

Meaning of compensation payment
under reg 7(1)(d) & 7(6) USI Reps

GPAG

★ 90/92

MJG/SH/9

Commissioner's File: CU/088/1991

SOCIAL SECURITY ACTS 1975 TO 1990

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 3 July 1991 as that decision is erroneous in law and I set it aside. My decision is that the sum of £15,700 paid by the claimant's employer to the claimant in December 1990 was not "compensation" within the meaning of regulations 7(1)(d) and 7(6) of the Social Security (Unemployment, Sickness, and Invalidity Benefit) Regulations 1983 nor is it a payment under regulation 7(1)(k) of the 1983 Regulations. Consequently the days in the inclusive period from 4 December 1990 to 3 February 1991 were days of unemployment for the purposes of unemployment benefit: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a man who was employed by a Housing Association from 7 October 1985 to 3 December 1990, on which latter date his resignation from his employment took effect. The appeal is against the majority decision of a social security appeal tribunal dated 3 July 1991 which, on a reference to it by the local adjudication officer, decided that the claimant had on or about 3 December 1990 received from his employers "a compensation payment" within the meaning of regulations 7(1)(d) and 7(6) of the Social Security (Unemployment, Sickness Benefit, and Invalidity Benefit) Regulations 1983, with the result that the days from 4 December 1990 to 3 February 1991 could not be regarded as days of unemployment, those days being the "ineligible period" within the meaning of regulation 7(5) of the 1983 Regulations.

3. The appeal was the subject of two oral hearings before me. The first was in Liverpool on 24 June 1992 at which the claimant was present and addressed me. The adjudication officer was

represented by Mr S Cooper of the Office of the Solicitor to the Departments of Health and Social Security. The second hearing was after a direction by me requiring additional evidence and took place in London on 8 October 1992. At that hearing the claimant was not present but was represented by his wife who addressed me and also gave evidence to me. The adjudication officer was again represented by Mr S Cooper. I am indebted to all those persons for their assistance to me at the hearings.

4. The facts of the case are shortly these. The claimant was employed as a Housing Officer by a Housing Association. His claim for unemployment benefit was disallowed ultimately for the inclusive period from 4 December 1990 to 3 February 1991 on the ground that he had received from his employers on or about 3 December 1990 a payment of £15,700 described by the employers in their replies on form UB85 as "a payment for loss of office". In answer to a question from the local office of the Department, "Please give a breakdown of the settlement amount received by [the claimant] the employers replied, "The settlement was a payment of £15,700. It was not broken down into various elements." In evidence to the tribunal, the claimant said, "I think the £15,700 was for loss of office and according to advice I have received .. I don't think that this counts as compensation". The tribunal held by a majority that the payment was a "compensation payment" within regulations 7(1)(d) and 7(6) of the 1983 regulations. The dissenting member said that the £15,700 was a "Payment for loss of office. It was not a payment in lieu of notice." However, if the payment were a payment for loss of office, I hold that it would in fact come within the extended provisions of regulation 7(1)(d) and (6) (definition of "compensation") of the 1983 Regulations, so the ground for dissent is erroneous in law.

5. The tribunal in its reasons for decision said, "It is necessary to read this decision in conjunction with the decision of this tribunal on an appeal relating to good cause for late claim heard on the same day." In their record of decision relating to the late claim appeal, the tribunal recorded the fact that the payment of £15,000 had been paid as the result of industrial tribunal proceedings taken by the claimant against his employer. They also held that the claimant had good cause for late claim, a decision which is not under appeal to the Commissioner.

6. In written observations to the Commissioner dated 21 December 1991, the claimant said of the £15,700, "The payment I received from my employer was made entirely within the context of my complaint to the Commission for Racial Equality and subsequent Industrial Tribunal Hearing. The payment was an implicit acknowledgment of the fact that I have suffered racial discrimination by my employer over a considerable period of time. Had I not withdrawn my Industrial Tribunal case I would not have received any of this payment, irrespective of whether or not I resigned. My employer has provided written evidence that this sum was not broken down. It would therefore be contrary to this evidence to argue that any proportion of this sum was paid

specifically in respect of termination of employment or in lieu of notice. My evidence to the Social Security Appeal Tribunal concerning the terms of the payment has not been reported in full. Please note that this is a confidential agreement. However, to assist the Commissioner, I can confirm that the first condition of the Agreement was that I withdraw my application to the Industrial Tribunal."

7. At the hearing before me in Liverpool on 24 June 1992, I directed that the relevant industrial tribunal documentation be produced to me. As a result the claimant has provided copies of the Originating Application (Form IT1) and Notice of Appearance (Form IT3) before the industrial tribunal together with a copy of a "Decision of the Industrial Tribunal", sent to the parties on 17 December 1990, following hearings before the tribunal on 10 September 1990 and 3 December 1990.

8. That documentation was not before the original tribunal that heard this case and I bear in mind that I have no power to take into account new evidence unless the original tribunal erred in law. However, I hold that the tribunal did err in law in that, although they clearly took considerable trouble with this difficult case, they did not in fact call for the industrial tribunal documentation to establish or try to establish the nature of the payment of £15,700 in this case, which payment admittedly had been made as a result of the industrial tribunal proceedings. It follows that I must set their decision aside as being erroneous in law and I now exercise my power under section 23 of the 1992 Act to take evidence and make my own findings of fact.

9. The relevant features of the industrial tribunal documentation are as follows. The Originating Application states that the type of complaint which the claimant was making was, "Whether or not I was unlawfully discriminated against in breach of the Race Relations Act 1976". The Application makes it clear that the claimant was not complaining about dismissal by reason of racial discrimination but about discrimination during the course of his employment. He states on the Application that the discrimination first took place or was known about on 4 April 1990. Indeed the Application was received by the Industrial Tribunals' Office on 3 July 1990. That was of course long before the claimant's employment terminated in December 1990. The Notice of Appearance from the employers does not dissent from the nature of the complaint and indeed states that the claimant was not dismissed.

10. The actual Decision of the Industrial Tribunal reads as follows,

"The unanimous decision of the Tribunal is that, by consent, the claim is withdrawn.

REASONS

1. This is a full decision.
2. Mr M and Mr McD, counsel for the parties, told us that terms of settlement had been agreed. Mr M asked that the application be withdrawn. We agreed."

11. That decision therefore does not indicate in any way on what terms the settlement had been agreed. However, the evidence before me is that the terms of settlement were that the employers should pay £15,700 to the claimant, a sum, incidentally, which appears to be considerably in excess of the maximum limit (£10,000) of compensation that an industrial tribunal can award for racial discrimination (see Race Relations Act 1976, section 56(2)).

12. In evidence before me at the hearing on 8 October 1992, the claimant's wife stated that the settlement was arrived at on 3 December 1990 at the outset of the full hearing of the claimant's application. The prior hearing on 10 September 1990 was merely a preliminary interlocutory hearing. The claimant's wife stated that she had been party to some of the discussions between counsel for the claimant and for the employers and it was clear to her from that discussion that the only object of compensation was the claimant's claim for racial discrimination during his employment. I accept the claimant's wife's evidence, on which she was questioned by Mr Cooper. Both the claimant's wife and Mr Cooper suggested reasons why the settlement figure of £15,700 was so large. Although I have some doubts about this matter and cannot help but wonder whether there was an element in the £15,700 representing "compensation for loss of office", I have ultimately come to the conclusion that the adjudication officer has not discharged the onus of proof upon him to show on a balance of probabilities that the claimant's prima facie entitlement to unemployment benefit for the period in question (i.e. 4 December 1990 to 3 February 1991) was displaced by the claimant receiving a "compensation payment" within regulations 7(1)(d) and 7(6) of the 1983 Regulations.

13. I put it in that way relating to the onus of proof because of the considerable doubts in this case despite efforts to obtain as much evidence as possible. However, it is to be noted that it looks as if the claimant had not in fact worked much beyond 10 October 1990 and there had been a period of some two months (as it happens, the notice period to which the claimant was entitled) before his resignation actually took effect on 3 December 1990. That could therefore explain why there is no payment in lieu of notice recorded by the employers on form UB85 and why the £15,700 payment was in truth not a "compensation payment". I accept the claimant's wife's evidence before me at the hearing on 8 October 1992 that the references to "compensation for loss of office" resulted from discussion by the minority tribunal member in the social security appeal tribunal, which had tended to proceed on the presumption that a payment for compensation for loss of office was exempt from being taken into

account in disentitling to unemployment benefit. The expression "loss of office" had, however, been used by the employers at an earlier date (see para.4 above)

14. I therefore conclude that it has not been shown that this sum of £15,700 was a "compensation payment". It was common ground between the parties that it could not be brought within regulation 7(1)(k) of the 1983 Regulations relating to industrial tribunal orders or awards, since the decision of the industrial tribunal referred to above was neither an order nor an award but merely recorded that the Application had been withdrawn, as part of a settlement.

15. Lastly, I should emphasise that I have arrived at this decision on its own somewhat special facts. It depends entirely on the detailed documentary evidence and on the oral evidence at the two hearings of the claimant and his wife to me respectively. It cannot therefore be regarded as any kind of precedent for future cases, where the facts may vary. The wording of regulation 7(6) of the 1983 Regulations relating to "compensation payments" is extremely wide and would normally 'catch' almost any payment made on the termination of employment. In the present case, however, I do not regard the £15,700 as having been proved to be "any payment made to or for a person in respect of the termination of the employment" (regulation 7(6) of the 1983 Regulations). Accordingly the claimant's appeal must succeed.

(Signed) M.J. Goodman
Commissioner

(Date) 2 November 1992