National Insurance Act 1965 Section 20(1)(b) as substituted by Section 3(1) of the National Insurance Act 1966—whether employment terminated or suspended by the employer

The claimant, a member of the Society of Graphical and Allied Trades (S.O.G.A.T.), was a printer's warehouseman. After being regularly employed for 12 years he became unemployed in March 1966 and became what is known in the trade as a " casual casual ". Each day employers notified S.O.G.A.T. of their labour requirements and the claimant attended the S.O.G.A.T. premises each afternoon for possible allocation to a night shift for one of the employers. Payment by employers to the claimant was in full without deduction for tax, to which he was assessed at the end of the year. In the morning his National Insurance card was handed back by the employer. He was not allowed to make an arrangement with the employer to work for him on any future night. The jobs were allocated by S.O.G.A.T. from lists which showed simply who worked on earlier nights and it was purely fortuitous whether on the following night the claimant worked for the same employer if he was allocated a job. He had worked for 18 employers including printers and publishers of newspapers and periodicals, as well as distributors and wholesalers in the printing trade. All had premises in London, some in the Fleet Street area and others at different distances and in different directions therefrom, some as far away as Park Royal.

The dates on which the claimant did not work disclosed no intelligible pattern, except that the interval between any given night of work and the immediately preceding and succeeding ones was never a long one. The claim for basic unemployment benefit was allowed for the various days and short periods in February, March, April, May and June 1967 which fell between spells of work for one or other of the employers in the trade, and the question arose whether for the purposes of section 20(1)(b) of the National Insurance Act 1965 as substituted by section 3(1) of the National Insurance Act 1966 his employment with the various employers in the trade had been terminated or suspended by his employer and whether in consequence he was entitled to earnings-related supplement.

Held that the Umpire's doctrine whereby a special meaning had been given to the phrase " termination of employment " in the law relating to unemployment benefit, a doctrine which had hitherto been adopted in numerous reported and unreported decisions of the Commissioner, should not be applied in this case. The phrase " termination of employment " in the old and new sections 20(1)(b) of the National Insurance Acts and in regulations 7(1)(j) and 7(1)(e) of the National Insurance (Unemployment and Sickness) Benefit Regulations 1967 [S.I. 1967 No. 330] 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. The claimant was, therefore, not disentitled to earnings-related supplement of unemployment benefit for any of the days in question under section 20(1)(b) of the National Insurance Act 1965 as substituted by section 3(1) of the National Insurance Act 1966.

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1. Our decision is that the claimant's employment was terminated at the end of his shift on each of the days referred to in the insurance officer's decision of 21st June 1967, and that the claimant is therefore not disentitled to earnings-related supplement to unemployment benefit for any of those days under section 3(1)(a) of the National Insurance Act 1966.

2. This is the first of three appeals which were heard by us in succession, the others being on Commissioner's Files C.U. 161/68 (Decision R(U) 8/68) and C.U. 160/68. All raise closely connected questions relating to the doctrine whereby a special meaning has been given to the phrase " termination of employment " in the law relating to unemployment benefit. The problems arise in this appeal under section 20(1)(b) of the National Insurance Act 1965 as substituted by section 3(1)(a) of the National Insurance Act 1966, and in the other two appeals under regulation 7(1)(j) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1967 [S.I. 1967 No. 330], to which we will refer simply as the 1965 and 1966 Acts, the new section 20(1)(b) and the regulations. Much of the argument was devoted to the history of that doctrine and applies equally to the three cases. We will therefore deal with the matter mainly in this decision and the other cases to some extent by reference to this one.

3. The claimant is a printer's warehouseman who works on the night shift, lives in South London and is a member of the Society of Graphical and Allied Trades (S.O.G.A.T.). Having been in regular employment for 12 years he had the misfortune in March 1966 to become unemployed and to become one of more than 1,000 workers in the trade known there as " casual casuals ". The procedure by which he obtains employment is as follows. He is registered for employment with S.O.G.A.T. Each day the employers notify that union of their labour requirements. The claimant attends with many others at the S.O.G.A.T. premises in the afternoon. S.O.G.A.T. allocates the work as fairly as it can between the members attending. The claimant works that night for an employer, if he has been allocated to one. He is paid in full without any deduction for tax, to which he is assessed at the end of the year. In the morning his cards are handed

back by the employer. He is not allowed to make a private arrangement with the employer to work for him on any future night. The jobs are allocated by S.O.G.A.T. from lists which show simply who worked on earlier nights, and it is purely fortuitous whether on the following night the claimant will work for the same employer if he is allocated to a job. During a period of a year for which evidence is available, it appears that the claimant worked for 18 employers, including printers and publishers of newspapers and periodicals, as well as distributors and wholesalers in the printing trade. All have premises in London, some in the Fleet Street area and others at different distances and in different directions, some as far away as Park Royal.

4. The claimant claimed unemployment benefit, including not only basic benefit but also earnings-related supplement, in respect of 51 days between 2nd February and 12th June 1967, which are specified in the insurance officer's decision dated 21st June 1967. As would be expected from the above description, the dates on which he did not work disclose no intelligible pattern, except that the interval between any given night of work and the immediately preceding and succeeding ones was never a long one. The claim for basic unemployment benefit was allowed ; the insurance officer's representative told us that this was probably by virtue of the escape provisions contained in Schedule 3 to the regulations, probably paragraph 2(2) of that Schedule. There is no evidence showing for which employer the claimant worked on any night. The insurance officer disallowed the claim, so far as it related to earnings-related supplement, by virtue of the new section 20(1)(b).

5. The local tribunal evidently considered the claimant's appeal with the greatest care. They referred to a number of Commissioner's decisions including Decisions R(U)17 to 19/59, which related to certain dockyard cases. By a majority the tribunal dismissed the appeal. The basis of the majority's decision was that the dockyard cases established that in certain circumstances a group of employers was to be regarded as the employer for the purposes of the relevant statutory provision, that in this case the claimant was employed by the group, and that at the end of a shift his employment by them was merely suspended and not terminated. The view of the minority was that the employers were not all in the same section of industry and were quite widely spread geographically ; the dock cases were therefore distinguishable.

6. On his appeal to the Commissioner the claimant was represented by counsel, and the insurance officer by a legal representative, to both of whom we are greatly indebted for their careful and helpful arguments. It was common ground between them that termination should be given the same meaning in regulation 7(1)(j) as in the new section 20(1)(b), and that, if the words in that section and regulation were interpreted in accordance with their natural and ordinary meaning and without regard to earlier decisions, termination would mean simply termination of the rights and obligations under the contract of employment.

7. The first contention on behalf of the claimant was that the provisions should be construed in this manner. The insurance officer's contention in answer was that, although this construction would undoubtedly have been adopted if the matter had been *res integra*, it would not be right for it to be adopted now, in view of the fact that for more than half a century in unemployment benefit law a doctrine had been established by the Umpire under earlier legislation, and accepted by the Commissioner since 1948, governing the payment of unemployment benefit in relation to holidays, trade disputes and the rule commonly known as " the normal idle day " rule. The effect of this doctrine is stated in paragraph 15 below. These

arguments make it necessary to examine the history of the doctrine in some detail.

8. Under the National Insurance Act 1911 every workman who, having been employed in one of certain specified trades, was unemployed and fulfilled the statutory conditions was entitled to unemployment benefit (section 84 and the Sixth Schedule). The Act contained a trade dispute provision, which can be recognised as the forerunner of section 22(1) of the 1965 Act. There was however no specific provision for holidays or days on which the workman did not ordinarily work. So far as relevant to this appeal, the short question which had to be decided was whether the workman had been " continuously unemployed " (section 86(2)). In Umpire's Decision 228 (given in 1912) the Umpire said " As at present advised, I do not consider that a workman has been continuously unemployed when his non-employment is due to recognised annual holidays which form part of the accepted terms of his engagement, there being the intention on the part of the workman to resume work and on the part of the employer to accept the workman's services at the termination of such holidays in the ordinary course. Where such holidays are extended by mutual consent the extended period forms part of the regular holidays. Where the extension is to meet the employer's convenience alone, then during such extended period the workman has not been employed." Further decisions under the 1911 Act are U.D. 301 and U.D. 393.

9. In the Unemployment Insurance Acts 1920 and 1935, the main Acts which replaced and extended the 1911 Act, the classes of persons who came within the scope of the insurance were defined somewhat differently. They no longer referred to a person who had been employed in a trade : " all persons . . . who are engaged in any of the employments specified " in a Schedule were insured. The Schedule referred mainly to employment under any contract of service. Under both these Acts therefore the insurance was directly related to the contract. Such provisions obviously give rise to a problem. If the only person insured is a person who is employed under a contract of service, how can he at the same time be unemployed ? As to this it is necessary to say no more than that under both the present and past legislation it has always been accepted that a person may be unemployed even though his contract of service continues to run, e.g. a factory worker who is temporarily laid off for a few days but would be regarded as continuing in the employment of the occupiers of the factory. Under the 1920 and 1935 Acts there was still a trade dispute disqualification but no specific reference to holidays nor any specific provision for any normal idle days. The question, so far as relevant to this case, still was whether the claimant had been continuously unemployed.

10. Under the 1920 Act the Umpires continued to develop the doctrine referred to in paragraph 8 above. See U.DD. 473, 535, 536, 614, 3599, 5819, 1331/26, 16930/31 and 18284/32. During this period the doctrine was extended to trade dispute cases and the " 12 days rule " was evolved. The effect of this rule was that if a person's employment had been terminated (in the ordinary sense) before a period during which, if still subject to a contract of employment, he would have been disentitled to benefit, e.g. a holiday period or a period of a strike, benefit was disallowed unless at least 12 days before that period he had been discharged and there was no intention of resuming the relationship of employer and employee on the next available opportunity (U.D. 16930/31). By then the doctrine had become extremely elaborate, and in U.D. 18284/32 the Umpire laid down 21 main principles for dealing with holiday cases.

11. The 1965 Act divides insured persons for the purposes of the Act into three classes, employed persons, self-employed persons and non-employed persons. " Employed persons " are persons gainfully occupied in employment in Great Britain, being employment under a contract of service (section 1(2)). It is clear from the definition of self-employed persons that a person can be gainfully occupied in employment in Great Britain but at the same time not be an "employed person ". That phrase therefore has a special technical meaning. The interpretation section (section 114) provides that, except where the context otherwise requires, " employed contributor's employment " means any employment by virtue of which an insured person is an employed person ; and " employment " includes any trade, business, profession, office or vocation and " employed " shall be construed accordingly except in the expression " employed person ". Subject to a minor and irrelevant exception it is only contributions as an employed person that gives title to unemployment benefit ; self-employed and non-employed persons are not entitled in general to that benefit. These provisions replace without any alteration relevant to this case similar provisions in the National Insurance Act 1946 sections 1 and 78. The 1966 Act so far as relevant to this appeal is to be construed as one with the 1965 Act (section 14(2)(a) of the 1966 Act) and accordingly the above expressions have the same meanings in that Act also.

12. If we disregard certain provisions which never came into force owing to the outbreak of war (see paragraph 5 of Decision R(U) 1/62), the first express provision for holidays was contained in regulation 6(1)(e)(i) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948 [S.I. 1948 No. 1277]. This provided that for the purposes of unemployment and sickness benefit " a day shall not be treated as a day of unemployment if on that day a person does no work, and—(i) is on holiday ; . . . ". Regulation 6(2) qualified this provision and referred to indefinite suspension and termination of the employment ; regulation 6(1)(d) also referred to termination.

13. The "normal idle day " rule was first enacted by section 4(1) of the National Insurance Act 1957, which provided that " where a person is employed in any employed contributor's employment which has not been terminated " certain legal consequences follow unless an additional condition is fulfilled. Section 4(2) enabled regulations to prescribe amongst other things circumstances in which an employed contributor's employment which had not been terminated might be treated as if it had been terminated. (We will refer to these as the 1957 Act and section 4.) Section 4 is reproduced in section 20(1)(b), as originally enacted, of the 1965 Act, which still applies and will apply until March 1969 (as the law stands at present) for the purposes of basic unemployment benefit. The new paragraph 20(1)(b), substituted by the 1966 Act, is in operation for the purposes of earnings-related supplement, but not yet for those of basic unemployment benefit. We therefore have the situation that two different statutory provisions at present operate concurrently for different parts of the same benefit claimed for the same day. The new section 20(1)(b) provides that " where an employed contributor's employment has not been terminated but a person's employment therein has been suspended by the employer, a day shall not be treated in relation to that person as a day of unemployment unless it is the seventh or a later day in a continuous period of days on which that suspension has lasted, " certain days being disregarded for that purpose. A new paragraph 20(2)(b) gives the Minister (now the Secretary of State) the widest powers to prescribe circumstances in which an employed contributor's employment may be

treated as having been, or not having been, terminated or suspended for the purposes of the new section 20(1)(b).

14. Between 1948 and 1966 the Commissioner accepted that the Umpire's doctrine of termination of employment applied equally under the legislation in force during that period ; see for example, Decision R(U) 20/57 in relation to the trade dispute provision, Decisions R(U) 16, 17 and 18/59 in relation to the normal idle day provision and Decisions R(U) 19/59, R(U) 1/62, R(U) 1/66 and R(U) 2/66 in relation to holidays. All these were decisions of Tribunals of Commissioners. In Decision C.S.U. 4/61 (not reported) a Commissioner applied the same doctrine under regulation 6(1)(d).

15. The Umpire's doctrine of termination was stated in Decision R(U) 16/59 as follows :

> " 8. The distinction between the " termination " and the " suspension " of employment was formulated by the Umpire in decisions under the Unemployment Insurance Acts. It may be well to point out that in these decisions the Umpire did not use the word termination in the sense of termination of the legal obligations of the contract of service . . . The Umpire used the word " terminated " as meaning " finally discharged without any intension of resuming the relationship of employer and employee on the next available opportunity ". See Umpire's Decision 16930/31.
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> 9. By the words " on the next available opportunity " the Umpire clearly meant an opportunity which would occur after an interval of unemployment which was not longer than the employee would normally be prepared to accept before taking employment elsewhere."

16. Regulation 6(1)(e)(i) was revoked as from 6th October 1966 by the National Insurance (Unemployment and Sickness Benefit) Amendment Regulations 1966 [S.I. 1966 No. 1049], which substituted for it as regulation 6A a provision which is now in regulation 7(1)(j) of the (consolidating) regulations of 1967. This provides that ". . . where in the case of any person an employed contributor'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, unless that person's employment therein has been indefinitely suspended and the day in question is the seventh or a later day, ascertained in accordance with the provisions of section 20(1)(b) of the Act, as substituted by section 3(1) of the 1966 Act, in a continuous period of days on which that suspension has lasted. . . ."

17. There is no dispute as to the meaning of termination of employment under the general law. The nature of suspension is explained in *Bird v. British Celanese, Limited* [1945] 1 K.B. 336 and other cases referred to in Halsbury's Laws of England (Third Edition) vol. 25, page 518, paragraph 989.

18. In support of his contention that the Umpire's doctrine ought not now to be departed from, the insurance officer's representative referred us to *North British Railway Company v. Budhill Coal and Sandstone Company and Others* [1910] A.C. 116 at 123, 124 and 127, *Beaman v. A.R.T.S., Limited* [1949] 1 K.B. 550 at 567, *Barras v. Aberdeen Steam Trawling and Fishing Company, Limited* [1933] A.C. 402 at 446-447, *The Royal Court Derby Porcelain Co. Ld. v. Raymond Russell* [1949] 2 K.B. 417 at 427 to 429, *Regina v. Bow Road Justices (Domestic Proceedings Court), Ex parte Adedigba* [1968] 2 W.L.R. 1143 and Decision C.S.U. 1/68 (not reported).

19. The insurance officer's representative helpfully formulated his main propositions in writing in a document headed " General propositions ". One of these was that if the employment of a claimant who regularly works intermittently for one employer in an industry at a place is regarded as suspended by his employer under the " finally discharged without any intention of resuming the employer/employee relationship at the next available opportunity " test, the employment of a claimant who regularly works intermittently for more than one employer in that industry at that place should similarly be regarded as suspended.

20. The 1965 Act was a consolidating Act, and the insurance officer did not seek to rely on the fact that section 20(1)(b) of the 1965 Act re-enacted words which had been interpreted by the Commissioner under section 4 of the 1957 Act. We think that his argument can be stated most strongly in relation to the enactment of the new section 20(1)(b) in 1966 containing those words which had since 1957 been construed in accordance with the Umpire's doctrine. The argument seems to us however to be much weakened by the mention in the section of suspension used in contrast to termination. The argument also seems to us far less strong where it is based on the reference to termination of employment in section 4 of the 1957 Act and the 1948 regulations. The Umpire's explanation of the meaning of termination was not an interpretation of that word appearing in any Act, but of the word used in phrases devised by him or his predecessor to explain words which were in the Act. In relation to holidays the interpretation was two stages removed from the Act. He explained " termination ", which he used to explain what was meant by being on holiday, which was not in the Act but was itself an explanation of the meaning of the phrase " continuously unemployed ", which did appear in the Act. We have of course not overlooked the further argument open to the insurance officer that the practice of a Tribunal of Commissioners has almost invariably been to follow earlier decisions of such a Tribunal, and any other course has been taken only in exceptional circumstances.

21. In the *Budhill* case earlier interpretations of the relevant words in contracts were treated as being strong evidence of the meaning of the words in a statute but not as conclusive. As to the re-enactment of a phrase which has an accepted earlier judicial construction Lord Macmillan in the *Barras* case found it " rather a strain to have to believe that the reputed omniscience of Parliament extends to every decision of the Courts ". A decision of the Commissioner or a Tribunal of Commissioners is by statute final, though subject to certiorari. Nevertheless, we are not a Court, and the insurance officer's representative was unable to refer us to any decision where the doctrine which we are discussing has been applied to a decision of the Commissioner or of any other tribunal.

22. In considering whether the Umpire's doctrine ought to be departed from we think it important to have in mind both the history of decisions by which it came to be accepted and the effects which have resulted and are likely to result from its adoption. Decision R(U) 11/53 was a decision on the meaning of " on holiday " in regulation 6(1)(e)(i), in which the Commissioner adopted in favour of the claimant the Umpire's limitation of the meaning of the words based on recognised or customary holiday, although no such words appeared in the regulations. In Decision R(U) 20/57 the Tribunal of Commissioners were concerned with the trade dispute section, which was a re-enactment of a similar provision in earlier legislation. In considering the question whether the claimant had lost employment by reason of a stoppage of work they adopted the Umpire's principle but held on the facts that the employment had been terminated and the claimant was therefore

not disqualified. Manifestly, if they had not adopted the Umpire's interpretation, the same conclusion would have been reached. Strictly speaking therefore their adoption of it was not necessary to the decision.

23. Decisions R(U) 16, 17 and 18/59 were decisions on section 4 of the 1957 Act. Here for the first time the Commissioners were concerned with a section which included the words " employed contributor's employment ". If we write out section 4 or the original section 20(1)(b) in full in the light of the interpretation sections in the statutes it reads as follows :—

> " . . . where a person is employed in any employed contributor's employment, that is to say employment by virtue of which he is an " employed person ", which means a person employed under a contract of service, which has not been terminated . . . "

24. Decisions R(U) 16 to 18/59 contain no reference to the definition of " employed contributor's employment " or an " employed person ", and we venture to think that insufficient attention was paid to the question whether the Umpire's doctrine could be applicable under the 1946 or the 1957 Act. In considering whether a person had been continuously unemployed the Umpire was dealing with a period of time, and it may well be that a somewhat imprecise conception of employment was permissible. Under the 1946, as well as the 1965, legislation we are concerned with individual days of unemployment, each of which if necessary has to be considered separately. In our judgment where one is dealing with employment, on a particular day, under a contract of service, which has not been terminated, this involves precise concepts, where the Umpire's doctrine is wholly inappropriate. In our judgment the acceptance of that doctrine in the 1959 cases was erroneous.

25. This is confirmed if one considers what the results have been. The insurance officer's representative told us that paragraph 9 of Decision R(U) 16/59 does not represent anything which is to be found in any Umpire's decision. It is a gloss on them, designed to limit, in favour of the claimant, the severity of the Umpire's rule, and it was relied on for that purpose by the majority in Decisions R(U) 1/66 and R(U) 2/66. In Decision R(U) 19/59 the Umpire's doctrine was applied under the holiday regulation (regulation 6(1)(e)(i)), and this was followed in Decision R(U) 1/62, a case where unfortunately the claimant was unrepresented, his arguments were of little assistance, and he did not appear before either the local tribunal or the Commissioners.

26. The history of the holiday cases since 1962 is that of a stream of indignant appellants who could not understand how their employment could be said not to have terminated when their contract of employment no longer subsisted. Countless anomalies were disclosed, as can be seen from many decisions collected in Mr. Jenkins' Digest at page 533 and the following pages, and in even more numerous unreported decisions. In the present case the insurance officer admits that a group of employers cannot be regarded for any of the relevant purposes as ' the ' employer. It seems to us that his proposition would produce further difficult problems in deciding the limits of an industry and a place. The present case illustrates the extreme difficulty of drawing the line. The Umpire's doctrine was applied in the 1959 decisions where there were several employers in one dockyard ; here there are more numerous employers spread over different parts of London.

27. At the hearing a further anomaly was revealed between decisions of the Minister of Social Security (now the Secretary of State for Social Services) on contribution and credit questions and those of the statutory authorities.

In answer to an enquiry from us the insurance officer's representative ascertained that where on a credit question the Minister is deciding whether employment has been terminated and the question would have been decided by the statutory authorities if the matter had come before them, the Minister applies the Umpire's doctrine in the same way as the statutory authorities would have done. If on the other hand the question is one for decision by the Minister in any event, then " termination " is interpreted according to its natural and ordinary meaning.

28. Our attention was drawn to a number of recent Commissioner's decisions, in which different views of these problems have been expressed. They included Decisions R(U) 4/67, C.U. 21/67, C.U. 1/68, C.U. 5/68 and C.S.U. 1/68 (the last four not reported).

29. Having given this matter anxious and careful consideration we have reached the clear conclusion that the Umpire's doctrine which we have discussed should not be applied in this case. In our judgment the phrase termination of employment in the old and new sections 20(1)(b) and in regulations 7(1)(j) and 7(1)(e) (which replaces 6(1)(d)) 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.

30. Applying this to the facts of the present case we have no doubt that at the end of his night's work with each employer the claimant's employment was terminated, and accordingly the new section 20(1)(b) did not operate to defeat his title to earnings-related supplement. This makes it unnecessary for us to consider the alternative arguments submitted by counsel on his behalf.

31. The claimant's appeal is allowed.

(Signed): R. G. Micklethwait
Chief Commissioner

H. I. Nelson
Commissioner

E. Roderic Bowen
Commissioner