

SUPPLEMENTARY BENEFITS ACT 1976**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside; I remit the case for determination to a new social security appeal tribunal who should have regard to what I have said in the course of this decision.

2. This is a claimant's appeal against the decision of the Cleveland social security appeal tribunal, given on 8 January 1990, which confirmed a decision of the adjudication officer.

3. On 9 September 1985 the adjudication officer decided that supplementary benefit amounting to £5,211.78 had been overpaid in respect of the inclusive period from 17 February 1984 to 2 May 1985 and was recoverable from the claimant pursuant to section 20 of the Supplementary Benefits Act 1976. The adjudication officer had reached his conclusion on the ground that throughout the relevant time the claimant and his wife had been running market stalls, and that if that had this been known, entitlement to supplementary benefit would have been nil; and further that the claimant had misrepresented the situation by declaring that neither he nor his partner did any work or had any income other than child benefit. The aforesaid decision of the adjudication officer has already been the subject of a decision by an appeal tribunal who confirmed it. That decision was set aside by the Commissioner. This appeal arises out of the rehearing, by a differently constituted appeal tribunal, which resulted in the aforesaid decision of 8 January 1990. The Commissioner set aside the decision of the earlier tribunal because they omitted to make a finding on the issue of whether or not the claimant worked for 30 hours or more a week. The present tribunal in the reasons for their decision stated that on the balance of probabilities they found the claimant worked for at least 30 hours per week on average in connection with a market stall rented in his wife's name from 17 February 1984 to 2 May 1985. They accepted the written evidence of the witnesses relied upon by the adjudication officer rather than the evidence of the claimant. They gave reasons for preferring the written

evidence and for rejecting that of the claimant. They found as fact that as from 20 February 1984 to 29 April 1985 the market stalls were held by the claimant's wife on an average of 30.5 hours per week over a 60 week period, excluding 2 weeks at Christmastime. They further found that the claimant and his wife attended the stalls for approximately equal number of days throughout the period, in addition the claimant spent 1½ to 2 hours each morning and the same period each afternoon on all these days setting up and dismantling them.

4. The claimant's grounds of appeal have been drafted by Mr J. Featherstone of the Stockton and Hartlepool Law Centre. The point is taken that the tribunal, on the basis of the evidence which it accepted and its findings of fact, miscalculated the average number of hours worked. It seems to me that that criticism is well founded. The tribunal accepted that the claimant attended the stalls for about 50% of the period when they operated, namely an average of 15 hours per week. They accepted that the claimant worked for a further 3 hours on each of the days setting up and dismantling the stalls. Calculating the number of hours worked on the basis of those findings gives an average figure of 27 hours a week and not 30 hours on average as stated in the reasons for the decision. It seems to me that the mistake in the calculation of the hours is such a misdirection as to constitute an error in law and I must set aside the decision. I have considered whether it would be possible for me to give the decision myself. It seems desirable to do so as 8 years has transpired since the adjudication officer's decision. However the members of the tribunal rejected the claimant's evidence on the basis of his credibility and I have not had the advantage of seeing or hearing him. Consequently it would be unfair to reject his evidence without an oral hearing. Such a hearing was not sought and it would only delay matters further if I were to direct one now. The case will have to go back to a new tribunal for determination.

5. Strictly it is unnecessary for me to enter upon consideration of the point of criticism of the tribunal taken by the adjudication officer now concerned. He has taken the point that they failed to consider whether the work in which the claimant was engaged was "remunerative". He submits that the tribunal were required to establish that there was a link between the claimant's work and subsequent or expected remuneration. It seems to me self-evident that a person would not engage for the length of time which the claimant did work in the market unless it was done in expectation of payment. It will be for the new tribunal to determine the question afresh on the evidence before them and I remind them of the necessity to make adequate findings thereon; a task which should not be too onerous in view of the period of time during which the claimant assisted in work at the market. They should have regard to what was said by the Commissioner in CSB/413/1984 at paragraph 9:

"The claimant hoped to derive a profit from his business but the fact that he failed to do so is of no consequence so far as the relevant statutory provisions are concerned.

The claimant's work was "remunerative" although it might have been unprofitable."

6. I direct that the new tribunal in rehearing the case shall pay particular attention to the aspects to which I have referred in this decision above. The evidence on the average number of hours worked is such that the tribunal might well conclude that the claimant has worked on average for not less than 30 hours a week, that of course is a matter of fact for them and all I can do is to direct them to make a careful calculation. Finally they should make and record their findings on all the material facts and give reasons for their decision.

(Signed) J J Skinner
Commissioner

Date: 11 February 1992