CPAG

JM/SH/2

Commissioner's File: CSB/150/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 8 February 1990 which varied a decision issued by the adjudication officer on 16 November 1988. My decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) Pursuant to section 101(5) of the Social Security Act 1975 (as amended), the case is referred to the appeal tribunal for determination in accordance with the principles of law set out in this decision.

2. It must seem rather odd that in 1992 I am referring back to the appeal tribunal a case which falls to be determined in the light of legislation which disappeared from the statute book on 11 April 1988. For that the claimant must accept some responsibility, for it was not until 18 August 1988 that he himself raised the issues the subject of this appeal. I should have liked to have finally disposed of the matter myself. But on the primary issue in the case, as it appears from the papers, I should have been inclined to reach a conclusion contrary to that reached by the appeal tribunal. Ordinary fairness would have required that I did not do that without directing an oral hearing at which the claimant's representative could renew her arguments. The claimant and the representative live in Manchester. It is in Manchester that the circumstances relevant to this appeal obtained. It is, accordingly, manifestly more convenient that the rehearing should be in Manchester. I trust that it will be possible to arrange that the rehearing is conducted by a chairman with experience of supplementary benefit

cases.

3. The case is of a type with which the Commissioners became very familiar. The type was generated by the manner in which the supplementary benefit legislation was drafted. Changes in the corresponding provisions of the income support legislation have rendered the type a moribund species. Section 5(1) of the Supplementary Benefits Act 1976 made the right of any person to a supplementary allowance subject to the condition that that person was available for employment; but provision was made for the exception of prescribed cases. Those prescribed cases were the subject of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. That was a long regulation. There were 23 paragraphs directed to the specific circumstances of those who were to be exempted from the requirement of availability for employment. Those paragraphs did not of themselves pose any great difficulties to the adjudicating authorities. But there was a 24th paragraph (which retained the designation (u) which it had been given in the Regulations as they were originally enacted). Paragraph (u) did pose difficulties to the adjudicating authorities - and there is no equivalent thereof in the relevant income support legislation.

4. I set out so much of regulation 6 as appears to be relevant to this appeal:

> " 6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8(1)(a) [which has no bearing upon this case] does not apply to him:-
>
> .....
>
> (e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding has -
>
> (i) on average worked for less than 4 hours a week,
>
> (ii) been available for employment under section 5 for not less than 39 weeks,
>
> (iii) made reasonable efforts to find employment and not refused any suitable employment;
>
> (f) he has no prospect of future employment and lacks the training or experience to be able to enter or re-enter employment and -
>
> (i) he is within 10 years of attaining pensionable age,
>
> (ii) he has not been in employment in the previous

10 years, and

(iii) during that period the requirement to be available for employment pursuant to section 5 has not applied and would not have applied to him had a claim been made for an allowance by or in respect of him;

.....

(p) he is a person aged not less than 60;

.....

(u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer [now to be read as the adjudication officer] it would be unreasonable to require him to be available for employment."

5. A reading of the passage which I have just quoted shows that, in the context of relief from the condition of being available for employment, Parliament gave precise and explicit consideration to the age of the relevant claimant. Paragraph (p) specified "60" - and left it at that. That paragraph can present no problems whatever. A Tribunal of Commissioners has expressly stated that 59 cannot be treated as "analogous" to 60 (see paragraph 8 of R(SB) 5/87). Where there is no prospect of future employment and the relevant claimant lacks the training or experience to be able to enter or re-enter employment, the 60 year lower limit is relaxed; but precise periods are specified in sub-paragraphs (i) and (ii) of paragraph (f) - and those periods, clearly, cannot be abridged by any analogy. The construction of legislation depends upon the ascertainment of the intention of the legislature as that intention is manifested by the wording of the statute or statutory instrument the subject of construction. Parliament's intention in respect of the effect of age was made very clear. The adjudicating authorities (of whom I am one) must be vigilant to ensure that when age is raised in the context of regulation 6, they do not fall into the trap of inadmissibly rewriting regulation 6.

6. Somewhat similar considerations apply to the prospects of further employment. I am well aware that in R(SB) 5/87 the Tribunal of Commissioners said that what the claimant had to show was that there were no realistic prospects of his securing employment again; and I respectfully agree with that. But regulation 6 was very specific as to the contexts in which no further prospects of employment came into play. I have already dealt with paragraph (f). There was also, of course, paragraph (e). But that paragraph made it plain that the lack of prospects had to be "by reason of physical or mental disablement". What is conspicuously lacking from regulation 6 is any reference to the state of the employment market. That cannot have been some type of oversight, because in 1981 (when the Conditions of

Entitlement Regulations were enacted) the depressed state of the employment market was very much to the fore. There are no circumstances set out in regulation 6 to which the depressed state of the labour market could - even by remote conjecture - be regarded as analogous. Indeed, in the final sentence of paragraph 19 of R(SB) 5/87 the Tribunal of Commissioners was at pains to point out that if a claimant's lack of prospects of employment was attributable solely to the state of the labour market, then such lack would avail him nothing. From the many appeals of this type which have been before me I know that certain representatives of claimant's have misconstrued - or affected to misconstrue - what the Tribunal of Commissioners said in R(SB) 5/87 and R(SB) 6/87. Many claimants were led into a state of wholly unjustified optimism. In particular, some representatives advised claimants that being put upon "quarterly signing" had some direct relevance to the types of circumstance envisaged by regulation 6. That was completely without foundation. In consequence, of course, quarterly signing had no bearing upon the application of the now revoked regulation 72 of the Social Security (Adjudication) Regulations 1986. I quote from paragraph 9 of CSB/1331/1989:

> "The mere administrative action of putting the claimant on to quarterly signing could not of itself give rise to any case for involving regulation 6(e) and (u), or for the Department to initiate a review for that purpose."

7. The claimant was born on 16 October 1933. He had many years of employment as an electrical fitter. At the time material to this case he had been unemployed since April 1983. He seems to have been in substantially good health. I quote from the chairman's note of evidence as recorded on the relevant form AT3:

> "[The claimant] gets stiffness in right hand and left knee. Cannot dig garden at home any more."

That was, or course, in February 1990. No finding of fact was recorded in respect of those statements. The papers contain a number of letters written to the claimant by prospective employers to whom he had applied for a job. None of those letters refers to any physical disablement as having any bearing upon the claimant's suitability for employment. Indeed, none refers to his age. One of the employers to whom he applied was Securicor. The appeal tribunal was told that Securicor was looking for someone "not over 50". In view of the nature of the services for which Securicor charges its customers, I do not, in fact, find that surprising. The position is comparable to that of a model or a professional footballer (the two examples given in paragraph 14 of R(SB) 5/87). No matter what the state of the labour market, applicants for such jobs inevitably pass out of contemplation as they reach a certain age. It seems to me that one of the questions which the fresh appeal tribunal ought to ask itself is: In 1988 would this claimant, with such experience and skills as he possessed, have had difficulty in finding employment in a normally healthy labour market? If age is to be urged as being, of itself, in some way "analogous" to "physical or mental

disablement", the fresh tribunal may wish to bear in mind the statement (in an undated written submission which appears to have been laid before the last appeal tribunal) that there were, at the material time, a "large proportion of young unemployed" in Manchester. Ought they, too, to have been relieved of the obligation to be available for employment as a condition of obtaining supplementary benefit?

8. It was contended on behalf of this claimant that retrospective review should relieve him of that condition since April 1984. At that time he was aged only 51. The application seems to me to have been breathtakingly optimistic.

9. The papers contain extracts from a publication which - inevitably, of course - deals with overall generalities. I am in no way to be taken as suggesting that such extracts cannot properly be considered by an appeal tribunal. I am sure, however, that the fresh tribunal will bear in mind that each case has to be assessed in the light of its own particular circumstances.

10. Both parties are agreed that the appeal tribunal fell into error of law in the decision which is before me. I need not here go into detail. I commend to the fresh tribunal what is set out in paragraphs 3 to 6 of the submission dated 5 June 1990 and made by the adjudication officer now concerned. A copy of that submission must, of course, be before the fresh tribunal. It is only fair that it should also have before it a copy of the observations which the claimant's representative submitted annexed to the form OSSC 1 which was signed on 9 April 1990.

11. With specific reference to the possible application of the erstwhile regulation 72 of the Adjudication Regulations, I direct the fresh tribunal that, as a matter of law, mere failure on the part of the Department of Health and Social Security to give adequate - or any - publicity to regulation 6 of the Conditions of Entitlement Regulations cannot, of itself, avail a claimant. (Erroneous or misleading publications would, of course, be a different matter.) The "nanny state" has not yet progressed to the position in which claimants are relieved from all responsibility in respect of enquiring about their own benefits.

12. The claimant's appeal is allowed.

(Signed) J. Mitchell
Commissioner

(Date) **20 January 1991**