Severe weather

RFMH/SH/MD

Commissioner's File: CSB/930/1985

C A O File: AO Not known

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: Irene Annie Stacey (Mrs)

Social Security Appeal Tribunal: Bromley

Case No: 6/13/08

[ORAL HEARING]

1. We grant to the adjudication officer leave to appeal against the decision of the social security appeal tribunal datd 27 June 1985; and, both he and the claimant having consented to our doing so we treat the application as the appeal and so treating it hold the decision to have been erroneous in law. The matter is remitted to another tribunal.

2. We held an oral hearing of the appeal at which the adjudication officer was represented by Mr. D.M. James of the Solicitor's Office of the Department of Health and Social Security and the claimant was represented by Mr. M. Rowland counsel instructed by Mr. Roger Smith Solicitor with the Child Poverty Action Group. Both representatives were agreed that for reasons to which we shall come the decision appealed from was erroneous in point of law; and neither of them suggested that this was a case in which it was expedient or even possible that we should ourselves give the decision which the tribunal should have given. Argument was therefore directed to the guidance that should be given to the new tribunal.

3. The claimant's electricity bill for the period of three months from 5 November 1984 to 4 February 1985 was £91.43 made up of a standing charge of £9.40 together with a charge of £25.95 for 437 units charged as 5.94 pence per unit and £56.08 for 2891 units charged at 1.94 pence per unit. She contended that this was more than the amount that had been put aside to pay for her fuel costs and she made a claim for a single payment for or towards meeting the cost. Such a claim could fall within either regulation 26 of the Supplementary Benefit (Single Payments) Regulations 1981 [SI 1981 No.1528] which is specifically concerned with fuel costs or under the more general provisions of regulation 30 of those Regulations, which relates to so-called exceptional needs payments. The adjudication officer rejected the claim under both regulations. On appeal the appeal tribunal opined that it was "almost a S.30 case" but did not find it necessary to rule on that regulation as they made an award of a single payment of £91.43, the full amount of the bill in question using language that indicated that they were making the award under regulation 26.

4. Regulation 26 as amended and so far as relevant provides as follows:

"(1) A single payment shall be made to meet the fuel costs of the assessment unit where they are greater than the amount which has been put aside to pay for them because -

(a) a period of exceptionally severe weather has resulted in consumption greater than normal, having regard to any available information on previous levels of consumption; or

(b) the members of the assessment unit are unfamiliar with the cost of running the heating system in their home because they have recently moved to that home or the system has recently been installed.

(2) The amount payable in a case to which paragraph (1) applies shall be -

(a) in a case to which paragraph (1)(a) applies, the cost of the amount of the excess over normal consumption;

(b) ....."

5. In the present case a payment, if it could be made under regulation 26 at all, could be made under paragraph (1)(a) and not under paragraph (1)(b) and the amount that could be awarded was thus the amount of the excess over normal consumption. The appeal tribunal in awarding a payment of a sum equal to the whole amount of the bill (including the standing charge) appear to have ignored the provision of paragraph (2)(a) altogether. And it was on this ground that the representatives of both parties are agreed that the decision was erroneous in point of law. But their agreement did not go far beyond this; and in the light of the argument presented to us we think it right to express our views on the manner in which the matter should be approached by the new tribunal.

6. Before an award of a single payment can be made under paragraph (1)(a) three conditions have to be satisfied, viz.

(i) the fuel costs of the assessment unit must be greater than the amount put aside to pay for them (see the opening words of paragraph (1));

(ii) there must have been a period of exceptionally severe weather (see paragraph (1)(a))

(iii) that period of exceptionally severe weather must have resulted in consumption greater than normal (see further paragraph (1)(a).

If these three conditions are satisfied the cost of the excess over normal under (iii) is the measure of the payment to be awarded (see paragraph (2)(a)).

7. Condition (i) is an essential pre-condition of an award, but is is not one that in this case is difficult to fulfil. It was held by a Tribunal of Commissioners in paragraph 15 of Decision R(SB) 22/84 that it was not a qualifying condition that any amount should have been put aside at all; and that it excludes only the person who has, notwithstanding the unexpected nature of the circumstances in which the need for a single payment for fuel costs is apt to arise, put aside enough to meet such costs. In the present case the claimant's evidence was that she had put aside £60 for fuel costs which she expected (on grounds that were not investigated) would be about £70. No findings were made on this point; but if the evidence is accepted the claimant will have established that the condition (i) is fulfilled. The question as to the position where nothing, or only a derisory sum, has been set aside, which is discussed in decision CSB/108/1985 at paragraph 3(d), will not then arise and we need not discuss it here. Once condition (i) is fulfilled the amount put aside enters no further into the calculations. Nevertheless the reference to the amount put aside is, in our view, an indication (as is paragraph (1)(b)) that the regulation is concerned with provision for the unforeseen and that the provisions of the regulation as a whole have to be interpreted by

reference to the personal circumstances of the particular assessment unit and not to the average circumstances of the population as a whole. This means for instance that the question whether the weather has been exceptionally severe has been answered by reference to the claimant's own locality; and that weather which would not be regarded as exceptionally severe say in Aberdeen may nevertheless be exceptionally severe if it occurs in Penzance. Indeed one has to conclude (in the absence of provision for an additional requirement based on climatic grounds) that claimants in cold areas are assumed to be hardier than claimants in warm areas.

8. Condition (ii) creates more of a problem. There has to have been a period of exceptionally severe weather. If as the result of weather conditions there is a significant excess in a claimant's fuel costs over normal, one might have supposed that it was reasonable that a single payment should be made. But in fact it has only to be made if there has been more than just weather; there must have been a period of exceptionally severe weather. This consideration however would lead one to suppose that it was not the intention of the legislating authority to place the construction of the words in a strait jacket and to rule out the claims of those whose fuel bills are manifesty inflated by weather conditions simply because some statistics of temperatures (however objective) do not measure up to some arbitary standard. The words to be applied are ordinary English words and appeal tribunals have been made the ultimate judge of whether they are satisifed. They are not, in our judgment, susceptible of precise definition, and there will eventually be a measure of uncertainty about how particular tribunals will react to the evidence. Mr. James submitted that "exceptionally" imports some norm to which there is an exception. But the exact original meaning of the word has become blurred, in common with that of many other words whose literal meaning is precise, and the transferred meanings of the word especially in referenceto the British climate is nothing more than "unusually" or "abnormally". Severe weather is relatively common in a British winter. Exceptionally severe weather is not. In particular we reject the rule that seems to have been devised for dealing with meteorological statistics that weather (or temperature) is only exceptional if it can be expected to occur in not more than one winter in five.

9. Accordingly we hold that the method explained to us of using "trigger points" to determine whether there has been a period of exceptionally severe weather does not represent a satisfactory method of determining whether there has been a period of exceptionally severe weather. As described it involved the concept of "degree days". If the mean temperatures at a given point (computed in a special but reasonably accurate manner) is on a day 15.5 degrees centigrade or above that represents nil degree days. If however it is on one day one degree below 15.5, then on that day there is one degree day; and it it is two degrees below 15.5, there are on that day two degree days and so on. The number of such degree days can be computed for periods longer than a day, such as a week by adding together the number of degree days in the days in such week. In fact the Department of Health and Social Security asked the Meteorological Office to look up the number of degree days in each week over a long period (30 years at Heathrow) derived from records at a number of weather stations spread throughout Great Britian, and to specify the number of a degree days in a week, which might be expected to be reached (in one or more weeks) in one year in five. In relation to Heathrow where 30 years' records were used, this involved identifying the coldest week in each year (ie the week in which there was the largest number of degree days; and then taking the six (30 ÷ 5) in which the coldest week contained the highest number of degree days. The number of degree days in the least cold of these six years is then taken as the level of exceptional severity. In the case of Heathrow this was 119. The Department referred to this as a "trigger point" and decided to treat any period which consisted of or included a week in which the trigger point was passed and no other period as a period of exceptionally severe weather. Every local office in the country was treated as falling within what we may call the "catchment area" of one of the designated weather stations. As soon as there was a week in which the trigger point was reached this fact was advertised; and claims were invited on the basis that condition (ii) would be regarded as satisfied if the claim was related to a period comprising or including the week in

question. This did not mean that condition (iii) would automatically be satisfied to some extent at least, as the claimant in this case discovered when the adjudication officer rejected her claim notwithstanding that in one of the weeks to which her bill related the trigger point was reached at Heathrow the relevant weather station.

10. Condition (iii) requires that the relevant period of exceptionally severe weather shall have resulted in consumption greater than normal, the amount of the excess over normal being the measure of the payment. The Department again proposes the use of the degree day concept to determine the admittedly difficult question of the extent of the fuel costs or of their excess over normal that is attributable to the exceptionally severe weather. The Department's method is to compute the number of degree days in the period in which the fuel costs were incurred and to compare that with the average number of degree days recorded over the corresponding period in past years, particulars of which are again supplied by the Meteorological Office. If the latter is a percentage of the former less than 100 the excess over the corresponding percentage of the bill would be treated as being in respect of consumption greater than normal resulting from the exceptionally severe weather. In the claimant's case, as the average number of degree days in the corresponding period in past years exceeded the number in the period to which the bill related, the adjudication officer, applying the above rule, concluded that condition (iii) was not satisfied. The appeal tribunal would have nothing of this. They pointed out that Heathrow was 30 miles away from Bromley where the claimant lives and (without making any findings about the weather) they reached the conclusion that we have already indicated was erroneous that a single payment should be made equal to the whole bill.

11. Mr. James invited us to direct the new tribunal that the process described in paragraph 9 above using trigger points (to which we shall refer as the trigger point process) was the appropriate method to adopt for determining whether condition (ii) was satisfied and that the process described in paragraphs 10 above (to which we shall refer as the percentage process) was the correct method for determining whether and to what extent condition (iii) is satisfied. In the present case it would enable the claimant to satisfy condition (ii) but not condition (iii). We are however quite unable to endorse such a suggestion. It appears to us that the legislature has entrusted to the adjudicating authorities the making of what are sometimes called "value judgments" about whether there has been a period of exceptional severe weather, and if so whether it has resulted in consumption greater than normal; and that it is quite wrong to lay down arbitrary rules of thumb for those authorities to follow. No doubt meteorolgical statistics can properly be looked at as evidence which the adjudicating authorities should take account of; but if administratively it is thought that some such rule of thumb is necessary then there should be substituted for regulation 26 some system of low temperature additions automatically payable without the need for enquiring about money put aside, exceptionally severe weather or consumption greater than normal. We feel fortified in our view (1) by the evidence very properly called by Mr. James of Dr. W.H. Moores the head of the Land Climatology Division of the Meteorological Office, who was plainly critical of the use made by the Department of the statistics furnished by his office; and (2) by certain other considerations raised in argument before us and it is to these matters which we now turn, in order to give some indication of the use to be made of meteorological evidence.

12. Dr. Moores' major criticism of the use made of the statistics, which is relevant both to the trigger point process and the percentage process was that the base weather stations were too far from most of the points in their catchment areas for the figures to be relied on for calculations as precise as those outlined. Towns as far apart as Eastbourne and Aylesbury were in the Heathrow catchment area. Dr. Moores said that not only was evidence of temperature at one place a poor guide to the temperature at another place close to it, far closer to it than Aylesbury is to Eastbourne, but also that evidence that temperatures were abnormal at one place was unreliable as evidence that the temperature would also be abnormal at another place close to it. A great increase in the number of base weather stations would mitigate but could never eliminate this. For instance coastal areas tend to be less extreme than inland areas. He indicated that the research into the level of

temperatures that could be expected only one winter in five was done as the instance of the Department, and he expressed no view on its relevance to the question whether the weather was exceptionally severe. Dr. Moores pointed out also that the weeks taken were periods of seven days beginning with a particular day of the week, and that the trigger point process takes no account of the fact that there might be a period of seven days beginning with a different day in the week that yielded a higher number of degree days than any of the actual weeks taken.

13. We would interpose a criticism of our own, that the Department's method take no account of the fact that what is abnormal or exceptional at one time of year may be quite normal at another. For instance unreasonable weather in March or April is capable of giving rise to fuel consumption in excess of what is normal for that time even though the number of degree days does not approach the trigger point which even in the coldest winters cannot be expected to be reached outside the winter months of December, January and February.

14. Dr. Moores was referred to a booket entitled "Degree Days" published on behalf of the Department of Energy which, as well as explaining the concept of a degree day, contained a section which sets out to show the relationship between degree days and energy consumption. This includes a graph showing, in respect of a particular factory, in two seasons one before and one after energy conservation measures had been taken the relationship between degree days and litres of oil consumed. The graph tended to show that in each season the energy consumption (oil in litres) was directly proportionate to the number of degree days in the season. He did not claim that his expertise in meteorology qualified him to pronounce as an expert on the point, though he was, as his insistence on the paramountcy of temperature would indicate, inclined to accept the validity of the conclusion in relation to an oil heated building, but subject to the qualifications in the booklet itself. In our view the percentage process cannot be sound unless the direct relationship between degree days and energy consumption shown by the graph is valid for all methods of heating; but it is not necessarily sound even if the direct relationship is universally valid.

15. The booklet itself contains important qualifications. It states that the application of degree days should be of particular interest to supervising engineers who control the heating of a number of buildings of the same type and construction such as schools, hospitals, institutions or blocks of flats as providing a useful guide to the consumption of fuel in buildings of similar character and type. But it warns that the daily or weekly degree day readings are likely to be misleading and it recommends that monthly figures should be used. It points out that degree days are not reliable as a measure of consumption where a single system is used for hot water and central heating. And one derives a general impression that the thesis is reliable only in relation to institutional buildings, where the use of heat sources is not intermittent. The booklet also stresses, more than did Dr. Moores, the significance of other factors than temperature, such as wind, humidity and solar radiation.

16. We heard Dr. Moores' evidence for the assistance that it might give us in furnishing guidance for the new tribunal. It is not for us to decide what weight to give to the views expressed by him and those in the booklet. But we do consider that the evidence of these two sources confirms our prior impression that the whole matter is not suitable for the application of rigid rule of thumb. The degree day system may be objective, but it is in our view no more than a guide that may assist the adjudicating authorities in deciding the questions whether condition (ii) and condition (iii) are satisfied.

17. We reject the suggestion that tribunals should, or indeed can properly determine, these questions by reference exclusively to the trigger point process (on condition (ii)) and the percentage process (on condition (iii)). The adjudicating authorities are called on to make value judgments on the question whether there has been a period of exceptionally severe weather; and if so whether that has resulted in any (and if so what) level of consumption of fuel greater than normal; and it would be entirely wrong for us to lay down rules by which they shall do so. The error in trying to do so was identified by Watkins J (as he then was) in Sampson v Supplementary Benefits Commission [1979] SB 19. In that case the question was whether in terms of section 7(1) of the Supplementary Benefits Act 1976, as originally

enacted, the claimant was receiving "full-time education of a kind given in schools". The Supplementary Benefits Commission in practice in the case of a person receiving full-time education determined the question whether it was of a kind given in schools by ascertaining from the Department of Education whether it was regarded as non-advanced (i.e. either primary or secondary) or advanced education and if they received the answer that it was the former they automatically treated it of a kind given in schools; and they took no account of any other evidence about the nature of the education being received. It was held that this approach, adopted by the Supplementary Benefits Commission and endorsed by the appeal tribunal, was erroneous. In the course of his judgment Watkins J said

> "In my opinion, the Tribunal insufficiently understood the extent to which the officer of the Commission had shackled himself. As I have said, I think his observations allow no room for doubt, that he considered himself, regardless of what the facts of the case were, as being bound to apply the test of "advanced" or "non-advanced" education, and to find the solution to that test in the office of the Local Education Authority and nowhere else. That being so I have no alternative but to allow this appeal....."

The Department of Education view was evidence, but it was not a warrant for refusing to look at anything else. The legislature had used an imprecise phrase and it was not part of the function of the Commission or anyone else to substitute Departmental views, however clear cut, for the words of the legislature.

18 In our opinion the same applies in this case but with more force inasmuch as Departmental views on the weight to be attached to meteorological statistics were based on foundations more uncertain than those of the Department of Education on the nature of particular types of education. In our view the question whether there has been a relevant period of exceptionally severe weather and whether such period has resulted in fuel consumption in excess of normal, and if so how much, have to be determined on the evidence, of which meteorological statistics are only a part. We consider the approach that should be adopted in considering these questions in the following paragraphs.

19. The first question is whether there has been a relevant period of exceptionally severe weather - relevant that is to the fuel consumption claimed to have been greater than normal. Mr. James submitted that the first question was as to the meaning of the word "period". He submitted that in relation to supplementary benefit payable in respect of weeks the relevant period must one of at least a week and possibly in cases where the fuel costs are paid at longer intervals some longer period. We accept that when one comes to determine whether a single payment is to be made to meet the relevant need one has almost necessarily to look at the period to which the fuel bill relates, or in the case where fuel is paid for by slot meter at periods of not less than a week. But we see no warrant for importing in these limitations into the consideration of the question whether there has been a period of exceptionally severe weather. Mr. Rowland submitted, and we accept, that the length of a period of weather was a factor in its severity. If the thermometer reaches a very low point for only a short time it may well not constitute a period of exceptionally severe weather, where a prolonged spell at a higher temperature would be. Moreover, what is or is not exceptional or abnormal at one place, or at one season may or may not be exceptional at another place or season. In our judgment all that is needed is that the period (whether of a week or more) to which the costs for which a single payment is claimed relate should include some period (long or short) of exceptionally severe weather.

20. We have already indicated that we do not consider that there has to be found some climatic rule from which the weather in question is an exception before it can be found to be exceptionally severe, and that the expression means no more than abnormally severe. Adjudicating authorities can rely on their own knowledge of the weather prevailing at a particular time in the area in question, but they would be well advised to check their recollections, particularly as to duration, against any weather records made available to them. The words are "exceptionally severe weather" and not "exceptionally cold weather" and factors other than temperature may certainly be taken into account if they are factors

that lead to increased fuel consumption. It should be borne in mind that the occurrence of a period of exceptionally severe weather is only one necessary condition of title to a payment; it is not the sole condition. There has also to be consumption in excess of normal. Consumption in excess of normal may be due to other causes than the weather, but in our judgment if the tribunal is satisfied that the weather has resulted in exceptionally high consumption of fuel, they are entitled to treat that as evidence that there has been a period of exceptionally severe weather.

21. In the present case the adjudication officer concluded that the period to which the claim related (5 November 1984 to 4 February 1985) included a period of exceptionally severe weather and it is likely that the new tribunal adjudging the matter on the evidence will reach the same conclusion. If they do they will have to pass on to the second question namely, whether and to what extent that has resulted in consumption greater than normal.

22. On this question the percentage process is advocated by the adjudication officer. We however reject this process as a way (however administratively convenient) of determining the excess of consumption over normal resulting from exceptionally severe weather. It has the effect, if applied universally, that each person's percentage excess of consumption over normal in a given catchment area will be the same, however his house is heated, however well it is insulated and however conscientious he is about fuel conservation. Such a method of computing excess consumption cannot be right. The percentage process may be used to test conclusions arrived by other means, but it is wrong to use it as the sole measure of excess consumption to the exclusion of all other evidence.

23. But there is an even more compelling reason for rejecting a method which excludes all other evidence, in that regulation 26(1)(a) specifically requires the adjudicating authorities to have regard to any available evidence of previous levels of consumption. This is not the only evidence that they may have regard to, but it is the only evidence that it is demonstrably wrong to disregard. Mr. James argued that evidence of previous consumption is unreliable as a guide to what is normal, as there may be countless reasons other than the weather for fluctuations in consumption. That may indeed be so. But the adjudicating authorities are enjoined to have regard to this evidence, and must make what ever adjustments are necessary to take account of the non-weather factors. Further we think that (given such adjustments) such considerations are likely to give a much better guide to a particular claimant's expenditure above the norm than does the percentage process operated across the board. We take a particular example of a person with a central heating system in which he consistently sets the thermostat at 18 degrees centigrade winter after winter, with no factors other than weather to account for fluctuating consumption. The evidence if available of consumption in successive winters would be extremely cogent evidence of the extent of the excess of the consumption over normal in any particular period that is attributable to the weather. All cases will not be so clear cut, but we consider that evidence of a particular claimant's consumption over the years is likely to furnish more reliable evidence than will the percentage test, even if adjustments have to be made for extraneous factors, and incidentally will assist compliance with regulation 26(1)(a). Evidence of the general level of domestic consumption in the same area over the same period will, if available, be valuable for the purpose of assessing the extent to which a particular claimant's abnormal consumption is attributable to the weather, and in considering the adjustments that ought to be made for non-weather factors.

24. In the present case the tribunal had evidence before them of the claimant's fuel consumption in the previous year, which showed that it was higher in the period of claim than in the corresponding period of the earlier year. This was of course scant evidence of what was then normal. A fee was demanded by the electricity board for furnishing information further back, which the claimant could not be expected to meet out of her supplementary allowance. But it would have furnished additional information on what was normal. The Department might wish to consider making arrangements with electricity boards and gas boards for obtaining such evidence in relation not only to individual claimants but as to domestic consumption generally. In the present case if no evidence of any period

further back can be obtained, the new tribunal will have to make do with what is now available as supplemented by the claimant's own evidence. She is recorded as having told the last tribunal that she had expected the bill to be about £70. She might perhaps be able to explain on what ground she had expected this, and she may be able to give some account of what she regarded as normal.

25. Lastly we must refer to regulation 30: The last tribunal having awarded the claimant the entire amount of her bill did not find it necessary to consider that regulation though in their findings of fact they described the case as almost a regulation 30 case. If the new tribunal makes no award under regulation 26 or an award of less than the amount claimed they will have to go on to consider the possibility of an award or a further award under regulation 30. An award under that regulation can be made only if a single payment is the only means of avoiding serious damage or serious risk to the health or safety of a member of the assessment unit. It has to be remembered that, even if the tribunal are satisfied that lack of heating will involve a serious damage or risk to the claimant's health or safety, the fuel during the period in question had been obtained by the time of the claim. An award on the claim will not avoid any damage or risk that might have ensued had the fuel not been ovided. If, however, there is evidence that only a single payment could avoid the threatened cutting-off of supplies, the question of an award under regulation 30 would fall to be considered.

26. The appeal is allowed.

(Signed) J.G. Monroe
Commissioner

(Signed) V.G.H. Hallett
Commissioner

(Signed) R.F.M. Heggs
Commissioner
Date: 17 October 1985