

COMMISSIONER'S DECISION
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SOCIAL SECURITY ACTS 1975 TO 1985
CLAIM FOR UNEMPLOYMENT BENEFIT
DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow this appeal. My decision is that unemployment benefit is payable to the claimant from 25 October 1984 to 27 October 1984 and that the forward disallowance imposed in respect of Thursdays, Fridays and Saturdays for the period from 29 October 1984 to 19 November 1984 both dates inclusive is not confirmed.
2. On 25 October 1984 the claimant claimed unemployment benefit for the days that he did not work (pages 9 and 10 of the file). By a decision dated 20 November 1984 the adjudication officer disallowed his claim under regulation 7(1)(e) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, because the claimant regularly worked for the same number of days in a week, in his case 3, for the same employer or group of employers and he was employed to the full extent normal in his case: see Form AT2 Box 1. The claimant appealed and on 20 June 1985 the appeal tribunal upheld the adjudication officer. The claimant now appeals to the Commissioner with leave of the chairman of the tribunal.
3. I held an oral hearing on 30 July 1985. The claimant was not present but he was represented by Mr Hannam, a welfare rights officer, and the adjudication officer was represented by Mr Chivers. I am grateful to them both for their submissions.

4. The Facts

The claimant was born in 1963. He is partially sighted and has been registered as disabled until June 1994 (page C26 of the file). From the papers in the file, he was in employment from June 1982 (page C15 of the file) until August 1983 (page C1 of the file). Whether or not he began employment before June 1982 I do not know, but at the hearing before me it was not disputed that he had been in full-time employment as a labourer until August 1983. From August 1983 until June 1984 he was unemployed and received unemployment benefit. During that period, namely from September 1983 until (according to the claimant's evidence before the appeal tribunal: Form AT3, Box 1) June 1984 he worked on a milk round but his earnings in that employment did not affect his unemployment benefit. In June 1984 he began work with R. G. for 2½ days a week, namely Monday, Tuesday and half Wednesday, under the Community Programme sponsored by the Manpower Services Commission. He worked as a general operative field worker, whatever that may mean. The employment was for a maximum of 52 weeks: see the particulars of employment

(page C27 of the file). In January 1985 the employment with R. G. ended but the claimant was transferred under the Community Programme to A. District Council for whom he worked for three days a week until about May 1985 and then for four days a week until June 1985, which was the date of completion of the 52 weeks under the Community Programme. In June 1985 he commenced full-time employment with R. by whom he is still employed.

In the Community Programme brochure it is stated:-

"What if I get a permanent job while I am on a project?

Being on the Community Programme should improve your chances of finding permanent work. So if you are offered a permanent job then of course you are free to move to it straightaway. That way, we can help someone else. Ask your employer about time off to go to interviews.

What happens when the project ends?

Being on the Community Programme will have made your chances of getting another job a bit easier."

5. The Law

Section 14(1)(a) of the Social Security Act 1975 provides that a person who satisfies certain specified conditions is entitled to unemployment benefit in respect of "any day of unemployment which forms part of a period of interruption of employment". Section 17 provides for the making of regulations dealing with the days which are or are not to be treated as "a day of unemployment". Regulation 7 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 deals with the days which are not to be treated as days of unemployment and regulation 7(1)(e) provides:-

"Subject to paragraph (2), a day shall not be treated as a day of unemployment if on that day a person does no work and is a person who does not ordinarily work on everyday in a week... but who is, in the week in which the said day occurs, employed to the full extent normal in his case, and in the application of this sub-paragraph to any person no account shall be taken, in determining either the number of days in a week on which he ordinarily works or the full extent of employment in a week which is normal in his case, of any period of short-time working due to adverse industrial conditions."

And regulation 7(2) provides that paragraph (1)(e) shall not apply to a person unless:-

- "(a) there is a recognised or customary working week in connection with the employment; or
- (b) he regularly works for the same number of days in a week for the same employer or group of employers."

6. The first question to determine, as Mr Chivers submitted, is whether or not the claimant is excluded from the provisions of regulation 7(1)(e) by virtue of regulation 7(2). It was not disputed that the relevant week was the week beginning 21 October 1984 when the claimant was working for R. G. Under his contract of employment there was a recognised working week in connection with the employment (for the purpose of regulation 7(2)(a)) and he regularly worked for the same number of days in a week namely 2½ days for the same employer (for the purpose of regulation 7(2)(b)). There can be no doubt, therefore, that the claimant was not excluded from regulation 7(1)(e) by virtue of regulation 7(2).

7. The second question, therefore, is whether or not, for the purposes of regulation 7(1)(e)

he was "employed to the full extent normal in his case" during the relevant week, namely the week beginning 21 October 1984. During that week he was, as I have said, working for R. G. under the Community Programme. The case raises therefore, the vexed question of the effect of employment under the Community Programme. As the Commissioner said in Decision on Commissioner's file CU/263/1983 at paragraph 24:-

"If the matter were ... untrammelled by authority, it would be strongly arguable that regulation 7(1)(e) did not affect the claimant. On the facts, he regularly worked on Wednesdays, Thursdays and Fridays for the same employer. Accordingly under regulation 7(2), regulation 7(1)(e) must be considered. But in answering the question whether, "in the week in which the said day occurs", the claimant was "employed to the full extent normal in his case", my conclusion would have been that part-time employment under the Community Programme on express terms that that employment is to be temporary and that it cannot last for more than 52 weeks in any event (the usual terms of employment under the Community Programme) could not determine what was normal for him. By its very nature, and express terms, it is temporary... The regulation is designed to cope with persons who do have a normal pattern of work, not with those who have none. It can have no application to a person for whom normality is unemployment."

I entirely agree with those observations. However, the Commissioner went on to say in paragraph 25 that "the above approach is simply not open to a Commissioner" since there was no suggestion in Decision on Commissioner's file CU/255/1984, or I would add, in the decision of the Court of Appeal in Riley v The Adjudication Officer (25 July 1985), a transcript of which is in the file now before me and which is to be reported as appendix to R(U)2/86, that the regulation is inapplicable to the long term unemployed who obtain employment on a Community Programme. It is, to say the least, surprising that no new regulation has been introduced to deal with the new situation created by the Community Programme.

8. In Riley v The Adjudication Officer, (which was an appeal against the decision on Commissioner's file CU/241/1983), the Court of Appeal laid down the principles on which this problem was to be approached.

(1) The question, as stated by Slade L.J. (at page 13 of the transcript), is:-

"Was the claimant's pattern of work in the relevant week the normal pattern for him at that time? This question has to be answered objectively according to the facts as they are, not as the claimant would wish them to be: (compare paragraph 3 of decision of R(U)36/51)."

(2) In answering that question, one must first look into the future. Slade L.J. said (at page 14 of the transcript):-

"Answering the essential question posed by regulation 7(1)(e), in my judgment, requires that the officer or tribunal concerned should try to look into the future in order to decide how permanent or transitory the present pattern of work is likely to be. If, as in decision CU/255/1984, there is some fairly clear evidence about what is likely in the future, this may well be conclusive."

(3) One must also look into the past. Slade L.J. stated (at page 14 of the transcript):-

"Evidence of past regular full-time work will, I think, never be wholly irrelevant. But if, as in decision CU/255/1984, full-time work is succeeded by a long period of unemployment, it may carry little weight. If, on the

other hand, there is evidence of full-time employment over several years finishing only a short time before the part-time employment started, this may be strong evidence that the part-time employment has not yet become the normal pattern of work for the particular employee and is properly to be regarded as "stop-gap" employment in his particular case."

In other words, as was submitted on behalf of the adjudication officer in that case (at page 12 of the transcript), regulation 7(1)(e)

"necessitates the ascertainment of the claimant's ordinary regime or pattern of work as at the relevant week and that his working history is only relevant in so far as it sheds light on what is normal for him in that relevant week, by facilitating the prediction of what may happen in his case in the near future. The 'stop-gap' test ... is of assistance only in so far as it may help to identify the ordinary working pattern as at the relevant week."

That submission was accepted by Slade L.J. as broadly correct.

9. In the present case, Mr Hannam submitted:-

- (i) that looking into the future the claimant obtained full-time employment;
- (ii) that looking into the past he worked full-time until ten months before he had begun employment under the Community Programme with R. G.; and
- (iii) that the Community Programme was of limited duration; that it was a bridge between unemployment and work; that it was a 'stop-gap' for young people; and that it entailed only part-time placements.

Mr Chivers, on the other hand, submitted, first, that regulation 7(2) must be looked at and, as I have already decided above, the claimant is not excluded from paragraph 7(1)(e) by virtue of regulation 7(2). Mr Chivers submitted, secondly, that when the adjudication officer decided the case under regulation 7(1)(e) on 20 November 1984, the decision of the Court of Appeal in Riley's case had not been given. In the light of that case he submitted:-

- (i) That the adjudication officer had to make a prediction as to the future. As to that, he submitted that there was no evidence that the part-time employment with R. G. was likely to lead to full-time employment and that the claimant had not been told when he started with R. G. that his employment would be likely to lead to full employment; that the claimant had been seeking full-time work since August 1983, and that although a man of 20 was more likely to get employment than a man in his fifties, the claimant had the misfortune of being partially sighted and that it was impossible for the adjudication officer to say what might happen in the future. He submitted that it was wrong to approach the adjudication officer's decision with hindsight.
- (ii) When looking back, although conceding that this was the claimant's strongest point, in fact the claimant's previous full-time employment had ended 14 months before the relevant week, that that was not a short time and that that full-time employment should be discounted. He submitted that any argument based on the fact that before he could qualify for the Community Programme, a claimant was required to have been unemployed for a period of 12 months, if the claimant was over 25, or, (as in the present case) for a period of 6 months if he was under 25, was not a relevant consideration: decision on Commissioner's file CU/263/1983 at paragraph 27(3) and decision on Commissioner's file CU/281/1984 at paragraph 16.

10. As I have indicated, Mr Chivers submitted that I must not approach the adjudication officer's decision with hindsight. As to that, I observe that in Decision R(S)10/83, where the insurance officer had disqualified the claimant for invalidity benefit from the date he had left for India because he had informed the DHSS that he did not intend to return to Great Britain, the Commissioner who, in the event decided that his absence from Great Britain was not temporary, stated in paragraph 9:-

"The hearing before me was, of course, a complete rehearing, and I consider that I am entitled to take into account all the events that have ensued since the date when the insurance officer first made his disallowance, and to apply the principle of hindsight (see paragraph 6 of the decision on Commissioner's file CS/40/1980)."

There have been several decisions relating to the Community Programme or its equivalent. Do they give any help or guidance? In Riley's case (at page 13 of the transcript) Slade L.J. said in relation to decision CU/255/1984:-

"But for the fact that the claimant in that case had taken up his new part-time employment in April 1983 on the basis that it was likely to lead to full-time employment with the same employers in the near future, I find it hard to see on the particular facts how he could properly have avoided the application of regulation 7(1)(e)."

Decision CU/255/1984, to which Slade L.J referred, was a decision of a Tribunal of Commissioners and the relevant facts are set out in paragraph 4 of that decision. In that case the claimant was aged 55 and had been unemployed from 8 November 1980 until 25 April 1983 when he began work with the Community Task Force and, on starting work with the Community Task Force, the claimant:-

"was informed by his superior there that the part-time employment was likely to lead to full-time employment with the Community Task Force, which in the event happened on 22 August 1983. That fact was not known to the insurance officer when he gave his decision of 13 July 1983, but it was known to the local tribunal when they gave their decision on 13 September 1983."

It is significant that the adjudication officer in that case did not know what the claimant had been told by his superior but that it was known to the local tribunal when they gave their decision. That fact, namely that the claimant was informed by his superior that the part-time employment was likely to lead to full-time employment with the Community Task Force which in fact happened, was considered to be crucial by the Commissioner in decision CU/263/1983 at paragraph 36; see also paragraph 38. In that decision, namely CU/263/1983, the claimant was just under 30 when he claimed unemployment benefit and the Commissioner decided that the claimant was not entitled to unemployment benefit.

In the decision on Commissioner's file CSU/51/1984 the claimant, who was aged 25, had become unemployed in August 1982 after four years of full-time employment and remained unemployed for ten months until June 1983 when he obtained full-time employment in a seasonal capacity until 19 August 1983; and on 17 October 1983 he began employment under the Community Programme. He continued to apply for full-time employment while working on the Community Programme and duly obtained such employment commencing 16 April 1984 with another department of the same local authority although the two employments were unconnected with each other (see paragraph 4 of that decision). In that case, the Commissioner stated at paragraph 8:-

"In looking to the future, it is only in the sense that it could be said in this case that the claimant's part-time employment was likely to, as it in fact did, lead to full-time employment... There is no doubt that the claimant took up this employment as a temporary expedient while looking for full-time employment."

The Commissioner, accordingly, decided that the claimant in that case was eligible for unemployment benefit.

I conclude, therefore, that evidence as to what in fact happened can be referred to as evidence as to what, at the relevant time, was likely to happen. I appreciate that the task of the adjudication officer in any particular case is not simple. He has to gaze into a crystal ball and predict what is likely to happen and his prediction may be shown to have been wrong by evidence as to what in fact happened in the future. But that conclusion is, in my judgment, to be derived from the authorities to which I have referred.

11. Turning now to the present case, the claimant stated in evidence before the appeal tribunal (Form AT3, Box 1): "Part-time in community programme was a stop-gap measure" and he produced the brochure about the Community Programme (to which I have referred in paragraph 4 above); and he stated that the Community Programme was "a bridge between unemployment and work of a more permanent nature". In their findings (Form AT3, Box 2) the appeal tribunal stated:-

"The history of the claimant's employment shows that for a period well exceeding a year he developed a new norm of work being less than full-time. In this respect the facts alone distinguish this case from the Tribunal of Commissioner's case urged before this tribunal. The claimant was employed to the full-extent normal in his case, during the period in issue."

The Tribunal of Commissioner's case was presumably CU/255/1984, referred to above.

In their reasons (Form AT3, Box 4) they stated:-

"Throughout the period from late 1983 to October 1984 continuing to June 1985 the claimant followed a pattern of part-time employment demonstrating the establishment of a new norm of working for him. The tribunal is not persuaded by the argument that the period of employment with the Community Programme should be disregarded as whatever the intentions of the Community Programme authorities the claimant was nonetheless engaged in part-time employment of a continuous nature."

I disagree. For the reasons given below, the claimant had not "developed a new norm of work".

12. On the facts in the present case:-

- (1) during the relevant week the claimant was working part-time under the Community Programme;
- (2) looking into the future, the Community Programme was intended as a bridge between unemployment and employment of a more permanent nature; and although there was no evidence that the claimant was told that his part-time employment under the Community Programme would lead to full-time employment, the brochure encouraged the claimant in the hope of finding a permanent job. The claimant was a young man of approximately 22 years who, although partially sighted, had in fact worked full-time until August 1983, since when he had looked for full-time employment, and during his period of unemployment had worked on a milk round from September 1983 until, it appears, June 1984 (see paragraph 4 above) thereby showing his desire or propensity to be employed. Be that as it may, he did in fact obtain full-time employment starting in June 1984 on completion of the Community Programme;
- (3) looking at the past, he had been in full-time employment until

August 1983. He was then unemployed for ten months between August 1983 and June 1984 during which time he had worked on the milk round. Then in June 1984 he obtained the part-time work under the Community Programme.

In my judgment, on the facts of this case, the claimant had not developed a new norm of work. The part-time work under the Community Programme was, as was submitted on his behalf, and as I find, a "stop-gap" between periods of full employment. Accordingly, my decision is as set out in paragraph 1 above.

(Signed) A T Hoolahan
Commissioner

Date: 31 October 1986

