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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR STATUTORY SICK PAY

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Sally Brown (Ms)

Appeal Tribunal: Cambridge

Case No: 2/04/93/23795

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 2 March 1994 is erroneous in point of law, and accordingly I set it aside. As it is convenient that I give the decision the tribunal should have given, I further decide that, albeit for different reasons than those relied upon by the tribunal, the claimant is not entitled to statutory sick pay for the inclusive period from 21 June 1992 to 12 September 1992.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the majority decision of the social security appeal tribunal of 2 March 1994. The claimant asked for an oral hearing, a request which was acceded to. At the initial hearing, which took place on 7 November 1994, the claimant, who was not present, was represented by Mr K Bennett, welfare rights adviser, whilst the adjudication officer appeared by Mr L Scoon of the Solicitor's Office, of the Department of Health and Social Security. Towards the end of the hearing matters of some legal complexity arose, and I adjourned further hearing of the appeal to enable the claimant to be legally represented. The adjourned hearing was resumed on 24 November 1994, when the claimant, who was again not present, was represented this time by Mr B Cox of Counsel, instructed by the Child Poverty Action Group, whilst the adjudication officer continued to be represented by Mr L Scoon.

3. On 9 September 1991 the claimant started to work for the Granta Housing Society, at Wessex Place as a "bank" day care assistant. "Bank" care assistants are employed on a daily basis, and are from time to time called upon, usually at short notice, to do a day's work. Although they work on a daily contract, bank

care assistants are paid in accordance with the main payroll system, and employee's income tax and national insurance contributions are deducted. In the event, the claimant in the present case, owing to staff shortages, worked to a greater extent than was perhaps initially envisaged. She worked 4-5 days in every week from 9 September 1991 to 11 June 1992, and her weekly hours always exceeded 24. On 20 June 1992 the claimant injured her neck whilst lifting a patient, and subsequently claimed statutory sick pay. However, her employer, the Granta Housing Society, advised her that she was not entitled to statutory sick pay, because her contract was for less than three months. The claimant challenged this, but was told that there was no entitlement to statutory sick pay because her working schedule was only on a day-to-day basis. On 17 September 1993 the adjudication officer gave a formal decision to that effect. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

4. Section 151(1) of the Social Security Contributions and Benefits Act 1992 provides as follows:-

> "Section 151(1) - Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 152 to 154 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of the Act, a payment (to be known as 'statutory sick pay') in respect of that day."

5. It is clear from the words of the foregoing section that, if a claimant is to obtain statutory sick pay, he has to satisfy <u>all</u> the conditions set out in sections 152 to 154. The crucial condition in the present case is that contained in section 153, and this has, of course, to be complied if a claimant is to succeed. That provision reads as follows:-

> " 153. - (1) The second condition is that the day in question falls within a period which is, as between the employee and his employer, a period of entitlement.
>
> (2) For the purposes of this Part of this Act a period of entitlement, as between an employee and his employer, is a period beginning with the commencement of a period of incapacity for work and ending with whichever of the following first occurs -
>
> (a) ....
>
> (b) ....
>
> (c) the day on which the employee's contract of service with the employer concerned expires or is brought to an end

(d) ....

(3) Schedule 11 to this Act has effect for the purpose of specifying circumstances in which a period of entitlement does not arise in relation to a particular period of incapacity for work."

6. At the initial hearing of 7 November 1994 Mr Bennett accepted that the basis on which the claimant was engaged as a "bank" day care assistant to work in the Home was as described above. His primary contention, however, was that the original contract, which apparently was made orally, was varied by a course of conduct, in that the claimant was employed so extensively that her position should properly be equated with that of a full-time permanent employee of the Housing Association. He pointed out that in practice the employer drew up a rota of work covering the following month, and this rota included both the permanent employees and the claimant herself. Mr Bennett contended there was no differentiation, and the claimant could not escape any period of duty - it was all shift work covering a seven day week - without finding a substitute. The claimant had in effect been working continuously for nine months, and accordingly she was entitled to statutory sick pay. At the resumed hearing Mr Cox repeated in essence the same submission.

7. Mr Scoon at both hearings contended that the claimant had been taken on as a "bank" worker. Her contract was on a strict daily basis. At the end of the day of engagement her contract came to an end, and she entered a further contract on the next day of engagement. The rota merely indicated the days of employment being offered to her, and which it was expected that she would accept. Although she had worked extensively, nothing had happened to disturb the initial contractual relationship.

8. I consider this analysis correct. The evidence clearly shows that the claimant's position was never assimilated to that of a full-time permanent employee. Her working hours per week were clearly less than that of such an employee. This is apparent from what is recorded in the chairman's note of evidence:-

> "The appellant stated that she was put onto the rota system after approximately 2 weeks working for Granta Housing. She worked some 4-5 days in each week. Always more than 24 hours a week. She worked shift work. When she was first interviewed for the post she said that it would be a bank staff appointment, the intention being that she would be called into work when a member of the permanent staff was ill or on holiday. She stated however that the employer had staff shortage problems, and therefore she worked more than half time because of the staff shortage. She understood that it would be a fill-in job. If she had worked as a full-time employee it would have been 37 hours."

9. It should also be borne in mind that the claimant was never entitled to holiday pay. It would have been otherwise had she been a full-time permanent employee.

10. The majority of the tribunal correctly decided on the evidence that the claimant was employed on a day-to-day basis as a "bank" worker, and by reason of this was not entitled to statutory sick pay. They relied on section 153(3) and Schedule 11, paragraph 2(b). Schedule 11 sets out the circumstances in which periods of entitlement to statutory benefit do not arise, and paragraph 2(b) provides as follows:-

" 2. The circumstances are that -

....

(b) the employee's contract of service was entered into for a specific period of not more than 3 months."

As the claimant's contract was on a daily basis, it was clearly for a period of not more than three months, and as a result no period of entitlement to sick pay arose.

11. However, in his address to me Mr Bennett suggested that the tribunal had overlooked paragraph 4(1)(b) of Schedule 11. That provides as follows:-

" 4. - (1) Paragraph 2(b) above does not apply in any case where -

(a) .....

(b) the contract of service (the 'current contract') was preceded by a contract of service entered into by the employee with the same employer (the 'previous contract') and -

(i) the interval between the date on which the previous contract ceased to have effect and that on which the current contract came into force was not more than 8 weeks; and

(ii) the aggregate of the period from which the previous contract had effect and the period specified in the current contract (or, where that period has

been extended, the specified period as so extended) exceeds 13 weeks."

Mr Bennett argued that the principle underlying this provision was that previous contracts should, provided there were no more than eight weeks between them, be linked together, and if the aggregate of the periods of employment exceeded 13 weeks, then a period of entitlement to statutory sick pay could arise. In the present instance, as the claimant had been working for some nine months more or less continuously, and with no interval, as between one contract and another, exceeding eight weeks, she was entitled to statutory sick pay at the time she made her claim.

12. However, at the initial hearing of 7 November 1994 Mr Scoon argued that although, as a matter of principle paragraph 4(1)(b) might well have provided for the aggregation of all previous contracts not separated in any one case by more than eight weeks, it simply did not do this. It provided for only two contracts, the "current contract" and the "previous contract". The effect of this was that paragraph 4(1)(b) was of no assistance to the claimant. For the day on which the claimant incurred the injury was a single day of employment, and if there was added to this the period of the previous contract, which again would be only a day, the aggregate was merely two days, and not the necessary three months.

13. However, at the resumed hearing Mr Scoon, who had in the intervening time been able to consider more fully Mr Bennett's submission, very properly pointed out that, although the claimant could derive no assistance from paragraph 4(1)(b) looked at in isolation, he could, nevertheless, rely on the principle of aggregation of all contracts (subject to the 8 weeks rule) if paragraph 4(2) were taken into account. For that reads as follows:-

"4. (2) For the purposes of sub-paragraph (1)(b)(ii) above, in any case where the employee entered into more than one contract of service with the same employer before the current contract, any of those contracts which came into effect not more than 8 weeks after the date on which an earlier one of them ceased to have effect shall be treated as one with the earlier contract."

I accept that submission. It follows that the claimant was, on the facts, effectively employed under a contract of more than three months' duration, and the disentitling effect of paragraph 2(1) had no application.

14. However, that is not the end of the matter. For it is still necessary to consider the effect of section 153(2)(c). When the claimant became unable to work because of incapacity, then by reason of her being employed on a daily basis, her contract ended with the last day worked. Accordingly, there could be no period

of entitlement, as the contract had already ended.

15. Both Mr Cox and Mr Scoon considered that, if the above was the effect of section 153(2)(c), it effectively neutralised the provisions of paragraph 4 of Schedule 11, and that paragraph had been clearly included in the Act to prevent a claimant being prejudiced where he had entered into a series of short contracts, none of which by itself was for three months or more. I see the force of their criticism, but I am bound by the plain words of section 153(2)(c). Moreover, although that particular provision clearly hits at persons employed on a daily basis, it will also, it would seem, apply to a contract of much longer duration where the incapacity occurs prior to its termination but continues thereafter. For example, supposing a claimant is employed on a 12 months' contract and falls ill on the last day, there will pursuant to section 153(2)(c) be no entitlement to statutory sick pay. Moreover, even if the claimant became entitled, by virtue of an incapacity occurring at an earlier date, to statutory sick pay, he still would not receive it for any period after the expiry of the contract. Of course, if a claimant were employed on an indefinite contract, albeit subject to a fixed period of notice of determination, he would continue to receive statutory sick pay if he fell ill, unless and until subject, of course, to the provisions of regulation 4 of the Statutory Sick Pay (General) Regulations 1982 the employer terminated the contract on giving due notice. I am told that it is now becoming increasingly fashionable for employees to enter into time contracts rather than contracts of indefinite length, and accordingly in certain circumstances entitlement to statutory sick pay will be lost. However, as against that, provided the necessary contributions have been paid, it will be possible to claim sickness benefit.

16. But, in the present instance, where, the claimant only worked on a daily basis, there simply could be no entitlement to statutory sick pay because the contract expired on the day the incapacity occurred. The claimant was caught by section 153(2)(c), and her claim must necessarily fail.

17. The tribunal, although they reached the right conclusion, did so for the wrong reasons, and I must accordingly set aside their decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently determine the matter myself, and dispose of this appeal finally.

18. For the reasons given above, I am satisfied that, for the relevant period, the claimant is not entitled to statutory sick pay. My decision is as set out in paragraph 1

19. For completeness, I should mention that Mr Cox, in his submissions to me, endeavoured to rely on the Employment Protection (Consolidation) Act 1978 in an attempt to establish that the contract of the claimant was for an indefinite period. In particular, he relied on section 49(4) and paragraph 3 of Schedule 13. He contended that, by virtue of the foregoing

provisions, the claimant was entitled, on the facts of the case, to one week's notice of termination of her employment, and accordingly her employment did not terminate on the day she contracted her incapacity. However, at best there would only be (after taking into account the three waiting days) entitlement to four days of statutory sick pay, but in any event I do not see how the Employment Protection (Consolidation) Act 1978 can effect the wording of section 153(2)(c). A daily contract expires at the end of the day, and this is unaffected by whether or not there is entitlement to one week's notice. The claimant might have certain remedies under the Employment Protection (Consolidation) Act 1978, i.e. damages for failure to give proper notice, but that has nothing to do with the effect of section 153(2)(c).

(Signed) D G Rice
Commissioner

(Date) 12 January 1995