CU 170/1981

JGM/VC

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision No C.U.2/82

1. My decision is that the claimant was not during the period from 16 to 24 October 1980 a seasonal worker and that unless there is some other obstacle to the payment to him of unemployment benefit for that period such benefit is payable. The forward disallowance imposed by insurance officer confirmed on appeal by the local tribunal will lapse.

2. The claimant is physically disabled in as much as he has only one lung and a weakness in his feet. Despite this he worked for many years as a public service vehicle driver and from 1977 as a coach driver. His employment in the latter capacity has in fact been for the summer months only. His last employment as a public service vehicle driver ended in December 1976 and he had between then and the period before me been employed as a coach driver for the following periods:-

9 4 77 to 22 10 77
20 4 78 to 18 10 78
25 3 79 to 18 10 79
17 4 80 to 15 10 80

He had had no other employment since 1976.

3. He claimed unemployment benefit from 16 October 1980 but the insurance officer reached the conclusion that the claimant had by that time become a seasonal worker within the meaning of regulation 19 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 S.I.1975 No 564. He ought in strictness to have referred to the similarly worded regulation substituted by the Social Security (Unemployment, Sickness and Invalidity Benefit) Amendment (No 2) Regulations 1979, S.I.1979 No 940 to which I shall refer as the 1979 regulation. A seasonal worker in terms of the 1979 regulation

has to satisfy certain additional conditions in order to qualify for unemployment benefit during his "off-season". The insurance officer did not consider that the claimant satisfied one of the additional conditions and disallowed the claim for the period in paragraph 1 and made a forward disallowance. His decision was confirmed on appeal by the local tribunal and the claimant now appeals to the Commissioner.

4. Since the local tribunal hearing the claimant has produced evidence (not challenged by the insurance officer) that in both the years 1979 and 80 when he was dismissed for the winter another man was taken on in his place. Also since then a Tribunal of Commissioners has in Decision C.U.7/81 (unreported) considered the meaning of the term "seasonal worker".

5. It cannot I think be suggested that the claimant satisfied at the relevant time the additional condition for benefit contained in regulation 19(2)(b) of the 1979 regulation (which relates to expectations of a substantial amount of employment during the off-season). The sole question for determination is thus whether the claimant was at the time a seasonal worker, a term defined in regulation 19(1) of the 1979 regulation as follows:-

> ""seasonal worker" means /a/ a person whose normal employment is for a part or parts only of a year in an occupation or occupations of which the availability or extent varies at approximately the same time or times in successive years; or /b/ any other person who normally restricts his employment to the same, or substantially the same, part or parts only of the year; and for purposes of this definition the following provisions shall apply-
>
> (i) .....
>
> (ii) in construing the expression "normal employment", regard shall be paid to factors inherent in the nature or conditions of the occupation or occupations in which that person is engaged, and not to factors abnormal to that occupation or occupations notwithstanding that those factors persist for a prolonged period."

The foregoing definition has been in existence in more or less this verbatim form since the coming into force (on 15 August 1952) of the National Insurance (Seasonal Workers) Amendment Regulations 1952 S.I.1952 No 1466. These regulations introduced among other things sub-paragraph (ii) above.

6. It is clear from the above definition that a person may be a seasonal worker in one or other of two ways which I have designated above by the letters /a/ and /b/. The /b/ designation comprehends people who restrict their employment to the same or substantially the same part or parts of the year, who might be called "voluntary" seasonal workers. Although there is evidence here that the claimant

loses his employment during the winter because his medical condition makes him unsuitable for the maintenance and other work given to drivers during the less busy season, there is no question of the claimant's restricting his employment to those parts of the year during which he gets employment as a driver and he does not fall under the /b/ part of the definition.

7. The /a/ part of the definition relates to the "involuntary" seasonal worker who finds that against his wishes his normal work is for a part or parts of the year in an occupation of which the availability or extent varies at the same or approximately the same time in each year. As to the latter part of the definition it is established that the availability etc of any occupation is to be regarded as varying at different parts of the year if it so varies in the claimant's district even if it does not vary nationally; see Decision C.U.7/81 at paragraph 15. The claimant lives and works in a seaside area, where I have no doubt that the availability of work as a coach driver varies at approximately the same time in each year. I have therefore to consider whether at the time in question it ought to be said that the claimant's"normal employment" was for a part only of the year in the occupation of coach driver.

8. It has become almost conventional in determining whether a person's normal employment is for a particular part or parts only of a year to apply the so-called three-year rule. As propounded in Decision R(U) 4/75 the rule required that the three years of the rule should be calculated forward starting with a claimant's first spell of employment in a particular year (as defined in the regulation) and that a person should accordingly not be regarded under the rule as a seasonal worker until there had been three completed cycles of on-season and off-season starting from that date. There is no doubt that under this rule the claimant here had by October 1980 completed three complete cycles. But it was emphasised in paragraph 16 of the decision that the rule should be regarded as a yardstick and not a magic wand and that many cases would make the application of the rule unnecessary or inappropriate. I have to consider whether this case is one, in view of the evidence that it is the claimant's medical condition and not the seasonal nature of the work that has resulted in the claimant being unemployed each winter.

9. The insurance officer now concerned has referred me to a passage in Decision R(U) 43/52 where the Commissioner (obiter however as he decided the case in favour of the claimant) said:-

> "It is settled law that a man may become a seasonal worker even though it is his infirmity or other circumstances beyond his control which prevent him from obtaining employment all the year round"

citing as authority for this Decision R(U) 3/51. Decision R(U) 11/55 is perhaps to the same effect, though this decision was criticised on other grounds in paragraph 16 of Decision C.U.7/81. I am very puzzled

about this. Decision R(U) 43/52 was given in relation to a period after the 1952 amendment came into effect and yet the Commissioner (though he alluded to the fact that the amending regulations had been made) did not refer in any way to the predecessor of sub-paragraph (ii) set out in paragraph 5 above. In those circumstances I find it impossible to take the above cited passage as an authoritative decision that the law on this question laid down in R(U) 3/51 is unaffected by the introduction of that sub-paragraph.

10. The sub-paragraph provides that in construing the expression "normal employment" regard shall be had to factors inherent in the nature or conditions of the relevant occupation and not to factors abnormal to that occupation. The state of the claimant's health is certainly not a factor inherent in the occupation of coach driver, and is not thus one of the factors to which regard is expressly to be had. Nor, I think, is it one of the factors as to which regard is expressly not to be had. The sub-paragraph was (according to the National Insurance Advisory Committee Report cited in paragraph 14 of Decision C.U.7/81) introduced to avoid the possibility that a pattern of apparently normal employment at a particular time of year resulting from abnormal economic conditions such as a recession rather than from the nature of the work done could make a person into a seasonal worker. But the sub-paragraph is not confined to this and I have reached the conclusion that its intention was to restrict the matters to be taken into account in considering whether a person's normal employment is for a particular part of the year to feature inherent in the employment (or in the employment as carried on in the area where the claimant works) to the exclusion of extraneous factors like the state of his health. It may of course be that the present recession was a cause of the claimant's losing work in the winter, if it has led to their being in winter a pool of fitter men for winter work. But in deciding that this claimant was not in 1980 a seasonal worker I have not taken this into account. The claimant's appeal is allowed

(Signed) J G Monroe
Commissioner

Date: 25 March 1982

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Region: South Western