

VGHH/SH/7/MD

Commissioner's File: CU/184/1985

C A O File: AO 4414/UB/1985

Region: North Eastern

**SOCIAL SECURITY ACTS 1975 TO 1986
CLAIM FOR UNEMPLOYMENT BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Kenneth Worthy

Appeal Tribunal: South Shields

Case No: 11/4

[ORAL HEARING]

1. This appeal fails. My decision is:-

"(i) Unemployment benefit is not payable for Monday 7 January, Thursday 10 January, Friday 11 January, Saturday 12 January, Monday 14 January and Thursday 17 January all in 1985 because the claimant regularly works 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 weeks in which those dates fell [Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, regulation 7(1)(e) and (2)].

(ii) The forward disallowance of further claims imposed by the social security appeal tribunal under regulation 12(5) of the Social Security (Claims and Payments) Regulations 1979 is confirmed in respect only of any Monday, Thursday, Friday and Saturday falling in the period 8 January 1985 to 5 January 1986 (both dates included)."

Representation

2. I held an oral hearing of this appeal, together with another appeal the reference to which on Commissioner's file is CU/173/1985. The claimant, who attended, was represented by Mr Mark Rowland, of Counsel, instructed by the Child Poverty Action Group. The adjudication officer was represented by Mr N. Butt of the Solicitor's Office, Department of Health and Social Security.

Nature of the Appeal

3. This appeal, and the appeal heard at the same time, raised the question of the applicability of the "full extent normal" rule to cases where a full-time worker, who has an additional "hobby" job undertaken outside normal working hours, for some evenings in the week, loses his full-time employment but continues with the part-time evening work.

The Relevant Law

4. The relevant regulations are set out in the appendix to this decision.

The Facts

5. The facts are not now in dispute. The following summary is taken from the first written submission of the adjudication officer now concerned:

"The claimant was employed full-time at Cowie (Fire Safety and Security) from January 1983 to 8 June 1984. The claimant has provided details of his employment history prior to this and it is clear that he worked full-time from approximately 1956 to 1981, when he became unemployed for one year. He then took up a community programme appointment in September 1982, which he left to take up the aforementioned full-time employment at Cowie (Fire Safety and Security). He claimed unemployment benefit on 25 June 1984 and declared that he was working part-time as a youth and community leader on Tuesdays and Wednesdays from 7.00 to 10.00 pm and had been so employed for the past 15 years. Apparently the claimant was never issued with a formal contract of employment but the Borough Council of South Tyneside (Education Department) have provided an example of a contract issued to another employee, giving the relevant terms and conditions of service. Unemployment benefit was paid for the days on which the claimant did not work down to and including 5 January 1985 and on 10 January 1985 the local adjudication officer gave the decision set out in Box 1 of Form AT2. [Note: This is to the effect set out in paragraph 1 of this decision except that that decision gives a substantive disallowance for 7 January 1985 alone.] The claimant appealed unsuccessfully to the appeal tribunal and now appeals to the Commissioner."

6. It should be added that the claimant was paid for his Tuesday and Wednesday evening work at the rate, as at June 1984, of £9.56 per three hour session. His ordinary hours of work, working full-time were from 9.00 to 5.00 approximately. Although the claimant received unemployment benefit for the days he did not work down to and including 5 January 1985, he had received no unemployment benefit for the Tuesdays and Wednesdays when he worked in the evening. An adjudication officer decided on 2 July 1984, by a decision a copy of which is in the case papers, that unemployment benefit was not payable from 26 June 1984 (a Tuesday) to 27 June 1984 (a Wednesday) both dates included because the claimant was engaged in employment from which his earnings were more than £2 (regulation 7(1)(h) of the (Unemployment, Sickness and Invalidity Benefit Regulations). He imposed a forward disallowance for Tuesdays and Wednesdays falling in the period 28 June 1984 to 25 June 1985 under regulation 12(5) of the 1979 Claims and Payments Regulations.

[NB: The reference to regulation 7(1)(h) is mistaken. The relevant regulation has, since the 1983 Regulations came into force, been re-lettered, 7(1)(g)]

The Tribunal's Decision

7. The tribunal's decision was wholly inadequate. They found no facts. The question at issue was whether the claimant regularly worked for the same number of days in a week for the same employers or group of employers and was employed to the full extent normal in his case in the week in which this date fell. In order to decide this question it was necessary to find primary facts which supported such a conclusion. It is not sufficient for the tribunal simply to state the conclusion itself, parroting the words of the regulation, under the heading "Findings of tribunal on questions of fact material to decision". There was accordingly a failure to comply with the statutory obligation imposed by regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984, as amended.

8. I have a discretion whether to send such a case back to a fresh tribunal: see decision R(S)2/63. In cases where there has been a clear breach of the statutory obligations imposed by regulation 19(2)(b) the case is frequently remitted for rehearing to a fresh tribunal: see, for example, decisions R(U)3/80 and R(S)2/83. The adjudication officer now concerned, in a further submission to me, originally suggested that I should send this case back as there were facts still in dispute. This, however, is no longer the case and, after careful consideration, I decided to hear the case myself, since it involves an important point of principle. The claimant in this case was a full-time worker for almost his entire working life. His last full-time job had ended on 8 June 1984. He claimed unemployment benefit on 25 June 1984 and received it for the days he did not work up to 5 January 1985. An adjudication officer disqualified him for receiving benefit for 7 January 1985 and imposed a forward disallowance in respect of Mondays, Thursdays, Fridays and Saturdays from 8 January 1985 to 5 January 1986. The reason for this decision was that the claimant had, for the past 15 years, been working (paid) in the evenings of Tuesday and Wednesday as a youth and community leader. At first sight, it appears startling that this should lead to disallowance of benefit for the remaining three days of the week. The claimant had worked some 14 years full-time while carrying out this additional part-time job in the evenings. The part-time job was quite outside the claimant's normal working life. On the other hand, the acts as above stated appeared at first sight to fall within the "full extent normal" (and also the "normal idle day") rule. There was no authority that appeared to be entirely in point. In these circumstances, I directed an oral hearing of the present appeal and the other appeal referred to in paragraph 2 above, which raises similar points.

The arguments on appeal

9. Mr Rowland referred me to the decision of the Court of Appeal (then unreported) in the case of Riley v. Adjudication Officer where the decision was given on 25 July 1985, and a copy of which is in the case papers where the "full extent normal" rule was discussed and Lord Justice Slade referred to three tests, the "50% test", the "one year test" and the "stop-gap test". In his submission, the 50% test was only appropriate for someone who had been working part-time for the whole of the past year and the one year test was inappropriate in the case of a person whose part-time employment was outside normal hours. Riley's case approved the statement of principle by the majority of the Tribunal of Commissioners in paragraph 9 of decision CU/255/1984 (now reported as R(U)3/86) to the effect that one looked at normality in terms of the claimant, not of the particular employment, in deciding what was normal. Riley's case also showed that one looked at the history of the claimant's employment and the surrounding circumstances in determining whether the full extent normal rule applied. If, on considering those circumstances, one could say that the claimant was, during the week in question, really unemployed, then the full extent normal rule could have no application.

10. Mr Butt, on behalf of the adjudication officer, submitted that regulation 7(1)(e) (the full extent normal rule) applied to cases where the claimant had had a full-time job and an additional subsidiary job. The subsidiary employment could not be excluded altogether. The question that one must ask is what (in the relevant week) is the normal extent of the claimant's employment? The word "employed" in the expression "employed to the full extent normal" included any gainful employment but not employment that was not gainful. Even if the remuneration received from that employment was, say, only £1 a day (one-half of the current limit under regulation 7(1)(g) during the period in issue in this case) the full extent normal rule would apply.

Conclusions

11. Unless there is some relevant exception, which enables a second, spare time, employment carried on outside normal working hours to escape the rigours of the full extent normal rule, as set out in regulation 7(1)(e) and (2) of the 1983 Regulations, there is no doubt, in my judgment, that it applies to the claimant. By 7 January 1985 the claimant was

regularly working for the same number of days in each week for the same employer. He had been working on Tuesdays and Wednesdays every evening for the past 15 years and had had no other employment after 8 June 1984: see paragraph 5 above. Accordingly, regulation 7(1)(e) is not excluded by the provisions of regulation 7(2) of the 1983 Regulations. Applying the decision in Riley's case, the question that I must ask myself is "on each of these days, did the claimant fall within the description -

- (a) a person who does not ordinarily work on everyday in a week (exclusive of Sunday or the day substituted for it by regulation 4) and
- (b) a person "who is in the week in which the said day occurs employed to the full extent normal in his case"?

Following the guidance by Lord Justice Slade in Riley's case, I must first look forward from the week in question to see whether the claimant's pattern of work was likely to be permanent or transitory. There is no clear evidence in the present case about what was likely in the future. (There is no suggestion that part-time evening employment, which the claimant had followed for the last 15 years was likely to lead to fuller employment). Looking to the past, the claimant had been continuously in full employment up to 1981 (except for his evening employment, two nights a week). He was then unemployed for one year. From September 1982 to December 1982, he was on a community programme employment. From January 1983 to 8 January 1984, he was in full-time employment. He was then unemployed (except for his part-time evening employment) from 9 June 1984 up to the first day in issue (7 January 1985). Thus, for the six months period prior to the date when the full extent normal rule was applied by the adjudication officer, the claimant had worked, and worked only, on Tuesdays and Wednesdays in each week in the spare time paid employment which he had followed for 15 years. In my judgment, on these facts, I must answer the question posed by Lord Justice Slade in Riley's case and set out above by holding that the claimant's pattern of work in the weeks in which the days in issue (set out in paragraph 1(1) above) fell had become the normal pattern for him at the time. Such work could not conceivably be regarded as a "stop-gap". It had the same character as it had had for the previous 15 years. No gap was being stopped.

12. It is not possible to hold that persons who work in a second, spare time, employment, carried on outside working hours are not "employed" for the purpose of regulation 7(1)(e) (which refers to persons "employed to the full extent normal" where such persons are paid for the work that they do.) I accordingly cannot accept Mr Rowland's submission to the contrary effect. "Employed" must be construed in accordance with "employment", which "includes any trade, business, profession, office or vocation": see the Glossary of Expressions in Schedule 20 to the Social Security Act 1975. In my judgment, the word "employed" in regulation 7(1)(e) (the full extent normal rule) must receive a similar construction to "employment" as used in regulation 7(1)(g) (the "engaged in employment", formerly "following an occupation" rule). Employment, in regulation 7(1)(g), means gainful employment: cf. decision R(U)3/77. The expression "engaged in employment" has always been construed in the same way as the words which they replace, from early versions of the regulation, namely "following an occupation". The latter expression has consistently been held to refer to a gainful occupation: see, for example, decision CWU/42/50; and, also, CU/30/49, CU/129/49; CWU/7/49, CU/235/50 and R(U)2/67.

13. Since the claimant, in the present case, was paid for his evening work, it was clearly gainful and I have no doubt that he was "employed" for the purpose of regulation 7(1)(e).

14. (1) Persons who carry on, outside normal working hours, a second or spare time employment can, however, in my judgment, escape the rigours of the full extent normal rule if, in respect of days when they work, they satisfy the conditions of regulation 7(1)(g). In other words, if their daily average earnings are less than £2 a day (or whatever other figure is currently in force) and conditions (ii) and

(iii) of that paragraph are also satisfied: see the terms of the regulation which is set out in the appendix to this decision. For regulation 7(1)(g) is both positive and negative in its effect. Where a day is one on which a person is actually employed (and paid) but on which that person satisfies the conditions of regulation 7(1)(g) that day is to be treated as a day of unemployment. This was explained by the Commissioner in decision R(U)6/77 at paragraph 6 in the following way:

"Although this regulation is couched in negative terms ("... a day shall not be treated ...") the statutory provisions which it replaces (with minor changes in terminology) have consistently been construed in a positive sense: as authorising a day which would prima facie be regarded as a day of employment to be treated as a day of unemployment by in effect disregarding the employment if it satisfies all four prescribed conditions."

- (2) A person who obtains benefit for the days when he is engaged in paid employment, because he earns less than £2 a day and the other conditions of regulation 7(1)(g) are satisfied, is not "employed" at all, in terms of regulation 7(1)(e), for the days when he is so engaged, because those days are to be treated as days of unemployment. If this were not so, the claimant who works part-time and satisfies the conditions of regulation 7(1)(g) would be placed in the absurd position of obtaining unemployment benefit for the days when he did work, but being denied benefit (under the full extent normal rule) for those when he did not.

15. The claimant, however, cannot satisfy the terms of regulation 7(1)(g) for the weeks in which the Tuesdays and Wednesday of 8, 9, 15 and 16 January 1985 (when he worked in the evenings) fell. His earnings were too great. He was paid more than £9 in each session. Indeed, as was pointed out in paragraph 3 above, there was in force during these weeks a forward disqualification under regulation 7(1)(g). Accordingly, regulation 7(1)(g) cannot assist the claimant to escape the full rigours of the full extent normal rule, as set out in regulation 7(1)(e). Decision CU/444/1984 (unreported) to which I drew attention at the oral hearing, where another Commissioner reached a similar conclusion, is in no way inconsistent with this result.

16. For the above reasons, the claimant is not entitled to benefit for the days referred to in paragraph 1(1) above. The original disallowance in this case related to only one of those days, namely 7 January 1985 (a Monday) a forward disallowance being imposed for other days. But the claimant did in fact claim benefit for Thursday 10 January, Friday 11 January, Saturday 12 January and Monday 14 January and Thursday 17 January 1985. His claim form dated 10 January 1985 is in the case papers. I have accordingly given a substantive decision in respect of those days. The forward disallowance originally imposed which is in terms limited to further claims is confirmed.

17. My decision is set out in paragraph 1. Before parting with this case, it is appropriate to note that this appeal, and the associated appeal the reference to which is CU/173/1985, was stood over at the request of the Child Poverty Action Group until the decision of a Tribunal of Commissioners in "Brunt the reference to which on Commissioner's file is CU/274/1984, was known. Both the Child Poverty Action Group and the adjudication officer now concerned agree that that decision does not assist the claimant, though the Child Poverty Action Group through their representative, Mr Mark Rowland, relies on the obiter observations of a single Commissioner at the end of that decision. Those remarks are not binding on me and I do not agree with them. The decision of Brunt itself was one which favoured certain types of claimant and is now under appeal by the adjudication officer to

the Court of Appeal. But since it is undisputed that, if correct, that case does not assist the claimant, there is no need to delay further in giving my decision, which I have accordingly given above.

(Signed) V.G.H. Hallett
Commissioner

Date: 4th August 1987

THE APPENDIX

Regulations 7(1)(e) and (g) and 7(2) of the 1983 Regulations

Regulation 7(1)(e) and (g) of the 1983 Regulations provide:

"For the purposes of unemployment, sickness and invalidity benefit ...

- (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;

- (g) subject to regulations 9, 10, 11 and 12, a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless -
 - (i) the earnings derived from that employment, in respect of that day, do not exceed £2.00, or, where the earnings are earned in respect of a longer period than a day, the earnings do not on the daily average exceed that amount; and
 - (ii) he is available on that day to be employed full-time in some employed earner's employment; and
 - (iii) if the employment in which he is engaged is employed earner's employment, it is not in his usual main occupation or it is done for, or organised through, a local authority, health authority, preserved board or health board in providing a service which is capable of being provided by a charity, or it is done for, or organised through, a charity;"

Regulation 7(2) provides:

"Days not to be treated as days of unemployment or incapacity for work
7.

- (2) Paragraph (1)(e) shall not apply to a person unless -
 - (a) there is a recognised or customary working week in connection with his employment; or
 - (b) he regularly works for the same number of days in a week for the same employer or group of employers."

By virtue of Schedule 20 to the Social Security Act 1975 "week", in the context of regulations 7(1)(e) and 7(2), means a period of seven days beginning with midnight between Saturday and Sunday.

Regulations 9, 10, 11 and 12 relating to "availability" for work in exceptional cases have no

relevance to the present appeal.

