

CSB 1153/1993

MJG/RPM

SUPPLEMENTARY BENEFIT ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal against the decision of the supplementary benefit appeal tribunal dated 26 September 1983 as that decision is erroneous in law and is set aside. In accordance with regulation 27 of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No 451], I give the decision which the tribunal should have given namely that on the date of claim (21 June 1983) for a supplementary allowance:-

- (i) The claimant's resources included an annual income of £1,650 payable in respect of the period from 31 March 1983 to 30 March 1984 under a deed of covenant dated 31 March 1982 and made in the claimant's favour by his father: Supplementary Benefits Act 1976, Schedule 1, paragraphs 1(2) and (3) and the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No 1527], regulation 9(2)(a)(1);
- (ii) Consequently the claimant's resources exceeded his requirements and supplementary allowance was not payable to him at the date of claim: Supplementary Benefits Act 1976, section 1(1).

2. This is an appeal to the Commissioner by the claimant, a man aged 19 years at the material time, from the decision of a supplementary benefit appeal tribunal dated 26 September 1983 confirming the benefit officer's refusal dated 28 June 1983 of a supplementary allowance for the claimant. I have allowed the claimant's appeal but only in the sense that I consider that the supplementary benefit appeal tribunal did not give adequate reasons for their decision. I have nevertheless in effect upheld the tribunal's decision and myself given the reasons which should have been given. The appeal was at the claimant's request the subject of an oral hearing before me on 6 April 1984 at which the claimant was not present nor represented and the benefit officer was represented by [redacted] of the Solicitor's Office of

the Department of Health and Social Security. I am indebted to
for his assistance to me at the hearing.

3. On 21 June 1983 the claimant claimed a supplementary allowance, stating that he had just finished re-sitting his "A" level examinations at school and that he had income from a deed of covenant. It appears that the claimant had a place at a university and he took up that place in October 1983. The tribunal held that, as a result of the £1,650 gross income receivable directly or indirectly under the deed of covenant, the claimant was not entitled to supplementary benefit since his resources then exceeded his requirements. From that decision the claimant appeals to the Commissioner. A written submission from the adjudication officer now concerned, dated 21 December 1983, in effect supports the appeal, for reasons which are analysed below and which were elaborated by at the hearing.

4. A copy of the deed of covenant in question was before the tribunal and has been made available to me. The deed is dated 31 March 1982 and is made between the claimant's father as the covenantor and the claimant as the beneficiary. The father covenants with the claimant that during their joint lives, or for 7 years, or until the claimant ceases to be receiving full-time education at an educational establishment (whichever shall be the shortest period) that the father will pay to the claimant on 31 March in each year the sum of £1,500 (less income tax at the basic rate) such sum to increase each year at the rate of 10% compound, the first payment to be made immediately following the execution of the covenant and each subsequent payment to be made on each anniversary thereof. Subsequently the parties entered into a further deed of covenant (dated 16 September 1983) of a similar nature to the previous one except that the payments were expressed to be made on 1 October, 1 January and 1 April in each year, each payment to be the sum of £605 (less tax at the basic rate) and to increase each year at the rate of 10% compound, the first payment to be made on 1 October 1983 and subsequent payments to be made on 1 January, 1 April and 1 October in each year. That second deed of covenant was executed after the benefit officer gave his decision on 28 June 1983 and was therefore never considered by the benefit officer. Consequently neither the local tribunal nor I have power to adjudicate upon it (see the Decision of a Tribunal of Commissioners in R(SB) 42/83). The second covenant appears to have been executed in an attempt to avoid the difficulties that arose in connection with the first deed and I do not consider therefore that it would be proper for me to pronounce on its efficacy for that purpose though of course the general principles set out later in this decision may bear on the construction of the second deed (see paragraph 10 below).

5. The relevant provision of the supplementary benefit legislation is to be found in the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No 1527], regulation 9, headed "calculation of income resources", the material parts of which read as follows,

"9(1) ... the amount of a claimant's income resources to be taken into account shall be -

- (a) [relates to earnings - not relevant];
- (b) the whole of any other income of the assessment unit...
- (2) Earnings and other income shall be calculated on a weekly basis and ... payments shall be attributable as follows:-
 - (a) ... 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) [not relevant to this case]
 - (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 ..."

6. Unfortunately, the local tribunal despite its clearly having grappled carefully with the problems involved in this case did not, in its findings of fact and reasons for decision, indicate clearly whether it based its decision on regulation 9(2)(a)(1) or on regulation 9(2)(a)(ii), merely stating in its reasons for decision,

"The tribunal were satisfied that in view of the above facts the appellant was not entitled to a supplementary allowance because the amount received under his covenant and also the amount of the tax refund should be taken into account over the period for which they were made (Resources Regulation 9(2)(a))."

The tribunal also made a finding of fact,

"The covenant referred to above allowed for annual payment to be made on 31 March in each year."

7. It is quite clear that the tribunal found that the gross payment of £1,650 was to be regarded as payable over the entire period of the calendar year, starting on 31 March 1983. For the reasons given below I am satisfied that that was a correct decision but as the tribunal did not give an indication of its detailed reasons and in particular which sub-head of regulation 9(2)(a) it had applied, I consider that I should set their decision aside as being erroneous in law but only for want of adequate reasons (as required by rule 7(2)

of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605] [now regulation 19(2) of the Social Security (Adjudication) Regulations 1984].

8. In his written submission dated 21 December 1983, the adjudication officer now concerned submits that the tribunal's decision was erroneous in substance as well as in its failure to give adequate reasons by asserting (paragraph 16),

"Even where a payable period is not stipulated in the Deed I submit that, given the intention of the parties, it would be legitimate and proper to say that the period to which the income is fairly attributable is the academic year and not the calendar year. I further submit that this applies not only to income covenanted under a Deed but also to any associated tax refunds".

A further submission (in paragraph 19 of the benefit officer's submission) that the tribunal should have taken into account, as evidence of intention, the second deed of covenant in construing the first was withdrawn by [redacted] at the hearing, in my view quite properly, because it was not sustainable (see below).

9. In making his submission, the adjudication officer invites me to dissent from a Decision of a Commissioner on Commissioner's File [redacted]. There, in relation to a deed of covenant similar to the first covenant in the present case, the learned Commissioner held that it was not open to the parties to the covenant to assert that the income payable thereunder was attributable to any period other than a calendar year because that would be inconsistent with wishing to obtain the benefit of sections 434-457 of the Income and Corporation Taxes Act 1970, granting certain income tax advantages. As a result the learned Commissioner held that during a Christmas vacation a university student, in receipt of income under such a deed of covenant from his father, could not claim supplementary benefit. The benefit officer in the present case has made a detailed submission to me on the revenue law aspect of this matter, seeking to show that the reasoning of the learned Commissioner in [redacted] on the revenue law aspects was incorrect. Fortunately I do not, in my view, have to rule on that issue because, with respect, I do not consider that the revenue law position is relevant to the application to a deed of covenant of regulation 9 of the Resources Regulations. I must in my view simply construe the deed of covenant as it is, without regard to the revenue consequences of it.

10. Nevertheless, I agree with the factual conclusion of the learned Commissioner in the decision on [redacted]. In my judgment, a payment under a covenant, such as the first deed in the present case, falls under sub-paragraph (1) of regulation 9(2)(a) of the Resources Regulations i.e. "it is payable in respect of a period" and I hold that that period is one calendar year. The deed in question was executed on 31 March 1982. It provided for the payment on 31 March in each year the sum of £1,500 less tax (to increase each year at 10% compound

- hence the £1,650 second payment). Moreover it provided that the first payment was to be made immediately following the execution of the covenant i.e. on 31 March 1982 and for each subsequent payment to be made on each anniversary thereof. It seems to me quite plain on such wording that the covenant is made in respect of a calendar year and that any payment under it must be averaged out on a weekly basis for the period of a whole calendar year and not be simply attributed to university terms or to an academic 'year', i.e. from October to June. If it is plain that a payment in respect of a particular period (as it is plain on the first deed in the present case), then that is the end of the matter and evidence or speculation as to the intentions of the parties is not relevant, even though there is a reference in the deed to the receiving of full-time education at an educational establishment. The fact that the claimant was between school and university when he made his claim is legally irrelevant - the position would be the same if the claim had been made after he had started at university. The second deed of covenant does not seem to be specifically 'tied' to any academic or educational year or term but merely provides for 3 payments on set dates in each year and thus may not have a legal effect different from that of the first deed of covenant, though, as explained, it is not directly in issue.

11. If I were wrong in holding that the first deed came under sub-paragraph (i) of regulation 9(2)(a) of the Resources Regulations and it were thought that (contrary to my view) it comes within sub-paragraph (ii) of the regulation i.e. "in any other case, for the period to which it is fairly attributable", then I would hold that the words "fairly attributable" do not give an adjudicating authority an unfettered discretion to decide as to what period a payment was attributable and to allow all kinds of extrinsic evidence to construe such a deed, though it may be that some extrinsic evidence could be admitted under rules akin to the normal rules of evidence as to the construction of written instruments. In my judgment the expression "fairly attributable" means no more than "reasonably attributable", i.e. according to the construction of the deed itself in its context, to be gathered wherever possible from the contents of the deed itself and not from extrinsic evidence. In my judgment, it is essential that there should be some element of certainty in the construction of deeds of covenant of this kind and that it should not depend on the view of the particular adjudicating authority as to the period to which a payment should be attributable. In particular I cannot think that a deed of covenant, which itself makes no reference to an academic

year or to academic terms, could be construed as applying only to that year or to those terms, simply because of oral evidence that it was meant to do so, particularly where that evidence sought to contradict the plain wording of the deed.

(Signed) M J Goodman
Commissioner

Date: 29 May 1984

Commissioner's File:
C SBO File: 1.
Region: North Western