Commissioner's File: CIS/894/94

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant against the decision of the Grimsby social security appeal tribunal, given on 8 September 1994 whereby the tribunal decided that the claimant was not entitled to income support from 7 April 1994 to 30 April 1994 because he was to be treated as engaged in remunerative work until that last date.

2. The claimant was at one time employed as a roustabout on a North Sea oil rig by Santa Fe Drilling Company (North Sea) Ltd. His contract of employment, dated 12 August 1993, required him to work in accordance with a work schedule set out in paragraph 6 of the contract as follows -

> "6. Normal Work Schedule and Hours of Work
>
> A tour of duty at the work location will be of 14 consecutive days duration at twelve continuous hours per day and subject as hereinafter provided, such tour of duty will recur every 28 days. However, although no systematic or consistent departure will be made from this work schedule, the commencement of such tour of duty may be advanced and/or the duration thereof may be extended on account of transportation, operation and/or weather conditions for such time as the Company may deem necessary. Continuation of work beyond the normal tour does not postpone the commencement of the next tour or give rise to rest entitlement in lieu of days worked. The Employee is required to work overtime for such daily period over and above the period of the shift, as specified above, as the Company may deem necessary for the operation to which the Employee is assigned. The daily shift will commence at such time as shall be notified to the Employee by his supervisor at the work location, which time may be modified from time to time."

The remuneration was fixed by paragraph 7 of the contract. There was a basic rate of £6.40 per hour, enhanced rates for overtime

and for working on certain public holidays and an offshore bonus of £12.00 per day for each day of a completed tour of duty. No payment was to be made for days between tours of duty. The employment was terminable on notice of various lengths as fixed by paragraph 14.

3. The claimant became ill and was absent from work due to his illness from 31 March 1994. As from 6 April 1994 his employment was terminated. He made a claim for income support which was treated as having been made on 7 April 1994. According to the employer's letter of that same date, he was to receive, and did in fact receive, " . . . one weeks pay in lieu of notice ... and any accrued vacation pay." The accrued vacation pay arose from clause 8 of the Contract of Employment which reads -

> "8. Vacation and Public Holidays
>
> (i) The employee will accrue 168 hours vacation pay per annum at the rate of 42 hours per quarter. The employee can request pay in lieu -of vacation at any time although it will only be paid through the end of the previous quarter i.e. 31 March, 30 June, 30 September and 31 December.
>
> (ii) There is no entitlement to vacation.
>
> (iii) There is no entitlement to Statutory Public Holidays.
>
> (iv) There is no entitlement to unpaid leave of absence, but such time off may be granted at the Company's discretion.
>
> (v) Subject to paragraph 14, in the event of termination of employment the employee will receive vacation pay pro rata to the number of days worked, including parts of a quarter, to the extent such pay has not previously been taken by the employee."

The amount the claimant received by way of "vacation pay" pursuant to that provision was £640.00, calculated on the basis of 100 hours at the basic rate of pay.

4. An adjudication officer then determined that because, in his view, the weeks pay in lieu of notice and the £640.00 were earnings as defined by regulation 35 of the Income Support (General) Regulations 1987, the claimant was not entitled to income support from 7 April 1994 to 30 April 1994 being the period to which those earnings should be attributed. Regulation 35(1) provides a definition of "earnings" by way of a list of items that are to be treated as such. The list includes -

> (a) any bonus or commission;
>
> (b) any payment in lieu of remuneration except any periodic sum paid to a claimant on account of the termination of his employment by reason of redundancy;
>
> (c) any payment in lieu of notice;

(d) any holiday pay except any payable more than 4 weeks after the termination or interruption of employment ... ";

(e) any payment by way of a retainer;

(f) any payment made by the claimant Is employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of -

(i) travelling expenses incurred by the claimant between his home and place of employment;

(ii) expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home;

(g) any award of compensation made under section 68 (2) or 71 (2) (a) of the Employment Protection (Consolidation) Act 1978 (remedies for unfair dismissal and compensation);

The payment in lieu of notice was caught by sub-paragraph (1) (c).

5. The adjudication officer took the view that the £640.00 was caught by sub-paragraph (1)(d). The claimant appealed because he contended that that sum was not "holiday pay" because under the contract he had no entitlement to holidays. It followed, he said, that that sum was to be disregarded under Schedule 8 to the 1987 Regulations (sums to be disregarded in the calculation of earnings) as it fell within paragraph 1 which reads -

"1 . In the case of a claimant who has been engaged in remunerative work as an employed earner

(a) any earnings paid or due to be paid in respect of that employment which has terminated -

(i) by way of retirement but only if on retirement he is entitled to a retirement pension under the Social Security Act, or would be so entitled if he satisfied the contribution conditions;

(ii) otherwise than by retirement except earnings to which regulation 35(1)(b) to (e) and (g) to (i) applies (earnings of employed earners);"

The tribunal, as I have indicated, disallowed the claimant's appeal. They held that the £640.00 was holiday pay and thus did not fall to be disregarded. On that basis, it is not in issue that, as the tribunal concluded, the claimant was, by virtue of regulation 5(5) of the 1987 Regulations, to be treated as engaged in remunerative work and thus not entitled to income support for the period for which the earnings were to be taken into account. The essential issue in this case is whether the £640.00 is "holiday pay" as that expression appears in regulation 35(1)(d).

6. The tribunals findings of fact were -

> "Mr Cooper was employed by Santa Fe Drilling until 6 April 1994 when he was made redundant whilst off sick. He received £640.00 holiday pay and one week's pay in lieu of notice amounting to £268.80. He concedes the one week's pay in lieu of notice falls under Regulation 5(5) and Regulation 35(1)(c) of the Income Support (General) Regulations and therefore he is not entitled to Income Support for period 6 April to 12 April 1994 inclusive. Mr Cooper's contract of employment at Paragraph 8 states that the employee will accrue 168 hours vacation pay per annum at the rate of 42 hours per quarter. The employee can request pay in lieu of vacation at any time although it will only be paid through the end of the previous quarter i.e. 31 March, 30 June, 30 September and 31 December. There is no entitlement to vacation. There is no entitlement to statutory public holidays and there is no entitlement to unpaid leave of absence. Subject to Paragraph 14 of the contract in the event of termination the employee will receive vacation pay pro rata for the number of days worked including parts of a quarter to the extent such pay has not previously been taken by the employee. Under Paragraph 14 employees who resign their employment and fail to give proper notice will not receive payment for accrued vacation, this is not relevant to Mr Cooper's case. When vacation pay is paid out it is at that point that tax and National Insurance deductions are made, vacation pay is only paid out if employees request it and employees can accumulate up to 2 year's vacation pay at which time 12 months of vacation pay is automatically paid out. Mr Cooper's employment was terminated on 6 April 1994 and the final payments made under his employment fall to be attributed to the period 6 April 1994 to 29 April 1994 as the pay in lieu of notice was one week and the holiday pay was for 100 hours, the equivalent of 2 weeks and 3 days as Mr Cooper's normal working hours were 42 each week."

The reasons the tribunal gave for their decision were -

> "Under Regulation 35 earnings means in the case of employment as an employed earner any remuneration or profit derived from that employment, and includes any payment in lieu of notice and any holiday pay except any payable more than 4 weeks after termination or interruption of employment .... Mr Cooper concedes that his payment in lieu

of notice falls under this Regulation and the Tribunal are of the view that although he was not under the terms of his contract and [sic] entitled to any vacation, he was entitled to a payment in lieu of vacation and no matter what the payment is actually called it is clearly remuneration or profit derived from his employment within the meaning of Regulation 35(1). The Tribunal considered the point made that employees of Santa Fe frequently elected to save and not draw this money but as tax and National Insurance contributions were not deducted until money was actually paid out, are of the view that the payments withheld by Santa Fe cannot be regarded as savings which could be defined as capital under Schedule 8. Therefore the entire payment made to Mr Cooper upon his redundancy falls to be taken into account and this disqualifies him from receiving Income Support until 29 April 1994 as until then he must be treated as engaged in remunerative work."

The current adjudication officer agrees with the claimants representative that the tribunals decision is erroneous in law for insufficiency of reasons in that they did not make explicitly clear that the £640.00 was to be regarded as earnings pursuant to paragraph l(d) of regulation 35.

7. I think it is probably clear that the tribunal had in mind that that sum was within the definition of earnings because it was "holiday pay" under sub-paragraph (d) but it does not matter because in my view the tribunal were wrong in their conclusion that, by reason of the £640.00, the claimant was to be treated as engaged in remunerative work in respect of the period in question.

8. The claimant's representatives reason for contending that the vacation pay was not "holiday pay" is put succinctly in the second of his grounds for this appeal as follows -

> "In particular, it is submitted that the payment was not holiday pay, (Regulation 35(1)(d) since the claimant was not entitled to holidays under the terms of his contract of employment. It is, therefore, submitted that the payment was not a payment to which Regulation 5(5) applied and that accordingly the claimant did not fall to be treated as engaged in remunerative work."

The current adjudication officer contends that the £640.00 is properly to be characterised as "holiday pay" because -

> "7. It is my submission that holiday pay is a payment made by a person's employer in respect of holidays or

vacations. This may take the form of pay accrued during time actually worked, to be applied for and used at such time as a person takes time off that employment, or alternatively may take the form of an accrued entitlement to paid time off work, for which a monetary equivalent may be paid if the time off

is not taken due to termination of that employment. submit that in the present case, the "vacation pay" falls into the former category. I further submit that it is accepted by both the claimant's former employer and by the claimant himself that this pay is in some way linked to holidays or vacations. The claimant himself, in his original grounds for appeal against the decision of the adjudication officer, states:

> When I started work last September with Santa Fe I entered a scheme whereby pay could accrue for holidays until such time that my time off coincided with school holidays. As I was working over Christmas and New Year I left my holiday pay alone with a view to saving for the summer holidays.
>
> I submit that the claimant clearly recognises that the accrued vacation pay is pay intended to be used during holidays.

8. I further submit that regulation j5(1)(d) refers to any holiday pay It is my submission that this phrase allows for a wide interpretation of what counts as holiday pay for the purpose of the regulation and therefore allows for the inclusion of accrued "vacation pay", as received by the claimant in the present case, to fall within that definition."

In reply, the claimant's representative observes that -

"3. As to paragraphs 7 and 8, whilst not disagreeing with the Adjudication officer that the term 'holiday pay, should be given its ordinary everyday meaning, the claimant submits that it does not bear the wide meaning argued for.

Regulation 5(3) of the Income Support (General) Regulations 1987 provides that 'A person shall be treated as engaged in remunerative work during any period for which he is absent from work..... by reason of a recognised, customary or other holiday.' It is submitted, therefore, that 'holiday, for the purpose of this appeal involves a period of absence from work and that 'holiday pay, necessarily involves a payment made to an employee either whilst s/he is absent from work on holiday or where there is entitlement to holiday which has not been taken. Regulation 5(3) contrasts 'holiday, and absences without just cause,. on that basis, it is submitted that it would not be proper to characterise a payment made to an employee who was absent without just cause as 'holiday pay'. Equally, a payment made to an employee for working when s/he has no just cause, to be absent should not be described as 'holiday pay'.

Although it is conceded that the claimant could have taken discretionary unpaid leave of absence, as provided for in clause 8(iv) of the claimant's contract of employment, and could have drawn out his accrued vacation pay, at that time, it is submitted that he could equally have drawn it out for another purpose quite unconnected with holidays.

It is submitted that the payment should not be treated as remuneration or profit derived from I employment under Regulation 35(1) so that the claimant does not fall to be treated as in remunerative work for the purpose of Regulation 5(5)."

9. "Holiday pay" is not defined in the legislation. It is not, as it seems to me, a technical expression; it has to be given its ordinary natural meaning, whatever that might be having regard, no doubt, to the context in which it appears. The claimant's case is that "holiday pay" presupposes the entitlement to paid holidays. In support of that proposition reference is made to regulation 5(3) which provides that a person is to be treated as engaged in remunerative work when he is absent from work either without good cause or because of a recognised, customary or other holiday. That provision is presumably necessary to make clear that a claimant does not cease to be engaged in remunerative work while he is absent from work in the circumstances mentioned. I doubt that it has anything to say about the meaning of "holiday pay" in regulation 35 (meaning of "earnings").

10. There are definitions of "holiday pay" in other legislation. For example, section 127(3) of the Employment Protection (Consolidation) Act 1978 defines "holiday pay" (for the purposes of determining rights on redundancy) as follows -

"(3) In sections 122 to 126 -

"holiday pay" means -

(a) pay in respect of a holiday actually taken; or

(b) any accrued holiday pay which under the employee's contract of employment would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday;"

That definition is, I think, entirely consistent with the contention on behalf of the claimant that "holiday pay" is limited to payments in respect of entitlement. Its purpose, in that provision, is to determine what debts, on the employer's insolvency, should be paid from the Redundancy Fund. I doubt whether a definition for that purpose can be of assistance with regard to the meaning of "holiday pay" in relation to entitlement

to income support but it may be thought that at least it corresponds with the sense in which the expression "holiday pay" is, as I understand it, usually used.

11. If, in ordinary usage, "holiday pay" means the pay to which an employee is entitled for the holidays he has taken or would have taken but for the termination of the employment, does it mean something different in regulation 35(1)(d) of the General Regulations and, as indirectly referred to in paragraph 1 of Schedule 8? So far as I can identify a purpose in sub-paragraph 1 (a) of the Schedule it would appear to be to allow the disregard of retirement pension earnings ((a) (i)) and of accrued earnings and debts ((a)(ii)) as distinct from payments which arise only because of the termination of the employment contract. So e.g. bonuses and commissions and certain outstanding expenses are disregarded while payments in lieu of remuneration and in lieu of notice, holiday pay, retainers and compensation are not. In the present case the so-called vacation pay" could, under the contract, be requested for payment by the employee at any time; following such request payment would be made at the end of any quarter. The current adjudication officer relies on the statement the claimant made in his grounds of appeal to the tribunal when he said -

> "When I started work last September with Santa Fe I entered a scheme whereby pay could accrue for holidays until such time that my time off coincided with school holidays. As I was working over Christmas and New Year I left my holidays pay alone with a view to saving for the summer holidays."

That was a way of putting it which was perhaps not best from the claimant's point of view in that it creates the impression that "time off" was holidays. But it was not. It was, as I understand it, merely the period between tours of duty for which there was no entitlement to payment.

12. Clause 8(v) of the contract provides for the payment of "vacation pay" on termination of the contract "pro rata to the number of days worked". It is plain that the vacation pay had nothing to do with the taking of holidays; in reality it is no more than an addition to the basic rate of pay to compensate for the fact that there was no holiday entitlement. If the contract terminated there was entitlement to what had already been earned, on a pro rata basis. Unlike holiday pay in what seems to me to be the usual sense it was pay that could have been taken at any time but was left owing. In the ordinary course there is, during the subsistence of an employment contract, no entitlement to pay when a holiday, to which there is entitlement, is not taken.

13. For the reasons I have sought to explain, I prefer the case put forward on behalf of the claimant to that put forward by the adjudication officer. I take the view that the "vacation pay" in this case was not, at least in its ordinary sense, "holiday pay" and nothing in any of the legislation to which I have referred suggests to me that "holiday pay" in regulation 35

should be given other than its ordinary meaning. It follows that the tribunal reached the wrong conclusion and I accordingly allow this appeal and set aside the tribunals decision. **My** decision, in substitution for that of the tribunal is that the £640.00 in question is to be disregarded under paragraph l(a)(ii) of Schedule 8. Entitlement to income support must be determined accordingly.

(Signed) R **A** Sanders
Commissioner

Date: 12 February 1996