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Commissioner's File: CU/193/87 

SOCIAL SECURITY ACTS 1975 - 1978

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

DECISION OF SOCIAL SECURITY COMMISSIONER

ORAL HEARING

1. Our decision is that the decision of the social security appeal tribunal dated 5 August 1987 is as to the period down to and including 15 January 1987 made without jurisdiction and so as to the remainder of the period with which it deals erroneous in law. We set that decision aside. The decision which we give in its place is 1) that the decision of the adjudication officer disqualifying the claimant for receiving unemployment benefit for a period of 7 weeks from 23 December 1986 was given without jurisdiction as to the period down to and including 15 January 1987 and is set aside; and 2) that the claimant is not entitled to unemployment benefit from 16 January 1987 to 26 January 1987 (both dates included) because she was not on these days available to be employed in employed earner's employment.

2. This is an appeal by the claimant with leave granted by the Chief Commissioner on a question of law against the decision of a social security appeal tribunal given on 5 August 1987. The tribunal refused the claimant's appeal against a disqualification for receiving unemployment benefit in the period from 23 December 1986 to 9 February 1987 imposed by an adjudication officer by a decision dated 9 March 1987 upon the ground that the claimant had voluntarily left her employment without just cause within the meaning of section 20(1) of the Social Security Act 1975. The further question of the claimant's availability for employment within the meaning of section 17(1)(a)(i) of the Social Security Act 1975, referred to the tribunal by the adjudication officer, did not, upon that view, arise.

3. The claimant is the wife of a serving member of the Armed Forces and was in employment while her husband was stationed in this country. Her claim for unemployment benefit arose because she had to give up her employment in order to be able to accompany her husband on an overseas posting. This claimant's appeal and the appeals of 2 other service wives whose claims for unemployment benefit were disallowed in similar circumstances were directed by the Chief Commissioner to be heard before a Tribunal of Commissioners. The other appeals are the cases on Commissioner's file CU/178/87 and CU/200/87. The appeals were heard before us on 20 and 21 September 1988 and, after adjournment, again on

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18 and 19 May 1989. The claimants in all 3 appeals were represented by Mr Martin Rodger of the Free Representation Unit. The adjudication officer was represented by Mr Guy Sankey. The present appeal, only, was then the subject of a further hearing on 9 August 1989. Further submissions and documents were lodged. On this occasion the claimant was represented by Mr Andrew Post of the Free Representation Unit and the adjudication officer by Miss K Lee of the Office of the Solicitor to the Departments of Health and Social Security. We are indebted to all concerned for their detailed and helpful submissions.

4. In 1986 the claimant was living in Northern Ireland with her husband who is a corporal in the Royal Anglian Regiment. She was employed as a telephonist by the Northern Ireland Police Authority. After the claimant's husband received warning of a posting to Gibraltar the claimant on 1 November 1986 gave notice to her employer to terminate her employment on 22 December 1986. Her husband had initially been warned to be prepared to move "within a few days of New Year 1987". Approximately 5 weeks later the date for leaving Northern Ireland was confirmed as 14 January 1987. The claimant worked up to and including 22 December 1986. She claimed unemployment benefit in Northern Ireland from 22 December 1986. She left Northern Ireland on 14 January 1987 and travelled via Liverpool to Norwich, arriving on 15 January 1987. She claimed unemployment benefit in Norwich on 19 January 1987 from 16 January 1987. She thereafter left Great Britain on 27 January 1987 and travelled with her husband to Gibraltar. Her claim to benefit was not adjudicated upon in Northern Ireland but an adjudication officer in Norwich disqualified her for receiving unemployment benefit from 23 December 1986 to 9 March 1987 as above mentioned and the claimant appealed to a social security appeal tribunal. Unemployment benefit was disallowed in Great Britain as above mentioned and as a consequence it was disallowed also in Gibraltar.

5. The foregoing facts were not in dispute before us at the conclusion of the adjourned hearing on 19 May 1989. However it appeared to us on a consideration of the present appeal that certain issues arose affecting the jurisdiction of the adjudication officer, the tribunal and ourselves which required to be further examined. In our consideration of these matters at a further hearing on 9 August 1989 we were much assisted by the willingness of the parties' representatives to agree upon the proper inferences of fact to be drawn from various departmental forms and documents examined before us. This has led us to the following conclusions in this case:-

- (1) That the period of the claimant's claim for unemployment benefit in Northern Ireland ("the Londonderry claim") extended from 22 December 1986 to 13 January 1987 and did not include 14 and 15 January 1987 on both of which days the claimant was in the process of travelling from Londonderry to Norwich;
- (2) The Londonderry claim was not adjudicated upon in Northern Ireland but was transmitted to Norwich on or about 21 January 1987;
- (3) On or about the same date the claimant was in Norwich made a payment of unemployment benefit of £87.00 representing benefit for 17 days from 25 December 1986 to 13 January 1987 inclusive;

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- (4) That payment was made before it was appreciated that any question arose of the claimant's possible disqualification for receiving unemployment benefit on the ground of having left her employment voluntarily without just cause;
- (5) On the balance of probability that payment proceeded on the basis of an adjudication officer's decision made in Norwich on or about the same date awarding benefit for the period from 25 December 1986 to 13 January 1987 inclusive;
- (6) The decision of the adjudication officer dated 9 March 1987 was made in ignorance of the prior decision awarding benefit for that period;

It was agreed before us that the claim made by the claimant at Norwich ("the Norwich claim") was for the period from 16 January 1987 to 26 January 1987 and did not include 14 or 15 January 1987.

6. It is well settled that a claim disposed of by a decision is res judicata (in the absence of review or appeal) and the same claim cannot thereafter be the subject of a further conflicting decision. See R(I)9/63, the decision of a Tribunal of Commissioners. The decision of the adjudication officer in the present case dated 9 March 1987 so far as given on the Londonderry claim was given without jurisdiction in respect that there was a prior subsisting adjudication officer's decision awarding benefit on that claim and the second did not purport to review the first. To that extent therefore the adjudication officer's decision on 9 March 1987 falls to be set aside. It follows also that neither the social security appeal tribunal had nor we ourselves have jurisdiction to adjudicate upon the Londonderry claim.

7. In view of the above conclusions the issues which might otherwise have arisen in this appeal as to adjudication in Great Britain upon the Londonderry claim do not now arise. In dealing with the issues which remain regarding the claimant's having left her employment voluntarily and regarding her availability for employment in relation to the Norwich claim we are satisfied that circumstances arising in Northern Ireland relevant to those issues can competently be taken into account in the adjudication of the Norwich claim having regard to the provisions of the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 (S.I. 1976 No. 1003) referred to in paragraph 9 below.

8. Section 20(1) of the Social Security Act 1975, as in force at the material time, contained the following provisions:-

"20. - (1) A person shall be disqualified for receiving unemployment benefit for such period not exceeding 13 weeks as may be determined ... if -

(a) he has lost his employment as an employed earner through his misconduct, or has voluntarily left such employment without just cause; ..."

Unemployment benefit is payable under section 14 of the Social Security Act 1975 in respect of "any day of unemployment which forms part of a period of interruption of employment". Section 17(1)(a)(i) of the Social Security Act 1975 contains the following provisions:-

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"17. - (1) For the purposes of any provisions of this Act relating to unemployment benefit, ... -

(a) subject to the provisions of this Act, a day shall not be treated in relation to any person -

(i) as a day of unemployment unless on that day he is capable of work and he is, or is deemed in accordance with regulations to be, available to be employed in employed earner's employment; .."

No question of deemed availability arises in this case.

9. It will be noted that both in section 20(1)(a) and section 17(1)(a)(i) quoted above the employment which is relevant for consideration is employment as an employed earner. Section 2(1) of the Social Security Act 1975 provides:-

"2. - (1) In this Act -

(a) "employed earner" means a person who is gainfully employed in Great Britain ..."

However the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 provides in regulation 2:-

"2. - (1) The provisions contained in the Memorandum of Reciprocal Arrangements set out in Schedule 1 to these regulations shall have effect so far as the same relate to Great Britain, and the Social Security Act 1975 ... shall have effect subject to such modifications as may be required .. for the purpose of giving effect to the said provisions."

Paragraph 2(1) of Schedule 1 to those regulations contains the following material provisions:-

"2. - (1) For the purposes of all or any of the provisions of the systems of social security established by the Acts -

(a) acts, omissions and events and in particular ... employment ...

having effect for all or any of those purposes in one territory shall have corresponding effect for all or any of those purposes in the other territory."

"Territory" is defined in paragraph 1(1) to mean Great Britain or Northern Ireland as the case may require.

In adjudicating upon the Norwich claim in the circumstances of this case of course "acts, omissions and events and in particular .. employment" in Northern Ireland are relevant.

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10. The social security appeal tribunal in Norwich heard the claimant's appeal in her absence on 4 August 1987 and by a unanimous decision dated 5 August 1987 they upheld the adjudication officer's decision. The tribunal made the following findings in fact:-

"[The claimant] was employed as a telephonist in N.Ireland. She resigned her job on 22nd December 1986. She has admitted that the purpose of terminating her employment on that date was to ensure that she remained unemployed for a period of more than 4 weeks before leaving U.K., in order to qualify for UB in Gibraltar. She left her employment voluntarily without just cause.

The tribunal's reasons were stated as follows:-

"The tribunal took the view that if [the claimant's] main concern had been to minimise her period of unemployment, she could have continued in employment until at least a very few days before she had to leave N.Ireland, evidently on 14 January. The tribunal observes that the period of disqualification was set by the Adjudication Officer at half the normal and endorses this period as reasonable in the circumstances."

11. In our judgment the decision of the tribunal so far as dealing with the adjudication officer's decision on the Norwich claim is erroneous in law. There are no findings regarding the primary reason for the claimant's termination of her employment. There are no findings as to the approximate date of departure which was originally notified, nor when that date was altered, nor to what later date. No views are expressed on the reasonableness or otherwise of the period allowed by the claimant to prepare for removal, nor on the effect of the subsequent fixing of a later date of departure. No evidence is referred to to justify the tribunal's view that the claimant could have continued in her employment to a later date after having given notice to terminate her employment on 22 December 1986. There is of course no mention of the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 to which the tribunal were not referred. Even if we had been able to hold that the tribunal had reached a valid decision on liability to disqualification we should be obliged to hold that the tribunal failed properly to exercise their discretion regarding the length of the period of disqualification. The period imposed by the adjudication officer and endorsed by the tribunal was not half of the normal as suggested but half of the maximum then sanctioned by section 20(1) quoted above. For these reasons the decision of the tribunal on the Norwich claim must be set aside as erroneous in law. We consider it appropriate in the circumstances for us to give the decision which the tribunal should have given in that regard. For that purpose we adopt as findings in fact the narrative contained in paragraph 4 above and our factual conclusions in paragraph 5 above to which we add below certain further findings.

12. We deal first with the questions arising under section 20(1)(a)(i). It was common ground that the claimant had left her employment voluntarily in this case. Furthermore there was no dispute between the parties that as to "just cause" regard has to be had to the interests of

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the general body of persons underwriting the National Insurance Fund as well as to the rights of the individual contributor - Crewe v Anderson [1982] 1WLR 1209, (Court of Appeal). It was submitted by Mr Sankey that on the above principle the wife of a member of the Armed Forces who voluntarily left her employment in order to accompany her husband on a foreign posting might establish "just cause" within the meaning of section 20 provided that she left her employment no earlier than was reasonably necessary in order to arrange her own and the family's affairs prior to departure. We agree. In our judgment (and we so find) the date at which the claimant's notice of termination of employment took effect conformed with that proposition having regard to the approximate date of departure originally notified. There is no specific evidence either way regarding the possibility of the claimant having continued in her employment beyond that date once the later definite departure date was intimated and in particular as to whether the Police Authority would have agreed. In the circumstances we do not think it would be right to regard the notification of a later departure date, at the stage at which that occurred and with the Christmas and New Year period involved, as a factor rendering the claimant's termination date unreasonably early. We therefore accept that the claimant had just cause within the above principle for leaving work when she did and that she is not subject to disqualification under section 20(1)(a)(i).

13. We come now to the question of the claimant's availability for employment in employed earner's employment for the purposes of section 17(1)(a)(i), quoted above. Availability is a question of fact. It in general requires that claimants are "prepared to accept at once any offers of suitable employment brought to their notice". See reported decision R(U)1/53, paragraph 7. We would have difficulty in accepting that someone in the claimant's position having only a period of a few days before leaving the country could establish compliance with this condition. But in any event there is the additional difficulty that, in common with the other appellants, the claimant wished to establish entitlement to unemployment benefit in Great Britain in order to be able to "export" the right to that benefit abroad, in this case to Gibraltar. That was a perfectly reasonable aim but one which would have been liable to be defeated by the acceptance of temporary employment prior to departure from this country and this claimant understood, correctly, that there was a general requirement of an accrued entitlement of at least 4 weeks in this connection, although this was subject to modification.

14. We are forced to the conclusion that the claimant cannot be regarded as having been available for employment within the meaning of section 17(1)(a)(i) of the Social Security Act 1975 in the period from 16 January 1987 to 26 January 1987.

15. As mentioned above it was the claimant's intention and hope to export entitlement to unemployment benefit to Gibraltar. This possibility arose under the provisions of Article 69 of Regulation (EEC) 1408/71. So far as material for present purposes Article 69 provides:-

"1. An employed or self-employed person who is wholly unemployed

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and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

- (a) before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent State for at least four weeks after becoming unemployed. However, the competent services or institutions may authorize his departure before such time has expired;
- (b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organized therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;
- (c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged."

16. Provisions for the implementation of Article 69 are contained in Article 83 of Regulation (EEC) 574/72. That Article, so far as material, provides as follows:-

"1. In order to retain the right to benefits, an unemployed person covered by Article 69(1) of the Regulation shall submit to the institution of the place to which he has gone a certified statement in which the competent institution shall certify that he is still entitled to benefits under the conditions laid down in paragraph 1(b) of the said Article. The competent institution shall specify in particular in this certified statement:

- (a) the amount of benefit to be paid to the unemployed person under the legislation of the competent State;
- (b) the date on which the unemployed person ceased to be available to the employment services of the competent State;
- (c) the time limit under Article 69 (1) (b) of the Regulation for registration as a person seeking work in the Member State to which the unemployed person has gone;

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(d) the maximum period, in accordance with Article 69 (1) (c) of the Regulation, during which the right to benefit may be retained;

(e) facts which might alter entitlement to benefit.

2. An unemployed person who intends to go to another Member State in order to seek employment there shall, before his departure, apply for the certified statement referred to in paragraph 1. If the unemployed person does not submit the said certified statement, the institution of the place to which he has gone shall obtain it from the competent institution. The employment services of the competent State must ensure that the unemployed person has been informed of his obligations under Article 69 of the Regulation and under this Article.

3. The institution of the place to which the unemployed person has gone shall notify the competent institution of the date on which the unemployed person registered and the date on which payment of benefits was commenced and shall pay out the benefits of the competent State in accordance with the procedure provided for by the legislation of the Member State to which the unemployed person has gone. ..."

17. It was submitted by Mr Rodger on behalf of the claimant that the issues under appeal to the social security appeal tribunal and before us extended to the consideration of the claimant's entitlement to unemployment benefit in Gibraltar. (Reference may be made to the Family Allowances, National Insurance and Industrial Injuries (Gibraltar) Order 1984 (S.I. 1974 No. 5557)). He made detailed submissions on the proper construction of the requirements for the retention of the right to benefit under Articles 69 and 83. These submissions raise a serious preliminary question of jurisdiction. The sole decision of an adjudication officer under appeal to the social security appeal tribunal in this case was the decision dated 9 March 1987 by the adjudication officer upon the claims made prior to the claimant's departure from the United Kingdom in respect of the period from 22 December 1986 to 26 January 1987. The only further question referred to the tribunal by the adjudication officer was the question of the claimant's availability for employment while in the United Kingdom. The claimant's evidence is to the effect that she "signed on" in Gibraltar after her arrival. Although the relevant forms have not been produced we think it very probable that she also claimed benefit on these occasions. Even assuming that she did, however, there is no evidence that such claims were accepted by the Secretary of State for transmission to an adjudication officer. There is no adjudication officer's decision upon any such claim and no reference of any such claim or claims was made to the tribunal under section 99 of the Social Security Act 1975.

18. Such claims could therefore not be competently considered by the tribunal except possibly under the provisions of section 102(1) of the Social Security Act 1975. Section 102 as in force at the material time and now provides as follows:-

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"102. - (1) Where a question under this Act first arises in the course of an appeal to a social security appeal tribunal or a Commissioner, the tribunal or Commissioner may, if they think fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer."

(2) Subsection (1) above does not apply to any question which under or by virtue of this Act falls to be determined otherwise than by an adjudication officer."

The adjudication provisions of the Social Security Act 1975 make a distinction between a "claim for benefit" and a "question arising in connection with a claim for or an award of benefit." See sections 98 to 100 of the Act. In these circumstances we entertain very considerable doubts whether the discretionary power under section 102(1) quoted above extends to the consideration of claims for benefit, and that notwithstanding reported decision R(I)4/75 which was cited to us. In any event however no reference was made to Article 69 in the claimant's appeal or in the submission of the adjudication officer to the tribunal and there is no reference to Article 69 or indeed to the provisions of section 102(1) of the 1975 Act in the tribunal decision. It is clear that the tribunal did not exercise any discretion (if they had one) to consider any further claim for benefit under section 102(1).

19. We find it unnecessary to decide whether in these circumstances it is competent for us to entertain any further claims under section 102(1), as we do not think it appropriate to exercise any jurisdiction under that section in any event. As Article 83 above makes clear, there is a special procedure applicable to the retention of rights to benefit when an unemployed person goes to another Member State, and even if we considered it appropriate to intervene we do not have sufficient evidence to enable us to do so. Mr Post on behalf of the claimant urged us to take a different view in the present case because this claimant, unlike the other appellants, fell to be regarded as holding a decision establishing her entitlement to unemployment benefit on the Londonderry claim for at least the first part of her period of unemployment prior to going abroad. We are however unable in the circumstances of this case to regard that factor as sufficient to justify us in acceding to Mr Post's request.

20. As the main purpose of the claims under appeal was to pave the way for the receipt of benefit in Gibraltar under Article 69 and as other cases raising questions under Article 69 have arisen and will no doubt continue to arise in future we record that it was submitted to us by Mr Sankey on the instructions of the Chief Adjudication Officer that the statutory adjudicating authorities (the adjudication officer, the social security appeal tribunal and the Commissioner) have jurisdiction, in a case properly before them, to determine issues of fact arising on Article 69 and that notwithstanding the provisions for the certification of various matters by the competent institution (in this case the Department of Social Security) contained in Article 83. The exceptions from that jurisdiction were, he submitted, confined to matters where a discretion or a duty had been conferred upon the competent institution,

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as in the shortening or extension of periods laid down in Article 69 (1) and in the issuing or withholding of a certified statement in accordance with Article 83.

21. In view of that submission it may be of some value for us at least to indicate that we have in general terms great difficulty in seeing how a claimant who goes abroad for the purposes of accompanying a husband (or wife) posted abroad can bring herself or himself within the description of a person going abroad "in order to seek employment" as provided in Article 69.1. Similarly we have great difficulty also in seeing how, in general, claimants in the position of service wives who have left their employment in the United Kingdom because of such a posting can satisfy the qualifying conditions of availability under Article 69.

22. The members of this Tribunal all have considerable sympathy with the position of the claimant in this appeal and those in the accompanying appeals. It seems manifestly unsatisfactory that such persons, all of whom were in employment in this country and all of whom were obliged to give up work in order to accompany their husbands abroad when they were posted abroad in the service of the Crown should find it virtually impossible to qualify for a benefit which would otherwise be their entitlement in a period of temporary unemployment. We must however apply the law as it stands. Accordingly although technically successful, in substance this appeal fails.

(signed) Leonard Bromley
Chief Commissioner

(signed) V G H Hallett
Commissioner

(signed) J G Mitchell
Commissioner

Date: 31 August 1989