

## UNEMPLOYMENT BENEFIT

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### **Day of unemployment—effect of a reduced compensatory award by an industrial tribunal.**

As compensation for unfair dismissal, an industrial tribunal awarded the claimant £44.60 a week for 13 weeks representing the full amount of her lost wages. For the next 12 weeks they awarded her £4.60 a week, the difference between her former wages and the wage they considered she would have obtained had she diligently sought employment. On review, the adjudication officer disallowed unemployment benefit under regulation 7(1)(l)(ii) [now 7(1)(k)(iii)] of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations for the whole of the period covered by the compensatory award. The decision was upheld by the social security appeal tribunal and on appeal the claimant's solicitor contended that the sum of £4.60 per week could not be regarded as "a sum representing remuneration which the industrial tribunal considered she might reasonably be expected to have had for that day but for the dismissal" as defined in regulation 7(1)(l)(ii) (paragraphs 14 and 15).

In dismissing the appeal, the Chief Commissioner *held* that:

In the determination of whether a day is or is not to be treated as a day of unemployment because in respect of that day there was payable to the person concerned an amount awarded by an industrial tribunal as compensation for unfair dismissal, the amount awarded is not material so long as some award was made under (now) Section 68(2) and Section 74 of the Employment Protection (Consolidation) Act 1978.

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1. My decision is that the decision given on 25 August 1983 by the Cambridge Local Tribunal, dismissing the appeal of the claimant in the circumstances to which I shall come, was correct. I accordingly dismiss the appeal.

2. The claimant presented her appeal herself and Mr. N. Butt of the Solicitor's Office, Department of Health and Social Security appeared for the adjudication officer. I am grateful to both for their assistance.

3. The claimant was dismissed by her employers and received unemployment benefit for the period 4 October 1982 to 4 April 1983. On 27 April 1983 an industrial tribunal awarded her £644.05 for unfair dismissal comprising a basic award of £29.05 and a compensatory award of £615.00, pursuant to the requirement to do so in the circumstances under section 68(2) of the Employment Protection (Consolidation) Act 1978.

4. The amount of the compensatory award was assessed in accordance with section 74 of the above Act which so far as relevant is in the following terms:—

“74.—(1) Subject to sections 75 and 76, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The said loss shall be taken to include—

(a) any expense reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) .....

(4) In ascertaining the said loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or of Scotland, as the case may be.”

5. The industrial tribunal framed its decision as to the compensatory award as follows:—

“Compensatory Award under section 74 of the Act (net average wages £44.60 per week)

From 1/10/82 to 31/12/82—

13 weeks at £44.60

£579.80

From 1/1/83 to 31/3/83—

12 weeks at £4.60

£55.20

£635.00

Less—earnings received

£20.00

TOTAL

£615.00”

6. The tribunal, having heard the evidence, considered that the claimant had “coasted” to some extent since October 1982. They concluded that, had she applied herself as she ought to trying to find another job, then she would have been successful in doing so by the end of 1982 at the latest and that by then she would have found a job giving her net pay of £40.00 per week at least. They held further that what they described as “the appropriate degree of application to the search” would by 31 March 1983 have put

the claimant into a job in which she was earning at least as much as her former employers were paying her. Accordingly for the three months October—December 1982 the industrial tribunal awarded the claimant the full amount of her lost wages, but on the hypothesis which they had adopted for the period January—March 1983 they awarded only the difference between her former wages of £44.60 and what they considered she would have got had she obtained a job by the application of due diligence at £40.00 per week before the end of December 1982, namely £4.60 weekly.

7. Under regulation 9 of the Employment Protection (Recoupment of Unemployment Benefit and Supplementary Benefit) Regulations 1977 [SI 1977 No 674], a recoupment notice was issued to the claimant's former employers to recoup the sum of £615.00 of unemployment benefit, the sum claimed being that calculated under regulation 9(2). There has been no issue before me as to the computation of that amount. The total amount of unemployment benefit paid to the claimant for the period 4 October 1982 to 4 April 1983 was £635.41. There thus remained (and still remains) £20.41 not recouped but there has been no challenge to the initial decision of the local insurance officer and the local tribunal that repayment of that amount was not required as the claimant had throughout used due care and diligence to avoid overpayment.

8. On 14 June 1983 the insurance officer revised on review the original decisions awarding the claimant unemployment benefit to the effect that unemployment benefit was not payable firstly for the inclusive period 4 October 1982 to 31 March 1983 and secondly, that it was not payable for the inclusive period 1 to 4 April 1983 because those days fell, it was said, within the first three days of a period of interruption of employment and accordingly no benefit was payable for those days by the effect of section 14(3) of the Social Security Act 1975. The decision on the second point is in fact consequential on the decision on the first point.

9. As I have said, the insurance officer's decision was upheld by the local tribunal. The correctness of the decision of the local tribunal on the first point turns upon the true construction of what was at the material time regulation 7(1)(l)(iii) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [SI 1975 No 564], as amended, in respects not material for this decision, by regulation 2(2) of the Social Security (Unemployment, Sickness and Invalidity Benefit) (Amendment No 2) Regulations 1976 [SI 1976 No 677]. Regulation 7(1)(l) was inserted into regulation 7 by the Social Security (Unemployment, Sickness and Invalidity Benefit) (Amendment) Regulations 1976 [SI 1976 No 328]. It is (as amended as I have indicated) in the following terms:—

“(1) 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, on making an order under section 71 or 78 of the Employment Protection Act 1975 for reinstatement or re-engagement, as payable to that person or an amount awarded to that person under section 72 or 80 of that Act as compensation for unfair dismissal or for non-compliance with an order under section 78(7) (8) or (9) of that Act, where either of those amounts includes a sum representing remuneration which the industrial tribunal considers he 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; . . .”

Since there is no contrary context the reference in regulation 7(1)(l)(iii) to section 72 of the Employment Protection Act 1975 is to be read as or including a reference to section 68(2) of the Employment Protection (Consolidation) Act 1978—per paragraph 4(a) of Schedule 15 to the last-mentioned Act. Section 68(2) requires the amount of the compensatory award to be calculated in accordance with section 74, the relevant parts of which are set out above. (Regulation 7(1)(l) is now regulation 7(1)(k) of the corresponding regulations now in force, [SI 1983 No 1598], although the reference to section 68(2) has not clearly been carried through.) [see footnote]

10. Mr. Butt correctly pointed out that under section 14(1) of the Social Security Act 1975, unemployment benefit is payable in respect of a day of unemployment which forms part of a period of interruption of employment and the effect of regulation 7(1)(l) is accordingly where it applies to negative the treatment of a day as a day of unemployment. Regulation 7(1)(l) identifies four other disentitling circumstances, but as to none of the five items is there in my judgment any indication that the amount of the disentitling item is relevant. This is in my view a significant point.

11. The arguments on behalf of the claimant were put (well put, if I may say so) by the solicitors who advised her on the appeal and who wrote to this Office. There is no doubt that regulation 7(1)(l)(iii) applied in terms to the £44.60 per week compensatory award awarded by the industrial tribunal for the three months, October—December 1982. The question however is whether regulation 7(1)(l)(iii) applies to require none of the days in the period January—March 1983 to be treated as a day of unemployment, the compensatory award in respect of that period being at the rate only of £4.60 per week, because (as I infer) the industrial tribunal had applied section 74(4) and treated the claimant as having been under a duty to mitigate her loss to the extent of £40.00 per week.

12. The submission was made in the solicitor’s letter in the following terms:—

“It cannot be said that the industrial tribunal, when making the compensatory award . . . reasonably contemplated that the claimant would have been receiving £4.60 per week as remuneration had she been in employment. The decision of the industrial tribunal was that the claimant would have been receiving £40.00 per week had she made proper efforts to obtain employment for the period 1 January 1983 to 31 March 1983. The sum of £4.60 per week as paid by the employers in compensation cannot therefore be described as ‘remuneration which the industrial tribunal considered the claimant might reasonably be expected to have had’. The reasonable sum in the contemplation of the industrial tribunal was considerably more, namely £40.00 per week. We submit therefore that the proper application of [the regulation] would result in the claimant not being subject to recoupment of unemployment benefit for the period 1 January 1983 to 31 March 1983. She did not receive during this period amounts appropriately described as ‘sums representing remuneration which the industrial tribunal considered she might reasonably be expected to have had’. We would submit that the proper interpretation of ‘an amount . . . as compensation for unfair dismissal . . . which includes a sum representing remuneration which the industrial tribunal considers she might reasonably be expected to have had . . .’ must logically mean a sum equal to or greater than the amount of social security benefit actually received. The regulation does not include a reference to ‘an element of remuneration (however tiny)’. It refers to ‘a sum representing

remuneration which the industrial tribunal considers she might reasonably be expected to have had.” (Original underlining.)

13. It was also submitted that the construction thus put on the regulation was the intended one and that a contrary construction would lead to a bizarre result that had the industrial tribunal found that the claimant had been *fairly* dismissed and had awarded no compensation, then there would have been nothing upon which regulation 7(1)(l)(iii) could operate and recoupment would accordingly not have been required. It certainly at first sight appears odd that the claimant should be worse off having got a compensatory award than she would have been had she not. However, only the legislature could change this situation and it is to be noted that disregard of quantum is a feature also of the corresponding provision in what is now regulation 7(1)(d) relating to a payment in lieu of remuneration—see R(U) 3/68 at paragraph 8.

14. I am not however able to sustain the arguments put forward by the claimant and on her behalf. As I have said, none of the parts of regulation 7(1)(l) treat as relevant upon the quantum of the amount which is found to be payable, and in my view the excluding effect of regulation 7(1)(l) does not turn on quantum; it turns upon whether there exists in fact a day in respect of which there was payable (relevantly) compensation for unfair dismissal. If it had been intended to make quantum a material consideration it would have been surprising to find no provision made for some form of set-off calculation showing how different amounts were to have different effects.

15. The question as it seems to me is whether the compensation for unfair dismissal “includes a sum representing remuneration” which bears a particular character, namely, that which the industrial tribunal considers the claimant might reasonably be expected to have had for that day but for the dismissal. The provision does not however say that the compensation must be equal to or exceed the remuneration considered to be reasonable; it says that the amount must include a sum representing remuneration (not “the” remuneration) and it would I think not be expected that a precise equation was requisite in this part of regulation 7(1)(l)(iii) when, as I have indicated, quantification is not part of the overall disentitlement mechanism for which regulation 7(1)(l) provides. Also, it appears to me that the reference in regulation 7(1)(l)(iii) to “an amount awarded to that person under section [68(2)] . . . as compensation for unfair dismissal” must necessarily include the sum arrived at by the operation of the whole of the relevant parts of section 74, namely, section 74(2)(b) and also section 74(4). In my judgment on the face of the decision of the industrial tribunal the compensatory amount does include a sum representing remuneration.

16. The local tribunal was concerned at the effect of the decision but, in the circumstances of the present case, I do not share that concern. It was the claimant’s own breach of her duty to mitigate which reduced the compensatory payment for the second three months to a sum computed on the basis of £4.60 per week. However, it does appear curious that if a complaint of unfair dismissal is not well-founded, then no compensatory award can be made (section 68(2) of the 1978 Act), therefore regulation 7(1)(l)(iii) has nothing upon which to operate; but if the claim is well-founded (and no order for reinstatement or re-engagement is made) then the award of compensation leads to the operation of regulation 7(1)(l)(iii). I find it unsatisfactory that a claimant who is justifiably dismissed may be in a better position in this particular respect than one who is unjustifiably dismissed and gets compensation. However, that, in my judgement, is the way the provision operates.

17. My decision is as in paragraph 1.

“FOOTNOTE [Reference to section 68(2) inserted by SI 1984 No. 551]”

(Signed) Leonard Bromley  
Chief Commissioner

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