

J. Mitchell

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CSB 410/84

JM/SH

Co-habitation ① Where prima facie appearances are against a couple, 'no small weight falls to be given to the views of friends and neighbours'. ② Where a different tribunal

SUPPLEMENTARY BENEFITS ACT 1976 [has an appeal tribunal] has decided the same question in respect of a different case. The current tribunal must consider that.

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

paras 11-16

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

③ where an allegation that alleged co-habitation has arisen by 1/91 filed - tribunal must make proper findings and if nec. deal with it reasons [para 17]

Supplementary Benefit Appeal Tribunal:

Case No: 6/216

[ORAL HEARING]

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the supplementary benefit appeal tribunal dated 22 December 1983 which confirmed a decision of the benefit officer (now the adjudication officer) issued on 26 October 1983.
2. I held an oral hearing of the appeal. The claimant appeared before me. He was assisted by Miss J G Bonner, solicitor of Messrs. Bower Cotton & Bower. The adjudication officer was represented by Mr E O Stocker. I am indebted to both Miss Bonner and Mr Stocker for their assistance in a somewhat troublesome case.
3. I have come to the conclusion that the decision of the appeal tribunal must be set aside and the matter referred for rehearing. That calls for two preliminary observations:
 - (a) The less I say here about the facts, the better.
 - (b) It is quite clear that the appeal tribunal went to considerable pains over its determination of this case. That its decision falls to be set aside is attributable at least as much to the peculiar circumstances of this matter as to any shortcomings on the tribunal's behalf.
4. The claimant is a divorced man, now aged about 37. He lives with the two sons and the daughter of his erstwhile marriage. Those children are all of school age. The other principal character in the narrative is a woman to whom I shall refer as 'Mrs J'. Mrs J is also divorced. She, too, has two sons and a daughter of her erstwhile marriage; and those children, too, are all of school age.

5. In or about July 1981 the claimant and Mrs J first met one another. Mrs J, with her three children, moved into the claimant's house on 20 December 1981. She wanted a 'father figure' for her children; and, on his part, the claimant wanted a 'mother figure' for his children. An extension to the claimant's house has very recently been completed. Prior to that, the accommodation was extremely cramped. The claimant slept in one room with his two sons. The claimant's daughter shared a room with Mrs J's daughter. Mrs J's two sons shared another room. Mrs J slept in the lounge. (Now that the extension is complete, Mrs J has a bedroom of her own.)

6. It has all along been the contention of both the claimant and Mrs J that they have neither lived together as husband and wife nor contemplated so doing. Mrs J, they contend, acts as the claimant's housekeeper. The relationship goes no further than that. Mrs J also has a part-time job as a relief cashier. At the time when she moved into the claimant's house, the claimant was in employment. He lost that employment on 30 September 1983. He claimed unemployment benefit and supplementary benefit on 3 October 1983. At the end of February 1984 he set up his own business. That did not, apparently, prosper. He obtained employed earner's employment in October 1984.

7. It is neither necessary nor desirable that I should here go into details of the financial arrangements between the claimant and Mrs J. Suffice it to say that:

- (a) the claimant does not pay Mrs J any wages or salary;
- (b) the claimant meets the mortgage and rates payments;
- (c) the cost of food is shared equally between the claimant and Mrs J; and
- (d) the claimant and Mrs J severally pay for the clothes and provide the pocket-money for their respective children.

8. Mrs J still goes under her married name. It seems to be common ground that friends and neighbours do not regard them as living together as husband and wife. I was told at the hearing before me that the claimant's children call him 'Dad' and Mrs J's children call her 'Mother'. The claimant's children do not, however, call Mrs J 'Mother' and Mrs J's children do not call the claimant 'Dad'. The claimant's children call Mrs J by her christian name and Mrs J's children call the claimant by his christian name. (I do not think that this last item of information was before the appeal tribunal. The tribunal recorded careful findings of fact - but no evidence whatever is recorded on the face of the relevant form LT 235.)

9. A solicitor drew up a short form of agreement which sets out (or purports to set out) certain of the terms upon which Mrs J and her family lived in the claimant's house. That agreement refers to Mrs J as 'the Employee'. I need here say only that there is a clause which provides that either party shall be entitled to terminate the agreement 'for whatever reason' upon giving to the other three months notice in writing.

10. I have already said enough to demonstrate that the question of whether the claimant and Mrs J were living together as husband and wife is obviously a difficult one. In many respects the eight occupants of the claimant's house were living, and live, as one family. That, however, is, in view of the size of the accommodation, almost inevitable. It cannot be denied that there are ample grounds for suspecting a husband and wife type of relationship. On the other hand, it must be borne in mind that, if such is not the relationship, there are obvious difficulties in proving that negative. It seems to me that it is against that background that the written agreement must be viewed. As a contract of employment, it may seem somewhat unreal. But, if the parties did not intend to live as husband and wife, they can hardly be criticised for taking such steps as were open to them to establish to the outside world that they did not so intend. I must say, too, that where prima facie appearances may be so much against the parties involved, no small weight falls to be given to the views of friends and neighbours. ||

11. What is really disturbing about this case, however, is the extraordinary inconsistency of the approach of the adjudicating authorities to the relationship between the claimant and Mrs J. Mrs J had been awarded a supplementary allowance with effect from 9 March 1981 and was still in receipt of that allowance when she moved into the claimant's house. She duly notified the local office of the Department of Health and Social Security of that move. An officer of the Department visited her on 16 February 1982 and made a detailed report. The upshot was that the benefit officer decided that Mrs J and the claimant were living together as an unmarried couple. Since the claimant was at that time in full-time employment, the consequence was that Mrs J lost her supplementary allowance. She appealed against the relevant decision. She attended the appeal tribunal hearing on 22 April 1982 but, apparently, there withdrew her appeal. No one could tell me why she did so.

12. On 26 October 1982 Mrs J was again interviewed by an officer of the Department - this time in connection with a claim for one parent benefit. She contended that there was nothing more than a 'housekeeper' relationship between herself and the claimant. On 25 November 1982 the insurance officer decided that one parent benefit was not payable to Mrs J from and including 28 December 1981 because from that date Mrs J had been living with another person as her spouse. Against that decision Mrs J appealed to the local tribunal. Her appeal was heard on 22 June 1983. She was successful. The local tribunal recorded:

"The evidence that the Insurance Officer thought proved that the claimant is living with [the claimant in the present case] as his spouse is in our view totally consistent with employment as his housekeeper."

I was informed that payment of one parent benefit to Mrs J has been made ever since.

13. What I have set out in paragraphs 11 and 12 above was recorded in the submission which the benefit officer made to the appeal tribunal which gave the decision the subject of this appeal before me. What that tribunal was not told (but I was) is that at all material times

down to the present the claimant has been drawing one parent benefit. As Mr Stocker, with characteristic objectivity, put it:

"The right hand of the Department appears to have been acting in total disregard of the manner in which its left hand was acting."

The insurance officer (as he then was) did not seek leave to appeal to the Commissioner against the decision which the local tribunal gave in respect of Mrs J's entitlement to one parent benefit; and that despite the fact that in that jurisdiction an appeal to the Commissioner is not confined to errors in point of law but takes the form of a complete rehearing. It is even more surprising that, although the benefit officer decided on 26 October 1983 that the claimant was living with Mrs J as husband and wife and has maintained that contention ever since, no challenge whatever has been made to the claimant's entitlement to one parent benefit.

14. The situation which I have described in paragraph 13 is the type of affront to commonsense which brings the law into disrepute. I am well aware of the facts that:

- (a) two conscientious and capable appeal tribunals may, at any rate in borderline cases, reach contrary conclusions upon identical sets of facts;
- (b) the relationship between the claimant and Mrs J may have changed in the 6 months which elapsed between the local tribunal's decision in Mrs J's case and the supplementary benefit appeal tribunal's decision in the claimant's case; and
- (c) the decision of a local tribunal determining a claim for one parent benefit has never in law been binding upon a supplementary benefit appeal tribunal when determining a claim for supplementary allowance - least of all when the claimant in one case is not the claimant in the other.

15. Nevertheless, I am firmly of the view that the adjudicating authorities ought to do everything in their power to obviate consequences which are an affront to commonsense; and, where they feel incapable of so obviating them, to give an explicit explanation to the parties involved.

16. On the form LT 235 which records the appeal tribunal's decision of 22 December 1983 no reference whatsoever is made either to the local tribunal's decision in respect of Mrs J's one parent benefit or to the claimant's continuing receipt of one parent benefit. (The appeal tribunal cannot possibly be criticised in respect of the latter omission. It was not in possession of the facts.) I regard what I have said at the end of paragraph 15 as being so important that I am prepared

to accept Mr Stocker's submission that error in point of law is disclosed. The claimant has been given less than he was entitled to expect by way of explanation as to why his appeal was disallowed. I re-emphasise that the claimant could not expect, as a matter of law, that the supplementary benefit appeal tribunal would follow the decision of the local tribunal. He was, however, entitled to expect that the appeal tribunal would expressly grapple with the inconsistencies of the situation - and, if it felt unable to eliminate those inconsistencies, to explain clearly why it felt unable so to do.

17. Other grounds were canvassed before me upon which I was invited to hold the appeal tribunal's decision erroneous in point of law. Most of those can properly, in my view, be left for urging before the appeal tribunal which will rehear this matter de novo. I regard two points, however, as meriting mention:

- (a) The submission of the local benefit officer stated that when the claimant was interviewed on 21 October 1983 he said that he had his own girl friend. In the context of a contention that he was living as husband and wife with Mrs J, that was a significant piece of evidence. It is not, however, mentioned on the relevant form LT 235. It should have been the subject of an express finding of fact. Had it been accepted as true, the appeal tribunal's reasons ought to have dealt with it. (I was told at the hearing before me that Mrs J has her own boy friend. I do not think, however, that the appeal tribunal was told that.)
- (b) I have, in paragraph 10 above, indicated the importance which ought in this type of case to be attached to the views of friends and neighbours. The submission of the local benefit officer contained the sentence: "Friends and neighbours do not accept them as a married couple." No reference whatever to this aspect of the case can be found in the relevant form LT 235.

18. It is clear from the submission of the local benefit officer that the sole issue which went before the appeal tribunal was that of whether the claimant and Mrs J were or were not living together as husband and wife. For the avoidance of doubt, I stress that that will be the sole issue before the appeal tribunal to which this matter is hereby referred.

19. My decision is as follows:

- (1) The claimant's appeal is allowed.
- (2) The decision of the supplementary benefit appeal tribunal is set aside.

- (3) The case is referred to the social security appeal tribunal (which must be constituted differently from the supplementary benefit appeal tribunal which gave the decision which is hereby set aside) for determination in accordance with the principles of law set out in this decision.

(Signed) J Mitchell
Commissioner

Date: 20 December 1984

Commissioner's File: CSB/416/1984
C SBO File: 491/84
Region: Wales and South West