

CU 181/1983

JGM/BOS

SOCIAL SECURITY ACTS 1975 TO 1982

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that unemployment benefit is not payable to the claimant for the inclusive period from 29 March to 14 August 1982 because the second contribution condition for such benefit was not satisfied by him.
2. The claimant worked in this country and was insured under the British national insurance scheme between the years 1947 and 1956, when he left to work in West Germany. It is not in dispute that by virtue of his contributions paid during the period 1947 to 1956 he satisfies the first condition for the payment of unemployment benefit in this country. He remained in West Germany working and residing there until 15 March 1982 when he gave up his employment in order to return to this country where he was in the process of purchasing a house and he actually returned here on 25 March 1982. He has claimed unemployment benefit in this country from 29 March 1982 until 14 August 1982 after which he went on a course; he may have claimed for later periods but I am not considering such claims. I understand that he obtained employment here in April 1983.
3. His first claim for unemployment benefit was made on a date between 29 March and 7 April 1982. Good cause for late claim (if it was late as to any part of the period of claim) has been accepted. There appears to me to have been some dispute as to the actual date of first claim, but in view of the acceptance of good cause for late claim I do not think it makes much difference on what date the claim was made. If anything it is, on the questions in issue, to the claimant's advantage to put the claim as late in the disputed period as possible.
4. The initial claim was rejected on the ground that the claimant did not satisfy the second contribution condition for unemployment benefit. And the insurance officer made a forward disallowance. The second contribution condition in question is that in paragraph 1(3) of Schedule 2 to the Social Security Act 1975 and is to the effect that the claimant shall have been paid or been credited with the requisite contributions in "the relevant past year". In relation to the period before me the relevant past year was the tax year 1980/81.

The claimant neither paid nor was credited with any contributions in Great Britain during that tax year. It is accepted that unless he can count the contributions paid in West Germany he does not satisfy this condition. On the other hand it is accepted that, if contributions in West Germany can be counted then the condition is satisfied. Thus once it is determined that West German contributions can or cannot be counted no contribution question arises. It is therefore accepted that, applying Decision R(G) 1/82, it is for the statutory authorities (the insurance officer, the local tribunal and the Commissioner) to decide whether West German contributions can be counted; see the decision on Commissioner's file C.S. 11/81 to be reported as R(S) 13/83 at paragraph 5.

5. Before the United Kingdom became a Member of State of the European Economic Community a claim to take into account contributions in West Germany could have been sustained, if at all, under the terms of the reciprocal convention scheduled to the National Insurance (Germany) Order 1961 [S.I. 1961 No 1513]; and if the circumstances of the present appeal had arisen before the United Kingdom entry into the Community it would appear that the claim might well have succeeded under Article 9 of that convention. But the question is now affected by Article 6 of Council Regulations (EEC) No 1408/71 , which provides (so far as is material) as follows:-

"Subject to the provisions of Articles 7, 8 and 46(4), this regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either

- (a) two or more Member States exclusively; or
- (b)

In the light of this the insurance officer took the view that the claimant, who is unquestionably a worker in terms of Regulation 1408/71 as originally enacted and an employed person in terms of that regulation as it now stands, could not rely on the reciprocal convention but only on the provisions of Regulation 1408/71. He also took the view that the claimant was not assisted by any of the provisions of the latter Regulation and gave a decision rejecting the claim. That decision was confirmed on appeal by the local tribunal and the claimant now appeals to the Commissioner. He presented his own case at the oral hearing before me and the insurance officer was represented by Miss Anne Windsor of the Solicitor's Office of the Department of Health and Social Security.

6. Although the point was not much stressed by the claimant I must first deal with the possibility that the claimant might succeed under the reciprocal convention. It was held by the European Court of Justice in case 82/72 Walder v Sociale Verzekeringsbank [1973] ECR 599 that Article 6 has the effect that Regulation 1408/71 replaces any but the conventions referred to in Articles 7, 8 and 46(4), which are not relevant, even if the convention would be more advantageous than Regulation 1408/71. It was subsequently suggested that if and so far

as the Article 6 has this effect it is invalid, and this specific question was referred to the European Court in case 99/80 Galinsky v Insurance Officer where however the Court found it unnecessary to decide the point. The weight of authority is however in favour of the view that it is not invalid (see Decision R(P) 1/81 at paragraph 7). In any case it was decided in case 101/78 Granaria B V v Hoofdproduktschap voor Akkerbouwprodukten [1979] ECR 623 that all persons subject to community law have the obligation to acknowledge that regulations are fully effective so long as they have not been declared to be invalid by a competent court. The Court did not indicate what courts or tribunals were competent courts for this purpose, but it is quite clear that the Advocate-General considered that only the European Court itself was such a competent court (see page 642). I conclude therefore that unless I refer the matter to that Court (which no one suggested that I should do) I must accept that Article 6 is fully valid.

7. This is not quite the end of the point because Article 6 applies only "as regards persons and matters which it covers". There is no doubt that this claimant (like the claimant in the Galinsky case) is a person covered by Regulation 1408/71; but the claimant in the Galinsky case succeeded on the ground that a British pension payable to him by virtue of his self-employment in Great Britain was not a matter covered by the regulation in that, at that time, self-employed persons as such were not persons to whom the regulations applied. Can it be suggested that if the claimant cannot succeed under Regulation 1408/71 then this is not a matter covered by that Regulation? Miss Windsor argued that it cannot, submitting that the matters said to be covered by the Regulation are those listed in Article 4(1) which included at sub-paragraph (g) unemployment benefits. I accept this submission and hold that the present is a matter covered by Regulation 1408/71, whether or not in the circumstances that regulation assists the claimant, and that accordingly the claimant, if he is to succeed at all, must do so under that Regulation.

8. Unemployment benefits are dealt with in Articles 67 to 71 of the Regulation. Articles 67 and 71 are concerned with cases where a person having worked in one Member State claims unemployment benefit in another, while Article 69 is concerned with persons who, having worked in one Member State, go to another and claim benefit in the country where they had worked. In the present case the claimant did claim benefit in West Germany under Article 69 but the claim was rejected on the ground that he did not satisfy the requirements of that regulation as to first making himself available to the West German employment services. Had he been awarded benefit for any period under Article 69, he could not I think have claimed benefit under either of the other two Articles in Great Britain (see case 227/81 Aubin v UNEDIC and SSEDIC [1982] ECR 1991).

9. The claimant, without pointing to any specific provision of the Regulation submitted that it was one of the purposes of the Community that there should be free movement of workers uninhibited by any fear of losing accrued social security rights and that on principle he should for this reason be entitled to count in his West German contributions. He invited me to interpret the Regulation

with this in mind. I have considerable sympathy with this point of view, but I must point out that the European Court has itself stated (in case 20/75 d'Amico v Landesversicherungsanstalt Rheinland-Pfalz [1975] ECR 891 at page 898) that:-

"..... with certain exceptions, Community law does not provide for the right of an unemployed worker to claim unemployment benefits under the legislation of a Member State other than the State in which he became unemployed."

It is my judgment clear that this claimant became unemployed in West Germany on 16 March 1982 even though he did not become available for employment there from that date; and accordingly I have to look at the actual provisions of the regulation unaffected by any broad principle such as the claimant sought to establish in order to determine his rights in this case.

10. The claimant founded his claim on Article 71(1)(b) of Regulation 1408/71. But he might with equal plausibility have based an argument on Article 67, and I must deal with both. I have set out in the Appendix to this decision Article 67, Article 71 (other than sub-paragraph (a) of Article 71(1), which related to frontier workers) and the definitions of the phrases 'competent institution', 'competent State' and 'periods of insurance' contained respectively in Article 1(o) (q) and (r), and shall refer in the text of this decision only to so much of these provisions as seems necessary to make it intelligible.

11. I take Article 67 first. Article 67(1) provides that the competent institution of a member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account periods of insurance or employment completed as an employed person under the legislation of any other Member State as though they were periods of insurance under the legislation which it administers. Article 67(2) makes comparable provision for Member States whose legislation makes the acquisition etc of the right to benefit depend on the completion of periods of employment. It is not in dispute that the United Kingdom is a member State to which Article 67(1) applies and at first sight that paragraph would seem to enable the claimant to succeed. But Article 67(3) (which operates subject to the effect of Article 71) places a severe restriction on the wide general operation of Article 67(1) by making it a condition of reliance on Article 67(1) that the claimant shall have completed periods of insurance lastly (my underlining) in accordance with the provisions of the legislation under which benefits are claimed. In relation to Article 67(2) it imposes a similar requirement that the claimant shall have completed lastly periods of employment in such Member State.

12. It follows that (unless under Article 71) the claimant can only succeed if he can establish that on any day for which he claims

unemployment benefit in Great Britain he had lastly completed period of insurance in Great Britain. If the case had been one under Article 67(2) there would have been no question that the claimant had lastly completed periods of employment in West Germany throughout the period before me. But I am concerned with periods of insurance. These are defined in Article 1(r) set out in the Appendix. It is in my judgment clear from that definition that periods of insurance relate to periods during which contributions are being paid rather than periods during which the person concerned is covered, and that, as periods treated as periods of insurance where they are regarded by the relevant legislation as equivalent to periods of insurance are included, I consider that periods for which a person is being credited with relevant contributions are included. On the other hand I hold that the references to periods of insurance in the context of Articles 67 to 71 (which comprise the Chapter headed "Unemployment Benefits") are references only to periods of insurance against unemployment; and that that question has to be determined as a matter of domestic law unsupplemented by Regulation 1408/71, since it cannot be right to assume that that regulation applies for the purpose of establishing that it does apply.

13. The claimant undoubtedly completed periods of insurance as defined in Article 1(r) while working in Germany; as the phrase includes periods of employment defined or recognised as periods of insurance. It follows that, whether West Germany is a State whose legislation makes the acquisition etc of the right to benefits subject to the completion of periods of insurance or not, the period or periods for which the claimant worked in West Germany constituted a period or periods of insurance. He can thus succeed under Article 67 (unaided by Article 71) only if he subsequently completed periods of insurance in this country.

14. He has been credited with contributions in respect of the period from which he made himself available for employment in this country. But those contributions were available to satisfy the contribution conditions for unemployment benefit only if when the time came (i.e. when the year 1981/82 or as the case may be 1982/83 became the relevant past year) the conditions of one of the paragraphs of regulation 9(g) of the Social Security (Credits) Regulations 1975 [S.I. 1975 No 556] as amended in particular by the Social Security (Credits) Amendment Regulations 1977 [S.I. 1977 No 788] were satisfied. Regulation 9(g) is very long and I consider that it is strictly for the claimant to establish that at the relevant time he fell within one of the paragraphs. I can see nothing in the facts of this case to suggest that either at the time of the various claims or in the light of subsequent events the contributions with which the claimant was credited in the period before me would bring his credited contributions within one of the paragraphs. It is not legitimate to make such an assumption; and for that reason I hold that he had not at the relevant time completed periods of insurance lastly in Great Britain and that he cannot succeed under Article 67 unaided by Article 71.

15. I turn therefore to Article 71 which opens with the words:-

"An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:"

Anyone reading this would draw the inference that the provision applied to a person who during his last employment was residing in a Member State other than the State which was at that time the competent State, that is to say that it applied to a person who was working in one Member State while remaining resident in another; and there are dicta in the decisions of the European Court that would appear to accept that view without question (see case 39/76 Metalnijverheid v Mouthaan [1976] ECR 1901 at page 1911 (paragraph 16) and case 76/76 Di Paolo v Office National de l'Emploi [1977] ECR 315 at page 324 (paragraph 11)). These dicta are not however based on any particular words in the Article and the claimant addressed to me an argument to the contrary based on words in the Article, to which I must now refer.

16. Article 1(q) defines the competent State as the Member State in whose territory the competent institution is situated. This takes one to the definition of competent institution in Article 1(o) and leads one to expect a definition that will provide a unique solution to the question what is the competent state. Instead Article 1(o) gives four alternative definitions of the competent institution, of which the last two at least (and possibly the first two as well) are concerned with the identification of the competent institution among the various institutions within a particular Member State rather than with the identification of the Member State whose competent institution is indicated. In Great Britain, where there is only one competent institution in relation to cash benefits this is specifically identified at point J, paragraph 2 of Annex 2 to Council Regulation (EEC) No 574/72 (Regulation 574/72) as the Department of Health and Social Security, London. It is thus easy in Great Britain to lose sight of the fact that in many Member States there is a variety of institutions and that there may be a real problem in identifying the relevant institution in particular cases. I shall assume, however, in favour of the claimant that at least Article 1(o)(i) on which he relies is directed to the identification of the Member State in which the relevant competent institution is located.

17. The claimant relies on Article 1(o)(i) because it defines the competent institution by reference to the state of affairs at the date of the claim for benefit which was after he returned to Great Britain; more particularly it defines it by reference to the Member State in which he was insured at the date of claim. If that was Great Britain (or strictly the United Kingdom) then the claimant could (paradoxically as it seems to me) contend that Article 71 applied to him as being a person who during his last employment was resident in a Member State other than that which turned out to be the competent State at the date of his claim. On this basis he could bring himself within Article 71 by establishing that while he was working in West Germany he was resident in a Member State (West Germany) other than the competent State. That contention can be met either by a general rejection of the proposition or by establishing (if it be the case) that the claimant was not at the date of claim insured in Great Britain. I will take this second point first.

18. The claimant contends that, at the time of his claim he was back in Great Britain and insured under the British scheme. I do not

doubt that for some purposes he was insured under the British scheme and could reasonably be regarded as a member of it. But the British scheme is in fact comprehensive, and (as with Article 67) I take the reference to insurance to be a reference to insurance under that comprehensive scheme against unemployment; and the question is whether the claimant was insured against unemployment with the British scheme at the date of his claim or of any of his claims. Arguably he could be treated as insured with it at a particular time if he was covered for unemployment occurring at that time or if he was at that time paying or being credited with contributions relevant for unemployment benefit purposes at that time. I have in paragraph 14 above given my reasons for considering that he was not, during the period with which I am concerned, paying or being credited with relevant contributions. I also consider that he was not covered for unemployment at that time. As with the question of periods of insurance this matter falls to be determined under domestic law; in this case too it is not permissible to assume that Regulation 1408/71 assists the claimant in order to establish the proposition that it does.

19. Miss Windsor went further than this and submitted that there was no substance in the argument based on Article 1(o)(i). She based this on the decision of the European Court of Justice in case 150/82 Coppola v Insurance Officer [1983] ECR 43. That was a case on sickness (and invalidity) benefit as opposed to unemployment benefit and the claimant submitted that it therefore was not relevant. I think that it is relevant, especially as Article 1(o)(i) is not itself specifically related to unemployment benefit. The Coppola case was concerned under Article 18 of Regulation 1408/71, which required the competent institution of a Member State whose legislation makes the acquisition etc of the right to benefit conditional upon the completion of periods of insurance to take account of periods of insurance completed under the legislation of any other Member State. The questions referred to the European Court of Justice included questions relating to Article 1(o)(i); but the Court, though setting out much of Article 1(o) in their decision, relied exclusively on Article 13 of the Regulation under which a person to whom the regulation applies is to be subject to the legislation of one Member State only. They held that only the competent institution of the Member State in which a person is last employed was competent to aggregate insurance periods under Article 18. Article 18 on sickness benefit is in very similar form to Article 67 on unemployment benefit and likewise the corresponding implementing provisions of Articles 16 and 80 respectively of Regulation 574/72 are very similar and I hold that the conclusion in the Coppola case is equally applicable to Article 67; in other words that the only competent institution in Article 67 is that of the Member State to which the relevant claimant whose legislation the relevant claimant is subject, viz normally that in which he was last employed.

20. Further I take the view that this applies equally to the phrase "the competent State" where it is used in the opening words of Article 71. It is true that, as was held in the Aubin case, that Article sometimes gives a claimant an option for the purposes of the Article of treating himself as subject to the legislation of another

Member State, but before that option can be exercised the claimant has to be within the opening words. This conclusion facilitates the natural interpretation of those opening words as applying to a person who while in his employment was resident in a Member State other than the State which was then the competent State. The claimant was not so resident and for that reason his appeal fails.

(Signed) J G Monroe
Commissioner

Date: 9 April 1984

Commissioner's File: C.U. 181/1983
C I O File: I.O. 3066/U/83
Region: North Western

APPENDIX

Article 1

- (o) 'competent institution' means:
- (i) the institution with which the person concerned is insured at the time of the application for benefit; or
 - (ii) the institution from which the person concerned is entitled, or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; or
 - (iii) the institution designated by the competent authority of the Member State concerned; or
 - (iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1), either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned.
- (p)
- (q) 'competent State' means the Member State in whose territory the competent institution is situated;
- (r) 'periods of insurance' means periods of contribution or periods of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, whether they are regarded by the said legislation as equivalent to periods of insurance;

Article 67

Aggregation of periods of insurance or employment

1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of insurance completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefit subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance of employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in article 71 (1) (a) (ii) and (b) (ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

- in the case of paragraph 1, periods of insurance,
- in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.

Article 71

1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

- (a)
- (b) (i) an employed person, other than a frontier worker, who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were residing in its territory; these benefits shall be provided by the competent institution;
- (ii) an employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject.

2. An unemployed person may not claim benefits under the legislation of the Member State in whose territory he resides while he is entitled to benefits under the provisions of paragraph 1 (a) (i) or (b) (i).