

## NATIONAL INSURANCE ACTS, 1946 TO 1964

## CLAIM FOR UNEMPLOYMENT BENEFIT

## DECISION OF THE COMMISSIONER

CS(4)

14/64.

1. My decision is that the decision of the local tribunal dated the 6th April 1964 is set aside.
2. This curious appeal by the claimant's association is of importance only for the procedural questions which it raises.
3. The claimant (A.B.) a coal miner (brusher), and another face worker (G.M.) were both dismissed from their employment on the 12th February 1964, on allegations of failure of duty in relation to the safety of the pit amounting to breach of the Coal Mines Act. When the claimants came to claim unemployment benefit and these allegations were put to them, they denied that they had been guilty of any default. The local insurance officer accordingly referred to the local tribunal for their decision whether (in terms of section 13(2)(a) of the National Insurance Act, 1946) the claimants were disqualified for receiving unemployment benefit, and if so for how long, because they had lost their employment through their misconduct.
4. The two cases came before the local tribunal on the 6th April 1964, the case of the claimant G.M. being number 5 on the list, and that of the claimant A.B. number 6. Both claimants attended, along with their representative, an official of their trade union. The insurance officer was in attendance. Also in attendance were two officials of the colliery, presumably to be called as witnesses.
5. What happened next is described by the clerk to the tribunal as follows - "I was Clerk to the Tribunal on Monday, 6th April 1964 when the above cases were heard. Before the interested parties, i.e. both appellants, N.U.M. Representative, two employers' representatives and Group Insurance Officer were asked to proceed to the Tribunal Room Mr W., Group Insurance Officer requested me to bring to the notice of the Tribunal the fact that court cases were pending in respect of both appellants and that the relevant papers were in the hands of the Procurator Fiscal. I told the Chairman. When all parties were assembled the Chairman informed them that the Tribunal had decided to adjourn both cases. He gave the appellants' agent an opportunity to make representations but these were not discussed by the Tribunal before a final ruling was given." The procurator fiscal, in Scotland, is the official charged with the duty of investigating crimes in his district, and of conducting prosecutions (in the Sheriff Court) in the public interest.
6. The Report of Proceedings of Local Tribunal (Form L.T.3) completed by the chairman, records that representations were made by the claimant's representative to the following effect - "The Procurator Fiscal was investigating the matter at issue, but the Tribunal should nevertheless inquire into the matter. The regulations did not require adjournment in the circumstances, and it was doubtful whether there was a precedent. If the matter went to trial the Tribunal would no doubt follow the criminal court's verdict one way or the other and it would be depriving the Tribunal of its power to adjourn for this purpose."
7. Under the heading "Full text of unanimous decision" is entered - "Case adjourned".

Under "Grounds of decision" the following is recorded: "Since the alleged industrial misconduct was so serious as to amount to a criminal offence, and since the Procurator Fiscal was indeed investigating the matter, the Tribunal felt that it would be fairer to the claimant and more proper in the interests of reaching a right decision if the case were adjourned until either the Fiscal had concluded his investigations and decided not to proceed with a charge or, if a charge were brought, until the criminal trial had been concluded. Assuming the case went to trial, it was felt that with such serious matters at stake the relative informality of the Tribunal procedure might not be so conducive to justice being done as an investigation of the facts in a criminal court according to the normal rules of evidence: and although the court's verdict, one way or the other, would not necessarily be conclusive it would no doubt be highly persuasive. Assuming on the other hand that after investigating the matter the Procurator Fiscal decided not to proceed, this too, although not necessarily conclusive, would be persuasive. In these circumstances the Tribunal felt that it was to all parties interests that the case should be adjourned."

9. On the 8th April 1964 the assistant compensation officer of the National Union of Mineworkers (Scottish Area) wrote to the clerk to the tribunal, protesting against "the action of the Chairman", and asking for a new date of hearing as early as possible "on the evidence available" - that is to say, without waiting for the outcome of the procurator fiscal's investigations. On the 29th April 1964 the clerk replied, refusing the request, and pointing out (among other things) that what the association had described as the decision and action of the chairman was in fact the unanimous decision of the tribunal.

10. On the 30th April 1964 the association wrote - "... In view of the fact that a unanimous decision of a Tribunal was arrived at in the presence of the claimants and the Trade Union Representative, I contend that the decision arrived at is null and void. According to Regulations 26(2) Determination of Claims and Questions. A Tribunal coming to a decision can only do so in the presence of the Tribunal members." The association requested the issue of a form on which to appeal to the Commissioner, and this having been sent, the association on the 14th May 1964 appealed to the Commissioner against the decision of the local tribunal dated the 6th April 1964. Grounds of Appeal were stated as follows - "I contend that the decision of the Local Appeal Tribunal was null and void, (hold on 6.4.64) due to the fact that their decision was arrived at in the presence of the claimant and Trade Union Representative. None of the persons concerned in the case were asked to leave the room. I refer to the decision of the Commissioner (Commissioners Decision No. C.S.I. 37/50), dated 24.4.50."

11. Charges under the Coal Mines Act were in due course brought against both claimants: the trial was held in the Sheriff Court on the 29th June 1964: a verdict of not proven was returned. A verdict of not proven is, of course, a verdict of acquittal.

12. Since the manifest object of the association was to obtain a decision on the claim for unemployment benefit before the verdict of the court in the criminal proceedings was known, it is difficult to see what good purpose can now be served by their pursuing the appeal. But since no application has been made to withdraw the appeal, it is my duty to deal with it, and incidentally to express an opinion on certain not-altogether-easy questions which have arisen on it.

13. In the first place, is the decision in question truly a decision of the local tribunal, or is it a decision of the chairman? It is necessary to decide this; because (prima facie at least) the right of appeal to the Commissioner lies from decisions of the local tribunal, and not from those which are in the exclusive discretion of the Chairman: compare Decision R(I)44/59 - a case under the Industrial Injuries Acts - in which it was held that there was no right of appeal to the Commissioner from a chairman's

refusal to...  
for the chairman alone and not for the...

14. Certain rules of procedure at local tribunal hearings are laid down in regulations 12, 13 and 14 of the National Insurance (Determination of Claims and Questions) Regulations, 1948 [S.I. 1948 No. 1144] as amended: but obviously this is not an exhaustive Code. Power to adjourn is not expressly provided, but must, in my opinion, be implied. And as matter of law the power to adjourn falls to be exercised by the tribunal, rather than by the chairman. Regulation 12(2) provides for the specific case of a claimant failing to appear, and provides that the tribunal may proceed to determine the case notwithstanding the claimant's absence, "or may give such directions with a view to the determination of the case as they may think proper". Plainly, in appropriate circumstances, such directions might include an adjournment; and in terms of the regulation, the adjournment would be at the direction of the tribunal. Reference to adjournment has been made in a number of Commissioner's decisions; and so far as I can discover this has always been referred to as an adjournment by the tribunal - see, for example, Decision R(S) 13/52, at paragraph 3(b). In the present case, the decision to adjourn bears to have been a decision of the tribunal, and I have no doubt that it was so.

15. The decision in question, being a decision of the tribunal, was in my judgment open to appeal to the Commissioner. I do not wish to offer any encouragement to the bringing of appeals on minor points of procedure: and in the ordinary case I should regard a decision to adjourn as a minor point of procedure. A decision to adjourn is, in any event, pre-eminently a matter within the discretion of the tribunal; and only rarely could such a decision be successfully challenged on appeal. There may, however, be instances where the adoption of a particular procedure may amount to a possible denial of justice. Even a decision to adjourn, if it were an unconscionably long time, or sine die, or if it were for an improper reason, might amount to a denial of justice. I hold that the decision in question here is appealable to the Commissioner.

16. The ground upon which the decision is challenged is that it was "arrived at in the presence of the claimant and Trade Union Representative. None of the persons concerned in the case were asked to leave the room." This is an objection of the most technical character. I can understand a claimant being aggrieved if his opponent is allowed to be present at the deliberations of the tribunal while he himself is excluded. I do not understand why he should complain that he himself is allowed to be present. But no doubt a claimant is entitled to object if the procedure of a tribunal is - even technically - in breach of the express provisions of the relevant regulations.

17. Regulation 13(5) of the Regulations above cited provides as follows. "For the purpose of arriving at their decision, or discussing any question of procedure, a local tribunal shall, notwithstanding anything in this regulation, order all persons not being members of the tribunal, other than the person acting as clerk to the tribunal, to withdraw from the sitting of the tribunal." There can be a failure to order a person to withdraw only if that person was already present. According to the account given by the clerk (see paragraph 5 above) the parties were not present when the decision was being deliberated: they were brought in and then informed of the decision. There was therefore no breach of regulation 13(5).

18. If the account given by the clerk is correct - and it obtains support from the letter of the association dated the 8th April 1964, in which it is said "I understand from our representative that the Chairman decided, before hearing evidence, to adjourn the hearing ..... " - the procedure adopted is indeed open to criticism on the ground that the decision was, apparently, arrived at without giving the claimant or his representative an opportunity to be heard on the matter. It does appear that, after the chairman had

announced the decision, the association representative made representations, but that was too late; and indeed, if these representations were to be properly considered, with a view to possible alteration of the decision already announced, it would have been necessary under regulation 13(5) to send the parties out while the decision was being reconsidered. In these circumstances I am driven to the conclusion that the tribunal came to a decision as to the disposal of the case without having given the claimant or his representative a fair opportunity to be heard. It may be that the procedure in fact caused no injustice: but justice must be seen to be done. I do not think justice was seen to be done on this occasion. Further; although the decision given was a decision on procedure and not on the merits of the case, I think it was a decision of some importance, and that the procedural objection to it cannot be ignored as too trifling for consideration.

19. As a result of their appeal, the association have obtained a statement of my opinion that the decision of the tribunal, although made for reasons which I should have thought to be entirely within their discretion, is open to objection in respect of procedure. To this extent, the appeal must succeed, the decision of the local tribunal being set aside. But it is impossible now for the claimant to achieve his purpose, which was to have the tribunal decide the merits of the case on the 6th April 1964, or at any rate before the 29th June 1964. The appeal to the Commissioner in the end of the day thus defeats itself. The reference, to the local tribunal will fall to be heard by the tribunal - which should in my opinion be differently constituted from that of the 6th April 1964 - at the earliest convenient date.

20. The appeal of the claimant's association is allowed.

(Signed) H. A. Shewan  
Deputy Commissioner  
Date: 22nd October 1964