VOL. LEAVING — LACK OF INSURANCE — CROSS CAUSE C.P.A.G. 43/95

MJG/SH/4

Commissioner's File: CU/071/1994

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 30 March 1994 as that decision is erroneous in law and I set it aside. My decision is that the claimant left his employment voluntarily on 20 November 1993 but that he had "just cause" for so doing: Social Security Contributions and Benefits Act 1992, section 28(1)(a): Social Security Administration Act 1992, section 23. The claimant is not therefore disqualified for receiving unemployment benefit because of his leaving his employment voluntarily.

2. This is an appeal to the Commissioner by the claimant, a man born on 9 March 1937. The appeal is against the unanimous decision of a social security appeal tribunal dated 30 March 1994, which dismissed the claimant's appeal from the following decision of the adjudication officer (dated 4 January 1994),

> "[The claimant] is disqualified for receiving unemployment benefit from 23 November 1993 to 23 May 1994 (both dates included). This is because he voluntarily left his employment without just cause."

3. The appeal was, at the claimant's request, the subject of an oral hearing before me on 4 May 1995 at which the claimant was present and was represented by Mrs C Cleave, a legal officer of the GMB Union. The adjudication officer was represented by Mrs S Rabas of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to all those persons

for their assistance to me at the hearing.

4. The adjudication officer's summary of facts for the tribunal was as follows,

> "[The claimant] was employed by [an engineering company] for the period 02.06.82 to 22.1.93 as a plater. On 19.10.93 [the claimant] was notified that he was to be temporarily laid off from work due to lack of demand for the Company's services with effect from 20.10.93. On 18.11.93 [the claimant] approached the Managing Director to find out what the work situation was like and to ask how long he was going to be laid off. He was advised that the work situation was very bad and he could not guarantee him any work in the near future. After 4 weeks of temporary lay off [the claimant] applied to take redundancy as in accordance with Employment Protection (Consolidation) Act 1978 [section 88 - see below]. On 24.11.93 [the claimant] was sent confirmation that his redundancy application had been accepted. On the following dates payments representing statutory redundancy pay were made to [the claimant]. 26.11.93, 10.12.93, 24.12.93 and 07.1.94. On 29.11.93 [the claimant] claimed unemployment benefit as a wholly unemployed person."

5. The tribunal made the following findings of fact,

> "The employee was temporarily laid off from work due to lack of demand. There was no guarantee of work resuming. The employee applied for voluntary redundancy. He was not, however, liable to be made redundant had he not so applied. Decided he would have returned to work."

The last sentence of the tribunal's findings of fact is explicable by the fact that, after the claimant appealed to the tribunal, the Department made further enquiries of the employer who stated that if the claimant had not applied for redundancy he would have been back at work since the Company was able to take employees back on 13 December 1993 and would have taken the claimant back. The Company also stated that there was no question of the claimant being made redundant but they were not able to answer the Department's question "Would the employment have continued for a further 26 weeks although it may have been a lay off period?".

6. I have set the tribunal's decision aside because I accede to the concurring submissions of Mrs Cleave and Mrs Rabas that the tribunal erred in law in not considering the provisions of section 28(4) of the Social Security Contributions and Benefits Act 1992 (set out in paragraph 7 below) though this particular subsection was not it seems cited to the tribunal. Consequently the tribunal simply held on the general law that the claimant had voluntarily left his employment and had not shown just cause for doing so. The tribunal also affirmed the 26 weeks

disqualification though they did not indicate whether they had considered its possible reduction, which omission would also constitute an error of law.

7. Both Mrs Cleave and Mrs Rabas submitted to me that the claimant should not be regarded as having left his employment voluntarily at all because they said he came within section 28(4) of the Social Security Contributions and Benefits Act 1992, reading as follows,

> "Unemployment Benefit - other disqualifications etc.
>
> 28(1)-(3) .....
>
> (4) For the purposes of this section a person who has been dismissed by his employer by reason of his redundancy within the meaning of section 81(2) of the Employment Protection (Consolidation) Act 1978 after volunteering or agreeing so to be dismissed shall not be deemed to have left his employment voluntarily."

8. There was cited to me reported Commissioner's decision R(U) 3/91, which held (inter alia), - see headnote,

> "The use of the word 'dismissed' in section 20(3A) of the Social Security Act 1975 [now section 28(4) of the 1992 Act] is not confined to the technical meaning of dismissal in sections 83(2) and 85 of the [Employment Protection (Consolidation) Act 1978]. It also covers the situation where, in anticipation of future redundancies, an employer and an employee mutually agree when and on what terms the employee will leave the employment (paragraphs 16-19)."

9. I should at this point say that I consider that paragraphs 16-19 of that decision (which was given by me) are to be regarded as part of the ratio decidendi of the decision, since they were an alternative reason given for the decision and are not to be regarded as obiter. Indeed the decision was doubtless reported for that reason. I mention this point because it has been suggested in a text book that that part of the decision may not be binding on social security appeal tribunals. I confirm that it is binding upon those tribunals and upon adjudication officers.

10. Both Mrs Cleave and Mrs Rabas submitted that I should extend the ruling in R(U) 3/91 to the circumstances of the present case. I have come to the conclusion that I cannot accept those concurring submissions for the following reasons. Section 28(4) of the Contributions and Benefits Act 1992 provides that a person shall not be regarded as having left his employment voluntarily where he "has been dismissed by his employer by reason of redundancy within the meaning of section 81(2) of the Employment Protection (Consolidation) Act 1978" (my underlining). Those are the words of the subsection and I have no power to ignore or override them. In R(U) 3/91 I held that the word "dismissed"

should not be construed narrowly and confined simply to a dismissal which would give rise to a claim for a statutory redundancy payment by reason of dismissal, under the relevant provisions of the Employment Protection (Consolidation) Act 1978. On the facts of R(U)3/91, the claimant was 'dismissed' in the sense that his employer had initiated the termination of the employment. The reason that there may not be a technical dismissal in such cases is that, to avoid the need for an actual termination date to be given by the employer who has already given warning of impending redundancy, an employee agrees to be selected for redundancy and leave. Nevertheless that employee has either individually, or as one of a number, been told by the employer that the employment will be or is likely to be terminated. Such circumstances do constitute a 'dismissal' within the meaning of section 28(4) of the Social security Contributions and Benefits Act 1992.

11. However, in my judgment, nothing of the kind occurred in the present case. The letter from the engineering company to the claimant dated 19 October 1993 did not of itself constitute an actual dismissal of the claimant. It read as follows,

> "I refer to our recent meeting with Shop representatives at which I explained that because of a reduction in the demand for the Company's services we have no option but to lay you off from work with effect from 20 October 1993. You will receive guaranteed payment of £14.10 per day for the first five days. I very much regret that economic pressures have forced us to take this action and I can assure you that we will take all necessary steps to ensure that the lay-off is as short as possible. Would you please check that your address as above is correct and we have your telephone number so that you can be contacted at short notice."

12. Clearly that is not an actual dismissal of the claimant. If the terms of the claimant's contract of employment, express or implied (eg. by custom and practice at the factory in question) did not permit a unilateral suspension from work, then the employer's letter might constitute a constructive dismissal of the claimant as being a fundamental breach of his contract. But even if that were so, it is quite clear from the circumstances of this case that the claimant had waived any right to treat himself as thus discharged by the employer. His claiming a redundancy payment under the special provisions of the Employment Protection (Consolidation) Act 1978, which are an alternative to claiming by virtue of dismissal, shows that (see below).

13. What in fact occurred is that after he had been laid off, the claimant wrote to the engineering company on 20 November 1993 in the following terms,

> "Because I have now been laid off from 20 October 1993 I now ask that you pay me the redundancy payment I am entitled to under the Employment Protection (Consolidation) Act 1978."

14. That letter is clearly a claim made under the provisions of sections 81 and 88 of the Employment Protection (Consolidated) Act 1978, the material parts of which read as follows,

> "General provisions as to right to redundancy payment
>
> 81. (1) Where an employee who has been continuously employed for the requisite period [as the claimant had] -
>
> (a) is dismissed by his employer by reason of redundancy, or
>
> (b) is laid off or kept on short-time to the extent specified in sub-section (1) of section 88 and complies with the requirements of that section, then, subject to the following provisions of this Act, the employer shall be liable to pay to him ... a 'redundancy payment' ...
>
> (2) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to -
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out particular work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish
>
> .....
>
> (3) In subsection (2) 'cease' means cease either permanently or temporarily and from whatsoever cause, and 'diminish' has a corresponding meaning."

15. At that point I should observe that under section 81(1) the right to claim a redundancy payment is divided into two entirely separate categories i.e. where there is a dismissal by reason of redundancy (section 81(1)(a)) or, as an alternative, where the claimant is laid off or kept on short time for the relevant

period (section 81(1)(b)). Under the latter route the claimant clearly does not have to show any dismissal of any kind by the employer.

16. I now set out the relevant parts of section 88 of the 1978 Act, as follows,

> "Right to redundancy payment by reason of lay-off or short-time
>
> 88. (1) An employee shall not be entitled to a redundancy payment by reason of being laid off or kept on short-time unless he gives notice in writing to his employer indicating (in whatsoever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (in this Act referred to as a 'notice of intention to claim') and, before the service of that notice, either -
>
> (a) he has been laid off or kept on short-time four or more consecutive weeks of which the last before the service of the notice ended on the date of service thereof or ended not more than 4 weeks before that, or
>
> (b) [not relevant to the facts of this case - refers to interrupted periods]
>
> (2) Where an employee has given notice of intention to claim, -
>
> (a) he shall not be entitled to a redundancy payment in pursuance of that notice unless he terminates his contract of employment by a week's notice which (whether given before or after or at the same time as the notice of intention to claim) is given before the end of the period allowed for the purposes of this paragraph, and
>
> (b) he shall not be entitled to a redundancy payment in pursuance of the notice of intention to claim if he is dismissed by his employer (but without prejudice to any right to a redundancy payment by reason of the dismissal): Provided that, if the employee is required by his contract of employment to give more than a week's notice, to terminate the contract, the reference in paragraph (a) to a week's notice shall be construed as a reference to the minimum notice which he is so

required to give.

(3) Subject to subsection (4), an employee shall not be entitled to a redundancy payment in pursuance of a notice of intention to claim if, on the date of service of that notice, it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than 4 weeks after that date, enter upon a period of employment of not less than 13 weeks during which he would not be laid off or kept on short-time for any week.

(4) Subsection (3) shall not apply unless, within 7 days after the service of the notice of intention to claim, the employer gives to the employee notice in writing that he will contest any liability to pay to him a redundancy payment in pursuance of the notice of intention to claim."

17. It is clear that in this case the employer gave no 'counter notice' under section 88(4) that the employment would continue. Indeed the employer accepted the notice given by the claimant under section 88 and made a redundancy payment to him. Both Mrs Cleave and Mrs Rabas submitted to me that that meant there had in truth been a dismissal of the claimant by the employer within the meaning of section 28(4) of the Social Security Contributions and Benefits Act 1992, so that the claimant should not be regarded as having left his employment voluntarily. I cannot accept those contentions. It is clear in my view from the language of section 88 of the 1978 Act that, where a claim for redundancy payment is made on the ground of four weeks' or more lay-off, that is wholly exclusive of a case where the employer has dismissed his employee. Indeed, subsection (2)(a) of section 88 indicates that, as well as the notice of intention to claim, there must also be a notice by the employee to terminate his employment.

18. Admittedly, as indeed Mrs Cleave and Mrs Rabas both stressed, the circumstances of this case, looked at in the abstract, show that there was what is sometimes referred to as a "redundancy situation" within section 81(2) of the 1978 Act since there had been a temporary diminution of the requirements of the business for work which the claimant carried out. But the claimant was not "dismissed by his employer" (section 28(4) of the Contributions and Benefits Act 1992) by reason of redundancy. What happened is that the claimant in fact brought the employment to an end himself by making his claim for a redundancy payment under the alternative provisions of section 88 of the 1978 Act and therefore the tribunal in this case rightly concluded that he had left his employment voluntarily. Although the tribunal did not have cited to them or consider R(U) 3/91, I confirm that the principle outlined in paragraphs 15-19 of that decision does not apply to the circumstances of this case. Nor would R(U)3/91

apply to any lay-off situation unless there were evidence of an actual or constructive dismissal of the employee by the employer either at the time of lay off or subsequently. In any other case a claimant who is laid off from work cannot, in my judgment, bring himself within section 28(4) of the 1992 Act and R(U) 3/91 is inapplicable.

19. However where I part company with the tribunal in this case is in their finding that the claimant had not "just cause" for leaving voluntarily. The onus is of course upon a claimant to show, once leaving voluntarily has been established by the adjudication officer, that he has "just cause" for doing so. Merely claiming a redundancy payment after four weeks' lay-off, under section 88 of the Employment Protection (Consolidation) Act 1978, would not of itself show "just cause" for leaving voluntarily. It all depends on the facts of the case. In the present case on its facts, Mrs Cleave and Mrs Rabas both submitted to me that the claimant had shown "just cause" for leaving and I accept their submissions on this point. The claimant acted perfectly properly. He had made an enquiry of the Managing Director as to whether the lay off was to go on for any considerable length of time and when the answer was that there was no foreseeable prospect of its coming to an end, he then in fact obtained other employment, which unhappily for him ceased to materialise when it was due to start. In my judgment on the facts of this case the claimant did therefore act properly and showed "just cause" for leaving. But that is simply a finding on the facts of this particular case and, as I have already indicated, does not necessarily apply universally to cases where there is a lay-off, no dismissal actual or constructive, and the claimant claims a redundancy payment after the minimum of four weeks (under section 88 of the 1978 Act). All the circumstances must be looked at in such a case to determine whether there is "just cause" for leaving. If it is decided that there is not "just cause" for leaving in a particular case, then clearly of course the adjudicating authority should give careful consideration to whether or not the maximum 26 weeks' disqualification period should be reduced in the case of some one who is laid off and then chooses to leave his employment voluntarily. That will depend on the facts of the individual case.

(Signed) M.J. Goodman

Commissioner

(Date) 25 May 1995