CPAG

DGR/SH/13

Commissioner's File: CSB/298/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 22 February 1990 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 22 February 1990.

3. The question for determination by the tribunal was whether the claimant could, by virtue of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981, for any period, escape the obligation, imposed on him by section 5 of the Supplementary Benefits Act 1976, of being available for employment as a condition of receiving supplementary benefit. If he could, then he was in a position to qualify for the long-term scale rate of benefit for the relevant period.

4. Regulation 6 provided at the relevant time as follows:-

> " 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 ....
>
> (a)-(d) ....
>
> (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 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)-(t) ....

(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 it would be unreasonable to require him to be available for employment."

5. In the event, the tribunal upholding the decision of the adjudication officer, disallowed the appeal. Although the tribunal made no specific findings that the claimant was without realistic prospects of employment within paragraph (e), they seem to have proceeded on the basis that such was the case, and that the only issue was whether this was caused by the claimant's age as being analogous to physical or mental disablement within paragraph (u). They decided that age was not the cause of the absence of realistic prospects of obtaining work.

6. As far as the question of age was concerned, the tribunal were clearly right. There was no evidence that age was the cause of his being unable to find employment. This was not the case, for example, of a footballer or ballet dancer having attained the age when he could not longer carry on these undertakings. There is a crucial distinction between age affecting a claimant's ability to perform work and age being a bar to employment opportunities. An employer might be prejudiced against taking on persons over a certain age, but it does not necessarily mean that such persons were unable, simply by virtue of their age, to undertake the relevant work. The matter is clearly expressed in paragraph 23(d) of Decision R(SB) 5/87:-

> "In particular it cannot be asserted as a matter of principle that age can never under any circumstances be analogous to 'physical or mental disablement' for the purposes of regulation 6(e), as age may affect the claimant's ability to perform work, as opposed to employment opportunities not being available to him by reason of his age [my emphasis]."

7. However, there was also evidence that the claimant had for eight years or so suffered from schizophrenia. Unfortunately, the tribunal did not consider whether this condition constituted "physical or mental disablement" within paragraph (e) which resulted in his having no further prospects of employment.

Accordingly, on that ground there was a breach of regulation 25(2)(b) of the Adjudication Regulations, and therefore the tribunal's decision was erroneous in point of law. I must necessarily set it aside and direct that the appeal be reheard by a differently constituted tribunal.

8. The new tribunal will consider paragraphs (e) and (u), and make specific findings as to whether, and if so, from what date, the claimant can establish that he was entitled to waiver. As regards paragraph (e) the tribunal will bear in mind that, if the claimant is to derive any advantage therefrom, he has first to establish that he was from the relevant date without any realistic prospects of employment. Unless he can do this, paragraph (e) will have no application. If the new tribunal are satisfied that the claimant was at any time without such prospects of employment, they must go on to determine whether the claimant can satisfy heads (i), (ii) and (iii), and, if he can, whether his being without prospects of employment was caused by physical or mental disablement. If the tribunal consider that the claimant was not at any time subject to physical or mental disablement, they must consider whether or not he was suffering from any analogous condition pursuant to paragraph (u), and whether such condition was the cause of his being without prospects of employment. I do not at the moment see how age can assist the claimant, but this is a matter for the new tribunal. Throughout, the tribunal must make full findings and give adequate reasons for their decision. In particular, if they are otherwise satisfied that the claimant can bring himself within paragraph (u), they must go on to make a express determination as to whether "it would be unreasonable to require him to be available for employment". Finally, if the tribunal are satisfied that the claimant can bring himself within regulation 6 at any time prior to 104 weeks before the date of request for review, it will be incumbent upon them to decide whether the provisions of regulation 72 of the Adjudication Regulations are satisfied, so that the limitations on the payability of arrears prescribed by regulation 69 may be circumvented. Of course, the question of backdating will not arise if a claimant is unable to bring himself within regulation 6 for any period.

9. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) 3 February 1992

JM/SH/2

Commissioner's File: CSB/293/1990

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 chairman of the social security appeal tribunal, against a decision of that tribunal dated 3 April 1990 which confirmed a decision issued by the adjudication officer on 25 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 and referred to in this decision.

2. This case is one of six which the appeal tribunal heard together. Annexed hereto is an Appendix which is common to all six of my decisions. That Appendix is to be read with and forms part of this decision.

3. The claimant was born in 1968. He moved into the Hostel on 19 January 1987 and remained resident therein throughout the time material to this appeal. On the claim form which he signed in March 1987 it was indicated that the charge which the Hostel made to him did not cover any meals.

4. The claimant's appeal is allowed.

(Signed) J Mitchell
Commissioner

(Date) 6 February 1992

JM/SH/2

APPENDIX

1. This Appendix is common to the six short decisions which I have given in respect of the six claimants in the supplementary benefit appeals upon the following Commissioner's files:

CSB/257/90
CSB/265/90
CSB/266/90
CSB/293/90
CSB/299/90
CSB/301/90

2. At all material times all six claimants lived at the same address in Birmingham. It has since early in 1988 been accepted by all relevant parties that the property at that address falls to be treated as having been a "hostel" within the meaning of regulation 9 of the erstwhile Supplementary Benefit (Requirements) Regulations 1983 and that each claimant was a "boarder" therein. (Although until 1988 there was a common misapprehension as to the true status of the property, I shall refer to it throughout as "the Hostel".) Each of the claimants is mentally handicapped but each, with the possible exception of the claimant in CSB/301/90, manages - and at all times material to these appeals has managed - his or her own affairs. There is an appointee in respect of the claimant in CSB/301/90. There has not, however, been at any material time an appointee in respect of any of the other claimants. The respective claimants took up residence in the Hostel upon various dates in 1986 or 1987. (The precise dates appear, respectively, from the individual decisions which I have given.) One claimant left the Hostel to live elsewhere for a period - but returned to the Hostel after 4 months. Each claimant was in receipt of supplementary benefit throughout his or her stay in the Hostel.

3. It is obvious that the Social Services Department of the Birmingham City Council has throughout (very properly) kept a supervisory eye on the affairs of these disadvantaged claimants. It must be clearly borne in mind, however, that the City Council is <u>not</u> a party to these proceedings. (In CSB/301/90 the claimant's appointee is the Director of Social Services. But the position of an appointee is well understood in social security matters. Such appointment in no way makes the City Council a party.) It was the Director of Social Services who appeared before the appeal tribunal in order to put the cases of the respective claimants. But on each of the relevant forms AT3 she is described as "Appellant's representative". For what it is worth, I contrast the position with that which obtained (at any rate before the Tribunal of Commissioners) in R(S) 11/89 - to which case reference is made in the papers. The Tribunal of Commissioners held an oral hearing in R(S) 11/89; but at that hearing the claimant neither appeared nor was represented. The

London Borough of Camden did appear - and was represented by counsel. But it is clear from paragraph 2 of the decision that that was "with the consent of the adjudication officer"; and it must also have been with the consent of the Tribunal. I was not myself a member of that Tribunal. To what extent - if any - such appearance and representation rendered the London Borough of Camden a "party" to those proceedings I do not need here to decide. What is certain is that -

(a) these appeals to the Commissioner are pursued on behalf of the claimants by the claimants' representative; and

(b) neither the Birmingham City Council nor its Social Services Department is a party in the proceedings.

There has been muddle and misunderstanding in the history of this matter. When it is borne in mind, however, that every one of the claimants is mentally handicapped and that at least five of them have acted throughout without any appointee, any adjudicating authority must be slow indeed to allow the muddle and misunderstanding to impel it towards conclusions unfavourable to the claimants. By the like token, of course, the appeal tribunal which rehears these cases will bear clearly in mind that it is with the interests of the claimants - and solely with the interests of the claimants - that its concern lies. The outcome may or may not be of indirect advantage to the City Council; but such effect is entirely incidental to the decision-making process.

4. In characteristically objective submissions, dated 19 December 1990, the adjudication officer supports the claimants' appeals and invites me to refer the cases to a fresh appeal tribunal for further investigation of the material facts. I consider those submissions to be well founded; and I have complied with the invitation. Since the cases are to be entirely reheard, I do not here attempt any detailed rehearsal of the relevant facts and law. I confine myself to what is necessary in order to make my decisions intelligible to the fresh tribunal.

5. Until late in 1987 it seems to have been generally accepted that the Hostel fell to be regarded as accommodation provided by the local authority under Part III of the National Assistance Act 1948. I must amplify what I mean by "generally accepted". The relevant view was certainly held by the Welfare Rights/Social Services Department of the City Council. In consequence, it appears, the Department of Health and Social Security (as it then was) took the like view. It is very much to be doubted, however, whether any of the claimants themselves had any view whatever in respect of the status in law of their accommodation. To them, I imagine, it was simply somewhere to live.

6. But towards the end of 1987 a development officer in the Welfare Rights Department came to the conclusion that the Hostel did not fall - and had not at any material time fallen - under Part III of the 1948 Act. It had been provided pursuant to section 21 of and paragraph 2(1)(a) of Schedule 8 to the National

Health Service Act 1977 and was, in consequence, a "hostel" within the meaning of regulation 9 of the then current Requirements Regulations; which, in turn, meant that the claimants were "boarders" within the meaning of that regulation and of Schedules 1A and 2 to the Requirements Regulations. All that was, in due course, accepted by the adjudication officer.

7. I interrupt my brief narrative at this point to observe that, in his letter dated 17 December 1987, the development officer identified no less than 13 hostels in the Birmingham area to which what I have said in paragraph 6 above applied. Some 250 residents were involved. To some extent, the sheer scale of the exercise may have contributed to the "muddle and misunderstanding" to which I refer in paragraph 3 above.

8. Details of the respective sums of money involved fully appear from the papers. Suffice it to say here that the recognition that the Hostel was a "hostel" for the purposes of regulation 9 of the Requirements Regulations (and did not fall under Part III of the 1948 Act) meant a substantial potential increase in the supplementary benefit to which each claimant was entitled. In a letter dated 30 March 1988 the development officer informed the Department that charges to the claimants would be increased in consequence - and that the revised charges would "be backdated to April 6th 1987". Moreover, on behalf of the claimants a claim was made for arrears of the personal expenses element in the supplementary benefit to which a boarder was entitled. So there were, in effect, claims for -

(a) reviews of the current assessment of supplementary benefit;

(b) retrospective reviews of both the board and lodging element and the personal expenses element in the assessment of supplementary benefit; and

(c) payment of any arrears thrown up by (b).

9. The local adjudication officer issued his decisions upon the respective claims on various dates in October/November 1988. No complaint was made about his treatment of item (a) in paragraph 8 above. So far as item (b) was concerned, he was awarded arrears of personal expenses right back to the dates of the respective claims which had been made when the relevant claimant had moved into the Hostel. Naturally, no complaint is made about that. (Very properly, he accepted that the situation fell within the ambit of the now revoked regulation 72(1)(b) of the Social Security (Adjudication) Regulations 1986.) But so far as the board and lodging element was concerned, the local adjudication officer refused any backdating prior to the respective dates (in December 1987 and January 1988) upon which the relevant claimant had actually been charged the increased sum. It is upon this aspect of the cases that these appeals turn.

10. By the time that these cases came before the appeal tribunal a new consideration had come upon the scene. It appears that at

the dates of the local adjudication officer's decisions both the adjudication officer and the Welfare Rights/Social Services Departments were under the impression that all the claimants had been provided with all their meals whilst living in the Hostel - and that the cost of those meals had been included in the respective charges made to the claimants. That impression was wrong. The appeal tribunal found as a fact that "the City had not charged for meals"; and that finding, so far as it goes, is accepted by the adjudication officer now concerned. But - as that adjudication officer lucidly demonstrates in the Appendix to his submissions dated 19 December 1990 - the tribunal's finding does not go far enough. It leaves unanswered the following pertinent questions:

(a) Although the City did not charge for meals, did it nevertheless provide meals? The claimants' representative is recorded as having told the tribunal: "Meals had never been provided only lodging." There was no express finding of fact recorded in respect of that averment, although the second of the recorded reasons reads: "The City had provided meals although apparently not charged for them." In common with the adjudication officer now concerned, I am at a loss to know -

(i) upon what evidence that "reason" was founded; and

(ii) upon what grounds the categorical statement of the representative was rejected.

(b) If the claimants did not take their meals (or all of their meals) in the Hostel, where <u>did</u> they take their meals (or some of them) - and how much did they pay for such meals? (I appreciate that at this late date - and in view of the claimants' mental capacity - those questions may not be easy to answer; but the fresh tribunal must do what it can.)

11. In paragraph 5 of the Appendix to the submissions of the adjudication officer now concerned are set out details of the enquiries which the fresh tribunal must make and also the manner in which are to be translated into assessment of benefit such findings of fact as the tribunal may make. I need not repeat what is there written. Copies of the submissions and of the Appendix must be before the appeal tribunal which rehears these cases.

12. It is beyond doubt, of course, that in their original claim forms for supplementary benefit at least four of the claimants indicated categorically that the Hostel provided them with three meals on every day of the week. (The status in law of the Hostel was also misdescribed.) In this context, there must be borne in mind the facts that -

(a) none of the claimants actually filled in his or her

claim form (which is perfectly clear from a comparison of the handwriting of the entries with the signatures of the claimants - where there is a signature); and

(b) there was a substantial number of claimants throughout Birmingham whom the Welfare Rights/Social Services Department was assisting.

In its fifth recorded reason the appeal tribunal held:

> "The DSS was entitled to rely on that information and the City was estopped."

I must confess to finding that a somewhat astonishing reason. As I have sought to demonstrate in paragraph 3 above, the City has never been a party to these proceedings. Accordingly, it is difficult to see the relevance of any estoppel which may or may not bear upon the City. That is quite apart from the well-known (and justified) antipathy with which estoppels are regarded in this jurisdiction. The jurisdiction is inquisitorial, not adversarial. The duty of the adjudicating authorities is to ascertain such rights and duties as the relevant legislation confers and imposes upon the parties whose cases come before those authorities. Estoppel is, in essence, the creature of the adversarial system. I am, of course, well aware that if a claimant -

(a) allows someone to complete a claim form on his behalf,

(b) and has to found upon that claim form,

that claimant will have to accept responsibility for what is written on the claim form, regardless of the fact that the "someone" is not a duly appointed appointee. But I was a Commissioner throughout the $7^1/_2$ years of the "new" system of supplementary benefit. I have come across countless cases in which - whether through ignorance or misunderstanding of the legislation - a claimant (who had completed his own claim form) had, in perfectly good faith, written or omitted something which resulted in his being awarded a smaller amount of supplementary allowance or supplementary pension than that to which he was actually entitled. (That happened frequently in the context of additional requirements.) When the mistake was brought to light, the benefit/adjudication officer readily embarked upon the review/revision exercise. I never once heard it suggested that the relevant claimant was "estopped" by what he had originally written on the claim form; and if any adjudication officer had made such a suggestion, I should have thought little of his or her prospects of promotion!

13. In five of the cases now before me the claimant's letter of appeal to the appeal tribunal contains the sentence:

> "Birmingham City Council Social Services Department agreed to accommodate me on the understanding that I would pay according to my means i.e. I would pay amounts claimable

from the DSS towards my board and lodging costs."

Taken at its face value, that term certainly distinguishes these cases from the case considered by the Tribunal of Commissioners which decided R(S) 11/89. It could well be urged to bring these cases within the second parenthesis in the following passage from paragraph 4 of R(S) 13/83:

> "Although regulation 4 of the Determination of Questions Regulations contains no provision analogous to that of regulation 31(4) of the Social Security (Determination of Claims and Questions) Regulations 1975 .... to the effect that review based on a material (sic) change of circumstances shall not have effect before the date on which the change took place, it is in my judgment clear that it must be the case that without any such provision (there is no such provision in regulation 32 of the last mentioned regulations, which relates to industrial injuries) revision on review based on a relevant change of circumstances must (unless perhaps there is something in the change that has a retrospective effect) be confined to the position subsequent to the change."

(Since that is a long sentence, I have underlined the crucial parenthesis.) As I have indicated in this paragraph, a legal argument is possible by way of justification of the backdating to 6 April 1987 of the increased lodging charges. In the decision dated 3 April 1990 the appeal tribunal made no finding whatever as to the terms upon which the claimants, from time to time, enjoyed the right to live in the Hostel. Reason 7 simply reads:

> "7. The tribunal generally felt that R(S) 11/89 applied to this case and as such it was bound by that decision."

It is, of course, entirely for the claimants' representative to decide whether at the rehearing the backdating of the lodging charges is to be further pursued. She may well decide that it is not worth so pursuing. I can, of course, judge the matter only on the material which is presently before me. I do, however, see difficulties in establishing the precise term contained in the quotation which I have set out at the beginning of paragraph 13 above. Moreover, that term must, to further the relevant argument, be construed so that "amounts claimable" includes "amounts which could have been claimed at the appropriate time". Each of the claimants is disadvantaged mentally as well as financially. It is axiomatic that consensus lies at the heart of contract. Did any one or more of the claimants really appreciate that -

(a) the agreement contained the term contended for, and

(b) that term fell to be expanded as aforesaid?