

"GIVES up employment" in section 5915 Social Security Act 1975 (reduced earnings allowance). — person who is dismissed did not 'give up' employment. ★ 77/92

ATH/SH/7

Commissioner's File: CI/253/1992

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR REDUCED EARNINGS ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Central London

Case No: 7107/33842

[ORAL HEARING]

1. I disallow this appeal by the adjudication officer. The decision of the social security appeal tribunal dated 13 March 1991 was not erroneous in law.
2. The claimant was born in 1925. On 22 September 1967 he injured his back in the course of his employment as a dock labourer. He claimed industrial injuries disablement benefit and the degree of disablement was assessed at 15% from 19 November 1967 to 18 August 1968, at 20% from 19 August 1968 to 18 November 1969, and at 10% from 19 November 1969 for life. After the accident he obtained other employment. On 10 August 1990 he reached the age of 65 and on 13 August 1990 he retired. From 13 August 1990 until 31 August 1990 he was employed as an assistant in a newsagents' shop. From 15 October 1990 he was employed as a porter.
3. From 22 November 1967 the claimant had been in receipt of special hardship allowance and then reduced earnings allowance (when that replaced special hardship allowance). By a decision dated 11 October 1989 the adjudication officer awarded the claimant reduced earnings allowance at the weekly rate of £28.48 from 15 November 1989 to 12 November 1991. However, by a decision issued on 24 October 1990 the adjudication officer reviewed that decision of the adjudication officer (awarding reduced earnings allowance from 15 November 1989 to 12 November 1991) on the ground that there had been a relevant change of circumstances since the decision was given namely that there had been a change of law from 1 October 1989; and his revised decision for the period from and including 5 September 1990 was that the claimant was not entitled to reduced earnings allowance from and including 31 August 1990

"because he gave up regular employment on that date and a person who has attained pensionable age, and gives up regular employment is not entitled to reduced earnings allowance from the date he gave up regular employment". The adjudication officer decided that the claimant was entitled to retirement allowance from and including 5 September 1990 at the weekly rate of £7.66. The claimant appealed. On 13 March 1991 the social security appeal tribunal decided that the claimant's entitlement to reduced earnings allowance did not cease from 31 August 1990 and on and from that date he remained entitled to reduced earnings allowance; and they allowed the appeal. The adjudication officer appeals with leave of the tribunal chairman.

#### 4. The law

Section 59B was introduced as from 10 April 1989 by the Social Security Act 1988 section 2(1). At that date it read as follows:-

" 59B. (1) Subject to the provisions of this Part of this Act, a person who -

- (a) has attained pensionable age; and
- (b) retires, or is deemed under section 27(5) above to have retired, from regular employment on or after the date on which this section comes into force; and
- (c) was entitled to reduced earnings allowance (by virtue either of one award or of a number of awards) on the day immediately before he retired or is deemed to have retired,

shall cease to be entitled to reduced earnings allowance as from the day on which he retires or is deemed to have retired and may be entitled to it again only if he makes an election in accordance with regulations under 30(3) above.

- (2) If the day before a person ceases under sub-section (1) above to be entitled to reduced earnings allowance he is entitled to the allowance (by virtue either of one award or of a number of awards) at a weekly rate or aggregate weekly rate of not less than £2.00, he shall be entitled to a benefit, to be known as 'retirement allowance'."

Section 59B(1) was amended as from 1 October 1989 by the Social Security Act 1989, Schedule 1, paragraph 8(2) and the sub-section then read as follows:-

" 59B (1) Subject to the provisions of this Part of this Act, a person who -

- (a) has attained pensionable age; and
- (b) gives up regular employment on or after the date on which this section comes into force; and
- (c) was entitled to reduced earnings allowance (by virtue either of one award or of a number of awards) on a day immediately before he gave up such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up regular employment and may become entitled to it again only if he returns to regular employment."

That subsection was again amended as from 1 October 1990 by the Social Security Act 1990, section 3(5)(a) and Schedule 7 by the deletion of the words "and may become entitled to it again only if he returns to regular employment". In other words, as from 1 October 1989, the relevant phrase was "gives up regular employment" in substitution for "retires from regular employment" and as from 1 October 1990 there was no provision for resumption of reduced earnings allowance upon a return to regular employment. The question in the present case is to determine the meaning of the words "gives up regular employment". It is the claimant's case that he did not give up regular employment: he was sacked.

5. On 10 August 1992 I held an oral hearing. The claimant was present and was represented by Ms Kathleen Pirkis, of the Southwark Welfare Rights Unit. The adjudication officer was represented by Mr Jenking-Rees, of the Solicitor's Office of the Departments of Health and Social Security.

6. As I have said, the claimant, having attained pensionable age, retired on 13 August 1990. On 13 August 1990 until 31 August 1990 he was employed as an assistant in a newsagents' shop. Although by a letter dated 9 October 1990 he informed the local office that he had "ceased working", he explained, by letter dated 27 October 1990, that he may have given a false impression and that in fact his employer had terminated the agreement. In their findings of fact in Form AT3, box 2 the appeal tribunal found that the claimant had been dismissed from that employment on 31 August 1990 and that finding was not disputed by the adjudication officer. In their reasons for their decision in Form AT3, box 4 the appeal tribunal stated:-

"The claimant did not 'give up' regular employment on 31.8.90 when he was dismissed from his job at the ... newsagents ... because the phrase 'gives up ... employment' in section 59B(1)(b) of the 1975 Act as amended does not include the situation where a person gets the sack from his job against his will and where it cannot reasonably be said that he has precipitated his departure from the job.

Instead the phrase 'gives up' employment in section 59B(1)(b) means some intention or conduct on the part of the employee himself which brings about his departure from the job.

In the present case the reason why the claimant left his job at the ... newsagents on 31.8.90 was solely because he was dismissed from the job by his employer because he failed to remember the price of two packets of sweets. The dismissal took place against the claimant's wish to stay on in the job where he had hoped to remain for about a year. Accordingly, although the claimant had attained pensionable age on 31.8.90 when he was dismissed from his job at [the] newsagents, and was entitled to reduced earnings allowance on the day before he was dismissed on 31.8.90, he did not on the true construction of section 59(1)(b) of the Social Security Act 1975 as amended 'give up' his regular employment ...

Accordingly he did not cease to be entitled to reduced earnings allowance on 31.8.90 because the condition in section 59B(1)(b) that he 'gave up' regular employment on 31.8.90 was not satisfied."

7. The first point, it seems to me, relates to the decision of the adjudication officer that he was entitled to review the previous decision of the adjudication officer on the ground that there had been "a relevant change of circumstances" and he stated that the relevant change of circumstances was "a change of law from 1.10.89". In fact, of course, the relevant change of circumstances for the purpose of the review occurred on 31 August 1990 when the claimant's employment at the newsagents' shop terminated on the ground of his dismissal. The change of law had occurred in the previous year and was not, in my judgment, the relevant change of circumstances entitling the adjudication officer to review the decision dated 11 October 1989. However, nothing in fact turns on that point and I say no more about it.

#### 8. The submissions

Ms Pirkis submitted that the words "gives up" should be given their natural meaning and she referred to Brutus v. Cozens [1972] 2 All ER 1297. Mr Jenking-Rees accepted that the adjudication officer must "get round" the natural meaning of the words. He submitted, however, that it was proper to look at the background of the legislation for the purpose of construction of the words in question. He submitted that there had been a change in Government policy whereby a person in retirement should be permitted to continue in employment and in consequence the word "retires" in section 59B was removed by the 1989 Act. The words "retires from" were replaced by "gives up" and he submitted that the draftsman was not intending to introduce a new category of claimant entitled to an allowance under section 59B who would not have been entitled to that allowance before the amendment. He submitted that in 1988, on the introduction of section 59B, a person of pensionable age who was sacked would have been entitled

to retirement pension and would have retired for the purposes of section 59B(1)(b). In August 1990, however, (when the claimant was dismissed), if the words "gives up" meant "voluntarily giving up", a person who was sacked would not cease to be entitled to reduced earnings allowance and would be in a better position than one who had voluntarily given up. The person who was sacked would be entitled to reduced earnings allowance notwithstanding the termination of his employment whereas the person who "gave up" regular employment would cease to be entitled to the allowance. He submitted that it could not have been the draftsman's intention to bring about a situation where it was preferable to be sacked and thereby to bring about a worsening of employer/employee relations. He referred to Luke v Inland Revenue Commissioners [1963] AC 557 to support the proposition that in certain circumstances one must do some violence to the words used; and to Attorney General v. Prince Augustus of Hanover [1987] AC 436 to support the proposition that a change in legislation does not necessarily mean that a policy change was intended.

9. Ms Pirkis submitted that she had not had notice of or been given an opportunity to consider the cases mentioned and that, if necessary, she would seek an adjournment to deal with the points raised by them. In the circumstances, I do not consider an adjournment is now necessary. Ms Pirkis pointed out that the words used was "gives up", - not "ceased" or "stopped" or "comes to an end". She submitted that if the words "gives up" were given their natural meaning, not only the person who was sacked, but the person who lost his employment through redundancy, or whose company closed down, would also be entitled to reduced earnings allowance notwithstanding the termination of their employment. She pointed out that the person who was sacked and over pensionable age was disadvantaged in that he had no recourse to an industrial tribunal. She said that she believed reduced earnings allowance would be frozen whereas retirement allowance was subject to annual increase. She also pointed out that the claimant in the present case was not intending to give up employment as, after his dismissal, he took a fortnight's holiday and then immediately looked for employment and, as the social security appeal tribunal found, he commenced work as a porter on 15 October 1990. Clearly he was not a person who intended to give up employment.

10. "Gives up regular employment"

It must be remembered that in section 59B(1)(b) the words are (as substituted by the 1989 Act) "gives up regular employment". There is no definition of the words "gives up". But the words "regular employment" were defined in the following year in the Social Security (Industrial Injuries) (Regular Employment) Regulations 1990 which came into force on 1 April 1990. Regulation 2(1) provides that "regular employment" for the purposes of section 59B means "in relation to any person and any week, gainful employment (whether or not under a contract of service) which the person undertakes for 10 hours or more in a week which forms part of a period of five or more consecutive weeks in which such employment is undertaken". Regulation 2(2)

provides:-

" (2) For the purposes of section 59B of the 1975 Act, a person -

(a) if he is engaged in regular employment, shall be regarded as not having given up that employment, or

(b) if he is not so engaged, shall be regarded as having returned to regular employment,

in any week falling within a period of 5 consecutive weeks during which the total number of hours gainfully employed, when averaged over the whole of that period, amounts to 10 or more for each week within that period."

In the present case, the claimants's "regular employment" continued, by virtue of regulation 2(1), until 31 August 1990. It then ceased and he will have lost his reduced earnings allowance and become entitled to retirement allowance unless (i) he can successfully argue that, by reason of having been dismissed, he did not give up regular employment and that he was entitled to the continuance of his reduced earnings allowance or (ii) he "returned to regular employment", within the meaning of regulation 2(2)(b), when he began employment as a porter on 15 October 1990. That would depend upon whether or not he worked the requisite number of hours "within a period of 5 consecutive weeks". It is to be noted, contrary to what was, I think, suggested at the oral hearing before me, that regulation 2(2) does not require the person to return to regular employment within 5 weeks of leaving his previous employment; under the regulation the 5 weeks can begin at any time in the future. However, as my decision, as will be seen, is that the decision was not erroneous in law, I was unable to hear any evidence as to whether or not the claimant had complied with the specified conditions and "returned to regular employment". Accordingly, it falls to me to decide the meaning of "gives up regular employment".

11. In Pinner v. Everitt [1969] 3 All ER 257 Lord Reid said at page 258:-

"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."

The question in that case was whether or not a person was "driving or attempting to drive" a motor vehicle when he had been stopped by the police in connection with the illumination of his rear number plate, and the driver got out of the car and started to talk to the police and they, smelling alcohol, required him to take a blood test which he refused to do.

Lord Reid said that the question was whether at the time when the breath test was required the appellant could still be said to be driving his car, and that he found the case to be very near the borderline but that he was prepared to agree with the majority of their Lordships that the appellant was then no longer driving his car within the ordinary meaning of the word.

12. Luke v. Inland Revenue Commissioners [1963] AC 557 was a case concerning income tax and directors' emoluments. The case arose under section 160(1) and section 161(1) of the Income Tax Act 1952. The appellant lived in a house owned by the company of which he was managing director. The appellant paid a rent but the company was responsible for repairs and paid rates, feu duties, and insurance and carried out substantial structural repairs. The House of Lords, by a majority, decided that the expenditure on owner's rates, feu duties and insurance should not be regarded as part of the directors' emoluments assessable to income tax by reason of section 161(1) of the Act.

Lord Reid at page 576 said:-

"To read the word 'provisions' [in section 161(1)] as limited to the provision of the house when the director enters into occupation would in many cases defeat the obvious intention of the section. For instance, if a company takes the lease of a house and then permits the director to live in the house, such a limitation would exclude the rent paid by the company from the scope of the section, although living in a house for which the company pays the rent is an obvious benefit.

How, then, are we to resolve the difficulty? To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

### 13. Meaning

There is no difficulty in understanding the ordinary meaning of the words "gives up". To "give up" according to the Shorter Oxford English Dictionary means "To resign, surrender, to hand over" also "to forsake, relinquish, desist from, relinquish the prospect of; ..." The phrase denotes some conscious act on the part of the doer. Likewise, the phrase "gives up regular employment" denotes an intention on the part of the person to give up regular employment. That is his intention. He has a choice and he decides to give up regular employment. Mr Jenking-Rees placed great emphasis on the fact that, upon this interpretation, a person who was sacked would be in a better position than a person who had voluntarily given up his employment. But I think that that is an over-generalisation. There may be cases where it is necessary to investigate the reason why the particular claimant was sacked. A claimant may act in such a way as to force his employer to dismiss him and it will be a question of fact in each case to determine whether or not the claimant had by his conduct evinced an intention to give up regular employment. There are a number of cases under section 20(1)(a) of the Social Security Act 1975 interpreting the phrase "has voluntarily left such employment without just cause": see, for example, R(U) 16/52 where at paragraph 8 the Commissioner stated:-

" 8. ... It is an established principle of unemployment insurance law that, if a person deliberately and knowingly acts in a way which makes it necessary for the employer to dismiss him, he may be regarded as leaving his employment voluntarily."

And in R(U) 7/74 at paragraph 5 the Commissioner said:-

" 5. I would have thought, without attempting to lay down exhaustive or definitive guidelines, that a normal element of a case of that kind would be a finding that the employee had acted, or was threatening to act, in a manner involving a deliberate repudiation of his contract of employment."

See further "Non-Means Tested Benefits: The Legislation. Commentary by Bonner, Hooker and White", 1991 Edition at page 45.

14. Does the natural or ordinary meaning of the words lead to some result "which cannot reasonably be supposed to have been the intention of the legislature"? What was the intention of the legislature?

### 15. Intention of legislature

What can one infer from the history of section 59B? First, the introduction of section 59B by the 1988 Act provided that a person who had attained pensionable age and retired from regular employment after 10 April 1989 (when the section came into force) would, if he was entitled to reduced earnings allowance, cease to be entitled to that allowance on the day on which he retired, and would be entitled to it again in certain circumstances. On the cessation of reduced earnings allowance, he would be entitled

to retirement allowance. Section 2(4) of the 1988 Act, however, provided that a person who on 10 April 1988 or on 9 April 1989 had attained pensionable age, had retired from regular employment and was entitled to reduced earnings allowance, "shall be entitled to that allowance for life". In other words, that sub-section contemplated that, in the circumstances specified, reduced earnings allowance would be payable for life. Section 2(8), on the other hand, provided that after 10 April 1989 no person over pensionable age and retired from regular employment would be entitled to reduced earnings allowance otherwise than under sub-section (4) above.

16. Secondly, as Mr Jenking-Rees submitted, the Act of 1989 substituted the words "gives up" for the word "retires" to bring the section in line with government policy to allow a person in retirement to continue in regular employment.

17. Thirdly, the 1990 Act provided that once entitlement to reduced earnings allowance ceased, a person could not be entitled to it again.

18. Fourthly, under the Social Security Contributions and Benefits Act 1992, Schedule 7, paragraph 12(1) there is a provision similar to that in the original section 2(4) of the 1988 Act (above) which contemplates that entitlement to reduced earnings allowance shall, in the specified circumstances, continue for life.

19. In "Non-Means Tested Benefits: The Legislation Commentary by Bonner, Hooker and White," in the 1991 Edition at page 114 it is stated:-

"(2) Reduced Earnings Allowance; its creation and slow demise,

...

The October 1990 changes [i.e. under the 1990 Act] implement the Government's policy of preventing arising new entitlements to reduced earnings allowance, while preserving existing entitlements until they otherwise cease, so that ensuing phased reductions in expenditure on this benefit ... can be deployed to help finance a package of new benefits to improve the position of disabled people as a whole during the 1990's."

20. In my judgment, the words "gives up" are clear and unambiguous. They are not used in an unusual sense and to construe the words in their natural and ordinary meaning does not lead to a result "which cannot reasonably be supposed to have been the intention of the legislature", to quote the words of Lord Reid in Pinner v. Everitt above. It is clear that reduced earnings allowance is not abolished but is to be phased out. It is contemplated that in certain circumstances entitlement to the allowance shall continue for life. But there will be no new entitlements. "Gives up regular employment" is a phrase which

in its context has a readily understandable natural and ordinary meaning and I see no ground, as a matter of construction, for giving it some meaning other than that which it naturally bears.

21. In my judgment, when the claimant was dismissed from his job at the newsagents' shop, he did not "give up regular employment" within the meaning of Section 59B(1). The decision of the social security appeal tribunal was, in my judgment, correct and I can find no error of law therein. Accordingly, I disallow this appeal.

(Signed) A.T. Hoolahan  
Commissioner

(Date) 7 October 1992