Full Extent Named

JNBP/3/LS

Commissioner's File: CU/307/1985
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Region: South Western

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

Name: Jane Marie Hiley
Appeal Tribunal: Hounslow
Case No: 37/1

[ORAL HEARING]

1. My decision is:-

(i) that unemployment benefit is payable for 15 October 1984 and

(ii) the forward disallowance imposed by the adjudication officer for the period 16 October 1984 to 14 October 1985 (both dates included) is discharged.

2. This is an appeal brought by the claimant with my leave against the decision of the social security appeal tribunal ("the tribunal") dated 9 July 1985 dismissing the claimant's appeal against the decision of the local adjudication officer (issued on a date not recorded in the papers) which (i) disallowed unemployment benefit for 15 October 1984 because the claimant regularly worked for the same number of days in a week for the same employer or group of employers and was employed to the full extent normal in her case in the week in which the day fell and (ii) imposed a forward disallowance for the period 16 October 1984 to 14 October 1985 (both dates included).

3. I heard the appeal at an oral hearing requested by the claimant who attended and gave evidence and was represented by Mr J. Luba of the Welfare Rights Unit, Greater London Citizens Advice Bureau Service. The adjudication officer was represented by Mr N. Butt of the Solicitor's Office, Department of Health and Social Security. I am grateful to both representatives for their helpful submissions.

4. The basic facts of the case are not in dispute. The claimant was in full-time employment from her graduation in 1973 until September 1983, most recently from September 1982 as a lecturer grade 1 with the Inner London Education Authority at the College for Distribution Trades. In September 1983 she began a period of maternity leave which was initially intended to last for 26 weeks. However the birth on 13 September 1983 was a particularly difficult one and was followed by an operation 5 weeks later and a second and major operation in mid-January 1984 which, although successful, nevertheless left the claimant with considerable difficulty in walking and sitting. These difficulties, coupled with emotional difficulties, not surprisingly made it necessary for her to extend her maternity leave to nearly the maximum of 1 year, the latter part of it being unpaid. She went back to work full-time for the last 2 weeks of the Summer term 1984. However, on 6 July 1984 she wrote to her college resigning her full-time post with effect from 1 September 1984 on the understanding that she would be appointed to a 0.6 post which she still held at the date of the hearing. It was a job-sharing arrangement with another lecturer and the claimant

worked on Tuesday, Wednesday and Thursday. I am satisfied that during her maternity leave, until 6 July when she wrote her letter, it was her hope and intention to resume full-time work as soon as possible but at some time during the Summer she became apprehensive about her ability to do a full-time job properly at the same time as looking after her baby daughter. According to one of the statements made by her or on her behalf it was not until she returned to work in September that she became unsure about being able to do a full-time job and asked for a part-time appointment but I am satisfied that that statement must have been made as a result of some confusion about dates because it seems quite clear to me from the rest of the evidence that her doubts must have arisen before 6 July 1984 and possibly while she was working the last 2 weeks of the Summer term. However, as I do not know the dates of the terms I cannot be sure. At all events I have not the slightest doubt that the reason why she resigned her full-time post was that she considered it to be the only course she could reasonably follow in view of her circumstances and responsibilities. According to a letter dated 7 January 1986 from the Inner London Education Authority, when the claimant wrote her letter of resignation she also expressed the hope that she would be able eventually to return to full-time employment and I have no reason to doubt that that was so. The letter also said that to the date of the letter no request for full-time employment had been made but the claimant told me that she thought it was not correct and in fact the statement had not been made in a similar letter from the authority dated 22 March 1985. Both the letters just referred to mentioned that the decision to transfer to a fractional salaried post was the claimant's own and that she could, had she chosen, have remained in full-time service following her return from maternity leave. In her evidence before me she said she believed that the suggestion that she should make a job-sharing arrangement was raised by her employers but that is not inconsistent with the eventual decision having been her own. In all the circumstances it seems to me to be very likely that she reached her own decision but after some discussion with her employers. It also seems possible, from what she told me, that it transpired that she could have changed to part-time work without resigning her full-time post but I do not see how that could have been possible and in any event I cannot see that it would have made any difference to her position.

5. After working for about 4 weeks of the Autumn term 1984 the claimant, whose arrangements for her baby were proving satisfactory, decided that she would, after all, be able to work full-time. Accordingly, on 15 October 1984 she claimed unemployment benefit. Also, from then onwards she tried to obtain full-time work either at her college or elsewhere and I am quite satisfied that her efforts were genuine although unsuccessful up to the date of the hearing before me.

6. It is common ground between the parties that the reasons given by the tribunal for their decision failed to explain adequately to the claimant why her appeal had failed and that there was a clear breach of regulation 69(2)(b) of the Social Security (Adjudication) Regulations 1984, as in force at the relevant time. I agree with that view and I need not go into details since in the circumstances I have a discretion to decide the case myself instead of remitting it for re-hearing by a different tribunal and propose to do so.

7. As stated in paragraph 2 above the claim was disallowed by the application of the "full extent normal" rule under the provisions of regulations 7(1)(e) and 7(2) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 which provide as follows:-

"7.-(1) For the purposes of unemployment, sickness and invalidity benefit -

(a) ...

(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.

.....

(2) Paragraph 1(e) shall not apply to a person unless:

(a) there is a recognised 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."

It is not in dispute that the claimant was at the date of her application a person within the terms of regulation 7(2)(b) and the only questions in issue are (a) whether at that date she was a person who did not "ordinarily work on every day in a week (exclusive of Sunday etc.) and (b) whether in the week in which that date occurred she was a person "employed to the full extent normal in [her] case".

8. In Riley v Adjudication Officer in which the Court of Appeal gave judgment on 25 July 1985 Slade LJ said of the above questions (at D on page 5 of the transcript of which there is a copy in the case papers):-

"Both these questions must be questions of fact, falling to be decided in the light of the particular circumstances of this case. Nevertheless, they give rise to certain questions of principle. Substantially the dispute has centred on the test which should have been applied by the Commissioner in judging ordinariness and normality for this purpose and, in particular, how far back in time this test required her to go in looking at the circumstances of the appellant."

Then (at A on page 6) he said:-

"A number of general tests or guides designed to assist in the ascertainment of what is "ordinary" and "normal" have emerged from these decisions, though it appears that they have not been entirely consistently applied. One such test (which I will call "the one year before test") was thus stated in paragraph 11 of Decision C.U.518/49 (K.L.) as follows:

"A claimant who has in fact worked only on some days of the week for a period of a year or more is "a person who does not ordinarily work on every day in a week", unless there are some exceptional industrial circumstances relevant to his case".

Another test (which is a more developed variant of the one year before test and which I will call "the 50% test") was thus explained by the Commissioner in Decision R(U) 14/59, when he said that where "during the year ending with the day in question (or such other period as may provide a more suitable test in a particular case) a claimant has worked on less than 50 per cent of the days of the week in question (excluding any day of incapacity for work or holiday and days on which he was unemployed because his employment had been terminated) that day should be held to be one on which in the normal course the claimant would not work. If the claimant has worked on as much as 50% of such days, it should (in my view) be held that it has not

been proved that in the normal course he would not have worked on the day in question". The 50% test was referred to in paragraph 10 of Decision R(U) 14/60, where it was pointed out that there might be other exceptional days which should in addition be excluded. A third test (which I will call "the stop-gap test") is to be found stated thus in paragraph 16 of Decision C.U.518/49 (K.L.):

> "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 in a week"."

Later (at B on page 13) he said:-

> "I can see no difference between the concepts of ordinariness and normality embodied in Regulation 7(1)(e). When it is reduced to its essentials, the question posed by that Regulation 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 to 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). Answering the essential question posed by Regulation 7(1)(e), in my judgment, requires that the officer or tribunal concerned should try to look into the future in order to decide how permanent or transitory the present pattern of work is likely to be. If, as in Decision CU/255/1984, there is some fairly clear evidence about what is likely in the future, this may well be conclusive. But often such evidence will not be available. Whether or not it is available, I do not see how the Commissioner can properly fail to pay attention also to the claimant's past history of both work and unemployment. The effect of such evidence will, of course, differ from case to case. Evidence of past regular full-time work will, I think, never be wholly irrelevant. But if, as in Decision CU/255/1984, full time work is succeeded by a long period of unemployment, it may carry little weight. If, on the other hand, there is evidence of full-time employment over several years finishing only a short time before the part-time employment started, this may be strong evidence that the part-time employment has not yet become the normal pattern of work for the particular employee and is properly to be regarded as "stop-gap" employment in his particular case."

9. In the present case I consider that as far as possible the period during which the claimant was on maternity leave should be left out of account. If it is left out of account then it seems to me that she would escape from the operation of regulation 7(1)(e) under the "one year before test" and the "50% test" if those tests are applicable. However I am not satisfied that either of those tests would be applicable in view of the fact that the claimant, by entering into a fresh contract for part-time work, to some extent abandoned the advantage derived from several years of full-time work. In the Riley case the learned Commissioner took the view that the claimant, by entering into a contract for part-time

work, immediately established a clear pattern of employment but Slade LJ held that, in entirely disregarding his past history of work and unemployment, she had taken too narrow approach to the evidence. He then went on (at A on page 16) to say:-

> "In the present case, in the absence of any finding by her that the appellant on 1st March 1983 had adopted his new part-time occupation with the intention of making it thenceforth his normal occupation, the learned Commissioner should, in my opinion, have directed her mind to the question whether or not the reasonable inference from all the evidence was that the employment on 1st March 1983 was in truth of a stop-gap nature: (see and compare paragraphs 4 and 5 of Decision R(U) 30/53). For this purpose the nature and terms of his employment were, of course, relevant. However, for this purpose she should, in my opinion, also have taken into account (inter alia) what had been the appellant's pattern of work over the one year (or such other period as she thought more appropriate) which immediately preceded 1st March 1983. I think she also should have attempted to assess his working prospects for the immediately foreseeable future. As I have already indicated I accept that in an appropriate case normality is capable of being established from a pattern of work over a much shorter period than a year. However, the crucial point at which I find myself differing from the learned Commissioner arises from her apparent opinion that the terms of the appellant's new contract of employment of March 1st 1983 by themselves sufficed to establish a new pattern of normality. In this opinion I think she erred in law."

In my view substantially the same considerations apply in the present case. I do not consider that the claimant had on 15 October 1984 adopted her new part-time occupation with the intention of making it thenceforth her normal occupation. I accept that she adopted it as her normal occupation for the time being but on all the evidence I am satisfied that she had in mind only a trial period and thought, perhaps wrongly, that she could not arrange for a trial period except by entering into a new contract. I also consider that it was too early to make a reasonable estimate of her employment prospects and that having regard to the nature of her work and the termly pattern of the academic year it would not have been possible to make a reasonable estimate before the expiry of, at the least an academic term. However, that is not a question I have to decide and I therefore limit myself to deciding that 15 October 1984 was too early to reach a conclusion and that benefit is payable for that day. It follows that I must discharge the forward disallowance.

10. For the foregoing reasons the appeal succeeds and my decision is as set forth in paragraph 1 above.

(Signed) J N B Penny
Commissioner

Date: 22 June 1987