

MHJ/6/RCJ/LS

Commissioner's File: CU/233/1986

C A O File: AO 4409/UB/86

Region: London North

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

Name: Peter Michael Simon

Appeal Tribunal: Harrow

Case No: 33/50

[ORAL HEARING]

1. My interim decision is:-

- (a) that unemployment benefit was not payable to the claimant for the inclusive period from 13 to 15 September 1983;
- (b) that the decision awarding unemployment benefit to the claimant for the inclusive period from 16 September to 30 October 1983 is not to be revised on review;
- (c) that the decision awarding unemployment benefit to the claimant for the inclusive period from 1 November 1983 to 8 March 1984 is to be reviewed as having been given in ignorance of material facts about the claimant's availability to be employed full-time in employed earner's employment;
- (d) that on such review the decision is to be revised so as to provide that unemployment benefit was not payable to the claimant for the said inclusive period from 1 November 1983 to 8 March 1984;
- (e) that in consequence of such revision there has been an overpayment of benefit to the claimant in a sum to be assessed by the adjudication officer. Such sum to be agreed by the parties or, in default of agreement, referred to me for determination;
- (f) that the claimant is required to repay such sum as may be agreed or determined under (e) above;
- (g) that the claimant is not disqualified for receiving unemployment benefit for the inclusive period from 9 March 1984 to 8 July 1985 solely by reason of his having continued to hold the office of director of a limited liability company during that period.

2. The claimant appeals to the Commissioner, with the leave of the Chairman of the Harrow social security appeal tribunal, against the unanimous decision of that tribunal dated 27 January 1986 confirming the decision of the adjudication officer issued on 10 July 1985. The claimant requested and was granted an oral hearing of his appeal, which took place on 24 September 1987, and at which he was represented by Mr Jan Luba of the Child Poverty

Action Group. The adjudication officer was represented by Mr P Darby of Counsel, instructed by the Solicitor's Office of the Department of Health and Social Security. I am indebted to both Mr Luba and Mr Darby for their assistance in this appeal, which I dealt with by way of a rehearing.

3. Mr Luba took a preliminary point on jurisdiction, which I rejected for reasons I deal with later as it is convenient that I should first set out the salient features of this case as I found them from the documents and the evidence given by the claimant.

4. The claimant was born in Northern Rhodesia (now Zambia) in April 1941 and is therefore now aged 46. He had a somewhat disturbed education in a number of countries, including England, and left school at the age of 17 without any qualifications. Since that time he told me, and I accept, that he had had more than 30 different jobs. He returned to England, for the first time as an adult, in April 1980, and he and his wife "became involved", as he put it, with a "hair treatment company". In fact this company, EMHT Ltd. was formed in 1980 with the claimant and his wife as the sole directors (and, incidentally, employees) of the company, which marketed and distributed a product produced by an Irish company, now I understand in liquidation, of which the claimant's mother was the sole director. The claimant and his wife carried on the business from their home address and initially appears to have provided them with a reasonable living; the company accounts (as corrected by the accountants) show that for the calendar year 1982 the claimant's gross remuneration was £5,100, but that fell to only £550 in 1983 and it is clear that, during those two years, turnover decreased from over £31,500 to less than £14,000. The PAYE deduction sheet appears to show the last payment to the claimant as being £100 for the month of 6 September to 6 October 1983, although the claimant's evidence, which I accept, was that he ceased to be employed by the company at the end of August 1983 as it "was not making enough money to support us". It may be that the PAYE record was incorrectly completed; I heard no evidence about that but, in the light of the evidence I did hear, such an error would not be surprising.

5. In any event the claimant applied for unemployment benefit, on form UB 461 dated 13 September 1983. On that form he signed a declaration that (a) he had received leaflet UBL 18 on Responsibilities of Claimants; (b) he was unemployed and willing and able to do suitable work; and (c) the information he had given was true and complete. Thereafter he continued to make claims on form UB 25 which included, inter alia, a declaration that he had read and understood leaflet UBL 18 - and there are a dozen such forms with the papers - until 5 March 1984, when he completed a questionnaire in form UB 671 on which he stated that he was not able or willing to take a full-time job because he was "endeavouring to save the present business from total collapse", that he could not start work immediately and would only be free to take a new job when "this one ceases to function", that he was not willing to take a job in his "usual occupation", was not yet willing to take some other kind of job, that his weekly wage in his last job had been £230 and that the minimum he would be willing to take was £185 per week. In answer to further questions on form UB 567D, on the same date, the claimant stated that he was working as a director of EMHT Ltd from Mondays to Fridays from 9am to 5pm, although he was not receiving any remuneration.

6. The claimant's benefit then ceased, with effect from 9 March 1984, on the basis that he "was engaged in employment from which his earnings were more than £2.00 on the daily average" (regulation 7(1)(g)(i) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, as amended). Thereafter the Department made further enquiries of the claimant, who had objected to the disallowance of benefit, but nothing he produced or said at that stage persuaded the Department that they were wrong; on the contrary - to summarise a fairly long and involved story -, a further decision was made that he should be required to repay benefit of £661.32 which, it was said, had been overpaid to him for the inclusive period of 16 September 1983 to 8 March 1984, and the Department continued to decline to consider his possible entitlement to unemployment benefit while he remained a director of EMHT Ltd which, as I understand it, was regarded as "gainful employment"

despite his statements that he received no remuneration and his declaration, dated 24 July 1984, that he had "ceased to do any work for [EMHT Ltd] since March 1984". For the sake of completeness I should mention that the claimant formally resigned his directorship on 8 July 1985.

7. The claimant's appeal against the disallowance of unemployment benefit and the requirement that he should repay the above-mentioned sum initially came before the Harrow social security appeal tribunal on 30 September 1985. The claimant gave evidence to the effect that the company's accountants' letter dated 3 July 1985 was inaccurate in showing that he had received remuneration of £1,365 in the year ended 31 December 1983; it was his wife who had received that sum while he had had only £550. The tribunal very properly adjourned the hearing for further enquiries to be made and, by letter dated 1 November 1985, the accountants confirmed that what the claimant had said was correct and apologised for the "transposition of figures" in their earlier letter. In the light of that evidence the adjudication officer - again in my view very properly - made a further submission, dated 4 November 1985, in which he conceded that the claimant's earnings had been less than £2 per day on average during the relevant period and submitted that, in those circumstances, the question for the consideration of the tribunal was whether or not the claimant had proved that he was available for full-time employed earner's employment, a matter which had previously been raised in paragraph 8 of the original submission to the tribunal. It was on that basis that the tribunal dealt with the matter on 27 January 1986, their decision being "(a) the appellant was not available for employment, and repayment is required for 16.9.83 to 8.3.84 (b) he was also not available from 10.3.84 to 23.7.84".

8. Mr Luba's preliminary point, which I mention in paragraph 3 above, was that as the adjudication officer's decision issued on 10 July 1985 had been on the basis that the claimant's earnings were more than £2 on the daily average, the issue of his availability for work, within the meaning of regulation 7(1)(g)(ii) of the Unemployment etc. Regulations 1983, was a question which first arose in the course of the appeal and consequently fell within the ambit of section 102(1) of the Social Security Act 1975. This section provides that in those circumstances a tribunal "may, if they think fit, proceed to determine the question" although it had not been considered by the adjudication officer. Mr Luba argued, correctly in my view, that the discretion conferred by the section had to be exercised, and exercised judicially, by the tribunal. He contended that in the instant case there was no indication that the tribunal had applied their minds to this issue at all; had they done so they should have considered all the circumstances, including the delay in raising this matter, the false sense of security the claimant had gained as a result of the Department's letter of 19 October 1984, and the fact that the change of approach from "excess earnings" to "availability" also meant a shift in the onus of proof from the adjudication officer to the claimant. Mr Luba consequently submitted that the tribunal were in error of law in not considering section 102(1) and, further, if they had considered it then they should not have exercised their discretion to deal with the question of availability and should have restricted the adjudication officer to his original ground (which he had abandoned), and he further contended that that was the course I too should adopt.

9. I considered Mr Luba's submission and rejected it. In my judgment it is implicit in the tribunal's findings and reasons that they did exercise their discretion pursuant to section 102(1); I am satisfied that the claimant was not prejudiced and accordingly that the tribunal properly exercised their discretion to determine the new issue. So far as Mr Luba's specific points are concerned, although the question of availability did not form part of the decision issued on 10 July 1985, it was specifically raised in paragraphs 8, 9 and 10 of the adjudication officer's submission to the tribunal which, although undated, must necessarily have been after the claimant's appeal on 15 July 1985 and before the tribunal hearing on 30 September 1985, so the claimant was or should have been aware at an early stage that that was in issue - and also aware that, if and when it arose, it would be for him to prove that he had been available for work, a factor which was emphasised in the further submission of 4 November 1985. I do not accept that there was any significant delay in either raising this

issue or in bringing it to the claimant's notice, and it seems to me that the claimant must bear vicarious responsibility for the fact that the matter originally proceeded on the basis of excess earnings, because that was the effect of the erroneous information provided by his accountants. Neither do I consider that there is any substance in Mr Luba's submission that the Department's letter of 19 October 1984 lulled the claimant into a false sense of security. I have no evidence of what took place at the interview on 7 June 1984, but it seems to me quite plain from the letter that this was part of an investigation with a view to the possible prosecution of the claimant, and that that was "the matter discussed" which it had been "decided not to pursue further" in the light of "all the facts available". It would be totally unrealistic to construe the letter as meaning that all matters in issue between the parties had been resolved. I should add that, had I found that the tribunal had failed to consider and properly apply section 102(1), I would, for the reasons set out above, have considered this a proper case in which to exercise my discretion pursuant to that section to determine the question of the claimant's availability.

10. It is convenient to deal at this stage with a submission by Mr Darby that the "general effect" of Commissioners' decisions R(P) 9/55 and R(G) 14/56 is that the mere holding of a directorship amounts to "gainful employment" for social security purposes and, therefore, in the instant case the claimant could not have become entitled to unemployment benefit until he resigned as a director of EMHT Ltd 8 July 1985. I do not agree; as the Commissioner has recently made plain in decision on file CU/206/1986, in both R(P) 9/55 and R(G) 14/56 the claimants were actually paid directors' fees, and the crucial question in such cases is whether or not a claimant in fact receives any remuneration. The fact that a claimant holds a directorship is clearly a fact of which the adjudicating authorities should be aware; it would put them on enquiry both as to his possible earnings and also his availability. It is easy to envisage circumstances in which a claimant, although receiving no remuneration, in the hope of future profit might wish to devote such an amount of his time to the company's affairs as to make it impracticable for him to take other employment, but his directorship could not operate per se to disqualify him.

11. It follows that the issue before me is whether on any particular day the claimant was, in the words of regulation 7(1)(g)(ii), "available ... to be employed full-time in some employed earner's employment". That is essentially a question of fact which I determine upon the evidence.

12. The claimant seemed to me immature, naive and muddle-headed, but not dishonest - although I am bound to say that the moral scruples he displayed about engaging in the hair treatment business did not seem to inhibit him when completing forms in connection with his claims for benefit. All the same, the answers he gave on forms UB 671 and UB 567D on 5 March 1984 and his insistence that these were true, and that he had been working for the company again since about November 1983, helped to persuade me that he had no intention to deceive and believed that he was entitled to unemployment benefit if he had no income. I do not know whether the claimant had in fact seen leaflet UBL 18 before the interview in June 1985; he said that he had not, but I have no doubt that, even if it was not sent to him, he could have obtained a copy. His evidence on that was, like a lot of what he said, confusing and inconsistent, but that seems to me to be more relevant to the question of "due care and diligence" (with which I deal later) than of availability. I have some doubts about the accuracy of the claimant's evidence that he only resumed his association with the company in October or November 1983 when his wife, who is of Austrian origin, got into difficulties with the correspondence. I have greater doubts about his evidence that he again ceased all work for the company in March 1984; in the light of his evidence that he was working five days a week prior to 5 March 1984 it seems to me inherently improbable that he could drop it at a moment's notice. However, that was his evidence; and he was not effectively challenged on it. In my judgment it could have seemed oppressive if I had pressed him upon these matters and, in the absence of any better or more precise evidence which would enable me to infer other dates, I accept that the claimant was available for work between 16 September and 30 October 1983, was not available for work between 1

November 1983 and 8 March 1984 and that he was thereafter available for work again.

13. I should also mention the claimant's evidence about his efforts to find employment. Suffice it to say that these seem to me to have been unrealistic; he was either seeking work for which he was insufficiently qualified or considering projects which he had no means to implement. However, although a considerable amount of time was devoted to that at the hearing, apart from reinforcing my assessment of the claimant's character, it did not greatly assist me. It might well have been otherwise if the claimant's disqualification had been put on the basis that he was placing unreasonable restrictions upon the type of employment he would accept, but that issue was not raised and I do not now intend to speculate about the possible result if it had been.

14. The question which then arises is whether the claimant should be required to repay the benefit overpaid to him in respect of the inclusive period from 1 November 1983 to 8 March 1984, pursuant to section 119(1) and (2) of the Social Security Act 1975, which was in force at the material time. It is not in dispute that repayment of any overpaid benefit is to be required unless the claimant can show "to the satisfaction of the ... tribunal determining the appeal ... that in the obtaining and receipt of the benefit the beneficiary ... has throughout used due care and diligence to avoid overpayment".

15. The claimant admitted - indeed asserted would be the more appropriate word - that he never read any of the forms he signed when claiming benefit although, he said, the time did come when the reference to leaflet UBL 18 apparently impinged upon him, as he gave evidence that he thought to himself that if he signed the form and "they wanted him to have the leaflet" he would be sent a copy. He said he was "very unfamiliar with forms", with which he had "had problems in the past". One might have expected that to have made him more careful in the future but, on the contrary, he said that he was "careless" about completing forms. In the face of those clear admissions it seems to me unnecessary to set out the law in this area, which is in any event helpfully set out in paragraphs 20 to 22 of the submission dated 13 February 1987 by the adjudication officer now concerned with the case. In my judgment there can be no doubt, on his own evidence, that the claimant failed to use due care and diligence to avoid overpayment of benefit, and accordingly he must repay the sum thus overpaid to him.

16. In view of my decision it will be necessary for the claimant's entitlement throughout the period in question to be reassessed. In those circumstances I express this as an interim decision, so that the matter can be referred back to me for final determination if the parties should be unable to agree the correct sums payable by one to the other, taking into account the repayment due from the claimant and the credit to be given by him in respect of any supplementary allowance received by him during a period for which he may now be entitled to unemployment benefit.

17. The claimant's appeal is accordingly allowed to the extent set out in my decision in paragraph 1 hereof.

(Signed) M H Johnson
Commissioner

Date: 5 November 1987