full extent normal rule - applies to Sunday only worker

RAS/15/LM

Commissioner's File: CU/64/88
Region: London South

SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR UNEMPLOYMENT BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant, a printer warehouseman, worked for some time and at the same time for both News International and Associated Newspapers. The first of those employments was for three nights a week and the other for one night. In January 1986 the claimant lost his job with News International. He had been caught up in the dispute over the move to Wapping. The other job continued. The one night's work in that job commenced on each Saturday evening and continued into Sunday. Following his loss of the News International job the claimant received unemployment benefit for the days on which he did not work. Eventually however the so-called full extent normal rule was applied against him. That was with effect from 27 August 1986 and a forward disallowance was imposed from 30 August 1986 to 27 October 1987. The claimant appealed to a social security appeal tribunal. They upheld the adjudication officer. He now appeals against their decision. At the hearing of the appeal - I heard this case and CU/30/88 together - the claimant was represented by Mr M. Rowland of Counsel instructed by the Tower Hamlets Law Centre, and the adjudication officer was represented by Mr N. Butt of the Office of the Solicitor to the Departments of Health and Social Security.

2. The full extent normal rule is contained in regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 which provides that -

> "(e) subject to paragraph (2), a day shall not be treated as a day of unemployment if on that day a person does no work and is a person who does not ordinarily work on every day in a week (exclusive of Sunday or the day substituted for it by regulation 4) but who is, in the week in which the said day occurs, employed to the full extent normal in his case, and in the application of this sub-paragraph to any person no account shall be taken, in determining either the number of days in a week on which he ordinarily works or the full extent of employment in a week which is normal in his case, of any period of short-time working due to adverse industrial conditions;"

The effect is that a person to whom this provision applies does not get benefit for the days he does not work. Paragraph (2), to which paragraph (1)(e) is subject, provides that -

> "(2) Paragraph (1)(e) shall not apply to a person unless -
>
> (a) there is a recognised or customary working week in connection with his employment; or

(b) he regularly works for the same number of days in a week for the same employer or group of employers."

In this case it is plain and is not disputed that the claimant's part-time work, one day a week, brings him within paragraph (2)(b) - so that paragraph (1)(e) is not prevented by paragraph (2) from applying. The question is whether it applies in the circumstances to which I have referred.

3. Notwithstanding that the claimant's working day for Associated Newspapers commenced on the Saturday he is to be treated as a Sunday worker by virtue of regulation 5 of the 1983 Regulations. And it was Mr Rowland's principal submission that regulation 7(1)(e) could never apply to a person whose only day of work in a week was Sunday. To be caught by the provision the claimant must be "a person who does not ordinarily work on every day in a week (exclusive of Sunday ...)" and he must also be a person "who is, in the week in which the said day [of unemployment] occurs, employed to the full extent normal in his case". Now Mr Rowland had to agree that on the face of it the claimant fitted into the first of those specifications - he did not ordinarily work on every day in a week excluding Sunday - but he contended that if a claimant worked only one day a week then for the rule to apply that day must be some day other than Sunday. That was because, as I understand it, Sundays being expressly excluded from the reckoning at least in relation to the first limb a person who did no work at all would be caught by the rule as his full extent normal would be no work. So no one would ever get unemployment benefit. And it made sense, said Mr Rowland, not to apply the rule against a Sunday only worker because Sunday is in principle not a day for which benefit is payable: sections 14(1)(a) and 17(1)(e) of the Social Security Act 1975. So a person who works on a non-benefit day should not be penalised. Now it seems to me that while Mr Rowland's proposition is somewhat beguiling there is no substance to it because it simply is not right to say that a person who does no work at all would be caught by the rule. Such a person would not in my view be "employed to the full extent normal in his case". He is not "employed" at all and the rule would therefore never be applied against such a person. And it seems to me to be not wholly logical to rule out of unemployment benefit a person who works Saturdays but not one who works Sundays. There is at least one case, C.U. 122/69, where the rule was applied against a Sunday only worker. Mr Rowland had to contend that it was wrongly decided. I do not think it was. It is of course puzzling to know why the first limb of the provision is there. Why would the second limb on its own not have been enough? Mr Butt said that when the provision was originally drafted six day week working was common and the intention was that the six day a week worker should not be caught by the rule. I do not know if that is right but it makes no difference to my rejection of Mr Rowland's principal submission.

4. Mr Rowland then contended that if the rule was capable of applying to the claimant it did not in fact apply because if due regard was had to the claimant's employment history and his future prospects of employment and if the appropriate test was applied it would be seen that Sunday only working had not, at least by 27 August 1986, become the claimant's normal pattern. This is a complex matter. There have been a number of different approaches over the years to the determination of what in any given case is a person's "normal" regime or pattern of work; a number of different tests had been invented to detect normality. How this is to be done has recently been considered by the Court of Appeal in Riley v Chief Adjudication Officer [1988] 1 All ER 457 and by the Court of Appeal and the House of Lords in Chief Adjudication Officer v Brunt [1988] 1 All ER 466 and [1988] 2 WLR 511. Lord Justice Ralph Gibson in the Court of Appeal in the Brunt case summarised (at pages 478 to 479) what Lord Justice Slade had said in the Riley case in this way -

"In reaching that conclusion Slade L.J. considered and expressed his view upon the way in which questions arising under Regulation 7(1)(e) and (2) should be approached:

(i) Whether the claimant is "a person who does not ordinarily work on every day in a week" and "who is in the week in which the said day occurs employed to

the full extent normal in his case" are questions of fact falling to be decided in the light of the particular circumstances of the case.

(ii) The "one year before test", the "50 per cent test" and the "stop gap test" were general tests or guides to assist in the ascertainment of what is "ordinary" and "normal" but they have not been entirely consistently applied.

(iii) He accepted as broadly correct the submission that Regulation 7(1)(e) necessitates the ascertainment of the claimant's ordinary regime or pattern of work at the relevant week and that his working history is only relevant in so far as it sheds light on what is normal for him in that relevant week by facilitating the prediction of what may happen in his case in the near future; and the "stop gap test" is of assistance only in so far as it may help to identify the ordinary working pattern as at the relevant week.

(iv) There is no difference between the concepts of "ordinariness" and "normality" embodied in Regulation 7(1)(e). The essential question posed by the regulation is: Was the claimant's pattern of work in the relevant week the normal pattern for him at that time? and that question is to be answered objectively according to the facts as they are and not as the claimant would wish them to be.

(v) To answer that essential question requires that the officer or tribunal concerned should try to look into the future in order to decide how permanent or transitory the present pattern of work is likely to be.

(vi) If there is clear evidence as to what is likely in the future, that may well be conclusive. For example, a new part-time occupation may be taken up by a worker with the intention of making it henceforward his normal occupation. But the Commissioner may also pay attention to the claimant's past history of both work and unemployment. Evidence of past regular full-time work may carry little weight if it is succeeded by a long period of unemployment. On the other hand, evidence of full-time employment over several years finishing only a short time before the part-time employment started may be strong evidence that the part-time employment has not yet become the normal pattern of work for the particular claimant and is properly to be regarded as "stop gap" employment in his particular case. The stop gap test must be applied with circumspection. Lord Justice Slade agreed with the opinion of the Chief Commissioner in CU/255/1984 as set out above.

(vii) The "one year before test" is only a guideline which cannot supplant the language of Regulation 7(1)(e) but (see decision CU/255/1984 para. 26) "... the prima facie approach of adopting a 'one year before basis'... affords a practical - but certainly not inviolable - approach which ought not to be disturbed..."

(viii) Finally, provided attention is properly directed to all the circumstances including the claimant's pattern of work over the one year (or other such period as may be thought more appropriate) preceding the week in question and to any evidence upon which it is possible to assess his working prospects for the immediately foreseeable future "normality is capable of being established, in an appropriate case, from a pattern of work over a much shorter period than a year"."

And that passage was referred to with apparent approval by Lord Templeman who gave the one speech in the House of Lords in the Brunt case.

5. There is nothing to indicate that the tribunal had before them either the Riley case or

the Brunt case in the Court of Appeal - the latter case had not by then gone to the House of Lords. And there is nothing in the findings of fact made or the reasons given by the tribunal for their decision to indicate explicitly how they approached the problem of 'normal' and what test they applied. The adjudication officer had it seems applied the fifty per cent test. Both Mr Rowland and Mr Butt submitted that that was wrong. The fifty per cent test is of course a refinement of the one year test - it simply looks at the number of days of employment over a one year period: see R(U) 14/59 and R(U) 14/60. And the reason for the refinement is to take account of different or irregular work patterns during the year; in R(U) 14/60 the claimant had worked in the year before her claim for six days in fourteen weeks and for three days in thirty three weeks. Now the claimant in the present case in the one year prior to 27 August 1986 when the rule was first applied against him had worked, until January 1986, for four days and then after January 1986 for one day a week. It therefore seems to me, notwithstanding that both Mr Rowland and Mr Butt agreed to the contrary, to be on the face of it a case to which the fifty per cent rule could sensibly be applied. They were both wrong in my view to assume that the adjudication officer and the tribunal had taken as the relevant period the period of less than one year from when the Sunday only working commenced. However, the tribunal were apparently not referred either to Riley or Brunt and they did not, as is appropriate in the light of the principles explained in those cases, have regard to what future prospects of employment there may have been in case, if there were any such prospects, that should make a difference on the question o 'normal'. So in that respect therefore the tribunal's decision was erroneous in law and I accordingly allow the claimant's appeal.

6. The new tribunal must endeavour to apply the principles as they were summarised by Lord Justice Ralph Gibson in the Brunt case as set out above. They will need to consider and find facts as to the claimant's working history and his future employment prospects. They may use as a guideline (but not as an unyielding rule) for their decision whichever of the tests on the facts as they find them, seems appropriate; in applying any of the tests they should consider whether in the circumstances a different period other than one year should be taken; they must keep in mind that the sole object of the exercise is to answer the question: Was the claimant's pattern of work in the relevant week the normal pattern for him at that time? I should mention R(I) 1/72 which was referred to by the tribunal and by Mr Rowland. In that case the Commissioner appears to have decided that because there had been what he referred to as "a significant change of circumstances" - a reduction of part-time working from three days a week to two - it was inappropriate on the question of 'normal' to look at the past employment, though that remained relevant in relation to regulation 7(2). In my view that decision has been overtaken by Riley and Brunt and the approach to be followed in any regulation 7(1)(e) case including a case where there is a reduction in the amount of part-time employment is that to which I have referred above. I should also mention that, despite the Wapping dispute background to this case, it has never been suggested that the final limb of regulation 7(1)(e) - short-time working due to adverse industrial conditions - applies.

(Signed) R A Sanders
Commissioner

Date: 18 April 1989