175/83

TEMPLETON, BAILEY
Solicitors
0 1 JUN 1984
205 GREENWICH HIGH ROAD LONDON SE10

MJG/JCB

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Joseph Kane

Supplementary Benefit Appeal Tribunal: North West Kent

Case No: 6/188

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the supplementary benefit appeal tribunal dated 6 August 1983 and I set that decision aside as erroneous in law. I remit the case for rehearing and redetermination to a differently constituted tribunal, in accordance with the directions in this decision: Social Security (Adjudication) Regulations 1984, [S.I. 1984 No 451], regulation 27.

2. This is an appeal to the Commissioner by the claimant, a man aged 45 at the material time. At the claimant's request the appeal was the subject of an oral hearing before me on 13 April 1984 at which the claimant was represented by Miss L A Findlay of the Child Poverty Action Group and the benefit officer was represented by Mr E O F Stocker. I am indebted to Miss Findlay and to Mr Stocker for their assistance to me at the hearing.

3. On 7 June 1982 the claimant claimed supplementary benefit and declared that, although he was living in the same household as a Mrs L and had done so for about 20 years, nevertheless he was no longer living with Mrs L as if they were husband and wife. A visiting officer visited the claimant at his house on 25 June 1982. Following that visit a benefit officer gave a decision on 1 July 1982 which, in the papers before the tribunal, is simply described as being a decision that "the [claimant] is not entitled to supplementary allowance from 8.6.1982".

4. It appears from the statement by the benefit officer to the local tribunal (on form LT 205) that that officer's decision was based on the facts that (i) the claimant was regarded as living with Mrs L as if they were husband and wife and (ii) that, as the claimant had not provided particulars of Mrs L's earnings, it was not therefore possible to make an assessment of their combined requirements and resources, there being therefore no entitlement to supplementary benefit. That appears to have been the position, though as Mr Stocker

pointed out, it is possible that the matter had not reached the stage of an actual decision by the benefit officer at all but merely a requirement by the benefit officer that the claimant should produce information about Mrs L's earnings, under regulation 4 of the Supplementary Benefit (Claims and Payments) Regulations 1981 [S.I. 1981 No 1525]. Of course, if there were no actual decision by a benefit officer then the tribunal would have had no jurisdiction on the appeal and neither would I, as Commissioner.

5. However, I must take the documents at their face value unless there is evidence to show that they are incorrect and form LT 205 states there to have been a decision of the benefit officer on 1 July 1982. When the matter came before the tribunal in their decision of 6 August 1982, the tribunal held that the claimant and Mrs L were in fact living together as husband and wife and added (in their reasons for decision),

> "... Because the appellant has failed to provide the Department with evidence of Mrs L's earnings (she is in remunerative employment) it is not possible for the local office to assess the appellant's entitlement to supplementary benefit. When this evidence is available his entitlement will be assessed and payments if any are made will be backdated to the date of his initial claim."

6. In my judgment that purported delegation by the tribunal to the benefit officer of its functions vitiates the tribunal's decision since if, in truth, the benefit officer's decision were as stated, namely that the claimant had no entitlement to supplementary benefit, then the tribunal's duty was to deal with all the elements implicit in that decision namely

(i) Whether or not the claimant and Mrs L were living together as man and wife and

(ii) If they were found to be so living together, what was their financial position?

The tribunal itself should have dealt with that second matter either by adjournment or by indeed endeavouring to ascertain at the hearing what Mrs L's earnings were. Presumably, the claimant had some idea of what her earnings were and could have told the tribunal about it. In a Decision on Commissioner's file C.S.B. 376/1983, the learned Commissioner (admittedly speaking of a review decision but the position is the same in the present context) said (para 8),

> "In the present case the tribunal to whom the matter is now referred will, if they conclude that the claimant and [a woman] were living together as husband and wife during any period for which [the woman] was earning, similarly have to reach some conclusion as to the amount or minimum amount of those earnings and fix the amount of benefit payable (if any) accordingly."

7. In the present case, the claimant was entitled to have the whole question of his entitlement to supplementary benefit dealt with by the tribunal itself. They did not do so though it was not really any fault of theirs since the benefit officer's submission to them was not entirely clear on the point. At another point the submission stated "No determination as to entitlement to supplementary benefit can be made until [the claimant] provides such information as is required by the Secretary of State" (my underlining). However, the tribunal did not deal with the entire matter and I must consequently remit the case for re-hearing and re-determination to a differently constituted tribunal. That tribunal will wish to deal with this matter of Mrs L's earnings at the material time if they conclude that the claimant and Mrs L were in truth living together as husband and wife.

8. In determining whether the claimant and Mrs L were living together as husband and wife, the tribunal will of course be able to arrive at its own decision on the matter after having taken full evidence from the claimant and any witness or witnesses, e.g. Mrs L, whom he seeks to call. I note incidentally that the chairman in the original tribunal made no note of evidence whereas it is of course very helpful if such a note of evidence is taken particularly if there is a su sequent appeal. In appraising the evidence the tribunal will no doubt wish to take account of the criteria for ascertaining whether or not a man and woman are living together as husband and wife, which criteria were fully reviewed and discussed in reported Commissioner's Decision R(SB) 17/81.

9. The adjudication officer now concerned (in paragraph 4.3 of his written submission dated 30 June 1983) submits that it is manifest from the tribunal's decision that they considered those criteria in reaching their decision. I cannot accept that submission because although the tribunal in their reasons for decision stated "the criteria for living together is [sic] met" it is not at all clear from their decision whether they in fact considered all relevant criteria. It would not necessarily be their fault if they did not, since it appears that the benefit officer's submission to them made no reference to those criteria nor to reported Commissioner's Decision R(SB) 17/81. Moreover, although the tribunal had detailed evidence before it, it did not make findings of fact on all material matters and in particular on the claimant's evidence that his relationship with Mr. L had seriously deteriorated and they were for some purposes at least living 'separately' in the house. Consequently in my view that the tribunal's decision must also be upset on the g ounds that there were not adequate reasons for decision and findings of fact.

10. A further question arises from the fact that after the tribunal held its hearing on 6 August 1982 and notified its decision to the claimant on 16 August 1982, written application was made to the clerk of the tribunal on 21 September 1982 by the claimant's solicitor in the following terms,

> "[The claimant] wishes to apply for the decision of the tribunal to be set aside and for the tribunal to hear

TEMPLETON, BAILEY
Solicitors
01 JUN 1984
205 GREENWICH HIGH ROAD LONDON SE10

his case again. The grounds for the application to set aside the decision are that [the claimant] wished to be represented on the hearing of his appeal. He was informed by a letter dated 7 July 1982 that there would be some delay in fixing the date for the hearing of his case. He was then informed by a letter which is not dated but which we believe [the claimant] received on about 29 July that the hearing of his appeal would be on 6 August. On 30 July 1982 he went to the [Citizens Advice Bureau] to whom he had earlier been on 14 July for advice regarding the matter. On 30 July he told the CAB that he would like advice and if possible representation regarding the matter. The solicitor who works full-time at the CAB and who normally advises on such matters was on holiday. It is the normal practice of the CAB to refer clients who wish to have representation at hearings of appeals before tribunals to the Free Representation Unit. However this Unit requires a good period of notice before they can take on matters. In this case there was insufficient notice to enable them to take on the matter. Accordingly despite the fact that [the claimant] wished to have representation he was not able to arrange it in view of the notice he had of the hearing."

11. On 29 September 1982 the clerk to the tribunal replied to the claimant's solicitor as follows,

"Thank you for your letter dated 21 September concerning the Supplementary Benefit Appeals Tribunal for the above-named which was heard on 6 August last. I regret we are unable to request a re-hearing in this instance. [The claimant] returned the tear-off portion of the notification of his hearing, on which provision is made for (a) requesting an adjournment and (b) to notify representation. He also attended the hearing and had the opportunity to request an adjournment in order that he could be represented, but you will see from the photocopies attached that he did not do so. I regret therefore that your request on behalf of [the claimant] for a re-hearing must be refused."

12. It is not apparent from that letter from the clerk of the tribunal whether the written application for setting aside made by the claimant's solicitor on 21 September 1982 was in fact placed before the tribunal itself, as, in my judgment, is undoubtedly required by regulation 3(2) of the Social Security (Correction and Setting Aside of Decisions) Regulations 1975 [S.I. 1975 No 572], providing,

"3(2) - An application to set aside a decision under the foregoing paragraph of this regulation shall be in writing; shall state the grounds on which it is made; and shall not be entertained by the body or person who gave the decision unless the application

EMPLE I. BAILEY
Solicitors
01 JUN 1984
205 GREENWICH HIGH ROAD LONDON SE10

> is received at an office of the Department of Health and Social Security ... or at the office of the body or person who gave the decision, within 28 days from the date on which the notice of the decision was given to the applicant or such further period as that body or person may for special reasons allow."

It is in my view clear from regulation 3(2) that, once written application is received by an office of the Department or by the office of the clerk of the tribunal, then the "body who gave the decision" i.e. in this case the local tribunal must give a ruling on the application. It is not competent e.g. the clerk of the tribunal to deal with the matter of his own accord (as may have happened here). Mr Stocker submitted otherwise at the hearing before me and stated that it was open to an administrative body such as the clerk of the tribunal to reject applications for setting aside on the footing that they did not come within the grounds set out in regulation 3(1) for the setting aside of decisions. In my judgment, that is not so. Every written application to set aside a decision that is in writing and states the grounds on which it is made must be placed before a tribunal. It is for the tribunal to rule whether the grounds stated are within regulation 3(1) and not for any other person to do so. In the present case, the written application from the claimant's solicitor stated a ground which in fact is within regulation 3(1)(b) of the regulations, namely that "the party's representative was not present at a hearing related to the proceedings". The tribunal should have ruled on that matter after having asked for representations from the benefit officer who was a "person interested in the decision" within the meaning of regulation 3(3) and then there should have been compliance with regulation 3(4) which requires that "Notice in writing of a determination on an application to set aside a decision shall be given to persons interested in the decision as soon as may be practicable and the notice shall contain a statement giving the reasons for the determination". If in fact the clerk's letter dated 29 September 1982 was meant to be such a written notice then in my view it was defective because it does not indicate that the tribunal itself has made the rulings set out in the letter of 29 September 1982 and indeed the wording of the letter raises the very considerable doubt whether the application was placed before a tribunal.

13. A further matter arising from the claimant's solicitor's letter of 21 September 1982 is the assertion that the claimant received inadequate notice of the hearing for him to secure the services of a representative. Enquiry has been made of the clerk of the tribunal, from whom information has emerged that the notice of hearing was despatched by post to the claimant on 27 July 1982 and the hearing was on 6 August 1982. Before examining the law on this matter, I should observe that apparently the claimant, when he arrived at the hearing without his representative, was given the choice by the clerk of the tribunal as to whether he should go ahead without a representative or whether he would wish to ask for an adjournment. Apparently the claimant, for the sake of getting a

quick decision, asked that his case be heard that day. By so doing, although he may not altogether understood the significance of his decision, the claimant did in fact, in my view, waive any objection to short notice that there might be.

14. In fact the length of notice given to the claimant was the bare minimum of 10 days notice referred to in rule 5(2) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1982 No 1605, as amended by S.I. 1982 No 40] which provided,

> "5(2) - Reasonable notice (being not less than 10 days beginning with the day on which the notice is given and ending on the day before the hearing of the case is to take place) of the time and place of an oral hearing and copies of documents supplied to the tribunal for the purpose of the appeal shall be given to ... the person who has brought the appeal."

In fact the 10 days begins to run from the date of which the notice of hearing is actually posted to the claimant, not on the day on which it is received (see rule 1(4) of the Appeals Rules to this effect). For that reason therefore the notice given on 27 July 1982 did just give the minimum 10 days notice. However it should be observed that rule 5(2) does not state that in every case 10 days notice is sufficient. The overriding requirement is that "reasonable notice" should be given and there may well be cases where in the particular circumstances 10 days is insufficient. However, if no point is taken on this before the tribunal itself or the point is waived, as in this case, (compare reported Commissioner's Decision R(S) 13/52 paragraph 3(b)), then it is not normally thereafter possible to assert that reasonable notice of the hearing was not given.

(Signed) M J Goodman
Commissioner

Date: 30 May 1984

Commissioner's File: C.S.B. 175/1983
CSBO File: 149/83
Region: London South