UNEMPLOYMENT BENEFIT

Recognised or customary holiday—supply teacher.

The claimant was engaged as a supply teacher by an Education Authority. The school at which he was working closed for the Easter holidays on 29.3.85 and he claimed unemployment benefit on 1.4.85. He returned to work on 15.4.85 and was again employed until 24.5.85 when the school closed for the half term holiday. A further claim for unemployment benefit was made on 28.5.85. The Education Authority stated that it was understood the claimant's appointment would be continuous from January 1985 to July 1985 despite the fact that he was paid on a daily basis. Both benefit claims were disallowed by an adjudication officer on the basis of the "recognised or customary holiday" provisions contained in regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. The appeal against the first decision was supported by the adjudication officer on the grounds that it was not agreed prior to the Easter holidays that the claimant's employment would continue thereafter. The appeal against the second decision was not so supported and was dismissed by the tribunal.

In allowing the appeal, the Commissioner *held* that:

1. entitlement to unemployment benefit in these circumstances depends upon whether the claimant's employment has terminated. Only if the employment is continuing, will it be necessary to consider whether a non-working day is a day of recognised or customary holiday (paragraph 7);
2. the appointment letters issued to the claimant are, at best, evidence of loose arrangements between the Education Authority and the temporary teachers in their area. They do not place on either party any legally enforceable rights or duties and do not in themselves constitute contracts of employment (paragraphs 16 and 17);
3. any contract between the claimant and the Education Authority terminated at the end of each day's work or period of work for which he had been engaged and that after finishing work on 24.5.85, he was not on holiday but was unemployed (paragraph 18).

Decision R(U) 8/68 distinguished.

1. My decision is that the claimant is entitled to unemployment benefit for the period 27 May to 1 June 1985, both dates included.

2. The claimant appeals to the Commissioner, with leave of a chairman who was not the chairman of the tribunal which heard his appeal, against the unanimous decision of the Blackburn social security appeal tribunal dated 10 October 1985 confirming the decision of the adjudication officer, issued on 11 June 1985, that unemployment benefit was not payable to the claimant for the period 27 May to 1 June 1985, both dates included, because that was a period of recognised or customary holiday in connection with the claimant's employment.

3. The claimant, who is aged about 55, has for some time past worked for Lancashire County Council Education Department as a supply teacher. On 1 April 1985 he claimed unemployment benefit on the basis that his employment had ceased on 29 March 1985—in effect at the end of the Easter term. That claim was disallowed on 6 June 1985. On 28 May 1985 the claimant made a further claim in respect of the period now in issue, on the basis that his employment had ceased on 24 May 1985. This claim was disallowed on 11 June 1985.

4. In respect of both claims the Department made the usual enquiries, to which the Education Department replied, in virtually identical terms, that the claimant had been employed on a daily basis, and produced two "letters of appointment" dated 18 December 1984 and 10 April 1985 respectively.

5. The claimant appealed against both decisions. His appeals were both heard by the appeal tribunal on 10 October 1985. In the former case the adjudication officer supported the appeal on the ground that—

> ". . . it was not agreed on 29 March that the employment would continue after Easter and a new contract was initiated on 10.4.85 to take effect 15.4.85".

That appeal was allowed. The second appeal was not so supported and was dismissed by the tribunal because—

> "27.5.85–1.6.85 was Spring Bank Holiday. Claimant knew before school holiday that he would be resuming his job after the holiday—contract never terminated".

It is against that decision that the claimant appeals to the Commissioner.

6. Regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [SI 1983 No. 1598] provides that—

> "7. (1) For the purposes of unemployment . . . benefit—
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> . . . . . .
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> (h) . . . . . where in the case of any person an employed earner's employment has not been terminated, a day shall not be treated as a day of unemployment if it is a day of recognised or customary holiday in connection with that employment . . . ".

7. It is clear that a claimant's entitlement to unemployment benefit depends upon whether or not his employment has been terminated—a consideration which both the adjudication officer and the tribunal plainly, and very properly and correctly, had in mind. Only if the employment is continuing will it be necessary to go on to consider whether or not a non-working day is "a day of recognised or customary holiday".

8. The meaning of employment which "has not been terminated" was considered by a Tribunal of Commissioners in R(U) 7/68. That was a case concerned with section 20(1)(b) of the National Insurance Act 1965 and the

"normal idle day" rule but, as I understand it, it has long been held to be authority for the proper construction of the words in question. At paragraph 29 the Tribunal held—

> "In our judgment the phrase termination of employment...should be interpreted according to its natural and ordinary meaning with the result that as soon as the contract of service between the particular employer and the claimant is terminated the employment under it is terminated also and not merely suspended".

9. In R(U) 8/68 the same Tribunal of Commissioners applied that principle in relation to an appeal by a supply teacher, but in my judgment that case is clearly distinguishable from the instant case as there the claimant's "original engagement was for a fixed period, namely the summer term 1955", and it would seem that he was re-engaged for further fixed periods of a term (or, possibly, longer) until the end of the summer term 1967, although there was "no evidence of any subsequent reappointment" after 1955. However, it was common ground that at a "very early stage of the [1967] summer holidays" he knew he would "resume work at the beginning of the next term", and in those particular circumstances the Tribunal found that, as there was "no evidence of any fresh arrangement", that was "very strong evidence that this was a running contract and the employment was merely suspended and not terminated".

10. It seems to me that a pre-requisite of the finding by the Tribunal of Commissioners in R(U) 8/68 must have been the existence of some arrangement which could properly be called a contract, and it is implicit in their decision that they found that the whole course of dealing, over a period of in excess of ten years, amounted, as a matter of law, to such a contract.

11. It is, in my opinion, noteworthy that the Tribunals of Commissioners, in the above decisions, refer to the "contract of service", and that the word "contract" is used by both the adjudication officer and the tribunal in the present case (see paragraph 5 above). I must therefore look to see what, if anything, can be said to constitute a contract between the claimant and the Education Department.

12. The standard "letters of appointment" the claimant received from the Education Department merely stated that he would start as a supply teacher on a particular date and that, in accordance with the Burnham salary scale, "supply teachers engaged by the Authority [i.e. the Education Department] for a period of less than a school term" would be paid at a daily or hourly rate and that, in the claimant's case, he would be "paid on a daily rate". It was therefore implicit that the appointment, whatever else its nature might be, was for less than—and could certainly not be for more than—a school term.

13. On 2 October 1985 a Miss W, on behalf of the District Education Officer, wrote to the claimant confirming that he had been appointed "as a daily paid supply teacher", saying that—

> "As you were on a daily basis you were employed when work was available with no security of employment",

and that he had been "employed on a daily basis when work was available".

14. On 5 February 1986 the District Education Officer, in response to the Department's enquiry wrote that—

> "It was understood that the appointment would be continuous from January until July even though he [the claimaint] was paid on a daily basis. There was, therefore, a guarantee that his contract as a Supply Teacher would be renewed at the beginning of the Summer term, 1985";

and, on 11 February 1986, the District Education Officer wrote further, enclosing copies of the "appointment letters" to which I have already referred, and saying that these—

> "...substantiate the information given to you in my previous letter".

15. The letters of 2 October 1985 and 5 February 1986 cannot both be correct. In the absence of any admissible extraneous evidence to resolve the inconsistency I cannot, for my part, see that the appointment letters "substantiate" what the District Education Officer had written.

16. In my opinion the letter of 2 October 1985 accords very much more closely with the facts and the evidence than the District Education Officer's later letter. In the first place, if it had been "understood" that the "appointment would be continuous from January until July", there would have been no need to send the claimant the letter dated 10 April 1985—which the adjudication officer submitted "initiated" a new contract. In the second place and in any event, in my judgment the appointment letters do not in themselves constitute contracts at all. A contract is a legally enforceable agreement. I do not overlook the fact that a contract may be partly in writing and partly oral, but there is here no appropriate evidence to that effect, apart from the District Education Officer's imprecise assertion that "It was understood..." which is outweighed by the reliance the Education Department place upon the letters as they stand, and I doubt if the Department would have had power to vary the written terms even if they had wished to do so.

17. The appointment letters, in my view, are at best evidence of loose arrangements made between the Education Department and temporary teachers in their area, whereby the Department create a pool or panel of teachers, including the claimant, upon whose services they can call as and when they wish. Equally, the claimant would no doubt have had the right to decline any work offered to him (although, as a matter of practicality, he would probably not do so too often, as he might not be asked again). I cannot see that either party had any legally enforceable rights or duties on the strength of the appointment letters alone, and it seems to me that legal obligations only arose between the parties when the claimant had been offered and had accepted (and was consequently "engaged" for) a particular day's work or period of work; he then had a duty to carry out his work in a proper manner and the Department had a duty to pay him therefore at the appropriate rate.

18. That being the case, in my judgment any contract between the claimant and the Education Department terminated at the end of each day's work or period of work for which he had been engaged. It follows that, in relation to the period in question, after the claimant finished work on 24 May 1985 he was not on holiday (whatever may have been the position for established teachers or the wage earning or salaried public at large), but was unemployed.

19. In all the circumstances I cannot accept the submission of the adjudication officer now concerned with this case. In my judgment the claimant is entitled to unemployment benefit for the period in question; the amount due to him will have to be assessed by the adjudication officer and, I trust,

agreed by the claimant. In the absence of agreement the matter will have to be referred back to me for determination. The claimant's appeal is accordingly allowed.

(Signed) M. H. Johnson
Commissioner