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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSJSA/1247/01

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

DECISION OF SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal given at Edinburgh on 5 June 2001 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This case came before me for an oral hearing on 20 February 2002. The claimant was represented by Mr Forsyth, a welfare rights officer of the Midlothian Council. The Secretary of State was represented by Miss Stirling, Advocate, instructed by Miss Cairns of the Office of the Solicitor to the Advocate General.

3. The claimant has appealed against the decision of the tribunal which confirmed an adverse decision in respect of job seekers allowance of 8 November 2000. The tribunal also had before them two other appeals relating to other claims for job seekers allowance by the claimant at different dates. He has appealed one of the other cases to the Commissioner in which an adverse decision was made. That case is numbered CSJSA/1248/01 and was heard along with this appeal. The Secretary of State has applied for leave to appeal in respect of the third case, in which the claimant was successful. The tribunal issued a joint statement of reasons in respect of all three appeals before them.

4. Section 1(2)(e) of the Job Seekers Act 1995 provides that a person is not entitled to income based job seekers allowance if he is engaged in remunerative work. For the purposes of determining what is remunerative work, it is necessary to look at regulation 51 of the Job Seekers Allowance Regulations 1996. Regulation 51(1) as relevant to this case is in the following terms:-

> "(1) For the purposes of the Act "remunerative work" means-
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> (a) in the case of [a claimant], work in which he is engaged or, where his hours of work fluctuate, is engaged on average, for not less than 16 hours per week;
>
> .....
>
> ... and for these purposes, ['work' is work] for which payment is made or which is done in expectation of payment."

It will be noted that, for the purposes of the definition, there requires to be a minimum number of hours worked. For the purpose of calculating these hours, if it is necessary to do so, there is a method for the calculation set out in the Regulations.

5. The claimant's case in this appeal is a simple one. It is simply that, at the time of the claim, the claimant was not engaged in remunerative work and the tribunal erred in law to find that he was.

6. The relevant findings in fact made by the tribunal in relation to what he did in relation to employment were as follows:-

> "Since at least January 1999, [the claimant] had been employed as a Welder/Rigger by Coflexip Stena Offshore Ltd (CSO Ltd). He had worked offshore as and when required. His wages were paid on the 10th of each month in relation to the period up to the 24th day of the previous month. [The claimant's] periods of work extended from only one day to more than 2 weeks. National Insurance and PAYE were deducted from

> his pay in the usual way. [The claimant] did not receive holiday pay or any pay in respect of days when he was onshore and had not been working. He received a P60 tax record from CSO Ltd at the end of the tax year.
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> On 28th January 1999, [the claimant] signed an agreement with CSO Ltd. This agreement was headed 'contract for services' and was stated to 'govern any individual project in respect of which [the claimant) is not rendering services to (CSO Ltd) but for the avoidance of doubt the contract may not be terminated by [the claimant] during any period in respect of which [the claimant] has agreed to render services to (CSO Ltd)'. There followed a declaration that there was 'no obligation on [the claimant] to utilise these services in respect of any particular project'. During the period of 12 months to 30 June 2000, [the claimant] worked for CSO Ltd for 12 hours on 181 days, a total of 2172 hours, representing an average of about 41 hours per week.
>
> Thereafter, [the claimant] was employed by CSO Ltd for one day on 21st August 2000 and for 35 days between 23rd August and 26th September; and he worked for a further 15 days beteen */sic/* 5th October and 19th October 2000. On each of these subsequent periods, [the claimant] worked for 12 hours each day."

7. It is clear from the decision which the tribunal gave that they considered that the claimant was engaged in remunerative work when he made his claim. Mr Forsyth's position was that such a conclusion was an error in law. Mr Forsyth referred me to the contract which the claimant had which is recorded at pages 5-7. It is headed as being a contract for services. Mr Forsyth indicated that, in terms of that contract, at the end of a period in occupation as a rigger, the employers were under no obligation to rehire and that he was under no obligation to undertake any work offered to him. It was Mr Forsyth's submission that the relationship between the claimant and those with whom he contracted his services ended when he came back on shore after a period of work offshore. It was his submission that there were no continuing rights and obligations at the end of each period of engagement. He also submitted that the tribunal erred in law in respect that, in relation to two of the appeals, they came to a different conclusion to that which was reached in relation to the other appeal, though I would observe that the three appeals deal with different claims at different dates.

8. Miss Stirling, on the other hand, submitted that the claimant was not, on the facts, entitled to job seekers allowance in relation to the claim, upon the basis that he was in fact engaged in remunerative employment. She pointed me to the tribunal's findings in fact which indicated that there was, subsequent to the date of the contract, a continuing relationship. I was referred to the finding in fact that the claimant received a P60 tax record and that when the contract was finally terminated, the claimant was handed a P45, and that when this was done the claimant enquired as to why it had been done. It was her submission that this demonstrated that the claimant had a continuing expectation of employment. She also submitted that perusal of the contract of employment demonstrated that it was a continuing relationship because, whilst there was no obligation to provide work on the part of the employers nor a right to obtain work on the part of the claimant, the contract was a continuing one which was not terminated on each occasion when the claimant was offshore.

She accepted that it was significant that, under the heading "Termination of Agreement", it was provided:-

> "By the Company or the Contractor by intimation in writing to the other party during any period when the Contractor is not rendering services to the Company but for the avoidance of doubt the contract may not be terminated by the Contractor during any period in respect of which the contractor has agreed to render services to the Company."

That demonstrated that, not only could the contract not be terminated by the claimant during any period he was actually working offshore, but it also could not be terminated at any time when the claimant had agreed to provide services to the company. Miss Stirling also referred me to a fax dated 2 November 2000 from the company at page 8 which said:-

> "I can also confirm that the contract mentioned is still current."

It was submitted that the letters from the employers at pages 14 and 16 do not take the matter any further. I agree with that.

9. Miss Stirling referred me to a number of employment benefit cases, namely R(U)6/81, R(U)10/80 and R(U)2/83, the first two of which indicated circumstances where employed earners employment had been accepted to continue during periods when a claimant was on shore when employed, like the claimant in this case, in the oil industry, and in the latter one where it did not, where there were separate contracts for each period of employment. She also cited CJSA/4126/99 to me. That case, on the face of it, might appear to be adverse to the proposition she was submitting, but she persuaded me that in that case, on the basis that such contract as was between the claimant and employers in that case, was terminated.

10. I am satisfied that, on the facts found by the tribunal, they were correct in concluding that the claimant was engaged in remunerative work. I do not accept, as was submitted by Mr Forsyth, that the claimant ceased to be engaged in remunerative work at the end of every period he came back onshore after a period offshore. I am satisfied that Miss Stirling is correct that the issue is to be determined by consideration of whether there is a continuing relationship between the claimant and those who engaged his services. That, in my view, is the correct approach when quite clearly, although there was no obligation to provide employment at any particular time on the part of the company, and that there was no obligation on the part of the claimant to accept employment which was offered, there were obligations on the claimant, both when he was actually working and when he had agreed to work, not to terminate the contract which had been entered into. The evidence was also clear that the contract was not terminated on each occasion the claimant came onshore, but had a continuing effect until it was finally terminated by the employers. The fact that there was such a continuing relationship is also demonstrated by the claimant asking why he had been given his P45. It is quite clear also from the findings in fact in respect of the amount worked, that there was a continuing provision of employment and acceptance of it by the claimant and that these factors led to the inevitable conclusion that engagement in remunerative work continued during periods when the claimant was onshore, not physically working and not at that time being paid. The position had to be looked at in its totality and, when that was done, the correct conclusion was reached. I am not satisfied that R(U)6/81, R(U)10/80 and R(U)2/83 have any bearing on this case, as they are in respect of substantially different

statutory provisions which relate to "employed earners" rather than "engaged in remunerative employment", which are rather different things.

11. Miss Stirling also drew my attention to a decision of Mr Commissioner Rowland where he had made an *obiter* observation in CJSA/1160/98. In that case he was concerned with the application of regulation 51(2)(c) but said in paragraph 6:-

> "I will add that the Secretary of State suggested that if regulation 51(2)(c) did not apply, the claimant's appeal should still fail because a calculation under regulation 51(2)(b)(ii) would produce the same result. Had I decided that regulation 51(2)(c) did not apply, I am not sure I would have accepted that submission. In the absence of a cycle of work (either where regulation 51(2)(b)(i) applies or where 51(2)(c) applies), I would require persuasion before I accepted that a person is engaged in work in a week in which he does not work at all. Regulation 51(2)(b)(ii), unlike regulation 51(2)(b)(i), does not appear to contemplate weeks when no work is done being taken into account in the averaging process."

In my view, he has not applied, nor did he require to apply his mind to circumstances such as the present. In my view, regulation 51(2)(b)(i) requires to be applied only when the principal decision in respect of engagement in remunerative work has been established and the question is as to whether, within the context of the definition, the hours qualification is met. Regulation 51(2) is only concerned with the calculation of hours for that purpose. In this case it was accepted by Mr Forsyth that, on the findings in fact made by the tribunal, on any basis the claimant worked for more than 16 hours a week. He accepted that the method of calculation of the number of hours engaged in remunerative work was not raised by him before the tribunal, as he had advanced his case on the proposition that the claimant's engagement in remunerative work terminated on each occasion he came onshore. It was Miss Stirling's submission that, on any method of calculation, the claimant's hours exceeded 16 per week and I accepted that. She also submitted that the tribunal corrected a mistake in the period for calculation by the decision maker and which I accept. She did, however, adhere to the submission made in writing by the Secretary of State in respect of the various methods of calculation and their purpose.

12. Without prejudice to the tribunal's decisions in respect of the other appeals for which they provided a common statement of reasons for their decision, in respect of the instant case, I do not consider that an error in law is demonstrated. I have not applied my mind to the decision which was favourable to the claimant and in respect of which I am told the Secretary of State is seeking leave to appeal to the Commissioner. A separate decision was made on each appeal before the tribunal and a separate decision notice issued. The tribunal has set out a different basis for allowing the appeal which was favourable to the claimant. It is clear that the factual basis upon which they did so was not the dame as the instant case and, although I have not applied my mind to that case as it is not before me, I do not think that the tribunal can be said to have erred in law in this case by refusing the appeal when, in a different case covering a later date and a later claim, they allowed an appeal. If leave to appeal to the Commissioner is granted by the Commissioner in that case, the merits of an appeal to the Commissioner can be determined at that stage. For the sake of completeness, the case of *The Chief Adjudication Officer v. Stafford* and another was cited to me by Miss Stirling. She submitted that it was not relevant to this case and I agree with that as the issue there was

related to the method of calculation of hours for the purposes of regulation 51(1) where there was a cycle of work.

13. In these circumstances, in the instant case, the appeal fails.

(signed)
D J MAY QC
Commissioner
Date: 7 March 2002