

R(U) 4/92**Mrs. R. F. M. Heggs****18.12.91****CU/88/1990**

Compensation for termination of employment - “*ex gratia*” payment ... in recognition of your time with us” - whether “made ... in respect of the termination of the employment”

The claimant's employment terminated on 24 November 1989 and his employers stated that they would make an *ex gratia* payment to him of half his year's salary “in recognition of [his] time with [them].” The employers told the Department of Employment that they would be making a payment to the claimant as a result of his employment ending, and that it would include a payment in lieu of notice. £19,000 was paid to him in two instalments. He received the first (£17,030.49) on 6 February 1990 and the second (£1,969.51) on 15 March 1990. This sum included the following elements: £12,423.00 for six months salary; £1,242.41 for 13 days holiday pay; £116.49 for past expenses and £3,248.59 for the employer's contribution to the claimant's pension fund for a period of six months. This amount was rounded up by the employers to £19,000. At the time his employment ended his contract of employment entitled him to six months notice of termination of his employment.

The local adjudication officer decided that the claimant was not entitled to unemployment benefit by virtue of regulation 7(1)(d) of the SS (U, S & IVB) Regs. 1983 for the inclusive period from 30 November 1989 to 25 December 1989. In addition the AO imposed a forward disallowance covering the period from 26 December 1989 to 24 May 1990 inclusive.

The social security appeal tribunal upheld the disentitlement. The claimant appealed to the Commissioner.

Held that:

1. the payment made (in whole or in part) was “in respect of the termination of the employment”. This phrase is wide enough to cover any payment which would not have been made to the claimant by the employers but for the ending of the employment (para. 11);
 2. a payment under regulation 7(1)(d) [as amended by regulation 4 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Amendment No. 2 Regulations 1989 as from 9 October 1989] must be severed into its component elements in order to determine whether the whole or any part falls within the list of excluded payments in regulation 7(6) (para. 12);
 3. holiday pay of £1,242.41 could be exempted under reg. 7(6)(b) of the SS(U, S & IVB) Regs. 1983; it was not clear that the sum of £3,248.59 stated to be the employers' contribution to the claimant's pension fund, could be exempted under reg. 7(6)(e), but this was conceded as it was not crucial to the determination of the case; the payment of £116.49 for past expenses could not be exempted under reg 7(6)(a) or (c) (para. 13);
 4. the remainder of the payment received by the claimant was compensation within the meaning of reg 7(1)(d), and unemployment benefit could not be paid for any days claimed within the ineligible period (i.e. 27 November 1989 to 24 May 1990) (paras. 1, 14 & 15);
 5. although the claimant had not received any payment at the time the AO's decision was made, by the time the Commissioner heard the case, payment had been received, and the date on which it was received was not relevant in calculating the ineligible period (para. 16).
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DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 23 July 1990 is erroneous in point of law and accordingly I set it aside. However, as I

consider it expedient to make fresh findings of fact and to give such decision as I consider appropriate in the light of them, I further decide that the claimant is not entitled to unemployment benefit during the inclusive period from 27 November 1989 to 24 May 1990. This is because his employment was terminated; he received compensation and the said period falls within the ineligible period.

2. This is the claimant's appeal against the decision of the social security appeal tribunal of 23 July 1990, leave having been granted by the tribunal chairman. I held two oral hearings of the appeal. The claimant was present at both and conducted his own appeal. The adjudication officer was represented by Mr. Z. Yaqub at the first oral hearing and by Mr. J. Heath at the second oral hearing, both from the Solicitor's Office of the Departments of Health and Social Security.

3. The claimant was employed as a director by the Greater London Fund for the Blind ("the employers") from 1 January 1988 to 24 November 1989, when his employment terminated. Under the terms of his contract of employment his annual salary was £21,500 and he was entitled to three months notice of termination during the first year of employment and six months notice of termination thereafter. On 24 November 1989 the employers' Chairman wrote to the claimant that "the Fund will make an *ex gratia* payment to you of half your yearly salary in recognition of your time with us". The claimant claimed unemployment benefit on 27 November 1989.

4. In reply to a query the employers' Chairman replied on the relevant form UB85 on 8 December 1989 that a payment was to be made to the claimant as a result of the employment ending and that although the precise amount was still subject to negotiation, it included a payment in lieu of the period of unworked notice. He confirmed that the employers were required to give the claimant six months notice of termination of employment.

5. In the light of the evidence the adjudication officer decided that the claimant was precluded by regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 ("the Regulations") from being awarded unemployment benefit for any day which fell during the inclusive period from 30 November 1989 to 25 December 1989. Further, the adjudication officer made a forward disallowance covering the inclusive period from 26 December 1989 to 24 May 1990 under the provisions of regulation 18(3) of the Social Security (Claims and Payments) Regulations 1987. Thereupon the claimant appealed to the tribunal.

6. The claimant attended the hearing of the appeal before the tribunal on 23 July 1990. In the event the tribunal dismissed the appeal. The findings of fact read, so far as material to the present appeal:

"Claimant was entitled to six months pay in lieu of notice He has been finally paid more than six months salary. The submission is very poorly put together."

The reasons for decision read:

"Tribunal satisfied that the claimant was entitled to six months pay in lieu of notice, this was paid late but must refer to this period which his employers were legally liable to pay for him. And therefore regulation 7(5) and (6) apply and unemployment pay cannot also be paid for this six months period."

7. Regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 provides that every tribunal chairman shall record a statement of the reasons for the

decision and of the findings on material questions of fact. In the present case the decision failed to comply with statutory requirements. There is nothing to indicate when the claimant's employment was terminated; the date of claim for unemployment benefit; the period during which the claimant was not entitled to unemployment benefit and the reasons for decision gave no indication that the tribunal considered the relevant regulations. I agree that "The submission is very poorly put together". Box 5 of the relevant form AT2 is omitted so that it is impossible to ascertain whether the adjudication officer applied the law correctly to the facts. The recorded grounds of appeal are manifestly not those of the claimant. In those circumstances it was incumbent on the tribunal to comply scrupulously with the statutory requirements. Manifestly the tribunal's decision was erroneous in law.

8. Section 14(l)(a) of the Social Security Act 1975 ("the Act") 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. Regulation 7 of the regulations lists the days not to be treated as days of unemployment. Paragraphs (1)(d), (5) and (6) were substituted and inserted with effect from 9 October 1989, by regulation 4 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Amendment No. 2 Regulations 1989 [SI 1989 No. 1324]. They apply to any termination of employment taking effect on or after that date and are therefore applicable in the present case. They deal with the effect on eligibility for unemployment benefit of payments received by a claimant on termination of his employment. Regulation 7(1)(d) provides:

"Where in any case the employment of a person is terminated and he receives compensation, a day shall not be treated as a day of unemployment if it is a day:-

- (i) which falls within the ineligible period as defined in paragraph (5), and
- (ii) which falls within the period of 52 weeks beginning with the day following the termination of the employment;"

Regulation 7(5) provides, so far as material to the present appeal:

"For the purposes of paragraph (1)(d), "the ineligible period" is the period which begins on the day following the termination of the employment and ends-

(a) in a case where the person who paid the compensation or represents that it, or any part of it, was paid in lieu of notice of termination of employment or on account of the early termination of a contract of employment for a term certain-

- (i) on the due date, unless sub-paragraph (b) of this paragraph also applies; or
- (ii) . . .
- (b)-(c) . . ."

Regulation 7(6) provides, so far as material to the present appeal:

"In this regulation-

“Compensation” means any payment made to or for a person in respect of the termination of the employment other than-

- (a) any remuneration paid in respect of the period before the termination;
- (b) any holiday pay;
- (c)-(d) ...
- (e) any refund of contributions to which he was entitled under an occupational pension scheme within the meaning of section 66(1) of the Pensions Act;
- (f) ...

“due date,” in relation to the termination of a person’s employment, means whichever of the following dates is applicable in his case, that is to say-

- (a) the date on which any period of notice applicable to the person was due to expire or would have been due to expire if it had not been waived;
- (b) ...

and for the purpose of paragraph (a) of the definition “period of notice” means the period of notice of termination of employment to which a person is entitled by statute or by contract, whichever is the longer, or if he is not entitled to such notice, that period of notice which is customary in the employment in question;”.

9. The claimant referred me to the employers’ chairman’s letter dated 24 November 1989, and argued that the payment he received on the termination of his employment was an *ex gratia* payment in recognition of past services and that as a result it was not caught by regulation 7(1)(d) of the regulations. He also referred me to a letter from the employers’ solicitors dated 26 January 1990 in which they stated:

“We are pleased to hear that your client [the claimant] has agreed to accept our offer, on the basis set out in our letter of 15 January, of £19,000 in full and final settlement of any claim he might have in relation to or arising out of his employment with the GLSB [the employers].”

The claimant told me that he had received a cheque for £17,030.49 on 6 February 1990 and a further cheque for the balance of £1,969.51 on 15 March 1990. Although he did not submit in evidence the letter from the employers’ solicitors dated 15 January 1990, he told me that the sum of £17,030.49 had been negotiated and took into account the following elements: £12,423.00 for six months salary; £1,242.41 for 13 days holiday pay; £116.49 for past expenses and £3,248.59 for the employers’ contribution to the claimant’s pension fund for a period of six months. He told me that the amount had been rounded up to £19,000 to compensate for the employers’ failure to follow the grievance procedure set out in his contract of employment. Finally the claimant referred me to a letter from his solicitor dated 26 June 1991 in which the nature of the payment was explained as follows:

“This was an *ex gratia* payment and not a payment for a salary in lieu of notice. This is evidenced by the lengthy negotiations which took place

between myself and [the employers' solicitors] to reach agreement on a final payment."

10. Regulation 7(1)(d) comes into play where the claimant's employment is terminated and he receives "compensation". Subject to a cut off of 52 weeks from the date following termination of the employment, it provides that a claimant is in consequence precluded from unemployment benefit for the "ineligible period", varying in length according to the character attributed to the "compensation" by the person paying it. It is not in dispute that the claimant received a payment on the termination of his employment and accordingly I first have to consider whether the whole, or any part, of the payment ranked as "compensation" and was caught by the provisions of paragraph 1(d) in consequence.

11. The claimant's employment terminated on 24 November 1989 and in due course he received a payment of £19,000. Was the whole or any part of this payment made to the claimant "in respect of the termination of the employment" for the purposes of regulation 7(6)? The phrase "in respect of" is not defined and therefore must be given its ordinary dictionary meaning of "in relation to", "because of", "in consequence of", "due to". In my view the phrase is wide enough to bring within its ambit any payment which would not have been made by the employers to the claimant but for the ending of the employment. It is not in dispute that the claimant was made a payment in respect of a termination of his employment.

12. I next have to consider whether the whole or any part of the payment made to the claimant was "compensation" as defined in regulation 7(6). This provides that any payment made to a person in respect of the termination of his employment ranks as "compensation" except in so far as it falls within the list of excluded or exempt payments listed in sub-paragraph (a)-(f). It follows that it is necessary to determine the true nature of the payment. The label attached by the parties is not conclusive of its character (R(U) 8/73). Further, the payment under the "new" regulation 7(1)(d) unlike a payment under the "old" regulation 7(1)(d) or its predecessors requires to be severed into its component elements in order to determine whether the whole or any part of the payment falls within the list of excluded or exempt payments. In the present case the employers' Chairman's letter dated 24 November 1989 stated that "The Fund will make an *ex gratia* payment to you of half your yearly salary in recognition of your time with us". However, the employers stated on 8 December 1989 on the relevant form UB85 that the claimant was entitled to six months notice of termination of employment and that although the amount of the payment to be made to the claimant as a result of the employment ending was still under negotiation, a payment in lieu of the period of unworked notice would be included in such payment. I appreciate that the claimant and his solicitor contend that the payment was an *ex gratia* payment, but this does not assist the claimant unless he can show that each component element of the payment fell within the list of excluded or exempt payments in regulation 7(6).

13. I now turn to the list of excluded or exempt payments in regulation 7(6) of the regulations. With regard to sub-paragraph (a) the claimant confirmed in reply to the adjudication officer's written submission dated 9 August 1991 that "there was no payment for any remuneration in respect of any period before termination". Accordingly no part of the payment fell within the terms of that sub-paragraph. The element of holiday pay amounting to £1,242.41 fell to be exempt under the provisions of sub-paragraph (b). It is not in dispute that sub-paragraph (c), (d) and (f) were not

applicable in the present case. With regard to the provisions of sub-paragraph (e) it is not clear from the evidence before me whether the sum of £3,248.59 fell within the terms of that sub-paragraph or whether it was an amount equivalent to the contributions the employers would have made to a private pension scheme had the claimant been allowed to work the period of notice to which he was entitled under the contract of employment. Mr. Heath conceded that sub-paragraph (e) applied. I accept this as the question is not crucial to the determination of the issue. I should add for completeness that there appears to be no provision to exclude from the definition of "compensation" the payment of expenses incurred in respect of a period prior to termination of employment. In my view such a payment cannot fall within the meaning of "remuneration" or "emoluments" in sub-paragraph (a) and (c). However, nothing turns on this question and I do not propose to comment on it further.

14. It will be seen that only a small part of the payment received by the claimant on the termination of his employment falls to be excluded from the definition of "compensation" under regulation 7(6). The claimant is caught by the provisions of regulation 7(1)(d) because he received "compensation" and in consequence is precluded from receiving unemployment benefit during the "ineligible period".

15. Under the provisions of regulation 7(5) the "ineligible period" as defined began on 25 November 1989, i.e. "on the day following the termination of the employment". The employers represented that part of the compensation paid by them to the claimant was paid in lieu of notice of termination of employment so that the ineligible period ended "on the due date" under the provisions of paragraph 5(a)(i). The relevant definition of "due date" in the present case is "the date on which any period of notice applicable to the person was due to expire". The period of notice expired on 24 May 1990 so that the inclusive ineligible period for the purposes of paragraph 5 was from 25 November 1989 to 24 May 1990. The claimant claimed unemployment benefit on 27 November 1989 and the adjudication officer decided that the claimant was not entitled to unemployment benefit for the inclusive period from 30 November 1989 to 25 December 1989. It should be noted that a forward disallowance was imposed for the inclusive period from 26 December 1989 to 24 May 1990. Mr. Heath agreed that the inclusive period from 27 November 1989 to 30 November 1989 comprised "the waiting days" under the provisions of section 14(3) of the Social Security Act 1975.

16. For the reasons stated above the claimant is not entitled to unemployment benefit during the inclusive period from 27 November 1989 to 24 May 1990. I should add for completeness that the claimant submitted that at the date of the adjudication officer's decision he had not received any payment although he readily conceded that the employers' chairman's letter dated 24 November 1989 confirmed that such a payment would be made although the precise amount was subject to negotiation. Regulation 7(1)(d) refers to any case where "the employment of a person is terminated and he receives compensation . . ." The regulation operates to exclude entitlement to benefit for those days falling within the ineligible period beginning on the day after the employment terminates and ending on a day determined by reference to the definition of due date. The calculation of the ineligible period is not in any way affected by when the claimant receives the "compensation".

17. For the reasons stated above the tribunal's decision was erroneous in law. As I consider it expedient to exercise the power conferred on me by section 101(5)(ii) of the Act, I give the decision set out in paragraph 1.

Date: 18 December 1991

(signed) Mrs. R. F. M. Heggs
Commissioner