc. at all.

15. My reason for so deciding is that in this case the claimant left his employment voluntarily (as I have found) with the result that he had no entitlement to notice from his employer, or to remuneration in lieu. It is, moreover, well known that a sum in the neighbourhood of £50, paid by an employer to an employee in compromise of industrial tribunal proceedings for alleged unfair dismissal, may be regarded by the parties to the agreement as a token payment to 'buy off' the 'nuisance value' of the claim and does not constitute in any real sense compensation for loss of employment, any more than nominal damages for breach of contract constitute damages assessed on any compensatory principle. The fact that the ACAS form stated that the claimant and his employer had agreed that the sum of £50 was received "in settlement of his claim .... for unfair dismissal and all other claims (if any) which the applicant may have arising out of his employment with the respondent and his dismissal therefrom" does not alter this fact. That is standard phraseology used in settlements approved by ACAS and is inserted out of caution to prevent an employee who has received such a payment attempting to renew his claim before the industrial tribunal or make a claim in Court for damages for breach of the employment contract. The fact that in the present case there was no statement that the employer made the payment "ex gratia" and did not make any admissions as to liability (phraseology commonly used) does not in my view alter the position. That is because such a £50 payment was in truth on the facts of this case a payment by the employer of a token sum without any admission as to liability, since the truth of the matter was (as I have found) that the claimant left his employment voluntarily and was not entitled to notice.

16. The facts of the present case, as I have analysed them above, cause this appeal in my view to be distinguishable from reported Decision R(U) 5/74 where the learned Commissioner was concerned with a payment by an employer to an employee (alleging unfair dismissal) of the substantial sum of £2,250, in consideration of which the claimant in that case had undertaken "to relinquish such claims as he may have at common law or otherwise against the /employer/ for wrongful dismissal". In R(U) 5/74, the claimant had undoubtedly been dismissed by his employer.

17. The learned Commissioner in R(U) 5/74 stated (in paragraph 14 of his decision) "In this case, therefore, if the claimant had been awarded compensation for unfair dismissal he would have received a payment including an element representing a payment in lieu of remuneration. He did not in fact obtain such an award because the proceedings were not conducted to their conclusion and the industrial tribunal never reached competence to make a finding whether or not the claimant had been unfairly dismissed. The proceedings were compromised but, in my view, the payments received by the claimant by virtue of the compromise must be regarded as containing the same ingredients as an award, although of course not necessarily of the same amount. In this respect the position is, in my view, similar to a compromise of proceedings for wrongful dismissal: see decision R(U) 3/68 paragraph 6".

18. I entirely concur with that statement of the law but it must, in my view, be read in the context of circumstances where what has been paid by the employer to the employee in compromise of an industrial tribunal claim for unfair dismissal is clearly intended to be a compensatory payment, whatever its amount. If what is paid is merely a token payment, in the present appeal, to 'buy off' the "nuisance value" of a claim then there is no compensatory element in the payment. I should hasten to add that each case must be determined on its own facts and it is perfectly conceivable that a small payment of e.g. £50 could, in a case with different facts, be demonstrated to contain an element intended to compensate for wages in lieu of notice. But this was not, in my view, such a case, in view of the fact that the claimant left his employment voluntarily, thereby forfeiting any right to notice from his employer (see paragraph 8 of the submission of the insurance officer now concerned).

19. In a case where the employee/claimant does not leave voluntarily and there is an actual or a constructive dismissal by the employer of the employee/claimant, a payment of a small-ish sum e.g. £50 to the employee by the employer might well contain an element of remuneration in lieu of notice or it might be a token sum to buy off the nuisance value of the industrial tribunal claim. Which it was would depend on evidence as to the intentions of the parties and as to any extrinsic facts which cast light on the true nature of the payment.

20. Although it is not directly in issue in this appeal, it perhaps ought to be noted for the sake of completeness that if an industrial tribunal makes an award of compensation for unfair dismissal (which it might do at the conclusion of proceedings but customarily does not do (not even by consent order) in cases of settlement of such claims) then the effect of such an award on entitlement to unemployment benefit is now specifically covered by regulation 7(1)(l)(iii), inserted into the 1975 Unemployment, Sickness and Invalidity Benefit Regulations, by S.I's 1976 No 328 and 1976 No 677. That regulation provides that -

> "7(1)(l) 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 ... (iii) an amount specified by an industrial tribunal ..... as payable ..... as compensation for unfair dismissal ..... where /that amount/ includes a sum representing remuneration which the industrial tribunal considers /the claimant/ 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".

21. In accordance with the principles as to assessment by industrial tribunals of awards of compensation for unfair dismissal (which principles are reviewed in reported decision R(U) 5/74 and which are in this respect unchanged despite legislative changes), compensation for unfair dismissal would normally include a sum representing wages for the period of notice to which the claimant was entitled under his

contract of employment and could include compensation for additional losses of earnings, both before and after the date of the industrial tribunal's award. Indeed such sums would normally be specified as such as separate items in the industrial tribunal's award. That part of the industrial tribunal's award which comprised loss of earnings up to the date of the industrial tribunal's decision would be subject to the Employment Protection (Recoupment of Unemployment and Supplementary Benefit) Regulations 1977, S.I. 1977 No 674, so that the Department could recover from the employer the amount of unemployment and supplementary benefit paid to the employee and only the net loss of earnings, i.e. after deduction of the amount of benefit would be payable by the employer to the employee. Thus, the practical importance of regulation 7(1)(1) of the 1975 regulations is confined to industrial tribunal awards for losses of future earnings.

22. It should be added that regulation 7(1)(1) does envisage that an industrial tribunal award may not include a sum representing loss of wages. An award might indeed constitute a token sum where the industrial tribunal concluded, as it can, that it was not "just and equitable" to award any more (see now Employment Protection (Consolidation) Act 1978, section 74(1)). The award of a "basic award" under sections 72 and 73 of the 1978 Act would not of itself bring regulation 7(1)(1) into operation, as it does not contain any element of wages in lieu of notice etc - per Templeman L J in R v National Insurance Commissioner, Ex p. Stratton [1979] 2 W.L.R. 389 at 401. In such a case therefore there would be no disentitlement to unemployment benefit. But care should be taken before concluding that an industrial tribunal award is a token award, bearing in mind that it is possible for an award of a compensatory nature to be substantially reduced for the employee's contribution to his own dismissal (see section 74(6) of the Employment Protection (Consolidation) Act 1978).

(Signed) M J Goodman
Commissioner

Date: 31 March 1981

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Region: Midlands