

IEJ/JCB

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Supplementary Benefit Appeal Tribunal:

Case No:

1. (1) This is a benefit officer's appeal against the unanimous decision dated 4 August 1982 of a supplementary benefit appeal tribunal ("the tribunal") brought by my leave and upon the contention that the tribunal's decision was erroneous in law. The claimant has been assisted upon his appeal by Mr B Lewis, to whom I am indebted for cogent written submissions.
- (2) The appeal succeeds. I set aside the tribunal's decision as erroneous in law in the respect under-mentioned and direct that the claimant's appeal from the relevant decision of a benefit officer, which was dated 5 May 1982 and to the effect that the weekly supplementary allowance of the claimant from the prescribed pay day (Thursday) in the week commencing 19 April 1982 was determined in the amount of £21.15, be re-heard by a differently constituted tribunal in accordance with my directions in paragraph 17 below.
2. (1) It is common ground that at all material times the claimant, married but separated from his wife, was living at the home of his brother-in-law and sister, was so living on a basis of full board, and was paying his brother-in-law, as lodger, a weekly charge of £35. In those background circumstances he claimed supplementary allowance at the rate appropriate to a "boarder".
- (2) The benefit officer's decision implicitly reflects a refusal so to treat him, as his award was of an amount reflecting in respect of "housing costs" a treatment of the claimant simply as a "non-householder".
- (3) The tribunal held that the charge the claimant was paying was a "commercial rate" (and it does not appear that the presenting officer concerned before the

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tribunal contended otherwise before the tribunal). The tribunal held that the claimant's supplementary benefit should be assessed on the basis that he was a boarder. Their stated findings on questions of fact material to decision, and reasons for decision, are recorded as under:-

Findings:

"This is an appeal against the decision as to the weekly rate of benefit paid, namely £21.15 pw from week commencing 19.4.82." /The claimant/ "is living in his brother-in-law's household and says that he is now required to pay £35 pw for full board and lodging. The Supplementary Benefit Officer said he could not be treated as a commercial boarder because he is living with a close relative, ie his sister. The charge of £35 pw is a commercial rate for full board and lodging."

Reasons:

"Reg 2(1) of Supp. Ben. Regs. (Requirements) 1980 define a "close relative" as being a parent, child, step-parent, step-child, brother or sister, and the accommodation is provided by" /the brother-in-law/ "on a commercial basis, and as he is a brother-in-law is not specified in the above list. Reg. 9(9)(b)(i) of Requirements Regs. refers."

- 3. (1) The above-cited record of decision is open to criticism in so far as there are included under findings what are really "matters of incidental narrative", and that the introduction "says that he is" leaves open whether the tribunal have accepted or rejected the evidence as to what is so recorded. However, it might, had the record of the **decision contained in one box or another all the** ingredients for a proper determination, have been possible to have overlooked the imperfections to which I have above drawn attention.
- (2) But that is not the **real** position, for in my judgment the record of the decision **reflects an underlying** omission on the part of the tribunal to "ask themselves the right questions", in consequence of which omission they failed to cover either by their findings or their stated reasons the full ground which needed to be covered in order to constitute their decision a proper determination. I have therefore no alternative but to set aside their decision, and since there are inadequate materials before me on which to found the decision they should have given, to direct a re-hearing as I have above done.

4. Shortly stated, the case before the tribunal turned upon the proper construction and application of regulation 9(9)(b) of the Supplementary Benefit (Requirements) Regulations 1980 as amended and in force at the material time. That was in the following terms:-

"(9) In this regulation -

(b) 'Boarder' means a person, not being a person to whom any of paragraphs 1-9 of Schedule 2 applies, who -

(i) pays a charge which is inclusive of his accommodation and at least some cooked or prepared meals which are both prepared and consumed in the accommodation or in associated premises, or

(ii) he is living in a hotel, guest-house, hostel or lodging-house, or in some similar establishment, or

(iii) is a refugee as defined in regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 who is living in a special centre for the reception of refugees prior to settlement in the community,

but excluding any person whose accommodation and meals (if any) are provided by a close relative or other than on a commercial basis."

5. (1) There has been no suggestion that the claimant was a person to whom any of paragraphs 1 to 9 of Schedule 2 applied, or that he was a person falling within (ii) or (iii). By regulation 2(1) of the same regulations (and unless the context otherwise requires - and I pause here to indicate that in my view it does not so require in the circumstances of this case) "close relative" means a parent, child, step-parent, step-child, brother or sister.

(2) The true issue before the tribunal can thus be seen as being whether or not the claimant fulfilled the prescription "boarder", meaning thereby a person who pays a charge which is inclusive of his accommodation and at least some cooked or prepared meals which are both prepared and consumed in the accommodation or in associated premises, but excluding any person whose accommodation and meals (if any) are provided by a close relative, as defined in regulation 2, or other than on a commercial basis.

6. On behalf of the claimant it is submitted that although not expressly stated in the record of the tribunal's decision, it is implicit in it, when read as a whole, that the tribunal considered all the several requirements stipulated in (i) prior to the qualification starting "but excluding"; and at large I am disposed to accept that. I also accept from the same quarter the submission that the tribunal were entitled to exercise their own local knowledge in reaching the finding that £35 a week was a "commercial rate". It follows that any deficiency to be found in the tribunal's deliberations, findings or stated reasons can be localised to the proper construction and application of the passage "but excluding ...".

7. (1) As a starting point I will indicate that there is in my judgment no scope for any gloss upon the statutory formulation of what is or is not expressly defined to be the meaning of "close relative". I am not concerned with the intendment of Parliament in that respect, though one may speculate that Parliament was unwilling to introduce provisions which they regarded as open to abuse as between close relatives - but I cannot attribute to Parliament any ignorance that a person's brother or sister may be married and have a spouse (any more than one may have an ignorance that claimants might have mothers-in-law, or that a particular claimant might in particular circumstances lodge with his brother-in-law or mother-in-law); but both those "relatives" are clearly left outside the definition.

(2) The material issue can thus be further localised to whether or not the claimant fell to be excluded:-

- (i) because his accommodation and meals (if any) were provided by his sister; or
- (ii) because his accommodation and meals (if any) were 'provided' ... other than on a 'commercial basis' - and I will say at once that I see no difficulty in regard to the words "provided by" which in context clearly bear the meaning identified in the Shorter Oxford English Dictionary as "to furnish (a person, etc) with something, as in 'provided with all complete provisions of Warre' - Camden".

8. I am satisfied also that "provided by" is not to be construed in any narrow sense of "the immediate hand which feeds". One may properly say that meals are "provided by" an hotelier or restaurateur notwithstanding that he employs kitchen staff and waiting staff by whose immediate efforts his customer is "provided"; a commonsense approach must in my view be applied in that respect. But there must still be conclusions properly drawn as to the identity of the "provider" in material context of a claimant who receives board and lodging. I note, however, that the prescription is of "accommodation and meals (if any)" and not "or meals (if any)", or "and/or"; and to my mind this is preclusive of any person being brought within the

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formulation whose accommodation is properly to be regarded as provided by a person other than a "close relative", if provided "on a commercial basis" at all, since this wording to my mind precludes the "but excluding" part of the material provision being brought to bear in regard only to the provision of meals.

9. However, "at a commercial rate" and "on a commercial basis" are to my mind phrases of different meaning, and not to be equated. And "on a commercial basis" is to my mind significantly the broader in its contemplations. "At a commercial rate" may fairly be taken to mean at the prevailing commercial rate for that which is being provided. "On a commercial basis" may well embody as one concept that the payor is making payment at a commercial rate - but it does not follow "as the night the day" that the provision so being made to him is being made "on a commercial basis". Take, for example, a person rendered homeless but able to pay "the commercial rate" for board and lodging, but who has a friend who has the facilities to provide him with board and lodging in his - the friend's - home but is nevertheless someone who does not ordinarily so engage and who values his personal privacy highly. If that friend responds to the appeal of the homeless person it will surely be correct to identify the basis upon which the board and lodging is provided as the basis of friendship. Pecuniarily, there is no difference - but the entire relationship in such circumstances will differ in a number of its aspects from that one would expect to find in circumstances of a provision truly "on a commercial basis".

10. Thus, in my judgment, the tribunal needed to go in considerably greater detail than it did into the situation obtaining in the claimant's case. That the claimant was paying "a commercial rate" was a significant factor, I do not question. But there was in my view a need to inquire more widely than that. I do not suggest that, where it is found to be the fact, the fact that a lodger takes meals with or shares the use of living rooms with a family with whom he is lodging is preclusive of his being a "boarder" in the material context. But it is only by looking into the whole tenor of the arrangements and the circumstances in which they have arisen that a tribunal, using its own commonsense knowledge, can arrive at a proper conclusion.

11. (1) The first submission by the benefit officer now concerned is that the claimant's sister and brother-in-law "both provide board and lodging and the tribunal misinterpreted the regulation by ignoring the presence in the household of" /the sister/, and goes on "It is submitted that this would be a technical device to avoid the exclusion and that regard should be had to all members of each unit."

(2) It is so submitted in the alternative:

"that the tribunal failed to make findings on who provided" /the claimant's/ "meals, who made his bed and cleaned his room and undertook other duties normally carried out by a landlord/landlady for a boarder. If his sister performed these tasks then I

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would contend that both his brother-in-law and sister provided his board and lodging and therefore he would have failed to satisfy "the material requirements". "By omitting to show findings on this I submit that the tribunal failed to fully satisfy Rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 and thereby erred in law".

- (3) As a further alternative it is so submitted that the tribunal failed to show on what basis their finding of fact that £35.00 per week was a commercial rate for full board and lodging was based, and that the tribunal were in error in failing to record any evidence on which that finding was based and to give any real consideration to such a question before recording the finding.

12. Taking those submissions, for my own convenience, in reverse order, I do not regard the third heading as well founded. In an absence of express reference to other evidence the tribunal were in my judgment to be inferred to be using their own general knowledge of prevailing rates in the neighbourhood, and whilst it might have been better practice to have so indicated I do not consider their decision to be in this respect in breach of their obligations under the stated rule or otherwise - the more so since, so far as I can see, the benefit officer then concerned did not challenge the contention in point before the tribunal.

13. Both the first and the second contentions rest upon the underlying contention that in applying regulation 9(9)(b) in the case of a claimant who lodges at the home of his sister and brother-in-law it is proper to put a gloss on what the regulation says in terms. For the regulation says nothing in terms about a case where a provision of accommodation and meals is made in part by a close relative and in part by a second person who is not such. Bearing in mind that this is an excluding provision, operating upon and restricting an application of more general criteria, I consider that it falls to be applied with close regard to what it does and does not actually state. I accept as well founded the stricture that the tribunal failed to make adequate findings of fact as to what in fact were the practical and financial arrangements in point, but, consistently with the conclusion I have already expressed as to who should be regarded as making the "provision" which the lodger enjoys, and leaving open a situation in which husband and wife so contributed to such provision that it might properly be regarded as a "joint venture" in which both were equal participants, I have come to the conclusion that in order for the "close relative" exclusion to bear the provision must be predominantly if not exclusively made by and at the expense (in money or effort) of the close relative. A tribunal faced with an aggregate of "several" provision in different respects, or "joint" provision - or both - would need to reach a "value judgment", based upon specific findings. This might well involve close analysis of all material arrangements. If, for example, the home was owned, and the outgoings in respect of it were defrayed, by the brother-in-law, the ingredients from which provided meals were prepared were paid for by him, and the bed linen also provided and laundered at his expense, - but it was the sister

who actually made the lodger's bed and cooked the meals he was provided with, a tribunal might well conclude that although the sister undoubtedly took some part in the provision it was not the predominant part. Fine points will no doubt arise in particular cases; but that does not vitiate the principles in point. What is, in my judgment, plainly untenable is that if a sister so much as lifts a finger, an inferred "gloss" is to render applicable the "close relative" provisions.

14. Moreover, whilst I appreciate that the field is one in which opportunities for abuse can readily be found, it is in my view "false pleading" to stigmatise circumstances for which the legislature has not seen fit to prescribe squarely as a "technical device to avoid the exclusion". If the legislature had wished to apply the "close relative" exclusion to brothers-in-law as such it could readily have done so in term - as also had it wished to exclude cases in which although the main burden of provision was carried by someone not within the prescription "close relative" some minor part of the burden was so discharged. But it has not seen fit to do so, and I do not consider it within the permissible grounds of judicial interpretation to remedy any assumed omissions in those respects.

15. But, be that as it may, there are, in my judgment, clearly not to be found in the tribunal's findings of fact and stated reasons any sufficient compliance with the requirements of rule 7(2)(b) above stated: and that alone is a sufficient foundation for setting aside the tribunal's decision.

16. Having so concluded, in favour of the interest he represents, I hope that Mr Lewis will not regard me as treating others of his contentions in too cavalier a fashion if I add only as follows:

- (i) I substantially accept his contention as to what is meant by "provided";
- (ii) I do not accept his contention that because the legislation in many contexts regards a man as "head of the household" it was the brother-in-law who must, in the context of the material regulation, be regarded as "providing", (with the ensuing consequence that since he was not a "close relative" the "close relative" exception could not bear). My reasons for this are already above indicated.
- (iii) I do not accept that, as Mr Lewis has asserted, the tribunal made "a clear finding that" /the brother-in-law/ "was Head of the Household". They have not made a clear or any finding in those terms or to that effect - what they have indicated is that he provided the accommodation, but with insufficient findings expressed to support that conclusion.
- (iv) I also reject the submission, dependent upon the contention last mentioned, that it was unnecessary for the tribunal to make detailed findings as to the practical and financial arrangements and that rule 7(2)(b) has been sufficiently complied with.

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- (v) I accept that paying at a "commercial rate" - a phrase, I stress, not itself to be found in the material regulations - is to be given its commonsense meaning and corresponds to a realistic charge for the services provided. I accept also that the tribunal were entitled to make that finding on the basis of their local knowledge - and without elaboration, in the circumstances that there does not seem to have been any challenge of the figure by the presenting officer.

17. I direct that the tribunal re-hearing the appeal be furnished with a copy of my present decision and that they shall have due regard to what I have indicated in paragraphs 7 to 10 above. I do not find it necessary to give such tribunal any other specific directions as to the re-hearing, but would stress that all issues of fact will be once more entirely at large before them, and that accordingly they must avoid "starting where the previous tribunal left off", and must deal both by findings and reasons for decision with all material aspects.

Signed I Edwards-Jones
Commissioner

Date: 6 October 1983

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