Full Extent Normal

T/SH/2/MD

Commissioner's File: CU/274/1984
C A O File: AO 3470/UB/84
Region: North Western

SOCIAL SECURITY ACTS 1975 TO 1985
CLAIM FOR UNEMPLOYMENT BENEFIT
DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name:
Appeal Tribunal:
Case No:

[ORAL HEARING]

1. Our decision is that for the inclusive period from 30 January 1984 to 23 April 1984 the claimant was not precluded from title to unemployment benefit: Social Security Act 1975, section 17(2)(a) and regulation 7(1)(e) of the Social Security (Unemployment Sickness and Invalidity Benefit) Regulations 1983 [SI 1983 No.1538] (the 1983 Regulations). This appeal is therefore allowed for the reasons given below.

Reasons of Mr. J.G. Monroe and Mr. M.J. Goodman.

2. This appeal to the Commissioner by the claimant's association (the claimant being a single man aged 23 at the relevant time) was by direction of the Chief Commissioner heard by a Tribunal of Commissioners on 14 November 1986. The claimant was not present but the appellant association was represented by Mr R O'Kelly, a research assistant for the association. The adjudication officer was represented by Mr G Berry, Counsel of the Office of the Solicitor of the Department of Health and Social Security. We are indebted to Mr O'Kelly and to Mr Berry for their considerable assistance to us at the hearing.

3. The appeal is against the unanimous decision of the national insurance local tribunal, which held that unemployment benefit was not payable to the claimant for Mondays, Tuesdays and Saturdays during the inclusive period from 30 January 1984 to 13 February 1985 (part of that decision being a forward disallowance) on the ground that there applied to the claimant (because of his participation in a Community Programme Scheme) the "full extent normal" rule to be found in regulation 7(1)(e) and 7(2) of the 1983 regulations. Regulation 7(1)(e) provides as follows,

"Days not to be treated as days of unemployment...

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

(a)-(d) .....

(e) ..... 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;"

4. We have allowed the claimant's appeal for the reasons given below but we have fixed the period to which our decision relates as ending not on 13 February 1985 as the local tribunal did but on 23 April 1984 because that is when the claimant ceased to be employed at the original site by the Community Programme Scheme. Our decision is in declaratory form because the adjudication officer, having decided the "full extent normal" point against the claimant had no need to go on to consider whether the claimant was otherwise entitled to unemployment benefit. As a result we have not the information on which to base any findings relevant to an actual award of benefit for the period in question and a decision on that will have to be left to the local adjudication officer.

5. The claimant left school in 1976 and was employed in a car components company for 19 months. He then enlisted in the army for five months. After that he joined a carpet firm for one year and thereafter worked as a miner for two years. Following an industrial accident he left the National Coal Board in 1982 and claimed unemployment benefit from 4 January 1982 to 25 October 1983 which was awarded to him until his title to benefit was exhausted. Then he "signed off" in order to join a Community Programme Scheme working for 2½ days a week. On Wednesdays he worked from 12.30 pm to to 4.30 pm; on Thursdays from 8.00 am to 4.30 pm and on Fridays from 8.00 am to 3.30 pm. On 30 January 1984 (after having been on the Community Programme Scheme for some three months) he had requalified for benefit and again claimed unemployment benefit for the days on which he was not working on the Community Programme Scheme namely Mondays, Tuesdays and (presumably) Saturdays. He did not claim benefit for the days on which he was working for the Scheme. Unemployment benefit was however refused to him by the application of the "full extent normal" rule.

6. The claimant's contract of employment was issued to him by Community Task Force. One of the decisions on the subject of the Scheme includes paragraphs quoted from the Agents' and Sponsors' Handbook relating thereto, paragraph 27 of which reads as follows.

> "27. Individual employees may not be employed for more than a total of 52 weeks including holidays. However, with the prior approval of the Area Office supervisors and others with skills essential for the continued successful operation of the scheme [the claimant was not in this category], and for whom no suitable qualified replacement is available from the unemployed register, may be retained for additional periods not exceeding 52 weeks. Applications for such extensions must be made in writing to the Area Office at least two weeks in advance of the date on which the minimum period of notice necessary to terminate the period of temporary employment is given."

7. In addition, the terms of the scheme make it clear that the work is entirely a temporary expedient, eg the following occurs in leaflet EPL130 issued by the Manpower Services Commission about the schemes, as follows,

> "Being on the Community Programme should improve your chances of finding permanent work. So if you are offered a permanent job then of course you are free to move to it straightaway. That way, we can help someone else. Ask your employer about time off to go to interviews. Being on the Community Programme will have made your chances of getting another job a bit easier. Your Jobcentre is there to help you find work, so make sure you call in before the project is over."

8. A typical statement to an employee of such a scheme (cited in a decision on Commissioner's file CSU/44/85 allowing a claimant's appeal in the circumstances) is as follows,

> "This post is sponsored... under the Manpower Services Commission 'Community Programme' and the engagement will be until [a fixed date] unless terminated earlier by your resignation or for disciplinary or for other reasons. However, as explained to you at your interview, the major objectives in offering you this fixed term post is [sic] to improve your chances of securing alternative, longer term employment, and we urge you to continue your efforts in this regard and will be glad to do anything possible to assist you, such as granting you reasonable time off with pay for interviews and releasing your services on short notice should an employment opportunity arise. In short, although 52 weeks is the maximum permitted period of service on such a project we hope you may be able to leave this post for other employment before that period expires."

9. This was the Scheme under which the claimant was employed. The statement of his terms of employment dated 16 November 1983 indicates that he was employed as a labourer, that his employment start date was 26 October 1983 and that on termination of employment the notice to be given by employer or employee was one week. There is no entry in the space opposite the words "If temporary employment your termination date is" and the probationary period was stated to be "Nil". Notwithstanding that there was no entry of a termination date, the evidence before the appeal tribunal was that the contract was for six months only and this was again asserted in the application for leave to appeal. There is no statement to the contrary and it is borne out not only by the general terms of the scheme but by the fact that the claimant was employed on his original site until 23 April 1984 almost exactly six months after he started. He was thereafter employed for different weekly hours until he left the employment with Community Task Force in July 1984. We have no information about the terms of his renewed employment which began after the date of the appeal tribunal hearing and we are confining our decision to the period to 23 April 1984, when the initial period of employment ended. The forward disallowance not being confirmed, subsequent claims will fall to be dealt with by the local adjudication officer.

10. The problems connected with the full extent normal rule, that led the Chief Commissioner to direct that this appeal be heard by a Tribunal of Commissioners, are perhaps best understood against a background of the history of the rule. It originated with the Umpire under the Unemployment Insurance Acts, because it was considered that a man who worked say for 11 hours per day on 4 days per week, was not really unemployed at all. With the coming of the National Insurance Act 1946 an attempt was made to codify this rule. And the Commissioner, faced with the problem of applying regulations as opposed to developing judge-made law, felt forced to conclusions (sometimes in relation to persons employed for only a day or even an hour or two per week) that could not conceivably have been reached by the interpretation of the word "unemployed". It is clear from the statement of Mr. Reith's reasons that not all Commissioners have taken the same line that there remains uncertainty about the scope of the rule. In the year 1949 the Commissioner in

the course of a decision in which he applied the full extent normal rule (CU 516/49(KL)) said:

> "On the other hand, if a claimant took up, when unemployed, employment which did not involve working on 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 in a week".

Until recently this dictum had hardly ever in reported decisions led to claimants escaping the consequences of the full extent normal rule. But with the coming of the various Community Programmes under which persons who had been unemployed were given part time work for a fixed and relatively short period with encouragement and special facilities for seeking full-time employment the argument was put that the "stop-gap" exception ought to be invoked. It has always to be remembered however that the word "stop-gap" does not appear in the regulations and that whatever principle lies behind it may be capable of application in cases where there is in fact no gap to stop.

11. A Tribunal of Commissioners was in 1985 convened to consider a case arising out of the Community Scheme. The claimant in question was at the relevant time employed part-time, but his case was not typical of those employed under the scheme. He had initially been given a contract for a very short fixed term and was continuing under the same terms; and he had been led to expect (an expectation that was fulfilled) that he would soon be employed full-time. Nevertheless the adjudication officer and on appeal the appeal tribunal had held that the claimant was caught by the full extent normal rule. The Tribunal of Commissioners allowed the appeal, the majority on more general grounds but the Chief Commissioner on the more limited ground that the claimant had all along the expectation of being employed full-time so that his part-time period was truly bridging a gap between previous full-time employment and future full-time employment.

12. Meanwhile another appeal was proceeding in the case which came later before the Court of Appeal as Riley v Adjudication Officer (unreported, 25 July 1985). This concerned a claimant employed part-time under a particular kind of community scheme. He had a part-time contract described as expected to last for one year. The Commissioner applying earlier decisions about those who were employed under contracts providing for part-time employment held that the claimant in that case was caught by the rule in that by virtue of the contract this part time working immediately became the norm (cf Decisions R(U) 18/62 and R(U) 1/72). The Court of Appeal reversed this decision, remitting the matter to a Commissioner for rehearing on the ground that it was necessary to look forward as well as backwards in determining what was normal. In their judgment the Court approved the reasoning of the Chief Commissioner in the case on file CU 255/1984. In the course of his judgment Slade L.J said:

> "When it is reduced to its essentials, the question posed by [regulation 7(1)(e)] is, in my opinion: Was the claimant's pattern of work in the relevant week the normal pattern for him at that time? This question has to be answered objectively according to the facts as they are, not as the claimant would wish them to be: (compare paragraph 3 of Decision of R(U)36/51). Particularly for this reason, I accept that the stop-gap test must be applied only with circumspection. With respect to the majority in Decision CU/255/1984, I agree with the Chief Commissioner's opinion in that case that the mere facts that the claimant had a past employment record of 25 years continuous full-time employment up to November 1980 and that there was a high degree of unemployment in April-July 1983 did not support the argument that, as at the relevant weeks in April-July 1983, the claimant did not fall within the descriptions specified in Regulation 7(1)(e); those points by themselves did not evidence any increased probability that the claimant would in the readily foreseeable future be reverting to full-time, as opposed to part-time, employment. But for the fact that the claimant in that case had taken up his new part-time employment in April 1983 on the basis that it

was likely to lead to full-time employment with the same employers in the near future, I find it hard to see on the particular facts how he could properly have avoided the application of Regulation 7(1)(e)."

13. Mr. Berry fastened on this last sentence as concluding the present case against the claimant, who, he said, had no prospects, at the time of full-time employment either with the community scheme or otherwise. His argument derived some support for the decision on Commissioner's file CU 263/1983, (to be reported as R(U) 6/86) in which the Court of Appeal decision in Riley was carefully analysed. CU/263/1983 also concerned a person employed by the Community Scheme part time on terms not dissimilar to those on which this claimant was employed. The Commissioner however felt constrained, seemingly contrary to his inclination, to conclude that in the light of the Riley decision the claimant must fail. Another Commissioner in his decisions on files CSU 44/1985 and CSU 51/1985 felt at liberty on the other hand to conclude that a person employed part time for a limited period (a maximum of 52 weeks) could properly be held during that employment not to be employed to the full-extent normal in his case. A temporary contract not expected to continue beyond the end of its term did not in that case make the claimant's employment under that contract normal.

14. Mr. O'Kelly did not in terms found his argument on this latter decision: but it was certainly supported by it. He submitted that a part-time contract that was for a temporary period bona fide intended to be terminated at the end of the period could not by itself make part-time employment normal and further that employment under the community scheme fell squarely into this category. We acknowledge that this raises the question "how long is temporary?" Although in our judgment the real question is whether the employment is genuinely intended to come to an end at the end of the fixed period, we consider that the usual form of contract entered into by those embarking on the community programme is of this kind, at any rate, where the fixed period does not exceed a year. Accordingly we accept Mr. O'Kelly' submission. We do not think that the last sentence of the passage from the judgment of Slade LJ in the Riley case (cited in paragraph 12 above) points to a contrary conclusion. The sentence includes the qualification "on the particular facts". And the particular fact was that the claimant in question was at the time on an indefinite contract in continuation of a short fixed term. If the Court of Appeal had intended the statement to carry any wider implications we find it hard to see why they should have disapproved the decision of the Commissioner in the Riley case itself.

15. Accordingly, we feel able to allow the appeal of the claimant's association on the ground put forward by Mr O'Kelly that a person employed for a fixed temporary period with no intention that employment should continue thereafter is not, by reason only of such employment, to be regarded as employed to the full extent normal in his case. We realise that there may be other cases to which the so-called "stop-gap" exception ought to be applied as to which there may be some prevailing difference of views (see paragraph 10 above), but we have not had argument on such more general points and we think it wiser not to express views on it which might without justification be accorded the extra weight that normally are attached to the views of a Tribunal of Commissioners. We do however consider that the prevailing doubts about the extent of the "full extent normal" rule and the parallel 'normal idle day' rule have harmful effects. In particular we believe that many people who genuinely desire full-time employment and are genuinely available for it hesitate to take up part-time employment in the meanwhile because of the risk that one of those rules may, rightly or wrongly, be applied to them. And we suggest that urgent consideration should be given to the extension of the exception in regulation 7(2) of the 1983 regulations and the corresponding regulation relating to the normal idle day rule (regulation 19(6)) so as to make express provision for excluding such persons from the operation to the rules.

Reasons of Mr. D. Reith Q.C.

16. As stated above we have all reached the decision that the claimant is not precluded from title to unemployment benefit from 30 January 1984 to 13 April 1984 by regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. My reasons for reaching that decision are set forth in the following paragraphs.

17. I need not repeat the relevant statutory provisions nor all the facts and circumstances relating to this case which are already set forth in the decision reached by the other two Commissioners who sat on the tribunal with me. The position briefly is that the claimant, after leaving school in 1976, was involved in various periods of full-time employment. He left employment with the National Coal Board in 1982, and he claimed unemployment benefit from 4 January 1982 to 25 October 1983. Unemployment benefit was awarded to him until his title to that benefit was exhausted. In October 1983 he commenced employment under a Community Programme Scheme working for 2½ days per week. On 30 January 1984 he requalified for unemployment benefit and he again claimed that benefit in respect of the days when he was not working on the said Community Programme Scheme. Unemployment benefit was refused by the local insurance officer and by a local tribunal in respect of the days on which he was not working on the basis that he was precluded from getting benefit for these days because of the "full extent normal" rule contained in the said regulation 7(1)(e). The question at issue is whether said regulation 7(1)(e) precluded payment of benefit in respect of these days when he was not employed.

18. The full extent normal rule has been contained in statutory provisions (amended from time to time) since the coming into effect of the National Insurance Act 1946. Some of the principles laid down by Commissioners in this connection over the years are as follows:-

(a) When deciding whether a claimant at a particular time is caught by the full extent normal rule regard has frequently been had to the claimant's employment history over the previous 12 months. I agree with what was stated in this connection by the present Chief Commissioner in the decision R(U) 3/86 which is a decision by a Tribunal of Commissioners:-

"In my view the prima facie approach of adopting a "one year before basis" specified in the Commissioner's Decision CU 518/49 (KL) at paragraph 11, affords a practical - but certainly not inviolable - approach which ought not to be disturbed; a very large number of cases must have been decided on the basis of it in the 35 years since 1949 and the legislation has been under the scrutiny of Parliament on a considerable number of occasions since, without apparent disapproval. I would regard it as thoroughly undesirable at this stage to disturb so long-standing a rule of practice. This said, however, it is only in effect a rule of evidence and cannot supplant the Parliamentary language. There have been frequently cases where a claimant's record of work over longer periods has been considered - thus three years in R(U) 13/55 at paragraph 10. There have been cases on the other hand where the necesssary findings of fact can be made on the basis of the immediate surrounding circumstances, including in particular the contract of employment and its nature, as in the oil rig worker case, R(U) 2/83."

(b) There have been cases when Commissioners have decided that a claimant is precluded from receiving unemployment benefit during days of unemployment because of the full extent normal rule before the lapse of 12 months. For instance, a person who retires but who decides to continue working in some form of employment for two days per week may well immediately, or at least very quickly, properly be regarded as a person whose normal employment from the regulation 7(1)(e) point of view is two days per week. That was obviously the view taken by the then Chief Commissioner in decision R(U) 3/74.

(c) When a claimant enters into a contract of employment which lays down that he is only employed for a certain number of days each week it may well be warranted to decide that the claimant is employed to the full extent normal for these days because of the provisions in the contract. That rule must, however, in my opinion be applied with caution. Decision R(U) 1/72 has frequently been cited in this connection. It is, however, important to note that the claimant in that case had been a part-time teacher employed on only a few days in the week for a number of years. The Commissioner pointed out that the claimant's pattern of employment had the character of regular employment on days specifically prescribed by the current contract. When therefore the claimant in question entered into a further contract in January 1971 which involved only two days work a week instead of three it was held to be proper to apply the full extent normal rule at once and to hold that the claimant was not entitled to unemployment benefit in respect of the other days in the week when he did not work.

(d) There are of course also the "stop-gap" cases in which it has been held that the full extent normal rule clearly does not apply. These are the sort of cases involving claimants who, having become unemployed from full-time work, take up temporary part-time employment while seeking to obtain full-time employment again. There may of course in such cases come a time when a claimant will, albeit still seeking full-time employment, be regarded as struck by the full extent normal rule.

(e) There have been cases in which some Commissioners have taken the view that it is not proper to apply the full extent normal rule even when a claimant has been involved in only part-time work for over a year. For instance in a recent case decided by me the claimant in question had been employed on full-time work from 1978 until 24 January 1983 when she was made redundant. From January 1981 she had in addition to her full-time work carried on employment as an agent for a football pools firm which involved working about three hours each Friday evening collecting football coupons and fees which part-time work yielded her about an extra £7 per week. Having been made redundant in January 1983 she continued to carry on this said work as an agent for the said football pools firm. I decided that although she had still been unable to find full-time work by December 1983 (i.e. about 12 months after having been made redundant) she did not yet fall to be regarded as a person who was employed to the full extent normal in her case and was therefore not precluded from receiving unemployment benefit during her days of unemployment because of the provision of regulation 7(1)(e).

19. Turning now to the facts and circumstances relating to the present case the claimant was employed under the Manpower Services Commission Community Programme Scheme. Quite a large number of cases have come before Commissioners involving claimants' employment on that basis, and conflicting decisions have been given by Commissioners. Also, the question arose whether having regard to the decision of the Court of Appeal in Riley v Adjudication Officer (unreported 25 July 1985) it was incumbent on Commissioners to decide that claimants employed under such a Community Programme Scheme normally fell to be regarded as struck by the provisions of said regulation 7(1)(e). It was in those circumstances that the Chief Commissioner decided that there should be a Tribunal of Commissioners to deal with the present appeal.

20. The following are the main features relating to employment under the Community Programme which is the successor to the Community Enterprise Programme. It is administered by the Manpower Services Commission on behalf of the Secretary of State for Employment to help long-term unemployed adults improve their prospects of obtaining

permanent employment by providing them with temporary employment, either full-time or part-time, on projects of benefit to the community. Individual employees may not be employed under the programme for more than 52 weeks, although in certain cases key employees, such as managers or supervisors, may be retained for a longer period if they are essential to a project and if there are no other suitable unemployed people. Such employment is designed to improve the person's chances of securing alternative, longer term employment, and such persons employed under such a Community Programme are urged to continue to make efforts to obtain full-time employment, and they are given reasonable time off with pay for interviews and allowed to release their services on short notice should an employment opportunity arise. Also, the contracts relating to such employment provide that although 52 weeks is the maximum permitted period of service it is hoped that the person in question may be able to leave for other employment before that period of 52 weeks expires.

21. I have had a number of cases before me relating to claimants who have obtained employment on that basis (one of which is decision on Commissioner's file CSU/44/85 referred to by the other 2 Commmissioners in the present case), and I held that the claimants in question were not precluded from receiving unemployment benefit during days of unemployment because of the provisions of said regulation 7(1)(e). Having heard the submissions at the hearing before the Tribunal of Commissioners in the present case and applying the said principles laid down by Commissioners in the past I consider that my said view was correct. I also consider that the above-mentioned case of Riley decided by the Court of Appeal does not render it incumbent on me to take a different view. Such employment is in my opinion clearly of a temporary nature, and it should normally be held that claimants involved in such employment do not fall to be regarded as struck by the full extent normal rule. In some cases I have referred to such employment as stop-gap employment, and at the hearing before this Tribunal of Commissioners it was stated that such employment should not be regarded as of a stop-gap nature. That may well be so, but I merely used in my decisions the expression "stop-gap" as meaning employment of a temporary character. In all the circumstances I am of the opinion like my fellow Commissioners who sat on the tribunal with me that the claimant in the present case was not precluded from receiving unemployment benefit during the days on which he did not work while he was employed on the said Community Programme post during the period up to 13 April 1984. The facts and circumstances relating to the claimant's employment after 13 April 1984 are not clear, and I agree that our decision should only apply up to that date. Furthermore, although I am of the opinion that claimants employed under a Manpower Services Commission Community Programme will not normally be precluded from receiving unemployment benefit under said regulation 7(1)(e) during the days on which they do not work, there may of course be special circumstances relating to certain claimants which would warrant unemployment benefit not being paid because of the provisions of said regulation 7(1)(e).

(Signed) D. Reith
Commissioner

(Signed) J.G. Monroe
Commissioner

(Signed) M.J. Goodman
Commissioner

Date: 4th February 1987