

CU 356/1980

DGR/BOS

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.U. 2/81

1. My decision is that unemployment benefit is not payable for the inclusive period from 16 July 1979 to 26 July 1979 because none of the days falling within that period is a day which in the claimant's case is to be treated as a day of unemployment pursuant to section 17(1)(b) of the Social Security Act 1975.

2. This is an appeal by the claimant against the decision of the local tribunal confirming the insurance officer's decision shown in box 1 of form LT2.

3. Since July 1978 the claimant, a roustabout, has been employed by an Aberdeen company in the construction and maintenance of off-shore oil rigs. His work has been organised in cycles of 28 days, during which he spends 15 days (including Sundays) at work off shore followed by 13 days (including Sundays) on shore. During the periods when he is on shore he is not required to undertake any work for his employer.

4. The claimant has claimed unemployment benefit for the period set out in paragraph 1, but this claim has been disallowed by the insurance officer and by the local tribunal. He has also claimed for certain other periods, but although they were disallowed by the insurance officer, the local tribunal was not specifically asked to consider them, so that the only period before me is that from the 16 July 1979 to 26 July 1979 (both dates included).

5. Section 17(1) of the Social Security Act 1975 provides as follows:

"For the purposes of any provisions of this Act relating to unemployment benefit, sickness benefit or invalidity benefit -

(a)

(b) where a person is an employed earner and his employment as such has not been terminated, then in any week a day on which in the normal course that person would not work

in that employment or in any other employed earner's employment shall not be treated as a day of unemployment unless each other day in that week (other than the day referred to paragraph (e) below) on which in the normal course he would so work is a day of interruption of employment;

(c) the expression "day of interruption of employment" means a day which is a day of unemployment or of incapacity for work;

(d)

(e) Sunday or such other day in each week as may be prescribed shall not be treated as a day of unemployment or of incapacity for work and shall be disregarded in computing any period of consecutive days."

6. The effect of section 17(1)(b) of the Act is modified by regulation 16 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975. The only part of regulation 16 which is material is paragraph (6) which provides as follows:

"The employment of a person shall be treated as if it had been terminated immediately after its commencement, 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".

A 'week' for the purposes of section 17(1)(b) is defined in Schedule 20 to the Act as a period of 7 days beginning with midnight between Saturday and Sunday.

7. The question at issue in this case is the effect of section 17(1)(b) (as modified by regulation 16) on the claimant's claim for unemployment benefit for the period set out in paragraph 1. However, it is clear that the section does not apply at all if his employment has prior to the relevant time been terminated or if under regulation 16(6) it is to be treated as if it had been terminated. Accordingly, it is first necessary to consider the question of actual or deemed termination.

8. Notwithstanding the claimant's contention to the contrary, it is quite clear that the claimant is employed under a written contract. That contract provides for an hourly wage rate of £3.40p payable for the first 40 hours in any week, additional hours being paid at 150%, and calls for a guaranteed minimum of 12 hours work a day whilst off shore. The wages are paid fortnightly, and there is no provision for holiday with pay. The contract provides that "any employee dismissed after 26 weeks of continuous employment may request a written statement of reasons for dismissal". It is also provided that any change of terms shall be brought to the attention of the employee within 1 month.

9. The claimant contends that his contract of employment is terminated when he goes on shore, that there is no guarantee that he will ever be called on to work again, that as a matter of convenience he does not collect his P45 at the end of each contract of employment, but could do so if he wished, and that he is available for employment during his time on shore.

10. In my judgment, the claimant is really confusing 'work' with 'employment'. It is not in dispute that the claimant is not required to work when he is on shore for the 13 days of his 28 days cycle, but it does not follow from this that he is necessarily unemployed. Indeed, everything points to his employment, which indisputably existed until the time when he went on shore, being then merely suspended, not terminated. The evidence shows, notwithstanding that there is no specific obligation on the employer to re-engage the claimant on the expiry of the 13 day period on shore, that it is nevertheless the practice to take him on and to repeat the sequence of events.

11. It is of great significance in this case that the contract contains the express provision that "any employee dismissed after 26 weeks of continuous employment may request a written statement of reasons for dismissal", because this clause implies that the claimant has been taken on on an indefinite basis, and not subject to an arrangement whereby his employment is terminated at short regular intervals. Furthermore, the additional provision that any change of terms shall be brought to the attention of the employee within 1 month makes no sense whatsoever if the contention put forward by the claimant as to the basis of his employment is right. Certainly, in this case there is no evidence of any actual terminations and re-engagements, and I think the claimant would be somewhat startled to be told that the effect of his interpretation of his terms of employment would be that he would not be entitled to any protection against unfair dismissal because through working on a rota system he had never achieved the necessary minimum period of continuous employment. Accordingly, I am quite satisfied on the facts of this case that the claimant was actually employed during his period on shore.

12. Moreover, I am also satisfied that he cannot be treated as unemployed. There is in his case clearly a recognised or customary working cycle so that he satisfies regulation 16(6)(a). I appreciate, of course, that the words of the relevant paragraph speak of "a recognised or customary working week" (my underlining), but for the reasons admirably set out in the unreported decision on Commissioner's file C.U. 18/1980 I am satisfied that nothing turns on this particular point. Under Section 6 of the Interpretation Act 1978 I am entitled to regard words expressed in the singular as expressed also in the plural, and if I so read regulation 16(6)(a) there are recognised or customary working weeks in connection with the claimant's employment notwithstanding that the pattern cannot be confined within a 7 day cycle.

13. As I am satisfied that the claimant's employment was not terminated in fact nor can it be deemed to have been terminated, his claim has to be considered under section 17(1)(b). Having regard to the definition of "week" in Schedule 20 it is clear that his claim falls into 2 parts, namely the week commencing Sunday 15 July 1979 and the week commencing Sunday 22 July 1979.

14. Whether a day is a day on which in the normal course a person would not work will, where a rota is in operation, be ascertainable by reference to that rota (R(U) 5/62 paragraph 5). Now, taking the week commencing 22 July 1979, it is clear from the rota that the 5 days from 22 July 1979 to 26 July 1979 inclusive were non-working days spent on shore and that the remaining 2 days, namely 27 and 28 July 1979, were days of employment off shore. Manifestly, each day in the period from 22 July 1979 to 26 July 1979 was an idle day, on which in the normal course the claimant would not have worked, and the 2 remaining days were not days of interruption of employment. The effect of this is that section 17(1)(b) precludes the payment of unemployment benefit for each day in the entire week commencing 22 July 1979.

15. As regards the earlier week all the days falling within that period were days during which the claimant was on shore. As they were therefore days of non-employment, they are caught by section 17(1)(b) and unemployment benefit is not payable. The claimant cannot rely on the escape route provided by the clause commencing with the word "unless" because that escape route depends upon there being at least one day during the week in question on which the claimant would normally work. In the words of paragraph 11 of Decision R(U) 10/80 -

"To fall within [the escape route] a claimant must show that there is at least 1 other day in the week in question upon which he would normally work in employed earner's employment and that each such day is a day of interruption of employment. If there is no other day in the week on which he would normally so work it is impossible to show that each such day is a day of interruption of employment. The escape provisions do not apply so that section 17(1)(b) applies on any day in that week on which in the normal course he would not work in employed earner's employment."

(See also the unreported decision on Commissioner's file C.U. 18/1980).

Accordingly, as in the present case there are no days in the week commencing 15 July 1979 upon which in the normal course the claimant would have worked, he cannot rely on the escape route and he is caught by the disentitling provision of section 17(1)(b).

16. However, the insurance officer has very fairly brought to my attention paragraph 6 of unreported Decision C.U. 7/63. In that case the claimant, who was a teacher, claimed unemployment benefit for a holiday period. The learned Commissioner remarked that "during the holidays there was no other day in the week 'on which in the normal course he would so work'. I do not therefore consider that [Section 17(1)(b)], which is a disabling provision, applies to this case". This is, in my judgment, a wrong approach. The effect of there being no day on which a claimant in the normal course would work has the sole effect of preventing the escape route from operating. It has nothing to do with preventing the application of the disentitling effect of the section. The section will automatically operate unless the escape route is available to a claimant. The fact that it is not available in any given case does not mean that the disentitling effect of the section shall not operate either.

17. In view of what has been said above I am quite satisfied that the claimant is not entitled to unemployment benefit for the period in question. However, the claimant has pointed out that in his view there are other employees of the same employer whose position is exactly on all fours with his own, but that they are in fact receiving unemployment benefit during their periods on shore. He regards this as a monstrous injustice. Of course, if the position is as he states it, manifestly there is an injustice; but it is not to be put right by a perpetuation of error, but should be remedied by ensuring that persons who are not entitled to benefit do not receive it. I hasten to say that I am expressing no view whatsoever on the alleged entitlement of the persons referred to by the claimant, as I am only concerned with the matter under appeal. However, doubtless the Department will take up the matters referred to by the claimant and ensure that persons, whose position is no different from that of the claimant, are not obtaining unemployment benefit, if on the facts of the case they are not entitled to it.

18. I have no hesitation in dismissing this appeal.

(Signed) D G Rice
Commissioner

Date: 4 June 1981

Commissioner's File: C.U. 356/1980
C I O File: I.O. 3028/U/80
Region: South Western