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**SOCIAL SECURITY ADMINISTRATION ACT 1992**

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW**

**DECISION OF SOCIAL SECURITY COMMISSIONER**

**Name:**

**Social Security Appeal Tribunal:** Motherwell

**Case No:** 559/95/02497

**[ORAL HEARING]**

1. My decision is that the decision of the social security appeal tribunal given at Motherwell on 13 July 1995 is erroneous upon a point of law. I set it aside. I make the decision that the tribunal ought to have made. That decision is to uphold the decision of the adjudication officer notified to the claimant on 23 January 1995. This is in the following terms:-

“[The claimant] is not entitled to unemployment benefit from 19/Sep/94 to 10/Jan/95 (both dates included).

This is because those days fall within periods of 7 days ending on Tuesday for which he has not proved that his earnings were less than £57.00.

If any further claim is made for a day falling in the period from 11/Jan/95 to 20/Jan/96 (both dates included) and on that day the grounds of this decision have not ceased to exist, this decision is to be treated as a disallowance of that claim.”

2. In the absence of argument to the contrary and having considered it I am satisfied that I can accept paragraphs 2 to 6 of the adjudication officer's submission to the tribunal against whose decision this appeal is taken, and accept as facts the assertions of fact made within that submission. That submission is in the following terms:-

“2) The first thing to identify is the weekday on which the 7 day periods end. The last notice given to [the claimant] by the Secretary of State said that Tuesday would be the weekday for the purpose of his claiming unemployment benefit. (Doc 6).

3) The next thing to identify is the 7 days periods in which the days in question fall and then the earnings in those periods. [The claimant] is a local authority councillor and is considered to be a councillor for 365 days per year (366 in a leap year) from 01/04/93 to 31/03/94 the basic allowance was £70.84 per week and from 01/04/94 the basic allowance was £72.42.

4) I submit that those days fall in the 7 day periods ending 20/09/94, 27/09/94, 04/10/94, 11/10/94, 18/10/94, 25/10/94, 01/11/94, 08/11/94, 15/11/94, 22/11/94, 29/11/94, 06/12/94, 13/12/94, 20/12/94, 27/12/94, 03/01/95 and 10/01/95 and [the claimant] received £72.42 in those weeks.

5) The next thing to consider is whether [the claimant's] earnings for the periods ending 20/09/94, 27/09/94, 04/10/94, 11/10/94, 18/10/94, 25/10/94, 01/11/94, 08/11/94, 15/11/94, 22/11/94, 29/11/94, 06/12/94, 13/12/94, 20/12/94, 27/12/94, 03/01/95 and 10/01/95 equal or exceed the weekly lower earnings limit for Class 1 Contributions in regulation 7 of the Social Security (Contributions) Regulations 1979. The amount laid down for this at present is £57.00. It is clear I submit that in the periods ending 20/09/94, 27/09/94, 04/10/94, 11/10/94, 18/10/94, 25/10/94, 01/11/94, 08/11/94, 15/11/94, 22/11/94, 29/11/94, 06/12/94, 13/12/94, 20/12/94, 27/12/94, 03/01/95 and 10/01/95 [the claimant] had earnings which were at least the weekly lower earnings limit.

6) The next thing to consider is whether the earnings can be disregarded. Regulation 3(5) of the Social Security (Computation of Earnings) Regulations 1978 says that earnings are not taken into account if:

either (a) they are for a day or days before the days for which unemployment benefit was claimed, and none of the 6 days (excluding Sunday) before the start of the relevant 7 day period are days of unemployment

or (b) they are for a day or days after the days for which the claim is made and all the 6 days (excluding Sunday) before the days for which the claim is made are days of unemployment.

7) I submit therefore that under regulation 7(1)(o) unemployment benefit is not payable from 19/09/94."

I also accept findings 1, 2 and 3 of the findings of the tribunal. They are in the following terms:-

1. Applicant is an unemployed brick layer in his 60s.
2. He is also a local authority Councillor with Motherwell District Council.
3. He receives in that connection, a basic allowance of £72.42 per week."

3. Regulation 7(1) of the Social Security (Unemployment, Sickness Etc) Regulations 1983 provide in so far as it is material to this appeal as follows:-

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

.....  
(g) subject to regulations 9, 10, 11 and 12, a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless-

- (i) the earnings derived from that employment, in respect of that day, do not exceed £2.00, 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
- (ii) he is available on that day to be employed full-time in some employed earner's employment; and
- (iii) if the employment in which he is engaged is employed earner's employment, it is not in his usual main occupation or it is done for, or organised through, a local authority, health authority, pre-served board or health board in providing a service which is capable of being provided by a charity, or it is done for, or organised through, a charity;

.....  
 (o) subject to regulation 9, a day shall not be treated as a day of unemployment in relation to any person, if-

- (i) it falls within a period of 7 days (including Sundays) ending on the week-day corresponding to the particular week-day specified in a written notice last given to him by the Secretary of State for the purpose of his claiming unemployment benefit; and
- (ii) his earnings in respect of that period are equal to or exceed the weekly lower earnings limit for the time being specified for Class I contributions under the Act."

Regulation 3(4A) of the Social Security Benefit (Computation of Earnings) Regulations 1978 as amended provide as follows:-

"(4A) For the purposes of regulation 7(1)(g)(i) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 there shall be disregarded any payment made to the councillor by way of a basic allowance or special responsibility allowance payable by virtue of regulations made under section 18(1) of the Local Government and Housing Act 1989."

4. It is clear from perusal of the adjudication officer's decision notified to the claimant on 23 January 1995 and the statement of the relevant statutory provisions used to make the decision and recorded at page 1. of the bundle that the adjudication officer in making that decision relied upon the provisions of regulation 7(1)(o) and for the sake of completeness 7(5A) of the Social Security (Unemployment, Sickness Etc) Regulations 1983.

5. The claimant appealed against the decision of the adjudication officer. The appeal was heard on 13 July 1995. The decision of the tribunal was in the following terms:-

"Appeal succeeds. Applicant receives a basic allowance of £72.42 a week as a local authority Councillor and is entitled to Unemployment Benefit for the period 19 September 1994 to 10 January 1995."

6. In addition to the three findings in fact which I set out above the tribunal made this following fourth finding in fact:-

“4. This basic allowance should be disregarded in the calculations of his entitlement to Unemployment Benefit. Payment of the allowance of £72.42 a week is made to him under the Local Government & Housing Scotland Act 1989.”

The reasons given by the tribunal for their decision are as follows:-

“Applicant is a local authority Councillor and the law which operates in this case is Regulation 7(1)(g) of the Social Security (Unemployment, Sickness, etc) Regulations 1983. He receives a basic allowance of £72.42 a week and in terms of the above Regulation, he is entitled to Unemployment Benefit.”

7. The adjudication officer has appealed to the Commissioner. An oral hearing of the appeal was directed by the Commissioner. This oral hearing was heard before me on 20 February 1997. Mr Neilson of the Office of the Solicitor to the Secretary of State for Scotland appeared for the adjudication officer. Mr Nelson of the Employment and Redundancy Support, a service provided by North Lanarkshire Council appeared on behalf of the claimant.

8. It was accepted by Mr Nelson on behalf of the claimant, under reference to paragraph 8 of CU/097/1993, that the Commissioner in that case was correct when he said that:-

“8. It has now been established:-

- (i) Work as a councillor is “employment” for the purposes of the legislation under examination - see R(U) 5/83 para 9 and the cases cited there, and CU/039/92; and
- (ii) Basic allowance receivable by a councillor are “earnings” for the purposes of that legislation - see CIS/77/93 (starred at 6/94).”

I too accept what the Commissioner said in that case.

9. The basis of the adjudication officer’s grounds of appeal can be found in paragraphs 12 to 14 of the adjudication officer’s written submission to the Commissioner which Mr Neilson adhered to. That submission is in the following terms:-

“12. I submit that it is not in dispute that the Basic Allowance - and indeed the Special Responsibility Allowance - payable to the claimant are to be disregarded for the purposes of Regulation 7(1)(g). However there is another “earnings rule” which applies in Unemployment Benefit claims and that is contained in Regulation 7(1)(o) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations which states that:

“[quoted in paragraph 3]

I submit that Regulation 9 is not applicable in this case.

The lower earnings limited at the time was £57 which was raised to £58 from 6 April 1995 and the week-day last notified to the claimant was Tuesday.

13. I submit that the disregard in Regulation 3(4) of the Social Security (Computation of Earnings) Regulations only applies in relation to the application of Regulation 7(1)(g) and not to Regulation 7(1)(o) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations.

14. I further submit that the tribunal erred in law in that they failed to consider the application of Regulation 7(1)(o) to the facts of this case."

10. Mr Neilson also submitted to me that it was necessary to look at regulation 7(1)(g). However he said that even if by virtue of the disregard contained in regulation 3(4A) of the Computation of Earnings Regulations, the material days could be regarded as days of unemployment for the purposes of regulation 7(1)(g), despite on these days the claimant being engaged in employment as a Councillor, the provisions of 7(1)(o) still were applicable. Accordingly the relevant days were not to be treated as days of unemployment.

11. In response to the submission made on behalf of the adjudication officer Mr Nelson referred me to paragraphs 6 and 7 of CU/097/1993. These paragraphs state:-

"6. What is "the basic allowance"? I think I can do no better than quote from a decision of the Commissioner in CIS/77/1993 para 8:-

"8. ...I consider that the expression "basic allowance" is really a term of art. It is not an everyday expression, and in those circumstances I take the view that I am at liberty to interpret that expression by reference to any relevant evidence, and the circular issued by the Department of the Environment and the Welsh Office affords excellent evidence as to the meaning of that expression. It would seem to me clear from the circular that the basic allowance was intended to (a) compensate the councillor for his time and (b) cover the expenses incurred by him in the execution of his duties. Moreover, it would seem to me that it was in contemplation that such expenses might absorb the totality of the allowance. In other words, the basic allowance is a composite figure to cover the two constituent elements, and the proportion that each element bears to the total will vary from case to case. The practical effect of this is that in some, and, for all I know, all instances the relevant councillor will receive nothing for his time, the entirety of the payment being absorbed by the costs involved in the performance of his duties."

7. By virtue of regulation 2 of the Computation of Earnings Amendment Regulations 1992, para (4A) was added to regulation 3 of the Computation of Earnings Regulations 1978 (which sets out the various payments to be disregarded in computing earnings). That regulation provided that with effect from 18.3.92:-

“...for the purposes of regulation 7(1)(g)(i) of - the USIB Regs - there shall be disregarded any payment made to the Councillor by way of basic allowance...”

Perhaps that regulation was not made before time. Since councillors cannot avoid the operation of the Earnings Rule by not claiming the basic allowance, it meant that service to the community as a councillor was financially unattractive to those who were unemployed.

For authority that a councillor could not opt out of receiving basic allowance, I need go no further than to refer to R(S) 6/86(T) in which the head note (as relevant) runs as follows:-

“(b) ... earnings means amounts to which the claimant is entitled and is not limited to payments he actually received ...”

12. Mr Nelson then went on to submit that in respect of regulation 7(1)(g) there is clearly by virtue of regulation 3(4A) of the Computation of Earnings Regulations a disregard. He said that the adjudication officer seemed to be of the view that he could avoid the disregard, which applied to regulation 7(1)(g), by going to regulation 7(1)(o). He said that he seemed to think that he could have “two bites of the cherry.” He referred me to the decision of another social security appeal tribunal in relation to a different case with a different claimant where the chairman had noted:-

“Presenting Officer - for any other, claimant to Regulation which applies is 7(1)(g). Adjudication Officer’s guide indicates this is not to be used for councillors but 7(1)(o) to be applied.”

The claimant’s appeal in that case against the use of regulation 7(1)(o) was successful. He pointed out that in the reasons for that tribunal’s decision it was said:-

“For purposes of claim for Unemployment Benefit Regulation 7(1)(g) is applied to all claimants except where the claimant is a local authority councillor when Adjudication Officer’s guide indicates 7(1)(o) relative to Lower Earnings Limit of £56 applies. No explanation given by Presenting Officer as to reasons for applying different Regulation to one category of claimant namely councillor.”

13. Mr Nelson went on to submit that the proper approach was to apply regulation 7(1)(g) and if having applied the test therein, with reference to the disregard, the effect was that despite the claimant’s employment as a Councillor, the relative days were days of unemployment the adjudication officer could go no further and that the decision should be made under regulation 7(1)(g). He said that regulation 7 provided a natural order for the adjudication officer to proceed. It was that order (which is alphabetical) in which the adjudication officer was required to go. It was not open to him to pick the sub-paragraph which suited the purposes of the decision which he wished to reach. He produced no judicial authority for that proposition but said that he considered it to be logical.

14. Mr Neilson in his response to that submission said that there was no authority in the form of a Commissioner’s decision on the point at issue in the appeal. He indicated that the

claimant's representative's argument was flawed in respect that if for example the claimant had been a student then even if the relevant days were to be treated as days of unemployment, despite the claimant's engagement as a Councillor, by virtue of the operation of 7(1)(g) that would be of no assistance to him because it is clearly stated in regulation 7(1)(m):-

“for the purposes of unemployment benefit -

.....

(m) a day shall not be treated as a day of unemployment if on that day a person is a student.”

Thus the disqualification would operate.

15. I consider that Mr Neilson's submission on this point is sound. In my view the conditions set out in the sub-paragraphs of regulation 7(1) of the Social Security (Unemployment, Sickness Etc) Regulations 1983 are independent of each other. Accordingly even if the relevant days are not to be treated as days of unemployment in accordance with one or more of the sub-paragraphs in that regulation if that is not the position in respect of another sub-paragraph then the adjudication officer is entitled to make a decision that the claimant is not entitled to unemployment benefit for the relevant dates. I consider that the example given by Mr Neilson of the position if the claimant had been a student illustrates this proposition very clearly and compellingly. It applies equally in the present case where the facts of the case cover the situation set out in sub-paragraph (o). I can appreciate that it may be felt by those affected by it that it is unfair that the advantage of the disregard which is related only to 7(1)(g) is not applicable to 7(1)(o) and that accordingly (at least in some cases) an advantage given by the disregard is negated by non-entitlement arising upon the application of sub-paragraph (o). However I am in no doubt that these sub-paragraphs operate independently of each other and that accordingly the adjudication officer gave a decision which he was entitled to reach.

16. The appeal succeeds.

(signed)  
D J MAY QC  
Commissioner  
Date: 5 March 1997