

Disallowance from US
of earnings CRAG

DGR/SH/18



89/92

Commissioner's File: CU/041/1992

SOCIAL SECURITY ACTS 1975 TO 1990
SOCIAL SECURITY ADMINISTRATION ACT 1992
CLAIM FOR UNEMPLOYMENT BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 February 1992 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is entitled to unemployment benefit for the inclusive period from 21 August 1991 to 5 September 1991. Moreover, the forward disallowance imposed by the adjudication officer is set aside.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 10 February 1992. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant was present, but unrepresented, whilst the adjudication officer appeared by Mr Mark Jenkin-Rees.

3. The claimant is a draftsman. In commercial terms, he is self-employed, in that he works on various projects at various times for various undertakings. However, the Inland Revenue require him, as, I understand they do all draftsmen, to be an employee, and, in furtherance of this objective, his accountants procured for him an "off-the-shelf" limited company, of which was technically its employee. He was, of course, also a director (and shareholder), and so was his wife. The mechanics of this arrangement were that the user of his services paid the company and the company paid him as its employee.

4. The claimant's work as a draftsman came to an end on 28 June 1991 when the particular contract on which he was then working terminated. His company had received for his work under that contract from 6 April 1991 the sum of some £1,700. The claimant sought unemployment benefit for the inclusive period from 21 August 1991 to 5 September 1991. However, the adjudication officer rejected the claim on the basis that the claimant was engaged in employment from which his earnings were more than £2 on the daily average. He took the view that the claimant was a director of his company, that the company had not been dissolved or even put into liquidation, and that when the sum of £1,700, which was paid to him as a director, was spread over the company's financial year, i.e. over the period from 6 April 1991 to the 5 April 1992, his earnings were in excess of £2 on the daily average. He therefore disallowed benefit for the period in question, and made a forward disallowance up to the end of the financial year. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

5. The tribunal took the view that, throughout the relevant period, and, for that matter, until such time as the claimant's company was put into liquidation, the claimant was a director, and the £1,700 received by the company for his services was paid to the claimant qua director, with the result that such earnings were, for the purpose of ascertaining whether he was in receipt of more than £2 on the daily average, to be spread over the financial year from 6 April 1991 to 5 April 1992 (R(P)9/55, R(G)14/56). The tribunal did not explain why they considered that the £1,700 was payable to the claimant qua director and it was, in the circumstances, a somewhat surprising conclusion. For the functions of a director qua director of a small private company are comparatively slight. He has to attend board meetings - and there are normally very few of those in the case of a small limited company - and he is responsible for compliance with the relevant legal formalities, such as making the annual return and filing accounts. The amount of remuneration that he would be expected to receive for these duties would, in all normal cases, be quite trivial. However, in the present case the claimant was also an employee of the company. The company was in effect hiring him out under contract, and in the normal course of events he would, as such employee, expect to receive remuneration which reflected the value of his services. In other words, he would expect to receive the full £1,700 as the company's employee, less the costs of running the Company. It must be remembered that the company was merely a device required by the Inland Revenue, and was not a commercial reality.

6. Accordingly, at the very lowest the tribunal should have given careful consideration to whether or not the £1,700 was really received by the claimant as a director or was simply pay received as its employee to recompense him for his services. The tribunal's failure to analyse the position in sufficient depth constitutes a breach of regulation 25(2)(b) of the Adjudication Regulations, and on that count I must set aside their decision as being erroneous in point of law.

7. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision. Any doubt that the tribunal might properly have entertained, on the evidence before them, as to whether the £1,700 was merely director's fees, as distinct from salary due to an employee, has finally been resolved by a letter from the claimant's accountant dated 12 February 1992. This reads as follows:-

"... I understand you require clarification as to a breakdown of the remuneration [the claimant] receives from the Company between his pay as an employee of the Company and his payment as a Director of the Company.

The remuneration he earns is generated from his employment as a contract draftsman and is paid for that employment.

As you will appreciate the Company is a small limited company that the actual services of a Director are negligible and relate merely to the approval of the Annual Accounts. No specific payment is made for these services and I am asking if you can accept that the remuneration quoted in my letter of 19 November 1991 relates solely to [the claimant's] employment and not to his position as a Director."

Manifestly, then, the £1,700 was paid to the claimant as an employee, and related to a period prior to the date of claim. There was nothing to suggest that the claimant received any earnings from 21 August 1991 onwards which could be attributed to his functions as a director of his company. Still less could it be said that they exceeded £2 on the daily average.

8. Accordingly, in my judgment, assuming there are no other grounds to invalidate his title, the claimant is entitled to unemployment benefit from 21 August 1991 onwards.

9. My decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 2 November 1992