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SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: David Alfred Howarth

Supplementary Benefit Appeal Tribunal: Sheffield

Case No: 10/282

ORAL HEARING

1. (1) This is a claimant's appeal from the majority decision of 12 March 1982 of a supplementary benefit appeal tribunal ('the tribunal') brought by my leave. The tribunal's decision upheld a benefit officer's decision dated 1 2 82 that the claimant was not entitled to supplementary allowance from 28 1 1982. It is contended on behalf of the claimant that the tribunal's decision was given in error of law.
- (2) My decision follows upon an oral hearing of the appeal on 10 January 1984 at which the claimant was represented by Mr J F Fox, Solicitor, of Messrs John Howell & Co, and the benefit officer was represented by Mr E O F Stocker of the Solicitor's Office, DHSS.
- (3) The appeal succeeds. I set aside the tribunal's decision as given in error of law in the respects later below mentioned and direct that the claimant's appeal from the tribunal's decision be re-heard by a differently constituted tribunal in accordance with my directions set out as an Appendix to this decision. I do not consider it expedient in the circumstances of the case to seek to give myself the decision which the tribunal should have given, as in my view a proper determination will require findings of fact additional to those before me.
2. (1) On Monday 18 January 1982 the claimant, who had at all material times thitherto been in regular full-time employment, commenced a week of "lay off" in the understanding - lately derived from his employer - that until further notice he would be laid off every third week in three. The claimant claimed supplementary allowance (it is said, on the case file,

that he did so on 15 January 1982). On 1 February 1982 the benefit officer concerned issued his decision that the claimant was not entitled to supplementary allowance from 28 1 1982.

- (2) It is not in dispute that such decision founded upon an application to the circumstances of the claimant's case of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations 1981 (S.I. 1980 No 1527) ('the Resource Regulations'). In appealing to the tribunal, and thence to the Commissioner, the substantive issue raised on the claimant's behalf has been that it was erroneous in law to apply such provision in the claimant's circumstances. It is, however, conceded by the benefit officer now concerned that the tribunal's decision is in error of law in another respect, namely that the record of the decision fails to comply sufficiently with the requirements of Rule 7(2)(b) of the Supplementary Benefits and Family Income Supplements (Appeals) Rules 1980 (S.I. 1980 No 1605) ("the Appeals Rules") as to making and recording adequate findings of fact to sustain the decision reached; and I would had it been necessary, have held there to be an insufficient compliance also with the requirements of such rule as to stating reasons for the decision sufficient to enable a claimant to ascertain from the record why - where such is the case - the contentions he has advanced have not prevailed. To "pile Pelion upon Ossa" I regard it as clear also that the omissions last mentioned reflect a failure on the part of the tribunal to 'ask themselves the right questions'; and that this has derived from insufficient appraisal by the tribunal of the tenor of regulation 9 of the Regulations - though this criticism does not apply as regards the dissenting member of the tribunal.

- (3) Whilst it has not been material to my decision to explore this aspect further, the tribunal re-hearing the appeal will need to give consideration to the inter-relation of the reputed claim date above indicated with the fact that the benefit officer's decision does not appear to have dealt with any date prior to 28 1 '82.

3. Regulation 9 of the Resources Regulations is concerned with the calculation of a claimant's income resources, and the attribution of payments constituting such, as elements in the assessment which, consequent upon a claim for supplementary allowance, is made of a claimant's resources and requirements. The benefit officer's decision under appeal to the tribunal reflected such an assessment the ingredients of which other than the treatment and attribution of earnings of the claimant himself have not been in controversy. However, the proper starting point, for the tribunal's purposes, should have been to ascertain from what date the claimant was to be treated

as effectively claiming supplementary allowance. Next they needed to determine what was the 'benefit week' applicable to the claimant - having due regard to the meaning assigned to that term in the regulations; and their conclusion as to that should have next taken them to consider the position in regard to regulation 7 of the Determination of Questions Regulations 1980 (S.I. 1980 No. 1643) ("Date of Commencement, change and termination of entitlement to pensions and allowances"), and to consider as a preliminary issue consequent upon that not only what would under regulation 9 of the Resources Regulations be the appropriate benefit week but also whether the claimant was or was not subject to a condition as to registration for employment - and if so whether he had or had not complied with it, (since if he was so subject, but had not complied, it would follow that the benefit officer's decision would, on that simple ground alone, have been demonstrably correct).

4. The tribunal's attention was not directed to the several aspects of a correct appraisal to which I have just referred, and they appear to have concerned themselves only with regulation 9 of the Resources Regulations. But even within that narrower field they have in my judgment fallen into error of law.

5. The tribunal were told, and it does not appear to have been in dispute, that the claimant's "short time working situation", of 1 week off in three until further notice, had commenced as from 18 1 82; that the claimant had received earnings of £79.51 on 14 1 1982, £109.68 on 21 1 1982, and £43.75 on 28 1 82; and that the benefit officer had in arriving at his decision totalled these receipts and averaged them, resulting in a weekly earnings figure of £77.64 (which is the arithmetical product of dividing the aggregate of such receipts by 3). They were also furnished with the assessment in which the £77.64 had been taken into computation, net of the usual disregard of £4.00. Each of the three dates last mentioned was a Thursday (from which it would appear that the claimant's normal weekly pay day was a Thursday). However, such dates also represent three consecutive Thursdays; and though this does not appear to have impacted upon the tribunal, there appears to me thus to arise from such information - as a query preliminary to any further contemplation of the 'averaging' approach - the question as to how, if the claimant was being laid off every third week in three, commencing from Monday 18 January 1982, such payments on three successive Thursdays came to be received. One may speculate that there may have been a guaranteed wage agreement, or that there may have been some arrangements in the character of 'week in hand' in point. But it was clearly imperative for the tribunal in arriving at a proper determination of the earnings issue to make and express findings of fact as to the period (if any) to which each of such receipts related, as a prerequisite to ruling upon the benefit officer's submissions founded thereon; and this the tribunal have not done.

6. (1) Regulation 9(1) of the Resources Regulations materially provides that (except in so far as regulations 10, 11 and 12 provide that certain payments shall be deducted and that certain payments shall be disregarded) the whole of a claimant's earnings are to be taken into account.

(2) Regulation 9(2) is in the following terms:-

"(2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments 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;
- (c) where a payment of income is payable in respect of a period which exceeds one week, it shall be attributable at a weekly rate, calculated in the case of a monthly payment in accordance with sub-paragraph (e), beginning with the appropriate date ascertained in accordance with sub-paragraph (b).
- (d) where the amount of a person's earnings fluctuates, or a person's regular pattern of work is such that he does not work every week, the preceding sub-paragraphs may be modified so that his earnings are averaged over such period as the benefit officer considers reasonable in the circumstances of the case;

(c) a monthly payment shall be treated as a payment -

(i) in respect of a calendar month,

(ii) at a weekly rate determined by multiplying the payment by 12 and dividing the result by 52."

(3) Regulation 3(2)(d)(i) so referred to makes provision as to certain receipts by way of repayment of income tax deducted, and regulation 13 so referred to makes provision as to certain payments made by or derived from liable relatives. It does not appear that the latter has any bearing in the present case, but the former may or may not once the full facts as to the nature of the payments received by the claimant and relied on by the benefit officer are ascertained.

7.

Had it been the case that the benefit officer originally concerned proceeded on the footing (which the tribunal found to be correct), that the claimant had received earnings of the amounts above indicated in respect of the successive three weeks of which that in which the pay day Thursday 28 January 1982 fell was the last there might well have been grounds for applying regulation 9(2)(d) on the basis of the claimant having "fluctuating earnings" in that three week period, and for proceeding accordingly by making the correct attribution of the amount determined on that basis. However, from the information provided to the tribunal by the written submissions before them it is apparent that the benefit officer had not in fact proceeded on that basis, but had proceeded under the "second limb" of regulation 9(2)(d) - ie upon the footing that the claimant's regular pattern of work was such that he did not work every week. And the arguments before the tribunal, as also before me, have been directed to the issue as to whether or not the benefit officer was in the circumstances of the case correct in law in proceeding on that footing to the conclusion at which he arrived. Having regard to the paucity of relevant information before me I would not wish to rule out the possibility that upon fully ascertaining the facts the tribunal re-hearing the appeal might properly take the view that the first limb of regulation 9(2)(d) did indeed properly bear. However, on the footing that it may well be contended before them that it is the second limb of regulation 9(2)(d) properly bears I consider it to be my duty to give some guidance to the tribunal in regard to the proper construction of that part of the regulation, though I will not attempt to define exhaustively the circumstances to which it may apply.

8. (1) Whilst Regulation 9(2)(d) may be loosely described as conferring a discretion upon benefit officers to depart from the otherwise operation of regulation 9(2)(a) by substituting an averaged figure of earnings for an actual figure, it is important to appreciate in the first instance that the discretion is a limited and not a general discretion. For whilst in specified circumstances the benefit officer may (but need not) act upon it, he cannot act upon it at all in any case other than one in which it is properly to be concluded that the specified circumstances subsist. Thus, in regard to what I have termed the 'second limb', that can properly be applied only if the case falls properly within the prescription "a person's regular pattern of work is such that he does not work every week". In that prescription the word 'is' postulates that the test as to whether or not a person falls within the prescription is a test to be applied in respect of a given date or dates, and that it applies only if the prescription fits as at such date or dates. In evaluating the correctness or otherwise of a decision that the formulation does apply it is thus necessary to postulate in the first instance what is or are the relevant date or dates in point. This will in turn depend in part upon an appropriate analysis of the claim in regard to which the assessment will relate. Where, as is usual, the claim for supplementary allowance falls to be treated as a continuing claim as from a specified initial date it will be material to apply the test, if relevant at all, as conceptually applicable separately in regard to each benefit date down to the date of the benefit officer's decision - since the interval between the date of claim and that of the benefit officer's decision may be substantial, and there may have been intermediate changes in relevant circumstance. It will not, however, be material to go beyond the date of the benefit officer's decision in point, since any subsequent events will bear only as matters potentially warranting review.
- (2) As regards any particular date in regard to which the question arises as to whether or not the formulation as to a person having a 'regular pattern of work such that he does not work every week' applies, a proper conclusion plainly involves looking at some period commencing antecedently to and concluding with the current week in which such relevant date falls or has fallen. What is a sufficient period to warrant the conclusion that the formulation bears is not prescribed arithmetically - though it is inherent that this must be a period of not less than two weeks in order to constitute a minimum of one week in which a claimant has worked and one week in which he has not worked to support the premise that 'he does not work every week'. The concept of a 'pattern of work' then falls to be taken into contemplation. This, to my mind, clearly imports some common element of repetition present only upon contemplation of a longer period than the two

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weeks necessary to constitute a sequence of a week off and a week on, or vice versa. The addition of the adjective 'regular' further reinforces this; but it is important to note that the material ingredient to be tested for is 'that he does not work every week' and it is as to that that the presence of regularity of pattern of work is germane. No difficulty will arise in cases where there is a perfectly regular sequence to be found subsisting over a substantial period of time. But - without seeking to prescribe precise boundaries myself - I should make it clear that in my view the provision is not to be so narrowly construed as to confine its application to cases in which there is a precise regularity in the sequence in which a week or weeks of work is or are interrupted by a week or weeks in which a person does not work. In my judgment what is a 'regular pattern of work' is, as is said of 'an emergency', a matter for recognition in the circumstances of a particular case and not for comprehensive definition.

9. Applying the criteria last indicated, I have been in no doubt that there are insufficient materials on the record of the tribunal's decision to enable me to seek to give myself the decision which they should have given.

10. On behalf of the claimant, Mr Fox pressed upon me the contention that a 'regular pattern of work' ought not to be regarded as capable of being established by reference to less than the long period which is generally applied, in the context of unemployment benefit, in regard to a claimant's employment 'to the full extent normal in his case'. I do not accept that submission as well founded. The established authorities as to 'full extent normal' stand in reference to an entirely different social security benefit regulated by entirely different statutory provisions; and regulation 9(2) of the Resources Regulations has in my judgment to be applied in accordance with its own tenor and the ordinary canons of construction applicable thereto.

11. (1) Mr Stocker, for his part, pressed me strenuously in the opposite direction, contending that so soon as a person was notified that he was to be subject to 'lay off weeks' - although in conjunction with continuing weeks of work - and a week of "lay off" had occurred, the "regular pattern" was established; and he stressed the practical difficulties in regard to administration of benefit which would be encountered if there had to be any significant period of delay, to enable a practical record demonstrating the pattern to be built up, before the "second limb" of regulation 9(2)(d) could be applied.
- (2) To my mind the position for which Mr Stocker contended is also not sustainable. The formula prescribes that the regular pattern of work 'is such'. That to my mind, cannot be taken to be so before there is practical exemplification sufficient to demonstrate 'a regular pattern of work' subsisting at the relevant particular date.

- (3) Provided that the adjudicating authority correctly construes the thrust of the material provisions, their application or non application to the circumstances of the particular case is then in my judgment an issue of fact, upon which the adjudicating authority is to reach its own conclusion; and I do not propose to confine the parameters more narrowly than I have already indicated.
- (4) Lest it be thought that the requirement of a 'regular pattern of work' opens the door wide to what may euphemistically be termed 'benefit planning' I would, however, observe that the requisite regular pattern of work might, in my judgment, be held in appropriate circumstances to subsist notwithstanding some variation in the arithmetical sequence of weeks worked and not worked.

12. I should for completeness mention also that although at first sight a different approach to 'lay off' situations might be thought to be tenable in reference to the statutory provisions as to supplementary benefit not being available to persons in full time employment, as defined, I respectfully agree with the conclusion of the learned Commissioner in the decision on Commissioner's File CSSB 73/82 (unreported) that those do not, for the reasons he has indicated, bear upon such circumstances.

13. My decision is as indicated in paragraph 1(3) above.

Signed: I Edwards-Jones
Commissioner

Date: 27 February 1984

Commissioner's File: C.S.B. 578/1982
C SBO File: 525/82
Region: North Eastern

APPENDIX

1. The tribunal rehearing the claimant's appeal are to be furnished with a copy of my decision, which it is hoped may be of some guidance to them in avoiding pitfalls.
2. If and so far as it becomes material for them to take into contemplation the provisions of regulation 9(2)(d) of the Resources Regulations they are to proceed on the footing that the views as to its proper construction expressed in my decision are a correct exposition of the law in point, unless by the time for their decision such views have been overruled by higher authority.
3. The tribunal are to reach and express findings of fact in regard to all receipts by the claimant which it is contended before them are to be taken into account as earnings of the claimant, indicating to what period such earnings relate, if any, and in what amount and to what dates the same are in accordance with regulations properly attributable, identifying the provisions of the regulations so relied upon.
4. In arriving at their decision the tribunal are also to take into contemplation all necessary facts as to when the claim the subject of the benefit officer's decision was instituted, and for what period, are to express all material findings in regard to those matters and generally, and are to express reasons for their decision which sufficiently comply with the requirements under rule 7(2)(b) of the Appeals Rules.