

COPY

MJG/SH/18/MD

Commissioner's File: CSB/0612/1986

C A O File: AO 2792/SB/1986

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: David Frederick Finch

Social Security Appeal Tribunal: Woolwich

Case No: 21/27-12

[ORAL HEARING]

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 11 March 1986 as that decision is erroneous in law and is set aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Social Security Act 1975, section 101(5) as substituted by paragraph 7(3) of Schedule 5 to the Social Security Act 1986.

2. This is an appeal to the Commissioner by the adjudication officer against the unanimous decision of the social security appeal tribunal dated 11 March 1986 in favour of the claimant on his appeal from a decision of a local adjudication officer issued on 24 October 1985,

"No entitlement to supplementary benefit until 22.11.85." [but see para. 10 below].

On my direction the appeal was the subject of an oral hearing before me on 27 May 1987 at which the adjudication officer was represented by Mr E O F Stocker and the claimant was present and was represented by Mr N Halford of the claimant's local Unemployed Centre. I am indebted to Mr Stocker and to Mr Halford for their assistance to me at the hearing.

3. This appeal principally concerns the length of time after the termination of the claimant's employment on 11 October 1985 for which the claimant should be disentitled to supplementary benefit by reason of section 6 of the Supplementary Benefits Act 1976 which provides,

"6. (1) A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this subsection as so engaged"

Regulation 9 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981

[SI. 1981 No. 1526 as amended] provides for "circumstances in which persons are to be treated as engaged in remunerative full-time work". In the present case we are concerned with the provisions of regulation 9(1)(b) which provide for the deemed continuance of engagement in remunerative full-time work after an employee's employment has in fact ceased. The regulation has the effect, where it applies, of disentitling a claimant altogether from any entitlement to supplementary benefit, no matter how large or small are the 'final earnings' which the claimant receives. The regulation refers in a number of places to regulation 9 of the Supplementary Benefit (Resources) Regulations 1981 [SI. 1981 No. 1527 as amended] dealing with "calculation of income resources" and the inter-action of regulation 9 of the Conditions of Entitlement Regulations and regulation 9 of the Resources Regulations respectively makes for considerable difficulties in interpretation. Some simplification of the legislative scheme in this whole area may well be overdue.

4. Regulation 9 of the Conditions of Entitlement Regulations so far as is relevant provides as follows,

- "9. (1) For the purposes of section 6(1) [of the Supplementary Benefits Act 1976] (exclusion from supplementary benefit of certain employed persons) a claimant shall be treated as engaged in remunerative full-time work only where -
- (a) [stipulates the number of hours per week necessary for "full-time" work]
 - (b) he was engaged in remunerative full-time work within the meaning of sub-paragraph (a) [as indeed the claimant was in the present case], but not as a self-employed person, and -
 - (i) ... his employment has terminated ... and
 - (ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with Part III of the Resources Regulations (calculation of income resources) which, by virtue of regulation 9(2) of those Regulations as modified by paragraph (3) of this regulation, fall to be taken into account for a period subsequent to the termination of the employment ...;
 - (c) [relates to work as a self-employed person - not relevant here]
- (2) [Relates to commencement of employment - not relevant here]
- (3) For the purposes of paragraph (1)(b), regulation 9(2) of the Resources Regulations shall be modified to the extent that where the claimant receives -

- (a) by way of earnings to which paragraph (1)(b) applies a payment of bonus or commission in respect of a period different from that in respect of which the other earnings are paid, that payment shall be treated as earnings in

addition to the other earnings for a period estimated by reference to a 5-day week on the basis of periodical earnings normally paid to him;

(aa) a payment of bonus or commission by way of earnings to which paragraph (1)(b) applies, in respect of the same period as other earnings which are paid on a different day, that payment of bonus or commission shall be treated as earnings for the same period as those other earnings;

(b)-(d) [not relevant]"

5. The basic rule in regulation 9(1)(b) is, therefore, that if an ex-employee receives 'final earnings' when his employment has terminated, those earnings are regarded as a resource looking forwards from the date of termination of his employment for the period for which they were earned (to be determined by detailed reference to regulation 9 of the Resources Regulations). The whole subject was examined in a decision of a Tribunal of Commissioners in R(S)23/84 and, although that decision was reversed on one point by the Court of Appeal (the Cunningham case - reported as an appendix to R(SB)23/84) the statements of principle by the Tribunal of Commissioners and indeed by the dissenting Commissioner Mr Rice are still valuable to assist in difficult cases such as the present. Paragraphs 17 and 18 of R(SB)23/84 set out the general principles applicable (and compare paragraph 30).

6. The general principle can readily be followed but it is its application to detailed cases in the present case to a payment or payments of bonus (or commission) to the claimant that difficulties arise. Before I deal with the facts of the case I draw attention to the fact that the question of bonus is dealt with by regulation 9(3)(a) and (aa) and, as I understand those provisions, they are intended to mitigate the normal rule that a bonus paid on the termination of employment would be spread forward for the number of weeks for which the bonus was paid, which could be a considerable number. Instead regulation 9(3) (a) and (aa) provide for the bonus simply to be treated as if it were a payment of weekly wages (by reference to the average wage paid (see regulation 9(a)). Regulation 9(3) operates for this purpose by modifying the normal rule as to spreading out of any payment of earnings by reference to the period for which it is paid.

7. That normal rule is to be found in regulation 9(2) of the Resources Regulations which provides as follows,

"Calculation of income resources

9. (2) Earnings and other income shall be calculated on a weekly basis, and ... payment shall be attributable as follows:-

(a) subject to the following sub-paragraphs, a payment of income shall be taken into account

(i) where it is payable in respect of a period, for a period equal to the length of that period, and

(ii) in any other case, for the period to which it is fairly attributable;

(b) a payment of income shall be treated as paid on -

(i) in the case of a payment which falls to be taken into account but which is payable before the first benefit week pursuant to the claim, the date on which it is

payable,

- (ii) in any other case the first day of the benefit week in which it is payable or the earliest succeeding benefit week in which, having regard to the method by which pension or allowance is payable in the particular case, it would be practicable to take it into account;"

8. In the present case the facts are not entirely clear since, although there was a detailed statement of facts by the local adjudication officer to the social security appeal tribunal, that tribunal did not make findings on all relevant matters, though it is clear to me from their record of decision on form AT3 that they took considerable trouble with this case. Consequently the new tribunal will need to ascertain the facts themselves but I now proceed to summarise them as I understand them probably to be.

9. The claimant was employed as an employee under a fixed term 26 week contract which expired on Friday 11 October 1985. The work consisting of large scale grass-cutting. On Thursday 17 October 1985 the claimant received a payment of his last wages ie. a week for the last week that he had worked and a "week in hand" from the beginning of the employment. These payments 'carried him forward' two weeks for disentitlement for supplementary benefit and I do not understand there to be any dispute about that. The difficulty arises out of the fact that the claimant's contract of employment provided not only for payment of weekly wages but also for a bonus for extra performance, to be paid at the end of every two working weeks (ie. 10 working days). The new tribunal must, however, enquire as to oral or written evidence of the contract of employment to ascertain whether this was so and when indeed the payments of bonus were "payable" (see below). Unfortunately the employer had cash flow problems and no bonus may have been paid until 17 October 1985 (but see tribunal's findings of fact - para. 11 below) when it appears that an unspecified sum on account of bonus was paid to the claimant together with his two weeks wages. The new tribunal will need to ascertain what the amount of that sum was. It then appears that further payments of bonus were made on 8, 15 and 25 November 1985 and 2 and 9 December 1985. It also seems that the overall amount of bonus due to the claimant was £1,400, which he eventually received, but exactly how much on each of the dates is not clear and the new tribunal should ascertain this.

10. The local adjudication officer applied regulation 9(3)(a) of the Conditions of Entitlement Regulations (see paragraph 4 above) to the bonus of £1,400 and divided it by the claimant's net weekly wage arriving at a figure of 54 days forward to 14 January 1986 for disentitlement for supplementary benefit. It was against that calculation that appeal was ultimately made to the original tribunal and I hold that it was within their jurisdiction to consider that matter also. The tribunal held that the adjudication officer's decision was erroneous and that "the applicant is entitled to supplementary benefit from week commencing 27 October 1985", giving as their reasons for decision,

"The tribunal were satisfied that the final payment of the bonus was money owing to the applicant over the 26 week contract, which had it have been paid at the correct time, within each period of the 10 day schedule, would not have been the subject of this appeal today, because this was money due to him over the 26 week period, and that he was not engaged in remunerative full-time work after period week commencing 27 October 1985. Regulation 9(1)(a) Conditions of Employment and Resources and Regulations 9(2)(b)(i) not satisfied."

11. I accept the adjudication officer's submission that that decision was erroneous in law

because it does not analyse the nature of the various payments of bonus when they were made or give detailed reasons as to the tribunal's conclusion, though I appreciate the difficulty of this type of case. The original tribunal's findings of fact were as follows,

"The applicant worked on a 26 week contract grass cutting and his schedule was rearranged every ten days. He was guaranteed a net wage weekly of approximately £130 gross £195, and this he received until 10 October 1985, and his week in hand on 17 October 1985. It was also agreed that he would work on a bonus system over the ten day cycle. Due to a cash flow problem only two payments were made £695 - for July 1985, and £130 1 August 1985 [the new tribunal should ascertain whether this was correct - compare paragraph 9 above]. He was therefore owed the sum of £1,400 which he eventually received. The tribunal were satisfied this was money which should have been paid within the 26 week contract."

12. In my judgment the legal position as to these payments of bonus is as follows. Regulation 9(1)(b) of the Conditions of Entitlement Regulations will apply only to "earnings calculated in accordance with Part III of the Resources Regulations (calculation of income resources) which, by virtue of regulation 9(2) of [the Resources Regulations], as modified by paragraph (3) of this regulation, fall to be taken into account for a period subsequent to the termination of the employment..." What that means I understand to be, as stated in R(SB)23/84, paragraph 33,

"However, the crucial point, in my judgment, is whether the relevant payment or payments arise out of one event, namely the dismissal of the person concerned. If the nexus which serves to connect the various entitlements is the discharge of the person concerned from his employment, the latter will in effect receive a composite payment, ie. a payment in discharge of the various heads of claim to which he is entitled to, and it is immaterial whether such composite payment is received as a single payment or a series of payment or whether it is received on a single date or a series of dates." (Dissenting decision of Mr Rice approved in this respect by Lord Justice Waller in the Court of Appeal - see the report at page 28, paragraph G - see also paragraph 38 of R(SB)23/84).

I do not consider that any of the amendments made by SI. 1984 No. 518 derogate from those statements of principle in R(SB)23/84 and I reject the written submission to the contrary of the adjudication officer (dated 27 November 1986.)

13. The new tribunal will first therefore need to ascertain whether there were any payments of bonus, eg. the payment for the last 10 day period, running up to the termination of employment, having the necessary link (nexus) with the termination of the employment. It is only such payment or payments that will be the subject of regulation 9 of the Conditions of Entitlement Regulations. Payments made subsequently to the termination of employment which were really by way of a debt owing to the claimant do not in my judgment come at all within regulation 9 of the Conditions of Entitlement Regulations (but they may well be a resource - see below).

14. The new tribunal will therefore need to spread over, under regulation 9 of the Conditions of Entitlement Regulations (using the special mode of calculation in regulation 9(3)), any payment of bonus which was connected with the termination of the claimant's employment. The mode of calculation under regulation 9(3) should be in my view simply to take the gross average weekly wage of the claimant and divide it into the bonus, not to take the net weekly wage as the divisor, as the original adjudication officer did in this case and I accept Mr Stocker's submission on that point. The reference in the regulation to "five days" means no more in my view than a requirement that an average gross weekly figure should be the divisor.

15. Then, so far as all other payments of bonus are concerned ie. those not connected with

the termination of the employment, they cannot be the subject of any disentitlement under regulation 9 of the Conditions of Entitlement Regulations and the new tribunal will need to ascertain in accordance with the ordinary principles in regulation 9(2) of the Resources Regulations what period those payments covered and when they are to be taken as paid, since payments of bonus are "earnings" (see regulation 10(1)(b) of the Resources Regulations). That means examination of the claimant's contract of employment, oral or written, to find out when those payments were "payable" (see regulation 9(2)(b)(i) of the Resources Regulations) and R(SB) 11/85) and to ascertain whether the periods for which they are payable (ie. presumably 10 day periods) in any way run into the period for which the claim for supplementary benefit was made. In such a case they will have to be taken into account as a resource of earnings in the ordinary way (but without considering the deeming provisions of regulation 9 of the Conditions of Entitlement Regulations).

16. If, as appears likely, these payments were "payable" for a period or periods which expired before ever the claimant claimed supplementary benefit, then in my judgment they cannot, when ascertaining his resources for supplementary benefit purposes during his period of claim, be taken as "earnings" and must be regarded as payments of outstanding debts which would go to swell the claimant's capital. Consequently the new tribunal will lastly need to enquire whether they would cause the claimant's capital to exceed the limit prescribed by regulation 7 of the Resources Regulations.

(Signed) M.J. Goodman
Commissioner

Date: 23rd June 1987