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SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Sandra Bell (Mrs)

Social Security Appeal Tribunal: Chesterfield

Case No: 02/06

[ORAL HEARING]

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 18 October 1984 is erroneous in point of law, and accordingly I set it aside. However, as it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is not entitled to supplementary benefit for any period prior to 26 November 1984.

2. This is an appeal by the adjudication officer, brought with my leave, against the decision of the social security appeal tribunal of 18 October 1984. The claimant asked for an oral hearing, a request to which I acceded. At that hearing the adjudication officer was represented by Mr E O F Stocker and the claimant, who attended, was represented by Mr R J Bowles, Welfare Rights Officer of the Pitsmoor Citizens Advice Bureau. I am indebted to both of them for their submissions.

3. The facts of this case are simple and straightforward and are not in dispute. On 16 May 1984 the claimant, who had been employed as a fleet sales administrator by T C Harrison (Sheffield) Ltd from 30 September 1981 to 9 January 1984, claimed supplementary benefit. She had, however, in the meantime taken her case to an industrial tribunal, contending that she had been unfairly dismissed from her employment, and on 20 March 1984 the tribunal had made the following award:

"[The claimant] is entitled to a 2½ week basic award at a rate of £60.50 per week making a total of £151.25. The tribunal has calculated that the net average wages, including the small amount of overtime earned, was £54.15 per week and she has lost 10 weeks up to the present date making a further £541.50. The tribunal has heard the evidence that [the claimant] has given about her attempts to find alternative employment and are satisfied that she is making every reasonable effort. They were also unfortunately satisfied that in the present employment climate and bearing in mind [the claimant's] age that she may not be successful in obtaining a job very quickly

and therefore the tribunal award a further 36 weeks at £54.15 per week, making a total of £1,949.40. They also award a further £10 for loss of statutory rights and a figure of £300 for the loss of the benefit of the employer's contributions to her pension rights taking into account the possibility of her further continued employment with the company, making a total under that head of £2,259.40. The total of these three sums is £2,952.15 and that is the sum which is awarded to [the claimant]."

On 13 June 1984 the adjudication officer decided that the claimant's compensation award of £1,949.40 fell to be taken into account as earnings for the period for which it was expressed to be payable, ie. 36 weeks, and that in consequence she was not entitled to supplementary benefit for any period prior to 26 November 1984.

4. In due course, the claimant appealed to the tribunal who by a majority, the chairman dissenting, reversed the adjudication officer's decision. They decided that "the claimant be granted a supplementary allowance from 16 May 1984 and gave as their reasons:

"The industrial tribunal's compensatory award of £1,949.40 was not a payment in lieu of notice or remuneration but a lump sum award of compensation, outside the scope of regulation 10(1)(d) or 10(1)(g) of Resources Regulations, and did not fall to be taken into account under any other regulation."

The chairman's reasons for dissenting were:

"That the future compensatory element of the industrial tribunal award was a payment in lieu of remuneration (Resources Reg. 10(1)(d)) and was calculated directly by reference to 36 weeks future losses at £54.15 per week."

5. The Employment Protection (Consolidation) Act 1978 governs the law on unfair dismissal. Section 54 provides for the right of an employee not to be unfairly dismissed. Section 67 allows for a person who has that right - not all employees are in that position - to make a complaint to an industrial tribunal. Sections 68-71 provide for remedies for unfair dismissal, one of which is the award of compensation. Section 72 provides that an award of compensation shall consist of:

- (a) a basic award calculated in accordance with section 73,
- (b) a compensatory award calculated in accordance with section 74, and
- (c) in certain circumstances a special award calculated in accordance with section 75 [not relevant in the present instance].

Section 72A and 73 provide for the detailed calculation of the basic award, and the grounds on which it can be reduced. Finally, section 75 imposes a maximum amount on the award of compensation.

6. It is not in dispute that the basic award calculated in accordance with section 73 is analogous to a redundancy payment and as such a capital resource. The real question at issue here is the nature of the compensatory award calculated in accordance with section 74 and its effect on entitlement to supplementary benefit.

7. Mr Stocker postulated the possibility that a compensatory award might be considered an award of a capital sum, and, as such, something which fell within the claimant's capital resources. However, it is quite clear from the decision of the Court of Appeal in R v. National Insurance Commissioner ex parte Stratton (reported as Appendix II to decision R(U)1/79) that a compensatory payment cannot be so regarded. The Court of Appeal refused to treat it as equivalent to a redundancy payment - and as such a capital, and not income item. In the words of Lord Denning M.R:

"Compensation for unfair dismissal is to be distinguished from a redundancy payment because its true characteristic is that it is a compensation for loss of future income, not for any loss of capital."

In the same case Templeman L.J. (as he then was) observed as follows:

"I agree with Lord Denning M.R. that the compensation awards made under... section 74 of the Employment Protection (Consolidation) Act 1978 lead to loss of unemployment benefit. Such compensation is given for loss of the benefits which the employee might reasonably be expected to get in the future. It seems to me, however, that the basic award given for unfair dismissal under section 73 of the Act of 1978 falls into the category of redundancy payment. Entitlement and quantum depend on past service, not on future loss."

8. Lord Denning accepted - and his brethren appear to have concurred in this view - that a compensatory award was caught by regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [now 1983] being "a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration which [the claimant] would have received for that day had his employment not been terminated". However, he went on to observe:

"Though, again, this kind of payment is so widespread that it would have been helpful if the regulations had been amended so as to deal with it specifically."

9. In due course, there were changes to the regulations and for the purposes of unemployment benefit the relevant regulation is now regulation 7(1)(k)(iii) which reads as follows:

"A day shall not be treated as a day of unemployment... if it is a day in respect of which there is payable to that person an amount awarded to that person... as compensation for unfair dismissal... [which] 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,...."

Accordingly, for unemployment benefit purposes, compensatory awards are now specifically provided for, without reliance any longer on the vaguer phraseology of regulation 7(1)(d). In the present instance, the adjudication officer disallowed unemployment benefit for the period up to 26 November 1984, the claimant having received a compensatory payment covering a period of 36 weeks from the date of award.

10. However, there is no specific regulation in the supplementary benefit legislation which deals directly with compensatory awards made by an industrial tribunal. But regulation 10(1) of the Supplementary Benefit (Resources) Regulations 1981 [S.1 1981 No.1527] is of general application. It provides as follows:

- "10. - (1) Subject to regulation 3(2)(g) [inapplicable] and the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment and shall include:-
- (a) any remuneration in kind
 - (b) any bonus or commission
 - (c) any advance of earnings or loan or, in the case only of a person to whom section 8 or 9 (persons affected by, or returning to full-time employment following, a trade

- dispute) applies, any ex gratia payment;
- (d) any payment in lieu of notice or remuneration;
 - (e) any holiday pay other than any received more than 4 weeks after termination of employment;
 - (f) any retainer;
 - (g) any such sum as is referred to in section 18(2) of the Social Security (Miscellaneous Provisions) Act 1977 (certain sums payable under the Employment Protection Act 1975 and Employment Protection (Consolidation) Act 1978 to be earnings for social security purposes);
 - (h) any sum paid for the purpose of retaining any accommodation in the home as a boarder."

The chairman of the tribunal took the view that the compensatory award constituted a payment in lieu of remuneration within paragraph (d), a view rejected by the majority of the tribunal.

11. In order to determine whether a compensatory award falls within regulation 10(1)(d) it is necessary to analyse its nature. As has been explained by Lord Denning M.R., "its true characteristic is that it is a compensation for the loss of future income". In other words, it is a payment in lieu of the remuneration the claimant would have received, had his employment not been unfairly terminated. This approach is reflected in the description given to the award by the actual industrial tribunal. They said:

"The tribunal has heard the evidence that [the claimant] has given about her attempts to find alternative employment and are satisfied that she is making every reasonable effort. They were also unfortunately satisfied that in the present employment climate and bearing in mind [the claimant's] age that she may not be successful in obtaining a job very quickly and therefore the tribunal award a further 36 weeks at £54.15 per week, making a total of £1949,40".

Manifestly, the tribunal took the view that it might well take the claimant 36 weeks to find new employment, and had it not been for her unfair dismissal by her former employers, she would have received payment at the rate of £54.15 per week for those 36 weeks. The tribunal were compensating her for the loss of remuneration throughout a 36 weeks period. Accordingly, in my judgment, the chairman was perfectly right to conclude that the compensatory award was a payment in lieu of remuneration within paragraph (d).

12. However, Mr Bowles contended that for a payment to fall within paragraph (d) it had to satisfy the opening words "or remuneration or profit derived from any employment" and he submitted that the compensatory award was not derived from the claimant's employment, such employment having previously come to an end. On this point Mr Stocker supported him, contending that the compensatory award was something which was imposed by an industrial tribunal and did not arise directly out of any employment. I reject this interpretation. The words "derived from" are wide. They mean "having their origin in". Moreover, "compensation for loss of future income", to quote Lord Denning M.R., necessarily presupposes a past employment. The compensation has its origins in past employment, and it is immaterial that the award is made through a statutory body. The award is payable by the past employer, and not out of some statutory fund. No award would be made at all if there had not been a past employment. Even the express words of regulation 10 do not refer to "current" employment, but are deliberately made all embracing by the use of the adjective "any" before "employment". But in any event, even if the opening words were to be construed

artificially in the way suggested by Mr Bowles and Mr Stocker, I am satisfied that the further words "and shall include" widen the opening definition so as to bring in "any payment in lieu of notice or remuneration" and I am also satisfied that in this context the word "remuneration" means the remuneration which would otherwise have been payable, had it not been for the termination of the claimant's employment. Accordingly, I agree with the chairman that a compensatory award made by an industrial tribunal constitutes a payment in lieu of remuneration within regulation 10(1)(d).

13. I find support for my conclusion, as set out above, from the fact that the Secretary of State is entitled, pursuant to section 132(2) of the Employment Protection (Consolidation) Act 1978 and regulation 9 of the Employment Protection (Recoupment of Unemployment Benefit and Supplementary Benefit) Regulations 1977 [S.I. 1977 No 674], to recoup supplementary benefit already paid out from that part of the compensatory award made for the period from the date of dismissal to the conclusion of the industrial tribunal's proceedings. Now, in my judgment, it would be illogical for the Secretary of State to be able to recover supplementary benefit paid to a claimant for the period prior to the date of the industrial tribunal's decision, so that for that period the fund bore no loss at all, but as regards the subsequent period, to which the compensatory award related, the Secretary of State was still expected to pay supplementary benefit, but this time without any possibility of recoupment. Whilst such a situation would obtain if the relevant statutory provisions so ordained, I would be slow to treat them as having the effect in the absence of clear language, and in the present case I am not satisfied that there is such clear language. For the reasons given above, I am of the view that the position for the period subsequent to the award is rendered consistent with the position applying prior to the award by the operation of regulation 10(1)(d). It is perhaps unfortunate that the legislature did not, in the case of supplementary benefit, include a specific provision, as it did in the case of unemployment benefit after the adverse comments of the Court of Appeal in ex parte Stratton, but nevertheless I am satisfied that reliance can be placed on regulation 10(1)(d).

14. It is not in dispute that the effect of my decision is to disentitle the claimant to benefit for the period up to 26 November 1984. (See section 6(1) of the Supplementary Benefits Act 1976 and regulation 9 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [S.I. 1981 No 1526]. Both Mr Stocker and Mr Bowles accepted that this was the position.

15. Accordingly, I must set aside the tribunal's decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to a new tribunal. This is a case where I can properly substitute my own decision, all the relevant facts having been determined. Accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

Date: 21st March 1986