CSB 1008/82

JGM/II

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

last earning
– date payable

[ORAL HEARING]

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 30 November 1981 is erroneous in point of law. The matter must be referred to another tribunal which, as is normal, should be entirely differently constituted from that which gave the decision now set aside.

2. The claimant's employment with a company was terminated in September 1981. According to the finding of the appeal tribunal that employment came to an end on 25 September 1981, the claimant having received a payment of one month's salary on 23 September 1981 (the first payment) and of four weeks salary in lieu of notice on 25 September 1981 (the second payment). He claimed a supplementary allowance on 22 October 1981 but the benefit officer decided that he was not entitled to an allowance from 22 October 1981. I understand that an allowance was in fact awarded from 19.November 1981 or thereabouts.

3. The claimant appealed against the refusal of an allowance from 22 October but his appeal was dismissed by the appeal tribunal, and he now appeals to the Commissioner. The submission of the benefit officer now concerned relates exclusively to the question above outlined about an allowance for a period in October/November 1981. But in form LT 306 the claimant complains that the submission does not deal with the more important part of his claim, meaning that connected with his loan payments in connection with the purchase of domestic furnishing. This was a matter scarcely debated at the hearing before me, though it could have a bearing on the amount of the claimant's supplementary allowance for any period for which an allowance could be awarded. Regulation 11(1) of, taken together with paragraph 15 of Schedule 3 to, the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No 1299] provides for the inclusion among a claimant's requirements of an additional requirement in respect the hire-purchase of items of essential furniture where the relevant agreement has been entered into before an allowance became payable. The claimant's loan payments in connection with the acquisition of such items were no doubt to be made under agreements so entered into. It has

been held however by the Commissioner in Decision R(SB)25/82 that for this purpose the term "hire-purchase" is confined to contracts of hire-purchase in the strict sense and that it does not extend to analogous forms of consumer credit such as credit-sale agreements. Still less can it be extended to ordinary loans for the purchase of relevant items. The loan payments were thus properly disregarded.

4. The references made by the claimant to these outstanding debts is not however totally irrelevant to the subject matter of this appeal as the claimant made it clear in his letter of appeal against the original disallowance of his claim that he considered that moneys paid to him in connection with the termination of his employment were, as it were, bespoken to meet these and other liabilities and were thus not available to maintain him and his family. At the oral hearing of his appeal to the Commissioner at which the claimant presented his own case and the benefit officer was represented by Mr D James of the Solicitor's Office of the Department of Health and Social Security, Mr James submitted that the decision of the appeal tribunal was erroneous in point of law in that the tribunal had given no consideration to the question whether a supplementary allowance was payable to the claimant under the Supplementary Benefit (Urgent Cases) Regulations 1980 [SI 1980 No 1642] (the Urgent Cases Regulations), inasmuch as the facts about the claimant's outstanding liabilities clearly raised by implication the question of the possible operation of those regulations. I accept this submission and set aside the decision on that ground.

5. This is not however enough to dispose of the appeal as the grounds on which the claim was rejected, irrespective of the Urgent Cases Regulations may fall to be considered again by the tribunal to whom the matter is referred back as I am not sure that all the relevant facts were found by the last tribunal, though I do now set the decision aside on that ground. The regulations on which the appeal turned are complex and for the guidance of the next tribunal I feel obliged to go into them further.

6. Section 6(1) of the Supplementary Benefits Act 1976 as amended provides as follows:-

> "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."

Section 4(1)(b) enables regulations to be made to provide that section 6, among others, shall in urgent cases be applicable with prescribed modifications, and regulation 3(2)(c) of the Urgent Cases Regulations (now re-enacted) provided that section 6(1) should not apply in urgent cases. It follows that if the claimant can succeed under those regulations it may not be necessary for the tribunal to consider section 6(1) and regulations made under it. The following paragraphs of this decision are for guidance of the tribunal only if they decide that the Urgent Cases Regulations do not enable the claimant to obtain the full amount claimed by him. On the other hand if the tribunal prefer to consider whether the claimant can succeed independently of the Urgent Cases Regulations, they may do so, should they reach the conclusion that the claimant can be awarded all that he claims without recourse to the Urgent Cases Regulations they could leave them out of account.

7. The claimant was not after the termination of his employment in September 1981 actually engaged in remunerative full-time work at any time material to this appeal. The question is whether and for what period he is to be treated as so engaged by virtue of regulations made under section 6(1). The relevant regulation is regulation 9 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 [SI 1980 No 1586] as substituted by regulation 7(7) of the Supplementary Benefit (Miscellaneous Amendments) Regulations 1981 [SI 1981 No 815] (the Conditions of Entitlement Regulations), now broadly re-enacted, which provided so far as relevant as follows:-

> "(1) For the purposes of section 6(1) ..... a claimant shall be treated as engaged in remunerative full-time work only where -
>
> (a) he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than -
>
> (i) .....,
>
> (ii) in any other case, 30 hours a week,
>
> or .....
>
> (b) he was engaged in remunerative full-time work within the meaning of sub-paragraph (a) ..... and -
>
> (i) either his employment has terminated or ....., and
>
> (ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with regulation 10 of the Supplementary Benefit (Resources) Regulations 1980 which, by virtue of regulation 9(2) of those regulations ....., fall to be taken into account for a period subsequent to the termination of the employment or .....
>
> and in a case to which this sub-paragraph applies the claimant shall be treated as engaged in remunerative full-time work for the period in respect of which those earnings fall to be taken into account pursuant to the said regulation 9(2) ....."

8. The effect of the foregoing provision is that if (as seems to have been the case) the claimant was engaged in remunerative full-time work before the termination of his employment, he fell to be treated as engaged in remunerative full-time employment for a period after the termination of his employment if he received in respect of that employment earnings calculated in accordance with the Supplementary Benefit (Resources) Regulations 1980 [SI 1980 No 1300] (the Resources Regulations) which by virtue of regulation 9(2) of those regulations fell to be taken account for a period subsequent to that termination; and that he would fall to be so treated for the period for which under regulation 9(2) they were to be so taken into account.

9. It is thus necessary to consider regulations 9(2) and 10 of the

Resources Regulations (which at the relevant time had been modified

(1) by regulation 8 of the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980 [SI 1980 No 1774] and

(2) by regulation 3(5) of the Supplementary Benefit (Requirements and Resources) Amendment Regulations 1981 [SI 1981 No 1016],

and which have since been re-enacted in a somewhat different form though seemingly to the same effect). Regulation 10(1) provided that a person's earnings should consist of all remuneration or profit, calculated on a weekly basis, derived from any employment and should include among other things any payment in lieu of notice or remuneration. It is therefore clear that the first and second payments made to the claimant on 23 September 1981 and on 25 September 1981 constituted earnings in terms of regulation 10(1). The more difficult question is whether, and if so for what period, they constituted earnings that fell to be taken into account for a period subsequent to the termination of the claimant's employment.

10. This question turns on the provisions of regulation 9(2) of the Resources Regulations, and the relevant period not necessarily the same as the period to which the payments related by virtue of the contract of service between the claimant and the employers.

11. Regulation 9(2), as in force at the relevant time, provided as far as relevant as follows:-

"A payment of any income shall be taken into account for -

(a) a period equal to the length of the period for which it is payable; (my underlining)

(b) where it is not paid in respect of a period, for the period to which it is fairly attributable,

at a weekly rate beginning -

(c) with 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 supplementary benefit is payable in a particular case, it would be practicable to take it into account;

(d) in the case of an income resource 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; (my underlining)

and in this paragraph "benefit week" has the meaning ....."

12. Under this provision a payment of earnings which is made in respect of a period is to be taken into account for a period of the same length (under 9(2)(b) above) and the precise period of that length for which it is to be taken account is (where the payment is made before the beginning of the first benefit week under the claim) under regulation 9(2)(d) a period beginning with the date on which the payment

was "payable". The tribunal found the first payment to be one month's salary making, if their finding is upheld, the period in respect of which it was paid a period of one month; they did not make any finding as to the period for which the second payment was made but they had evidence (not conclusive evidence) that it represented four weeks' pay in lieu of notice and it will be for the tribunal to whom the matter is now referred (who must make a finding on the matter) to make a finding on this. Once the length of the periods covered by the two payments is known, it will be necessary to determine the starting date of these periods. As the claim was made on 22 October 1981 it is virtually certain that the tribunal will find that the payments made in September were made before the first benefit week under the claim made on 22 October. On that basis the date from which the periods begin to run under regulation 9(2)(d) will be the date on which they were payable; and I shall in the directions that I give to the tribunal consider the effect of that provision.

13. Plainly the tribunal will have to determine the date on which the two payments were payable. The word "payable" underlined in the text cited above was in fact substituted by the Amendment Regulations of 1980 for the word "received" and clearly does not mean the same thing as "received". In Decision R(SB) 13/82 at paragraph 6 the Commissioner was concerned with the date on which invalidity benefit became payable and he reached his conclusion by reference to regulation 15(2) of the Social Security (Claims and Payments) Regulations 1979 [SI 1979 No 628] which lay down the date on which the benefit "shall be paid". I agree with that approach to the question and I consider that a sum of a kind that can be required to be paid should be regarded as being payable on the earliest day on which it can be required to be paid. This may of course turn out to be the day on which it is paid. Indeed the presumption of regularity would probably lead to the conclusion in the absence of evidence to the contrary that a sum paid on a particular date was in fact payable on that date. But when it is shown that a sum could have been required to be paid on a date earlier than that on which it is paid it would be payable on the former date. Conversely I apprehend that in the context of regulation 9 a sum paid before it could have been required to be paid would be regarded as payable on the latter date, although for some purposes it is difficult to regard a sum that has once been paid as continuing to be payable thereafter.

14. It will thus be necessary for the tribunal to determine the period in respect of which and the date on which each of the two payments in question was payable. The first payment (of the salary) was no doubt made pursuant to the claimant's contract of service and the period in respect of which and the date on which it was payable will be determined by reference to the evidence as to those terms and a finding as to such terms so far as relevant should be made.

15. The question of the second payment may be more difficult. In decisions relating to payments in lieu of notice under the Social Security Act 1975 it has been said that in general such payments are regarded as made in respect of all days in the notice period or in the unexpired part thereof or the unexpired part of a fixed term (see Decision R(U) 1/80 at paragraphs 8 and 9) rather than the period (if different) represented by the number of weeks' pay included in the payment itself (see Decision R(U) 7/73). It therefore does not necessarily follow that the second payment, which the appeal tribunal found to be of four weeks pay, was necessarily paid in respect of a period of four weeks though it is not

unlikely that it will be found to be. But the fresh tribunal should make a finding of the notice to which the claimant was entitled and when it expired or would, if given, have expired if they find the second payment to be a payment in lieu of notice.

16. I now turn to the date on which the second payment was payable. A person's employment may be brought prematurely to an end in a number of different ways. It is possible that an employer and an employee may agree to a premature termination on terms that a payment or payments be made to the employee. In that case the date on which such payment or payments are payable will depend on the terms of the agreement.

17. More often perhaps the employer acts unilaterally. He may give the claimant the notice to which he is entitled under his contract and inform him that his attendance at work will not be further required while his notice is running. In such a case the employment (unless exceptionally the circumstances are such that the claimant can and does treat the employer's action as repudaition of his contract) continues until the expiry of the notice even though the claimant does not attend and any payments made are payments of remuneration and not payments in lieu of notice and they are payable on the date on which under the contract of service they were payable.

18. For tax reasons however it is much more usual for the employer to dismiss the claimant summarily tendering a sum in lieu of notice. The strict legal analysis of this is that the employer repudiates the contract of service offering a sum of money as settlement of any claim arising out of this repudiation, and the employee, if he accepts the sum, both accepts the repudiation and the sum in question in full settlement of any claim that he might otherwise have for damages. The parties can of course expressly vary this; but in my judgment the inference to be drawn, where nothing more happens than that the employer terminates the employment before he is entitled to do so and tenders a sum of money which is accepted by the employee, is the above.

19. When is the amount so tendered to be regarded as payable? Mr James submitted to me that the situation was the same as if the employer had followed the course outlined in paragraph 17 above and that the amount tendered was payable at the same time as the corresponding remuneration would have been payable if the contract had continued on foot. I do not accept this submission. In my judgment repudiation once accepted brings the contract to an end and any payment is made not under the contract but outside it: see Henley v Murray [1950] 1 All ER 908. It was decided long ago in Hochster v De La Tour (1853) 2 E & B 678 that where an employer repudiates a contract of service the employee can if he accepts the repudiation immediately commence an action for damages. If in the present case the employer had repudiated the contract without the offer of salary in lieu of notice the claimant could immediately have commenced an action for unliquidated damages if he had accepted the repudiation. I hold that in the event that a payment in lieu of notice is tendered and accepted the moment at which (or if later the moment as from which) he accepted the repudiation would be the moment when such payment is payable. I should not however be taken as deciding what if nothing was tendered would be position of a sum eventually fixed as damages.. The foregoing conclusion is based on the law of England, but I apprehend that the relevant law in Scotland is similar (see White and Carter (Councils) Ltd. v McGregor [1952] AC 413 at page 427).

20. I have now to consider what conclusions should be reached on the

main issue once the primary findings relating to the periods in respect of which the payments were made and the date on which the payments were payable have been determined. In giving guidance on this I shall be forced to postulate findings on these primary matters; it should not however be taken that just because I postulate a particular finding for purposes of illustration I am in any way advocating the making of such a finding. If, for instance, the tribunal find that the first payment was made in respect of a period of four weeks and that it was payable on 23 September 1981, and that the second payment whatever was the period in respect of which it was paid was payable not less than four weeks later (as might happen if the case was found to be that outlined in paragraph 17) there would be no difficulty. There would under regulation 9(1)(b) of the Conditions of Entitlement Regulations be two periods of deemed engagement in remunerative full-time work (which I will refer to as deemed full-time work) which did not overlap.

21. Difficulties begin to appear if it be found that the two payments were payable on the same day or on days so close to one another that the periods of deemed full-time work would, if determined separately, overlap; in which case one of the two payments would be without effect, rather like concurrent periods of imprisonment. If for instance it were found that both payments were made in respect of a period of four weeks and were payable on 23 September, the two periods of deemed full-time work would run for four weeks from 23 September. I have reached the conclusion that it would be more in conformity with the manifest purposes of the enactments if the two periods were treated as a single period of eight weeks in all running from 23 September. Can this result be arrived at without doing violence to the language of the regulations? I think that it can. If employers had (with a view to assisting a claimant) instead of paying four weeks' salary payable on a specified day in a single payment, made four separate payments of the salary all on the one day I think that it would be held that the four weeks should (not be computed concurrently but should be added together before the period of deemed full-time work was determined. I consider that the same should apply even where the two payments constitute earnings under different heads in regulation 10 of the Resources Regulations. This conclusion seems to be in conformity with the Commissioner's Decision on file CSB 184/82.

22. I come last to the possibility that the two payments be found to have become payable on different dates but so that the two periods in respect of which they are paid would partly overlap if separately determined with effect from the dates from which they are respectively found to be payable; this would be the case for instance if the two payments were found to have become payable on the days on which they were made. Here it is not quite so easy without taking liberties with the language of the regulation simply to aggregate the two periods, as there does not immediately appear to be any reason why the aggregated period should be calculated so as to run from one of the two payable dates rather than the other. I have reached the conclusion however that the proper course is to aggregate them and to compute the aggregated period as running from the earlier of the dates on which they are found to be payable.

23. The fresh tribunal will if they are unable to dispose of the appeal in the claimant's favour by reference to the Urgent Cases Regulations have to reach a conclusion on this other aspect of the case; and I think that I should recapitulate the matters on which it is desirable that they should for this purpose record findings; such record being absolutely necessary, and not just desirable, in relation to all matters other than those as to which it is clear from the papers that there is no dispute.

The matters are as follows:-

(a) whether the claimant was down to the termination of his employment engaged in remunerative full-time employment in terms of regulation 9(1)(a) of the Conditions of Entitlemt Regulations.

(b) in respect of what period was the first payment made;

(c) on what date was the first payment payable;

(d) in respect of what period was the second payment made?

(e) on what date was the second payment payable?

Questions (b) and (c) will be answered by reference to what they find were the terms of the claimant's service. Question (d) and (e) can only be answered after it has been determined what were the circumstances of the second payment eg was it a payment of the kind discussed in paragraph 17 or of the kind mentioned in paragraph 18 or of some other and if so what kind. It will thus not be possible to answer questions (d) and (e) without recording findings on these last mentioned matters.

24. The claimant's appeal is allowed.

Signed J G Monroe
Commissioner

Date: 1 August 1983

Commissioner's File: CSB/1008/1982
C SBO File: 1109/82
Region: Wales and South Western