

CU 433/1980

JM/EA

SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

CU 433/1980

1. This is a claimant's appeal against two decisions of the local tribunal, each dated 6 June 1980, which confirmed two decisions of the insurance officer dated, respectively, 14 March 1980 and 31 March 1980. My decision is that unemployment benefit is not payable for 7 and 13 September 1979; 22 October 1979; 2, 6, 12, 14, 20, 21, 26, 27, 28 and 30 November 1979; 6, 10, 14, 17 and 19 December 1979; 2, 7, 8, 9, 10, 16, 22 and 30 January 1980; 4, 13, 18, 19, 22, 25, 26 and 28 February 1980 and 5, 7, 11, 12, 19 and 24 March 1980 because on each of the said days the claimant was engaged in employment from which his earnings exceeded 75p a day.

2. I held an oral hearing of this appeal. The claimant appeared and gave evidence before me. I regard him as a wholly truthful witness but, as will be seen, this appeal does not turn upon any disputed issues of fact. The claimant was represented by Mr P Lefevre of the Brent Community Law Centre. As appears hereunder, Mr Lefevre took upon himself the task of persuading me that a well established line of Commissioners' decisions was erroneous and ought not to be followed. His argument was well prepared and attractively presented. To the insurance officer's representative fell the more mundane duty of supporting the precedents, but he too was clear and helpful.

3. The claimant registered as unemployed on 3 September 1979. He was placed on the professional and executive register as being available for work of a clerical nature. At some time in his life he was a nurse, but he told me that he had been out of nursing too long for it to be practicable for him to return thereto. He is an elected member of his local Borough Council. He is clearly a very active member. (His words to me were: "Probably I am too active"). He is chairman of the Labour majority group. He is chairman of four of the Council's committees. He is vice-chairman of the

Council's finance and general purposes committee. He is a member of at least ten other committees, sub-committees and panels which are directly involved in the functions of local government. He is a conscientious attender of the meetings of those various bodies. Some such meetings are held in the afternoon, but the overwhelming majority are held in the evening. They can go on until far into the night.

4. It is the claimant's opinion that the law of the land should make provision for full-time paid local councillors - but he recognises that this is still a long way off. Indeed, it is of the essence of his case that under the prevailing legislation councillors receive for their services nothing at all which can legitimately be regarded as "earnings", whether within the meaning of the Social Security Act 1975 or any other meaning. I turn first, accordingly, to the recent history of the provisions pursuant to which payments are made to councillors in respect of the discharge of their duties as such.

5. Prior to 1948 a miscellany of provisions in various Acts empowered the reimbursement of local councillors in respect of certain travelling and subsistence expenses. But that was all. However, section 112(1) of the Local Government Act 1948 (as amended by section 16 of the Local Government (Miscellaneous Provisions) Act 1953) provided as follows:

"112.-(1) A member of a body to which this Part of this Act applies shall be entitled to receive a payment by way of financial loss allowance not exceeding such amount as may be prescribed where -

- (a) loss of earnings which he would otherwise have made; or
- (b) additional expense (other than expense on account of travelling or subsistence) to which he would not otherwise have been subject,

is necessarily suffered or incurred by him for the purpose of enabling him to perform any approved duty as a member of that body."

(Section 113 of the 1948 Act made provision for the reimbursement of travelling and subsistence expenses.) It will be noted that the payments authorised by section 112(1) were closely related to sums which had been actually lost or actually disbursed by a councillor by reason of his performance of an approved duty. I doubt whether such payments affected the recipient's income tax; and I should not regard them as falling within the definition of "earnings" in the Social Security Act 1975.

6. Such was the position until 1 April 1974, when sections 173 to 178 of the Local Government Act 1972 came into force. Sub-sections (1) to (3) of section 173 provide as follows:

"173.-(1) Subject to sub section (6) below [which relates to members of parish or community councils], any member of a local authority who is a councillor shall be entitled to receive a payment by way of attendance allowance, that is to say, a payment for the performance of any approved duty, being a payment of such reasonable amount, not exceeding the prescribed amount, as the local authority may determine.

(2) The amount prescribed under sub section (1) may be prescribed by reference to any period of twenty-four hours.

(3) The amount of any allowance determined by a local authority under sub section (1) above may vary according to the time of day and the duration of the duty, but shall be the same for all members of the authority entitled to the allowance in respect of a duty of any description at the same time of day and of the same duration."

It will be noted that the payments authorised by this section are flat rate payments and are not related to sums which have been actually lost or actually disbursed by a councillor by reason of his performance of an approved duty.

7. Section 174 of the 1972 Act makes provision for the reimbursement of travelling and subsistence expenses. Section 177(2) defines "approved duty" so as to include attendance at a meeting of the relevant body, or of any of its committees or sub-committees, and the doing of any other thing approved by the body, or anything of a class so approved, for the purpose of, or in connection with, the discharge of the functions of the body, or of any of its committees or sub-committees.

8. I need not expand upon the definition of "approved duty". It is common ground that on each of the days set out in the second sentence of paragraph 1 above the claimant performed an approved duty and that he received in respect thereof an attendance allowance in the sum of £11, which sum was within "the prescribed amount".

9. The central issue before me is whether the aforesaid payments of £11 fall to be treated as "earnings" for the purposes of the Social Security Act 1975 ("the 1975 Act") and of regulations made thereunder. That issue arises in this way:

(a) It is explicit in section 14(1) of the 1975 Act that a person is not entitled to unemployment benefit except in relation to days of unemployment.

- (b) Regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 S.I. 1975 No 564, as in force at the relevant time, provided as follows:

"7.-(1) For the purpose of unemployment ... benefit -

(h) subject to regulation 9 which has no bearing upon this appeal, a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless the earnings derived from that employment, in respect of that day, do not exceed 75 pence, 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 unless he is available on that day to be employed full-time in some employed earner's employment and the employment in which he is engaged is consistent with that full-time employment and, if the employment in which he is engaged is employed earner's employment, it is not in his usual main occupation;"

(c) By virtue of Schedule 20 to the 1975 Act "employment" "includes any trade, business, profession, office or vocation".

(d) Section 2(1)(a) of the 1975 Act defines "employed earner" as -

"a person who is gainfully employed in Great Britain either under a contract of service, or if an office (including elective office) with emoluments chargeable to income tax under Schedule E;"

(e) Section 3(1) of the 1975 Act provides that -

"In this Act 'earnings' includes any remuneration or profit derived from an employment; and 'earner' shall be construed accordingly."

10. As I indicated in paragraph 2 above, we are in no way in virgin territory. In Decision R(P) 2/76 the then Chief Commissioner was concerned with whether a man who had attained pensionable age, but had continued in the office of city councillor, was entitled to a retirement pension. The case fell to be considered under the National Insurance Act 1965. In the relevant section the phrase

"engaged in a gainful occupation" appeared where, in the equivalent section of the 1975 Act, "an earner" is used. Nevertheless, much that the Chief Commissioner had to say remains in point. I quote from paragraph 10:

"The first point taken by Mr Besserman on behalf of the claimant was on a submission that no question of engaging in a gainful occupation arose for consideration, because 'gainful occupation' in section 30(2)(b) only related to a regular employment, and the claimant, as a councillor, was not and could not be employed or regarded as having employment within the definition of section 114(1) of the 1965 Act. He submitted that the claimant's activities did not fall within 'any trade, business, profession, office or vocation', and in particular he relied on section 80(1)(a) of the Local Government Act 1972, which provides for the disqualification for being elected, or being a member of a local authority, of persons holding any paid office or employment (other than the office of chairman, vice-chairman or deputy chairman), appointments to which are or may be made or confirmed by the local authority, with payment for the chairman and vice-chairman to meet the expenses of their office being specifically provided for by sections 3(5) and 5(4) of the Act. The strictness of the disqualification provisions was, he submitted, shown by section 116, providing for disqualification of a person for being appointed to any paid office by a local authority for 12 months after ceasing to be a member of that authority. The claimant was, he submitted, elected by the electorate, and although he served the electorate he was not employed by them or by the Council, of which he was a member; he had no contractual relationship with anybody and had no contractual responsibility to anyone. He was therefore he submitted not employed or self-employed and section 30(2)(b) had no application to his case."

11. The Chief Commissioner dealt with those submissions as follows:

- (i) "I do not accept the argument that so far as the claimant is concerned the effect of the Local Government Act 1972 was to prevent any investigation under the National Insurance Act 1965 of the question whether he was engaged in a gainful occupation or not". (Paragraph 11)
- (ii) "It seems to me that the claimant's position as a councillor, to which position he was elected, and to which rights, duties, obligations and emoluments attached, is that of a gainful occupation, which he has held and is continuing to follow, and that his occupation may properly be described as 'city councillor' engaged in a gainful occupation within the meaning of section 30(2)(b)." (Paragraph 12)

- (iii) "Attendance allowances, unlike financial loss allowances, are chargeable by the Inland Revenue for income tax purposes under Schedule E as the emoluments of an office." (Paragraph 14).
- (iv) "It was contended that the claimant in his activities as a councillor was not following a gainful occupation, because those activities were taken up and pursued out of a sense of public duty and not with the desire, hope or intention of gain, fee, reward or profit. In Benjamin v Minister of Pensions and National Insurance /1960/ 2 Q.B. 519 at page 530 Salmon J (as he then was) said "It may well be that there are cases when it is important to consider what was the hope, intention, or desire of the person alleged to have been employed or self-employed, during the relevant period..... When, however, the person in question is receiving money during the course of his employment it is not, I think, very important to consider what his hopes, intentions or desires were at the time he entered upon his employment or during its course. I do not consider that if a man is in fact paid money for services during the course of his employment the fact that when he entered into his employment he had no hope, intention or desire of obtaining gain is of the slightest relevance". It was sought to distinguish that case on the ground that it concerned a field of employment which could not be said to exist in the claimant's case. In my view, inasmuch as the claimant follows an occupation which carries a statutory right to receive attendance allowances, the approach to the question of his hopes, intentions or desires of gain, fee, reward or profit should be as if he were in employment. The fact is that the claimant is paid money for the performance of approved duties as a councillor during his tenure of office, and that such payment is made if the claimant desires to submit a claim (S.I. 1974 No 447, regulation 4)." (Paragraph 16).

In paragraph 22 of his decision the Chief Commissioner was at pains to point out that his conclusion would have been the same if the case had fallen to be considered under the 1975 Act. He referred to the definition of "employed earner" (quoted by me in paragraph 9 of this decision) and ruled that the claimant was "an earner" within the meaning of the 1975 Act.

12. In Decision R(U) 6/77 the Commissioner was faced with the very same point as arises in this appeal: does a day in respect of which a councillor receives attendance allowance fall to be regarded as a day of unemployment? The Commissioner dealt with the issue quite briefly - and without finding it necessary to refer to Decision R(P) 2/76. "Prima facie at least", he said, "a day on which a person earns reward for services rendered is not a day of unemployment in his case. But

regulation 7(1)(h) above-cited may provide some relaxation" - paragraph 4. In paragraph 8 he said:-

"In my judgment, on each of the days in question the claimant was engaged, to a significant extent, in employment, and was not unemployed. Nor can the employment on any of these days be disregarded under regulation 7(1)(h), because, in my judgment, the allowance for which he qualified in respect of each day of attendance, constituted "earnings derived from that employment, in respect of that day": and they exceeded 75 pence, which means that not all of the conditions of regulation 7(1)(h) can be satisfied. It is unnecessary, and inappropriate, that I express my opinion as to the other conditions. The days listed cannot be treated as days of unemployment. Unemployment benefit is not payable in respect of any of them."

13. Decision R(U) 6/77 has been consistently followed and applied by all tiers of the determining authorities. In the context of this appeal, however, it is only fair to point out that in paragraph 7 of R(U) 6/77 the Commissioner said: "There is no suggestion that these payments were merely reimbursements of expenses." It is that very suggestion which forms one of the principal planks of Mr Lefevre's case before me. The change from financial loss allowance to attendance allowance, he urges, was administrative and not qualitative. The new attendance allowance is merely the old financial loss allowance stripped of the time and money-consuming necessity for itemised particulars of claim. Parliament has opted for the broad brush approach. Councillors are, as before, to be compensated for loss and disbursement - but at a flat rate designed to achieve rough justice over the whole spectrum of councillors and their approved duties. It was never the intention of Parliament that councillors should derive from their attendance allowances anything in the nature of fee, remuneration or emolument. Parliament took account of the fact that, over a typical year, a typical councillor incurs considerable expenses which go beyond those specifically related to the discharge of approved duties. In support of these arguments Mr Lefevre referred me to passages from the Report of the Maud Committee on "Management of Local Government" (1967), the Report of the Lindsay Committee on "Expenses of Members of Local Authorities" (1946-47) and "A History of Local Government in the Twentieth Century" by Brian Keith-Lucas and Peter G Richards (1978).

14. Attractive though these submissions are, I am unable to accept them. I am obliged to look, not at what Parliament ought to have effected, nor even at what it hoped it was effecting, but at what it actually effected by the words which it put onto the statute book. There is nothing in section 173 of the Local Government Act 1972 to suggest that the attendance allowance is intended to compensate councillors in respect of the overall loss and expense to which they are put in consequence of their office. Quite the contrary. The attendance allowance is therein described as "a payment for the performance of any approved duty". Entitlement thereto is dependent upon the performance of approved duties - and upon nothing else (save, of course, for the making of the appropriate claim). An indolent councillor, who does nothing for his electorate other than to sit

silently through every council meeting, is entitled to the full authorised allowance. From the financial standpoint he will fare very much better than a colleague who, although he diligently conducts "surgeries" and by correspondence pursues the grievances of his electorate, seldom goes to meetings. It may be unreasonable. It may even be unfair. But that is the way that Parliament has arranged it.

15. The matter goes beyond this, however. The claimant agreed that the attendance allowances which he receives are charged to income tax under Schedule E. I have no hesitation in concluding that they are properly so charged. It is plain from paragraph 14 of Decision R(P) 2/76 that such allowances have been so charged since their inception. If there were any doubt as to the propriety of such practice, the issue would surely have been canvassed and resolved many years ago. It follows, accordingly, that the claimant "is gainfully employed in Great Britain.... in an office.... with emoluments chargeable to income tax under Schedule E"; from which it follows, in turn, that he is an "employed earner" within the meaning of the 1975 Act (cf. paragraph 9(d) above); and from this it must follow that (subject to what is said in paragraphs 15 and 16 below) his attendance allowances fall to be treated as "earnings".

16. Provision for deduction of expenses from earnings is made in regulation 4 of the Social Security Benefit (Computation of Earnings) Regulations 1978 [S.I. 1978 No 1698] which, so far as material, provides as follows:-

"....in calculating or estimating for the purposes of any provision of the [Social Security] Act [1975] and of any regulations made under the Act which relates to benefit the amount of a person's earnings for any period, there shall be deducted from the earnings which he derives from employment in that period -

- (a)
 - (b) expenses reasonably incurred by him without reimbursement in respect of -
 - (i) travel between his place of residence and his place of work and travel which he undertakes in connection with and for the purposes of that employment;
- [there follow sub-paragraphs (ii) to (iv)]
- (c) any other expenses....reasonably incurred by him without reimbursement in connection with and for the purposes of that employment."

Since the oral hearing in this appeal, Decision on Commissioner's File C.U. 122/1982 (to be reported as R(U) 5/83) has been promulgated. That decision deals in detail with the application of the aforesaid

regulation 4 to councillors' attendance allowances. I quote paragraph 13:

"There is no clear indication in the above [i.e. in regulation 4] as to how particular items of expenses incurred are to be appropriated to particular items of earnings. The insurance officer's representative at the hearing drew my attention to the words "for any period" and "in that period" in the opening paragraph of the regulation and invited me to hold that as the remuneration itself was paid in respect of a single day on each occasion I must treat such day as the relevant period and permit deduction only in respect of expenses incurred on that day, so that if for instance he incurred (as this claimant did not) expenses in travelling to the meeting for which he received an attendance allowance that could be deducted whereas expenses incurred in travelling to look at sites which would come up for consideration at a meeting on a later day could not. I do not accept this. The question in my judgment is whether the expenses can be regarded as being incurred in respect of the performance of the duty that carries the right to the earnings in question. If they can, then if there are expenses to which regulation 4 applies they may be deducted from such earnings."

17. In paragraph 15 of Decision R(U) 5/83 the Commissioner turned to more general expenses. He said this:

"The more general expenses incurred by the claimant in connection with the performance of his duties as a councillor would be deductible from more general remuneration, if such were paid for acting as councillor. Such remuneration like the expenses would be averaged over a long period. It may be that, as there was no such general remuneration, it would be right to treat general expenses as deductible from other remuneration by reference to a daily average. But on the evidence before me it would not assist the claimant if I allowed him to deduct so much of his general expenses as on a daily average would apply to 23 June and 30 June from the attendance allowance earned for those two days; and I give no decision on the point."

18. In the appeal before me Mr Lefevre made somewhat muted submissions in respect of expenses. Very candidly, he stated that the claimant's real purpose in carrying his case to the Commissioner was to obtain a favourable ruling on the fundamental submission that the office of councillor was "unrewarded"; i.e. that there were no "earnings" at all. The claimant had been invited by the Department of Employment to submit an itemised schedule of expenses. He had declined. In his view this would have involved the reintroduction of the very mischief that the 1972 Act had sought to eliminate. The Inland Revenue dealt with the matter broadly. It did not require particularity.

19. There is, of course, some inconsistency in the claimant's approach. Mr Lefevre agreed that councillors do pay some income tax in respect of their attendance allowances. If, as he submitted to me,

no part of these allowances represents reward or emolument, the Inland Revenue is in error in raising assessments thereon - and it is, surely, to the Inland Revenue that the initial challenge should be made. In the absence of such challenge, it is only to be expected that the Social Security determining authorities will apply the definition of "employed earner" in the manner in which I have myself applied it in paragraph 14 above.

20. With that position reached, the fact that the Inland Revenue is content to adopt a broad approach to councillors' expenses is of no relevance to this appeal. The Inland Revenue operates under one body of legislation. The Social Security determining authorities operate under another. The Computation of Earnings Regulations 1978 must be applied. As to the manner of their application, let me say that I am in full agreement with the principles set out in Decision R(U) 5/83.

21. Although the claimant has produced no itemised schedule of expenses, he did give me an outline of the nature and extent of the costs to which he is put by the conscientious manner in which he discharges his public duties. His conclusion was that it cost him an average of £25 a week "to service the function of councillor". Nothing that he told me came anywhere near to establishing that he could, within the principles set out in paragraph 13 of Decision R(U) 5/83 (see paragraph 15 above), attribute £10.25 of expenses to any of the individual days referred to in paragraph 1 above. Nor would he be assisted by the daily average approach canvassed (somewhat unenthusiastically) in paragraph 15 of Decision R(U) 5/83 (see paragraph 16 above). In his closing address, Mr Lefevre told me that a good deal of the claimant's "out-of-meeting" work as a councillor was done at the weekend. It would be fair, accordingly, to obtain the daily average by dividing £25 by 7. Once again, therefore, the claimant comes nowhere near to the £10.25 a day which is required if he is to bring himself within the 75 pence limit prescribed by regulation 7(1)(h) of the Unemployment, Sickness and Invalidity Benefit Regulations 1975.

22. In support of his central contention Mr Lefevre raised the argument in respect of disqualification which was raised in Decision R(P) 2/76 (see paragraph 10 above). Section 80(1)(a) of the Local Government Act 1972 provides as follows:-

"80. (1) Subject to the provisions of section 81 below which contains exceptions which have no bearing upon this appeal, a person shall be disqualified for being elected or being a member of a local authority if he -

- (a) holds any paid office or employment (other than the office of chairman, vice-chairman or deputy chairman) appointments to which are or may be made or confirmed by the local authority or any committee or sub-committee of the authority or by a joint board or joint committee on which the authority are represented or by any person holding any such office or employment;"

23. In Decision R(P) 2/76 the then Chief Commissioner dealt very briefly with this argument:

"I do not accept the argument that so far as the claimant is concerned the effect of the Local Government Act 1972 was to prevent any investigation under the National Insurance Act 1965 of the question whether he was engaged in a gainful occupation or not." (Paragraph 11).

That must be right. It can be carried further, however. The words "any paid office or employment" are qualified by the long passage which begins "appointments to which are or may be made or confirmed by....". That passage is crucial. The office of councillor is not one to which the appointment is or may be either made or confirmed by the local authority or by any of the other bodies or persons specified in the subsection. Appointment to the office of councillor is made by the relevant councillor's electors - and by no one else. It is true, of course, that appointments to such office as chairman of a committee or chairman of a sub-committee may be made by the relevant committee or sub-committee. But these are not paid offices. For example, the claimant told me that he is chairman of his Borough Council's establishment committee. No doubt attendance at the meetings of that committee is an approved duty. But the attendance allowance paid in respect thereof is paid to the claimant because he holds the office of councillor - not because he holds the office of chairman of the committee.

24. It follows from the foregoing that I am unable to accept the arguments advanced on behalf of the claimant. Since Mr Lefevre acknowledged at the outset that the claimant's case could not be distinguished from the precedents and that, accordingly, he could not succeed unless he could persuade me that those precedents had been wrongly decided, I have been at pains, not merely to follow the precedents, but to explain why I find myself in full agreement with them. I cannot find them in any way undermined either by the rehearsal of arguments with which they specifically deal or by the deployment of fresh arguments.

25. The 75 pence earnings limit is not, of course, the only condition set out in regulation 7(1)(h). Very properly, the insurance officer's representative invited me to have regard to what are commonly referred to as the "availability" and the "consistency" conditions. (The "consistency" conditions were abolished by an amendment which took effect on 8 March 1982.) In view of the conclusion to which I have come in respect of the earnings condition, however,

I do not intend to burden an already lengthy decision with any further discussion of regulation 7(1)(h).

26. The claimant's appeal is disallowed.

(Signed) J Mitchell
Commissioner

Dated: 22 March 1983

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C I O File: I.O. 3448/U/80
Region: London