

Trade disputes over whether holidays should now be only at fixed annual dates — apprentice did not have direct interest NJG/SH/4/TP because he was not allowed to go on holiday when he was supposed to attend college/trade exams.

Commissioner's File: CIS/266/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Andrew John Shaw

Social Security Appeal Tribunal: Lancaster

Case No: 605:01674

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 27 June 1989 as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely that in respect of the claimant's claim for Income Support dated 12 July 1988, the claimant was not a person who was disqualified under section 19 of the Social Security Act 1975 for receiving unemployment benefit or a person who would have been so disqualified if otherwise entitled to that benefit. That is because, although the claimant lost his employment on 12 June 1988 as an employed earner by reason of a stoppage of work due to a trade dispute at his place of employment, he has proved that he was not directly interested in the dispute: Social Security Act 1975, sections 19 and 101 (as amended) and the Social Security Act 1986, section 23.

2. This is an appeal to the Commissioner by the claimant, a young man who was at the relevant time an apprentice under the Vickers Apprenticeship scheme. There was at that time a trade dispute at Vickers which lasted from 12 June 1988 (so far as the claimant was concerned), up to a resumption of work on 30 August 1988 (for details see below).

3. The appeal was the subject of an oral hearing before me in Liverpool on 23 July 1990, at which the claimant was present and was represented by Ms S Maunders of the Lancashire County Council Welfare Rights Organisation. The adjudication officer was represented by Mr N Butt of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant, to Ms Maunders and to Mr Butt, for their assistance to

me at the hearing. The claimant's appeal is against the unanimous decision of a social security appeal tribunal dated 27 June 1989 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 13 July 1988 to the effect that (in respect of a claim for Income Support made on 12 July 1988) the claimant was not entitled to that benefit because of the combined provisions of section 19 of the Social Security Act 1975 and section 23 of the Social Security Act 1986. Those provisions together mean that the claimant could not receive any Income Support, he being a single person without a "family" and he was held to be subject to a "trade dispute" disqualification under the provisions (relating to unemployment benefit) of section 19 of the Social Security Act 1975.

4. Although I have eventually decided that I must hold the tribunal's decision to be erroneous in law, I should say that it is clear that the tribunal here took considerable trouble with this case. There had been a previous adjournment to obtain further detailed documentary evidence as to the Apprenticeship Scheme with Vickers. The tribunal, when it conducted its full hearing on 27 June 1989, made a full record of its decision on Form AT3. However, in my view, the question whether or not a given set of facts can amount to a "direct interest" within the meaning of section 19(1)(a) of the Social Security Act 1975 (as amended by section 44 of the Social Security Act 1986) itself involves a question of law. In my view the tribunal erred in law in its legal deductions from the admitted facts in this case.

5. Those facts were that the stoppage of work from 12 June 1988 to 30 August 1988 was undoubtedly due to a trade dispute, i.e. as to the terms and conditions of employment, and in particular as to the employers wishing to substitute for the workforce as a whole a system of fixed annual holidays at fixed dates rather than as hitherto allowing employees a flexibility of choice as to when during the year they would take their holidays. An overtime ban was imposed as a result of this and then there was a subsequent stoppage of work. But the holiday issue was undoubtedly the only issue that was involved in the trade dispute.

6. In order therefore to escape disqualification (because he undoubtedly lost his employment as the result of a stoppage due to the trade dispute) the claimant has to prove, on a balance of probabilities that he was "not directly interested in the dispute". The meaning of the words "direct interest" which have been in the legislation for many years has been the subject of many reported decisions some of which were cited to me at the hearing. The point has even been taken as far as the House of Lords in the case of Presho v. Adjudication Officer [1984] 2 W.L.R. 25, also reported as an Appendix to R(U) 1/84. The Presho case, as indeed many of the other cases, concerned a dispute as to wages and is not particularly helpful in a factual context in the present case where the dispute was not as to wages at all but as to holiday entitlements.

7. It was contended by Ms Maunders on behalf of the claimant

that he had no direct interest in the trade dispute though he did of course have some interest in the dispute, in that undoubtedly his holiday entitlement would be affected. However there is in the papers before the Commissioner a letter from the Regional Adjudication Manager of the Department of Employment dated 6 July 1988 to the employers asking questions to which the Employee Relations Manager of Vickers replied on 11 July 1988. I have tabulated the questions and answers in the quotation as follows:-

QUESTIONS

ANSWERS

5. Are apprentices: able to choose when to have their holidays now?

5. No: they are not permitted to be on holiday on any day they are due to attend college. They also have the same fixed annual holidays as do adults, currently Spring, Bank, Week, August Bank Holiday Monday (Hourly Paid only), and link between Christmas and New Year.

6. If, or when a fixed holiday is imposed, will apprentices have exactly the same fixed holiday?

6. Yes.

7. In the event that a fixed holiday includes any period during which apprentices etc would normally be required to attend college would they still be expected to attend college?

7. Yes to both questions."

If so, would extra days of holiday be allocated to them in compensation and when would those days be taken?

8. I should add at this point that, as well as a requirement for attendance at further education courses at the local College of Technology, the claimant was also required to take examination courses and examinations as is evinced by paragraph 11(viii) of the general written conditions of Vickers apprentices reading as follows,

"Associated further education to expand upon the largely practical skills learned at the workplace. Trainees will be enrolled on a suitable course of 'off the job' academic

studies usually at Barrow College of Further Education. (BTEC, City and Guilds etc). Courses selected will depend upon the vocational qualifications required for a particular Trade or Technical discipline and may be day or block release. Trainees will be expected to work towards successful completion of 2 full sessions of further education during their YTS entitlement. VSEL (Vickers) will pay College fees during the YTS course and trainees will be expected to conform to college rules and regulations particularly in respect of behaviour and attendance times."

9. Those conditions also make it clear that any apprentice who failed to keep up his college attendances or take the examinations runs the risk of dismissal. In relation to holidays, paragraph 5(iv)(B) of the Conditions of Apprentices reads as follows-

"Time off and holiday should be agreed, well in advance of the occasion, with your Section Instructor so that proper arrangements can be made. Holiday entitlement during your first year of service with VSEL will be calculated according to the length of time you have been with the company. You will not normally be eligible to take a substantial period of paid holiday until you have completed basic Skill Contra Training (i.e. late July, early August). You should also avoid taking holidays during periods of further education attendance particularly any involving course examinations."

10. I have to consider the case law as to "direct interest" in the light of those facts, which are not disputed. The social security appeal tribunal in its findings of fact dealt with this matter in paragraphs 3 and 5 of those findings. In paragraph 3 they speak of the fixing of holidays automatically including apprentices and say "during a period of fixed holidays the apprentices would have no opportunity of working and learning their skills". But in paragraph 5 the tribunal says "[the claimant] would be automatically affected by the outcome of the strike in that, as already set out in our findings at (3) above, his holidays would require to be fixed in common with the workforce, to enable him to acquire his necessary training in the works subject only to attendance at college and examinations. In other words, there was a direct association between the appellant and his trainers amongst the other employees of VSEL".

11. In my judgment those conclusions are erroneous. The fact that undoubtedly the claimant's holidays were always subject to variation by the overriding necessity of attendance at college and the taking of examinations meant that, although he would undoubtedly have an interest in the outcome of the dispute as to holidays by the rest of the workforce, it was not a "direct" interest because there was a contingency which intervened namely that he must attend colleges and examinations. Whether in fact the college and examination requirements would 'cut across' any fixed holidays that were substituted for flexible holidays is in my view beside the point. The fact is that in theory and possibly in practice they could do so and that was enough to

prevent the interest being direct. The contingency of attendance at Further Education College and examinations had intervened (compare the Presho case cited above and paragraph 8 of R(U) 13/71 approved in the Presho case.

12. That also in my view is consonant with the well known legal position of apprentices etc, i.e. that the relationship between them and their principal employer or 'master' is not solely that of employer and employee. There has always been a status relationship between them. Apprentices have a special role to fulfil. Their contract is partly a contract for employment but equally importantly a contract for education. It would be wrong in my view for them to be held to be directly effected by a trade dispute which covered a workforce whose contracts were merely employment contracts, unless it was clear that they could not in the circumstances of any particular case discharge the onus of proof imposed by section 19 of the 1975 Act. But by the very nature of things, apprentices frequently will be able to discharge that onus, as the claimant has in this case.

13. My having found in favour of the claimant on this ground means that I do not have to deal with the further contention which Ms Maunders addressed me that the claimant could take advantage of the provision of section 19(1)(a) which provides that, if it can be shown that the claimant's "place of employment" was a "separate branch of work" and the trade dispute did not apply to that "branch of work", then he would ipso facto escape disqualification. There was some evidence led to me on this point but it seems to me to be a point involving some considerable difficulties, particularly in regard to the reference in section 19 of the 1975 Act subsection (2)(a) to "separate businesses". In the circumstances I consider it better if I say no more about this. I merely record that there was some evidence on the point but leave the point to be decided in a case where it inescapably occurs, which it does not in this case.

14. Lastly, I should say that I have therefore by my decision effect lifted the trade dispute disqualification in regard to the claimant's claim for Income Support dated 12 July 1988. The local adjudication officer will now therefore need to look at that claim for Income Support and any subsequent claim, presumably up to the date that the stoppage of work ceased on 30 August 1988 and determine the claimant's entitlement to Income Support on the financial side of the case. But the claimant is not to be affected by the special rule relating to a trade dispute disqualification.

(Signed) M J Goodman
Commissioner

(Date) 13 August 1990