JGM/JJ

Commissioner's File: CU/249/1984

C A O File: AO 3250/UB/84

Region: Northern

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Peter Kumar Biswas

Appeal Tribunal: Stockton

Case NO: 006/01

[ORAL HEARING]

1. My decision is that unemployment benefit is not payable to the claimant for 4 and 5 November 1983 or for any Monday, Friday or Saturday in the period from then down to and including 16 December 1983, in the inclusive period from 9 January to 6 April 1984, or in the inclusive period from 30 April to 28 May 1984 by virtue of the provisions of regulation 7(1)(e) of the Social Security (Unemployment Sickness and Invalidity Benefit) Regulations 1983 or the corresponding provisions of the regulations previously in force (relating to the so-called "full extent normal" rule).

2. The claimant is a well qualified electrical engineer. He holds a B SC. degree; he is an Associate Member of the Institute of Electrical Engineers and he holds a management qualification from the British Institute of Management. He is now aged about 54 and down to the year 1981 he worked consistently for a full five-day working week as an electrical engineer. He worked for a local education office as a lecturer for about three months from November 1981 to January 1982 before again securing further employment as an electrical engineer down to August 1982. Since then the only employment that he has been able to obtain is that of part-time lecturer employed by his local education authority. It would appear that after he obtained such part-time work, his claims for unemployment benefit were rejected in relation to the days on which he worked (under regulation 7(1)(h) of the above regulations or their predecessors); in substance they were not days of unemployment. But as I understand it his claims were admitted for a time in relation to the days on which he did not work.

3. In the autumn of 1983 the claimant's contract of employment as a part-time lecturer was renewed in terms of an undated letter of appointment which provided for his giving lectures in three subjects altogether viz. industrial environment (electrical); business organisation (computing) and business organisation (mathematics and statistics) during the academic year 1983/84. The academic terms were from Wednesday 21 September to Friday 16 December 1983, Monday 9 January to Friday 6 April 1984 and Monday 30 April to Friday 13 July 1984. The lectures were to take place on Tuesday Wednesdays and Thursdays, the latest course to start beginning on Wednesday 5 October 1983. The number of days per week worked was one fewer than in the first part of the previous academic year. The claimant is still and has at all material times been actively seeking full-time (five days per week) employment as an electrical

engineer. The conditions annexed to his letter of appointment provided that a person should not accept appointment who did not intend to teach for the whole of the contract period. But I shall assume in the claimant's favour that the authority would have been prepared to relieve him of the obligation had he obtained full-time employment.

4. The claimant continued claiming unemployment benefit after the commencement of this renewal appointment and I have before me claims covering the greater part of the period to 28 May 1984 (including all non-working days which thus include all the periods mentioned in paragraph 1). Some claims in respect of days on which the claimant would have been rejected in terms of regulation 7(1)(h) and there has been no appeal against such rejection. Claims for 4 and 5 November 1983 were rejected in terms of regulation 7(1)(e) of those regulations, which both before and after the re-enactment of those regulations (which came into effect on 28 November 1983) provided as follows:-

> "(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."

Paragraph (2) to which the above is subject provides that sub-paragraph (i)(e) shall not apply unless:-

> "(a) there is a regular 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."

5. The object of this provision is to ensure that those who fit a full week's work into less than a full working week shall not be entitled to unemployment benefit on the days which they do not work. The regulation is however widely drafted and has in the past been held to defeat the claims of those who work only for a limited number of days in the week for the entirely different reasons that that is all the work that they can secure. It has been held to apply to persons able to secure much less work than that which the present claimant secured.

6. In November 1983 the insurance officer (as he then was) disallowed the claimant's claim for unemployment benefit in respect of Friday and Saturday 4 and 5 November 1983 by reference to regulation 7(1)(e). He took the view that the terms of the claimant's contract with the local authority were by themselve sufficient to establish that in terms of regulation 7(2) the claimant worked regularly for the same employer for the same number of days in a week; and that in terms of regulation 7(1)(e) the claimant did not ordinarily work on every day in the week and was in the week in question employed to the full extent normal in his case. There was no question of short-time working. The insurance officer also made a forward disallowance

extending to all Mondays Fridays and Saturdays in the period to 8 November 1984. The claimant appealed to the local tribunal, who on 16 March 1984 confirmed the decision of the insurance officer. The claimant now appeals to the Commissioner.

He was represented at the oral hearing before me by Mr. Robin Allen of counsel who was instructed by Mr. A.L. Hosking solicitor of the Stockton on Tees Law Centre and the adjudication officer was represented by Mr G. Berry of the Solicitor's Office of the Department of Health and Social Security.

7. In my view the claimant fell within the provisions of regulation 7(1)(e) and 7(2). The insurance officer was on the authorities entitled to look at the claimant's contract as establishing the necessary degree of regularity, normality and ordinariness (cf Decision R(U) 1/72). Mr. Allen however pressed me with the proposition that the claimant was a man who had until August 1982 subject to a brief intermission been employed full-time throughout his working life to 1982 and that it was in these circumstances absurd to treat the pattern of his employment since then as normal. He was still anxiously seeking full-time employment in his chosen field of electrical engineer. His employment in lecturing was only a "stop-gap" until something permanent was found. In this connection I was referred to a well-known passage from the decision of the Commissioner CI 518/49(KL). In that case the claimant worked on a rota system which was not the same in each week and which did not involve his working on every day in every week. His claim for unemployment benefit was rejected by reference to the full extent normal rule. But in the course of his decision the Commissioner, after discussing a number of cases, added the following:

> "On the other hand if a claimant took up, when unemployed, employment which did not involve working every day of the week as a stop-gap, while looking for full-time employment, he could not properly be held to be "a person who does not ordinarily work on every day of the week".

Mr. Allen in substance submitted that this obiter dictum precisely fitted the claimant. Before a recent majority decision of a tribunal of Commissioners there was only one reported commissioner's decision of which I am aware in which a claimant has established that his employment was stop-gap employment. In that case (R(U) 30/53) the period of such employment lasted three months at the end of which he returned to full-time work in the same employment as he had been immediately before the stop-gap work, and the stop-gap work itself was in the same employment during what looks like a period of seasonal short-time working.

8. At the end of the hearing I formed the view that Mr. Allen's argument could not be accepted, because it was inconsistent with the general current of decisions on the regulation and its predecessors of which I will take as an example Decision R(U) 3/74. In that case a person who had worked all his life as an insurance agent and collector opted to retire at 60 because he wanted to work indoors; and the employers offered him part time work for 2½ days per week. He accepted this although he would have liked full-time work. He was in fact allowed unemployment benefit on the days on which he did not work for about a year, but was then disallowed benefit under the full-extent normal rule. I appreciate that there are differences between this case and that now before me. But the argument that the claimant had worked all his life to date full-time (so that it could not be said that it was normal for him to work part-time) failed. I did not give an immediate decision to this effect however because I was aware that a Tribunal

of Commissioners had been convened to consider the application of the rule in current circumstances of high unemployment, particularly in relation to those doing part time work for organisation Community Task Force. I did not consider that I could in fairness to the claimant give an adverse decision as if that decision was not pending. The decision has now been promulgated and it is on file CI 255/84. And the reasons of the majority in that case did offer some relaxation of the law as it had previously been understood to be. I invited submissions from the adjudication officer and the claimant before giving my decision. Unfortunately I overlooked the submissions put in response to that invitation on behalf of the claimant and gave my decision without reference to them. And I have been asked by the claimant's representative to set my decision aside, and reconsider the matter in the light of those submissions. Accordingly I set my decision aside. In giving this replacement decision (much of which is a repetition of what I said in my original decision) I have taken account also of the decision of the Court of Appeal in Riley v Adjudication Officer (25 July 1985 not yet reported).

9. The submissions made on the part of the claimant that subject to their further observations the view of the majority was to be preferred to that of the minority; that the majority had correctly held that it was in present times easier to establish that work was undertaken as a stop-gap exercise, but that they were wrong (as was the minority) to hold that stop-gap employment will lose its stop-gap nature at the end of one year, as this would mean that no weight was given to other relevant factors; and they were wrong to reject the opinion of the claimant as to the stop-gap nature of the work undertaken was not necessarily of any relevance. Of these points the first, as to the preference of the majority view to that of the minority, has been undermined by the decision of the Court of Appeal in the Riley case, where the opinion of the minority was preferred. In submitting that the majority (and the minority) were both in error both erred in holding that employment will always lose its stop-gap character at the end of one year, the claimant was in reality asking me to depart from the hitherto accepted interpretation of the regulations to a greater extent than was warranted even by the majority view. Moreover the one-year rule has now been approved in the Court of Appeal; subject possibly to the qualification that there may be circumstances that could lead one to hold employment to be a stop-gap nature even after a year, a matter to which I shall return.

10. The minority member of the Tribunal of Commissioners drew attention to the fact that the claimant's contract was in terms of the basis that it was likely to lead (as it in fact did lead) to full time employment in due course. Nothing of the sort applies to the present claimant. In paragraphs 11 and 12 of the decision I have set aside I set out more fully my conclusions as to the effect of the majority decision and I do not consider that the validity of those conclusions is affected by the Riley decision and I repeat the substance of them hereafter in this decision. The Court of Appeal in Riley indicated that it was not right to decide that a particular level of employment is normal by reference exclusively to the terms of the contract of employment itself, thereby possibly trenching on what was decided in Decision R(U) 1/72 above referred to. But I do not consider that my conclusions on the extent of the stop-gap exception as applied in Decision CU 255/84 turned on what was said in this claimant's contract or are otherwise vitiated by what was said by the Court of Appeal in the Riley case.

11. It was pointed out by the Commissioner in Decision CU 437/84 (a decision given before the Court of Appeal decision in Riley) that, as the present claimant has acknowledged, the Tribunal of Commissioners (even the majority)

concluded that after a year from when particular employment has terminated new employment at a lower level of intensity will not normally escape the taint of the full extent normal rule. I should certainly follow this latter conclusion unless there is something in the Riley decision to cause me to reject it. In fact I consider that Riley decision reinforces it. The fact is however that in the case the subject of the tribunal decision itself something like 2½ years had run from the time when the claimant had last been employed full-time and yet he was held by the whole tribunal (the reasoning of the minority being preferred by the Court of Appeal), that the claimant was entitled to succeed. He succeeded in my judgment because at the date in question there was a real prospect of the claimant's returning to full-time work; so that there was a real gap to stop. The majority view was approved by the Court of Appeal in Riley. This may represent some qualification of the rule that after one year part-time employment can no longer be regarded as a stop-gap.

12. But it is a qualification that has no application in the present case where there was no evidence of any likelihood of return to full-time work. It has been submitted on behalf of the claimant that the majority of the Tribunal of Commissioners had erred in holding that the statement by the claimant that he regarded his employment as stop-gap was irrelevant. In my judgment the question whether employment is stop-gap or not is one of inference to be drawn by the adjudicating authorities from the facts; that the claimant's own opinion that his employment is stop-gap is more in the nature of a submission on his behalf than an objective fact from which any inference can be drawn. I note the view of the Court of Appeal that the stop-gap exception is to be applied with circumspection. I see no ground for not applying the one year rule here. I hold therefore that he was rightly refused benefit for 4 and 5 November 1983.

13. I now come to the forward disallowance, which was in my judgment too widely framed. The insurance officer (whose decision was in this respect confirmed by the local tribunal) directed that if any further claim was made in respect of Monday Friday or Saturday falling in the period from 7 November 1983 to 8 November 1984 and on that day the grounds of the decision (as to 4 and 5 November) had not ceased to exist the decision was to be treated as disallowance of that claim. It was held in Decision R(U) 1/78 that a forward disallowance terminates as soon as the grounds of the original disallowance have ceased to exist. In my judgment once they have ceased to exist the disallowance does not revive if they spring into existence again. For instance if the forward disallowance had in this case been expressed to apply to every day of the week and not just Mondays, Friday and Saturdays it would have terminated on the first day of claim to which the grounds of the original decision did not apply, which would have been Tuesday 8 November 1983. This would not have meant that benefit would automatically have been payable thereafter but that claims thereafter had to be referred to an insurance officer. The forward disallowance was however drafted so as to apply to only Mondays, Fridays and Saturdays; and it thus did not terminate on 8 November.

14. But in the week beginning Monday 19 December 1983 the claimant was not employed at all and I question whether the grounds of the original decision continued to apply. In Decision R(U) 9/54 the Commissioner held that a person was employed in a week to the full extent normal in his case if he had worked on two days less than his normal because the days on which he had not worked had been Christmas day and Boxing day and it was normal in his case not to work on those days. This was so, even though in fact he had worked only three days whereas he normally worked for five days. This decision was said to have been wrong by a Tribunal of Commissioners in Decision R(U)5/51. And I should have liked to think that the effect of the latter decision was

that a claimant whose working week was reduced by a holiday was not in that week employed to the full extent normal in his case, and that (whether or not he was adversely affected by other provision) he was not in that week caught by the full extent normal rule. I have however some difficulty in extracting this straightforward proposition from the decision. But whether that is right or not, I hold that under the present claimant's contract it was not in any week normal for him to work on no days in the week, and that he cannot in a week in which he did not work at all have been regarded as employed to the full extent normal; and that there is nothing in paragraph 7 of Decision R(U) 2/83 to the contrary of this. It may be that the claimant was during the break caught by some other regulation, but that was not debated before me, and I do not propose to rule on it.

15. This does mean that the adjudication officer's forward disallowance would have come to an end on the first day of claim in the Christmas break. On the whole I think it better to deal with the matter by way of actual decision and not by forward disallowance. The adjudication officer now concerned does not ask me to go beyond 13 July 1984, the end of the claimant's then current contract. In fact I have in the case papers claims covering all Mondays, Fridays and Saturdays down to 28 May 1984 inclusive and I have given the decision in paragraph 1 accordingly. Days not covered by this or any other decision must be dealt with by the adjudication officer.

16. In substance the appeal fails.

Signed: J G Monroe
COMMISSIONER

Date: 18 November 1985