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Region: London North

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Ann Elizabeth Middleburgh (Mrs)

Appeal Tribunal: Luton

Case No: 99/3

[ORAL HEARING]

1. My decision is that the claimant is not entitled to unemployment benefit.
2. This is an appeal by the claimant, brought with my leave, against the decision of the social security appeal tribunal given on 12 June 1986. The claimant asked for an oral hearing, a request to which I acceded. At that hearing she was represented by her husband, whilst the adjudication officer appeared by Miss K Lee of the Solicitor's Office of the Department of Health and Social Security.
3. The facts of this case are not in dispute. On 26 August 1985 the claimant, who had been born in the Republic of Ireland and had lived there all her life, came to join her husband in the United Kingdom. Prior to her arrival she had been working for some eight to nine years as a computer operator for International Chemical Co. (Wyeth Laboratories) Ltd in Dublin. After effecting certain domestic arrangements she made herself available for employment on 2 September 1985, and on that day claimed British unemployment benefit.
4. Notwithstanding the size of the file, the parties are now agreed on almost all of the issues that have been ventilated. The adjudication officer's written submissions to the tribunal are, I understand, no longer challenged by the claimant. At paragraph 19 there is a convenient summary, which I set out below:-
 - "(a) the claimant is a person to whom the EEC Regulations apply;
 - (b) the claimant does not satisfy the contribution conditions for British unemployment benefit;
 - (c) the basic question at issue is whether her Irish contributions can be used to enable her to satisfy the British contribution conditions;
 - (d) the Irish contributions can be aggregated if Article 67 of Regulation (EEC) No. 1408/71 is satisfied;
 - (e) aggregation depends initially on the claimant having been insured under British legislation immediately before becoming unemployed and she fails to meet this

requirement;

(f) ..."

5. The claimant's complaint, as I understand it from the submissions of her husband, is that as an immigrant worker she ought to be able to retain her rights to her Irish benefits under Article 69 of Regulation (EEC) No. 1408/71. That Article starts from the standpoint that a migrant worker will be entitled to the benefits of the Member State which he or she has left. For it reads:-

"1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits"

However, unfortunately for the claimant, it goes on to impose conditions. For it reads:-

"under the following conditions and within the following limits:-

- (a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks before becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;
- (b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organized therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;
- (c) entitlement to benefit shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged."

Apparently, before the claimant's departure to this country she gave up her employment whilst she made preparations to leave. During this period she was not registered as a person seeking work - it would have been a fraud on her part to have allowed herself to be so registered - and as a result she is unable to satisfy paragraph (a). It follows that she cannot comply with Article 69.

6. The claimant contends that Article 69(1) operates unfairly and is in breach of the provisions of the Treaty of Rome on freedom of movement for workers and, in particular of Article 51 which obliges the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. Her representative invited me most strenuously to refer the matter to the European Court in the hope that the Court would declare Article 69(1)(a) void and might construe the remaining Articles in such a way as to ensure that the claimant was not prejudiced by her removal from the Republic of Ireland to Great Britain.

7. Miss Lee, in vigorously opposing the suggestion, drew to my attention three cases,

namely 41, 121 and 796/79, Vittorio Testa, Salvino Maggio and Carmine Vitale v. Bundesanstalt für Arbeit [1980] ECR 1979. These three cases involved the construction of Article 69(1)(c) and the corollary thereto contained in Article 69(2). The latter provision reads as follows:-

"2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under the provisions of paragraph 1(c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. - In exceptional cases, this time-limit may be extended by the competent services or institutions."

The European Court accepted the validity of Article 69(1)(c) and Article 69(2) ruling that:-

"A worker who returns to the competent State after the three month period referred to in Article 69(1)(c) of Regulation No. 1408/71 has expired may no longer claim entitlement, by virtue of the first sentence of Article 69(2), to benefits as against the competent State unless the said period is extended pursuant to the second sentence of Article 69(2)."

The Court considered the compatibility of Article 69(2) with Articles 48 to 51 of the Treaty and also with the basic rights guaranteed under Community law. It concluded that "Article 69(2) of Regulation No. 1408/71 is not incompatible with the rules on freedom of movement for workers in the Community" and that "the penalty laid down by Article 69(2) in the event of late return must likewise be judged in the light of the advantage granted to a worker by Article 69(1), which has no equivalent in national law". In other words the Court looked upon Article 69(1) as concessionary and there was no conflict with the provisions of the Treaty of Rome.

8. Though, of course, the Court did not specifically refer to Article 69(1)(a) - it was wholly irrelevant - the mere fact that it accepted the validity of Article 69(2) and Article 69(1)(c) carries with it the necessary implication that it also regarded Article 69(1)(a) as valid. After all, it treated the whole of Article 69(1) as concessionary.

9. It follows from this that the chances of the European Court, in the face of their earlier decisions, taking the view contended for by the claimant's representative are remote to the extreme, and if I were to refer the matter to the European Court, I would be involving the Department in unnecessary expense, and perhaps encouraging the claimant herself or her husband to incur considerable costs - and, in my judgment, all to no avail.

10. In my view, the law is perfectly clear, and I see no difficulty in construing the relevant Articles of Regulation No. 1408/71. The position is accurately set out in the submissions of the adjudication officer to the tribunal, and the claimant simply cannot take advantage of any escape route from disentitlement under the Articles of Regulation No. 1408/71 or qualify for benefit within the provisions of the British legislation. It follows from this that she is not entitled to unemployment benefit, and this appeal must necessarily fail.

(Signed) D.G. Rice
Commissioner

Date: 5 October 1987