

HARRISON v. DIRECTOR OF LABOUR AND SOCIAL SECURITY

Supreme Court

Spry, C.J.

14 March 1979.

Employment — meaning of “unemployed” — Social Insurance Ordinance, ss.2,10.

Social insurance — contributions credited during unemployment — entitlement to credit — Social Insurance (Contributions) Regulations, reg. 10.

The appellant claimed that a period during which he was not working because of a trade dispute was a period of unemployment for the purposes of reg. 10 of the Social Insurance (Contributions) Regulations. On appeal

HELD: “Unemployed” means without employment and the appellant was not unemployed during the time he was not working and not receiving remuneration.

Appeal

This was an appeal under s. 35 of the Social Insurance Ordinance (Cap. 145, 1965-69 Ed.) from a decision of the Social Insurance Appeals Board.

J. E. Triay for the appellant

F. E. Pizzarello for the respondent

20 March 1979: The following judgment was read —

This is an appeal under s. 35 of the Social Insurance Ordinance against a decision of the Social Insurance Appeals Board, upholding a decision of the Director of Labour and Social Security. It is common ground that at all material times the appellant was employed by the Ministry of Defence and that he, like many of his fellows, did no work and received no remuneration during a period of ten weeks on account of a dispute between the Ministry and the Civil and Public Servants Association, of which the appellant was a member. He claimed to be entitled to a credit under reg. 10 of the Social Insurance (Contributions) Regulations. These regulations were made under s. 3 of the Ordinance which, inter alia, gives the Governor power

to make regulations for treating a person's employment as continuing during periods of unemployment. The relevant parts of reg. 10 are as follows —

"10. (1) Subject to the provisions of these regulations, a contribution as an employed person shall be credited to an insured person for any week of unemployment if Condition I or Condition II of the Schedule has been satisfied:

(2) For the purposes of this regulation, a day shall not be treated as a day of unemployment if it is a day in respect of which the person concerned fails to prove, in such manner as the Director may require, that he is unemployed and capable of work and available for employment in an employed contributor's employment."

The Board, upholding the Director, found that the appellant had failed to discharge the burden of proof imposed by para. (2).

Mr. J. E. Triay, who appeared for the appellant, submitted that the Board had erred in failing properly to evaluate the law and that on the agreed facts the appellant was entitled to the credit as a matter of law.

The essential question is whether, for the purposes of reg. 10, the appellant ought to be regarded as "unemployed" during the time that he was not working. He was clearly not unemployed in any ordinary sense of the word, since neither he nor the Ministry had taken any step to determine the contract of employment to which they were parties.

Mr Triay's first argument was based on the definition of "employed person" in s. 2 of the Social Insurance Ordinance. This reads as follows —

"'employed person' means a person occupied in employment being employment under a contract of service or in employment by or under the Government of Gibraltar, and includes apprentices and learners under agreement whether written or oral and whether express or implied;."

There is no definition of unemployment and Mr. Triay's argument, if I understood him correctly, was that a person who was not an employed person, as defined, should be regarded as unemployed. With respect, I cannot agree. An unemployed person cannot be an "employed person" but a person who is not an

employed person is not necessarily unemployed. There are categories of persons who are not employed persons but who are not unemployed: under the Ordinance there are self-employed persons and, in England, non-employed persons. (I do not overlook the fact that the Gibraltar Ordinance as originally enacted did not apply to the self-employed.)

Mr. Triay developed his argument by submitting that the definition of "employed person" contains two elements: there must be a contract of service and also the person concerned must be "occupied" in his employment. This, he argued, must mean actively engaged in the duties of his employment. He submitted that unless such a meaning were given to the word, it would add nothing to the clause and every word in a statute ought to be given its due weight. Again I find myself unable to agree. The definition of "employed persons" was clearly derived from s.1 (2) of the English National Insurance Act, 1946, where the words are defined as meaning "persons gainfully occupied in employment in Great Britain, being employment under a contract of service." It is not an elegant expression but I think it is clear that the word "occupied" or some such word was required to support the word "gainfully". When the Gibraltar Ordinance was enacted, the word "gainfully" was omitted and I accept that the word "occupied" appears unnecessary. But Mr Triay's interpretation would lead to extraordinary results. For example, a person who, though not laid off, could not pursue his usual duties because a machine was being serviced or repaired would temporarily cease to be an employed person. I cannot believe that to have been the intention of the Legislature. "Occupied" is not a term of art and in its context I think it means no more than that the appellant's occupation is in employment under a contract of service.

Mr. Triay further argued that para. (4) of reg. 10 of the Social Insurance (Contributions) Regulations requires the regulation to be interpreted in accordance with the meaning given to the expression "period of unemployment" by s.8 of the Non-Contributory Social Insurance Benefit and Unemployment Insurance Ordinance (Cap. 145). He submitted that nothing in s.8 expressly disqualifies the appellant, if the test for credit is to be that contained in s.8. The first difficulty here is that the expression "period of unemployment" is used in para. (3) but not in para. (1) or para. (2) of reg. 10. On this Mr. Triay argued that the same principles must govern the interpretation of "week of un-

employed person is not necessarily unemployed. There are categories of persons who are not employed persons but who are not unemployed: under the Ordinance there are self-employed persons and, in England, non-employed persons. (I do not overlook the fact that the Gibraltar Ordinance as originally enacted did not apply to the self-employed.)

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employment' in para. (1), "day of unemployment" in para. (2) and "period of unemployment" in para. (3). I agree. Secondly, s.8 does not contain any definition of "unemployment": it merely lays down certain rules which are of no relevance to the circumstances of the present case, except para. (2), (a) which adds nothing to reg. 10(2) of the Social Insurance (Contributions) Regulations. Mr. Triay argued that because para. (2) (d) provides that a person following any gainful occupation is, with certain exceptions, not to be deemed to be unemployed, a person not in gainful occupation should be deemed to be unemployed unless otherwise disqualified. With respect, that does not follow. It is the same fallacy as regarding a person who is not an "employed person" as unemployed. I cannot see anything in s.8 that positively assists the appellant's case.

Mr. Triay conceded that s.10 of the Non-Contributory Social Insurance Benefit and Unemployment Insurance Ordinance precludes the appellant from receiving unemployment benefit but he argued that this in no way affected the entitlement to credits.

I have not found it necessary to deal with the arguments put forward by Mr. Pizzarello for the respondent. I should, however, mention that he cited s.5 (2) of the Social Insurance Ordinance as recognizing that a person may not be working and may not be receiving remuneration but does not on that account necessarily cease to be in employment.

I can see no reason to give the word "unemployed" any meaning other than its ordinary one in current English usage, that is to say without employment. On that basis, on the agreed facts, the appellant was not unemployed during the relevant period. It follows that he does not qualify under reg. 10 and that the decision of the Board was right.

I would add that I heard some argument on the meaning of "available for employment." I do not find it necessary to decide it for the purposes of this appeal, and I do not think any general definition desirable: I think it is a matter to be decided on the facts of each case.

The appeal is dismissed.