CU 299/1981-1

IEJ/BW

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

C U 299/1981

1. (1) This appeal does not succeed except in a minor technical respect. My decisions are that - (i) unemployment benefit is not payable for either of the periods 26 May 1980 to 12 June 1980 and 23 June 1980 to 18 July 1980 (all dates included) because each day within such periods was a day in respect of which the claimant received such a payment as is specified in regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975, ("Reg 7(1)(d)"); and(ii) I set aside as given without jurisdiction so much of the decision dated 28 November 1980 of the local tribunal as purported to disallow on like grounds unemployment benefit for the period 13 to 22 June 1980 (both dates included) since the claimant did not in fact claim benefit for any of that period.

(2) If, as appears possible the reasons on which my decision is founded bear also to indicate that disallowance should have been (but has not been) imposed for 19 July 1980, then whilst no issue as to benefit, or treatment as to a "waiting day" of that date, is embodied in the present appeal, I express the hope that should it hereafter be held that any overpayment of benefit has so resulted it be held also that repayment of the benefit so overpaid need not be required, as it appears to me that the claimant throughout used due care and diligence to avoid any such overpayment.

2. The principal facts material to this appeal are not in dispute, are common to the other appeals now also before me, and are indicated in Appendix I. All the 17 appeals are brought by the claimant's association, and my decision on this appeal follows, as follow also my decisions on those other 16 appeals, an oral hearing on 21 April 1982 at which the appellant's association was represented by Mr D J Nolan, of the firm of Jack Thornley, Solicitor, and the insurance officer was represented by Mr J H Swainson of the Solicitor's Office of the Department

of Health and Social Security. I am grateful to both for their helpful submissions.

3. (1) In the circumstances indicated in Appendix I the employment of the claimant by the employer (as there identified) terminated on 24 May 1980, and as from 26 May 1980 she claimed unemployment benefit over 18 July 1980 save for an interval - 13 June to 22 June - during which she did not claim.

(2) The payment made to the claimant under the agreed terms referred to in Appendix I was made on 29 May 1980.

4. On 10 July 1980 an insurance officer's decision in respect of the claimant was given in the following terms:-

"Unemployment benefit is not payable from 26 May 1980 to 26 June 1980 (both dates included) because it is a period for which the claimant receives a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration she would have received for that period had her employment not been terminated. (Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations reg 7(1)(d)).

If any further claim is made in respect of a day falling in the period 27 June 1980 to 18 July 1980 (both dates included) and on that day the grounds of this decision have not ceased to exist, this decision is to be treated as a disallowance of that claim. (Social Security (Claims and Payments) Regulations reg 12(5))."

5. There are substantial issues with which I must shortly go on to deal as to whether the payment which the claimant had received fell within reg 7(1)(d) at all, and if so as regards what period. But it is convenient to indicate at this point that the above decision overlooked that the claimant had in fact made no claim for benefit for the period 13 to 22 June 1980 so that the purported decision as to these dates was clearly a nullity.

6. The claimant appealed against the insurance officer's decision to a local tribunal, which on 28 November 1980 dismissed the appeal; and from that decision her association have appealed to the Commissioner.

7. The substantive arguments on the present appeal and my conclusions in respect of them are common to all 17 appeals and are set out as Appendix II to this decision, which is given for the reasons there expressed in conjunction with those above expressed.

8. I should, however, add that the grounds on which the local tribunal's decision was expressed to be founded were in error of law in respects which will sufficiently appear upon contrasting with them Appendix II to the present decision.

9. My decisions are as indicated in para 1(1) above.

(Signed) I Edwards-Jones
Commissioner

Date: 14 June 1982

Commissioner's File: C.U. 299/1981
C I O File: I.O. 3119/U/81
Region: North Western

DECISION CU/299/1981

This decision is circulated because of the caution it seeks to express as to applying too widely certain passages in R(U) 7/80.

In this context it is unnecessary to read more than Appendix I and paras 9-21 of Appendix II to the present decision, but material to note that the regulation 7(1)(d) referred to is, regulation 7(1)(d) of the Unemployment, Sickness and Invalidity Benefit Regulations.

IEJ

A P P E N D I X I

Principal Facts

1. At all material times down to and including 24 May 1980 the claimant was employed by Intex Yarns (Manufacturing) Limited ("the Employers"). Due to reduced demand the Employers decided to close their factory at which the claimant was employed and to dismiss as redundant 381 employees there of whom the claimant was one and to open consultations with the several trade unions concerned, of which the claimant's association was one. Those consultations were instituted on 22 February 1980 but had not by 17 April 1980 fructified into any overall agreement as to the date of closure or terms of termination.

2. On 17 April 1980 the Employers:

(i) gave notice of intention to dismiss the 381 employees to the Secretary of State under section 100 of the Protection of Employment Act 1975 ("the Protection Act") indicating 18 July 1980 as the date of the first proposed redundancy; and

(ii) notified the several trade unions in reference to section 99 of the Protection Act to the like effect, by way of formally opening consultations (which then ensued).

3. On 21 April 1980 the Employers gave individual written notices to each of the 381 employees stated to expire on 19 July 1980 in the case of each of them who was hourly paid and 31 July 1980 in the case of each of them who was paid monthly. Each notice specified the period of notice to which the claimant was entitled (taking into account both contractual rights to notice and those conferred by statute) and was expressed to take prospective effect from a (specified) commencement date calculated as consistent with due notice having run by the stated expiry date.

4. Oral agreement upon overall terms was, as the product of the further consultations, reached with all the trade unions concerned on a date which cannot be precisely identified from the materials before me but is accepted by Mr Nolan and Mr Swainson as having been on or shortly before 7 May 1980.

5. The overall terms so agreed are not set out in any written document before me, nor is there any record of the course of the consultations and negotiations which led up to their being agreed. But it is common ground that the terms expressly included the following key elements:

(A) the factory closure would be accelerated to 24 May 1980 and employment would be terminated then in the case of hourly paid employees and the case of those paid monthly, on 31 May; and the closure would be "peaceful" - i.e. would not be attended or preceded by any industrial action;

(B) Each employee so made redundant would receive normal renumeration down to and including the termination of employment plus a terminal sum the composition of which would be formulated as the aggregate of:

(i) the amount of the statutory redundancy payment to which the employee was entitled;

(ii) the like amount multiplied by 2;

(iii) a sum equal to 20 weeks gross wages or salary.

(C) Acting by their respective trade unions all the employees concerned formally agreed (as later confirmed in writing) to relinquish their rights to any notice due, or payments in lieu of notice.

6. I think it strongly probable, although it is nowhere mentioned in the case file (and in view of other conclusions I have reached which are expressed in Appendix II to this decision it is unnecessary for me to decide this point) that expressly or by necessary implication the agreed terms also included agreement on the part of the trade unions and, by them, their member employees, that neither the trade unions nor their employee members would pursue or seek to have pursued any rights or potential rights that might exist to have a protective award of remuneration under the Protection Act made or enforced.

7. The proposal as to waiver of rights to notice or payments in lieu was put forward by the trade unions - who had closely in mind the status for income tax purposes of payments received by employees which fell to be treated as payments in satisfaction of such rights.

8. The Employers had welcomed that proposal as opening the way for agreement of overall terms which removed the risk (which they regarded as substantial) of industrial action affecting a peaceful closure in the absence of such an agreement; and in response to later inquiries by the Department of Health and Social Security the Employers indicated that whilst the 20 weeks wages/2 months salary element had been arrived at as representing 12 weeks "flat rate" remuneration plus a further 8 weeks "ex gratia" payment of wages (or 2 months salary in the case of the monthly paid) "equivalent to the period between the actual termination date and the date originally notified" (i.e. the period 24 or 31 May to 19 or 31 July) they had regarded the entire "package" making up each payment as an outlay expended by the Employer primarily to ensure a peaceful closure and secondly (in response to specific inquiry by the Department as to whether the payments were made on this account) as payments for loss of established jobs.

(I should here interpose that a few very senior staff had 22 weeks - 14 + 8 - instead; but in my view nothing material turns on that.)

9. When the payment to each employee was made it was made under covering letter which set out the total payment as comprised of two elements only -

(i) the statutory redundancy entitlement;

(ii) the balance - styled "ex gratia" - of the amount due in accordance with the agreed terms.

10. The payments were made "gross" - i.e. without any deduction of income tax - except where, by reason of exceeding the tax free ceiling for "golden handshake" compensation, tax was attracted on that account.

11. Each of the 17 claimants whose appeals are now before me was an "hourly paid" employee whose actual termination date was 24 May 1980 and to whom antecedent notice had been given to expire on 18 July 1980, termination of employment "taking effect" as from 19 July.

12. The closure, and work-out of the agreed terms, in fact proceeded as agreed.

A P P E N D I X II

The substantive issue, the arguments, and my conclusions

1. The substantive issues are:

   (A) whether or not the terminal payment which the claimant received falls to any and what extent within the "bite" of regulation 7(1)(d) - i.e. constitutes in any part:

   "... a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration he would have received for that day had his employment not been terminated ...;" and

   (B) if so falling at all, to what day or days it is referable thereunder.

2. It is convenient to indicate at this point that nothing in the present case turns upon the words in the parenthesis "(whether or not a payment made in pursuance of a legally enforceable obligation)" though - quite rightly in my view - Mr Nolan disclaimed any reliance upon the references in the documentation to elements of the payment received having been made "ex gratia".

3. (1) Mr Nolan's contention was in brief summary that the payment received was a single entire payment received under a "package deal" and had the overall character of a redundancy payment such as to take it wholly outside the scope of regulation 7(1)(d) notwithstanding that it was as to part of the constituent total computed by reference to the claimant's periodic remuneration and, in particular, to such remuneration for a period which corresponded to the remuneration which had been prospectively payable between the actual - accelerated - termination date in May and the originally notified termination date in July.

   (2) Mr Swainson's contention was in brief summary that although he did not contend that either the element of the single payment attributed to statutory redundancy payment or the element constituted by the additional "two times statutory" fell within regulation 7(1)(d) the remaining element - of 20 weeks/ 2 months remuneration - did so fall.

4. It is convenient at this point to note that (as will be apparent upon reference to Appendix I) whilst both the statutory redundancy payment element and the "2 x redundancy payment" element involved individuals receiving different amounts reflecting different lengths of service in the employment, the 20 weeks or 2 months remuneration was paid to all the employees concerned irrespective of length of service - though of course varying in individual amounts in accordance with individual current wages/salary levels.

5. (1) Mr Nolan relied upon the express waiver on the claimants' behalf of both notice and payment in lieu of notice as exonerating the terminal payment from any application of regulation 7(1)(d) as regards a payment in lieu of notice, citing paragraph 4 of Decision R(U) 1/80 in support of that contention; and Mr Swainson directed no separate argument to that contention, though not conceding that it was well founded.

(2) In my judgment the embodiment in the agreed terms of such waivers was in no sense a sham and formed part of an entire "package" of mutual considerations passing under the agreed terms notwithstanding that it was a term sought by the trade unions with the income tax status of the payment which claimants would receive closely in mind. Accordingly I hold that the claimant succeeds on this contention.

That, however, leaves still in play the "second limb" of Regulation 7(1)(d) "- ... a payment ... in lieu ... of the remuneration he would have received ...had his employment not been terminated."

(3) As to that, Mr Swainson very properly recalled to me that it was a provision originally introduced to bring within the "bite" of regulation 7(1)(d) payments received upon premature termination of a fixed term contract, which could not be regarded as received "in lieu of notice"; but he did not contend that such wording was as a matter of law to be considered as so restricted in its operation, nor did Mr Nolan - and in my judgment those words are to be read in their ordinary sense and so read are not so restricted in force. And indeed they were not so regarded in the tribunal Decision R(U) 9/73.

6. (1) Mr Nolan submitted that the inclusion in the computation of the remuneration element was innocuous, because only a computational element in what was, in overall true character, a redundancy payment falling within the general line of authorities as to what were such and as such were accepted as falling outwith regulation 7(1)(d). He relied in this behalf upon Regina v National Insurance Commissioner Ex parte Stratton R(U) 1/79 Appendix II ("the Stratton case") and R(U) 1/80, distinguishing Decision R(U) 3/68 (which holds that the regulation bears once it is clear that a payment made up of composite elements contains an element of payment in lieu of notice or of the remuneration to which a person would have been entitled had his employment not been terminated) on the basis that here no such element could properly be held to have been involved, the inclusion in the "package" of 20 weeks/2 months remuneration being an arbitrary ingredient unrelated to any period in time and thus incapable of identification as remuneration which would have been received had the employment continued. And though he did

not expressly cite this in support, I note that normal remuneration was paid down to the May closing date, leaving outstanding only some 8 weeks before the period for which the notices already given to the employees for July expired, and it is also the case that:

(i) there is no evidence as to how the trade unions considered the 20 weeks to have been arrived at;

(ii) there is no evidence as to how any party to the negotiations regarded 12 weeks of that 20 as appropriate or to be attributed - and only the Employers' much later than contemporary intimation that they had regarded the additional 8 weeks as an increment referable to the accelerated closure.

(2) Mr Nolan further relied strongly on Decision R(U) 4/80 in so far as it is there indicated that a terminal payment can properly be looked at broadly, in the material context, without necessarily splitting it into component parts.

7. Mr Swainson took me helpfully through a number of authorities on which he relied, starting with Lord Justice Templeman's formulation of the characteristics of a redundancy payment properly so regarded, and Lord Denning's, in the Stratton case. He adopted the analysis and approach which I had myself indicated in Decision C(U) 6/80 that I regarded as appropriate (and still do); and relied upon that as sustaining his contention that because of the 20 weeks/2 months element (and in particular the 8 weeks of that) the payment received could not be regarded as wholly a redundancy payment, proceeding then to rely upon Decision R(U) 3/68 to invoke regulation 7(1)(d) as to that element, and upon Decision R(U) 9/73 as then indicating that the payment received constituted both a payment in lieu of notice and a payment in lieu of remuneration within the "bite" of that regulation.

The relevant circumstances in Decision R(U) 9/73 were significantly different, and since (as I have already indicated) I regard the waivers of notice and of payment in lieu as effective in the present case, that decision does not in my view carry home this argument of Mr Swainson's.

But I accept the submission that Decision R(U) 3/68 is still good law, and so there is still left open the "second limb" as to the payment embodying a payment in lieu of the remuneration which would have been received had the employment continued.

8. (1) There so arises for determination the crucial but relatively narrow issue as to whether the 20 weeks/2 months remuneration element, or the 8 weeks element finally embodied in it, is within or outwith the "bite" of regulation 7(1)(d).

I do not regard this as an easy question to decide.

(2) On the one hand I am mindful that the "agreed terms" were undoubtedly agreed "as a package" in the direct context of impending redundancy and - see the Stratton case at page 2603E - that the circumstance that a payment is quantified by a computation in which the current rate of pay is one ingredient does not preclude it constituting a redundancy payment on which regulation 7(1)(d) does not bear. And I take into account also the proposition in Decision R(U) 4/80 on which Mr Nolan relied.

(3) On the other hand, even the eventual reference by the Employer to the entire payment having been made for loss of an established job does not to my mind get the claimant over the hurdle that - even if, though lacking the precise features which Templeman L.J. regarded in the Stratton case as characterising a true redundancy payment (see at page 2604A) - 12 weeks of the 20 weeks remuneration element should be counted as such, the final 8 weeks was quite clearly an addition to which some specific origin is to be attributed. And to my mind it was quite clearly so added in order to "make up weight" in the circumstance that since, under the running notices of termination of employment already current, remuneration under the contract of employment stood to be continued down to the July date for which notice had been given to expire, under the "package" as so agreed 8 weeks or 2 months expected remuneration would otherwise be lost.

(4) So regarding the payment, and notwithstanding the obvious sense of a relatively broad approach "at large", I have come to the clear conclusion that the added 8 weeks remuneration is an element which properly falls to be treated as a payment received in lieu of remuneration under regulation 7(1)(d).

(5) It has long been established (and is confirmed by Decision R(U) 6/73) that where (now) regulation 7(1)(d) bears, the days to which the relevant payment is referable are in the case of a payment in lieu of notice established by reference to the period of notice to which the claimant was legally entitled (but did not receive); and, under the "second limb" of regulation 7(1)(d), by reference to the period during which the claimant was legally entitled to serve (but did not serve). Thus regulation 7(1)(d) bears, at first sight, on all those days for which unemployment benefit has been claimed falling within the maximum period which at the date of actual termination of employment the claimant was entitled to continue to serve.

(6) And, at first sight at least, this falls to be taken in the individual case as the period of notice which, if given to start at the date next following the actual termination date, the Employers were required by law (i.e. under the combined effect of the claimant's contract of service and the operation of the Employment Protection (Consolidation) Act 1978) to give in order to terminate the employment by notice.

However, Mr Swainson contended that since, at 24 May 1980 (the date of actual termination) each of the claimants was already the subject of an individual notice given to take effect from 19 July - i.e. to expire on 18 July, recipient claimant was legally entitled to have his or her employment continued down to the latter date even if the length of the period between the date of actual termination of employment and 19 July was greater than the period of legal entitlement to notice (as in some cases was so) - because, as he contended, the claimant had under the operation of the notice in fact given acquired a legal right to be employed and remunerated down to 18 July.

(7) Mr Swainson did not, however, seek to have that submission implemented to its full extent in the case of claimants entitled to legal notice longer than the period between the May termination and the July expiry date - he was content that disallowance should run only to 18 July 1980. But he did contend that I should regard disallowance down to the 18 July apt even in the individual cases in which the legal right to notice as at 24 May was to notice expiring earlier than 18 July.

(8) I am not persuaded that an employer who has, perhaps from benevolent motives which later economic pressures force him to review, given a longer than legally necessary period of notice is thereby precluded from serving an effective earlier expiring second notice, if he considers it necessary to do so, provided such second notice is itself of sufficient length to satisfy the employee's legal rights in that respect.

But I find it unnecessary to decide that point; because, in my judgment, in the context of regulation 7(1)(d) "if employment had continued" is to be interpreted in the sense of "as was to be expected in the ordinary course of events" - but for which implication it could never bear, since in every case of prognosis there would be such possibilities as that the employee would be summarily dismissed for gross breach in the interim before notice once given (or the balance of a fixed term) had fully run.

And, so regarded, the July expiry date for which notice had already been given is, in my judgment, in the circumstances of the case the proper closing date for disallowance both for those claimants whose period of legal entitlement to notice was longer than the period between the May termination date and the July expiry date and those for whom it was shorter or co-extensive.

9. The foregoing paragraphs collectively suffice to found my decision. I must, however, say something also about a further contention which Mr Swainson strongly pressed on me but to which I have not acceded, and which appears to me (as do also the stated grounds of decision in several

of the local tribunal decisions appealed from) to disclose serious misappreciation of the legal effects of sections 99, 101 and 102 of the Employment Protection Act 1975 ("the Protection Act") and of the true scope of Decision R(U) 7/80 in regard to such effects in the context of regulation 7(1)(d).

10. The further contention advanced by Mr Swainton was that under the operation of section 99 of the Protection Act each of the claimants was at the date when the agreed terms were reached entitled (or was to be regarded as entitled) to be remunerated for 90 days from 17 April 1980 by the Employers at the claimant's current rate of remuneration; and that accordingly the agreed terms, by implication if not expressly, embodied an element representing that remuneration - which element accordingly attracted the operation from the actual termination date over the 90 days of regulation 7(1)(d) in its second limb.

17 April 1980 was, as indicated in Appendix I, the date on which the Employers gave formal notice under the Protection Act to the Secretary of State (under section 100) and to the relevant trade unions (under section 99).

11. (1) Section 99 of the Protection Act undoubtedly did impose on the Employers a number of statutory obligations, commencing with an obligation to start consultations with the relevant trade unions at least 90 days prior to the earliest dismissal proposed, and - in the character of a "protective award" capable of being made by an industrial tribunal under the combined effect of sections 101 and 102 - undoubtedly did put into the hands of the trade unions concerned potential sanctions upon the Employers if they failed to comply with any of those obligations. And those sanctions do, when an award is made, result in payments of remuneration for a period having to be made to employees of the Employer in breach; and that period is such period not exceeding, in the circumstances which obtained in the present case, 90 days, as the tribunal may determine.

(2) However:

(i) the length of the "protected period" is, within that maximum, to be whatever the tribunal determines "to be just and equitable having regard to the seriousness of the Employer's default in complying with any requirement of section 99";

(ii) section 99 itself imposes no obligation on an Employer as to continuing employment or remuneration over any period to anyone;

(iii) the "protected period" is required to commence with the date of the earliest dismissal, or that

of the award (whichever is the earlier) - it is unrelated to the commencement of the 90 days prior to the first dismissal which is the time by which consultation is required to start.

12. Thus although those sections of the Protection Act clearly confer a considerable protection to employees against summary dismissal in cases of multiple redundancy, exercisable by and through their representative trade unions, and this in turn equips the unions with a useful negotiating weapon should a solvent Employer be recalcitrant to agree redundancy terms acceptable to the unions (as also a powerful sanction over an Employer who disregards in any particular his obligations under section 99), there is no such provision in the Protection Act as Mr Swainson contended there was.

13. The highest that it can in my own view be put in that direction is that in a case where an Employer who is required to commence consultations at least 90 days before the first dismissal either fails to do so or, tiring of the process, effects dismissals which have not been preceded by a commencement of consultations more than 90 days before, it can with some confidence be anticipated both that the unions will apply for a "protective award" and that the tribunal will consider the circumstances to warrant a substantial, perhaps maximum, award commencing from the date of the first dismissal.

14. In other cases the conduct of the Employer, if indeed involving any breach at all of his section 99 obligations, may be such that no award would be made if sought, or that only a nominal award would result - this is made clear by the following passage in Spillers-French (Holdings) Ltd v U.S.D.A.W. (E.A.T.) [1980] I.C.R.31 at page 40 - cited with approval in G.K.N. Sankey v Metal Mechanics (E.A.T.) 1980 I.C.R. 148 ("the G.K.N. Sankey case") at page 154:-

> "It seems to us that here Parliament is providing that employers should, in this kind of potential or actual redundancy situation, discuss the matter with the union and the Secretary of State in the hope of achieving one or other of the alternative courses to which we have referred. True it is that the tribunal has power to make a declaration. It seems to us that there is a duty, in the appropriate case, to make a declaration. In addition it seems to us that Parliament has given to the industrial tribunals the power, if they so decide, also to make a protective award which involves the payment of money. It seems to us that when that decision is taken, the question which has to be looked at is not the loss or potential loss of actual remuneration during the relevant period by the particular employee. It is to consider the loss of days of consultation which have occurred. The tribunal will have to consider, how serious was the breach on the part of the employer? It may be that the employer has done everything that he can possibly do to ensure that his employees are found other employment. If that happens, a tribunal may well take the view that either there should be no award or, if there is an award, it should be nominal."

15. Certain passages in Decision R(U) 7/80 have clearly appeared to Mr Swainson, and others, to stand as authority for the general proposition for which he contends; and I can readily understand why. But "cases are not talismans" and passages in any judicial decision must always be studied with close regard to the circumstances of the particular case to which they relate.

16. (1) In R(U) 7/80 it is clear that the Employers wished to reduce their workforce as soon as possible, and that although notice to the trade unions concerned was given under section 99 of the Protection Act on 6 March 1979 (so that 90 days measured from then would not expire until early June 1979) it was desired to make the first dismissals effective from 13 March 1979.

(2) In those circumstances an agreement of overall terms was quickly struck between the union concerned (acting as principal in the context of sections 99 and 101 of the Protection Act and also on behalf of its individual employee members) and the Employer.

(3) Under that agreement the union expressly waived all its rights to have the Employer duly discharge its obligations as to consultation under section 99 and each employee volunteering for redundancy became entitled (in addition to other benefits) to a payment equal to the remuneration he would have received between the date of his leaving and the expiry of the 90 day period regardless of when he actually left.

(4) By such waiver (and as a matter of law) the union also relinquished all prospective foundation on which to base any application under section 101 of the Protection Act for a protective award.

(5) However, had the Employer commenced dismissals on 13 March 1979, a bare one week after giving notice to the union under section 99, (otherwise than under the dispensation of such waiver as had in fact been made), there would patently have been gross breach of the Employer's obligations under that section; and in consequence every expectation that:

(a) the union would have made application for a protective award, in the interests of its member employees ; and

(b) the application would have resulted in an award of remuneration under section 102 commencing from 13 March 1979 and extending (if not for a full 90 days from that date) at least for the balance of the (separate) section 99 period of 90 days started from 6 March.

(6) And it is in that context that one should view the two passages in R(U) 7/80 upon which Mr Swainson particularly relied, namely:

> paragraph 3 (in reference to section 99):
> "The practical effect of this provision was that those employees who were to be dismissed for redundancy were entitled to be employed and earn remuneration accordingly for the 90 days period of notice"; and
>
> paragraph 4 "... I consider it would be unrealistic of me to suppose that" (emphasis here supplied by me)"in a case such as the present one where there is a trade union actively looking after the welfare of its members, such trade union will fail to ensure that those of its members who are to be dismissed receive the full 90 days notice or a cash equivalent. Accordingly in my judgment for all practical purposes the member concerned had in the present case a 90 days' entitlement."

17. For the reasons I have sought to indicate above, the significance, if any, to be attributed to prospective benefit to employees of a protective award being made in their favour under section 101 of the Protection Act in the context of regulation 7(1)(d) and a terminal payment can in my judgment be determined only by close consideration of the circumstances of the particular case - and I do not read Decision R(U) 7/80 as expressing any contrary view.

18. The circumstances of the present case were in such context widely different from those which obtained in the case of R(U) 7/80. Informal consultations had started as far back as 28 February 1980. True it is that formal notice under sections 99 and 101 was not given until 17 April and that in the event the first dismissal took place on 27 May, well before the expiry of 90 days under section 99 - which, I may recall in passing, would in any event, have expired on 16 July, not (as did the notices to employees) at 18 July (a distinction with which Mr Swainson's arguments never grappled). But the redundancy notices given on 21 April were for 19 July - at which date that period would have run; and the acceleration to 27 May was by consent of the unions as part of the overall terms agreed.

19. (1) Mr Swainson further submitted that notwithstanding such consent the effect of such acceleration was to put the Employers in breach of section 99 since the first dismissal then preceded the expiry of 90 days from 17 April, when the formal notice in relation to section 99 had been given.

(2) I am not convinced that he was right about that. There is nothing in section 99 which provides that the consultations must be continued over the full 90 days, and it is not difficult to postulate

circumstances in which it would be repugnant to common sense if it had - e.g. where:

(a) overall terms are earlier agreed; or

(b) every avenue for such solutions as the Protection Act envisages has been earlier explored and exhausted.

But I need not, I think, express a conclusion on that point, which could arise for substantive determination only in circumstances other than those which in fact obtain and in a jurisdiction other than my own.

(3) The crux of the matter, so far as relevant to the present case, is in my view that even if the acceleration did produce a breach, since the acceleration eventuated under terms agreed by the unions it could not have led to any substantial protective award being made under section 101.

I am fortified in this view by noting from the G.K.N. Sankey case at page 150 that whilst the industrial tribunal had found that a bringing forward of the closure date in circumstances in which, due to confusion, union consent had not been obtained to the acceleration did constitute a breach of section 99, they declined in all the circumstances to make any protective award on that account; which seems to me to support the more strongly my conclusion that no substantial award could be anticipated to flow from an acceleration specifically agreed to.

20. (1) That of course leaves outstanding the alternative contention that had terms not been agreed as in fact they were and had the Employers nevertheless proceeded with dismissals accelerated to begin on 27 May it might reasonably be expected that a protective award under section 101 would or might have been made and might - indeed well might - have awarded remuneration for a period covering the balance of the section 99 period.

(2) However, in my judgment that contention must also fail in the circumstances of the present case.

For it appears to me clear that, upon a balance of probabilities amounting to virtual certainty, had not terms for the accelerated closure been reached as in fact they were there would have been no acceleration of the closure and the Employer would in default of agreement upon overall terms have awaited the expiry of the notices given on 21 April - which would have fallen outside the 90 day period running from 17 April - and in the absence of some other

foundation for breach of section 99 obligations (of which there is no evidence) - no foundation for seeking a protective award would then have arisen, still less the foundation for making any award of substance. Indeed it seems to me that the obvious intendment of an Employer who - as the Employer did here - serves notices of redundancy upon the employees to be affected which are given to expire when a 90 days period will have run for the purposes of section 99 of the Protection Act is to endeavour to avoid, by giving and acting in accordance with those notices in conjunction with full observance of his obligations under that section, any potential entanglement with a section 101 application for a protective award.

21. (1) Thus it is that I have been unable to accept in original or any alternative form the contention that any part of the payment received in the present case is referable to waiver of remuneration referable to any prospects of award under the Protection Act or (if it was done) to waiver by any union of any right or prospective right of substance to apply for such an award.

(2) That is not, of course, to suggest that there may not be many cases - of which R(U) 7/80 is clearly one - in which quite different conclusions in regard to this issue may be warranted.

But each case will turn upon its own particular facts, and - as is made clear in the decision on Commissioner's File C.U. 349/1981 (paras 6 and 10 onwards of the "Statement of Reasons" annexed) - it will be of some importance to distinguish between the 90 days period stipulated for by section 99 and the - quite distinct - 90 days period which under section 102 is the maximum for which a protective award of remuneration can be made when and if deciding in the context of regulation 7(1)(d) that a payment received in connection in part is attributable to remuneration, or the prospect of remuneration, awarded or to be awarded under the Protection Act.

REPORT NOTIFICATION (for information only)

The Chief Commissioner has decided that the following decisions shall be reported:

CF 1/82 - R(F) 1/82
CSB 36/81 - R(SB) 8/82
CSB 38/81 - R(SB) 9/82
CSB 1/82 - R(SB) 7/82

The Chief Commissioner has decided that the following decision shall not be reported:

CG 1/82
File CSB 287/81

F Brand
22 April 1982

Commissioners Officer
6 Grosvenor Gardens
LONDON SW1W 0DH

REPORT NOTIFICATION (for information only)

The Chief Commissioner has decided that the following decisions shall not be reported:

Commissioners Office
Grosvenor Gardens
LONDON SW1W 0DH