

MASTER

Payment from former employers on termination of employment not in lieu of notice but compensation for loss of a capital asset. Claimant ∴ not disentitled to SB.

MHJ/3/LS

Commissioner's File: CSB/1039/1986

C A O File: AO 2915/SB/86

Region: London South

**SUPPLEMENTARY BENEFITS ACT 1976**

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

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: Stuart Sillett

Social Security Appeal Tribunal: Southampton

Case No: 18/07/08

**[ORAL HEARING]**

1. My decision is that the decision of the social security appeal tribunal dated 4 June 1986 is erroneous in point of law and accordingly I set it aside. In this case it is expedient that I should give the decision the tribunal should have given, which is that the claimant is not disentitled to a supplementary allowance for the inclusive period of 27 May to 19 August 1985 because he is not to be treated as having been engaged in remunerative full-time employment during that period.

2. The claimant appeals to the Commissioner, with leave of the chairman of the tribunal, against the unanimous decision of the Southampton social security appeal tribunal, dated 4 June 1986, upholding the decision of the adjudication officer, issued on 10 July 1985, that the claimant was not entitled to a supplementary allowance for the inclusive period from 27 May 1985 to 19 August (originally 27 August, and subsequently revised) 1985. The claimant requested, and I granted, an oral hearing of this appeal, which took place on 2 February 1987 and at which he was represented by Mr Anthony Farrell of the Southampton & District Unemployment Centre. The adjudication officer was represented by Mr E. O. F. Stocker, instructed by the Solicitor's Office of the Department of Health and Social Security. I am indebted to both Mr Farrell and Mr Stocker for their assistance.

3. On 17 May 1985 the claimant was made redundant by his employers, Vosper Thorneycroft Ltd, for whom he had worked since August 1983. On 27 May 1985 the claimant applied for a supplementary allowance but this was disallowed on the basis that the sum of £1334 he had received upon leaving his employment included 13 weeks' wages in lieu of notice and 2 days holiday pay, and the adjudication officer accordingly determined that, under regulation 9(1) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, the claimant should be "treated as engaged in remunerative full-time work" up to and including 19 August 1985. The claimant appealed against that decision.

4. At the hearing of the claimant's appeal on 4 June 1986 it was argued on his behalf that, as a large number of people had been made redundant by Vosper Thorneycroft at the same time and, irrespective of their length of service with the company, they had all received a payment equivalent to 13 weeks' wages, it was in fact a capital sum and should be treated as such for the purpose of assessing the claimant's entitlement to benefit. The tribunal upheld the decision of the adjudication officer and the claimant appealed to the Commissioner.

5. The adjudication officer now concerned with this case, in his submission dated 2 October 1986, very fairly pointed out that, among other things, the tribunal had not considered the period of notice to which the claimant had been contractually entitled and consequently the tribunal had failed to make sufficient findings of fact to establish whether any, and if so what, proportion of the total payment should not be regarded as having been in lieu of notice and so outside the ambit of the Conditions of Entitlement Regulations. He therefore submitted that the matter should be remitted for rehearing by a differently constituted tribunal.

6. However, that submission had not (and, no doubt it was not practicable for it to have) taken into account the Commissioner's decision on file No. CU/364/1985, which had been promulgated on 23 September 1986. In response to my request for a further submission regarding the effect of that decision the adjudication officer now concerned with the case, in his submission dated 6 January 1987, very frankly conceded that, as the claimant in the instant case was made redundant on precisely the same terms as the claimant in CU/364/1985 then, notwithstanding the fact that that decision was concerned with unemployment benefit, provided I accepted CU/364/1985 as a correct interpretation of the law, the sum paid to the claimant upon his redundancy fell to be regarded as "compensation for the loss of a capital asset and not a payment in lieu of notice or of remuneration".

7. I do accept the decision in CU/364/1985 as correctly stating the law in relation to the particular facts in that case and, although the learned Commissioner was there dealing with unemployment benefit, I also agree with the adjudication officer's submission that there is "no basis for applying that decision differently in the field of supplementary benefit".

8. CU/364/1985 is concerned with regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, which provides, inter alia, that -

"a day shall not be treated as a day of unemployment if it is a day in respect of which a person receives a payment ... in lieu either of notice or of remuneration which he would have received for that day had his employment not been terminated";

whereas in the instant case benefit was disallowed pursuant to the provisions of regulation 10(1)(d) Supplementary Benefit (Resources) Regulations 1981, that -

"... a person's earnings shall ... include ... (d) any payment in lieu of notice or remuneration";

and of Regulation 9 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 which provides, in so far as it is relevant, that -

"9. (1) For the purposes of section 6(1) [Supplementary Benefits Act 1976] (exclusion from supplementary benefit of certain employed persons) a claimant shall be treated as engaged in remunerative full-time work only where -

(a) .....

(b) he was engaged in remunerative full-time work ..., but not as a self-employed person, and -

(i) ... his employment has terminated ... and

(ii) he has received in respect of the employment in

which he was so engaged earnings calculated in accordance with ... the Resources Regulations (calculation of income resources) 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 ... "

Regulation 9(2) of the Resources Regulations prescribes the way in which earnings "and other income" shall be calculated and attributed.

9. It will be clear from the foregoing that the regulations provide for analogous situations in the unemployment and the supplementary benefit fields and, particularly as the facts in the instant case are indistinguishable from those in CU/364/1985, the same conclusion must follow. In those circumstances it would be a pointless exercise to remit the case for rehearing by a differently constituted tribunal, and I am satisfied that it is expedient that I should give the decision which the tribunal should have given.

10. In giving that decision I take the point made by Mr Stocker, from which Mr Farrell did not dissent, that, whereas in CU/364/1985 it was open to the Commissioner to make findings of fact, the instant appeal lies on a point of law only and, therefore, it would be more appropriate for me to find that the claimant is not disentitled to benefit during the period in question than for me to make a positive finding that he is so entitled. As a matter of law I accept that submission and find accordingly.

11. The claimant's appeal is allowed and my decision is as set out in paragraph 1.

**(Signed)** M H Johnson  
Commissioner

**Date:** 17 February 1987