

MJG/SH/7

Commissioner's File: CU/113/1989

SOCIAL SECURITY ACTS 1975 TO 1990

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 7 February 1989 as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given namely that, in connection with his claim for unemployment benefit made on 5 August 1988, the claimant is to be regarded as available for employment for the inclusive period from 2 August 1988 to 4 August 1988: Social Security Act 1975, sections 17(1) and 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a man claiming first invalidity benefit and then unemployment benefit (see below). The appeal is against the unanimous decision of the social security appeal tribunal dated 7 February 1989 which dismissed the claimant's appeal against a decision of the local adjudication officer issued on 12 August 1988 in the following terms,

"Unemployment benefit is not payable from [Tuesday] 2 August 1988 to [Thursday] 4 August 1988 (both dates included). This is because the claimant was not available to be employed on those days. (Social Security Act 1975, section 17(1)(a)(i))."

3. The facts were briefly these. Up to 1 August 1988, the claimant was claiming invalidity benefit. It appears from his evidence to the tribunal that his doctor, having heard that the regional medical officer of the Department had found the claimant to be fit for work, had then on Monday 1 August 1988 signed off the claimant to start work the following Monday namely 8 August 1988. However on 5 August 1988 the claimant received a letter from the Department containing an adjudication officer's decision disallowing the claim for invalidity benefit for the inclusive period from 2 August 1988 to 6 August 1988. As soon

as the claimant received that letter on 5 August 1988 he attended the unemployment benefit office claiming unemployment benefit for that day and also a back-dated payment of unemployment benefit for the period 2 August to 4 August 1988, Because the claimant had stated on the relevant form that he was not looking for work during that period (because he thought he was still unfit for work) the adjudication officer, however, disallowed the claim on the ground that the claimant had not shown that he was available for employment in the period 2 August to 4 August 1988. The tribunal affirmed that decision.

4. The adjudication officer now concerned in a written submission dated 31 January 1990 supports the tribunal's decision and does not support the claimant's appeal. In observations to the Commissioner the claimant has referred to this as a "catch-22" situation and so to a certain extent it is. One answer could of course be that the claimant should have appealed against the disallowance of invalidity benefit for the period from 2 August 1988 to 6 August 1988. However if he chooses to regard the adjudication officer's decision that he was fit for employment during that period as correct, he should not in my view be thereby penalised unless there is clear provision to that effect in the legislation.

5. The question in these circumstances is what is meant by the unamended section 17(1)(a)(i) of the Social Security Act 1975 (subsequent amendments relating to "actively seeking work" were not then in force). Section 17(1)(a)(i) as in force at that time read,

" 17. (1) For the purposes of any provisions of this Act relating to unemployment benefit .. -

(a) subject to the provisions of this Act, a day shall not be treated in relation to any person -

(i) as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, available to be employed in employed earner's employment;"

There is no question of the claimant being deemed to be available for employment. The Regulations in force at that time contain no appropriate provision. The question is therefore whether he was actually "available to be employed".

6. A number of reported Commissioners' decisions have been cited by the adjudication officers now concerned, eg. R(U) 3/65, R(U) 4/66, R(U) 5/80 and R(U) 1/82. However, availability is essentially a question of fact and depends on the circumstances of an individual case. In the present case, given that the claimant had been held by the regional medical officer to be

capable of employment and that decision had not been challenged, it must be taken at face value. That meant that the claimant (whether he realised it or not) was objectively available for employment if such employment had been offered to him. I appreciate that the normal rule is that one cannot just sit idly by and wait for employers to offer jobs but the particular circumstances of this case do mean that the claimant acted perfectly justifiably. Objectively he was available for employment. Consequently his appeal must succeed.

7. I have expressed my decision simply as a decision on availability because the local adjudication officer will need to work out the question of whether payment should actually be made, bearing in mind the question of waiting days and the maximum period for payment of unemployment benefit. If any difficulty arises over this matter it can be referred back to me for Supplemental Decision.

8. Lastly I should observe that the new provisions of the law as to "actively seeking employment" did not come into force until 9 October 1988 but it is of interest to note that, under those provisions (made by way of amendment to section 17(1)(a)(i) of the 1975 Act) regulation 12D(1)(a), introduced at the same time, provides that a person "shall be deemed to be actively seeking employment" in respect of "the week which includes the first day for which a claim for unemployment benefit is made since that person was last in employment". Although that provision was not in force at the relevant time it indicates the way in which the framer of the regulation regarded the requirement of "actively seeking employment" as being fulfilled. By analogy that reasoning could of course also apply to this case.

(Signed) M.J. Goodman
Commissioner

(Date) 4 February 1992