DGR/SH/15

Commissioner's File: CSB/08/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 26 January 1989 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 26 January 1989. I directed an oral hearing. At that hearing the claimant, who was present, was represented by Ms P Fitzpatrick of the welfare rights unit of the National Association of Citizens Advice Bureaux, whilst the adjudication officer appeared by Mr J Jobbings of the Chief Adjudication Officer's Office.

3. On 23 June 1988 the adjudication officer decided that the claimant had been overpaid supplementary benefit in respect of the inclusive period from 7 July 1983 to 26 October 1987 amounting in all to £10,350.02, and that the same was recoverable from the claimant pursuant to section 53 of the Social Security Act 1986.

4. He would appear to have relied on the claimant's failure to disclose the material fact that he was, during the relevant period, in receipt of earnings as a result of collecting rents at three houses, namely 82 Tottenhall Road, N13, 8 Mitchell Road, N13 and 349 High Street, Enfield. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer. The claimant maintained that he had only collected the relevant rents for cigarettes, and that in practice he made nothing out of it at all. However, there was a statement by Mr Christoforos Markou, made in the knowledge that he was

liable to be prosecuted if he were guilty of a falsehood, to the effect that, in respect of the first two properties mentioned above, the claimant had paid him in all £210 a week, and had retained for himself £110 a week. Moreover, there was a statement made by one of the tenants of 82 Tottenhall Road setting out the rents paid by all the occupiers. Unfortunately, the tribunal disregarded the statement of Mr Markou merely on the ground that he was not present before them. Whilst his absence was a distinct disadvantage, in that he was not open to cross-examination by the claimant, the tribunal erred in law in failing to take into account his evidence. They had to determine whether they preferred the statement of Mr Markou, backed up by the further evidence of the principal tenant of one of the properties, to the statement of the claimant that he undertook all these activities for a few cigarettes a week. They also had to bear in mind the evidence contained in the interview of the claimant conducted by officers of the Department. At the end of the day they had to determine which version of events they believed. Unfortunately they did not address their minds to this crucial issue, but went off on a secondary issue as to the effect of regulation 4(3) of the Supplementary Benefit (Resources) Regulations 1981, something which would seem to me unlikely to be relevant, unless the tribunal concluded that they believed the evidence of the claimant. By approaching the matter in the wrong way, the tribunal erred in point of law, and I must set aside their decision.

5. Further, as this was a recovery case, sub-section (4) of section 53 had to be complied with. There is no evidence that the adjudication officer actually reviewed and revised the original award. The tribunal failed to consider this aspect of the case, and on that ground also they erred in point of law. Accordingly, I must set aside the tribunal's decision and direct that the appeal be reheard by a differently constituted tribunal.

6. That tribunal will, if they are satisfied that the adjudication officer did not review and revise the original award, be at liberty, pursuant to what I said in CSB/1272/1989, to rectify the omission in reliance on section 102(1) of the Social Security Act 1975, so as to obviate the need for the proceedings to be started all over again ab initio with all the wasted time and money involved. Assuming they go on to deal with the substantive issue, they will first decide which version of events they believe, as between the claimant and Mr Markou, and will then determine what were the actual earnings of the claimant, and in this connection they will also have to take into account any earnings derived from collecting the rent at 349 High Street, Enfield. If they are satisfied that the claimant received earnings on the scale suggested by Mr Markou's evidence, there will have to be an investigation of the question of overpayment, and, of course, the claimant, if regarded as a self-employed person, will be entitled to deduct the relevant expenses. Moreover, the question of any disregards will also have to be taken into account. If, however, the tribunal consider that the claimant did only work for cigarettes, then consideration will have to be given to regulation 4(3), so as to

calculate the amount of notional earnings in accordance with the criteria set out in paragraph 8 of the submissions of the adjudication officer now concerned dated 22 March 1990. When the notional earnings have been arrived at, then the question of overpayment will have to be considered and a schedule produced giving the claimant the benefit of any proper deductions or disallowances.

7. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) **1 May 1992**