

JM/SH

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

CSB 66/1982.

(concessionary coal) no maintenance.

1. This is a benefit officer's appeal, brought by my leave, against a majority decision of the supplementary benefit appeal tribunal dated 29 October 1981 which allowed the claimant's appeal against a decision of the benefit officer issued on 25 September 1981.
2. I held an oral hearing of the appeal. The benefit officer was represented by Mr M Qureshi of the Solicitor's Office of the Department of Health and Social Security. The claimant did not appear. She was, however, represented by Mr E Ballans, of the Citizens Advice Bureau. In the course of the hearing argument ranged over a wide number of legal issues - some of them of considerable complexity. I am indebted to both Mr Qureshi and Mr Ballans for their constructive assistance. I trust that they will not feel affronted if I do not deal with all the knotty questions of construction and application which they canvassed before me. By reason of the conclusion to which I have come, several of those questions do not demand decision by me. It is expedient that their answers should await cases in which they are directly in point.
3. The claimant is now divorced and has remarried. At the material time, however, she was separated from her then husband and had the sole care of a dependant son. Her husband (to whom I shall refer as 'Mr C') was in the employment of the National Coal Board. He had on 26 July 1981 gone to live with his father, leaving the claimant and the son in the matrimonial home.
4. This case centres upon the concessionary coal or coke which is a well-known perquisite of NCB employees. As appears below, I can decide this appeal upon the basis of the findings of fact made by the appeal tribunal. It may assist comprehension, however, if I supplement those findings by

information which Mr Ballans furnished at the hearing before me. (Some of that information appears in the note of evidence taken by the chairman of the appeal tribunal - before which Mr Ballans appeared - although it is not the subject of any recorded finding.)

5. Mr Ballans told me that to qualify for the concession one must be both an employee of the NCB and a householder. The fuel the subject thereof must be used by the recipient. He cannot properly give it away - let alone sell it. The concession is liable to be withdrawn from those who abuse it. Nothing is paid for the fuel itself, but the recipient must pay the delivery charges. By the strict letter of the scheme the concession is terminable if the relevant employee dies or ceases to be a householder. An indulgent pit manager will be prepared, however, to continue for a while deliveries to the family of an employee who has either died or moved from the matrimonial home. Such indulgence would not, of course, be countenanced if the employee had become a householder elsewhere and had indicated that he wished the concession to be delivered to his new address. It was common ground at the appeal tribunal hearing that an employee who does not wish to take the concessionary fuel will be paid the sum of £8.16 a week in lieu thereof. Mr Ballans stressed, however that such payments are confined to those who would be entitled to the fuel. A non-householder will get no payment in lieu. It is common ground, moreover, that the retail market value of the fuel the subject of the concession is substantially in excess of the sum of £8.16.

6. In respect of this particular case, Mr Ballans told me that the deliveries which had been made to the claimant after Mr C had left her were not made consequent upon any indulgence on the part of the relevant pit manager. The coke simply continued to arrive at the claimant's house - and she paid the delivery charges. When she remarried she asked the NCB to stop the deliveries. This was the first that the NCB had known about the departure of Mr C from the household. It then, of course, terminated the deliveries immediately. It had not, however, intimated that it intended to make any sort of claim upon either Mr C or the claimant in respect of the coke which had been mistakenly delivered for so long. Mr Ballans submitted that it could now be assumed that there would be no such claim - and I entirely agree with him.

7. After Mr C had left her, the claimant claimed supplementary benefit. By that time a court had ordered Mr C to pay a total sum of £15 a week by way of maintenance for the claimant and her son. That sum was collected by the Department. On 25 September 1981 the benefit officer awarded supplementary allowance at the rate of £30.76 a week from the prescribed pay day (Monday) in the week commencing 28 September 1981. He reached that sum by carrying into the calculations the sum of £8.16 per week as part of the claimant's resources. On the relevant form LT 205 he described that item as "Voluntary Payment (coke)". In his written submission to the appeal tribunal he expanded this by explaining that:

- (a) he had treated the coke as representing a periodical payment within the meaning of regulation 11(3) of the Supplementary Benefit (Resources) Regulations 1980 [SI 1980 No. 1300]; and
- (b) he had quantified that "payment" by reference to the sum which the NCB paid when an employee elected to have cash instead of kind.

8. Regulation 11 of the Resources Regulations 1980 was headed "Calculation of other income". Paragraph (1) thereof provided as follows:-

"(1) For the purposes of the calculation of the income resources of the claimant, all income other than that to which regulation 10 applies [i.e. other than 'earnings'] shall be taken into account in accordance with the following paragraphs."

So much of paragraph (3) of regulation 11 as is material to this appeal provided as follows:

"(3) Any periodical payment, including any arrears paid periodically, and any lump sum payment made, whether in pursuance of a court order or otherwise, to a member of the assessment unit, by or derived from a liable relative or from a person liable to maintain that member under section 17(1)(c) (sponsored immigrants) shall be taken into account in full as income;".

[The remainder of the paragraph was devoted to the attribution of lump sum payments.]

In regulation 2(1) "liable relative" was defined as:

"a spouse, former spouse or parent; and, for the purposes of these regulations, shall include a person who has not been adjudged putative father of a child but is making payments to or in respect of that child".

Paragraph (4) of regulation 11 listed a number of "income resources" which were to be disregarded. Amongst these was "the value of any benefit in kind in the form of a concession" (subparagraph (f)).

9. In allowing the claimant's appeal, the majority of the appeal tribunal took the view that regulation 11(4)(f) applied. The coke which the claimant received was "benefit in kind in the form of a concession". It fell, accordingly, to be disregarded. On the relevant form LT 235 the dissenting member's reasons were recorded thus:

"The dissenting member took the view that the voluntary payment is not a concessionary payment to the appellant and has been correctly treated as a periodic payment and a resource in accordance with the Supplementary Benefit Act and Regulations."

10. Both the local benefit officer and the dissenting member of the appeal tribunal seem to have accepted without question that a delivery of coke can be brought within the phrase "periodical payment". I take a different view. The word "payment" has, of course, colloquial and metaphorical usages. However, even if the matter were untouched by authority, I should have thought that, in a formal context, its ordinary and natural meaning is "payment of money". That is, in fact, confirmed on high authority. I quote from the judgement of Brett MR (as he then was) in the Court of Appeal case of In re Moody and Yates' Contract (1885) 30 Ch D 344, at 346 - 7:

"The first point is whether the production of a writing showing that a peppercorn has been handed over is the 'production of the receipt for the last payment due for rent under the lease', within the meaning of the Conveyancing and Law of Property Act, 1881, s.3, sub-s.4. I think that it is not. A peppercorn is very seldom handed over except under the stress of a case like this; and when it is handed over, it is not the payment of rent due under a lease; and the writing showing that it has been handed over, is not a receipt for the payment of rent. But I must go further and say whenever a rent in kind is reserved, - such as the delivery to the landlord in an agricultural lease of a portion of the crops of hay, or in a mining lease of a part of the coals or minerals won from the soil - although it is a real rent, it does not fall within the statute, which applies only where there is a payment in money. In other cases, such as those which I have mentioned, rent is yielded or rendered, not paid."

Baggallay and Fry LJJ took a similar view. It is to be noted that they were construing the phrase "payment due for rent" - and that they took note of the fact that rent is not infrequently reserved in kind. They were not prepared to extend "payment" beyond the payment of money. Still less am I prepared to do so in the context of "periodical payment by or derived from a liable relative". Rent in kind is a familiar concept. The periodical delivery of goods by way of maintenance is not.

11. As an alternative to paragraph (3) of regulation 11, Mr Qureshi invited me to consider the combined effect of paragraphs (5)(d) and (6)(c):

"(5) There shall be taken into account -

.....

(d) any other income not mentioned in the preceding paragraphs,

only to the extent that the aggregate of any income to which the preceding sub-paragraphs apply exceeds the sum of £4.

(6) In this regulation -

.....

(c) 'income' includes any income in kind."

12. There is no definition of "income" in the Supplementary Benefits Act 1976. There was no definition of "income" in the Resources Regulations 1980. There is no definition of "income" in the Resources Regulations 1981 SI 1981 No. 1527. Its construction in the context of "any other income" presents considerable difficulties. Manifestly it does not apply to earnings; for earnings are the subject of regulation 10 and, as appears from paragraph 8 above, regulation 11 is concerned with "all income other than that to which regulation 10 applies". (It is to be noted that, by virtue of regulation 10(1)(a), earnings includes "any remuneration in kind".) I cannot think that in a scheme which is, basically, administered by benefit officers (few, if any, of whom have legal qualifications) "income" is intended to be construed in the light of the bankruptcy and income tax legislation and of the hundreds of leading cases which that legislation has spawned. But how else is it to be construed? Does it mean any resource which is not a capital resource and is not specifically excluded by the Resources Regulations? Does "income" import legally enforceable entitlement? In this last context, it is to be noted that regulation 11(4)(i) of the Resources Regulations 1980, as originally enacted, provided for the disregard of "any occasional payment by way of a gift, for example for Christmas or a birthday, to the extent that in value it does not exceed £20." In consequence of a steady stream of amendments, the equivalent sub-paragraph in the Resources Regulations 1981 now reads as follows:

"(i) any occasional payment by way of a gift (for example for Christmas or a birthday), including any such payment to which regulation 13 would otherwise apply, except that, if such payment exceeds £100, the amount of the excess shall -

(i) where the payment has been made by or derived from a liable relative, be treated in accordance with the provisions of regulation 13;

(ii) in any other case, be taken into account in full;"

Regulation 13 of the 1981 Regulations deals with periodical and lump sum payments by or derived from a liable relative - i.e. it replaces regulation 11(3) of the 1980 Regulations. The inference would seem to be that payments by way of gift which are not "occasional" are to be treated as income - but the issue is far from clear. If such was indeed the intention of the legislature it would have been a simple matter to say so. In any event, it is to be noted that, since the sub-paragraph uses the word "payment, it is inept to cover gifts in kind.

13. I do not intend to answer any of the rhetorical questions which I have posed in the preceding paragraph. If the deliveries of coke were not "income", they did not fall within the scope of the Resources Regulations at all. If they were "income", they fell, in my view, to be disregarded as being "benefit in kind in the form of a concession".

14. It is clear that both the dissenting member of the appeal tribunal and the benefit officer now concerned were of the view that the coke was to be regarded as passing, in some way, from Mr C to the claimant. In his written submission to the Commissioner the benefit officer now concerned describes it as "a payment of income made by a 'liable relative'". Mr Qureshi suggested to me that the right to receive the coke was transferred by Mr C to the claimant. (He expressly hesitated to use the word "assigned" because he was in some doubt as to whether that formal term was appropriate where the benefit assigned was one which was not legally enforceable by anyone.) If what Mr Ballans told me (cf paragraph 5 above) is correct, there was not, after Mr C had left the matrimonial home, even a concessionary benefit to transfer. But the transfer argument falls at an earlier hurdle than that. There is not a shred of evidence to suggest that Mr C either transferred or purported to transfer anything to the claimant. The subsequent deliveries of coke were the outcome of inertia. The NCB simply went on doing what it had been doing before - delivering coke to the claimant's erstwhile matrimonial home. When it discovered the true situation, it decided to let the tree lie where it had fallen. Retrospectively, it "conceded" the coke to the claimant.

15. The matter can be put another way. Had the relevant pit manager known at the time that Mr C had gone to live with his father, he might well have continued for a period the deliveries to the claimant. In such period the claimant would have been the direct beneficiary of the concession. By declining to take any action against the claimant in respect of the coke mistakenly delivered, the NCB can be regarded as having ratified those deliveries.

16. It follows that I consider that the decision of the majority of the appeal tribunal was correct. It is not, accordingly, either necessary or desirable that I should dilate upon the alternative methods of valuing the coke which were canvassed by Mr Qureshi. Those responsible for framing and amending the regulations, however, may take note of the anomaly - and possibly injustice - which would ensue from a valuation at £8.16 a

week. From regulation 15(3) of the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No. 1299] it can be deduced that at the relevant time the Department took the view that £4.85 a week was the appropriate sum to allocate in respect of heating and hot water for a typical house. That part of a supplementary allowance which is related to normal requirements is intended to cover, among other things, 'household fuel' (see, eg, regulation 4(1) of the Requirements Regulations 1980). A recipient of concessionary coke cannot properly do anything with it other than burn it. He cannot eat it. He cannot wear it. He cannot convert it into money by selling it. He can only use it as household fuel. At the relevant time the Department appears to have valued household fuel (exclusive of that used for lighting and cooking) at £4.85 a week. By valuing this resource of the claimant's at £8.16 a week, the benefit officer was in effect reducing by £3.31 a week the amount available to the claimant for expenditure on all normal requirements other than heating and hot water. But there was no way that the resource could properly be used to replace the £3.31 thus lost.

17. The benefit officer's appeal is dismissed.

(Signed:) J Mitchell
Commissioner

Date: 1 June 1983

Commissioner's File: CSB/66/1982
C SBO File: 102/82