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SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Lawrence Farrelly

Local Tribunal: St Helens & District

Case No: 2/3

ORAL HEARING

1. My decision is that:-

- (1) unemployment benefit is not payable to the claimant for 27, 28 and 29 October 1983 because title to benefit is precluded by regulation 7(1)(e) and (2) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, since consolidated in a similarly numbered regulation in the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983; and
- (2) this decision is to be treated as a disallowance of any further claim for unemployment benefit for any Thursday, Friday or Saturday in any week in the inclusive period from 31 October 1983 to 31 October 1984 on which the grounds stated in paragraph 1(1) above have not ceased to exist (regulation 12(5) of the Social Security (Claims and Payments) Regulations 1979).

Representation

2. I held an oral hearing of this insurance officer's appeal. The claimant, who appeared and gave evidence, was represented by Miss L Findlay of the Child Poverty Action Group. The adjudication officer was represented by Mr G Berry of the Solicitors Office of the Department of Health and Social Security.

The facts

3. The claimant worked from some 23 years as a coal miner and then for 12 years with Fosters of Rainford. He lost his job through redundancy in each case. He was then unemployed for 2½ years until 31 March 1983 when he started work on a Community Programme Scheme working 2 days a week. This work ceased in September 1983 but on

10 October 1983 he started a further Community Programme Project working with the Community Task Force in Preston. He was employed as a labourer and it is not in dispute that his employment was employed earners' employment. The terms of his employment were that he should work on Mondays, Tuesdays and Wednesdays, his hours being from 8 am to 4.30 pm on Mondays and Tuesdays and from 8 am to 12 pm on Wednesdays. For these three days work his agreed rate of pay was £44.

4. The Community Programme, which is the successor to the Community Enterprise Programme, is administered by the Manpower Services Commission on behalf of the Secretary of State for Employment to help long-term unemployed adults improve their prospects of obtaining permanent jobs by providing them with temporary employment, either full-time or part-time, on projects of benefit to the community. Individual employees may not be employed under the programme for more than 52 weeks, except for certain key employees: see paragraphs 1 and 3.i. of The Agents' and Sponsors' Handbook on the Community Programme. The statutory basis of this type of scheme is the Employment and Training Act 1973.

#### The insurance officer's decision

5. On 4 November 1983 an insurance officer decided that unemployment benefit was not payable for 27, 28 and 29 October 1983 because the claimant regularly worked for the same number of days in a week for the same employer or group of employers and he was employed to the full extent normal in his case in the week in which these dates fell. He also gave a decision of "forward disallowance" under regulation 12(5) of the Claims and Payments Regulations 1979 in respect of the inclusive period 31 October 1983 to 31 October 1984. The claimant appealed against these decisions to a local tribunal.

#### The local tribunal appeal

6. In his grounds of appeal to the local tribunal, the claimant said that he had been working part-time for the last 25 weeks. Prior to this he was unemployed for 2½ years. He only took this part-time work as a stop-gap whilst looking for full-time work. He did not feel this pattern of work that he was undertaking at the moment could be considered his normal extent of working and did not therefore feel that he should be penalised under the "full extent normal" rule.

7. Before the local tribunal, the claimant's representative said that the basis of his argument was that the claimant took the part-time job as a stop-gap: see Commissioner's Decision C.U. 518/49. If one looked at the previous year he had been working part-time but mainly he had been working 2 days. The claimant only took the job because he could not get full-time work due to adverse industrial conditions. He had worked full-time for the majority of his working life. The insurance officer argued that looking back over the 52 weeks it did not seem to be stop-gap.

8. The local tribunal allowed the appeal and decided that the claimant was entitled to unemployment benefit for 27, 28 and 29 October 1983. After stating that the facts were set out in the case papers and were not disputed they recorded as material facts that the claimant worked as a miner and for a small firm in Rainford continuously for 35 years. He then became unemployed which condition lasted 2½ years. He then started work on a Community Programme Scheme. During this occupation he worked 2 days per week and latterly 3 days. He had continued to seek full-time employment. The tribunal found that regulation 7(1)(e) did not apply to him. They considered that the words in the last sentence of paragraph 16 of C.U. 518/49 applied to the claimant's case.

9. The insurance officer sought leave from the chairman to appeal against the local tribunal decision on the ground that, in the current economic climate, work on a Community programme after a lengthy spell of unemployment could not be regarded as "stop gap" in the context of C.U. 518/49. Leave was granted.

#### Arguments and evidence on the present appeal

10. The claimant gave evidence before me, which I accept, that he was, while employed on the Project, still seeking full-time work. The claimant's representative conceded, rightly (and in an investigatory jurisdiction such as this I would not have accepted a concession which I considered was wrongly made) that the claimant's work on the Community Project, for which he was paid £44 for his three days' work in each week, was employed earners' employment. The remaining undisputed facts are set out in paragraphs 3 and 4 above.

11. The representative of the adjudication officer referred me to Decision C.U. 518/49, including the last sentence of paragraph 16, to paragraph 10 of R(U) 14/60 and to paragraphs 6 and 9 of R(U) 1/72. It was his contention that a claimant's wish to obtain full-time employment was not relevant in the context of regulation 7(1)(e). The matter must be looked at objectively, normality and "ordinarily" were established at the outset and R(U) 1/72 should be followed in rejecting on the facts that the employment was stop-gap employment. The claimant's representative referred me to Decisions R(U) 30/53, paragraph 6; R(U) 14/59, paragraphs 15 and 16; and R(U) 18/67 at paragraph 5. She argued that the claimant's employment was stop-gap employment, while he was looking for full-time work and that accordingly regulation 7(1)(e) did not apply to the claimant.

Regulation 7(1)(e)

12. Regulation 7(1)(e) of the Unemployment, Sickness and Invalidity Benefit Regulations provides -

"7.(1)(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 regulation applies to those in whose employment there is a recognised or customary working week or who regularly work for the same number of days in a week for the same employer or group of employers (regulation 7(2) of the said Regulations). "Week" in the context of regulation 7(1)(e) and 7(2) means a period of 7 days beginning with midnight between Saturday and Sunday. (Schedule 20 to the Social Security Act 1975).

Application of regulation 7(1)(e)

13. In the claimant's case the regulation applies because he regularly works for the same number of days in a week for the same employer. This is not due to adverse industrial conditions but because his terms of employment provide that he shall work on Mondays, Tuesdays and Wednesdays.

14. In applying the regulation, the ordinary or normal extent of a person's employment is, it has been settled for many years, to be determined objectively: see Commissioner's Decision R(U) 13/60. Thus the fact that a person is anxious to obtain fuller employment is in general irrelevant. As was explained in Commissioner's Decision R(U) 2/83, at paragraph 15, "normal" and "normally" and "ordinarily" should be interpreted by reference to similar tests. "Where there is a pre-ordained programme it may not be necessary to wait at all before normality is established (see Decision R(U) 18/62)". The Commissioner in Decision R(U) 1/72 (see especially paragraphs 6 and 9) also made it clear that what is normal and ordinary may be established at the outset by the terms of the claimant's contract. In so doing, one looks at the period in issue, not to past employment. As was explained by the Commissioner in the unreported Decision on Commissioner's file No. C.U. 207/83 at paragraph 9.

"In the context of the regulation 'ordinarily' operates on the work being done in a week and is conjunctive '... on

that day a person does no work and is a person who does not ordinarily work on every day in a week' (my emphasis). It does not refer to past employment and when, as in this case, it is plain from the terms of the contract of employment that the claimant does not work on every day in a week, regulation 7(1)(e) applies, although it is customary, but not required by law, to allow some time to elapse before applying it. Likewise 'the full extent normal in his case' relates to the work being done and not to past employment."

See, also, the decision on Commissioner's file C.U. 241/1983. That was a case where the claimant was in part-time employment under the auspices of the Manpower Services Commission Community Programme and the Commissioner there concerned quoted, and applied, the above passage.

### Conclusion

15. Applying the law as above explained, to the present facts, on each of the days in issue, namely 27, 28 and 29 October 1983, the claimant had a pre-ordained pattern of employment which had been established by the terms on which he was engaged. It was plain from these terms that on each of those days he was a person who did not ordinarily work on every day in a week. His pattern of employment was that he worked for the whole day on Mondays and Tuesdays and for a half day on Wednesdays and did no work on the remaining days of the week. From the outset, that is to say from 10 October 1983, this was the position and work on the above mentioned days was the full extent normal in the claimant's case.

16. As regards the suggestion that this was "stop-gap" employment which was the argument accepted by the local tribunal, in my judgment I am bound to reject it. The claimant, albeit much against his own wishes, has the misfortune to be one of the long-term unemployed. Apart from his current job on a Community Project and a previous similar job, both part-time, he had had no work for 2½ years. Where there is a short gap between spells of full-time employment during which a man has to take temporary part-time employment for a short period of time, it may be possible, on the particular facts, to say that the claimant is a person who ordinarily works on every day in the week, following the suggestion in C.U. 518/49 paragraph 16. The suggestion was adopted in Decision R(U) 30/53 where on the facts a man, after full-time employment for many years proved unable to continue in the same occupation because of angina pectoris, then had a couple of short spells of full-time employment but for a period of 3 months was employed for week-ends only, before taking up full employment again, and it was held that he was still a person who ordinarily worked on every day of the week. But the present case is quite different.

The claimant had been unemployed, prior to obtaining work on a community project part-time on 31 March 1983, for so long that he was in fact a person who ordinarily (through no fault of his own) did not work. He was one of the long-term unemployed, and it cannot possibly be said that on the days in issue the claimant was a person who ordinarily worked on every day of the week or that the full extent normally applied to days other than those fixed by his current terms of employment.

17. The appeal accordingly succeeds. My decision is set out in paragraph 1. I have considerable sympathy with the claimant. But my jurisdiction is limited to the interpretation of the statutory regulations as they are currently enacted. I have no power to amend or alter them.

(Signed) V G H Hallett  
Commissioner

Date: 7 September 1984

Commissioner's File: C.U 106/1984  
C I O File: I.O. 3139/UB/84  
Region: North Western