Guarantee Agreement—Alteration of agreement—Principles for interpretation of an agreement

The terms of a guarantee agreement in the engineering industry which had previously been held by the Commissioner to guarantee wages to employees for the whole of each week were altered with a view to securing title to unemployment benefit in respect of certain days in the week on which the employees, during a period of short-time working, did no work. It was agreed between the parties that the alteration was made solely to achieve this purpose and that the alteration should have no effect "industrially" or in the "application" of the original agreement.

Held that the agreement in its original form was still operative. Where a claimant's employment is subject to a guarantee agreement, the ultimate question is what does the employee undertake in consideration of the employer's guarantee. In the present case, the employee was guaranteed wages quivalent to his inclusive hourly plain time rate for 34 hours in any pay week, and was required to be at the employer's disposal for 34 hours, which could be spread over the entire week. Accordingly the employee was not unemployed on any day of the week.

1. Our decision is that the claimant was not unemployed on the 13th April, 1956.

2. On the 19th April, 1956 the local insurance officer referred to the local tribunal the following question "whether unemployment benefit is payable from and including the 13.4.56 which can be treated as days of unemployment and in particular whether for those days the claimant has proved that he was unemployed". (The reference was doubtless intended to be read as

though the words "for any days" had been inserted after "payable".) In his submission to the local tribunal the local insurance officer explained that on the 9th March, 1956 the claimant's employers started working short time under an agreement for a guaranteed week dated the 3rd April, 1946 which was subsequently varied as from the 9th April, 1956 by an agreement dated the 10th March, 1956. (We refer to the first of these agreements as the 1946 guarantee and to the second as the 1956 guarantee.) He added that doubt had arisen whether the 1956 guarantee was a guarantee of employment or a guarantee of wages. The local tribunal recorded "claim allowed" as their decision and as their "grounds of decision" they recorded that the claimant was guaranteed four days employment as distinct from a weekly wage and notified that such four days were Monday to Thursday inclusive. From this decision the present appeal is brought by the insurance officer now concerned.

3. At the oral hearing before us the representative of the insurance officer now concerned submitted that it was not clear whether the contract of service between the claimant and his employers had become subject to the 1956 guarantee by the 13th April, 1956, which was the date from which the local insurance officer had questioned his title to unemployment benefit. On the view we take of the case this question of date is immaterial and we will assume in the claimant's favour that by that time the 1956 guarantee did apply to him.

4. The decision of the appeal turns upon the interpretation and legal effect of the following documents:—

(1) The 1946 guarantee which was in the following terms:—

"*Guaranteed Week*

It is hereby mutually agreed that the following provisions are applicable in respect of the introduction of a guaranteed week.

(*a*) All hourly-rated manual workers who have been continuously employed by a federated firm for not less than four weeks are guaranteed wages equivalent to their inclusive hourly plain time rate for 34 hours in any pay week. *Provided that* they are capable of, available for and willing to perform satisfactorily, during working hours, the work associated with their usual occupation, or reasonable alternative work where their usual work is not available. For the purpose of this guarantee premium payments for work done on Sundays and holidays shall be disregarded.

(*b*) The guarantee does not apply in the following circumstances:—

(i) In the case of a holiday recognised by agreement, custom or practice, the guarantee shall be reduced in respect of the pay week in which the holiday takes place in the same proportion as the normal working hours for the time being have been reduced in that pay week.

(ii) In the event of a dislocation of production as the result of strike action the guarantee shall be automatically suspended in respect of workpeople affected in the establishment where the strike is taking place.

(*c*) Where the employment of an hourly-rated manual worker who has been continuously employed by a federated firm for not less than four pay weeks is terminated for reasons other than misconduct (e.g., redundancy or where the worker wishes to

leave) the duration of notice given shall be equivalent to the non-overtime weekly hours operating in the establishment for the time being."

(2) A letter of the 13th February, 1956 from the secretary of the Engineering and Allied Employers' National Federation to the general secretary of the Confederation of Shipbuilding and Engineering Unions as follows:—

"We refer to our letter of the 2nd February, 1956 and previous correspondence in connection with the above question.

The most careful consideration has been given to a revision of the first paragraph of Clause (*a*) of the Guaranteed Week Agreement of 3rd April, 1946 in order to prevent employees in the Engineering Industry being disqualified from unemployment benefit because of the present wording of this paragraph.

We are now in a position to offer the following to replace the existing first paragraph of Clause (*a*):—

'All hourly-rated manual workers who have been continuously employed by a federated firm for not less than four weeks are guaranteed four days' employment in any pay week, such as will enable them to earn during such period the equivalent of their consolidated time rate for 34 hours.'

This change is for the benefit of employees in relation to unemployment benefit. It is the intention that industrially the Guaranteed Week Agreement should operate as at present and the Employers offer this alteration in Clause (*a*) subject to there being no resulting change in the application of the Agreement and no additional responsibility, financial or otherwise, on the Employers.

It will be appreciated that the efficacy of this form of wording cannot be tested prior to its incorporation in the Agreement as we understand that the National Insurance Commissioner will not pronounce on a hypothetical case."

(3) The 1956 guarantee which was as follows:—

"*GUARANTEED WEEK*

It is mutually agreed that Section C of the National Agreement of 3rd April, 1946 be amended to read as follows:—

C. *GUARANTEED WEEK*

It is hereby mutually agreed that the following provisions are applicable in respect of the Guaranteed Week.

(*a*) All hourly-rated manual workers who have been continuously employed by a federated firm for not less than 4 weeks are guaranteed 4 days' employment in any pay week, such as will enable them to earn during such period the equivalent of their consolidated time rate for 34 hours.

Provided that they are capable of, available for and willing to perform satisfactorily, during working hours, the work associated with their usual occupation, or reasonable alternative work where their usual work is not available.

For the purpose of this guarantee premium payments for overtime worked on weekdays and premium payments for work done on Sundays and holidays shall be disregarded.

(*b*) The guarantee does not apply in the following circumstances:—

(i) In the case of a holiday recognised by agreement, custom or practice, the guarantee shall be reduced in respect of the pay week in which the holiday takes place in the same proportion as the normal working hours for the time being have been reduced in that pay week.

(ii) In the event of a dislocation of production as a result of strike action the guarantee shall be automatically suspended in respect of workpeople affected in the establishment where the strike is taking place.

(*c*) Where the employment of an hourly-rated manual worker who has been continuously employed by a federated firm for not less than 4 pay weeks is terminated for reasons other than misconduct (e.g., redundancy or where the worker wishes to leave) the duration of notice given shall be equivalent to the non-overtime weekly hours operating in the establishment for the time being."

We assume for the purposes of this decision that the two associations had authority to enter into an agreement in these terms on behalf of the claimant and his employers respectively.

(4) The following letter dated the 27th March, 1956 addressed by the general secretary of the Confederation of Shipbuilding and Engineering Unions to "All E.C.s and D.C.s":—

"*Guaranteed Week Agreement of 3rd April,* 1946

Over a considerable period of time we have endeavoured to seek an amendment to the terms of the above agreement with the Engineering Employers' Federation to enable employees in the Engineering Industry to draw state benefit during short spells of unemployment.

At the Executive Council meeting on 8th March, 1956 consideration was given to a letter from the Engineering Employers' Federation suggesting an amendment to Clause (*a*) of the Guaranteed Week Agreement of 3rd April, 1946 to meet the Confederation's representations to prevent employees in the engineering industry being disqualified from drawing unemployment benefit because of the wording of Clause (*a*) of the agreement.

A copy of the Engineering Employers' letter dated the 13th February, 1956 is set out overleaf, and the terms were accepted by the Executive Council.

Since the decision to accept the amendment to the agreement was reached, you will doubtless be aware that a test case took place at Coventry recently affecting an employee of the Standard Motor Company, whose claim for unemployment benefit was rejected. The case has been referred to the Umpire, whose decision is awaited.

In the meantime, however, it is suggested that members of affiliated Unions covered by our agreement of 3rd April, 1946 as now amended, should make application to the Ministry of Labour for benefit for spells of unemployment even though they may have received payment of wages equal to the guaranteed wage during the same week."

5. According to a letter dated the 19th April, 1956 from the claimant's employers to the local insurance office the above-mentioned agreement of the 10th March, 1956 was brought into operation at their establishment on the 9th April, 1956. There seems, therefore, no room for doubt that by the 13th April, 1956 the claimant and his employers were purporting to treat the 1956 guarantee as superseding the 1946 guarantee in relation to the claimant's employment.

6. It was submitted for the insurance officer now concerned—

(1) that if the 1946 guarantee was still applicable to the claimant on and after the 13th April, 1956 he was not unemployed from and including that date;

(2) that it has not been established that during the relevant period the 1946 guarantee had been superseded by the 1956 guarantee in relation to the claimant's employment;

(3) that even if this had been established the claimant still could not be deemed to be unemployed on the days in question having regard to the terms of the 1956 guarantee.

7. We undersood that the first of these submissions was not seriously contested and we are satisfied that it was correct. Our reasons for this view can be more conveniently stated hereafter.

8. We are of opinion that the second submission is also correct. In their letter of the 13th February, 1956 the employers' federation offered to replace the 1946 guarantee by the 1956 guarantee. They added that (1) the change was "for the benefit of employees in relation to unemployment benefit": (2) that it was the intention that industrially the 1946 guarantee should operate as at present; and (3) that the alteration was offered subject to there being no resulting change in the application of the guarantee and no additional responsibility, financial or otherwise, on the employers. (The underlining was the federation's.)

9. In his circular of the 27th March, 1956 the secretary of the Confederation of Shipbuilding and Engineering Unions expressly stated that the terms of the federation's letter of the 13th February, 1956 were accepted by the executive council. It follows that the Confederation of Shipbuilding and Engineering Unions (who were the claimant's agents) agreed that the 1956 guarantee should only take effect subject to the terms of the National Federation's letter of the 13th February, 1956. That letter stipulated that the "alteration" should have no effect "industrially" or in the "application" of the 1946 agreement but was designed solely "for the benefit of employees in relation to unemployment benefit". Clearly if the Confederation of Shipbuilding and Engineering Associations had authority from the claimant to agree to the 1956 guarantee they also had his authority to accept these stipulations.

10. The claimant therefore must be taken to have agreed that "industrially" and in the "application" of the 1946 agreement it should operate as at present and that the introduction of the 1956 guarantee should not produce any change in the "application" of the 1946 guarantee. We can only interpret this language as meaning that the employers should have the same rights to the services of their workmen as they had under the 1946 guarantee. In other words the employers' offer of the 1956 guarantee was conditional upon the confederation agreeing to the terms of the employers' letter of the 13th February, 1956. This offer was accepted by the confederation who were the claimant's representatives and the 1956 guarantee and the letter of the 13th February, 1956 must therefore be read together in order to ascertain the conditions of the claimant's employment.

11. One of two consequences must follow from these facts. Either (1) the 1956 guarantee is inconsistent with the letter of the 13th February, 1956 in which case the employers' offer was self-contradictory and its acceptance could not result in an effective agreement or (2) the parties agreed that there should be no change in the claimant's "industrial" obligations including the period for which he was bound to place his services at the disposal of his employers. On either view the claimant's employment continued to be subject to the terms of the 1946 guarantee and he was therefore not unemployed on the day in question.

12. These conclusions are sufficient to entitle the insurance officer to succeed in his appeal, but we think it desirable to make some further observations.

13. The question of the effect of a guaranteed week agreement was dealt with recently in Decision C.U. 12/56* (not reported). That decision was given by a single Commissioner. When it was learned that the present appeals were to be brought it was not known that the question whether the 1956 guarantee was effective might arise and it was thought desirable that a tribunal of three Commissioners should take the opportunity to consider whether the views expressed in Decision C.U. 12/56 required any modification.

14. Section 11(1) of the National Insurance Act, 1946 provides (in effect) that one of the conditions of entitlement to unemployment benefit in respect of any day is that the claimant proves that it is a day of unemployment. No definition of "unemployment" is given in the Act, but Section 11(3) provides that regulations may make provision as to the days which are or are not to be treated for the purposes of unemployment benefit and sickness benefit as days of unemployment or incapacity for work. A number of regulations have been made by the Minister under this section but none of them is relevant to the question of the effect of a guarantee agreement such as those here in question. It follows that the task of determining whether a claimant whose employment is subject to a "guarantee agreement" has discharged the burden of proving that he is unemployed on a day on which his employer does not avail himself of the claimant's services devolves upon the local insurance officer and (on appeal) upon the local tribunal and Commissioner.

15. In our opinion the burden of proof resting on the claimant in such cases was correctly stated in the following passage in Decision C.U. 12/56 (not reported). "The burden of proving that he was unemployed on the 6th March [the date there in question] rests upon the claimant. To discharge it he must show that he was under no obligation to place his services at the disposal of his employers on that day. Whether he can show this depends upon whether the meaning of the guarantee agreement is that in consideration of the guaranteed payment of minimum earnings of [the sum specified] the claimant will remain at the employers' disposal for all the days of the working week (which is a 5-day week) or only for [the guaranteed number] of those days." In other words the ultimate question in these cases is not—what does the employer guarantee? but—what does the employee undertake in consideration of the employer's guarantee? The agreement dealt with in Decision C.U. 12/56 contained a provision which the Commissioner interpreted in the light of its context as meaning that the employee only undertook to be at the employer's disposal on 4 days

* *Printed as an appendix to this decision*

in the week in contrast to such agreements as that considered in Umpire's Decision 958/41 which provided that the guarantee was conditional on the claimant keeping himself available each day up to 2 p.m. Where there is no such express provision the employee's obligation may be inferred from the terms of the employer's guarantee. Thus if the guarantee is expressed to be of a weekly payment and no mention is made of any period of work the inference is that the guarantee is offered and accepted on the terms that the employee's services will be at the employer's disposal on every working day of the week.

16. It follows from the view expressed above that if (as we hold) the 1946 guarantee still applied to the claimant during the period in question he was not unemployed during that period. That guarantee was of wages equivalent to his inclusive hourly plain time rate of 34 hours in any pay week provided that the claimant was available for work during working hours. Under such an agreement the claimant clearly undertakes that in consideration of the guaranteed payment he will be at the disposal of the employers for 34 hours which could be spread over the entire week. As in our view the parties to the 1956 guarantee have agreed that it should not produce any change in the conditions of the claimant's employment we do not think it desirable to express any opinion as to what its effect would have been if it had stood alone.

17. These observations are (in our view) consistent with Decision C.U. 12/56 (not reported) and we see no reason to differ from that decision on any substantial point. We think it well however to call attention to the following matter.

18. In Decision C.U. 12/56 (not reported) Umpire's Decision 215/47 was cited with approval and it was said that that decision had been followed in Decision C.S.U. 49/50 (reported). This statement clearly implied that the terms of the agreement dealt with in the latter decision brought it within the principle applied in Umpire's Decision 215/47. We feel some doubt now about this view for the agreement dealt with in Decision C.S.U. 49/50 (reported) provided a guarantee of employment for " 34 hours in each pay week " and although the agreement did not give the employer the alternative of paying wages it might be said that it did give him the right to spread the 34 hours over every working day of the week. On the principle applied in Decision C.U. 12/56 and in our present decision if the employer had that right the employee would not be unemployed on any working day so long as that agreement was in force.

19. The Insurance officer's appeal is allowed.

25.4.56 **APPENDIX**

The unreported decision C.U. 12/56 mentioned in R(U) 21/56 is printed below for information.

1. My decision is that the claim for unemployment benefit in respect of the 6th March, 1956 is allowed.

2. The claimant was employed by the S. Company on the terms of an agreement made in October, 1952 (hereafter called " the guarantee agreement ") between the S. Company and a confederation of trade unions and entitled " Guarantee of Employment for Hourly Paid Employees." He made a claim for unemployment benefit on the 6th March, 1956.

3. Section 11(1) of the National Insurance Act, 1946 provides that a person shall be entitled to unemployment benefit in respect of any day of unemployment which forms part of a period of interruption of employment and Section 11(3) provides that regulations may make provision as to the days which are or are not to be treated as days of unemployment. Regulation 6(1) of the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 [S.I. 1948 No. 1277] (so far as material) provides that a day shall not be treated as a day of interruption of employment if it is a day in respect of which the claimant fails to prove that he is unemployed. The local insurance officer referred to the local tribunal the question whether unemployment benefit was payable to the claimant in respect of the 6th March, 1956 and in particular whether the claimant had proved that he was unemployed. He stated that a doubt arose "whether the minimum earnings assured by the guarantee are to be regarded as a payment made in respect of each and all of the days of the whole week, or whether the earnings are to be regarded as payment for the four days of guaranteed employment." By a majority the local tribunal disallowed the claim, holding (on the authority of Decision R(U) 23/55) that the claimant was not unemployed as he was guaranteed a weekly wage i.e. £6 a week: hence this appeal by the claimant's association.

4. The guarantee agreement is as follows:—

"All employees shall be guaranteed employment for four days in each normal pay week. In the event of work not being available for the whole or part of the four days, the following minimum earnings will be assured:—

Male employees	£6 0 0
Female employees ...	£4 10 0
Youths and Girls:	
Aged 15	£1 13 0
,, 16 .. .	£2 1 0
,, 17	£2 10 0
,, 18	£3 12 0
,, 19	£3 14 0
,, 20	£4 5 0

This guarantee is subject to the following conditions:—

(*a*) That the employees are capable of, available for, and willing to perform satisfactorily, during the period of the guarantee, the work associated with their usual occupation, or reasonable alternative work where their usual work is not available.

(*b*) When an agreed holiday occurs, the guarantee shall be reduced proportionately.

(*c*) In the event of a dislocation of production as a result of strike action within the Company's factories, the guarantee shall be automatically suspended.

(*d*) In computing the minimum earnings referred to above, premium payments due for overtime or nightshift working shall be ignored."

5. The guarantee agreement replaced a provision for a "guaranteed week" in an earlier agreement. It was stated at the oral hearing of this appeal that it was recognised by the employers and the association that, having regard to the interpretation placed upon agreements of this type by the determining authorities in the past, the effect of the language used in this earlier agreement would be that the employee would not be entitled

to unemployment benefit for any of the days on which he was not offered work (such a day is hereafter called an "idle day") and that the wording of the corresponding provision of the guarantee agreement was substituted with the express object of ensuring that unemployment benefit would be payable for an idle day.

6. The burden of proving that he was unemployed on the 6th March, 1956 rests upon the claimant. To discharge it he must show that he was under no obligation to place his services at the disposal of his employers on that day. Whether he can show this depends upon whether the meaning of the guarantee agreement is that in consideration of the guaranteed payment of minimum earnings of £6 a week the claimant will remain at the employers' disposal for all the days of the working week (which is a 5-day week) or only for 4 of those days.

7. In my opinion the second of these alternative interpretations is correct.

8. The question is dealt with expressly in condition (*a*) of the agreement which provides that the guarantee is subject to the condition that the employees are capable of, available for and willing to perform satisfactorily, during the period of the guarantee, the work associated with their usual occupation or reasonable alternative work where their usual work is not available.

9. In its context the word "guarantee" in conditions (*b*) and (*c*) must, I think, be regarded as an abbreviation of the expression "period of guarantee" in (*a*). In (*b*) the period referred to is clearly the 4 days for which employment is guaranteed and this is also (though perhaps less indisputably) the meaning of the word "guarantee" in condition (*c*). In my opinion therefore on a proper construction of its language the agreement does not require the claimant to be at the disposal of his employers on his idle day. This conclusion is strongly reinforced if the agreement is interpreted (as it should be) in the light of the surrounding circumstances. It was explained at the hearing of this appeal that under the short-time system the employee is notified at the end of each pay week of his "idle day" for the next week. It cannot have been the intention of the parties that an employee should be required to be at the disposal of the employers on a day on which he had been notified that there would be no work for him.

10. The facts in this case are in my opinion clearly distinguishable from those dealt with in Decision R(U) 23/55 on which the majority of the local tribunal and the insurance officer now concerned relied. That decision was grounded upon the second paragraph of the relevant agreement which provided that certain workers should be guaranteed that "work will be available for 34 hours in any pay week or, if not, a guaranteed wage equivalent to their inclusive hourly plain time rate for 34 hours shall be paid, always providing that piece-work earnings in excess of the normal hourly plain time rates will not be taken into account in assessing the sum earned towards the guaranteed wage." That was a guarantee of "hours" which (so far as appears) might be spread over any number of days in the week and there was apparently no provision which could justify the inference which has been drawn above from condition (*a*) of the guarantee agreement.

11. Counsel for the association stated at the hearing that the guarantee agreement had been modelled on that which formed the subject of Umpire's Decision 215/47 given under the provisions of the Unemployment Insurance Act, 1935 corresponding to Section 11(3) of the National Insurance Act, 1946 and Regulation 6(1)(*a*) of the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948.

12. The representative of the insurance officer now concerned sought to distinguish the guarantee agreement from the agreement dealt with in Umpire's Decision 215/47 on the ground (as I understood) that the latter was a guarantee of actual employment and not of employment or wages. This was not the view of the Umpire for he stated in his decision that the guarantee was "in terms one of employment (or failing employment payment of wages) for 'a period' of 4 days in the pay week of 6 days"; and it seems to me unreal to suppose that the parties contemplated that the employer should be obliged to keep his business going at a loss merely to provide work. In my opinion there is no material difference between the terms of the guarantee agreement and that dealt with in Umpire's Decision 215/47.

13. In the course of the helpful submission on behalf of the insurance officer now concerned it was pointed out that to be entitled to unemployment benefit for any day a claimant must prove that he was unemployed on that day. It was submitted that under the guarantee agreement if on a Friday in one week the employers were to notify an employee that there would be no work on any day of the coming week the employee would not be able to prove that any particular day in that week was not one of the 4 days in respect of which he was guaranteed work or earnings and therefore could not show that he was unemployed on any such day. It is, I think, clear that this criticism would be equally applicable to the agreement dealt with in Umpire's Decision 215/47, and that if it were accepted that decision could no longer be regarded as authoritative. That decision was followed in Decision C.S.U. 49/50 (reported) and has doubtless formed the basis of other agreements besides the one now in question. In these circumstances I should be reluctant to impair the authority of Umpire's Decision 215/47 even if I thought the contention for the insurance officer was sound. In fact I do not take this view. One answer to the contention is (in my opinion) that in the circumstances supposed the employee could say when he applied for benefit on the Monday "My employer did not guarantee to employ me on any particular four days in the week and therefore the guarantee does not apply until there are not more than three working days left in the week besides the day for which benefit is claimed. As this is not the case I am unemployed today." Other answers were suggested by counsel for the association but I need not pursue the point further.

14. The association's appeal is allowed.