SICKNESS BENEFIT

Deeming incapacity for work—Councillor's earnings

The claimant, an assistant divisional officer of the ambulance service, claimed sickness benefit from 23.1.84 having previously received statutory sick pay from his employer. Incapacity was diagnosed as nervous debility. Although incapable of following his normal occupation the claimant had performed the duties of a Local Authority Councillor. He provided details of prospective meetings together with evidence that he had been actively encouraged to take an interest in the affairs of the Local Authority for therapeutic reasons by his general practitioner. On 16.3.84 the adjudication officer disallowed the claim from 23.1.84 to 17.4.84 and referred the period 18.4.84 to 3.7.84 to the social security appeal tribunal for determination. The adjudication officer's decision was confirmed and the claimant appealed to the Commissioners.

Held that:

(a) because of the work he had done in attending council meetings he could not be regarded as incapable of work unless he could be deemed under regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 (paragraph 7);

(b) in the context or regulation 3(3) 'earnings' means amounts to which the claimant is entitled and is not limited to payments he actually receives (paragraph 8);

(c) for the purpose of regulation 3(3) 'ordinarily' is interpreted as 'in more than half of the weeks in which the claimant has worked' (paragraph 9);

(d) a reference period of a specific length is desirable to produce a reasonable assessment of what is ordinarily earned. The suggested period of 13 weeks is not an inflexible rule however (paragraph 9);

(e) for the purposes of the earnings test weeks in which no work has been done should be discounted (paragraph 9);

(f) as the claimant did not satisfy the earnings test the claim was disallowed except for 2 weeks when no work was performed.

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1. Our decision is:—

(a) that sickness benefit is not payable from 23 January 1984 to 21 April 1984 (both dates included) because the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement and the deeming of incapacity is not appropriate;

(b) that sickness benefit is not payable from 23 April 1984 to 19 May 1984, 28 May 1984 to 23 June 1984 and 2 July 1984 and 3 July 1984 (all dates included) because although the claimant was not incapable of work by reason of some specific disease or bodily or mental disablement the deeming of incapacity is not appropriate; and

(c) that sickness benefit is payable from 21 May 1984 to 26 May 1984 and 25 June 1984 to 30 June 1984 (all dates included) because the claimant was incapable of work by reason of some specific disease or bodily or mental disablement.

(Social Security Act 1975, sections 14 and 17. Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983 No 1598], regulation 3).

2. This is an appeal by the claimant with the leave of the Commissioner against the unanimous decision of the appeal tribunal (1) confirming the decision of the adjudication officer issued on 16 March 1984 disallowing sickness benefit for the period 23 January 1984 to 17 April 1984 (both dates included) and (2) on a reference by the adjudication officer as to whether sickness benefit was payable from 18 April 1984 to 3 July 1984 (both dates included) disallowing benefit for that period. The Commissioner adjourned the oral hearing of the present appeal on 24 October 1985. The Chief Commissioner directed the case to be heard by a Tribunal of Commissioners and on 19 February 1986 we held an oral hearing. The claimant was present and was represented by Mr. Graham Davies of the Pontypridd Citizens Advice Bureau. Mr. J. P. Canlin, solicitor of the Solicitor's Office, Department of Health and Social Security represented the adjudication officer. We are indebted to both of them for their assistance. The periods before us are those referred to in paragraph 1 of this decision and this decision is in respect of both the cases numbered above.

3. The adjudication officer first concerned in these appeals recorded the facts as follows:—

"1. The claimant, an assistant divisional officer in the Ambulance Service, claimed sickness benefit from 23.1.1984 for incapacity stated by his doctor to be nervous debility. He had previously been paid statutory sick pay by his employer from 21.11.83.

2. Information was held that the claimant was a local authority Councillor and accordingly he was requested to provide details of activities he would undertake during his claim. On 23.1.1984, the claimant stated he would carry out all Council duties as requested. In addition he was a member of other Committees which he would also attend but could not be precise as to their frequency. These activities were present in the pre-claim period.

3. The Rhondda Borough Council have provided details of meetings attended by the claimant during the period from 23.11.1983. Since 23.1.1984 meetings average 2 per week to 5.3.1984.

4. On 12.3.1984 the claimant was examined by an examining medical officer of the Regional Medical Service, Department of Health and Social Security. The officer reported the claimant's depression to be improving—attending psychiatrist.

5. On 16.3.1984 the Insurance Officer disallowed the claim. A letter dated 12.3.1984 was received from the claimant's Member of Parliament requesting information on his claim. A copy of same and the reply are enclosed in these papers.

6. The claimant appealed against the disallowance of his benefit and has submitted a further doctor's statement on which he is advised to refrain from work for 3 months from 3.4.1984 by reason of depression. In his grounds of appeal the claimant maintains his local authority duties to be of a therapeutic nature and his employer has started the administrative process of retirement on health grounds. He has provided no evidence on these points."

4. The claimant did not claim attendance allowance in respect of council meetings but we have before us (as amended by the Commissioner at the adjourned hearing) a schedule annexed to the submission of the adjudication officer now concerned dated 4 June 1985 for the periods at issue giving details under the heads, "Week Commencing, Dates of Meetings In That Week, Attendance Allowance Payable For That Week". There were no meetings in the 2 weeks commencing 21 May 1984 and 25 June 1984 and therefore no attendance allowance payable for those 2 weeks.

5. At the hearing Mr Graham Davies handed us a statement by Lord Bellwin annexed to a letter dated 23 August 1983 from The Association of Councillors. Lord Bellwin's statement reads as follows:—

"As for full-time salaries for councillors, it is the Government's view that the voluntary principle of local government service is worth preserving, and we have no plans to change the present system in such a way as to make council service a fully salaried position."

6. Regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983 No 1598] at the relevant time provides as follows:—

"(3) A person, who is suffering from some specific disease or bodily or mental disablement but who, by reason only of the fact that he has done some work while so suffering, is found not to be incapable of work by reason thereof, may be deemed to be so incapable if that work is—

(i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital or similar institution, or

(ii) work which is not so undertaken and which he has good cause for doing,

and from which, in either case, his earnings do not ordinarily exceed £22.50 per week."

Regulation 7(1)(g)(i) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 provides as follows:—

"7.—(1) For the purposes of unemployment, sickness and invalidity benefit—

...

(g) .....a day shall not be treated as a day of unemployment if on that day a person is engaged in any other 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;.."

So far as relevant for present purposes regulation 1(2) of the Social Security Benefit (Computation of Earnings) Regulations 1978 [S.I. 1978 No 1698] as amended, provides as follows:—

"1.—(2) In these regulations, unless the context otherwise requires:—

...

"earnings" means earnings derived from a gainful employment.."

A Tribunal of Commissioners in R(S)11/51 at paragraph 5 have held that a person is incapable of work if having regard to his age, education, experience, state of health and other personal factors, there is no work or type of work which he can reasonably be expected to do and that "work", in this connection means remunerative work, whether part-time or whole time, for which an employer would be willing to pay for or work as a self-employed person in some gainful employment. Regulation 1(2) of the Social Security Benefit (Computation of Earnings) Regulations 1978 defines "gainful employment" so far as relevant for present purposes as follows:—

" 'Gainful employment' means employment as an employed earner or a self-employed earner.."

7. At the hearing it was conceded on behalf of the claimant, rightly in our view, that because of the work he had done in attending council meetings he could not succeed in his appeal unless he could be deemed incapable of work under regulation 3(3). It was conceded on behalf of the adjudication officer that the claimant had had good cause for doing such work and that regulation 3(3)(ii) was satisfied. As to the concluding words of regulation 3(3) it was contended on behalf of the claimant first that he had derived no earnings from his work as a councillor because he had not claimed the attendance allowances to which he was entitled and second that, even if the allowances that he could have claimed were treated as earnings, the schedule referred to in paragraph 4 above showed that such earnings had not ordinarly exceeded £22.50 per week.

8. In our view the first of the above contentions is ill-founded. We consider that in the context of regulation 3(3) "earnings" means amounts to which a claimant is entitled and is not limited to payments which he actually receives. The definition of earnings in section 3 of, and Schedule 20 of the Social Security Act 1975 by virtue of section 11 of the Interpretation Act 1978 apply equally to regulations under that Act. Section 3(3) of the 1975 Act provides for the calculation or estimation of earnings on such basis as may be prescribed; the Social Security Benefit (Computation of Earnings) Regulations 1978 made under the power contained in section 3(3) of the 1975 Act defines "earnings" as meaning "earnings derived from gainful employment". We conclude that in the absence of a context to the contrary that is the meaning of earnings

throughout the 1975 Act and regulations made thereunder. Consequently we read into regulation 3(3) after "earnings" the words "derived from gainful employment". In our judgment the word "derived" adds nothing to the context and means emanates. It does not mean actual payment. This question of construction does not lend itself to elaboration. The fact that a claimant may from the start never intend to claim his councillor's attendance allowance is we think immaterial as on our view of the construction of "earnings" in the context of regulation 3(3) the earnings emanate from "gainful employment" as the employment is a gainful one because attendance allowance can be claimed.

9. We turn now to the second of the above contentions. What a claimant ordinarily earns in a week has to be determined by reference to his weekly earnings over a period of weeks and we accept the submission on behalf of the adjudication officer now concerned to the effect that for the purposes of the regulation weekly earnings ordinarily exceed a specified amount if they exceed it in more than half of the weeks in the reference period. That meaning of "ordinarily" has, we believe, been generally accepted by Commissioners although as often tacitly as expressly. We are also aware that it has often been accepted as appropriate to take the whole of the period under consideration as the reference period unless significant changes of circumstances during that period have made it appropriate to reconsider the position from time to time. However, we have thought it worth considering whether it would be desirable to suggest that the reference period should, whenever possible, be of a specified length, long enough to provide a reasonable basis for the determination of what is ordinarily earned but not so long as to deprive the claimant of possible benefit from changes of pattern which, although not attributable to significant events, last for a number of weeks. The period which suggests itself to us as suitable for that purpose is 13 weeks but we do not consider that we could properly go further than to say that in general a shorter reference period, or a much longer reference period, should be avoided if possible. We have also considered how weeks in which a claimant has no earnings by way of attendance allowances should be treated. It seems to us to be inappropriate to speak of earnings from work in weeks in which no work is done and we conclude that such weeks should be left out of account. We are reinforced in that conclusion by paragraph 6 of the unreported Commissioner's Decision CS 162/1982 (which we regard as rightly decided) the relevant part of which reads:—

> "In looking at what the claimant's earnings ordinarily are it is necessary to look at the weeks in which he did in fact work by attendance at council meetings and not the weeks he did not attend any meetings."

10. In the present case the claimant earned more than the statutory maximum in the first week of the period in issue. In the following week he earned less than the maximum and then in each of the next 7 weeks he again earned above the maximum. Then followed 3 weeks in which he earned less than the maximum and 3 weeks in which he earned more. In the next week he earned less and in the next more than the maximum and after a week of no earnings, earned less than the maximum twice followed by 2 weeks in which he earned more than the maximum. After 1 more week of no earnings he earned less than the maximum in the final week. From these figures it follows that out of a total of 24 weeks he earned in 22. If the whole period of earning weeks is regarded as the reference period he earned more than the maximum in 14 out of 22 weeks and thus "ordinarily" earned more than the maximum. If, on the other hand, the first 13 weeks are taken as a reference period he earned more than the maximum in 9 of those weeks

and less than the maximum of 4 but of the remaining 9 weeks of the total of 22 he earned more than the maximum in 5 weeks. Thus on either of these two ways of looking at the matter his claim fails in respect of the whole period except the 2 weeks of no earnings which are the weeks referred to in paragraph 1(c) above. The only basis upon which the claimant could succeed in respect of any of the weeks in which he earned would be if the *last* 13 of the earning weeks were regarded as a reference period. That possibility was suggested on behalf of the claimant but we cannot accept that there would be any justification for adopting such a basis.

11. We turn now to consider the 5 relevant unreported decisions to which we were referred at the hearing. First CU 1/80 (unreported) deals with unemployment benefit and the relevant regulation is what is now regulation 7(1)(g). At paragraph 9 of the Commissioner's decision the Commissioner states:—

> "To have a right to attendance allowance a claim must be made. Until such a claim is made a claimant's right is inchoate and incomplete. I come to the conclusion therefore that in respect of the days on which the claimant carried out approved duties but made no claim for attendance allowance, the claimant had no earnings for those days derived from his employment."

We consider the decision correct but for the wrong reasons. The Commissioner placed too great an emphasis on the right to claim attendance allowance. From regulation 4 of the Local Government (Allowances) Regulations 1974 no time limit is set for claiming and the ordinary 6 year limitation period would apply, though no doubt a local authority might put in some time limit. We consider the position more analogous to an employee putting in a time sheet of the hours he has worked—so here a Councillor has a need to put in details of his attendances in order that his allowance can be calculated. The second case—CS 19/83—is in respect of sickness benefit where the claimant in that case refused to accept payment for her attendance on council business in excess of the statutory limit. The Commissioner in that case sets out his reasoning at paragraph 12 as follows:—

> "Earnings are still earnings whether they are received sometime in the distant future or whether they are surrendered altogether. The claimant by her exertions had created a monetary entitlement, albeit she never intended to be paid the full extent of that entitlement. I am afraid that the device adopted by the claimant of artificially bringing herself within the statutory figure does not enable her to escape from the "earnings rule" imposed by regulation 3(3)."

The Commissioner's view in decision CS 19/1983 was expressed only obiter. However it was adopted in relation to invalidity benefit by another Commissioner in the third of the decisions we deal with being decision CS 376/1983. The fourth decision we consider is that on Commissioner's files CWS 6/84 and CWS 7/84 where at paragraph 6 of that decision given in respect of both those cases the Commissioner stated:—

> "I adopt the approach of the Commissioner in his decision on Commissioner's file CS 19/83.. (see paragraph 12) rather than that adopted by the Chief Commissioner in decision CU 1/80 (see paragraph 9) for the reasons given in the latter decision. At my request, Mr. Phippard prepared a schedule, which has been agreed by Mr. Morgan. It indicates that the available evidence as to earnings only covers a total of 21 weeks. In 10 of those weeks, the earnings exceeded [the statutory limit], while in 11 of them it did not do so. In the light of this evidence, I hold that the claimant's earnings from the work

done by him at the relevant time did not ordinarily exceed the prescribed limit."

12. We regard the second, third and fourth decisions referred to above as correctly decided albeit we would add that in the light of the decision on the facts in paragraph 6 of the Commissioner's files CWS 6/84 and CWS 7/84 his observations in respect of "earnings" were obiter. We turn finally to the decision CU 290/1983 (unreported) which deals with unemployment benefit. The Commissioner at paragraph 10 of that decision after citing the concise Oxford dictionary accepted the decision CU 1/80 as right. However the Commissioner states at paragraph 13 of his decision:—

> "I question whether any distinction ought to be drawn between the meaning of the word "earnings" in regulation 7(1)(h) now [7(1)(g)] and in regulation 3(3) of the 1975 Amended Regulations."

Whilst we agree that there is no distinction between the meaning of the word "earnings" in regulation 7(1)(g) and in regulation 3(3) we regard decision CU 290/1983 as wrongly decided in that it followed decision CU 1/80 the reasoning in which (on the grounds given immediately above) we think to be wrong. It follows in our view that "earnings" should be given the same meaning in what is now the 1983 Regulations in respect of the benefits there referred to and it is immaterial whether a claimant makes no claim at all for attendance allowance or a limited claim.

13. One further point arises in that in paragraph 14 of decision CU 290/1983 the Commissioner seeks to draw an analogy between the tax and social security legislation. The Commissioner's basis for this is that "so far as I am aware, it has always been accepted by the Inland Revenue so that a person's income will always in practice be agreed with the exclusion of renounced remuneration." We do not propose to consider the position arising for income tax. All we need say in that regard is that complex legal questions in respect of disclaimer contrasted with release arise and in our view nothing is to be gained in a consideration of social security benefits in the case before us by a tax analogy which would at least appear to be open to argument.

14. The claimant's appeal is to the extent aforesaid allowed.

(Signed) E. R. Bowen
Commissioner

(Signed) J. N. B. Penny
Commissioner

(Signed) J. B. Morcom
Commissioner
