CSU 11/1982

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SOCIAL SECURITY ACTS 1975 TO 1981

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

CSU 11/82

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1. Our decision is that the claimant is precluded by regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 from receiving unemployment benefit for any day in the period from 6 April 1981 to 2 June 1981 (both dates included).

2. This is an appeal by the claimant, a former employee of Hoover Limited, from the majority decision of a local tribunal dated 21 August 1981. Two other claimants (cases C.S.U.12/82 and C.S.U.13/82) presented similar appeals which were dealt with at the same time. Another case concerning former employees of the same company in Wales was the subject of a decision of a Commissioner in unreported case on the Commissioner's file C.W.U.1/82 dated 14 April 1982. The present case was dealt with by a Tribunal of Commissioners at an oral hearing held in Edinburgh at which the claimant was represented by Mr. R.S. Keen, Advocate, instructed by Messrs. L. & L. Lawrence, Solicitors, Glasgow, on behalf of the claimant's trade union. The insurance officer was represented by Mr. J.H. Swainson of the Solicitor's Office of the Department of Health and Social Security.

3. The claimant was employed from 5 November 1980 as a press operator by Hoover Limited at their plant at Cambuslang, Glasgow. Due to reduced demand for their product, the employers in 1981 decided that it was necessary to reduce their workforce by some 1,065 below the existing level of 2,677. Consultations upon the proposed redundancies with 6 trade unions representing the workforce began on 4 March 1981. It would appear that on the same day the employers gave notice to the Secretary of State for Employment under section 100 of the Employment Protection Act 1975 of the proposed redundancies, giving the first date at which these would take effect as 5 June 1982. The consultations with the unions were, however, designed to achieve voluntary redundancies at an earlier date on agreed terms, and the company set out terms (including financial terms) upon which it was prepared to act. In the case of volunteers for redundancy it was provided under head 2(A) of those terms:

/ "(A)

"(A) Volunteers for redundancy will be made severance payments comprising:-

I Statutory redundancy pay with earnings and service limitation.

II Payment in lieu of notice, based on statutory requirements or their company terms of employment, whichever is the greater.

III The balance of the 90 day consultative period unexpired at the date of their leaving (calculated in working days)."

At some date between 23 and 26 March 1981 the unions concerned evidently agreed to communicate the available terms to their members and by 26 March 1981 approximately 500 employees, including the claimant, had agreed to voluntary redundancy from 27 March 1981. The terms on which agreement was reached between the claimant and the company are set out in the company's letter dated 27 March 1981 as modified in the claimant's case by a separate payment note headed "Redundancy - March 1981". The letter contained the following:-

"... You have been accepted as a volunteer for redundancy and your employment will terminate on Friday 27 March 1981.

In calculating service for the purpose of redundancy pay and payment in lieu of notice, the company will compute your entitlement based on the length of your service between your starting date and Saturday, 6 June, 1981. In addition the company will make an ex gratia payment comprising of the balance of the 90 days consultative period unexpired at your date of leaving (calculated in working days)."

4. The claimant had insufficient service with the company to entitle him to any statutory redundancy payment. He received a payment in lieu of notice representing one week's pay (£98.44) and a lump sum payment based on 10 weeks' wages of £984.40, a total of £1,082.84. No application was made by the claimant's trade union under the provisions of section 101 of the Employment Protection Act 1975, no doubt because the consultative period had been shortened by agreement. Subsequently 3 setters employed by the company who became surplus to requirement as a result of amalgamations in March 1981 and who did not leave until July 1981 were treated as covered by the March redundancy proposals and accepted redundancy on the same financial terms as the March volunteers, notwithstanding that the balance of the 90 day consultative period referred to in the agreement had expired whilst they were still employed.

5. The claimant's employment terminated in accordance with the agreement on 27 March 1981. He claimed unemployment benefit on 6 April 1981. This was disallowed by the local insurance officer and, on appeal, by the majority decision of a local tribunal on the ground that in terms of the redundancy settlement the claimant had received a payment, described as referable to the balance of the 90 day consultative period, which attracted the operation of

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regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 in respect of days of claim up to 2 June 1981. The claimant appealed to the Commissioner and founded upon a decision by a local tribunal in favour of Welsh employees of the same company arising out of the same redundancies. That decision was reversed by the Commissioner in C.W.U.1/82 referred to in paragraph 2 above. The claimant also complained that he had been misled by his employers in the belief that unemployment benefit was payable.

6. Regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 provides as follows:-

> "7.-(1) For the purposes of unemployment, sickness and invalidity benefit -
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> .....
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> (d) a day shall not be treated as a day of unemployment if it is a day in respect of which a person receives a payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration which he would have received for that day had his employment not been terminated, so however that this sub-paragraph shall not apply to any day which does not fall within the period of one year from the date on which the employment of that person terminated;"

It is relevant to note that by amendment having effect from 31 March 1976 the operation of regulation 7(1) was extended to cover payments made under various provisions of the Employment Protection Act 1975. In particular it is now provided by regulation 7(1)(1)(v):-

> "(1) a day shall not be treated as a day of unemployment in relation to any person if it is a day in respect of which there is payable to that person -
>
> .....
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> (v) remuneration under a protective award made under section 101 of the Employment Protection Act 1975 or an amount ordered to be paid under section 103 of that Act;"

7. The material provisions of sections 99 to 103 of the Employment Protection Act 1975, which are somewhat detailed and lengthy, are reproduced in the appendix to this decision. Their effect may be summarised as follows:-

> Section 99(1) and (3) place a statutory obligation on an employer to consult the recognised trade union representatives about the dismissal of any employees whom he proposes to dismiss as redundant at the earliest opportunity: where he proposes to dismiss 100 or more at one establishment within a period of 90 days or less, he is to consult at least 90 days before the first dismissal takes effect. In "special circumstances" the employer is to do what is "reasonably practicable". Subsection (9) of section 99 expressly states that the section is not to be construed as conferring any rights on a trade union or an employee except as provided by sections 101 to 103. Section 100 requires an employer to notify the Secretary of State for Employment of his proposals.

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> Under section 101 a trade union may present a complaint to an industrial tribunal on the ground that an employer has dismissed or is proposing to dismiss as redundant one or more employees without complying with section 99. The industrial tribunal is empowered to make a non-compliance declaration and also a protective award specifying payment of remuneration for specified descriptions of employees for a protected period which begins with the date of the first dismissal or the date of the award and is not to exceed 90 days. Section 102 provides for entitlement under the protective award and section 103 for an employee to complain to an industrial tribunal if he is not paid remuneration under it.

8. In an attractive and well presented argument Mr. Keen on behalf of the claimant submitted that regulation 7(1)(d) had no application in the present case because (1) contrary to the written submission of the insurance officer the claimant had no legal entitlement to a 90 day period of notice in terms of the Employment Protection Act 1975, and in any event (2) if the claimant had or could be deemed to have had such an entitlement, the payment received on redundancy was, on the facts of this case, in the nature of a capital payment by way of compensation for the loss of a job, for past services, and as an inducement to accept voluntary redundancy, and was not a payment of income in lieu of notice or remuneration within the scope of regulation 7(1)(d). On the first point he contended that for regulation 7(1)(d) to apply there must have been a right in the employee to be employed and paid beyond the date of actual termination of the employment for a recognised period. The 1975 Act did not create such a right. Upon the second point he stressed that both employers and employees regarded the payment as a capital payment. While he accepted that labels used by the parties were not conclusive the payment was described as "ex gratia". The employers by letter dated 18 August 1981 had described the payment as a lump sum payment equalling 10 weeks' pay to compensate for loss of job and made to encourage voluntary redundancy. The capital nature of the payment was also evident, he contended, from the fact that the setters who left after the expiry of the 90 day period also received the same payment.

9. In considering whether the payments received by the claimant in the present case included a payment coming under the scope of regulation 7(1)(d) we agree with the observations of the Commissioner in paragraph 15 of unreported decision C.U.2/78. The Commissioner, dealing with a question under regulation 7(1)(d) said:-

> "15. The purpose of unemployment benefit is, by insurance, to compensate those who have had the misfortune to lose their employment and to provide an income for those who are out of work. It is not the intention that those who are unemployed should thereby be better off financially than those who are working. In some instances, which it is not possible to avoid, that occurs, but it should be avoided whenever it is possible to bring about a fair result without it occurring. It is in the interests of all who contribute to the National Insurance Fund that those whose loss of employment is compensated for by a payment,

> which might reasonably be regarded as including an element for remuneration lost which would have been earned, should not come on to the National Insurance Fund for days which have otherwise been provided for by such a payment."

10. While the general policy of regulation 7(1)(d) and its predecessors may be reasonably clear, the wording of the regulation has given rise to much difficulty and criticism in the past. It has been the subject of a number of amendments which have not silenced the criticism. See for example R. v The National Insurance Commissioner ex parte Stratton 1979 2 W.L.R.389 reported as Appendix II to R(U)1/79, per Bridge L.J at page 2601 of the latter report. The problems of construction are not made easier by the fact that, although it is known that the reference in the regulation to payments in lieu of remuneration was introduced to meet cases of premature determination of fixed term contracts and the words in parenthesis were introduced to cover Crown Servants having no legal entitlement to notice, the provisions in each case are not so expressed as to be limited in scope to these situations. The language of the regulation has to be applied to the circumstances and, if it fits, the regulation applies.

11. It is well established that it is necessary to ascertain the true nature of the payment giving rise to an issue under the regulation and that the labels applied by the parties are not conclusive. It is also well established that statutory redundancy payments or their armed service equivalents are outwith the scope of regulation 7(1)(d), upon the basis that they are in the nature of capital payments to compensate for loss of a job - see per Denning M.R. in Stratton page 2596. On the other hand it has been established by decisions of Commissioners that payments wholly or partly made by way of agreed compensation for termination of employment in breach of a notice provision or in advance of the expiry of a fixed term contract, or payments made in consideration of an agreement to the termination of employment in circumstances which involve the claimant foregoing notice or a right to continuing remuneration are within the scope of the regulation. See R(U)7/73 and R(U)9/73. It has also been established that such a payment even if it does not amount to full compensation will attract the operation of regulation 7(1)(d) for the whole of the relevant period - R(U)2/68 and R(U)3/68. Although the inequitable consequences which might result from these decisions were pointed out in Stratton these decisions remain applicable to payments other than capital payments in compensation for redundancy.

12. We agree with the submission of Mr. Keen in the present case that section 99 of the Employment Protection Act 1975 confers no entitlement upon an employee to be employed and paid for a 90 day notice period. In paragraph 3 of decision R(U)7/80 the Commissioner referred to section 99 and observed: "The practical effect of this provision was that those employees who were to be dismissed for redundancy were entitled to be employed and earn remuneration accordingly for the 90 days' period of notice." The Commissioner expressly recognised that no individual right vested in any employee guaranteeing a 90 days' period of employment and that no right prior to the making of a protective order was vested in any individual employee, but he went on to say: "I consider it would be unrealistic of me to suppose that, in a case such as the present one, where there is a trade union actively looking after the welfare of its members, such trade union will fail to ensure that those of its members who are to be dismissed receive the full 90 days' notice or a cash equivalent. Accordingly, in my judgment for all practical purposes the members concerned had in the present case a 90 days' entitlement."

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13. While the conclusion of the Commissioner in R(U)7/80 may be justified in an individual case we do not consider the Commissioner's observations to be of general application. It is in our opinion clear from the terminology of section 99 and cases such as Spillers French (Holdings) Limited v U.S.D.A.W. (E.A.T.) 1980 I.C.R.31 and G.K.N.Sankey v Metal Mechanics (E.A.T.) 1980 I.C.R.148 that the period in section 99 is not an employee's notice period but a consultative period, one of the objects of which is to allow the exploration of alternatives other than redundancy. No direct rights are conferred on an employee under section 99 in respect of the consultative period and the section cannot be said to entitle the employees to be employed and paid for a 90 day period. Nor in our view does such an entitlement arise as a result of the combination of sections 99 to 103. There may be sound reasons why trade unions endeavouring to serve the interests of all of their members may decide not to invoke section 101 notwithstanding an employer's non-compliance with section 99. Even if a union does invoke section 101, the employer may establish "special circumstances" in light of which an industrial tribunal may not make any protective award or may find it just and equitable to do so only for a protected period which is less than the statutory maximum and which does not in any event run from the same starting date as the consultative period in section 99.

14. Nevertheless, the effect of section 99 is to place upon employers a statutory duty of advance consultation for at least the specified number of days with the appropriate trade unions. Observance of this duty may result in individual employees receiving 90 days early warning of proposed redundancy. The process of consultation may of course avoid the redundancies. Alternatively it may lead ultimately, as in the present case, to an agreement between the employers and the redundant employees to accelerate the termination of their employment to a date within the consultative period. Even in a case of non-compliance with section 99 the employers may avoid action by the trade unions under section 101 by reaching an agreement which may in some circumstances provide for the employees receiving payment for a lesser period than the statutory consultation period. The existence of the statutory duty of consultation placed on employers under section 99 and of the sanctions in sections 101 to 103 may well cause an employer to negotiate an agreement with the employees whom he wishes to dismiss in which he acknowledges that observance of the 90 day or 60 day consultation period would have resulted in those employees enjoying a period of employment and remuneration after the date of actual termination of their employment and for which he accordingly agrees to pay them remuneration.

15. If an agreement of the kind mentioned above is made, the relevant payment made under it may in our opinion attract the operation of regulation 7(1)(d). It will not do so as a payment in lieu of notice. In our opinion that expression refers to the statutory or contractual period of notice of termination of employment applicable to an employee. But it may do so as a payment in lieu of "the remuneration which he would have received for that day had his employment not been terminated". In R(U)7/73, the decision of a Tribunal of Commissioners, consideration was given to the application of an earlier regulation in the same terms in relation to a severance payment equivalent to 2 months' pay made to an employee who had also received a payment in lieu of the one month's notice to which he was entitled. The majority decision of the Tribunal was that the severance payment was not a payment in lieu of remuneration in terms of the regulation. In paragraph 40 of the decision of the majority of the Commissioners it is stated:-

> "In our view, a payment in lieu of remuneration, as now defined by the regulation, should be referred

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> to the days during which the claimant would otherwise have worked; i.e. the appropriate period of notice. The only exception where a post termination period is for consideration is where the employment was for a fixed term, and this is because the days in respect of which remuneration would have been earned are precise and ascertainable."

That statement was of course not made in contemplation of the statutory provisions dealing with redundancies and unfair dismissals which are now in force. We agree that the days in respect of which the remuneration would have been earned must be precise and ascertainable, but insofar as the statement in R(U)7/73 suggests that a payment in lieu of remuneration can only be considered in relation to fixed term contracts it is, in our opinion, no longer correct and we note that one of the Commissioners concerned in effect departed from that view in paragraphs 17, 18 and 23 of R(U)1/79. An obligation on the part of an employer to employ and pay an employee beyond the notice period may arise in circumstances other than a fixed term contract and each case must be considered in relation to its own facts. In the context of redundancy cases, the obligation may arise from the statutory duty placed upon employers under section 99 of the Employment Protection Act 1975 and an employer's acknowledgement in an appropriate case of his obligation to comply with the appropriate statutory consultative period which would have resulted in the employee concerned enjoying a period of continued employment after the date of actual termination of that employment. Since the hearing before us, we have had the advantage of reading unreported decision C.W.299/81 with which we are generally in agreement, albeit many of the observations are <u>obiter dicta</u>.

16. We turn now to consider the nature of the payment in the present case. Notwithstanding the references in the documents to the payment being "ex gratia" and the employers' subsequent statement regarding the nature of the payment, we are of the clear opinion that the relevant payment which was described as "comprising of the balance of the 90 days consultative period unexpired at the date of your leaving (calculated in working days)" was not a payment in the nature of a capital sum in recognition of the claimant's loss of his job, his past services, and an inducement to accept voluntary redundancy. On 4 March 1981 the employers had in effect acknowledged the practicability of observing the 90 day consultation period by stipulating 5 June 1981 as the intended date for first redundancies. The relevant payment made under the agreement was based on and related to the unexpired portion of the 90 days and was in our opinion made in acknowledgment of the fact that but for the agreement the claimant's employment would have continued until at least 2 June 1981. Although there was undoubtedly an element of inducement to accept voluntary redundancy in the overall agreement, the relevant payment was in our opinion essentially a payment in respect of lost income by way of wages in the period defined. This conclusion cannot in our opinion be affected by the subsequent agreement to treat three other employees as part of the same redundancy as mentioned in paragraph 4 above. Albeit that they were paid the same sum it was clearly not paid on the same basis of calculation or they would have received nothing. It appears to have been agreed that they should be deemed to have been part of the same redundancy. It is also apparent that the terms of the agreement covering the corresponding redundancies of Hoover employees in Wales, dealt with in C.W.U.1/82, were different in at least one material respect namely that the relevant agreement in that case contained an express stipulation that "the agreement negates any application for a protective award". It is also clear that the Commissioner's decision in

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that case proceeded upon an assessment of certain oral evidence different from the present case. Subject therefore to our general observations on the effect of section 99 to 103 of the Employment Protection Act 1975 we cannot usefully comment further upon that case.

17. We therefore conclude that the payment received by the claimant in the present case, described as the "ex gratia payment", was truly a payment in lieu of the remuneration which the claimant would have received if his employment had not been prematurely terminated by agreement and is a payment in lieu of remuneration within the scope of regulation 7(1)(d) covering the balance of a 90 day period from 4 March 1981 to 2 June 1981 unexpired as at 27 March 1981. As we are informed that the claimant has claimed benefit from 6 April 1981 to 2 June 1981, the payment of unemployment benefit for those days is in our opinion precluded by the operation of regulation 7(1)(d).

18. The appeal of the claimant is refused.

(signed) Douglas Reith
Commissioner

(signed) J. S. Watson
Commissioner

(signed) J. G. Mitchell
Commissioner

Date: 28 July 1982

Commissioner's File: C.S.U.11/82
C.I.O. File: I.O.3359/U/81
Scottish H.Q. File: Unregistered Papers

APPENDIX

EMPLOYMENT PROTECTION ACT 1975

99.-(1) An employer proposing to dismiss as redundant an employee of a description in respect of which an independent trade union is recognised by him shall consult representatives of that trade union about the dismissal in accordance with the following provisions of this section.

(2) In this section and sections 100 and 101 below, "trade union representative" in relation to a trade union means an official or other person authorised to carry on collective bargaining with the employer in question by that trade union.

(3) The consultation required by this section shall begin at the earliest opportunity, and shall in any event begin -

(a) where the employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less, at least 90 days before the first of those dismissals takes effect; or

(b) where the employer is proposing to dismiss as redundant 10 or more employees at one establishment within a period of 30 days or less, at least 60 days before the first of those dismissals takes effect.

(4) In determining for the purposes of subsection (3) above whether an employer is proposing to dismiss as redundant 100 or more, or, as the case may be, 10 or more, employees within the periods mentioned in that subsection, no account shall be taken of employees whom he proposes to dismiss as redundant in respect of whose proposed dismissals consultation has already begun.

.....

(8) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements of subsections (3), (5) or (7) above, the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.

(9) This section shall not be construed as conferring any rights on a trade union or an employee except as provided by sections 101 to 103 below.

100.-(1) An employer proposing to dismiss as redundant -

(a) 100 or more employees at one establishment within a period of 90 days or less; or

(b) 10 or more employees at one establishment within a period of 30 days or less,

shall notify the Secretary of State, in writing, of his proposal -

/ (i)

(i) in a case falling within paragraph (a) above, at least 90 days before the first of those dismissals takes effect; and

(ii) in a case falling within paragraph (b) above, at least 60 days before the first of those dismissals takes effect,

and where the notice relates to employees of any description in respect of which an independent trade union is recognised by him, he shall give a copy of the notice to representatives of that union.

101.-(1) An appropriate trade union may present a complaint to an industrial tribunal on the ground that an employer has dismissed as redundant or is proposing to dismiss as redundant one or more employees and has not complied with any of the requirements of section 99 above.

(2) If on a complaint under this section a question arises as to the matters referred to in section 99(8) above, it shall be for the employer to show -

(a) that there were special circumstances which rendered it not reasonably practicable for him to comply with any requirement of section 99 above; and

(b) that he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances.

(3) Where the tribunal finds a complaint under subsection (1) above well-founded it shall make a declaration to that effect and may also make a protective award in accordance with subsection (4) below.

(4) A protective award is an award that in respect of such descriptions of employees as may be specified in the award, being employees who have been dismissed, or whom it is proposed to dismiss, as redundant, and in respect of whose dismissal or proposed dismissal the employer has failed to comply with any requirement of section 99 above, the employer shall pay remuneration for a protected period.

(5) The protected period under an award under subsection (4) above shall be a period beginning with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, of such lengths as the tribunal shall determine to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 99 above, not exceeding -

(a) in a case falling within section 99(3)(a) above, 90 days;

(b) in a case falling within section 99(3)(b) above, 60 days;

or

/ (c)

(c) in any other case, 28 days.

102.-(1) Where an industrial tribunal has made a protective award under section 101 above, every employee of a description to which the award relates shall be entitled, subject to the following provisions of this section, to be paid remuneration by his employer for the protected period specified in the award.

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(3) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a period falling within a protected period, shall go towards discharging the employer's liability to pay remuneration under the protective award in respect of that first mentioned period, and conversely any payment of remuneration under a protective award in respect of any period shall go towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(4) In respect of a period during which he is employed by the employer an employee shall not be entitled to remuneration under a protective award unless he would be entitled to be paid by the employer in respect of that period, either by virtue of his contract of employment or by virtue of Schedule 2 to the Contracts of Employment Act 1972 (rights of employee in period of notice), if that period fell within the period of notice required to be given by section 1(1) of that Act.

103.-(1) An employee may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under that award.

(3) Where the tribunal finds a complaint under subsection (1) above well-founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.