

VGHH/JW

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

*bona fide  
evidence about what happened  
at SSAT and in tribunal*

*Report to a*

*R(SB) 10/82*

Decision C.S.B. 3/82

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 19 February 1981 was not erroneous in point of law: Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605], rule 10(8)(b). The appeal of the claimant is therefore dismissed.

2. The record of the proceedings of the above-mentioned tribunal is set out on form LT235. Box 1 shows that the claimant was not present at the hearing but that his wife was and that he was represented by someone from the Liverpool Welfare Rights Advice Centre (LWRAC). Boxes 3, 4 and 5, as completed, are as follows:

"3. Findings of Tribunal on question of fact material to decision

[The claimant] is in receipt of a supplementary allowance. He requested help to buy a coat for his wife. A single payment was refused. The wife of the claimant is using a coat borrowed from a relative. Her own coat was available to her.

4. Tribunal's unanimous Decision

That a single payment for an overcoat for the wife of the claimant should not be made.

5. Reasons for Decision

A need for an overcoat had not been established since [claimant's wife's] overcoat was available to her and she had the use of a borrowed overcoat. A payment for an overcoat could not, therefore, be made since the conditions of regulation 3(2) of the Single Payment Regulations 1980 had not been satisfied."

The record is signed by the chairman and dated 19 February 1981.

3. The chairman's note of evidence, which is also signed by him and dated 19 February 1981, is contained in the case papers and is in the following terms:

"The Appellant's wife told the Tribunal that she was pregnant and expected the baby in May 1981. Subsequently a grant of £29.50 was [sic] been made for two maternity dresses. She stated that she was now wearing a borrowed overcoat as her own coat had now become too small because of the pregnancy."

4. The claimant appealed against the decision of the tribunal on the ground that it was wrong in law because "the tribunal having found that [the wife] was pregnant and that evidence was presented that her own overcoat was too small, this established a need for an overcoat". Evidence was, it was alleged, presented to the tribunal that the owner of the borrowed overcoat wanted it back and thus it could not be held that this met the need. Consequently it was submitted that the tribunal erred in law in not making a payment under section 27(1)(a)(i).

5. I granted leave to appeal, and asked the supplementary benefit officer on the appeal to deal with -

- (a) whether or not evidence was given before the tribunal that the owner of the borrowed overcoat wanted it back
- (b) if such evidence was given, whether or not the decision of the tribunal was erroneous in law on the ground that there was no finding on a material question of fact: see regulation 7(2)(b) of the above mentioned Appeals Rules 1980; and
- (c) the construction of regulation 27(1)(a)(i) of the Supplementary Benefit (Single Payments) Regulations 1980 which appeared to contemplate expressly that a need could arise for an item which, prior to pregnancy, was already available to the wife of the applicant i.e. that the availability of such an item did not preclude the making of a single payment.

6. I directed an oral hearing. The claimant did not appear. The claimant's wife appeared and gave evidence. She was represented by Mr Godfrey (who did not appear before the tribunal) of the Liverpool Welfare Rights Advice Centre. The supplementary benefit officer was represented by Miss L Shuker of the Solicitor's Office, Department of Health and Social Security.

7. Prior to the oral hearing, the supplementary benefit officer had submitted in writing that the Commissioner was "restricted to considering the documents before the tribunal and their recordings", so that no evidence could be admitted as to what had happened at the hearing. A similar submission was made by Miss Shuker in an earlier unreported

but numbered case, namely Commissioner's Decision C.S.B. 34/81. The Commissioner rejected this submission in the following terms (paragraph 10):

"Miss Shuker submitted to me that I was not entitled to take into account anything but the written record of the evidence before the tribunal, and that I could not supplement that record by what the claimant's brother told me at the oral hearing. I do not accept that submission. In my judgement where a point of law before an appellate court or tribunal is the familiar one that there was not sufficient evidence to justify a conclusion reached by an inferior court or tribunal, the appellate court or tribunal is at liberty to take note of any reliable account whatsoever of what evidence was in fact tendered to the inferior court or tribunal, including for example, oral testimony before the appellate body. I consider, therefore, that I am entitled to take into account what the claimant's brother told me as to the evidence he gave to the tribunal."

Accordingly, before me, Miss Shuker did not object to evidence being given by the wife of the claimant and I accordingly heard such evidence de bene esse (i.e. provisionally).

8. I found the wife an entirely frank and honest witness. Her evidence was quite clear, namely that she had merely said before the tribunal that the coat had to be returned. She had not said and she did not recall her representative saying when the coat had to be returned.

9. At the oral hearing Mr Godfrey handed to me a photocopy of a typewritten statement dated 29 October 1981, which is unsigned but bears the name of the claimant's former representative at the bottom and is in these terms:

"I hereby confirm that I represented [the claimant] at the Supplementary Benefit Appeal on Thursday 19th November [sic] 1981 at which our client's wife stated that the coat she was wearing was that [sic] only one that fitted her at all, but that this had been borrowed on a temporary basis and had to be returned to its owner as soon as possible, and it was otherwise likely to be repossessed."

10. Mr Godfrey submitted that -

- (1) Regulation 3 of the Single Payments Regulations was ultra vires because it was inconsistent with regulations 9, 12 and 27.

- (2) The date of the return of the overcoat was not relevant and that a borrowed item did not meet "need" in terms of regulation 3(2)(a) of the Supplementary Benefit (Single Payments) Regulations 1980 [S.I. 1980 No 985] (which I shall refer to as "the Single Payments Regulations"). Given that the condition of 27(1)(a)(i) of the Single Payments Regulations was fulfilled, the regulations state that a payment "shall be made". Regulation 27(1)(a)(i) could only be met by new items of clothing and not loaned second-hand items of clothing: see paragraph 15 of Commissioner's Decision Number C.S.B. 29/81 (unreported). The claimant did not need to show that she had no coat of her own but merely that she had a need for one of a larger size because of pregnancy.
- (3) Alternatively, if the first submission was not accepted, the tribunal had erred in law in not finding as a matter of fact when the overcoat needed to be returned.

On behalf of the benefit officer, Miss Shuker conceded that if evidence had been given as to when the coat needed to be returned, this was a material fact which should have been included in the record of the tribunal decision; but she submitted that no such evidence was in fact given. She relied on regulation 3 of the Single Payments Regulations, which provide that a payment can only be made when there is a need for a garment. Regulations 27(1)(a)(i) of those regulations cannot be taken in isolation. The regulations must be considered as a whole: see Decision Number C.S.B. 16/81 paragraph 12.

11. The relevant provisions of the Single Payments Regulations are as follows:

" PART I  
GENERAL  
.....

Interpretation

- 2.-(1) In these regulations, unless the context otherwise requires .....  
"assessment unit" means the claimant and any partner and dependant of the claimant  
.....
- (2) .....

Meaning of single payment and amount payable

- 3.-(1) In these regulations "single payment" means supplementary benefit payable by way of a single payment to meet an exceptional need in circumstances to which Parts II to VIII of these regulations apply.
- (2) A single payment shall be made only where -
  - (a) there is a need for the item in question; and
  - (b) in a case in which the payment would be in respect of the purchase of a particular item, the assessment unit does not already possess that item or have available to it a suitable alternative item, and has not unreasonably disposed of, or failed to avail itself of, such an item.
- (3) .....
- (4) .....

..... "

The expressions "claimant", "partner" and "dependant" are all defined, either expressly or by reference, in regulation 2; but it is not necessary to set out these definitions, since it is not in dispute that the claimant's wife is a partner and dependant of the claimant in terms of this regulation. Parts II (Maternity Needs), III (Funeral expenses), IV (Household expenses), V (Housing Expenses) and VI (Miscellaneous expenses) contain no provisions under which a single payment for an overcoat for the claimant's wife might be made. Part VII is headed "ITEMS TO WHICH THE CATEGORIES OF NORMAL, ADDITIONAL AND HOUSING REQUIREMENTS RELATE". (It has not been suggested that the overcoat for which a single payment has been claimed is not such an item.) The relevant provisions in this Part are contained in regulation 27 and are as follows:

"Clothing and footwear

- 27.-(1) A payment for any item of clothing or footwear specified in column 1 of Schedule 2 shall be made where any member of the assessment unit needs new or replacement clothing and -
  - (a) that need has arisen otherwise than by normal wear and tear, for example where the need has arisen because of -
    - (i) pregnancy, the birth of a child, or rapid weight loss or gain,

Decision C.S.B. 3/82

(ii) .....

(iii) .....

(iv) .....

but not where the need has arisen in the normal course of events (for example where an item of clothing or footwear is outgrown);  
or

(b) that need arises because he is admitted to hospital or a similar institution as a patient or to a re-establishment course as a resident and for the purposes of his stay there

(2) The amount payable for any item to which this regulation applies shall be the amount specified for that item in column 2 of Schedule 2 ... unless the person concerned is outsize or disabled so that the amount specified is not appropriate in his case.

(3) [this relates to children) ....."

Column 1 of Schedule 2; in Part III, which is headed "Women's Clothing", includes "Overcoat", and Column 2 states, opposite this, the amount of £40.00.

12. The Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No 1605], which I shall call "the Appeals Rules" provide:

"Determinations of the tribunal

7. (1) .....

(2) The tribunal shall -

(a) record every determination in writing; and

(b) include in every such record a statement of the reasons for their determination and of their findings on material questions of fact; and

(c) .....

(3) .....

.....

PART III

.....

10. ....

- (9) Subject to the provisions of this Part of these rules, the procedure in connexion with the consideration and determination of any application or appeal shall be such as the Commissioner may determine."

13. Regulation 3 of the Single Payments Regulations would not be ultra vires if it were inconsistent, as Mr Godfrey has submitted that it is, with regulations 9, 12 and 27, for the reconciliation of regulations that are, or appear to be, inconsistent is a matter to be dealt with by applying the rules of construction, and does not give rise to any question of ultra vires. In the present case, regulations 9 (essential furniture and household equipment) and 12 (bedclothes) are not in point. But regulation 27 (clothing and footwear) is in point. That regulation must be read together with regulation 3 and a sensible construction adopted. I reject Mr Godfrey's submission that regulation 3 is ultra vires.

14. (1) The suggestion that a borrowed overcoat does not meet "need" in terms of regulation 3(2)(a) of the Single Payments Regulations is unsupported by any authority. (Decision C.S.B. 29/81 (unreported) which was cited to me, contains remarks on borrowed clothes but these are concerned with regulation 3(2)(b) of those regulations, and not with regulation 3(2)(a).) In order to obtain a single payment it is necessary to satisfy the requirements of both paragraph (a) and paragraph (b). Under paragraph (a), it is stipulated that a single payment shall only be made where "there is a need for the item in question". That need must be an exceptional need in circumstances to which Parts II to Part VIII of the regulations apply: see regulation 3(1). Where a member of the assessment unit (in the present case, the wife of the claimant) needs new or replacement clothing and that need has arisen because of pregnancy, the combined effect of regulation 3(1) and (2) and regulation 27(1)(a)(i) is that such a payment shall be made. It is for the tribunal, in a case under appeal to them, to decide whether there is such a need. In the present case, they decided, unanimously, that there was no such need, because the claimant was using an overcoat borrowed from a relative and her own coat was available to her. The "availability" of the claimant's own overcoat is not an adequate reason for rejection of the claim, since regulation 27(1)(a)(i) expressly contemplates that an item of clothing or footwear may require to be replaced purely on account of pregnancy i.e. it contemplates that the item in question may be one that the woman already actually has. But

it was entirely open to the tribunal to decide (as they did) that since the claimant had the use of a borrowed overcoat she did not have a need for new or replacement clothing on account of pregnancy. There may be cases where a borrowed item does not satisfy a need. But where the situation giving rise to the need is pregnancy, which is obviously a temporary condition, a borrowed item may well be capable of satisfying the temporary need. It is for the tribunal to decide, on the particular facts before them, whether the express prohibition of a single payment where there is no need for the item in question which is contained in regulation 3(2)(a) of the Single Payments Regulations is applicable in the case under appeal. In doing so, they should bear in mind that the clothing was borrowed and any terms of the borrowing or other facts before them.

- (2) In Decision C.S.B. 29/81, the Commissioner was considering paragraph 3(2)(b) (not 3(2)(a)) of the regulations in his remarks on borrowed clothes. He thought (paragraph 15) that clothing borrowed temporarily by a claimant from her sister to wear at job interviews was not clothing which the claimant "possesses" within the meaning of the expression "already possess that item" and (in paragraph 16) expressed the view that such clothes cannot normally be said to be "a suitable alternative item" for a man or woman wanting to attend job interviews for responsible jobs. For my part, I do not consider that the expression "possess" is used in regulation 3(2)(b) in any technical sense or that it means more than "have" (i.e. that the assessment unit does not already have the item in question); and it seems clear that the reference to "a suitable alternative item" relates to some item other than that claimed, but which is a suitable alternative. (In the present case, for example, if a cloak, instead of an overcoat, had been available, that would have been an alternative item which it would have been open to the tribunal to consider as suitable.) But regulation 3(2)(b) must, in the present case, be read in conjunction with regulation 27(1)(a)(i). Although, therefore, the claimant already possessed (in every sense in which that term might be used since it was both in her ownership and in her possession) an overcoat of her own, the prohibition of a payment for an item where the assessment unit already possesses that item is clearly inapplicable. For the need in this case arises as a result of pregnancy and to hold otherwise would be to render the provisions of regulation 27(1)(a)(i) relating to pregnancy entirely meaningless. The additional prohibition, in regulation 3(2)(b) of a payment where there is available a suitable alternative item does not apply, because whether or not any such alternative item would be suitable (which would be a matter for the tribunal to decide), there is no alternative item in issue in this case. The borrowed item was an overcoat and it was for an overcoat that the claimant was claiming a payment for his wife. Paragraph 3(2)(b) accordingly has no application to the present case.



15. Mr Godfrey's final submission was that the tribunal had erred in law in not finding as a matter of fact that the overcoat needed to be returned. Such a finding is, however, clearly implicit in the finding that the overcoat was borrowed. He also submitted that there should have been a finding as to when it should be returned. The representative who appeared before the tribunal has stated that evidence was given that the overcoat was to be returned as soon as possible. If indeed evidence had been given before the local tribunal of such a request, I agree that it might well be argued that the tribunal should have made a finding as to whether or not they accepted that there had been such a request, on the ground that this was a material fact, in terms of regulation 7(2)(b) of the Appeals Rules and that the failure to do so was an error of law. I do not accept that the Commissioner is bound by the documents before the tribunal and by the record of the proceedings as set out on form LT235. In my judgment, the Commissioner has a discretion on this as on other procedural matters not expressly dealt with elsewhere, see regulation 10(9) of the Appeal Rules. He is at liberty to look at the note of evidence of the chairman of the tribunal and to admit such other evidence as to what happened at the tribunal, in appropriate cases, as he thinks fit. Such a discretion should, however, be exercised on similar principles to those followed in the High Court and in the Court of Appeal. In hearing appeals on the ground that there had been an error of law by the supplementary benefit commission, the High Court was bound by the provisions of Order 55 rule 7 of the Rules of the Supreme Court: see G. Imrie v Supplementary Benefit Commission [1979] SB 27, which was a decision of Mr Justice May (as he then was). That rule requires an appellant to apply for a signed copy of the judge's note and if it is incomplete confers power to determine the case on any other evidence or statement as appears to the Court to be sufficient but provides that unless the Court otherwise directs an affidavit or note by a person present at the proceedings is not to be used in evidence unless it was previously submitted to the person presiding at the proceedings for his comments. There is express power to receive further oral evidence: see Order 55, rule 7, paragraph (v). In hearing appeals to the Court of Appeal, that Court has power, under RSC Order 59 rule 12, to admit evidence other than that contained in the official shorthand note or the judge's note. The way in which this discretion should be exercised was considered by the Court of Appeal in Thompson v Andrews [1968] 1 W.L.R. 778; [1968] 2 All E.R. 419. In that case the question at issue was whether there had been an error of law on the part of an official referee on the ground that there was no evidence on which he could properly have reached the conclusion that he did; Lord Justice Salmon, at page 420 stated the normal practice which is that "save in the most exceptional circumstances if this court is asked to look at something other than the shorthand note or the judge's note, it usually will only look at an agreed note of the evidence". Lord Justice Harman said: "It would produce very strange results, or may do, in future cases before official referees where there would be presumably a competition of notes taken by the solicitors on each side and either side objecting to the other. It seems to me that in the absence of agreement we must stick to what we have got and abide by the judge's note so far as it goes".

Decision C.S.B. 3/82

16. In the present case, the evidence given by the claimant's wife, which I heard de bene esse, at the oral hearing before me was merely that at the tribunal she had said that the coat had to be returned and that she had not said and did not recall her representative having said when the coat had to be returned. The "statement" of her representative, that he had submitted at the oral hearing before the tribunal that the overcoat has to be returned as soon as possible, is unsigned and is contradicted by the claimant's wife. There is thus no additional evidence as to what happened at the hearing which it is worth considering admitting and accordingly I do not intend to look beyond the documents before the tribunal, the record of the proceedings on form LT235 and the signed chairman's note. If there had been additional evidence that might have been worth admitting, before doing so I should have directed (1) that the parties should endeavour to agree upon a note of what happened at the hearing and (2) if (and only if) agreement had been reached, I should have referred the agreed note to the chairman of the tribunal for his comments.

17. In my judgment, the tribunal decision was not erroneous in point of law. The findings of the tribunal were satisfactorily recorded, in compliance with regulation 7(2) of the Appeals Rules. It is clear from the record of the proceedings that the tribunal considered that the claimant had the use of a suitable overcoat, that in those circumstances she did not need a payment to enable her to obtain one and that they considered regulation 3(2), which prohibits payment where there is no need. "Findings and reasons need not be lengthy; indeed brevity clearly indicating them is often to be preferred to a lengthy and possibly ambiguous record": see Commissioner's decision R(SB) 5/81 at paragraph 10.

18. My decision is set out in paragraph 1.

(Signed) V G H Hallett  
Commissioner

Date: 17 February 1982

Commissioner's File: C SB 101/1981  
CSBO File: SBO 127/81