

File

Remarks

Lost earnings
Payment in lieu

CSR 364/1981

1. My decision is:-
 - (a) that the decision of the supplementary benefit appeal tribunal (the appeal tribunal) dated 1 May 1981 was erroneous in point of law and is set aside;
 - (b) that in lieu there is decided as follows:-
 - (i) that the claimant is to be treated as having been engaged in full-time employment (and thus is not entitled to a supplementary allowance) down to and including 28 March 1981;
 - (ii) that supplementary allowance (at the appropriate rate) was payable to the claimant from the commencement of the benefit week next after that date.
2. The claimant was dismissed from his employment without previous notice on Friday 27 February 1981, his employment nominally continuing down to the end of the following day. He was entitled to one month's notice under his contract, according to his employers. He was paid at the time of his dismissal a sum of slightly over £370 representing his last month's wages less deductions and a further sum of £500, which his employers stated in unemployment benefit form UB 85 was a payment in lieu of notice. In fact it equalled the gross amount of one month's salary.
3. He then claimed a supplementary allowance. The benefit officer decided that the claimant was to be treated as engaged in full-time employment down to 9 May 1981, subsequently revised to 29 April 1981. This decision was based on regulation 9(1)(b) and 9(2)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 (the Conditions of Entitlement Regulations) under which a person is to be treated as engaged in remunerative full time work for a period of the same duration as the period for which "final earnings" are paid, beginning on the day on which they would normally have been received, viz the last day of February 1981. The benefit officer took the view that both the

£370 (approximately) and £500 constituted final earnings within the meaning of the regulation and that they were each made in respect of a period of one month (two months in all) so that the claimant was to be treated as engaged in full-time employment for two months from 28 February. The claimant appealed to the appeal tribunal.

4. The majority of the appeal tribunal decided that the £500 payment was not earnings within the Supplementary Benefit (Resources) Regulations 1980 (the Resources Regulations) and seemingly allowed the appeal though their decision did not spell out precisely what resulted from it. The minority member of the tribunal considered that in terms of the above Conditions of Entitlement regulations it was either a payment in lieu of notice or an ex gratia payment. The majority decision was based on a letter from the employers to the effect that the £500 payment was not earnings. The benefit officer now appeals to the Commissioner. He was represented at the oral hearing before me by Miss Shuker of the solicitor's office of the Department of Health and Social Security; the claimant presented his own case.

5. It is now accepted by the benefit officer that the sum of £500 was not final earnings within the meaning of the relevant regulations. In the decision on Commissioner's file C.S.B. 123/81 the Commissioner said that where a claimant had been paid in full everything owed to him in respect of a period he had clearly received final earnings in respect of that period and that earnings received in respect of any subsequent period cannot be regarded as final earnings in respect of the first-named period. It is clear from the terms of regulation 9(1)(b) of the Conditions of Entitlement regulations that final earnings can be related only to a period in which a person is actually engaged in full-time employment, so that (even if it be accepted that the £500 was earnings in respect of the month following the claimant's dismissal) such earnings could not constitute final earnings in relation to which regulation 9(1)(b) and 9(2) had any effect. In consequence those regulations only had the effect that the claimant was to be treated as engaged in full-time employment down to the expiration of one month from 28 February, i.e. down to 28 March (inclusive of that day). The claimant does not contest this.

6. Had the claimant fallen to be treated as engaged in full-time employment for the longer period down to 29 April it would have followed automatically that he would not down to that date have been entitled to any supplementary allowance. Miss Shuker argued that the same result followed from a consideration of the Resources Regulations. Under regulation 10 of these regulations earnings were defined as including among other things "an ex gratia payment" (sub-paragraph (c)) and "a payment in lieu of notice" (sub-paragraph (d)). It would follow that if, as the minority member thought, the £500 was either an ex gratia payment or a payment in lieu of notice it constituted earnings; and if the employers were right, as I think they were, in saying that they were not earnings in the ordinary sense of the word, they were certainly earnings in terms of regulation 10. The majority in finding that the £500 was not earnings were emphatic that it was not a payment in lieu of notice, but did not reach any conclusion on what it was, if not a payment in lieu of notice. They appear to have reached their conclusion that it was not earnings by reference to the ordinary meaning of that word and without proper regard to the extended meaning given to that term by regulation 10 and in my judgment their decision was on that ground erroneous in point of law and I set it aside accordingly.

7. Miss Shuker urged me to give a replacement decision myself rather than send the matter back to a different tribunal and I think that I have sufficient evidence on which to do so. The employers stated that the £500 was a payment in lieu of notice and the tribunal ought not to have found that it was not without explaining why they rejected this statement, which was otherwise uncontradicted. I consider that on that ground I can reject the conclusion that it was not such a payment. There was clear evidence before the tribunal on which I can hold that it was such a payment. The employers say that it was; and, although it has to be admitted that employers are not always correct in their assessment of the nature of payments, in this case there is strong circumstantial evidence that they were right. The claimant was dismissed without notice being entitled (according to the employers) to one month's notice. If the employers had paid nothing they would have been exposed to a claim for damages for wrongful dismissal (quite apart from any possibility of a complaint to an industrial tribunal of unfair dismissal). It is to my mind inconceivable that it was intended that the claimant should have an outstanding right to damages for that wrongful dismissal after accepting the £500, which is in fact the gross amount of his normal salary for the notice period, I hold therefore that the payment was a payment in lieu of notice.

8. Even if it had been an ex gratia payment it would have been earnings in terms of the Resources Regulations. But the period for which it would have constituted earnings could have depended on the nature of the payment. Miss Shuker urged me to hold that the payment constituted earnings for the period immediately following that for which the claimant was treated as continuing to be engaged in full-time employment. This would no doubt have led to a sensible result. But I am obliged to decide the matter in accordance with the regulations, and I have been unable to see how they achieve this sensible result.

9. Regulation 9(2) of the Resources Regulations appears to me to provide conclusively what is the period in respect of which I must regard the payment in lieu of notice as constituting earnings. This regulation has been the subject of two Commissioner's decisions promulgated since the hearing viz C.S.B. 7/82 and C.S.S.B. 1/82 (both unreported). These decisions confirm the view that I formed at the hearing that sub-paragraphs (a) and (b) of regulation 9(2) fix the duration of the relevant period and that sub-paragraphs (c) and (d) fix the starting date of such period. The payment in lieu of notice fixes the duration of the relevant period as the period of notice, that is to say a period of four weeks (as the notice happened to have been given in February); and the commencement of the period must be taken under regulation 9(2)(d) to be the day on which the money was payable, that is to say (inasmuch as it was paid before the commencement of the first benefit week pursuant to the claim) when it was received (see Decision C.S.S.B. 1/82 at paragraph 6). This period coincides with the period for which the claimant was treated as being engaged in full-time employment, and so does not affect his title to a supplementary allowance thereafter.

10. In my judgment a supplementary allowance fell to be payable (if the claimant's resources were less than his requirements) from the beginning of the benefit week next following 28 March 1981, that being the earliest date permitted by regulation 7 of the Supplementary Benefit (Determination of Questions) Regulations 1980. I have some

difficulty in saying when that was. It appears that it is ascertained by reference to the day of the week on which unemployment benefit would have been payable if the claimant had been entitled to it. Unemployment benefit is a daily benefit which for administrative reasons is paid on a particular day of the week. I can readily see the meaning of the day on which unemployment benefit is payable where it is in fact being paid on a particular day, but in the absence of evidence of administrative practice I cannot follow how one can determine the day of the week on which it would have been payable to a person who is not entitled to it. There remains an ultimate fall-back provision for fixing the relevant day as Monday. But I leave the day to be fixed for the purposes of giving effect to these decisions. If necessary it must be referred back to me.)

11. The benefit officer's appeal, though in form allowed, is in substance dismissed. I add that the relevant provisions of the Resources Regulations have been substantially rewritten and that I express no opinion on the extent to which the foregoing decisions would be applicable to the new regulations.

(Signed) J G Monroe
Commissioner

Date: 16 April 1982

Commissioner's File: C.S.B. 354/1981
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