CU 686/1979

T/AG

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision CU 7181

1. This is a claimant's appeal from a decision of the local tribunal dated 21 August 1979 confirming a decision of the insurance officer dated 18 June 1979. Our decision is that the claimant is not entitled to unemployment benefit from 30 May 1979 to 1 September 1979 (both dates included) because the claimant was at the material time a seasonal worker who made a claim for benefit during his off-season, which lasted from 26 May 1979 to 1 September 1979, and he has failed to prove that he had had, or could reasonably have expected to obtain, a substantial amount of employment in the said off-season.

2. The facts of this case are simple. The claimant, now aged about 50, is a driver of heavy goods vehicles. From about 1973 he worked periodically for a well known group of fuel distributors ("the Group"). In the years immediately preceding the claim the subject of this appeal his pattern of employment by the Group was as follows:

(1) 22 September 1975 to 11 June 1976
(2) 20 September 1976 to 27 May 1977
(3) 5 September 1977 to 19 May 1978
(4) 18 September 1978 to 25 May 1979

In each of these periods he was employed as a fuel oil tanker driver. The fuel oil was destined for central heating systems. His employment was terminated each summer. He expected to be taken on again in each autumn, although there was no contractual agreement to that effect. During the summer off-seasons he would have accepted suitable work had such been available. It was not, however, available. The claimant lives in an isolated house. Transport difficulties greatly reduce the field of what he regards as suitable employment.

3. On 30 May 1979 the claimant claimed unemployment benefit. By form UB 55 the local insurance officer asked the claimant: "What are your expectations of working for an employer before you resume your normal employment?" On 7 June 1979 the claimant answered: "None."

Decision C.U. 7/81

On 18 June 1979 the local insurance officer disallowed the claim for unemployment benefit from 30 May 1979 to 18 June 1979 and made a forward disallowance in respect of the period 19 June 1979 to 17 September 1979. The claimant appealed to the local tribunal. On 21 August 1979 the local tribunal unanimously disallowed his appeal. He now appeals to the Commissioner.

4. The central question before us is whether on 30 May 1979 the claimant was a seasonal worker. The answer depends upon the application to his case of regulation 19 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [S.I. 1975 No 564]. At the relevant date the material passages of that regulation were as follows:

"19.-(1) .....

(2) In this regulation -

"employment" means employment as an employed earner ....;

.....

"off-season" means, in relation to a seasonal worker, that period of the year (or, if more than one period, the aggregate of those periods) during which he is normally not employed, and for this purpose the expression "period" shall not include any period of less than 7 consecutive days;

"seasonal worker" means a person whose normal employment is for a part or parts only of a year in an occupation or occupations of which the availability or extent varies at approximately the same time or times in successive years; or any other person who normally restricts his employment to the same, or substantially the same, part or parts only of the year; and for the purpose of this definition the following provisions shall apply:-

(i) the expression "part or parts only of a year" shall include any period of time (or, if more than one period, the aggregate of those periods whether in the same or different occupations) whatever the duration of that period: but where any period or periods of a year during which a person is normally not employed is not, or if more than one period (whatever the duration of any such period) do not amount in the aggregate to, more than seven weeks, that person shall not be treated as a seasonal worker;

(ii) in construing the expression "normal employment", regard shall be paid to factors inherent in the nature or conditions of the occupation or occupations in which that person is engaged, and not to factors abnormal to that occupation or occupations notwithstanding that those factors persist for a prolonged period;

"a substantial amount of employment" means employment which is equal in duration to not less than one-fourth (or such other fractional part as may, in the circumstances of any particular case, be reasonable) of the current off-season;

"year" (where used in this paragraph) means the period of 12 months commencing with the first day in the calendar year on which the person concerned begins a period of normal employment.

(3) The following shall be additional conditions with respect to the receipt of unemployment benefit by a seasonal worker in respect of any day during his off-season -

(a) .....; and

(b) that either -

(i) in his current off-season he has had a substantial amount of employment before that day; or

(ii) (having regard to all the circumstances of his case, including the nature and extent of his employment (if any) in any past off-seasons and the industrial or other relevant conditions normally obtaining in the district or districts in which he is available to be employed) he can or could reasonably expect to obtain, after that day in his current off-season, employment which, together with his employment (if any) before that day in that off-season, constitutes a substantial amount of employment."

5. The immediate predecessor to regulation 19 of the Unemployment, Sickness and Invalidity Benefit Regulations 1975 was to be found in the National Insurance (Seasonal Workers) Regulations 1950 [S.I. 1950 No 1220], as amended by the National Insurance (Seasonal Workers) (No 2) Regulations 1950 [S.I. 1950 No 1915], by the National Insurance (Seasonal Workers) Amendment Regulations 1952 [S.I. 1952 No 1466] and by the National Insurance (Employment and Training Act 1973 Consequential Amendments) Regulations 1974 [S.I. 1974 No 1243]. The amendments made by the No 2 Regulations

of 1950 and by the Consequential Amendments Regulations of 1974 are immaterial to this decision. The primary Regulations of 1950 (to which we shall refer as "the 1950 Regulations") and the Amendment Regulations 1952 are, however, highly material. Their combined effect was to enact provisions which (although differing slightly in wording and substantially in arrangement and numbering) were, for practical purposes, identical to the provisions of regulation 19 of the 1975 Regulations; and it was under the 1950 Regulations, as amended in 1952, that each of the decisions to which we refer below was decided.

6. The Social Security (Unemployment, Sickness and Invalidity Benefit) Amendment (No 2) Regulations 1979 /S.I. 1979 No 940/ substituted, with effect from 27 July 1979, a new regulation 19 in place of that from which we have quoted in paragraph 4 above. Paragraph (2) of the old regulation is repeated as paragraph (1) of the new; and paragraph (3) of the old regulation is repeated as paragraph (2) of the new. Apart, however, from this minor renumbering, everything which we have set out in paragraph 4 above appears verbatim in regulation 19 as currently in force. It follows, accordingly, that from 1952 down to the present day the statutory provisions in respect of seasonal workers have remained, in their essence, unaltered.

7. Regulation 19(2) of the 1975 Regulations sets out two definitions of a "seasonal worker", namely -

> "a person whose normal employment is for a part or parts only of a year in an occupation or occupations of which the availability or extent varies at approximately the same time or times in successive years"; or (the underlining is ours but the conjunction is the draftsman's) "any other person who normally restricts his employment to the same, or substantially the same, part or parts only of the year;"

The first of these definitions echoes, but is by no means identical to, the definition of "seasonal worker" which obtained prior to the 1950 Regulations. The second was entirely new.

8. Down the years since 1950 a difference of opinion has emerged among the Commissioners in respect of the meaning and application of the first definition. So far as we can discover the overt expression of that difference is to be found only in unreported decisions. One view (which we shall call "the employment record view") is to be found in unreported Decisions C.S.U. 4/68 and C.S.U. 3/73 - each of which was decided by the same Commissioner. It can be summed up in words taken from paragraph 5 of the former decision:

> "The question of whether or not a person is a seasonal worker depends in my opinion on an examination of that person's record of employment whether or not the said employment is seasonal in character."

The Commissioner supported this view by -

(a) comparing the then current definition of "seasonal worker" with the definition which had been in force prior to 1950;

(b) praying in aid certain paragraphs from Reports of the National Insurance Advisory Committee; and

(c) his construction of "the reported decisions of the Commissioner" - although no specific reported decision is referred to.

9. The other view (which we shall call "the characterising view") is to be found in unreported Decisions C.U. 15/68, C.U. 3/70 and C.U. 1/75 - each of which was decided respectively by a different Commissioner. This view requires that in applying the first definition the statutory authorities should look further than the bare employment record of the relevant claimant. It can be summed up in words taken from paragraph 12 of Decision C.U. 15/68:

> "In my judgment the fact that the claimant's normal employment was limited to approximately the same time or times in successive years does not of itself /our underlining/ make him a seasonal worker; I must also consider the activities which he was engaged to perform. This seems to me to follow from the language of the first part of regulation 2(2)(a) which in terms applies to persons whose normal employment fulfils two conditions; it must be for a part or parts only of a year; and it must be in an occupation or occupations possessing certain defined characteristics."
>
> (Regulation 2(2)(a) of the 1950 Regulations, as amended, was the equivalent of regulation 19(2) of the 1975 Regulations.)

The protagonists of this view also claim support from -

(a) a comparison of the current definition of "seasonal worker" with the definition which was in force prior to 1950;

(b) the Reports of the National Insurance Advisory Committee; and

(c) reported decisions of Commissioners and Tribunals of Commissioners.

As appears, however, from the passage which we have quoted from C.U. 15/68, they found principally upon the actual language of the definition as enacted; and this must, of course, be the primary consideration.

10. In construing the language of the definition as enacted we do not think that we can improve upon certain passages from the three unreported decisions referred to in paragraph 9 above. Thus in Decision C.U. 3/70 the Commissioner wrote:

> "8. The statutory definition of 'seasonal worker' does not use the words 'seasonal' or 'season' at all save in the phrase it defines (although an earlier version of it did so), and I shall refer to the characteristics at which the definition is aimed as 'the offending characteristics'. When one looks at the definition it is seen that the offending characteristics are not characteristics of an employment but of an occupation or occupations. As already appears, the relevant part of the definition reads: ..... an insured person whose normal employment is for a part or parts only of a year in an occupation or occupations of which the availability .....' and so on. On no account can it be legitimate to treat this definition as if the underlined words were not there.
>
> The contrast between an employment and an occupation is a familiar one. An employment is either a particular contractual relationship between an employer and an employee, or the work performed in such a particular relationship. An occupation is a type of work. The statutory definition of seasonal worker provides that a person becomes a seasonal worker if his normal employment is for a part or parts only of a year in an occupation having the offending characteristics. An insured person who has employment for a part or parts only of a year, albeit at approximately the same time in successive years, in an occupation without the offending characteristics is not included in the definition.
>
> 9. Accordingly, looking only to the language of the definition, this appeal cannot be decided merely by finding that the claimant was normally employed in the manner I have described. It is necessary to go further and decide whether or not that employment was in an occupation having the offending characteristics."

Again, in Decision C.U. 15/68 the Commissioner wrote, at paragraph 12:

> "Furthermore, if the first part of the definition had the effect that all persons who worked for the same part or parts only of successive years were seasonal workers, the second part (which deals with persons who restrict their employment to the same part or parts of successive years) would surely be otiose."

Further, in Decision C.U. 1/76, the Commissioner wrote, at paragraph 8:

> "Thus, as the Commissioners pointed out in the passage I have quoted from Decision R(U) 14/53 (supra) the availability or extent of a particular occupation may in some circumstances, but may not

> in other circumstances, have seasonal variations and it is, accordingly, necessary, indeed essential, to examine, not only the periods for which a person has been employed, but also the nature of, and the characteristics inherent in, the occupation (or occupations) he has followed. Furthermore, if the view expressed in Decision C.S.U. 3/73 is correct it would, as it seems to me, follow that the second part of the definition in regulation 2(2)(a) would be otiose."

11. This reasoning appears to us to be compelling. The plain language of the definition as enacted cannot legitimately be overridden by reference either to the definition which was in force prior to 1950 or to passages from Reports of the National Insurance Advisory Committee. (In any event, as appears from paragraphs 8 and 9 above, such reference can be plausibly invoked in support of each of the views now under consideration.) Nor do we consider that anything which has been said by previous Tribunals of Commissioners inhibits us from now endorsing the characterising view. This aspect of the issue is carefully and fully treated in the three unreported decisions from which we have quoted in paragraph 10 above. We attempt nothing more than a summary review.

12. In Decision R(U) 14/53 a Tribunal of Commissioners was concerned with a woman who regularly worked in the holiday months as a shop assistant at a holiday resort. In paragraph 22 the Tribunal wrote:

> "It next remains to consider whether that employment was in an occupation (or occupations) of which the availability or extent varies at approximately the same time or times in successive years. It seems to us that that was so. There are doubtless many places in which the availability and extent of the occupation of cashier or counter assistant at a cafeteria remains fairly constant through the year. But 'occupation' in this context clearly means <u>the occupation as followed by the insured person</u> and in this case the occupation was followed at a holiday resort at which its availability or extent varied at approximately the same time or times in successive years." (The underlining is ours).

It is quite clear that as early as 1953 it was appreciated that the identifying of seasonal workers could not be effected by simply drawing up lists of general occupations, styling some seasonal and the others non-seasonal. The occupation of the claimant must be examined in its individual context. Considerable sub-classification may be called for. At the end of the day, however, the claimant's <u>occupation</u>, and not merely his employment, must be one of which the availability or extent varies at approximately the same time or times in successive years.

13. In support of the employment record view there is prayed in aid the following dictum from paragraph 7 of Tribunal of Commissioners' Decision R(U) 5/64:

> "As appears from numerous decisions of the Commissioner, the answer to the question whether a person is a seasonal worker is provided, not by considering the conditions in an industry generally, but by an examination of the individual claimant's own record of employment."

Decision C.U. 7/81

Once again we do not think that we can improve upon the words of the Commissioner who decided Decision C.U. 3/70; in paragraph 13 he wrote:

> "Taken out of context, this sentence may appear to contradict the view taken by the Commissioner who decided C.U. 15/68, but it must not be taken out of context. The case dealt with in R(U) 5/64 was that of a share fisherman operating from a small port on the coast of Yorkshire. His work was divided into a winter season and a summer season, each separated from the other by a considerable temporal gap. The reason was that by law he was required to take his boat out of service for inspection, maintenance and repair, and these processes took a long time owing to the inadequacy of the facilities at the port. The then claimant's occupation was that of a fisherman, and if one looks at the industry of fishing as a whole, it would be impossible to say that his occupation had a seasonal characteristic. The fishing industry carries on its activities throughout the year. In my view, what the Tribunal meant by the sentence I have quoted was that you do not look to an industry as a whole in order to decide whether an occupation is seasonal in character; you look at the way in which the occupation is conducted in the claimant's case. In the case before them the occupation of a fisherman, as carried out where the claimant lived, plainly had the offending characteristics /c.f. paragraph 10 above of this our decision/. In my view it would not be right to read more than this into the Tribunal Decision R(U) 5/64."

We accept that passage from C.U. 3/70 as a correct statement of the law - as we also accept the following passage from paragraph 12 of Decision C.U. 15/68:

> "While I am anxious to avoid saying anything beyond what is strictly relevant to the issue in this appeal, it might be right to add that where you find that a person regularly works for the same part or parts of successive years and is idle during the remaining parts, there may well be cause for enquiry as to whether the occupation in which he works has the defined characteristics. It may even be that a rebuttable presumption arises. Further than that however I do not think one can go."

14. When making the enquiry referred to in the passage last quoted above, the statutory authorities must not overlook subparagraph (ii) appended to the definition of "seasonal worker" in regulation 19(2) of the 1975 Regulations (now regulation 19(1) of the regulation as substituted in 1979). This provides:

> "in construing the expression 'normal employment', regard shall be paid to factors inherent in the nature or conditions of the occupation or occupations in which that person is engaged, and not to factors abnormal to that occupation or occupations notwithstanding that those factors persist for a prolonged period;" (Our underlining).

(In passing, we note the repetition of the distinction between "employment" and "occupation".) This subparagraph did not feature, in any form, in the 1950 Regulations. It was inserted by virtue of the

1952 Amendment Regulations - manifestly in consequence of the National Insurance Advisory Committee's Report of May 1952, Cmd. 8558. Paragraph 56 of that Report reads:

> "We consider it advisable, however, to secure forthwith that the Seasonal Workers Regulations are not automatically extended in scope as a result either of a general trade recession or of a substantial recession in a particular trade or trades to apply to workers who, while having a regular period in each year during which they do not normally work, are in this position because of the effect of abnormal, even if prolonged, economic conditions, and not because their work is in the nature of things seasonal. We recommend therefore that the phrase 'seasonal worker' in the present regulations should be so redefined as to limit its application to employment which is seasonal in consequence of factors which are inherent in the nature or conditions of the industry concerned, and which, of necessity, normally result in substantially reduced opportunities of employment at similar points in successive years. The most obvious illustrations are afforded by certain agricultural work, as a result of the nature of agricultural processes and climatic conditions, and by work at holiday resorts, as a result of custom, due in the main but not entirely to climatic conditions."

(It will be noted how ill this passage accords with the employment record view.) We have not been directed to, nor have we been able to find, any decision which turned upon the application of the aforesaid subparagraph (ii). Such cases are likely to be rare. We prefer to await such a case before generalising upon the effect of the subparagraph. Obviously, however, it would apply where -

(a) an occupation (e.g. car builder) is not inherently seasonal; but

(b) due to recession in demand, an employer decides to close down his production line for the same 3 months for a number of successive years.

It would also apply - with the effect of limiting the off-season - in the case of an essentially seasonal occupation in respect of which an employer, for economic reasons, reduced the normal on-season.

15. In paragraph 12 of Decision C.U. 3/70 the Commissioner said that the difference between the two views which we have been discussing "may be more apparent than real". There is force in this. We do not foresee that our acceptance of the characterising view will affect the outcome of more than a handful of the cases which come before the statutory authorities. We can illustrate this by reference to Decision R(U) 21/52, a case which is frequently cited as an example of the application of the employment record view. The claimant there was an electrician who lived in Blackpool and who had for 4 consecutive years been able to obtain employment for only parts of the year. Paragraph 8 of the decision runs thus:

> "It has been contended by the claimant's Association that an electrician is not a seasonal worker because his occupation is not

> one the availability or extent of which varies with the season of the year. An electrician's occupation, it is contended, is one in which there is employment to be had all the year round, and the reason why the claimant has not been so employed is that in Blackpool, where he lives, there is less demand for electricians in the winter months than in the summer and this fact, owing to the claimant's age, places him at a disadvantage in competing with younger men."

The Commissioner directed himself that all that he was concerned with was the claimant's industrial record - and held the claimant to be a seasonal worker. It will be clear, however, from what we have said in paragraph 11 above that a true application of the characterising view would have led to the same result. "Electrician" as such is not normally a seasonal occupation. This particular claimant was, however, an electrician in Blackpool; and the evidence was that this was an occupation the availability or extent of which varied with the season of the year. The proponents of the characterising view have always recognised that such sub-classification is not merely permissible - it is essential to a proper application of the regulations. (R(U) 21/52 was decided under the 1950 Regulations as they were prior to the 1952 amendments. This affects the terminology but not the substance of that decision.)

16. Indeed, of the many reported decisions at which we have looked, we have found only one in which the outcome might have been different had the characterising, as opposed to the employment record, view been applied by the Commissioner. Decision R(U) 11/55 concerned a claimant whose record of employment had been as follows:

> 1952: 17 July to 17 September - 'bus cleaner;
> 1953: 9 July to 5 September - booking agent; and
> 1954: 14 June to 14 October - garage hand.

The decision is a short one. Nothing is said in respect of the geographical location of the claimant's work. The three respective occupations do not, at first sight, appear to be of a seasonal character. On the other hand, the Commissioner in paragraph 3 said this:

> "It is by force of circumstances, and not by choice, that [the claimant] has become a seasonal worker. This, however, does not avail the claimant, for the definition of a seasonal worker contained in Regulation 2(2)(a) covers not only persons who voluntarily restrict their employment to certain parts of the year, but also persons who involuntarily, by circumstances beyond their control, find themselves normally employed for part of the year only in a seasonal occupation. Nor does the fact that the claimant's employment in each of the past three years has been in a different occupation take him outside the statutory definition."

The words which we have underlined certainly suggest that the Commissioner was not unmindful of the need to look at the characteristics of the claimant's occupation - as distinct from his employment. The decision, however, contains no expansion of the (implicit) finding that each of the aforesaid three occupations was, in the context of the claimant's circumstances, seasonal by nature. It stands, perhaps, as a salutary reminder of the need carefully to carry out the enquiry referred to in the first sentence of paragraph 14 above; always bearing in mind that it is for the insurance officer to establish that any given claimant has become a seasonal worker.

17. We return to the case now under appeal. As the matter stood when the papers were first before a Commissioner -

(a) it was clear that if the employment record view were the correct one, the claimant must be a seasonal worker; but

(b) if the characterising view were correct, it was by no means obvious that domestic fuel oil tanker driver was an occupation of which the availability or extent varied at approximately the same time or times in successive years.

(There is no question of this claimant "restricting" his employment and thereby falling within the second definition.) The Chief Commissioner, accordingly, directed that the appeal should be heard by a Tribunal of Commissioners so that the conflict between the two views might be resolved. The insurance officer now concerned was also directed to obtain further evidence as to the factual position regarding domestic fuel oil tanker drivers. This evidence was before us when we heard the appeal. From the manager of the Jobcentre in the area in which the claimant lives came the following reply:

> "I am not in a position to inform you, with any accuracy, the extent to which fuel tanker drivers are employed on a seasonal basis. I have, however, contacted several Jobcentres and firms employing tanker drivers and it would appear that they do not normally work on a seasonal basis."

So far so good for the claimant - in the light of our acceptance of the characterising view. From the personnel executive of the Group, however, came a letter stating that -

(i) the Group employed 37 full-time fuel oil tanker drivers nationally and 34 part-time;

(ii) of these numbers, 3 full-time and 2 part-time drivers were employed at the depot at which the claimant worked;

(iii) the reason for employing part-time drivers was that the demand for fuel oil was greater in the winter months; and

(iv) other fuel oil distributors employed part-time drivers on a like basis.

18. Accordingly, although we have taken the opportunity of expressing our opinion that the characterising view is the correct one, that conclusion is of no avail to this claimant. He did not attend the hearing; nor has he made any attempt to rebut in writing the evidence from the Group. He claims that he is a part-time worker and stresses that he would prefer to work all the year round - preferably as a farrier. We have no reason to doubt the truth of these statements; but they cannot assist the claimant to escape the effect of the statutory provisions. His occupation is clearly seasonal within the first definition of that term. There is no doubt, moreover, that he did not satisfy the "additional condition" set out in regulation 19(3)(b) of the 1975 Regulations (c.f. paragraph 3 above). His appeal must, accordingly, fail.

19. The local insurance officer's forward disallowance took effect down to, and including, 17 September 1979, that being the last day of the "year" as defined in regulation 19(2). We now know that the claimant in fact obtained work on 3 September 1979 and that 1 September 1979 was the last day in his off-season in respect of which he claimed unemployment benefit. This is reflected in the terms of our decision as set out in paragraph 1 above.

20. The claimant's appeal is unanimously disallowed.

(Signed) I O Griffiths
Chief Commissioner

(Signed) M J Goodman
Commissioner

(Signed) J Mitchell
Commissioner

Date: 8 September 1981

Commissioners File: C.U. 636/1979
C I O File: I.O. 3560/U/79
Region: South Eastern