

Commissioner's File: CU/364/1985

CAO File: AO 4547/UB/85

Region: South Western

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

[ORAL HEARING]

1. My decision is that unemployment benefit is payable to the claimant for the inclusive period from 4 February 1985 to 5 April 1985 because no payment received by the claimant from his former employer during that period, or referable to it, was a payment in lieu either of notice or of the remuneration the claimant would have received for that period had his employment not been terminated: Social Security Act 1975, section 17(2) and the Social Security (Unemployment, Sickness and Invalidity Benefit (Regulations) 1983, regulation 7(1)(d). The claimant's appeal against the decision of the social security appeal tribunal dated 8 July 1985 is therefore allowed.

2. This is an appeal to the Commissioner by the claimant's trade union, the General Municipal Boller-makers and Allied Trades Union and was the subject of an oral hearing before me on 21 August 1986. At that hearing the claimant (a man born on 28 June 1958) was present and was represented by Mr R O'Kelly of GMBATU. The adjudication officer was represented by Mr N Butt of the Solicitor's Office of the Department of Health and Social Security I am indebted to Mr O'Kelly and to Mr Butt for their assistance to me at the hearing. Evidence was given at the hearing by a Mr A T Farrell as to the different types of payments made by the claimant's former employers (British Shipbuilders) on redundancies in the early part of 1985.

3. At the end of 1984, the claimant's employers British Shipbuilders at Southampton were considering some 500 to 700 major redundancies in their workforce, in order to centralise the employer's major functions at one particular shipyard. The employers eventually decided to reduce the workforce by 790 employees. Consultations with the relevant trade unions began on 22 November 1984 and notification of impending redundancies was given to the Department of Employment on 7 December 1984. The claimant was one of a number of employees who completed a form described as a "redundancy counselling sheet" by the employers (number C34 in the appeal papers), which indicated to him the financial entitlements which he was likely to receive if he was made redundant. There was a part of the form which the employee could complete, and which the present claimant did complete on 23 January 1985, stating "I wish to be formally considered for redundancy". The claimant in fact then ceased employment with the employers, by reason of redundancy, on



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1 February 1985.

4. He then received payments from British Shipbuilders, being of three kinds,

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plan
- (i) a statutory redundancy payment under the provisions of section 81 et seq. of the Employment Protection (Consolidation) Act 1978
  - (ii) a 'top-up' redundancy payment under the British Shipbuilders scheme based (as is the statutory redundancy payment) on the age of the claimant and his years of service
  - (iii) a sum of £1,645.80 described in the "redundancy counselling sheet" as "pay in lieu"

5. That latter sum of £1,645.80 was calculated by multiplying the claimant's weekly wage by 13 and in one sense therefore could be described as 13 weeks' wages. The claimant having been employed by the employers for ten complete 'years' was entitled under section 49 of the Employment Protection (Consolidation Act) 1978 to ten weeks' notice. The maximum period of notice provided for under section 49 of the 1978 Act is 12 weeks for an employee with 12 years' service or more. The evidence in the documents was that the 13 weeks wages which the claimant was paid (amounting to £1645.80) was a sum which was paid uniformly to all employees who were made redundant at that time, whatever their length of service. In a letter dated 12 October 1984 from the Employee Relations Manager of the employers to the Department of Employment's local office, it was stated as follows,

"I have to advise you that there is no formal written agreement between [British Shipbuilders] and the Trade Unions on the matter of payments in lieu of notice to redundant employees. It has, however, been our general practice since we began major restructuring of the Shipbuilding Industry in 1979 to pay all redundant employees the equivalent of 13 weeks' wages on termination and not to require them to work notice. This payment is made regardless of the employees' statutory notice of entitlement. There were two main reasons why we decided to operate in this way. The first was that paying employees 13 weeks' (or 90 days') wages on termination enable us to release employees quickly without having to await the end of the 90-days period for consultation on redundancies [on this, see paragraph 11 of this decision below]; while the second was that the lump sum represented by the 13 weeks' wages was a considerable inducement to employees to volunteer for redundancy. As to the exact nature of the payments, we have always taken the view that the amounts by which they exceeded employees' statutory entitlements are ex gratia payments."

6. The local tribunal upheld the local adjudication officer's decision to disqualify the claimant from receipt of unemployment benefit for the inclusive period from 4 February 1985 to 5 April 1985. That period represented the balance of the ten weeks statutory notice period to which the claimant was entitled under section 49 of the 1978 Act, running from the date (25 January 1985) on which the employers stated (in Form UB85 dated 7 February 1985) that they had given the claimant notice of dismissal. The local tribunal made the following findings of fact,

"The terminal payment was computed as to redundancy payment and payments under British Shipbuilders Scheme. Thirteen weeks payment made separately; not included in other calculations. Claimant would not have gone on the scheme without this payment. Thirteen weeks payment regarded by British Shipbuilders as being in full and final settlement. No formal waiver of notice.

In dismissing the appeal, they gave as their reasons for decision,

As the payment was separate from the Redundancy payments and there was no agreed



waiver of notice we find that the payment to claimant of 13 weeks money included a sum in settlement of money in lieu of notice. R(U)1/80 - R(U)4/80. R(U)7/80 - Stratton."

7. I have naturally given very careful consideration to the findings of an experienced tribunal, who clearly took considerable trouble with this case, regarded as it was in some ways as being a 'test case' for other similar appeals. However, I have come to the conclusion that the payment, equivalent to 13 weeks' wages, of £1,645.80 to the claimant did not come within the provisions of regulation 7(1)(d) of the above cited Unemployment Sickness and Invalidity Benefit Regulations 1983, which provides as follows,

"7. (1) For the purposes of unemployment... benefit -

(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."

8. In reported Commissioner's decision R(U)2/80, at paragraph 15, the learned Commissioner accepted that there cannot be a rule of law that "...a payment to an employee made on his resignation by mutual consent, without notice given or received, must (i.e. must in law) be a payment in lieu of notice in terms of [regulation 7(1)(d)] in every case where the claimant forgoes a right to notice. Acceptance of that proposition would involve deciding that, as a matter of law, whenever a lump sum payment is made to an employee on his voluntary early retirement and the employee, when receiving such sum, expressly or impliedly admits that the sum received is in satisfaction of all rights to which he might otherwise be entitled, it must follow that, if the employee could not have been dismissed without notice, the payment is a payment in lieu of notice in terms of regulation 7(1)(d)... and that this is so however the amount of the payment was in fact calculated, and whatever its purpose. Wherever, therefore, there is a 'package deal' under which an employee retires early, by mutual consent, and takes a lump sum payment in consideration of such retirement, the employee must, under regulation 7(1)(d), be disallowed unemployment benefit for the length of the notice period applicable in the case of his dismissal, unless notice is actually given and worked out. I do not agree with this submission."

9. In that particular case, the Commissioner then went on to note that the payment made to the claimant in that case was calculated on the two factors of age and salary only, whereas the payment in the present case of course was calculated by reference to a number of weeks wages. However, the same payment was made to all employees of British Shipbuilders then being made redundant, whatever their length of notice entitlement under section 49 of the Employment Protection (Consolidation) Act 1978. In my judgment there was no nexus between the payment, which happened to be calculated as 13 weeks wages, and any entitlement to notice that the claimant might have under section 49 of the 1978 Act. I consider that the claimant was entitled to notice because the reality of the matter was that he was dismissed, not that he had voluntarily left his employment, as contended by Mr. O'Kelly. The claimant had volunteered for redundancy but that is not the same as voluntarily dismissing himself on a given date.

10. I note that in reported Commissioner's decision R(U)4/80, at paragraphs 5 and 6, the learned Commissioner stated,

"It is as a rule reasonable to infer that any 'package' settlement of all claims, reached



by agreement, will include a payment in lieu of notice. It was, I think, usual for the statutory authorities in such circumstances to draw that inference; and further to hold that the existence of such component element in a 'package' settlement was sufficient to attract the application of regulation 7(1)(d). But it is not in all cases an inevitable inference. A right to payment in lieu of notice may be waived. As I understand the observations of the Court of Appeal in Stratton [1978] 1 W.L.R 1041 it is proper to consider the true nature of the terminal payment, without necessarily splitting it into component parts, and to determine whether it represents compensation for the loss of future rights (e.g. to earn a wage, i.e. an income loss) or compensation for the loss of a capital asset, namely an established job (i.e. a means of earning remuneration)."

11. The Commissioner then went on to hold that the payment to employees on redundancy in that case was for loss of a capital asset, not an income loss, and was not therefore subject to regulation 7(1)(d). In the present case, which is a difficult one, I have come to the conclusion that the payment to the claimant of the equivalent of 13 weeks' wages was also payment for the capital loss of a job, despite the payment's being separate from the two true redundancy payments, the statutory payment and the payment under the British Shipbuilders Scheme. Even though British Shipbuilders themselves referred to the payment of 13 weeks' wages as being in lieu of notice, it clearly was not in lieu of notice. In my view it was not referable to any notice period but was a lump sum payment, the same in all cases including that of the claimant. Its predominant purpose was to secure an early release of the workforce and to facilitate administration (cf R(U)1/80, paragraph 4).
12. It was also urged on behalf of the adjudication officer that the payment to the claimant of 13 times a week's wages was 'caught' by the decision of a Tribunal of Commissioners, in R(U)3/83, that a payment to an employee which is referable to the possibility of a protective award made by an industrial tribunal under sections 99 et seq. of the Employment Protection Act 1975 could also come within the second limb of regulation 7(1)(d) of the 1983 Regulations as being a payment in lieu of "the remuneration which [the claimant] would have received... had his employment not been terminated". It is true that in the present case in the letter already cited (paragraph 4 above) British Shipbuilders referred to the similarity of the period of 13 weeks wages paid to the claimant (and all other employees) and the 90 days' period of consultation required by section 99 of the Employment Protection Act 1975 but in my view that was only in the context of the administrative convenience of ensuring freedom from any disruption etc on the making of the large scale redundancies. The payment of 13 weeks' wages to the claimant in the present case and to the other employees bore no relation to any unexpired portion of the 90 days' consultation period, as was the case in R(U)3/83 and also in R(U)7/80. I note that the agreement in R(U)3/83 described the relevant payment as "comprising of the balance of the 90 days consultative period unexpired at the date of your leaving (calculated in working days)". That was clearly referable to the 90 days consultative period but that was not the case in the present appeal. The consultation here had started on 22 November 1984 and the 90 days period therefore expired on or about 22 February 1985. But the payment made to the claimant bore no reference to a period expiring on or about 22 February 1985. It was simply a lump sum payment of 13 multiplied by his weekly wage. The use of the weekly wage in the calculation was simply to reflect the fact that what was being compensated for was loss of a capital asset and the greater the income earning power of that capital asset the greater the compensation for the loss of capital. In paragraph 15 of R(U)3/83, the Tribunal of Commissioners stated, "We agree that the days in respect of which the remuneration would have been earned must be precise and ascertainable". There was no precise and ascertainable period of days here clearly referable to the consultation period required by the Employment Protection Act 1975 and in my view R(U)3/83 has no application.
13. For all these reasons, the appeal of the claimant must be allowed in what in my view is a comparatively exceptional case, I should add that it is not material to ascertain, in view of the judgment I have made of the facts in this situation, whether or not there was an actual



waiver of the notice period or what was the precise effective date of termination (a point made by Mr Butt by reference to 12 April 1984 being given by the employers as the Redundancy Payments Act relevant date - in any event section 55(5) of the Employment Protection (Consolidation) Act 1978 may well explain that). My decision is based simply on the fact that the payment of 13 times the claimant's weekly wage to the claimant bore no relation to and was not connected with any of the claimant's rights (whatever they were) to notice or to the exact date of expiry of his contract of employment but was simply a lump sum compensation payable to all employees made redundant whatever their length of service and whatever their entitlement to notice.

(Signed) M.J. Goodman  
Commissioner  
Date: 23rd September 1986