JM/SH/5/MD

Commissioner's File: CU/444/1984
C A O File: AO 3527/UB/84
Region: North Western

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

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 27 June 1984 which confirmed a decision of the insurance officer (now the adjudication officer) dated 26 March 1984. My decision is as follows:

(1) Unemployment benefit is not payable for any of the days 26, 27, 28, 29 and 31 March 1984 because there was a recognised or customary working week in connection with the claimant's employment and he was employed to the full extent normal in his case in the week in which these dates fell.

(2) In so far as any claim for unemployment benefit has been made in respect of any Monday, Tuesday, Wednesday, Thursday or Saturday falling in the period between 2 April 1984 and 27 January 1986 (both dates included) such claim or claims is or are disallowed upon the like ground as set out in sub-paragraph (1) above.

(3) If any claim for unemployment benefit has been or shall be made in respect of any Monday, Tuesday, Wednesday, Thursday or Saturday falling in the period 28 January 1986 to 26 January 1987 (both dates included) and on that day the grounds of this decision have not ceased to exist, this decision shall be treated as a disallowance of such claim.

2. I held an oral hearing of the appeal. The claimant attended and was most ably represented by Mr J Fletcher, a Tribunal Unit Co-ordinator of the National Association of Citizens Advice Bureaux. I am indebted, too, to the assistance afforded by the adjudication officer's representative.

3. The case involves what is commonly known as "the full extent normal rule". That rule has its origins in pre-war decisions of the Umpire. In those days it was purely judge-made law - with all the flexibility inherent in such law. The underlying rationale of those decisions is sound enough. Since 1948 the principle has been enshrined in statutory

regulations (originally regulation 6(1)(e)(ii) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948). That, of course, has inhibited the adjudicating authorities from their erstwhile flexible and common-sense approach to individual cases. The practical consequences have often been unfortunate. In this case they are little less than absurd. In spite of considerable reflection, however, I can see no way in which I can properly circumvent the words of the legislation and thereby obviate a proposterous result. Whether anything will ever be done about it by the legislature, I do not know. In this corner of the law - as with that relating to seasonal workers - there appears to be an extraordinary antipathy to remedying injustices which save Departmental money.

4. The claimant is now almost 63 years old. He has worked hard and regularly throughout the great majority of his adult life. But, through no wish of his own, he has fallen victim to the prolonged recession. By trade he is an engineering fitter with particular expertise in paper-making machinery. In July of 1979 he was made redundant. He remained unemployed until November of that year - when he obtained employment as a storekeeper. In March 1981 he was again made redundant. He was unemployed until May 1982 - when he obtained another job as a storekeeper. But in September 1983 he was, for the third time in just over four years, made redundant. He has not since then been able to find anything approaching full-time employment.

5. In or about 1971 the claimant started a side-line as a collector of football pools coupons. At, and for some years after, that time he did the collecting at his place of work - his "clients" being his workmates. In more recent years the "clients" have come to his home, there delivering to him their coupons and their stakes. Someone to whom the claimant referred as "a higher collector" then calls at the claimant's home and takes away the fruits of the claimant's collecting. That higher collector is an agent or servant of the relevant pools company. The claimant is not. I heard evidence relevant to his status. I need not rehearse it here. The adjudication officer's representative was not concerned to contest that the claimant is self-employed in his capacity as coupon collector.

6. The aforesaid work occupies about one hour a week, on Friday evenings. The claimant is entitled to a commission of 12½% on the stakes collected. That works out at about £3 a week - although, naturally enough, it falls off in the summer, when the punters (or, as the pools companies prefer to call them, "the investors") have to turn their attention to Australian football.

7. Ludicrous as it may seem, the effect of the legislation is that, by reason of that brief and derisively rewarded work, the claimant is disentitled from <u>any</u> unemployment benefit in respect of <u>any</u> day of the week.

8. Regulation 7 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 provides (so far as material to this case) as follows:

> "7. (1) For the purposes of unemployment..... benefit -
>
> .....
>
> (e) 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 every day in a week (exclusive of Sunday or the day substituted for it by regulation 4) 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;

.....

(2) Paragraph (1)(e) shall not apply to a person unless -

(a) there is a recognised or customary working week in connection with his employment; or

(b) he regularly works for the same number of days in a week for the same employer or group of employers."

9. So paragraph (2) of regulation 7 must be looked at first. Sub-paragraph (b) of that paragraph clearly cannot bite on this claimant. In his capacity of coupon collector he does not work for any employer or group of employers. But that is not relevant to the application of sub-paragraph (a). In that sub-paragraph "employment" falls to be construed as indicated in Schedule 20 to the Social Security Act 1975: "Includes any trade, business, profession, office or vocation." Although the appellation may, in the context of this case, seem somewhat high-flown, the claimant was carrying on a "business". And it is quite clear from the evidence which I have summarised that there was, in connection with that business, a "customary working week". So the claimant cannot successfully invoke the excepting provisions of regulation 7(2).

10. What, then, of paragraph (1)(e) of regulation 7? That question immediately imports the construction to be given to the words "ordinarily" and "normal". Whilst this appeal was pending before the Commissioner, the Court of Appeal has given detailed consideration to the full extent normal rule - Riley v Adjudication Officer, a copy of the transcript of which is in the papers. Much of the leading judgment (by Slade LJ) is devoted to the scope of the "stop-gap test", which has no place in this appeal. But on the more general issues of construction Slade LJ said this:

> "I can see no difference between the concepts of ordinariness and normality embodied in Regulation 7(1)(e). When it is reduced to its essentials, the question posed by that Regulation is, in my opinion: 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 R(U)36/51)." (At page 13 of the transcript.)

11. The stark simplicity of that dictum has, in practice, been amplified by certain rules-of-thumb which have been developed down the years. They are considered by Slade LJ under the names of the "one year before test", the "50% test" and the "stop-gap test" (see pages 5 to 7 of the transcript). As I have already indicated, the stop-gap test has no part to play in this appeal. As Slade LJ points out, the one year before test is succinctly stated in paragraph 11 of Decision CU/518/49(KL):

> "A claimant who has in fact worked only on some days of the week for a period of a year or more is 'a person who does not ordinarily work on every day in a week', unless there are some exceptional industrial circumstances relevant to his case."

Slade LJ then proceeded:

> "Another test (which is a more developed variant of the one year before test and which I will call 'the 50% test') was thus explained by the Commissioner in Decision R(U)14/59, when he said that where 'during the year ending with the day in question (or such other period as may provide a more suitable test in a particular case) a claimant has worked on less than 50 per cent of the days of the week in question (excluding any

day of incapacity for work or holiday and days on which he was unemployed because his employment had been terminated) that day should be held to be one on which in the normal course the claimant would not work. If the claimant has worked as much as 50 per cent of such days, it should (in my view) be held that it has not been proved that in the normal course he would not have worked on the day in question.' "

12. Although Slade LJ observes (at page 6 of the transcript) that it appears that the three tests have not been entirely consistently applied, there is nothing in his judgment to cast doubt on the validity of the tests themselves. The circumstances of individual cases may be of almost infinite variation - and the appropriateness of one test rather than another will vary accordingly. The local insurance officer applied the 50% test - and I cannot find that it was inappropriate to the facts of this case. The claimant had been engaging in his coupon collecting side-line for some 13 years - and there was no indication that he might, in the foreseeable future, cease so to do. In view of his advancing age and the employment situation in the part of the country in which he lived, his prospects (at the time when the insurance officer gave his decision) of obtaining further full-time employment must reasonably have appeared to be poor. In Riley Slade LJ said this:

> "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." (At page 14 of the transcript - the Lord Justice's emphasis.)

That exercise falls to be performed as at the date of adjudication by the insurance/adjudication officer. The appellate bodies must transport themselves back in time accordingly. What has actually happened since the date of adjudication can only be prayed in aid to the extent that it assists in determining what was reasonably foreseeable. Naked hindsight is inadmissible. But, with the best will in the world, I cannot find that - looking both backward and forward from the standpoint of 26 March 1984 (the date of the insurance officer's decision) - the pattern of the claimant's working week was other than "ordinary" or "normal" in his case.

13. Mr Fletcher invited me to apply the de minimis rule to the virtually negligible amount of work which the claimant did in each week. I should most gladly have done so had I thought that there was legitimate scope for such a course. I am afraid, however, that that road is impassably blocked. There seems to be no precedent directly in point. Those peripherally relevant are of little assistance.

14. Decision R(S)18/53 concerned sickness benefit. The claimant was a glass worker employed on a night shift. At the end of a period of incapacity for work he was certified fit for work. He resumed work at 11pm on a Saturday night. The question was whether that Saturday could be treated as a day of incapacity for work. In paragraph 5 the Commissioner said this:

> "He did in fact work from 11pm to midnight (and beyond), and I could only find that he did no work on Saturday if I were able to hold that one hour's work was so insignificant that for practical purposes it ought to be disregarded. I cannot, however, so decide. A normal shift runs to 8 hours, and I cannot hold that one eighth of a shift is so trifling an amount that it can be ignored. In Decision CS 37/53 (not reported) fifteen minutes after midnight were disregarded on this principle. In Decision CS 363/49 (reported) two hours were held to be too long to be disregarded. In my judgment one hour is not so trifling or insignificant a part of a day's work as to be negligible. It follows that the claimant was not incapable of work on the Saturday."

Mr Fletcher stressed that the one hour in that case was placed against an eight hour shift - and not against a whole week.

15. In decision R(S)2/61 (another case concerning sickness benefit), a farmer who normally ran his 50 acres dairy farm with the aid of one man had suffered injury to his left shoulder. In consequence, he was unable to carry out any of the more strenuous duties on his farm. He was, however, able to let in the cows, feed the poultry, drive a car, keep the accounts and do such little supervising work as was necessary. It was held that the work which he was able to do was not so trivial as to be negligible - and, in paragraph 8, certain earlier cases were considered. Their facts are, however, so far removed from the facts in the appeal now before me that I can derive no assistance therefrom.

16. In Decision R(U)15/59 the claimant, who normally worked on five days a week (Monday to Friday), was put on short time, working on four days a week only. That work was in a car factory. He took additional work with a butcher from 7 am to 12 noon on a Saturday. The Commissioner held that a claimant should be deemed to have been employed to the full extent normal in his case unless the extent of his employment in the week in question had fallen below the normal by at least one hour. On that basis the claimant had not been employed to his full normal extent. In paragraph 7 the Commissioner said:

> "It was submitted that the only satisfactory interpretation of the provision would be that a claimant should be held to have been employed to the full extent normal in his case unless he had lost at least half a day's employment. It was conceded that even on this basis the claimant's appeal would succeed but I cannot accept the suggested interpretation of the provision for it is impossible to hold that the expression 'to the full extent normal in his case' means 'to a lesser extent than is normal in his case if the deficiency does not amount to half a day'. I think however that it is right to assume that the framers of the regulation did not intend that claimants should escape from its provisions if the reduction in their employment had been negligible. I therefore hold that a claimant should be deemed to have been employed to the full extent normal in his case unless the extent of his employment in the week in question has fallen below the normal by at least one hour."

That, of course, is a different side of the coin. It does indicate, however, that one hour's employment is not so trivial as to be regarded as negligible.

17. I have referred to the foregoing decisions out of deference to Mr Fletcher's submissions. It seems to me, however, that the death stroke to his de minimis contention is to be found in regulation 7(1)(g) of the aforesaid Unemployment, Sickness and Invalidity Benefit Regulations:

> "(g) subject to regulations 9, 10, 11 and 12 [which have no bearing upon this case], a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless -
>
> (i) the earnings derived from that employment, in respect of that day, do not exceed £2.00, or, where the earnings are earned in respect of a longer period than a day, the earnings do not on the daily average exceed that amount....."

As I have indicated above, this claimant generally earned about £3.00 for the hour's work which he did on Friday evenings. That work - insignificant though it must appear to the ordinary man in the street - was sufficient to prevent Fridays from being treated as days of unemployment. Accordingly, I do not see how I can legitimately hold that - in the context of the full extent normal rule - it was so insignificant that I am entitled to ignore it altogether.

18. For the reasons set out above, I have no alternative but to disallow the claimant's appeal.

(Signed) J Mitchell
Commissioner

Date: 19th June 1986