Regulation 7(1)(j) Unemployment and Sickness Benefit Regulations 1967—Part-time music teacher employed by local education authority—whether days in the school holiday were days of recognised or customary holiday in connection with the claimant's employment

The claimant, who had been employed in a theatre orchestra for about 20 years, became redundant in May 1967. From 1955 onwards he had also been doing teaching work in a local education authority school as part-time qualified music teacher. By July 1967 he was working six half-day sessions weekly on Tuesdays, Wednesdays and Fridays and drawing unemployment benefit for Mondays and Thursdays. 15.7.67 was the first day of the school summer holiday, during which the claimant's services were not required by the education authority and he claimed unemployment benefit on and from that date.

It was clearly established that his original engagement with the local education authority was for a fixed period, namely the summer term 1955, but the claimant continued his services thereafter for ten years and there was no evidence of any subsequent re-appointment. Although he was given his National Insurance card at the end of the summer term 1967 and was not formally notified either that he would be re-employed next term or that he was discharged, the Director of Education confirmed in writing on 19.7.67, in reply to an enquiry, that the claimant would recommence on 1.9.67, the first day of the autumn term.

Held that there was in existence on 15.7.67 and throughout the relevant period a running contract of service by virtue of which the claimant continued to be employed by the local education authority and the claimant's employed contributor's employment was suspended but was not terminated at the end of the summer term 1967 ; that the evidence did not establish that the claimant's employment fell into two parts with the result that the reasoning of R(U) 7/63 did not apply in his case ; that accordingly the days in the school holidays were days of recognised or customary holiday in connection with the claimant's employment within the meaning of regulation 7(1)(j) and that the claimant was not entitled to unemployment benefit for the days in question.

In decision R(U) 7/68 given on the same day the Tribunal of Commissioners decided that the termination of an employed contributor's employment in regulation 7(1)(j) is to be construed in accordance with the natural and ordinary meaning of the phrase and not in the special sense in which termination of employment has hitherto been understood by the Umpire under earlier legislation and the Commissioner.

1. Our decision is that the claimant is not entitled to unemployment benefit from 15th to 25th July 1967, both days included.

2. For about twenty years the claimant was the first violin and leader of the theatre orchestra of a well-known city. In May 1967 he had the misfortune to lose that employment by being made redundant with a number of others. From 1955 onwards, concurrently with that employment, he was also doing teaching work for the local education authority in one of their schools in the capacity of a part-time qualified music teacher. By July 1967 he was working six half-day sessions weekly on Tuesdays, Wednesdays and Fridays and drawing unemployment benefit for Mondays and Thursdays. The 15th July 1967 was the first day of the school summer holiday, during which the claimant's services were not required by the education authority. His remuneration was based on the fact that the terms in a school year contained forty weeks and a week contained ten half-day sessions. He was paid for each session that he worked 1/400th of the annual salary of a full-time worker of his grade. If therefore he had worked six sessions regularly he would in a year have been paid 3/5ths of a qualified teacher's annual salary, and it is alleged and not disputed that this would have been paid in twelve calendar monthly instalments irrespective of the school's being in session or on holiday. In fact he was not so paid, his days worked

having been not entirely regular: there was a period of about two months in January/February 1967 when he did not work on any Wednesday afternoon, apparently because the orchestra had matinee performances.

3. The insurance officer disallowed the claim under regulation 6A of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948 [S.I. 1948 No. 1277], which regulation was inserted into the 1948 regulations by regulation 8 of the National Insurance (Unemployment and Sickness Benefit) Amendment Regulations 1966 [S.I. 1966 No. 1049]. The insurance officer should have referred to the National Insurance (Unemployment and Sickness Benefit) Regulations 1967 [S.I. 1967 No. 330] which revoked and replaced the 1948 and 1966 regulations as from 16th March 1967.

4. Regulation 7(1)(j) of the 1967 regulations provides, subject to qualifications not relied on in this appeal, 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 certain other conditions are satisfied. It is not suggested that on 15th July 1967 there was an indefinite suspension or that those conditions are satisfied. The question for decision in this appeal is therefore whether the words quoted above apply to the case, so that the days in question cannot be treated as days of unemployment, and accordingly unemployment benefit is not payable for them.

5. This is one of three appeals heard by us in succession, the others being on Commissioner's files C.U. 207/68 and C.U. 160/68. In Decision C.U. 20/68 [now reported as Decision R(U) 7/68] given by us today in the first of these cases we have explained our reasons for deciding that the termination of an employed contributor's employment in regulation 7(1)(j) and in section 20(1)(b) (in both its old and new forms) of the National Insurance Act 1965 is to be construed in accordance with the natural and ordinary meaning of the phrase and not in the special sense in which termination of employment has hitherto been understood by the Umpire under earlier legislation and the Commissioner. Copies of Decision C.U. 20/68 [R(U) 7/68] should be supplied, if requested, to the claimant, his association, the local tribunal and any others concerned with this case.

6. The first question for decision is whether the claimant's employed contributor's employment in the service of the education authority had not been terminated on 15th July 1967. Unless that condition is satisfied, the regulation does not apply in his case at all.

7. An employed contributor's employment is defined in section 114(1) of the 1965 Act as meaning any employment by virtue of which an insured person is an employed person. An employed person means a person gainfully occupied in employment under a contract of service (section 1(2)(a)).

8. It is important to keep in mind the distinction between the contract of service and employment under that contract, and to remember that in this legislation the words " employed " and " employment " seem to be used in more senses than one. The regulation, like the new section 20(1)(b), refers to " employment therein " i.e. to employment in an employed contributor's employment. Being unemployed means the same thing as being not employed, and it cannot be doubted that a person may be in employment in one sense but at the same time unemployed in another sense. If a man works a five-day week on the day shift in a factory his contract of

employment is not " terminated " every evening nor even on Friday evening, and in our judgment his employment is not terminated at those times, though it may be described as " suspended " or " interrupted " during nights and the week-end. Even if he is laid off for a few days or withdraws his labour owing to a dispute, neither his employment nor his contract of service would normally be regarded as having been terminated. Regulation 7(1)(j) itself, like the new section 20(1)(b), contrasts (indefinite) suspension and termination of employment. In the present case, if the claimant's agreement with the education authority was what may be described as a contract of employment running on for an indefinite period until it was terminated by notice, in our judgment it would not be right to hold that the contract or the employment under it had been terminated as opposed to suspended. If, on the other hand, there were a series of agreements each covering a fixed period, e.g. of either one school term or one school year ending in July (if that was when the school year did end), then we should hold that in July 1967 the contract and the employment were terminated and not merely suspended. The question which, if either, of these two arrangements was in operation is a pure question of fact to be decided on the available evidence. Unfortunately the association did not attend and was not represented at the hearing before us, and the claimant was not present and the evidence is in some respects scanty.

9. A letter from the director of education to the claimant on 28th April 1955 clearly establishes that his original engagement was for a fixed period, namely the summer term 1955. After that however the claimant continued his services at the school for ten years and there is no evidence of any subsequent reappointment. He told the local tribunal that [at the end of the summer term 1967] he was given his card and was not formally notified by the education authority either that he would be re-employed next term or that he was discharged. We attach great importance to the fact that in answer to an enquiry the director of education wrote on 19th July 1967 that the claimant would recommence on Friday 1st September 1967 the first day of the autumn term ; and the claimant on 22nd July agreed that the director's replies were correct. The fact that at this very early stage of the summer holidays both the employers and the employee understood that he would resume work at the beginning of the next term, as in fact he did, and there is no evidence of any fresh arrangement, seems to us very strong evidence that this was a running contract and the employment was merely suspended and not terminated.

10. Having fully considered all the evidence we draw the inference that there was in existence on 15th July 1967 and throughout the relevant period a running contract of service by virtue of which the claimant continued to be employed by the education authority, and we hold that the claimant's employed contributor's employment was suspended but was not terminated at the end of the summer term 1967.

11. The claimant's association contend that the claimant did not have a recognised or customary holiday, and that the period of school holiday did not necessarily affect him as his teaching at that time was only part of his work as a musician. This is really two contentions. As to the first, in view of our findings as to the nature of the claimant's contract and his employment, in our judgment the conclusion is inescapable that the days in the school holiday were days of recognised or customary holiday in connection with the claimant's employment within the meaning of regulation 7(1)(j). As to the second point, the evidence falls far short of satisfying us that the claimant's employment fell into two parts so that the reasoning of

Decision R(U) 7/63 could be applied to the case, as was done in the case of another musician to which the association have referred.

12. The association have not sought to distinguish between the different days of the week during the holiday period.

13. For these reasons we must hold that the claimant is disentitled by virtue of regulation 7(1)(j) to benefit for each of the days in the period before us. Manifestly the same conclusion will apply to later days in the same holiday.

14. We must draw attention pointedly to a matter of procedure. This appeal was out of time. The local tribunal's decision was given on 27th September 1967. The appeal was not received before 3rd January 1968, a few days out of time. The statute provides that an appeal to the Commissioner must be brought within three months from the date of the decision of the local tribunal, " or such further period as the Commissioner may in any case for special reasons allow . . . " (National Insurance Act 1965 section 70(2)). The association's only grounds for requesting an extension of time are that it was necessary to obtain further information from one of their offices. It would have been perfectly simple for them to submit a notice of appeal in time but subsequently ask to abandon it if further information warranted that course. By failing to give notice within the generous time limit of three months, the association were unwarrantably imperilling their member's interests. In the present case we should not have felt justified in granting the extension but for the fact that the application for it was supported by the insurance officer.

15. The association's appeal must be dismissed.

(Signed): R. G. Micklethwait
Chief Commissioner

H. I. Nelson
Commissioner

E. Roderic Bowen
Commissioner