

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is:

- (a) that the decisions awarding to the claimant unemployment benefit for 11 and 12 May 1983, 7 June 1983, 13 June 1983 and 27 June 1983 are to be reviewed as having been given in ignorance of a material fact;
- (b) that on such review the decisions relating to 11 and 12 May and 7 June 1983 only are to be revised so as to provide that benefit was not payable for those days;
- (c) that in consequence of such revision there has been an overpayment of benefit amounting in all to £12.65, repayment of which (so far as not already recovered) is required;
- (d) that unemployment benefit is payable to the claimant (unless there is some obstacle to payment other than the regulations considered in this decision) for 5 July 1983.

2. The claimant being at the time in receipt of unemployment benefit was a member of his local borough council and as such was entitled to claim the so called "attendance allowance" in respect of approved duties performed by him in the form of attendance at council and committee meetings. He in fact performed such approved duties on 11 and 12 May, 7, 13 and 27 June, and 5 July 1983. He made claims for attendance allowance in respect of each of these days, but whereas he claimed £12.08 in respect of each of 11 and 12 May and £13.56 in respect of 7 June he limited his claim to £2 in respect of each of the three remaining days.

3. Unemployment benefit was actually awarded to the claimant in respect of each of the first five days last mentioned; and when the adjudication officer became aware of the facts he concluded that the awards for those days should be reviewed and revised; and he gave a decision to that effect and, after revising,

the decisions so as to provide that benefit was not payable for any of the days in question decided that repayment was required of £21.08 being five days' benefit at £25.30 per week. He also decided that unemployment benefit was not payable for 5 July 1983. The claimant appealed to the appeal tribunal who dismissed the appeal and he now appeals to the Commissioner. In view of the fact that the adjudication officer now concerned had referred me to two Commissioner's decisions on this or a similar point which he said were conflicting and that he invited me to follow the decision that seemed unfavourable to the claimant, I directed an oral hearing of the appeal. The claimant did not attend though he submitted in advance of the hearing a reasoned argument in support of his appeal. The adjudication officer was represented by Mr G Gerry of the Solicitor's Office of the Department of Health and Social Security, who took a somewhat different line from the adjudication officer.

4. The matter turns on regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [SI 1975 No 564] as amended by SI 1982 No 96 (the 1975 amended Regulations). This regulation as so amended was for present purposes the same as (though not identical with) regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, and provided so far as material as follows:

".....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 in 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) a charity, or
 - (b) a local authority, health authority, preserved board or health board in providing a service which could be provided by a charity;"

5. The adjudication officer took the view that the claimant by acting as a councillor was engaged in employment on each day that he performed an approved duty; and that although he accepted that he satisfied conditions (ii) and (iii) of regulation 7(1)(h) he did not satisfy condition (i) relating to the amount of the earnings derived whether or not he claimed the full attendance allowance. He gave his decisions on that basis.

6. The claimant in appealing against the decision was at first inclined to dispute the proposition that he was, as a councillor, engaged in employment at all. This or a similar question has been considered by Commissioners in relation to the parallel regulations relating to earnings while otherwise

qualifying for sickness/invalidity benefit and earnings while drawing retirement pension. It was concluded in relation to the latter in Decision R(P) 2/76, where the words in question were "engaged.....in a gainful occupation", that a councillor was engaged in such an occupation. These words are somewhat reminiscent of the words "following an occupation" that used to be in the predecessor of regulation 7(1)(h), as to which see Decision R(U) 3/77 at paragraph 7. In relation to sickness benefit where the relevant phrase is "has done some work" the Court of Appeal, affirming in this respect the conclusions of Commissioners, have expressed the view that the attendance at council meetings is undoubtedly "work" (see Merriman v Insurance Officer; Hunt v Department of Health and Social Security (14 June 1985 not yet reported), a copy of the judgment in which is in the case papers. The same conclusion has been reached in relation to unemployment benefit on the present words in Decisions R(U) 6/77 and R(U) 5/83. The claimant does not in his written submission to me raise this issue and I hold that a person who performs approved duties with a local authority such as to entitle him to claim an attendance allowance under section 173 of the Local Government Act 1972 is a person engaged in employment on the days on which he performs those duties; and that he is so engaged whether or not he elects to draw such attendance allowance (as to which point see further paragraph 15 below).

7. The claimant's leading contention is that on the days in respect of which he declined to apply for any attendance allowance above £2, and thus was paid only £2, he is entitled to unemployment benefit on the footing that the earnings derived from the employment are no more than £2, whatever he might have drawn had he claimed it. He told the appeal tribunal that it was by the time of their hearing too late for him to claim more. He cited in support of his contention the unreported Commissioner's Decision CU 1/80, which is precisely in point. It would seem that the adjudication officer did not follow this decision because he conceived that it was inconsistent with another unreported Commissioner's Decision CS/19/1983. That at any rate was the ground on which the adjudication officer now concerned sought to support the decision. The appeal tribunal decision, as recorded, seems to be devoted to the considerations which caused them to require repayment of the amount overpaid. Decision CS/19/1983 was a decision relating to invalidity benefit and turned on the interpretation of regulation 3(3) of the 1975 amended regulations, the relevant words to be interpreted being:

".....if that work is -

- (i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital or similar institution; or
- (ii) work which is not so undertaken and which he has good cause for doing,

and from which, in either case, his earnings do not ordinarily exceed £16.50." (The figure was that in force for the period which bears on this appeal it is normally increased at the time of the annual uprating of benefits).

8. In the case in question the claimant had for some years been in receipt of sickness followed by invalidity benefit. He served as an elected councillor for a number of periods that were under consideration in the appeal; so far

as this case is concerned the relevant period was a period from February to November 1982 during which the claimant had "refused to accept" pay in respect of his attendances and maintained that he thus had no earnings. In fact the Commissioner held that he in any case incurred expenses in connection with the attendance which would have been deductible under regulation 4 of the Social Security (Computation of Earnings) Regulations 1975 [SI 1978 No 1698] (the Computation of Earnings Regulations) which in most weeks would have brought the full amount payable below the maximum amount. In the result he held that on any view the claimant's earnings did not "ordinarily" exceed this amount. In consequence the work that the claimant did as councillor during the period in question was held to be work to which regulation 3(3) applied.

9. But the Commissioner expressed the view that the undrawn attendance allowance constituted earnings within the meaning of the regulation. He cited Decision R(P) 1/70, which concerned the earnings of a business in Italy which could not be, or at any rate were not, remitted to this country. The Commissioner there held that these profits clearly constituted "earnings derived from gainful occupation" in terms of the similar definition of "earnings" in section 114 of the National Insurance Act 1965. The view that the same applied to earnings waived expressed in Decision CS/19/1983 was expressed only obiter, but it was adopted in relation to invalidity benefit by another Commissioner in Decision CS/376/1983. That Commissioner left open the question whether the same went for unemployment benefit.

10. The adjudication officer seems to have based his decision in this case on the assumption that the invalidity benefit decisions were not only correct but equally applicable to unemployment benefit. This view was by implication accepted by the appeal tribunal and in the written submission of the adjudication officer now concerned. But Mr Berry withdrew from such a submission. He pointed out that the unemployment benefit regulation ((7)(1)(h) of the 1975 amended Regulations) refers to earnings derived from an employment, whereas the sickness/invalidity benefit regulation (regulation 3(3)) refers only to earnings from work. He cited the definition of "derive" in the Concise Oxford Dictionary as a transitive verb meaning (as its first meaning) to "get" or "obtain". He submitted that earnings that are waived or not claimed are not gotten or obtained and that they were thus not derived from employment. He submitted therefore that Decision CU 1/80 was right and should be followed and that the invalidity benefit decisions were distinguishable. I accept this submission so far as it relates to unemployment benefit. I hold therefore that the claimant's unclaimed attendance allowance was not earnings derived from his "employment" as a councillor. My decision as set out in paragraph 1 above follows from this conclusion subject only to the question of liability to repay the small amount overpaid.

11. The amount overpaid to the claimant is money that he received to which he was not entitled. The natural consequence of this is that he should repay it, no matter how the overpayment came about. Section 119 of the Social Security Act 1975 requires that I direct repayment unless it has been shown to my satisfaction that in the obtaining and receipt of the benefit in question the claimant throughout used due care and diligence to avoid the overpayment. It is not a question of a penalty for carelessness, but of whether the claimant's care has been of a level high enough to allow him to retain that which should not have been paid to him in the first instance.

12. I accept the claimant's statements that he was not aware that attendance allowance would affect his title to benefit. But the Department of Employment on behalf of the Department of Health and Social Security went to some trouble to acquaint him with what is required of a claimant. They sent him a form UBL 18 in which he was warned that he must tell the Department if he did or expected to do any kind of work (including voluntary work) even if it was unpaid or only for a few hours. This requirement is to ensure that any question of the effect of such work on title to benefit can be referred to the adjudicating authorities; and a claimant who by not reporting any such work in time in effect decides the question in his own favour acts as judge in his own case and will not be held to have used due care and diligence. I may add that each time he drew benefit the claimant put his name to a statement that he had read UBL 18. I cannot hold him to have used the necessary degree of care and diligence to relieve him of the obligation to repay.

13. Before leaving this appeal I want to make clear that it should not be inferred from what I have said so far that I accept that the cases on sickness/invalidity benefit under regulation 3(3) are distinguishable. I am doubtful about them because they do not appear to me to have been based on the definition of earnings in section 3 of, and Schedule 20 to, the Social Security Act 1975, which definitions by virtue of section 11 of the Interpretation Act 1978 apply equally to regulations under that Act. In the decision above referred to R(P) 1/70 the Commissioner considered the definition of "earnings" under the 1965 Act, which included the magic word "derived"; and I can readily follow that earnings made in a business but not remitted to this country are earnings derived (meaning obtained) from an occupation. The comparable definition of earnings in section 3(1) of the 1975 Act refers to the word "earnings" as "including" remuneration or profit derived from an employment, which leaves it open to speculation whether it also includes remuneration or profit not so derived. But section 3(3) of that Act provides for the calculation or estimation of earnings on such basis as may be prescribed; and the Computation of Earnings regulations, made under this power defines "earnings" as meaning **earnings derived from gainful employment**, which leaves one with the conclusion either that this in the absence of a context to the contrary is the meaning of earnings throughout the Act and regulations under it; or that the Computation of Earnings Regulations apply only to earnings within that definition while earnings not within the definition fall to be computed in some other way. I reject the latter alternative. I consider that the word "earnings" when used in the Act and regulations means where the context does not otherwise require, earnings derived from a gainful occupation. For this reason I question whether any distinction ought to be drawn between the meaning of the word "earnings" in regulation 7(1)(h) and in regulation 3(3) of the 1975 amended Regulations.

14. There is a further reason for my reaching this conclusion. Under regulation 5 of the Computation of Earnings Regulations the earnings of certain persons fall to be taken, for purposes of invalidity but not sickness benefit, by reference to the figure assessed or agreed for income tax purposes. It is stated in Whiteman and Wheatcroft on Income Tax (2nd Edition) at page 596 that a person who renounces the emoluments of his employment before they are paid to him is clearly not liable to tax on them. It is difficult to find authority for this proposition because, so far as I am aware, it has always been accepted by the Inland Revenue so that a person's income will always in practice be agreed with the exclusion of renounced remuneration.

The nearest to an authority for the point of which I am aware is an obiter dictum of Rowlatt J in Parker v Chapman (1928) 13 TC 677 at page 682. It would be highly anomalous if waived earnings constituted earnings in the case of those to whom regulation 5 does not apply, while they did not count in relation to those to whom it does apply.

15. In another income tax case Henry v Galloway (1933) 17 TC 470 approved in Oliver v Chuter (1934) 18 TC 570, it was held that a person who received emoluments of office in year 1 but renounced them from a date in year 2 and wholly in year 3 continued to hold an office of profit after the renunciation so that (being taxable on the proceeding year basis) he was taxable in year 3 by reference to the emoluments actually received (excluding the emoluments renounced) in year 2. There was no attempt to assess him in respect of the renounced emoluments of year 2. The decision does however confirm that it is right for social security purposes to treat the office of councillor as continuing to be a gainful occupation or an employment notwithstanding any waiver of attendance allowance. And this is certainly of significance in relation to the sickness/invalidity benefit provision of regulation 3(3). This (unlike the unemployment benefit provision in regulation 7(1)(h) - or now 7(1)(g)) relates to what are ordinarily the earnings of the claimant, and not to what are his earnings on the day in question. If a person is doing work but has temporarily while incapacitated waived the emoluments, his earnings will continue to be regarded as ordinarily what he drew before the incapacity; though of course when incapacity is prolonged a time may come when the matter should be viewed differently. It may well be that the non-claiming of an attendance allowance during incapacity will for this reason be found not to assist a claimant for sickness or invalidity benefit.

16. The claimant's appeal is allowed to the extent indicated by my decision in paragraph 1.

(Signed): J G Monroe
Commissioner

Date: 16 January 1986