CSB 1824/82

Ex-Gratia payment

JBM/II

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER -

Name: Michael Peter Bell

Supplementary Benefit Appeal Tribunal: Portsmouth and the Isle of Wight

Case No: D6/39

[ORAL HEARING]

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 7 October 1981 is erroneous in point of law and should be set aside. I remit the case to another tribunal for rehearing.

2. This is an appeal on a point of law against the decision of the Isle of Wight Supplementary Benefit Appeal Tribunal dated 7 October 1981 on an appeal against the determination by the benefit officer made on 21 August 1981. Leave to appeal was granted to the claimant on 29 March 1982 and the claimant appealed on 27 May 1982. I granted an extension of time to 23 July 1982 to enable the supplementary benefit officer to make her submissions which she did on 22 July 1982. On 19 October 1982 I made the following direction:-

> "I direct an oral hearing to hear legal argument on the supplementary benefit officer's submissions. Such argument should in particular have regard to:-
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> (i) whether any particular payment does, or does not, constitute an ex-gratia payment would seem to be a question of fact to be determined in all the circumstances of the case. The tribunal having apparently decided that a total of £1,300.84 represented an ex-gratia payment falling to be treated under regulation 10(1)(c) to the Resources Regulations, is it now arguable that they erred in law?
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> (ii) having regard to the analysis of the combined payment of £2,309.24 to be found on form LT205 under the heading 'facts of the case' can it be said that the tribunal in expressly mentioning only the sum of £1,300.84 recorded an adequate statement of the reasons for their determination and of their findings on material questions of fact is required by rule 7(2)(b) of the Supplementary Benefit and

Family Income Supplements (Appeals) Rules 1980?"

3. I held an oral hearing on 22 February 1983. The claimant appeared in person. The supplementary benefit officer was represented by Mr D James of the Solcitors Office of the Department of Health and Social Security to whom I am indebted for his detailed argument.

4. The claimant gave as his written grounds for appeal against the tribunal decision that the redundany payments received should have been treated as capital and not as income. Orally before me he reiterated those submissions. I should add that the claimant is married with two dependent children and was made redundant on 24 July 1981.

5. The appeal tribunal in its reasons for decision on 7 October 1981 dealt only with the 'lump sum payment of £1,200 plus 5 days holiday pay of £100.84'. The facts of the case set out on form LT205 state:-

> "On 24 July Mr Bell received amounts of £70 (which was one week's wages), £50 (which was 4 days holiday pay) plus a combined payment of £2,309.24 which represented:
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> Redundancy pay of £403.36
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> Payment equivalent to notice £403.36
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> Additonal redundancy pay £201.68
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> Ex-gratia payment ..... £1,300.84"

The appeal tribunal in their record did not deal with the £70, the £50, the redundancy pay, the payment equivalent to notice or the additional redundancy pay. It is possible (one has to speculate) that only the question of the 'ex-gratia payment' was in issue and that the other matters were not in dispute. If this were the case the tribunal should have recorded in their record what matters were not in dispute. I find that the appeal tribunal has failed to comply with rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980. If matters other than the 'ex-gratia payment' were in dispute the appeal tribunal should have in their reasons for decision dealt specifically with each item stating (having found the necessary facts in their findings of fact) whether each item was income or capital for the purposes of the Supplementary Benefit Act 1976 as amended. They should also have dealt with the period of disentitlement of the claimant for receipt of supplementary benefit. In their reasons for decision the appeal tribunal does record 'the tribunal is satisfied that the sum of £1,300.84 was therefore correctly treated as a resource ..

averaged to a weekly figure for the period commencing after expiry of the period covered by holiday pay and wages in lieu of notice'. It is possible as a question of construction of the reasons for decision that the appeal tribunal dealt with the £70 and the £50 (the wages and the four days holiday pay). However I am left to speculate in reading the reasons for decision and while the standards of a judgment of the High Court are not necessary in an appeal tribunal's reasons for decision what was being dealt with should have been specifically stated in the record. The appeal tribunal failed to make a finding as to whether the claimant was paid in arrears or not.

6. I deal in this paragraph specifically with that part of the payment under the termination agreement which is set out as "Ex-Gratia payment £1300.84 in document 6 in the case papers. From the termination agreement which was before the appeal tribunal the claimant received £1,200 'plus 5 days holiday entitlement above that already accrued at date of termination less annual holiday already taken.' The total of these figures is £1,300.84. The evidence before the appeal tribunal refers to this total figure of £1,300.84 as an 'ex-gratia payment'. The appeal tribunal failed to ascertain precisely the extent of the 5 days holiday entitlement'. It would appear that this was a 5 days net, that is a weeks entitlement, but this is a question of fact for the appeal tribunal. The holiday pay is clearly income and an income resource for the purposes of the Resources Regulations. The main point at issue is whether the payment of £1,200.00 is an income or capital resource. The appeal tribunal decided that it was an income resource. In this they erred in law. The Supplementary Benefit (Resources) Regulations 1980 (SI 1980 No. 1300) so far as relevant for present purposes provided as follows:-

> "3-(2) For the purposes of these regulations resources shall consist of capital resources and income resources ...."
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> "9-(1) .. the amount of a claimant's income resources to be taken into account shall be -
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> (a) the whole of his earnings ...
>
> (b) the whole of any other income of the assessment unit ... Calculated on a weekly basis."
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> "10-(1) Subject to the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit, calculated on a weekly basis, derived from any employment and shall include:-
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> ....
>
> (c) any advance of earnings or loan or ex-gratia payment;"

7. I was informed that subsequent to the date of claim in the present case regulation 10(1)(c) was amended. However I cannot

take that into account. I must construe the relevant regulation as it stood at the date of claim in the present case. Mr James submitted that it was necessary to consider the structure of the Resources Regulations and that Part I of the Resources Regulations (in which regulation 3 is to be found) relates to interpretation of the whole of the Resources Regulations which comprise Part I (general) Part II (capital resources) and Part III (income resources). Regulation 3 set out above underlies all the regulations. Mr James submitted that there was an analogy with regulation 3 of the Single Payments Regulations and the underlying provisions of those Regulations. Stopping at regulation 3(2) of the Resources Regulations (so ran Mr James's submission) there is a division into capital and income resources and one has to decide on general principles what is a capital resource and what is an income resource in a way similar to (but of course depending on the differences in legislation) a decision as to whether an item is capital or income under the Income and Corporation Taxes Act 1970 and its predecessors. The fact that a payment is described as 'ex-gratia' involves an examination to see whether it is intended as an income compensation or a capital compensation. Mr James submitted that one has to make this decision as to whether the item is income or capital without looking at the remainder of the Regulations as the Regulations leave the distinction open. Looking at the termination agreement a lump sum of £1,200 was for each employee aged 20 and over. It was paid to all the employees. If it had been intended as an income computation it would have applied to the wages they were receiving. Employees under 20 received less than the full payment by a percentage varying with age. The percentage is nothing to do with the time they have been with the employers. A 19 year old might have just joined the company. It is a compensation for the fact that an employee has lost his livelihood. This is further reinforced by the fact that the apprentices who continued their apprenticeship with an alternative employer received a half. Looking at the terms of the termination agreement, so Mr James submitted, I should infer that the ex-gratia payment was meant as capital compensation not as income. In the present case if one were confined to regulation 3 of Part I of the Resources Regulations that would conclude the case in favour of £1,200 being a capital payment. I turn now to regulation 9(1). Para 9(1) refers to 'income resources'. I find that the provisions of Part III (in which regulations 9 and 10 are set) applies therefore only to income resources and a decision that a particular item is a capital resource means that one does not have to consider the provisions of Part III. Regulation 10(1)(c) set out above refers to 'ex-gratia payment'. This is limited to income resources. I think the ejusdem generis rule applies so that 'ex-gratia payment' must be construed on the lines of 'any advance of earnings'. 'Ex-gratia payment' here in regulation 10(1)(c) relates to an income resource. It is not an overriding provision in the Resources Regulations making every ex-gratia payment into an income resource. I accept Mr James' submission on the above. The appeal tribunal erred in law in its treatment of the £1,200. As a question of law on the evidence before them the payment was a capital payment. Any other construction would I think involve a radical departure from regulation 3(2) of the Resources Regulations.

In arriving at a conclusion as to whether the item is capital or income one looks at regulation 3(2) and regulation 9(1) - one does not need to look at regulation 10 once one has already decided that what one is dealing with is a capital resource.

The Commissioner in an unreported decision on Commissioner's file CSB/354/1981 considered the payment of £500 to an employee on the termination of his employment, such payment being expressed by the employers to be not earnings but a payment in lieu of notice. The Commissioner concluded that as such the payment was 'earnings' within the meaning of regulation 10 of the Resources Regulations. However the Commissioner went on to say that even had the payments been an ex-gratia payment, it would nevertheless have been 'earnings' in terms of that regulation. This conclusion was unnecessary for the determination of that particular appeal and I do not propose to follow it in this case. I note in passing that the House of Lords has recently decided not to have unreported cases cited to it; Roberts Petroleum Ltd v Bernard Kenny Ltd (1983) Times 10 February.

8. Further the appeal tribunal erred in law in that it failed to deal or at least deal adequately with the question of the period of disentitlement of the claimant to supplementary benefit. The contesting views are that of a concurrent disentitlement in respect of the various income items or a consecutive disentitlement. Of the income resources the claimant received one week's wages 4 days holiday pay, apparently one week's holiday pay (for which he received £100.84) and payment equivalent to notice. In all (and for the reasons given below) if (as I think it right) a consecutive approach is the correct one this amounts to a total disentitlement period in respect of the claimant of six weeks and four days from 24 July 1981 (the date he was made redundant).

9. Section 6(1) of the Supplementary Benefits Act 1976 as amended by the Social Security Act 1980 provides that a person who is engaged in remunerative full time work shall not be entitled to supplementary benefit and that regulations may provide as to the circumstances in which a person is or is not to be treated for the purposes of that section as so engaged. Regulation 9(1) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 (SI 1980 No. 1586) as amended by the Supplementary Benefit (Miscellaneous Amendments) Regulations 1981 (SI 1981 No. 815) specified the circumstances in which for the purposes of section 6(1) a claimant was to be treated as engaged in remunerative full time work and provided that he was to be so treated where:-

> "(a) he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than -
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> (i) in the case of a claimant who is mentally or physically disabled and whose earning capacity is by reason of that disablement reduced to 75% or less of what he would, but for that disablement be reasonably expected to earn, 35 hours a week;
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> (ii) in any other case, 30 hours a week,
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> or he is absent from such work with[illegible]t good

cause or by reason of a recognised or customary holiday;

(b) he was engaged in remunerative full-time work within the meaning of sub paragraph (a) but not as a self employed person, and -

(i) either his employment has terminated or he is without employment in circumstances in which section 8(1) or (2) applies, and

(ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with regulation 10 of the Supplementary Benefit (Resources) Regulations 1980 which, by virtue of regulation 9(2) of those regulations as modified by paragraph (3) of this regulation [which is not relevant here], fall to be taken into account for a period subsequent to the termination of the employment or as the case may be, during which he is without employment in circumstances in which section 8(1) or (2) applies;

and in a case to which this sub paragraph applies the claimant shall be treated as engaged in remunerative full-time work for the period in respect of which those earnings fall to be taken into account pursuant to the said regulation 9(2) as modified by paragraph (3) of this regulation;

[(c) this provision is not relevant to the present appeal.]"

10. Regulation 9(2) of the Supplementary Benefit (Resources) Regulations 1980 as amended by the Supplementary Benefit (Aggregation, Requirements and Resources) Amendment Regulations 1980 (SI 1980 No. 1774) provides as follows:-

"9.-(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 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;

(d) in the case of an income resource which falls to be taken into account but which is payable before the first

benefit week pursuant to the claim, the date on which it is payable;

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)."

The payments of £70 (one week's pay), £50 (4 days holiday pay) and £100.84 (the apparently 5 days net hoiday pay) are to be taken into account for a period of two weeks and four days from the date on which they were payable which was the date of redundancy, 24 July 1981, under regulation 9(2)(a) and 9(2)(d) of the Resources Regulations as amended. The claimant was therefore to be treated as engaged in remunerative full time work for a similar period, under regulation 9(1)(b) of the Conditions of Entitlement Regulations as amended. The effect of this (subject to paragraph 11 of this decision) was to disqualify the claimant for entitlement to supplementary benefit for a period of two weeks and four days from 24 July 1981.

11. I turn now to the 'Payment equivalent to notice' in the amount of £403.36. This is an income resource being the wages the claimant would have received if he had been required to work out his period of notice. The payment in lieu of notice falls under regulation 10(1)(d) of the Resources Regulations as amended which provided that a person's earnings were to consist of all remuneration or profit derived from any employment and were to include any payment in lieu of notice or remuneration. In the absence of the 'Payment equivalent to notice' being paid for a specific period it falls to be taken into account at a weekly rate for the period to which it was fairly attributable under regulation 9(2)(b) of the Resources Regulations. On the assumption that the claimant's gross earnings were about £100 a week the payment equivalent to notice was fairly attributable to a period of four weeks. Consequently under regulation 9(1)(b) as amended of the Conditions of Entitlement Regulations the claimant was to be treated as engaged in remunerative full time work for a total period determined under regulation 9(2) of the Resources Regulations being a period of 6 weeks and 4 days, the sum of the four periods in respect of which the four income payments were made. It is the total payment which is to be attributed from the date on which it is payable (and was actually paid) being 24 July 1981 on which all of the payments were made. They are all to be taken into account as earnings under regulation 10 of the Resources Regulations.

12. In paragraph 9 of the unreported decision on Commissioner's file CSB/354/1981 the Commissioner held that where an employee had been paid on the same day one month's salary and an amount in lieu of one month's notice the two payments shall be taken into account concurrently for one month from the date of payment. In my view the correct approach is that the payment should be taken into account consecutively that is for a period equal to the total of the periods to which they relate, that is in the present case six weeks and four days from 24 July 1981.

13. The claimant has received payments of an income nature in respect of a period of six weeks and four days - that period therefore is the period of disentitlement for receipt of supplementary benefit. Both the claimant and Mr James submitted that the period of disentitlement was five weeks and four days. However, for the reasons given above the period of disentitlement is that of six weeks and four days. The claimant did not argue for a concurrent approach nor do I see grounds for accepting such an approach, in particular a concurrent approach would involve taking the longest period of possibly a number of different periods (all possibly almost as long as the longest period) in respect of each of which there were a number of separate income payments. Regulation 9(1)(a) and (b) of the Resources Regulations the relevant part of the provisions of which is set out at paragraph 6 of my decision provides that the whole of the claimant's earnings and the whole of any other income of the assessment unit (my underlining) is to be taken into account in calculating the amount of a claimant's income resources. In my view a concurrent approach does not take fully into account the whole of the claimant's income resources but only takes into account the longest period of the various periods involved.

14. Rule 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 as amended by the Supplementary Benefit and Family Income Supplements (Appeals) Amendment Rules 1982 (SI 1982 No. 40) provides as follows:

> "10(8) On an appeal from a decision of a tribunal the Commissioner may -
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> (a) hold that decision is erroneous in point of law and -
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> (i) if he is satisfied that it is expedient in the circumstances, give the decision the tribunal should have given; or
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> (ii) refer the case to another tribunal with directions for its determination;
>
> or
>
> (b) hold that the decision is not erroneous in point of law".

15. Mr James submitted that the possible course was open to me of giving the decision the appeal tribunal should have given provided if of course I am satisfied that it is expedient in the circumstances. However, as indicated above the facts are not fully found - indeed it was only when the claimant was himself asked at the hearing before me that some of the factual back-ground became clearer. I think it would be unsatisfactory for me therefore to give the decision the appeal tribunal should have given. Accordingly I refer the case to another tribunal with directions as above for its determination.

16. Accordingly the claimant's appeal is allowed.

(Signed) J B Morcom
Commissioner

Date: 23 May 1983

Commissioner's File: CSB/184/1982

C SBO File: 54/82