

Police Officer Van. Leavine - SSAT must
San Lucas Discretion Re: Pen.

MR/SH/1

Commissioner's File: CU/170/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED]

Appeal Tribunal: [REDACTED]

Case No: [REDACTED]

1. This appeal is allowed. The decision of the Manchester social security appeal tribunal dated 29 July 1992 is erroneous in point of law. I set the decision aside and refer the case for determination by a differently constituted tribunal.

2. The claimant was an inspector in the Greater Manchester Police Force. He joined the police on 1 September 1959 and resigned with effect from 1 September 1991, having completed 30 years pensionable service, by giving notice in writing a month earlier. Almost immediately after his resignation took effect, he became quite seriously ill, requiring admission to hospital, and he claimed and was paid sickness benefit. He then claimed unemployment benefit from 16 December 1991. Benefit was paid at first but was subsequently suspended from 24 January 1992 while the question of the circumstances in which he had left his employment was investigated. When the investigation was complete, the adjudication officer disqualified the claimant for receiving unemployment benefit from 24 January 1992 to 23 July 1992 on the ground that he had voluntarily left his employment without just cause (section 20(1)(a) of the Social Security Act 1975 - see now section 28(1)(a) of the Social Security Contributions and Benefits Act 1992).

3. The claimant appealed, arguing firstly that he did not leave voluntarily at all because his employment could not have continued under the same terms and secondly that, in any event, he had just cause for leaving because his resignation was in the interests of both the general community and the police service. He also referred to the attempts he had made to obtain alternative employment and to the fact that other police officers who had retired with 30 years completed service had not been disqualified from unemployment benefit. By a majority (the

chairman dissenting) the tribunal dismissed the appeal. The claimant now appeals against that decision with the leave of the chairman of the tribunal.

4. The claimant's first ground of appeal is that the tribunal considered certain written evidence which was disputed without requiring oral evidence to support it. That evidence was a letter from a Chief Superintendent in which she said:

"[The claimant] chose to resign voluntarily from the Police Service. He was not employed under a contract of employment, he was merely subject to the conditions of the Police Regulations which allow for an officer of inspector rank to serve until he/she reaches 60 years of age. The number of years service completed is irrelevant.

[The claimant] chose to retire upon reaching 30 years service. He was 49 years of age and could have served for a further 11 years.

Notwithstanding those personal reasons given by [the claimant] as to the reason he left the service the fact remains ~~he~~ voluntarily chose to resign. He would have remained employed under the same conditions of service and would not have been disadvantaged in any way. Provided he remained in good health, which he was at that time, he could have remained within the service.

Police officers are not subject to any formal contract of employment other than under those conditions of service, outlined within the Police Regulations and Police Pension Regulations.

To reiterate [the claimant] was eligible to be retained in service under those same conditions."

That letter had been written in response to questions on a form UB95B/2 seeking a response to the claimant's assertion that he resigned on completion of a 30 year contract and that he would have been working under different terms had he remained. The claimant says that he expected that the Chief Superintendent would be called to give evidence to the tribunal because she had been asked on form UB95B/2 whether she would be willing to attend a hearing and she had not said "no". It is suggested that the tribunal should have adjourned the hearing and demanded her presence on the next occasion.

5. I reject that ground of appeal. A tribunal is entitled to rely on disputed written evidence, not being bound by the strict rules of evidence applicable in courts, provided that they consider all the other evidence in the case. A tribunal have no power to order a witness to attend a hearing (although they could in theory obtain a subpoena from the Crown Office - see Rules of the Supreme Court, Order 38, rule 19). It was open to the tribunal to adjourn the case in order to obtain copies of the relevant Regulations governing the claimant's service and pension

arrangements but no request for an adjournment was made and it is perhaps surprising that neither the claimant nor his representative from the National Association of Retired Police Officers produced them in view of the arguments they were advancing. However, had they been produced, the majority of the tribunal could only have been confirmed in their view. The terms of a police officer's service were considered in great depth by a Commissioner in R(U) 4/70. The legislation has been updated (see now the Police Regulations 1987 (S.I. 1987 No. 851) made under the Police Act 1964 and the Police Pensions Regulations 1987 (S.I. 1987 No. 257) made under the Police Pensions Act 1976) but the general effect is the same. At paragraph 12 in R(U) 4/70, the Commissioner said:

"In my view there is no doubt that there is throughout a police officer's service only one contract (or quasi-contract), although the terms of that contract which deal with his service after 30 years are less favourable to him than those dealing with his previous service. Were the position otherwise, there would be no need for him to give notice of retirement; his service would simply end unless he gives notice of his intention to continue it."

Accordingly, the tribunal in this case were right to find that the claimant had left his employment voluntarily and the presence of the Chief Superintendent or the production of the Regulations could not have assisted the claimant on that issue.

6. I think the claimant also wished to have the Chief Superintendent present to deal with his argument that it was in the interest of the Police Service and of the general public for him to leave his employment. His argument was that he had not received any proper training for 10 years and therefore was not as capable of doing his job as younger officers. It is difficult to see how the presence of the Chief Superintendent could have assisted the claimant with what was an almost hopeless argument on the facts of this case. It will be rare for a claimant to be able to show that it was in his employer's interests for him to leave the employment when the employer does not agree and, in R(U) 4/87, a Commissioner held that the fact that voluntarily leaving of employment was in the public interest was irrelevant to the question of just cause though not necessarily to the period of disqualification. In R(U) 4/70, at paragraph 15(c), the Commissioner said:

"I accept that the terms I have outlined above, including those of the pension scheme, reflect a deliberate policy to encourage the early retirement of police officers, but that does not mean that for the purposes of the unemployment insurance scheme all officers have "just cause" for retiring the moment they have completed 30 years of service. For those purposes, what matters is the timing of a police officer's retirement viewed in relation to his prospects of employment after retirement."

The dissenting chairman in the present case relied on CU/95/1989 which was a case to which the claimant had referred. However, as the adjudication officer robustly pointed out to the tribunal in the written submission, "the Commissioner did not seek to distinguish [that] case from well established case law, in particular R(U) 23/59, R(U) 20/64(T) and R(U) 4/70". All those cases concerned police officers retiring after 25 or 30 years service and in two of them the interests of the police force were at least among the reasons put forward by the claimant to justify his leaving. In all those cases, the Commissioners held the claimants not to have had just cause for leaving their employment. Either there was something exceptional about the circumstances considered by the Commissioner in CU/95/1989 (the facts are not set out within his decision) or else he decided that case against the weight of authority. In my view, the reported decisions should be followed. The evidence before the tribunal in the present case did not suggest any exceptional circumstances justifying a different conclusion.

7. The claimant's second ground of appeal is that the majority of the tribunal recorded in their reasons for decision that they "did not accept that [he] had genuine concern for the Police Service". He points out that his certificate of service stated that "his conduct was exemplary". However, an appeal lies to a Commissioner only on a point of law. It was for the tribunal to decide questions of fact. The reasoning of the majority might perhaps have been better expressed but, in its context, it is quite clear to me that they were not suggesting that the claimant did not care about the police force at all but were saying that that was not the reason why he left. I take the view that they were entitled to reach that conclusion.

8. However, the adjudication officer now concerned with the case supports the claimant's appeal on a different ground. Under section 20(1) of the 1975 Act (now section 28(1) of the 1992 Act), the tribunal had a discretion as to the period of any disqualification. The adjudication officer submits that it is unclear from the tribunal's reasons whether they exercised that discretion and he refers to R(U) 4/87 in which the Commissioner said:

"It is likely that tribunals will be held to have erred in law if they do not indicate in their decisions (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."

In the present case, it is fairly clear that the tribunal did not exercise a discretion because they said simply:

"For these reasons, the tribunal came to the conclusion that [the claimant] did not have just cause for losing his employment. His appeal therefore failed."

In any event, if they did exercise their discretion, they failed to record reasons for imposing a disqualification for the maximum

period of 26 weeks, so that whether or not they actually exercised their discretion they erred in law.

9. There is another point about the period of disqualification which was raised by the adjudication officer in the written submission to the tribunal but on which neither the tribunal nor the adjudication officer now concerned with the case have expressed a view. In the submission to the tribunal, the adjudication officer said:

"Although the period of disqualification given ends on 23.7.92, I submit that the period of 26 weeks should have been reduced by 90 days to take account of the 90 days for which [the claimant] failed to claim unemployment benefit (Commissioner's Decision CU 19/48)."

The starting date for a period of disqualification is usually the day after the day of discharge (R(U) 11/59), or, if there is a payment caught by regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, one day after the end of the "ineligible period" (R(U) 35/53). Even if a person is sick or obtains other employment for a short period before the date of the adjudication officer's decision imposing the disqualification, the period of disqualification still begins on the day after the day of discharge or the end of the "ineligible period", despite the fact that it therefore bites only for those parts of the period before and after the period of sickness or employment (R(U) 11/59 and R(U) 13/64). Sometimes, as in this case, unemployment benefit is paid for a short period before being suspended. In such a case, the disqualification is imposed from the day after the last day in respect of which unemployment benefit was paid (R(U) 24/56). However, so that the fortuitous circumstance of benefit having been paid does not affect the length of the period for which disqualification is actually effective, it seems to me that it is necessary to reduce the period of disqualification by the number of days for which unemployment benefit would not have been payable during what would have been the period of disqualification had some benefit not already been paid. (For the same reason, sickness or employment after the payment of some benefit may occasionally suggest an increase in the period of disqualification that would otherwise be imposed, subject to the statutory maximum.) I therefore agree with the adjudication officer who wrote the submission to the tribunal that the period of disqualification should in this case have been reduced by 90 days whether or not the tribunal thought that, in the exercise of their discretion, there should be any further reduction.

10. I have not received submissions from the parties as to the appropriate period of disqualification to be imposed in this case and I do not feel that I can properly give the decision the tribunal should have given. I therefore refer the case for determination by a differently constituted tribunal. That tribunal must first consider again the question whether the claimant voluntarily left his employment without just cause, but should pay close attention to what was said in R(U) 4/70. If the

tribunal is satisfied that the claimant did leave his employment voluntarily without just cause, they must consider the period of disqualification which should start on 24 January 1992 and end no later than 9 April 1992 for the reasons I have given in paragraph 9 above. The tribunal should consider whether the period should end on an earlier date. Consideration of R(U) 20/64, R(U) 4/70 and R(U) 4/87 may be of assistance. In each of those cases, a period of disqualification rather less than the maximum (then six weeks) was imposed. Even if the tribunal agrees with the majority of the tribunal whose decision I have set aside and considers that the claimant's real reason for leaving his employment was not concern about the interests of the Police Service, the tribunal may wish to give consideration to the claimant's ill-health which the majority of that tribunal did think was a reason for his leaving the employment.

(Signed) M. Rowland
Commissioner

(Date) 9 November 1993