

VCHH/FB

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

174/1982

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1. My decision is that the decision of the supplementary benefit appeal tribunal dated 26 October 1981 is erroneous in point of law. I set it aside and refer the case to another tribunal for decision in accordance with my directions.

2. I held an oral hearing of this claimant's appeal. The claimant was represented by her father. The supplementary benefit officer was represented by Miss L Shuker of the Solicitor's Office, Department of Health and Social Security.

Nature of this appeal

3. It is not now in dispute that the decision of the above-mentioned supplementary benefit appeal tribunal is erroneous in point of law; for the record of their determination does not include adequate findings on material questions of fact and an adequate statement of their reasons, as required by rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980, as amended. But three points were raised on behalf of the claimant by her father, who is a lecturer with a degree in law, any one of which, if correct, would make it unnecessary for me to refer the case to another tribunal.

4. Two of these points are novel. The third is without substance and is covered by authority. It is argued that

- (1) earnings from an employment outside Great Britain are not income resources at all, in terms of the Resources Regulations;
- (2) earnings from a part-time employment in one month are not relevant to a claim for supplementary benefit in the next month and only count as resources in respect of the period for which the money was earned;

- (3) the benefit officer having given his decision on the basis that the claimant was in the month prior to claiming benefit in full-time employment in France cannot, on appeal, support his decision on other grounds.

The appeal to the supplementary benefit appeal tribunal

5. According to form LT205, an appeal was lodged on 6 July 1981 against the following decision of the supplementary benefit officer issued on 2 July 1981 "Supplementary allowance of £19.20 determined and paid weekly from the prescribed pay day Wednesday in week commencing 6.7.81". On copies of this form in my case papers and in those of the benefit officer, "6.7.81" has been crossed out and "29.6.81" has been substituted. At the oral hearing before me I asked the claimant's representative for the notice of determination by the benefit officer and he produced form FF260 which is dated 1.7.1981 and states "The Supplementary Benefit Officer" has decided that you are entitled to supplementary pension/allowance of £21.94 for the period from 30.6.81 to 7.7.81 ...". The Notice of Appeal dated 6 July 1981 and set out in paragraph 6 below does not identify by date the notice of determination, but it seems clearly to refer to that dated 1 July 1981. The first question to which the tribunal to whom this case is referred in paragraph 1 of this decision should address themselves is "What is the decision appealed against?". Is it that of 1 July 1981 or that of 2 July 1981?

6. The claimant's grounds of appeal were:

"I have been signing on for supplementary benefit since 8 June 1981 and only received payment dating from 30 June 1981. I was working in France until 31 May 1981 and was paid monthly. I was not paid a month in hand and at the time of signing on I had no money except what my parents lent me to live on. My wages in France paid off debts, living expenses and my fare home. Although I was told that I would not be paid until June 30 I did not realise that my cheque would not include back-payments from 8 June. I am in debt to my parents. I have no savings and I relied on being paid this extra 3 weeks money in order to repay my debts. I shall receive no student grant until this autumn, meanwhile I am expected to have enough money to buy books for vacation reading to repay my parents and have enough money on which to live, I would appreciate it if you would reconsider your decision."

7. Form LT205 says, under "Facts of the Case":

"The appellant is aged twenty-two and lives in the household of her parents. She was employed from 1.10.80 until 31.5.81 in France. On 31.5.81 she ceased employment, receiving final earnings amounting to £350. She claimed supplementary benefit on 8.6.81."

The reasons for the supplementary benefit officer's decision were stated, on form LT205, to be that the claimant should be treated as in remunerative full-time employment until 29.6.81, when the claimant's final earnings should be deemed to be exhausted.

8. The tribunal first heard the appeal on 19 August 1981. The claimant was present and was represented by her father. The chairman's notes of evidence state "Worked in France till 31.8.81. Worked only 12 hours per week. Received £325 per month. Claimed she was not in full employment." Form LT235 was completed as follows: The Findings of Tribunal on questions of "fact" were:

"The claimant's father represented her and said his daughter's final earnings were received on 25/5/81 - not 31/5/81 as shown. The Presenting Officer produced a statement signed by the claimant which gave the date at 31/5/81. The claimant's father contested the statement that his daughter was in full-time work. She is an assistant at a French school on the basis of an exchange visit and puts in 12 hours a week. He said his daughter's earnings were paid on random dates in mid month and that her earnings on 25/5/81 were £350."

Tribunal's unanimous decision was:

"To adjourn the hearing"

Their Reasons for Decision were:

"The Benefit Officer's decision was based on the statement made by the claimant and it is not clear whether she is in full or part time work. The hearing is adjourned so that the Benefit Officer can pursue this point. If it is decided that the claimant's entitlement revolves solely around her earnings, the question of her expenses - which her father says are considerable - should be considered."

9. The benefit officer, after the adjournment, made the following further observations:

"It has been confirmed that the claimant worked for 12 hours a week whilst in France. However, as payment of wages were made by the Educational Ministry in France, it was not possible to establish precise dates of payment of any of the wages, only that the wages were paid monthly and that those received in May would have been payable to 31 May."

Although the claimant was only working part-time, her monthly wages equate to £80.76 per week. As claimant's weekly supplementary benefit is only £19.20, her wages received at the end of May were still sufficient to remove any entitlement to Supplementary Benefit for one month from the date of payment."

10. On 26 October 1981, after an adjournment on 1 October 1981, at the claimant's request, there was a further, and final, hearing and the tribunal gave their decision.

The facts material to the decision were stated to be:

"The claimant was engaged in part time work in France and was paid wages for the end of May 81. She claimed benefit on 8/6/81 and submits that her final earnings should not be taken into account under Reg 9(2)(c) because they do not apply as from the first day of the benefit week. At the time of payment the claimant was in France and therefore her earnings were not received in any week in which benefit was payable. Nor was there anything in the Regulations to say her income should be projected forward".

The tribunal decision was:

"To confirm the Benefit Officer's decision".

The reasons for their decision were:

"Under Section 10 of the Resources Regulations the claimant's earnings are a resource. In the Tribunal's view, her earnings are a resource which fall to be taken into account under Section 9(2)(d) of the Resources Regulations. Her earnings paid in France, were payable before the first benefit week pursuant to the claim and are to be taken into account on the date on which they were payable".

The relevant law

11. Paragraph 1 of Schedule 1 to the Supplementary Benefits Act 1976 as amended provides that the amount of supplementary benefit to which a person is entitled shall be the amount by which his resources fall short of his requirements and that his resources are to be calculated in the prescribed manner: see sub-paragraphs (1) and (2). In respect of the period in issue, the prescribed manner is set out in the Supplementary Benefit (Resources) Regulations 1980 S.I. 1980 No. 1300 as amended by the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980 S.I. 1980 No. 1774. Those regulations have since been further amended and are now consolidated in the Supplementary Benefit (Resources) Regulations 1981 S.I. 1981 No. 1527; but without affecting the points decided in this case, which would be decided in the same way under the new, as under the old, regulations.

12. Regulation 9 of S.I. 1980 No. 1300 provides:

"9.--(1) Except in so far as regulations 10, 11 and 12 provide that certain payments shall be deducted and that certain payments shall be disregarded, the amount of a claimant's income resources to be taken into account shall be -

- (a) the whole of his earnings and the earnings of any other member of the assessment unit other than a

dependant, any earnings of whom shall be disregarded, calculated in accordance with regulation 10;

- (b) the whole of any other income of the assessment unit, calculated in accordance with regulation 11, calculated on a weekly basis.

(2) A payment of any income shall be taken into account for -

- (a) a period equal to the length of the period in respect of which it is payable;
- (b) where it is not paid in respect of a period, for the period to which it is fairly attributable, at a weekly rate beginning -
- (c) with the first day of the benefit week in which it is payable or the first day of the next following benefit week, whichever is the more practicable;
- (d) in the case of an income resource which falls to be taken into account but which is received before the first benefit week pursuant to the claim, the date on which it is received;

and in this paragraph "benefit week" has the meaning assigned to it in regulations made pursuant to section 14(2)(f) (days on which entitlement to supplementary pension or allowance is to begin or end or the amount thereof is to change).

- (3) This deals with the averaging of fluctuating earnings and with persons who do not work every week.

(4) Any monthly payment shall be treated as a payment -

- (a) in respect of a calendar month;
- (b) at a weekly rate determined by multiplying the payment by 12 and dividing the result by 52".

Paragraph 2 of that regulation was amended by S.I. 1980 No. 1774 (which came into operation on 24 November 1980) by substituting in sub-paragraph (c) for the words beginning "or the first day" to the end, the words "or the earliest succeeding benefit week in which, having regard to the method by which supplementary benefit is payable in a particular case, it would be practicable to take it into account" and by substituting in sub-paragraph (d) for the word "received" wherever it occurs, the word "payable".

13. Regulation 10 provides, by paragraph (1), that subject to the following paragraphs for the purposes of the regulations "a person's earnings shall consist of all remuneration or profits, calculated on a weekly basis, derived from any employment and shall include" here

follows a list of items, the first of which is "any remuneration in kind". Sub-paragraph (2) provides for disregards in calculating the amount of a person's earnings (e.g. the value of one daily meal provided free for him at his place of work), sub-paragraph (3) provides for deductions from earnings derived from any employment (e.g. income tax and certain reasonable expenses incurred without reimbursement), sub-paragraph (4) deals with earnings not immediately ascertainable, and sub-paragraphs (5) and (6) relate to a reduction of £4 in most earnings which fall to be taken into account.

14. Regulation 11 (as amended) provides that "all income" other than that to which regulation 10 applies shall be taken into account in accordance with the following paragraphs. Sub-paragraph (2) lists certain items which it provides "shall be treated as income and taken into account in full", one of which (under letter (m)) is "any payment made under the legislation of, or any scheme operating in, any other country outside Great Britain which is analogous to any income to which the preceding sub-paragraphs relate;". Sub-paragraph (5) provides that 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. "income" is defined in sub-paragraph (6) as including "any income in kind".

#### Submissions on behalf of the claimant

15. (1) Foreign earnings are not income resources

On behalf of the claimant it was said that earnings from an employment outside Great Britain are not income resources at all, in terms of the Resources Regulations. For the basic right to supplementary benefit depends on being in Great Britain (see section 1(1) of the Supplementary Benefit Act 1976); that it is self evident that while a person is earning income as a resident in France he cannot simultaneously be in Great Britain, and qualified to claim supplementary benefit and that income thus gained abroad is irrelevant for the purpose of subsequent entitlement to supplementary benefit except in so far as capital resources may be called into question. If the claimant's needs while in France are of no concern to the supplementary benefit scheme neither then are her resources obtained in France to meet those needs. There is no comparability between francs, or French currency, in which the claimant was paid in France, and British currency and prices, and the one cannot be converted into the other. Regulation 11(2)(m) of the 1980 Resources Regulations shows that it cannot have been intended to include foreign earnings because when it was intended to refer to foreign income this was done so expressly. Constitutionally it was beyond the competence of a British government to legislate on the disposition of income received in France by a resident in France.

(2) Part-time earnings relate only to the period when earned

The submission here is that earnings from a part-time employment received in one month are only resources in respect of the period for which they are payable and cannot be relevant to a claim for supplementary benefit in the next month. There is nothing in the Resources Regulations to provide otherwise.

(3) Fresh reasons cannot be advanced on appeal

It was submitted that it would be a clear departure from principle if the benefit officer were to be permitted to substitute a succession of "reasons" as each in turn failed.

16. I reject these arguments. Paragraph 1(2) of Schedule 1 to the Supplementary Benefits Act 1976 as amended provides that a person's resources shall be calculated in the prescribed manner and, without prejudice to this, regulations may provide for a person to be treated as possessing resources which he does not possess and for disregarding resources which a person does possess. The relevant regulations are the 1980 Resources Regulations (as amended): see paragraphs 11-14 above. Except in so far as regulations 10, 11 and 12 provide otherwise all earnings must be included: see regulation 9(1)(a). There is no context which forms any foundation for restricting the source of the earnings to earnings in Great Britain and regulations 10, 11 and 12 contain nothing to suggest that foreign earnings are to be excluded. The principle regarding income resources payable before the first benefit week pursuant to the claim is, in my view, clear. In determining the needs of an applicant for supplementary benefit with income/resources (from whatever source) payable before that week, such resources are to be treated as income resources for a period equal to the length of the period in respect of which they are payable or, if not paid in respect of a period, for the period to which they are fairly attributable, commencing in both cases on the date on which the payment is payable. In the case of a payment in respect of a monthly period, the weekly equivalent is determined by multiplying by 12 and dividing by 52. The date when the payment is payable will often, no doubt usually, be the date when it is received. Reasonable expenses and income tax, together with certain other specified amounts are allowed by way of deduction or allowance before the net amount of the payment is ascertained, its weekly equivalent is calculated and that, usually less £4, is projected forwards from the payable date and set against the claimant's requirements when calculating that claimant's entitlement (if any) to supplementary benefit.

17. I can see no justification either in the regulations or in principle for treating foreign earnings differently from earnings in Great Britain. If a claimant has income in hand, from a previous employment, whether whole time or part-time and whether in Great Britain or in France or somewhere else abroad, that income, net of permissible deductions and allowances, is converted under the regulations into a weekly amount to be set against the claimant's requirements. If the earnings are paid in foreign currency, they

should be converted, in making the calculations, into English currency. This is not difficult. The English currency equivalent was in evidence (either £325 or £350). If not in evidence, the tribunal can call for evidence as to the appropriate exchange rate. There is no more difficulty, indeed less difficulty, than is involved in dealing with remuneration in kind, which must be taken into account under regulation 10(1)(a). Regulation 11(2)(m) of the 1980 Resources Regulations (quoted at paragraph 14 above) does not assist the claimant in any way. Regulation 11 relates to income other than earnings and this case is concerned with earnings. Paragraph (2) of regulation 11 treats certain specified items as income which might otherwise not be regarded as income. One of these is specified in (m). But paragraph (2) is not exhaustive. For paragraph (5) expressly refers (in sub-paragraph (d)) to "any other income not mentioned in the preceding paragraphs". Not only foreign earnings, but also foreign income, clearly fall within the purview of the Resources Regulations.

18. The argument that part-time earnings can only be related to the period in respect of which they are earned is contradicted by the express provisions of regulation 9. Such earnings, calculated in accordance with regulation 10, are clearly income in terms of regulation 9(2). Once the amount of the net income has been determined, the period for which it is payable must be ascertained, or, if it is not payable in respect of a period, the period to which it is fairly attributable must be determined: see (a) and (b) of regulation 9(2). Where the period for which the amount is payable is a monthly period (and that does not appear to be in dispute in this case), the next step is to determine whether the payment was payable before the first benefit week pursuant to the claim. That, in the present case, is also not in dispute. Then, thirdly, it is necessary, under (d) of regulation 9(2), as amended, to determine the date on which the sum was "payable". That is the starting date for which the sum is to be taken into account at a weekly rate. Regulation 9(2) expressly so provides. With all due respect to the claimant and her representative, no other construction is arguable.

19. The suggestion that the claimant can tie the benefit officer down, in the appeal to the supplementary benefit appeal tribunal, to his original submission is wholly unsustainable. The hearing before the appeal tribunal is, it is well settled, a complete rehearing at which fresh facts and fresh arguments can be adduced by either side. This was clearly explained in Commissioner's Decision R(S8) 1/82 (reported) at paragraph 10 and was expressly approved by a Tribunal of Commissioners (whose decision is binding on me) in R(FIS) 1/82. The benefit officer originally thought that the claimant was in full-time employment in France. He was relying on a statement, not in the case papers before me, signed by the claimant. It was accepted, before an adjourned tribunal, that she was in fact in part-time employment. It would indeed be lamentable if the tribunal could be forced to close its eyes to the true facts. That is not the law.



Was the decision of the benefit appeal tribunal erroneous in law?

20. Yes, it clearly was. In order to work out whether the claimant was entitled to benefit, in respect of her claim of 8 June 1981, and from what date, it was essential for that tribunal to find as a fact the date (which was in dispute) on which the French earnings of the claimant (which are an income resource) were payable: see regulation 9(2)(d) as amended by S.I. 1980 No. 1774 (paragraph 11 above). The tribunal made no finding as to this and that was a clear error of law. Notwithstanding the mention of expenses in the record of their first (adjourned) hearing, which they had been told were considerable, there is nothing in the record of their decision to say whether they had considered this question, and as to any, and if so what, expenses were allowable. The disregards, allowances and deductions referred to in sub-paragraphs (2)(3) and (5) of regulation 10 do not appear to have been considered at all. The failure to deal with the question of expenses, which had been expressly raised, was also erroneous in law and in breach of rule 7(2)(b) of the Appeals Rules. Since I cannot find the facts on any of these points, the case must be referred to another tribunal, which should be differently constituted, to determine in accordance with my directions.

Directions to the fresh tribunal

21. The tribunal should -

- (1) clear up the uncertainty as to the decision appealed from. Was it that of 1 July 1981 awarding benefit at £21.94 from 30 June 1981 to 7 July 1981 or that of 2 July 1981 awarding benefit at a different rate and from a different (uncertain) starting date: see paragraph 5 above. Their decision should make clear what benefit officer's decision they are dealing with;
- (2) find as a fact the amount of earnings paid to the claimant in May 1981 and in respect of what period (e.g. for the entire month of May - 1-31 May?);
- (3) determine the date on which such earnings were payable. "Payable" is an ordinary word in the English language and it is undesirable to define it: see Cozens v Brutus /1973/ A.C. 854, HL. It is clear that where employed in the amended paragraph (d) of regulation 9(2) it does not simply mean "received" for the word "payable" was expressly substituted by amendment for the word "received" wherever the latter word occurs in that paragraph (d). In order to determine when earnings are payable, the first step would usually be to look at the terms of the contract to see whether there was a provision as to when earnings were payable. In the present case, I was told at the hearing that this was not possible. If that is correct, the tribunal should find when the

payment was received (either 25 May 1981 or 31 May 1981, the evidence is conflicting) and, in the absence of any evidence pointing in some other direction, they may feel able to conclude, on the balance of probabilities, that the date when the payment was received is that when it was payable;

- (4) fix the starting date under regulation 9(2)(d) (as amended);
- (5) allow any expenses, disregards and deductions authorised by regulation 10 and calculate the weekly rate referred to in regulation 9(2);
- (6) set the resources, as so calculated, from the starting date and for the period determined by them, against the amount of the claimant's requirements;
- (7) if the claimant's requirements exceed the claimant's resources for the period to which the payment relates, state the day on which benefit first becomes payable and at what rate, making it clear which decision of the benefit officer is being modified (if it is modified) and how;
- (8) if those requirements do not exceed the resources for the period to which foreign earnings relate, award benefit, at a rate which is to be sufficiently explained, for that period;
- (9) if the value in English currency of the claimant's earnings is disputed, the earnings should be converted at the appropriate rate of exchange (that ruling, in my view, at the date when the earnings were payable, but this may be a matter for argument) and the rate of exchange specified.

22. For the reasons given in this decision, it is open to the benefit officer, and to the claimant, to adduce further evidence, or arguments, before the tribunal, which should have a complete rehearing. I direct that tribunal that earnings by the claimant in employment abroad are not to be excluded in applying the Resources Regulations either on the ground that those earnings were made outside Great Britain or because they were earned in part-time employment. The reasons for this are set out above. In this connection, it is appropriate to record that the benefit officer originally suggested

that the decision under appeal had been reviewed when it was discovered that the claimant was not in full-time employment. This contention, which the claimant did not accept, and which I also reject, was withdrawn at the hearing before me.

23. My decision is set out in paragraph 1.

(Signed) V G H Hallett  
Commissioner

Date: 23 May 1983

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C SBO File: 63/82