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SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 24 October 1990 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to an entirely differently constituted social security appeal tribunal: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a man who was employed as a director by an engineering company from 4 February 1989 to 31 December 1989. The appeal concerns the question of his entitlement to unemployment benefit on and after the termination of his employment on 31 December 1989.

3. At the claimant's request the appeal was the subject of an oral hearing before me on 16 June 1993. The claimant was present, addressed me and gave evidence to me. The adjudication officer was represented by Mr R Dowdall of the Central Adjudication Service. I am indebted to the claimant and to Mr Dowdall for their assistance to me at the hearing.

4. The claimant's appeal is against the dismissal by the majority decision of the social security appeal tribunal of 24 October 1990 of the claimant's appeal from a decision of the local adjudication officer issued on 1 May 1990 in the following terms,

"[The claimant] is not entitled to unemployment benefit from 1.1.90 to 8.1.90 and from 17.1.90 to 10.4.90. This is because his employment has terminated; and he has received compensation; and that period falls within the ineligible period. (Social Security (Unemployment, Sickness and

Invalidity Benefit) Regulations 1983, regulation 7(1)(d), 7(5) and 7(6)). If any further claim is made for a day falling in the period 11.4.90 to 15.6.90 (both dates included) and on that day the grounds of this decision have not ceased to exist, this decision is to be treated as a disallowance of that claim. (Social Security (Claims and Payments) Regulations 1987, regulation 18(3))."

I have reviewed each of the decisions of the adjudication officer awarding unemployment benefit from 9.1.90 to 16.1.90 (both dates included) because I am satisfied that the decisions were given in ignorance of a material fact. This was that [the claimant] received a payment in connection with the loss of his employment. (Social Security Act 1975, section 104(1)(a)). My revised decision is as follows:-

"[The claimant] is not entitled to unemployment benefit from 9.1.90 to 16.1.90 (both dates included). This is because his employment is terminated and he has received compensation, and that period falls within the ineligible period. (Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, regulation 7(1)(d), 7(5) and 7(6)). As a result of the review of a decision an overpayment of unemployment benefit has been made from 9.1.90 to 16.1.90 (both dates included) amounting to £65.45. As [the claimant] did not misrepresent or fail to disclose a material fact this overpayment is not recoverable. (Social Security Act 1986, sections 53(1)(2)(4) and (10))."

5. The effect of that decision, reduced to its essentials is to disentitle the claimant to unemployment benefit from 1 January 1990 to 15 June 1990 on the ground that the whole of that period constitutes the "ineligible period" within regulation 7(1)(d) etc of the 1983 Regulations (see paragraph 6 below). For the reasons given below I consider that that decision may not be correct depending on the evidence that the new tribunal will take. I confirm that the claimant is not required to repay the overpayment of £65.45 unemployment benefit overpaid for the period from 9 January 1990 to 16 January 1990 which on any reckoning was a period when he was not entitled to unemployment benefit (see below).

6. The relevant provisions of the legislation are to be found in regulation 7 of the Social Security (Unemployment, Benefit, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983, No. 1598 as inserted by regulation 4 of the Social Security (Unemployment, Sickness and Invalidity Benefit) (Amendment No. 2) Regulations 1989, S.I. 1989, No. 1324 as from 9 October 1989, reading as follows,

"Days not to be treated as days of unemployment or incapacity for work"

7. - (1) For the purposes of unemployment .. benefit -

(a)-(c)

(d) where in any case the employment of a person is terminated and he receives compensation, a day shall not be treated as a day of unemployment if it is a day -

(i) which falls within the ineligible period as defined in paragraph (5), and

(ii) which falls within the period of 52 weeks beginning with the day following the termination of the employment;

.....

(5) For the purposes of paragraph (1)(d), 'the ineligible period' is the period which begins on the day following the termination of the employment and ends

(a) in a case where the person who paid the compensation represents that it, or part of it, was paid in lieu of notice of termination of employment or on account of the early termination of a contract of employment for a term certain -

(i) on the due date, unless sub-paragraph (b) of this paragraph also applies; or

(ii) if that sub-paragraph does apply, on the date determined under it;

(b) in a case where the person who paid the compensation represents that it, or part of it, was paid in lieu of consultation under section 99 of the Employment Protection Act 1975, [not relevant here] on the later of -

(i) the day on which the consultation period under that section would have ended; and

(ii) where sub-paragraph (a) of this paragraph also applies, the due date or, where that sub-paragraph does not apply, the standard date; or

(c) in any other case, the standard date.

(6) In this regulation -

'compensation' means any payment made to or for a person in respect of the termination of the employment other than

- (a) any remuneration paid in respect of the period before the termination;
- (b) any holiday pay;
- (c) any payment not falling within paragraph (a) or (b) of this definition which is paid in respect of any emolument of the employment (whether in money or in kind) and which has accrued before the determination of the employment;
- (d) any redundancy payment within the meaning of section 81(1) of the Employment Protection (Consolidation) Act 1978; and
- (e) any refund of contributions to which he was entitled under an occupational pension scheme within the meaning of section 66(1) of the Pensions Act;
- (f) any compensation payable by virtue of section 178(3) or (4) of the Education Reform Act 1988;

'due date,' in relation to the termination of the person's employment, means whichever of the following dates is applicable in his case, that is to say -

- (a) the date on which any period of notice applicable to the person was due to expire or would have been due to expire if it had not been waived;
- (b) where he had a contract of employment for a term certain, the date on which it was due to expire;

and for the purpose of paragraph (a) of this definition 'period of notice' means the period of notice of termination of employment to which a person is entitled by statute or by contract, whichever is the longer, or, if he is not entitled to such notice, that period of notice which is customary in the employment in question;

'the standard date' means the earlier of -

- (a) the due date; and
- (b) the last day of the period determined by -
 - (i) dividing the amount of the compensation by the maximum weekly amount which, on the day following the day of termination of employment, is specified in paragraph 8(1)(c) of Schedule 14 to the Employment Protection (Consolidation) Act 1978, and
 - (ii) treating the result (less any fraction of a whole number) as a number of weeks;

'week' .. means any period of 7 days (including a Sunday)."

Those provisions of the 1983 Regulations are new and are completely different from the regulation which they replaced. It follows that earlier reported Commissioners decisions on the earlier regulations must be treated with caution.

7. What occurred in this case was that under his Service Agreement (dated 2 February 1989) the claimant was entitled to six months' notice in writing on the termination of his employment. It is common ground that that notice was given to him on 15 December 1989 (it may be that the notice was not in writing but that particular requirement appears to have been waived) and consequently the period of six months notice expired on 15 June 1990. Under the provisions of regulation 7 of the 1983 Regulations set out above the claimant was held by the tribunal to be disentitled to unemployment benefit for the whole of the six months' notice period. However, the claimant alleged before the tribunal and before me that of a total sum of £20,000 paid to him by the employers on termination only a comparatively small sum represented "compensation" within the meaning of the regulation. The tribunal do not appear to have made any finding of fact as to what was the exact sum which represented "compensation" under the regulations. They may not have considered it necessary because of the view they took of the evidence. However, for the reason, explained below, I consider they should have dealt with this matter and it is for that reason that I have therefore set the tribunal's decision aside as being erroneous in law. The new tribunal will need to make careful enquiry to ascertain what proportion of the £20,000 payment was in fact "compensation" after there had been deducted from the £20,000 all relevant items in regulation 7(6)(a)-(f) (see above). The claimant alleged at the hearing before me that only just over £5,000 of that figure represented "compensation" and the rest of the £20,000 represented eg. holiday pay and debts due to him by the Company. The new tribunal will need to go into this in detail and make relevant findings of fact.

8. The reason the original tribunal did not go into this matter may be because they concluded that this was a case which came within regulation 7(5)(a) i.e. "where the person who paid the compensation represents that it, or part of it, was paid in lieu of notice of termination of employment". They therefore applied the rule that the disentitlement to unemployment benefit must last for the whole of the notice period, even though it was common ground that the amount of the compensation i.e. £20,000 less appropriate deductions was less than six months' salary. Proceeding on that footing, the tribunal decided that because there was a six months' notice the ineligible period lasted for the whole of the six months. The dissenting member of the tribunal (apparently the chairman) dissented on the following grounds,

"The dissenting Member considered that Regulation 7(1)(d) has to be considered in terms that where the compensation is payable for a day within the ineligible period the appellant will not be entitled to any Unemployment Benefit for which he has received salary in lieu of notice. This would not have the effect of disentitling the appellant for the full period of his contractual term of notice where he has not received salary for the full term of his contractual term of notice. The Appellant in this instance because of the insecure financial position of the Company accepted less

than he was entitled to as salary in lieu of notice. The appellant therefore did not receive salary for the full period of his term of notice. The dissenting Member therefore considered that regulation 7(1)(d) together with the definitions in Paragraphs (5) and (6) of that regulation should be read to the effect that the Appellant should not be disentitled for those days within the ineligible period for which he had not received any salary and for which no salary would be payable as he had accepted the payment."

9. The claimant in his appeal to the Commissioner relied on that dissent. Mr Dowdall opposed that, citing R(U) 5/73 (especially paragraphs 19 and 21) and R(U) 7/73 (Tribunal of Commissioners) which, on the earlier regulation had decided that there must be disentitlement for a notice period in appropriate cases whether the amount paid to a claimant was more or less than the strict amount of notice money legally due. I have already said above that caution should be used in applying Commissioner's decisions on the earlier regulation to the new regulation and I prefer not to base my decision on those earlier decisions but simply on the wording of the new regulation 7. In my view it is clear that the majority of the tribunal were correct and I reject the contention put forward by the claimant. The dissent was incorrect in law, though it was clearly carefully thought out and designed to do what may have appeared to have been 'justice' in the present case.

10. However, it is quite clear, to quote regulation 7(5)(a), that 'in a case where the person who paid the compensation represents that it or part of it, was paid in lieu of notice of termination of employment' the ineligible period does not end until "the due date" (regulation 7(5) (a) (i) - the reference to a consultation period does not apply on the facts of this case). The due date is the date on which the contractual period of notice expired (if longer than the minimum notice) under section 49 of the Employment Protection (Consolidation) Act 1978, as is so here. In this case the contractual period of notice did not expire until 15 June 1990 (see regulation 7(6)(a) and (b)) and the undoubted result therefore is that the disentitlement for unemployment benefit had to continue throughout the notice period even though the claimant accepted salary for less than the whole six months' period assuming the necessary representation by the employer (see above). In my view there is nothing in regulation 7 to justify the view of the dissenting member of the tribunal that only the days which could have salary attributable to them should be days of disentitlement to unemployment benefit.

11. Had the matter remained there, I would have held the decision of the tribunal to be correct. However, the whole of the tribunal's decision was based on the assumption on the evidence that this was a case "where the person who paid the compensation represents that it, or part of it was paid in lieu of notice of termination of employment" (regulation 7(5)(a)). But it was common ground at the hearing before me that the evidence before the tribunal, eg. the employer's completion of form UB85 on 17 January 1990, was equivocal and did not clearly

indicate (particularly in view of the employer's vacillations in subsequent correspondence) that there was the necessary representation by the employer of a payment in lieu of notice of termination of employment. The new tribunal will need to look into this matter and make its own finding on the matter. If, as seems possible, the evidence does not show the representation by the employer, then the tribunal will need to proceed to regulation 7(5)(c) i.e. "in any other case, the standard date". The "standard date" is defined near the end of paragraph (6) of regulation 7. There must be taken the end of the six months' period of notice in just the same way ("the due date") unless a lesser period of weeks is ascertained by applying the formula in paragraph (6)(b). The weekly amount specified at the relevant time paragraph 8(1)(c) of Schedule 14 to the Employment Protection (Consolidation) Act 1978 was, Mr Dowdall gave me to understand, £205 (though the new tribunal should check this). It follows as a matter of simple arithmetic that, if the claimant received "compensation" of less than £5,330 (26 weeks x £205 per week), the formula in sub-sub-paragraph (b) will produce a lesser period of disentitlement. As the claimant is now alleging that his compensation could well have been less than £5,330, the new tribunal will need to look into this matter as I have indicated above, and if relevant, apply regulation 7(6)(b) to ascertain the period of disentitlement.

(Signed) M. J. Goodman
Commissioner

(Date) 12 August 1993