CSB 117/1981

JGM/GJH

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision CSB 12/81

1. My decision is that the decision of the Supplementary Benefit Appeal Tribunal (the Appeal Tribunal) dated 22 January 1981 is erroneous in point of law and is hereby set aside. The matter must be referred to a fresh appeal tribunal.

2. The claimant, having been employed for two weeks by a company, left the employment voluntarily on or immediately after 12 December 1980, and he applied for supplementary benefit on 16 December 1980. The benefit officer considered that it was a case where a reduction in the amount of benefit ought for a period to be made under regulation 8 of the Supplementary Benefit (Requirements) Regulations 1980 [SI 1980 No 1299] (regulation 8), which relates to the modification of normal requirements during periods of actual or notional unemployment benefit disqualification. He concluded that a deduction of £8.50 per week was to be made (for a period not specified in his decision) under regulation 8. The claimant appealed to the Appeal Tribunal who reached the conclusion that the deduction should by virtue of regulation 8(3)(b)(iii) be reduced by one-half and in effect awarded to the claimant an extra £4.25 per week during the period of the deduction. The benefit officer with my leave now appeals against that decision as being erroneous in point of law.

3. Regulation 8, so far as material provides as follows:-

"(1) This regulation applies to a claimant, not being a person to whom regulation 10 and Schedule 2 (normal requirements in special cases) apply, whose right to an allowance is, pursuant to section 5, [of the Supplementary Benefits Act 1976] subject to the condition of registration and availability for work, and who -

(a) is disqualified for receiving unemployment benefit under section 20(1) of the Social Security Act [1975] (disqualification by reference to conduct resulting in unemployment or conducing to its continuance); or

(b) has made a claim for unemployment benefit which has not been determined by an insurance officer appointed under section 97)1) of that Act, but in respect of which, in the opinion of the benefit officer, a question as to disqualification under the said section 20(1) arises; or

(c) either -

(i) has not made a claim for unemployment benefit, or

(ii) has had such a claim disallowed other than by reason of disqualification under the said section 20(1);

but who would be so disqualified if he were to make such a claim or if it had not been so disallowed.

(2) [makes provision for the relevant deduction]

(3) Where -

(a) the claimant's available capital does not exceed £100; and

(b) any one or more of the following is applicable -

(i) ....

(ii) ....

(iii) the claimant's last employment either was part-time or was full-time but for a continuous period of not more than six weeks,

(iv) ....

(v) ....

(vi) ....

the reduction to be made under paragraph (2) shall be reduced by one half, rounded, if the reduction is not a multiple of 5p, as provided in that paragraph.

(4) [provides for the period for which the regulation is to apply in each case and makes provision for adjustment if in a case under regulation 8(1)(b) disqualification is not in the event imposed or is imposed for a different period from that of the reduction.]"

4. The claimant is a person who in accordance with section 5 of the Supplementary Benefits Act 1976 is required to be registered and available for employment inasmuch as it is not suggested that he falls within any of the prescribed exceptions to this. Accordingly

an allowance or pension payable to him under the Act is potentially subject to deduction under regulation 8. Under section 20(1) of the Social Security Act 1975 a person is liable to be disqualified for receiving unemployment benefit for such period not exceeding 6 weeks as may be determined by the insurance officer or on appeal or reference by the local tribunal or Commissioner on the ground (among others) that he has voluntarily left employed earner's employment without just cause. The claimant had voluntarily left his employment, and it is obvious that it was for consideration whether under one or other of sub-paragraphs (a), (b) or (c) of Regulation 8(1) set out in paragraph 3 above a deduction should be made for up to 6 weeks.

5. It is clear that the benefit officer decided that it was an appropriate case for making a deduction, and his assessment of the allowance payable (of which I understand the particulars given on the reverse side of the form LT 205 is a replica) records a deduction for "voluntary unemployment" of £8.50. No indication appears of the period for which the deduction was to continue or of the sub-paragraph of regulation 8(1) under which the deduction was made, though it would seem to me that these two matters constitute an important part of the determination, especially as under paragraph (4) it is subject to adjustment in the light of later events. I have been informed that in practice a claimant is notified of the particulars of an assessment in the first instance on form A14N (which contemplates the inclusion of notification of deduction for being "unemployed without good reason") and that, if the claimant queries the assessment, he is furnished with a more detailed form A124 (which includes spaces for "Adjustments" and for "Remarks") and I would think it right that at that stage at the latest the claimant should be notified both of the duration of the deduction and the sub-paragraph under which it is made.

6. In the present case it emerges by inference from the findings of fact recorded by the Appeal Tribunal that at all events by the time the matter came before them a claim for unemployment benefit had been made and was under consideration, so that the case fell under sub-paragraph (b) of regulation 8(1). That sub-paragraph applies where the claimant has made a claim for unemployment benefit which has not been determined but in respect of which in the opinion of the benefit officer a question as to disqualification under section 20(1) arises. It is stated in the form LT 205 in effect that modification of normal requirements can be made where in the opinion of the benefit officer there would be disqualification for entitlement. In fact however, under regulation 8(1)(b) where a claim for unemployment benefit has been made but not adjudicated on the only requirement is that the officer should be of opinion that a question arises. A conclusion on the question whether disqualification would have been imposed and for what period is required only where no claim has been made or the claim has been determined on other grounds. This difference is no doubt due to the fact that, if a claim has been made the question of disqualification will in due course probably be adjudicated on by the insurance officer or higher tribunal, the award of supplementary benefit made in advance of such adjudication will be subject to adjustment under regulation 8(4).

It is to be presumed that the benefit officer was of opinion that a question arose and he made a deduction of £8.50 on that account.

7. The matter went on appeal to the Appeal Tribunal who had under section 15(3)(c) of the Supplementary Benefits Act 1976 to substitute for any determination appealed against any determination which the benefit officer could have made; and this in my judgment authorised the substitution of their own opinion on whether a question arose under section 20(1) for that expressed by the benefit officer under regulation 8(1)(b); (cf Decision CSB 6/81 at paragraph 8). But under rule 7(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [SI 1980 No 1605] (rule 7(2)) the Appeal Tribunal were required to record any determination in writing and to include in every such record a statement of the reasons for their determination and of their findings on material questions of fact. Such findings in a case under regulation 8 ought (though the benefit officer has not in this case complained of any omission in this respect) in my judgment to include findings as to any relevant claim for unemployment benefit having been made or not made and adjudicated on or not adjudicated on. Further if their determination relates to a continuing period the duration of any deduction imposed should be stated.

8. I add that the effect of a claim for unemployment benefit being made or adjudicated on by an appeal tribunal between the date of the determination by the benefit officer and that of that appeal tribunal is to make it appropriate for an appeal tribunal to apply a different sub-paragraph of regulation 8(1) from that applied by the benefit officer. I first included this proposition in my decision before I had made to me by the representative of the benefit officer in another appeal an argument inconsistent with it. In the event it did not prove necessary on that appeal to reach any conclusion on the point and I think that I ought on this appeal to state my reasons for adhering to the proposition.

9. It was submitted to me that an appeal tribunal had no power to consider new facts that had arisen since the date of the benefit officer's decision. The submission was supported by three arguments viz. (1) that section 15(3)(c) of the Supplementary Benefits Act 1976 gives an appeal tribunal power only to substitute for any determination appealed against any determination which a benefit officer could have made, and the benfit officer could not have made any determination based on evidence of facts which had come into existence only after his decision; (2) that in Decision CSSB 1/81 (not yet reported) the Commissioner in holding that an appeal tribunal could base its determination upon facts which were not before the benefit officer expressly limited his conclusion to facts which could have been before him; (3) that new facts, if constituting a relevant change of circumstances, justified review of the decision, a matter in the first instance for the benefit officer under regulation 4 of the Supplementary Benefit (Determination of Questions) Regulations 1980 [SI 1980 No 1643] ("The DQ Regulations"), and that review not appeal was the only way of introducing new matter. I would add in this connection that there is not in the supplementary benefit enactments anything analogous to section 102 of the Social Security Act 1975 under which, arguably at least it may be open to tribunals on appeal to deal with a question of review that arises for the first time before them. I will take these points in turn.

10. There is a well recognised distinction between an appeal in the strict sense and an appeal in the nature of a rehearing. On an appeal of the former kind a judgment can only be given if it can be said that it ought to have been given at the former hearing, while with a rehearing a judgment may be given that could have been given by the tribunal of first instance if it were considering the matter at the time of the rehearing (see per Lord Davey in Ponnamma v Arumogam [1905] AC 383 at page 390). I have no doubt that appeals to an appeal tribunal are (like appeals under the Social Security Act 1975 to local tribunals and Commissioners (as to which see Decision R(F) 1/72 at paragraph 9)) in the nature of rehearings to which the latter rule applies. I consider that section 15(3)(c) of the Supplementary Benefit Act 1976 is to be interpreted in that sense.

11. As for Commissioner's Decision CSSB 1/81 I consider that the Commissioner was doing no more than limiting the effect of his decision to the exact point that was before him. He was not concerned with the question before me and ought not in my judgment to be regarded as having by implication given a decision on it. Incidentally, as it is a ground for the review of a decision that it was given in ignorance of a material fact his decision is in fact inconsistent with the argument, to which I now come, that review and not appeal is the only proper way of introducing new matter.

12. The argument that where review is possible appeal is not open was rejected in the National Insurance field even before the introduction of what is now section 102 of the Social Security Act 1975, in Decision R(S) 20/51. And I think that it should be rejected also in the supplementary benefit field. I have not overlooked that under regulation 4(6)(a) of the DQ regulations review is mandatory, where this is necessary, in a case such as the present. An appeal can make it unnecessary. It seems to me to be most undesirable that an appelate tribunal should be forced to close its eyes either to what has become fact since the time of the decision appealed from or to facts which have come to light since such a decision. Further it can impose delay if a claimant instead of being able to put forward new facts at the hearing before an appeal tribunal, has to ask for review of the benefit officer's decision and then, if review is refused or the revised decision is unsatisfactory to him, to appeal from that refusal or unsatisfactory decision to the appeal tribunal. In the National Insurance field it was decided in Decision CU 42/54 (not reported) that the effect of reviewing a decision (meaning I think revising it on review) was to annul the decision so that any pending appeal from it lapsed. This decision was followed in the case on Commissioner's file CI 202/77 where it was stated that after the earlier decision a practice had grown up, which had the approval of the Commissioners, of not reviewing (or perhaps of not revising on review) decisions from which there was a pending appeal unless the revised decision would give the claimant all that he could get on the appeal. I would commend this practice for application in supplementary benefit cases. It is calculated to minimise delay.

13. For the foregoing reasons I consider that an appeal tribunal can consider the effect of events supervening since the time that the

benefit officer gave his decision and that in the present case the Appeal Tribunal to whom this matter is referred, as the result of my decision, will determine the appeal in the light of any decision by them given on the question of disqualification for receiving unemployment benefit. I find nothing however to suggest that any relevant change took place between the time of the benefit officer's decision in this case and that of the Appeal Tribunal. The benefit officer's complaint is that that tribunal reduced the deduction which they held fell to be made under the regulation to one-half, purporting to exercise the power conferred by paragraph (3) of that regulation. This provides for halving the deduction if the condition in sub-paragrpah (a) and one of the conditions in sub-paragraph (b) are satisfied. There is no doubt that the condition in sub-paragraph (b)(iii) was satisfied inasmuch as the claimant's last employment was for a period of not more than six weeks. But the Tribunal appear to have overlooked the requirement in sub-paragraph (a) that the claimant's available capital should be less than £100. They made no finding on the amount of his available capital, though in fact the claimant had stated in his statement on form A11 that he had money deposited in a bank and building society to a total of over £150, which was recorded in the form LT 205 as his available capital. If this sum ceased to be available at the relevant time or did not amount to available capital for the purposes of the regulation, it was certainly necessary under rule 7(2) to include some statement of the reasons for so finding. The decision was on this ground plainly erroneous in point of law and it is set aside accordingly.

(Signed) J G Monroe
Commissioner

Date: 7 October 1981

Commissioner's File: CSB/117/1981
CSBO File: SBO 144/81