

Cu 66/1981

IEJ/BR

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

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1. This appeal does not succeed. My decision is that unemployment benefit is not payable for 28 August 1980 because the claimant is a sea-going share fisherman, and although I am satisfied that it was a day on which he performed no work as a share fisherman he has not proved that he did not neglect to avail himself of a reasonable opportunity of work as a fisherman: regulations 8(5) and (7) of the Social Security (Mariners' Benefit) Regulations 1975.

2. It is not in dispute that the claimant at the material date normally worked as a share fisherman on a fishing vessel which put to sea on that date, and on which work was available for him; but that he stayed ashore and did not sail with her; or that he claimed unemployment benefit for that day; or that his claim was disallowed by insurance officer's decision dated 3 9 80, from which he has appealed to a local tribunal who on 29 9 80 unanimously dismissed his appeal. He did not attend the appeal.

3. When asked, in reference to his claim, why he had not gone to sea that day the claimant indicated to the officer of the Department making the inquiry - whom he has described as a "young girl" - that it was because he had to visit the dentist. He does not now rely on that explanation - he has indicated in the course of his appeal that it was not true.

4. What he has since asserted is that upon the advice of a named GP he attended a named clinic on shore on that day, and that it was on that account that he did not go to sea.

5. He has further intimated that the complaint in respect of which he was so advised was of a "confidential nature" and that on that account he was embarrassed to give the DESS officer who was inquiring the correct information and "automatically said the dentist" - and he authorised inquiry of the (named) doctor as to the truth of his revised explanation.

6. The insurance officer now concerned submits that the material regulation is not one which admits of any escape by proof of "good cause" - and I accept that submission as well founded in literal terms.

Indeed Decision R(U) 9/72 has expressly so held as regards what is under the regulation to be regarded as a "reasonable opportunity".

However, the text of the regulation does say "neglects to" avail himself of a reasonable opportunity, and not "does not avail himself of"; and to my mind the use of "neglects to" necessarily imports the concept of breach of an obligation, legal or moral. The Shorter Oxford English Dictionary definition of to "neglect" includes materially: "3. to fail to perform, render, discharge (a duty) ..."; and can conveniently be paraphrased as "to leave undone that which ought to be done".

Thus, as indicated in R(U) 9/72, events which prevent a claimant from availing himself of a reasonable opportunity of employment such as an accident or unavoidably delayed journey are material to the question whether a claimant has "neglected" to avail himself of a reasonable opportunity of employment.

7. Whilst personal, domestic and family considerations have been held by the above cited decision not to bear on whether a particular opportunity of employment was "reasonable" or not, that decision - whilst stressing that the basic purpose of unemployment benefit is to provide for the misfortune of unemployment happening against a person's will and that (as was pointed out in Decision R(U) 20/64) it is not sufficient to show that a claimant acted reasonably in his own interests - the interests of the National Insurance Fund and of other contributors to the fund have also to be taken into account - does not go on to consider how far, if at all, personal factors may bear on whether a person's omission to avail himself of a reasonable opportunity of employment amounts to "neglecting" so to avail himself.

8. (1) In my judgment there are clearly circumstances in which a claimant's failure so to avail himself, cannot reasonably be cast as amounting to "neglect" on his part - if the legislature meant the standard to be absolute it need only have used the words "does not" in place of "neglects to". This was indeed recognised in paragraph 10 of R(U) 9/72 itself as regards various extraneous "preventing events" there mentioned.

But I see no reason why the line should be drawn so narrowly. I do not propose to attempt any exhaustive catalogue or delimitation of boundaries. But, to take two simple illustrations, it would not in any ordinary usage properly be said - to my mind - that a share fisherman "neglected" to avail himself of a reasonable opportunity of employment by not going to work on - say - the day of a close relative's funeral which in accordance with accepted convention he would be expected to attend - or if attending the deathbed of a spouse or child - "voluntary" as his presence there, and absence from work, would undoubtedly be in the strict dichotomy of "voluntary" and "involuntary" (though otherwise as regards his finding himself in such circumstances).

(2) The inter-relation of sickness (and invalidity) benefit and unemployment benefit is such that a day on which a person is incapable of work by reason of some specific

disease or bodily or mental disablement will not normally fall to be considered in the context of a claim for unemployment benefit - but it could scarcely be held that a share fisherman so incapable had "neglected" to avail himself of a reasonable opportunity of employment.

- (3) So to construe "neglects" is not to "open a floodgate to dubious claims" - the further qualifying requirement as regards unemployment benefit that a claimant is "available for employment" will to my mind adequately prevent that result (see regulation 8(2) of the above regulations).

9. In the claimant's case it is open to question whether, even if his own - revised - account of why he did not go to sea on the material date is accepted, he was "available for work". But it is unnecessary for me to decide his appeal on that ground because the burden of proof is by regulation 8(5) expressly cast on him to show that he has not neglected to avail himself of a reasonable opportunity of employment as a fisherman; and to my mind he has not discharged that burden.

10. (1) The initial explanation given by the claimant was plausible enough as it stood - but on his own later admission untrue - and whether it could have furnished a sufficient answer to "not neglecting" I do not have to decide. But, to put it no higher, it could not have sufficed on its own - further information as to the urgency and severity of the dental circumstances would clearly have been needed.

(2) The revised explanation is no less plausible - but, it cannot in my judgment suffice as it stands to found a successful appeal. Further information as to the urgency and severity of the medical circumstances would be needed, preferably by way of corroborative medical evidence.

11. (1) In that context, and in the absence of any observations from the claimant in answer to the insurance officer's written submissions on the appeal, I gave directions to the insurance officer on 17 December 1981, aimed at following up the claimant's intimation that the doctor whom he asserted had advised him might be consulted for confirmation by a direct approach to that doctor (and also for considering in the light of any information so derived whether the claimant should be advised to request that his claim be treated additionally or in the alternative as one for sickness or invalidity benefit). This direction was sought to be implemented, but the named doctor proved not to have been the claimant's regular doctor and had no records in respect of him or other material information in point.

(2) Since it was known that the claimant's permanent address was in Northern Ireland, strenuous attempts were also made by the DHSS to contact the claimant there and obtain his

co-operation in obtaining additional medical information - but these also have proved abortive.

12. In the circumstances I must decide the appeal on the evidence available - and for the reasons indicated in paragraphs 6 to 8 and 10 above my decision is as indicated in paragraph 1 above.

13. The expense to the public of this appeal is quite disproportionate to the amount in issue. But since the views above I have above expressed as to the meaning of "has not neglected" differ substantially from that contended for by the insurance officer's submissions (which, though the wording here is my own, can fairly be summarised as according to those words the same meaning as "does not" - despite the scope for "justification" contemplated by paragraph 10 of R(U) 9/72 - limited as that is in terms) my decision may serve the additional purpose of providing some further consideration of that phrase.

(Signed) I Edwards-Jones
Commissioner

Date: 11 August 1982

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