

CSB 326/1983

T/AJ

*Concurrently v Conspicuously
Earnings that fall to
be taken into account*

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Payable - definition

Name: David Henry Cunningham

Supplementary Benefit Appeal Tribunal: Aylesbury

Case No: 11/20

[ORAL HEARING]

Arrangement of paragraph in this decision

Our decision is arranged as follows:

	<u>Paragraph(s)</u>
Decision	1
Representation	2
Nature of the appeal	3, 4
The Law	5
The supplementary benefit officer's decision	6
Submissions to the SBAT	7, 8
"Evidence" before the SBAT	9
The SBAT decision	10
Grounds of appeal to the Commissioner	11
Submissions on the appeal	12, 13, 14
 Construction of the statutory provisions:	
Introductory	15
Person in full-time work: the basic principle: no supplementary benefit	16
Termination of full-time work: deemed continuance while earnings "fall to be taken into account"	17
Earnings that "fall to be taken into account"	18-23

Was the SBAT decision erroneous in law?	24
Is it expedient to give the decision the SBAT should have given?	25
Directions to the fresh SBAT	26
Dissenting judgment of Mr Rice	27-41

Decision of Chief Commissioner and Commissioner Hallett

1. Our decision (Mr Rice dissenting) is that the decision of the supplementary benefit appeal tribunal ("the SBAT") dated 18 January 1983 is erroneous in point of law. We set it aside and refer the case to another tribunal for determination in accordance with our directions.

Representation

2. We held an oral hearing of this appeal by the claimant. The claimant was represented by Mr Richard Drabble of Counsel, instructed by the Child Poverty Action Group. The supplementary benefit officer was represented by Mr D James of the Solicitor's Office, Department of Health and Social Security. We are grateful to them both for their submissions.

Nature of the appeal

3. This appeal concerns the treatment of the final payments from an employer where a claimant for supplementary benefit has lost his employment. It raises the question of the correctness of three unreported decisions of the Commissioner, the references to which on Commissioner's file are CSB/184/1982, CSB/532/1982 and CSB/1008/1982. The Chief Commissioner has directed that the appeal, which involves a point of law of exceptional difficulty, should be heard by the present Tribunal of Commissioners.

4. The general principle is that when an employed person stops work he is excluded from benefit for a period equal to the period covered by his last earnings: see regulation 9(1)(b) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [SI 1981 No.1526], which we shall call "the Conditions of Entitlement Regulations". Holiday pay, bonuses and commission and payments in lieu of notice or remuneration are taken into account as well as normal wages when working out the period of exclusion. The question at issue is whether payments in satisfaction of different legal obligations (in the present case, wages for past weeks, holiday pay and a payment in lieu of notice) when all are made on the same date, should be treated as concurrent or consecutive, when calculating the period of exclusion. The appeal also raises the question as to the treatment of wages, paid on different dates, in the calculation of this period.

The law

5. (1) The relevant law is set out in the Supplementary Benefits Act 1976 as amended, the Conditions of Entitlement Regulations (referred to in paragraph 4) and the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No.1527], which we shall call "the Resources Regulations".

(2) Section 6(1) of the Supplementary Benefits Act 1976 as amended provides as follows -

"A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this sub-section as so engaged."

(3) The relevant provision is made in regulation 9 of the Conditions of Entitlement Regulations. Regulation 9(1) reads as follows -

"(1) For the purposes of section 6(1).....
a claimant shall be treated as engaged in remunerative full-time work only where:-

(a) subject to paragraph (2), he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than -

(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 per cent or less of what he would, but for that disablement, be reasonably expected to earn, 35 hours a week,

(ii) in any other case, 30 hours a week,

or he is absent from such work without 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 a person affected by a trade dispute, and

(ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with Part III of the Resources Regulations (calculation of income resources) which, by virtue of regulation 9(2) of those regulations as modified by paragraph (3) of this regulation, 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 a person affected by a trade dispute;

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)

"(2) [Not relevant to this appeal]

(3) For the purposes of paragraph (1)(b), regulation 9(2) of the Resources Regulations shall be modified to the extent that where the claimant receives -

(a) by way of earnings to which paragraph (1)(b) applies a payment of bonus or commission in respect of a period different from that in respect of which the other earnings are paid, that payment shall be treated as earnings in addition to the other earnings for a period estimated by reference to a five-day week on the basis of periodical earnings normally paid to him;

(aa) a payment of bonus or commission by way of earnings to which paragraph (1)(b) applies, in respect of the same period as other earnings which are paid on a different day, that payment of bonus or commission shall be treated as earnings for the same period as those other earnings [(aa) was inserted by SI 1983/1000 with effect from 15.8.83 and is reproduced because it is referred to in paragraph 22 below]

(b)

(4) The relevant regulations in Part III of the Resources Regulations are regulations 9, 10 and 11. Since the Commissioner in decision CSB/184/1983, which is referred to in paragraph 3 above, considered the opening words of regulation 3(2) from Part I to be of crucial importance, these are also set out below:

"Calculation of resources

3. - (1)

(2) For the purposes of these regulations resources shall consist of capital resources and income resources, and in particular -

(a) any grant or gratuity paid under the Social Security Act shall be treated as a capital resource

.....

"PART III
INCOME RESOURCES

"Calculation of income resources

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 partner of his, the earnings of any dependant being disregarded, calculated in accordance with regulation 10;
 - (b) the whole of any other income of the assessment unit, calculated in accordance with regulations 11, 12 and 13.
- (2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments shall be attributable as follows:-
- (a) subject to the following sub-paragraphs, a payment of income shall be taken into account -
 - (i) where it is payable in respect of a period, for a period equal to the length of that period, and
 - (ii) in any other case, for the period to which it is fairly attributable;
 - (b) a payment of income shall be treated as paid on -
 - (i) in the case of a payment 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,
 - (ii) in any other case, 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 pension or allowance is payable in the particular case, it would be practicable to take it into account;
 - (c) where a payment of income is payable in respect of a period which exceeds one week, it shall be attributable at a weekly rate, calculated in the case of a monthly payment in accordance with sub-paragraph (e), beginning with the appropriate date ascertained in accordance with sub-paragraph (b);
 - (d)
 - (e) a monthly payment shall be treated as a payment -
 - (i) in respect of a calendar month,
 - (ii) at a weekly rate determined by multiplying the payment by 12 and dividing the result by 52."

"Calculation of earnings

10. - (1) Subject to the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment and shall include -
- (a) any remuneration in kind;
 - (b) any bonus or commission;
 - (c)
 - (d) any payment in lieu of notice or remuneration;
 - (e) any holiday pay other than any received more than 4 weeks after termination of employment;
 - (f)
 - (g)
 - (h)"
-"

"Calculation of other income

11. - (1) For the purpose of the calculation of the income resources of the claimant, all income other than that to which regulation 10 applies shall be taken into account and calculated on a weekly basis in accordance with the following paragraphs and regulation 9(2).
- (2) These shall be treated as income and taken into account in full -
- (a) except in so far as the following paragraphs provide otherwise, any benefit under the Social Security Act
-"

The supplementary benefit officer's decision

6. The claimant ceased full-time remunerative employment on 12 November 1982 and claimed supplementary benefit on 15 November 1982. By a decision issued on 1 December 1982 a supplementary benefit officer decided that the claimant was not entitled to supplementary benefit until 2 February 1983.

Submissions to the SBAT

7. The claimant appealed against this decision on 17 December 1982. In a letter dated 14 December 1982, his grounds of appeal are set out:

"You go on to state that 'your wages cover your requirements to 02.02.83'. I query that remarkable statement. In my previous employment I was paid monthly in arrears. On 12th November I was paid £608.17 which represented my salary for November up to and including 12th November plus one day's holiday pay still owed to me. I was paid a further cheque for £2,330.77 being seven weeks' salary up to the end of 1982!!! This was paid to me in lieu of notice. By no stretch of the imagination can it be construed that I have been paid to 02.02.83".

8. In his written submission to the SBAT on form LT205, the benefit officer stated that the facts before him were that the claimant was a married man with two dependent children aged 5 and 3 years. He was employed from 14 June 1982 to 12 November 1982. On 12 November 1982 he ceased full-time employment, receiving 2 weeks' final earnings, 1 day's holiday pay and 7 weeks' salary in lieu of notice amounting in total to £2,938.94. He had received his previous month's salary on 30.10.82 and would normally have received his next salary on 30.11.82. He claimed supplementary benefit on 15.11.82 and declared capital amounting to £1,668.61. His wife was in part-time employment. The claimant had stated that he would be without resources at the end of December. The benefit officer's reasons for his decision were that he had decided that the claimant should be treated as in remunerative full-time employment until 2 February 1983, when the claimant's final earnings should be deemed to be exhausted.

"Evidence" before the SBAT

9. The chairman's "note of evidence" before the SBAT is in these terms;

"The Appellant's letter of 14/6/82 to DHSS was seen by the Tribunal. This requested the necessary form to claim benefit until his first salary was paid.

The letter was marked A7 sent 29/6/82. This form was not received by the Appellant, who received benefit for w/c 10/6/82 and 17/6/82".

The SBAT decision

10. On 18 January 1983 the SBAT unanimously confirmed the benefit officer's decision. They made the following findings of fact -

"The Appellant received a month's salary on 30/10/82. He ceased employment on 12/11/82, and received two weeks' final earnings, 1 day's holiday pay and seven weeks in lieu of notice. Supplementary benefit was claimed on 15/11/82. The Appellant worked from 14/6/82 to 12/11/82."

The SBAT gave as the reasons for their decision -

"The Tribunal, having fully examined the facts, were satisfied that there was no entitlement to Supplementary Benefit until 2/2/83 by virtue of the final earnings received. Reg 9 and 10 of the Resources Regs. refers and Reg 9 of the Conditions of Entitlement Regs. refers. It was noted that the Appellant apparently did not receive the A7 form on commencing work and so did not follow up his claim then since he was monthly salaried."

Grounds of appeal to the Commissioner

11. The claimant appealed against the SBAT decision on the ground that it was wrong in law because the benefit officer appeared to have simply added up the total number of weeks covered by his earnings and debarred him from benefit for the total number of weeks running consecutively, when in fact 2 weeks' final earnings, 1 day's holiday pay and 7 week's salary in lieu of notice all became payable simultaneously and should run concurrently, not consecutively, so that by his reckoning he was eligible for supplementary benefit from 3 January.

[Note: 3 January is the first Monday (i.e. payday) after the end of the period of 7 weeks and 1 day calculated from either 12 or 13 November 1982].

Submissions on the appeal

12. On behalf of the claimant, Mr Drabble adopted the written submission of the supplementary benefit officer now concerned with the appeal that the SBAT decision was erroneous in law and should be set aside. In failing to record the payable date or dates of the payments made to the claimant and the representative periods to which they should be attributed the SBAT had failed to comply with rule 7(2) of the Appeals Rules which required the SBAT's findings of the material facts to be recorded.

13. In Mr Drabble's submission, although 3 separate sums were paid, one on 30 October 1982 for a month's pay, one by cheque on 12 November 1982 for 2 weeks' pay and one day's holiday pay and another by a different cheque also on 12 November 1982 for 7 weeks' wages in lieu of notice, there were 4 separate payments since the holiday pay stemmed from a different obligation to that relating to the 2 weeks' wages. Regulation 9 of the Resources Regulations operated in the following way. First a "payment of income" must be identified: see the opening words of regulation 9(2)(a). Then the length of period must be identified: see regulation 9(2)(a)(i). The payable date must next be ascertained: see 9(2)(b)(i). Finally the payment must be converted, if for more than a week, to a weekly rate, starting with the payable date: see 9(2)(c). The payable date was the date when the payment in question was due to be paid under the contract or in consequence of a breach of contract. In the case of the one month's wages it was, Mr Drabble submitted, the date of payment namely 30 October 1982. In the case of the other 3 payments it was also the date of payment, namely 12 November 1982. As regards the length of the period, the payment made on 30 October related to a period of 1 month, that of two weeks' wages paid on 12 November related to a period of two weeks and that of one day's holiday pay to a period of 1 day. As regards the 7 weeks' wages in lieu of notice the period to which that related was the contractual period of notice. The "start date" for the payment was correctly analysed in paragraph 19 of Commissioner Monroe's decision the reference to which on Commissioner's file was CSB 1008/82. The payment in lieu of notice was equivalent to damages for breach of contract and was therefore payable from the moment the employee accepted the repudiation of the contract and was therefore entitled to damages.

14. On behalf of the benefit officer, Mr James submitted that the manifest purpose of the Supplementary Benefits Act 1976 and of the regulations was that supplementary benefit should be a benefit of last resort i.e. it was only payable if there were no other resources. That was the reason why income resources were projected forward although paid retrospectively. In the present case one payment was received on 30 October 1982 and on 13 November 1982 an amount was received in respect of 3 different liabilities. All 4 liabilities should be run together to arrive at a total period that takes one up to 2 February 1983, a total of 13 weeks' plus 1 day. Even if this submission was

rejected, the period must still be 9 weeks plus 1 day running from 13 November consecutively so that the whole of the claimant's income was taken account. It was for consideration that the payment in lieu of notice was not in respect of a period at all. Amounts paid on one day or separated by a relatively close interval of time should be treated as a composite payment falling within paragraph (2)(a)(ii) of regulation 9 as a payment not made in respect of a period, and the period to which it was "fairly attributable" should be ascertained, that period being the total of the periods to which the payments relate, treated as running consecutively and not concurrently. There was difficulty in submitting that payments separated by as much as a fortnight could be treated as composite payment. Seven days was the limit of what might be regarded as close together but probably this was not sufficiently close. It might be that the period of time or separation was not relevant and that what should be considered was the context in which it was made. On this view, 30 October 1982 was not relevant as the payment was not made in the context of the dismissal. But all payments made on 13 November were made in that context and should be treated as a composite payment falling within regulation 9(2)(a)(ii).

Construction of the statutory provisions

Introductory

15. The supplementary benefit scheme has, since the parts of the Social Security Act 1980 relating to supplementary benefit and the regulations made thereunder came into force on 24 November 1980, been governed very much more firmly by the law and in particular by the supplementary benefit regulations which lay down claimants' rights and substitute precise provisions for matters which previously fell within the discretion of the Supplementary Benefits Commission, a body which has been abolished. The discretion conferred by the regulations considered below is minimal.

Persons in full-time work: the basic principle: no supplementary benefit

16. Section 6(1) of the Supplementary Benefits Act 1976 (as amended) lays down the basic principle that a person who is engaged in remunerative full-time work is not to be entitled to supplementary benefit and states that regulations may provide as to when a person is to be so treated. Regulation 9(1)(a) of the Conditions of Entitlement Regulations specifies the precise conditions which must apply for a person who is engaged in work to be treated as engaged in full-time remunerative work. A person engaged in work can only be so treated if he satisfies these conditions: see the opening words of the regulation.

Termination of full-time work: deemed continuance while earnings "fall to be taken into account"

17. Under regulation 9(2)(b) of the Conditions of Entitlement Regulations, a person (not being self-employed) who was engaged in remunerative full-time work as provided in regulation 9(1)(a) is to be treated as still so engaged, after the termination of his employment, during the period subsequent to such termination for which his earnings fall to be taken into account by virtue of regulation 9(2) of the Resources Regulations as modified by paragraph (3) of this regulation.

Earnings that "fall to be taken into account"

18. Regulation 9(2) of the Resources Regulations relates to "Earnings and other income": see the opening words of that regulation. But only earnings are relevant for the purpose of treating a person whose employment has been terminated as still in full-time remunerative work: see paragraph 17 above. "Earnings" are, for this and other purposes, defined in regulation 10 of the Resources Regulations. Any earnings (subject to certain exceptions not relevant here) that fall within that regulation must, in our judgment, be treated as income for the purposes of regulation 9 of the Resources Regulations, whether or not they are otherwise to be regarded as capital. Regulation 9(1) states that the whole earnings are income resources and both paragraph (1) and paragraph (2) of regulation 9 treat such earnings as income, for they both refer to earnings and then to "other income". Payments in lieu of notice, holiday pay, bonuses and commission and the particular ex gratia payments specified in regulation 10 accordingly fall within regulation 9 and must be treated (unless they are to be disregarded in accordance with regulation 10) as payments of income whether they are income in other contexts and for other purposes or not. Decision CSB/354/81 is in this respect correct. Decision CSB/184/1982, which is to the effect that any payment which on analysis proved to be a capital resource cannot fall within regulation 9 or 10 of the Resources Regulations is, in our judgment, erroneous and should not be followed in this respect. Mr Drabble's concession, on behalf of the claimant, that payments in lieu of notice and holiday pay were "payments of income" for the purpose of regulation 9 of the Resources Regulations, was accordingly rightly made.

19. Once a payment of earnings falling within regulation 10 has been identified, the period to which those earnings are to be attributed is ascertained in 2 stages, which are respectively set out in sub-paragraphs (a) and (b) of regulation 9(2) of the Resources Regulations. The first stage is to determine the length of the period. The second stage is to identify the starting date for that period. The basic principle in the first stage is that if the earnings were paid (and there can be no payment unless they have been paid) "in respect of a period", then the period to be taken into account must be of equal length: see regulation 9(2)(a)(i). If, however, the earnings were not paid in respect of a period, then the period to which they are fairly attributable must be determined: see regulation 9(2)(a)(ii). It is only when they have not been paid in respect of a period that the discretion to determine what is "fairly attributable" applies at all. It is then, as the second stage, necessary to ascertain the starting date of the period. In the present appeal, it is not in dispute that all the payments in issue were payable before the starting date of the first benefit week pursuant to the claim, that is to say the first Monday after the date of the claim, and in this judgment we confine our attention to this type of case. The starting date for the period, in such a case, is the date on which the payment is "payable": see regulation 9(2)(b)(i) of the Resources Regulations. "Payable" is an ordinary word in the English language and, for the reasons given in Cozens v Brutus [1973] A.C.854 at page 861 it is not desirable to define it. It clearly does not simply mean the date on which the payment is received, since the word "payable" was substituted for "received" in the regulations. It may, and often will, be the same date. But in order to discover when a payment was in fact payable, which may in some cases be before or after the date of receipt, the first step must be to look at the claimant's contract

with his employer or, if there is no written contract, his terms of employment, in order to see when the payment ought to have been made. If the contract has been repudiated by the employer, it may then be necessary to look at the circumstances of the repudiation and to determine the date on which such repudiation was accepted by the claimant.

20. Wherever earnings falling within regulation 10 are paid in respect of a period, regulation 9(1)(a)(i) of the Resources Regulations must be applied to that payment. If a single cheque comprises payments in respect of two distinct periods, whether or not those periods overlap and even if they coincide, regulation 9 should be applied to each payment separately. This is the clear and obvious meaning of the regulation. Applied thus, there is no difficulty at all in dealing with individual cases. To take the present case, four sums of money were paid to the claimant in respect of four distinct periods. For clarity of the example, it will be assumed that each payment was paid on the payable date. First, a month's wages were paid on 30 October 1982, being wages in arrear. As regards these wages, the relevant period is one calendar month (see regulation 9(2)(e) of the Resources Regulations) the start date is 30 October 1982 and the relevant period is 30 October 1982 to 29 November 1982. The weekly rate is determined in the way set out in regulation 9(2)(e)(ii). Secondly, two weeks' wages were paid on 12 November 1982. The period here is two weeks and the start date (again assuming that the date of payment and the payable date are, in this particular case, the same) is 12 November 1982 (not 13 November 1982, as suggested by Mr James): see regulation 9(2)(b)(i). Thirdly, one day's holiday pay was paid. The period here is one day and the start date is the date of payment (on the same assumption as to the payable date). Fourthly, seven weeks' wages in lieu of notice were paid on 12 November 1982. Here, it is necessary to determine when the claimant's contract of employment was repudiated, applying principles set out in paragraph 19 of Commissioner Monroe's decision CSB/1008/1982 (unreported) with which in this respect we are all in agreement. Then it is necessary to determine the period of notice to which the claimant was entitled under his terms of employment or, if that period is longer, by statute. It is that period, be it more or less than 7 weeks, in respect of which the payment must have been made. We do not accept Mr James's submission that a payment in lieu of notice can be made in respect of no period.

21. If the position in the present case is that the claimant was entitled to 7 weeks' notice of termination of his employment, then that period of 7 weeks, which starts (on the assumption already made) on 12 November 1982 lasts up to 31 December 1982. All the other periods overlap with it. But since it is the longest period and commences before the date of claim (15 November 1982) it is this period which fixes the period of deemed continuance in employment. If, on the other hand, the claimant had only been entitled to, say, 10 days' notice, but was paid 7 weeks' wages in lieu of that notice, the period would be only 10 days' long, starting on 12 November 1982. On that basis, the longest period would be that for which wages were paid on 30 October 1982 and (assuming that was the payable date) the claimant would be deemed to remain in full-time employment until 29 November 1982. Decisions CSB/184/1982, CSB/532/1982 and CSB/1008/1982, all of which add the separate overlapping periods relating to different payments together so as to form one continuous period without overlapping are, in our judgment, wrongly decided and should not be followed. All of them ignore the mandatory and express provisions of regulation 9(2)(b)(i) of the Resources Regulations that the date of commencement of a payment shall be treated as the date on which that payment was payable.

22. We, for our part, can find no warrant at all, anywhere in the regulations, for the suggestion that any of the above mentioned sums of money, all of which were paid in respect of distinct periods should, in defiance of the clear words of regulation 9(2) of the Resources Regulations, be treated as not having been paid in respect of a period at all. There is nothing in the regulations to support the suggestion that the intention was that such payments should be treated as consecutive. The only provisions expressly relating to overlapping periods are contained in regulation 9(3) of the Conditions of Entitlement Regulations and here, both paragraph (a) which was in force at the date of the present claim and paragraph (aa) which was inserted later, clearly envisage that earnings periods can and do, as regards bonuses and commissions, in any event, overlap. Paragraph (aa) was evidently introduced to ensure that such overlap should be complete and coincident, by prescribing an identical starting date in cases where bonus and commissions were payable on different days but for the same period as other earnings by providing that they should be treated as payable on the same day.

23. A principal mischief at which the 1980 legislation was aimed is well known to be that, in the absence of precise legal rules, the abundance of discretionary payments resulted in lack of consistency in a scheme originally designed for a comparatively small number of claimants, but which was by 1978 serving over 3,000,000 claimants and paying benefits to some 5,000,000 people including dependants: see, for example, Social Assistance (DHSS 1978), Ogus and Barendt, The Law of Social Security, 2nd Edition at pages 453-4 and The Law of Supplementary Benefits, by M. S. Rowel and A. M. Wilton at pages 9-11. It is accordingly particularly desirable that, in construing the statutory provisions introduced pursuant to the 1980 reforms, claimants should be entitled to rely on the express wording of the regulations and that the statutory authorities should not do violence to the words used unless the result is wholly unreasonable and defeats the obvious intention of the legislature. We can find no obvious intention that all payments of earnings should be treated as consecutive, although made in respect of overlapping periods, which would justify doing violence to the words of the regulations. Accordingly, applying the general principle of construction set out by Lord Reid in Luke v Inland Revenue Commissioners [1973] A.C.767 at page 577, the words of the regulation should prevail. In Lumsden v Inland Revenue Commissioners [1914] A.C.877, where at page 892, Viscount Haldane, the Lord Chancellor said:

"it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation".

These words are, in our view, equally applicable to the construction of statutory regulations. It may perhaps be conjectured that Parliament might have provided for the payments under consideration in this decision to be consecutive. But this is the purest speculation and is quite insufficient reason for departing from the literal interpretation of the regulations.

Was the SBAT decision erroneous in law?

24. The SBAT decision was clearly erroneous in point of law since they did not record the payable dates or dates of the payments made to the claimant or the period or periods to which they should be attributed, which are material facts, and it is impossible from reading their decision to ascertain by what process of reasoning they arrived at their conclusion. There are no findings at all as to the terms of the claimant's employment or as to what the period of notice was to which he was contractually entitled on termination of that employment. Indeed, the nature of the claimant's employment and its terms remain in total obscurity. Rule 7(2)(b) of the Appeals Rules, which requires the record of the SBAT decision to state the material facts and to give the reasons for their decision has not been complied with.

Is it expedient to give the decision the SBAT should have given?

25. It is neither expedient nor possible for us to give the decision that the SBAT should have given, in the absence of the necessary findings of fact. Accordingly, the case must go back to another SBAT, which in accordance with the usual practice, should be entirely differently constituted, to find such facts and to give a decision in accordance with our directions for determination.

Directions to the fresh SBAT

26. The SBAT to whom the case is now referred should:

- (1) hear evidence from the claimant, if he wishes to give evidence. The chairman's note of evidence should record the names of those persons, if any, who give evidence and what that evidence is. The record of the tribunal decision should indicate whether that evidence is accepted or rejected.
- (2) enquire as to the claimant's terms of employment. If the contract of employment is available, it should be examined.
- (3) record the nature of the claimant's employment and its terms including in particular the period of notice of termination of employment to which he was entitled.
- (4) record the dates on which the various payments discussed in this decision were payable, in terms of regulation 9(2)(b) of the Resources Regulations.
- (5) record the actual dates of payment, the amounts and the method of payment of all the earnings in issue.
- (6) determine the period for which the claimant should be treated as in full-time employment in accordance with the principles set out in the majority decision of this Tribunal of Commissioners.

Decision of Commissioner Rice

27. I regret that I differ from the view taken by my fellow Commissioners. I agree that the tribunal erred in point of law through failure to comply with rule 7(2)(b) of the Appeals Rules, but unlike them I am of the opinion that the payment made on 12 November 1982 of two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice should be attributable to the inclusive period from 12 November 1982 to 14 January 1983. If the matter lay solely with me, I would consider it expedient that I give the decision which the tribunal should have given, all the relevant facts having been determined, and my decision would be that the claimant is not entitled to supplementary benefit for any period prior to 15 January 1983.

28. On 12 November 1982 the claimant, whose employment was terminated with effect from that date, received a payment comprising 2 weeks' final earnings, one day's holiday pay and 7 weeks' salary in lieu of notice totalling in all £2,938.94. On 30 October 1982 he had also received one month's salary in respect of the previous month, and had he not been dismissed, he would have expected to receive a further month's salary on 30 November 1982. On 15 November 1982 he claimed supplementary benefit, but the benefit officer disallowed it on the ground that the claimant should be treated as in remunerative full-time employment until 2 February 1983. On appeal the Tribunal upheld the benefit officer.

29. The relevant statutory provisions are set out in paragraph 5 of the majority judgment and there is no merit in my repeating them here. The question at issue is the date up to which, by reason of the claimant's earnings, he must in the light of the aforesaid statutory provisions be treated as having been engaged in remunerative full-time work and consequently by virtue of section 6(1) of the Supplementary Benefits Act 1976 ineligible for benefit. The two relevant payments are those made on 30 October and 12th November 1982 respectively. The tribunal failed to make appropriate findings of fact and to give adequate reasons for their decision, on the basis of which their confirmation of the benefit officer's decision could be justified, and manifestly they were in breach of rule 7(2)(b) of the Appeals Rules. It follows that their decision must necessarily be set aside. However, for the reasons hereinafter appearing, if the matter were solely mine, I would substitute my own decision for that of the tribunal and disentitle the claimant to benefit for any period prior to 15 January 1983.

30. Before construing the relevant provisions it is important to bear in mind what is manifestly the underlying purpose of the supplementary benefit legislation. Supplementary benefit is the benefit of last resort. Its purpose is to safeguard everyone from falling below a standard of living accepted by society at large as being the minimum subsistence level, and it is paid for out of public funds without any contribution on the part of the beneficiaries. Not surprisingly, safeguards have been built into the system, so as to ensure that a claimant does not need to have resort to supplementary benefit if he already has adequate income or capital resources of his own. Accordingly, if on ceasing to be in full-time employment a claimant receives back-pay, albeit such back-pay indisputably relates to work which he has done in the past pursuant to his contract of service, nevertheless for the purpose of supplementary benefit it will be treated as an income resource available to him for a period in the future. The philosophy behind the legislation is that, if a claimant has resources (regardless of the period during which they were earned), which he can for a period in the future employ to meet his living expenses, he will to this extent be independent of any need for supplementary benefit. Public funds are not to be distributed where they are not properly required.

31. Now, where the policy of the legislation is so self-evident, I consider that I should be slow to interpret any of the relevant provisions giving effect to the scheme as conferring on a claimant an entitlement of which by reason of his income or capital resources he does not stand in need. Of course, if the language of any part of the relevant legislation goes manifestly counter to the underlying philosophy of the supplementary benefit scheme, then effect must be given to such language, regardless of the consequences. However, to bring this result about the language must, in my judgment, be clear and unequivocal.

32. The tribunal found as a fact, and I do not think it has ever been in dispute, that on 12 November 1982 the claimant received two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice. It would appear that he received two cheques on that day, one for £608.17 representing the first two items, and a further cheque for £2,330.77 representing a payment of seven weeks' salary in lieu of notice. Although he received two cheques on the same day, in my judgment this is wholly immaterial. It would not have mattered if the cheques had been paid on different days or, if there had been three cheques, each representing a different item, or, for that matter, any number of cheques paid on any number of days. The crucial point is that the claimant received what can conveniently be called, and often is called, "severance pay". He was dismissed from his employment, and in accordance with normal practice, he received a sum of money in satisfaction of various entitlements.

33. Severance pay normally includes a payment for arrears of salary up to the date of dismissal, any holiday entitlement, a payment in lieu of notice if the circumstances so demand, and frequently redundancy payment. The mechanics of how this payment is dealt with varies from case to case. Sometimes there will be a separate cheque for each entitlement, which may or may not be paid on the same day, and sometimes there will be one single payment covering all the relevant items. It is a matter of accountancy convenience, varying from case to case. However, the crucial point, in my judgment, is whether the relevant payment or payments arise out of one event, namely the dismissal of the person concerned. If the nexus which serves to connect the various entitlements is the discharge of the person concerned from his employment, the latter will in effect receive a composite payment, i.e. a payment in discharge of the various heads of claim to which he is entitled, and it is immaterial whether such composite payment is received as a single payment or a series of payments or whether it is received on a single date or a series of dates. In the present case I consider that the claimant received such a composite payment.

34. Regulation 9 of the Resources Regulations provides that there shall be taken into account as the claimant's income resources, inter alia, the whole of his earnings, and in regulation 10(1) his earnings are defined as including any remuneration in kind, any payment in lieu of notice or remuneration, and any holiday pay. Accordingly, the two weeks' back pay, the one day's holiday pay and the seven weeks' pay in lieu of notice are all relevant resources which have to be taken into account. The crucial issue in this case is the period to which these three heads of entitlement are to be attributed, and for this purpose the relevant provision is regulation 9(2) of the Resources Regulations.

35. Of course, in a very simple case where, for example, there is only one head of entitlement, e.g. two weeks' back pay, there is little difficulty in determining the forward period to which this particular payment shall relate. It will be two weeks. The position is governed by regulation 9(2)(a)(i). The back-pay was payable in respect of a period of two weeks and for the purposes of supplementary benefit it will be attributed forwards for a period of two weeks. In other words, the claimant will be regarded as having income resources of that amount for two weeks. However, often - doubtless in most cases nowadays - the position is not as simple as in the illustration just given. The severance payment will be a composite payment, and to deal with the complication to which this gives rise paragraph (2)(a)(ii) of regulation 9 has been specifically enacted. It provides that the relevant payment shall be taken into account "for the period to which it is fairly attributable".

36. In the present case the total severance payment received by the claimant produced an income sufficient to cover him in all for nine weeks and one day. In my judgment "fairness" dictates that it should be attributable to a period of nine weeks and one day. Moreover this period should start from the date when the relevant payment is to be treated as having been paid. And this issue is determined by regulation 9(2)(b).

37. Unfortunately, it is not altogether easy to construe paragraph (2)(b). The relevant date is the date on which the income "is payable". This is not the same thing as "paid". The question was considered in paragraphs 17 to 19 of the unreported decision on Commissioner's file CSB/1008/1982, with which I respectfully agree. Fortunately, in the present case no real problem arises, in that the employer clearly repudiated the contract on 12 November 1982, whilst the claimant both accepted such repudiation and took in satisfaction of all claims arising out of this contract the sum paid on 12 November 1982. The sum was both payable and paid on that day. It follows that the period to which the relevant sum shall be fairly attributable expired on 14 January 1983, and the claimant became entitled to benefit from 15 January 1983.

38. It remains for me to consider the earlier payment made on 30 October 1982. Manifestly, this was payable in respect of the month of October and therefore, pursuant to regulation 9(2)(a)(i), must be taken into account for a period equal thereto, namely for the month of November. As the claimant was not dismissed until 12 November, it could be said that in addition to what he received on 12 November, the claimant also obtained a further sum which covered him for the period from 13 November to the end of the month. Is this to be added to the two payments made on 12 November 1982, so as to increase the period of disentitlement beyond the 14 January 1983? In my judgment, the payment received on 30 October is unrelated to the claimant's dismissal on 12 November. There is no evidence to suggest that at the time the claimant was paid on 30 October the dismissal was ever in contemplation. The payment was a routine one at the end of the month. There is no nexus between this payment and the claimant's discharge from employment, and accordingly, in my judgment, no part of that payment can properly be included in the composite payment made on 12 November 1982.

39. I find support for the approach taken by me in the two unreported decisions on Commissioner's file CSB/532/1982 and CSB/1008/1982 respectively. These decisions were arrived at by different Commissioners, and although no detailed reasons were given for their conclusions, they support my interpretation of the relevant regulations.

10. In the present appeal my fellow Commissioners take the view that the payments received on 12 November 1982 should be treated as applying to a concurrent, and not a consecutive period, but I am afraid I find their arguments unconvincing. I think the matter can be tested this way. Suppose there are two claimants, A and B, of whom B is in a position similar to that of the claimant in the present appeal. A was dismissed on full notice at a time when he was earning £100 per week payable fortnightly in arrear, and he received full wages of £200 (less deductions) on the last day of his employment, which incidentally was also the day on which the remuneration was payable. It is, as I understand it, the view of the majority (which I share), that the period, for which he would be treated as being in full-time work under the relevant regulations after the termination of his employment, is the period of two weeks from the date of payment, and that he could not, even if the employers made separate payments in respect of the two weeks, successfully contend that the period for which he is to be treated as being in full-time work should be limited to two concurrent periods of one week each. Let us suppose, however, in the hypothetical case that B on the other hand was dismissed without notice when he was earning £100 a week payable weekly in arrear. In these circumstances he will be paid on the last day of his employment (the day on which the remuneration was payable) final wages of £100 (less deductions) and £100 in lieu of the week's notice to which he was entitled, this latter payment being, of course, for present purposes regarded as remuneration. In this case, the majority take the view that the claimant is to be treated as engaged in full-time employment for two concurrent periods of one week each. It has not been explained to me what it is in the relevant regulations that justifies this distinction, which, of course, as explained above, frustrates the manifest purpose of the relevant provisions. In the absence of such an explanation, why should not A also be entitled to limit the period for which he was to be treated as engaged in full-time employment to two periods of one week each? And if so, why not, on this view to 14 (or 10) periods of a day each?

11. Accordingly, if the matter rested solely with me, my decision would be as set out in paragraph 27.

Signed I O Griffiths
Chief Commissioner

Signed V G H Hallett
Commissioner

Signed D G Rice
Commissioner

Date: 27 February 1984

JA.

40. In the present appeal my fellow Commissioners take the view that the payments received on 12 November 1982 should be treated as applying to a concurrent, and not a consecutive period, but I am afraid I find their arguments unconvincing. I think the matter can be tested this way. Suppose there are two claimants, A and B, of whom B is in a position similar to that of the claimant in the present appeal. A was dismissed on full notice at a time when he was earning £100 per week payable fortnightly in arrear, and he received full wages of £200 (less deductions) on the last day of his employment, which incidentally was also the day on which the remuneration was payable. It is, as I understand it, the view of the majority (which I share), that the period, for which he would be treated as being in full-time work under the relevant regulations after the termination of his employment, is the period of two weeks from the date of payment, and that he could not, even if the employers made separate payments in respect of the two weeks, successfully contend that the period for which he is to be treated as being in full-time work should be limited to two concurrent periods of one week each. Let us suppose, however, in the hypothetical case that B on the other hand was dismissed without notice when he was earning £100 a week payable weekly in arrear. In these circumstances he will be paid on the last day of his employment (the day on which the remuneration was payable) final wages of £100 (less deductions) and £100 in lieu of the week's notice to which he was entitled, this latter payment being, of course, for present purposes regarded as remuneration. In this case, the majority take the view that the claimant is to be treated as engaged in full-time employment for two concurrent periods of one week each. It has not been explained to me what it is in the relevant regulations that justifies this distinction, which, of course, as explained above, frustrates the manifest purpose of the relevant provisions. In the absence of such an explanation, why should not A also be entitled to limit the period for which he was to be treated as engaged in full-time employment to two periods of one week each? And if so, why not, on this view to 14 (or 10) periods of a day each?

41. Accordingly, if the matter rested solely with me, my decision would be as set out in paragraph 27.

Signed I O Griffiths
Chief Commissioner

Signed V G H Hallett
Commissioner

Signed D G Rice
Commissioner

Date: 27 February 1984

Commissioner's File: CSB/326/1983
CSBO File: 328/83
Region: London North

Decision of Chief Commissioner and Commissioner Hallett

1. Our decision (Mr Rice dissenting) is that the decision of the supplementary benefit appeal tribunal ("the SBAT") dated 18 January 1983 is erroneous in point of law. We set it aside and refer the case to another tribunal for determination in accordance with our directions.

Representation

2. We held an oral hearing of this appeal by the claimant. The claimant was represented by Mr Richard Drabble of Counsel, instructed by the Child Poverty Action Group. The supplementary benefit officer was represented by Mr D James of the Solicitor's Office, Department of Health and Social Security. We are grateful to them both for their submissions.

Nature of the appeal

3. This appeal concerns the treatment of the final payments from an employer where a claimant for supplementary benefit has lost his employment. It raises the question of the correctness of three unreported decisions of the Commissioner, the references to which on Commissioner's file are CSB/184/1982, CSB/532/1982 and CSB/1008/1982. The Chief Commissioner has directed that the appeal, which involves a point of law of exceptional difficulty, should be heard by the present Tribunal of Commissioners.

4. The general principle is that when an employed person stops work he is excluded from benefit for a period equal to the period covered by his last earnings: see regulation 9(1)(b) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [SI 1981 No.1526], which we shall call "the Conditions of Entitlement Regulations". Holiday pay, bonuses and commission and payments in lieu of notice or remuneration are taken into account as well as normal wages when working out the period of exclusion. The question at issue is whether payments in satisfaction of different legal obligations (in the present case, wages for past weeks, holiday pay and a payment in lieu of notice) when all are made on the same date, should be treated as concurrent or consecutive, when calculating the period of exclusion. The appeal also raises the question as to the treatment of wages, paid on different dates, in calculation of this period.

The law

5. (1) The relevant law is set out in the Supplementary Benefits Act 1976 as amended, the Conditions of Entitlement Regulations (referred to in paragraph 4) and the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No.1527], which we shall call "the Resources Regulations".

(2) Section 6(1) of the Supplementary Benefits Act 1976 as amended provides as follows -

"A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this sub-section as so engaged."

3) The relevant provision is made in regulation 9 of the Conditions of Entitlement Regulations. Regulation 9(1) reads as follows:-

"(1) For the purposes of section 6(1)..... a claimant shall be treated as engaged in remunerative full-time work only where:-

(a) subject to paragraph (2), he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than -

(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 per cent or less of what he would, but for that disablement, be reasonably expected to earn, 35 hours a week,

(ii) in any other case, 30 hours a week,

or he is absent from such work without 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 a person affected by a trade dispute, and

(ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with Part III of the Resources Regulations (calculation of income resources) which, by virtue of regulation 9(2) of those regulations as modified by paragraph (3) of this regulation, 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 a person affected by a trade dispute;

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)

"(2) [Not relevant to this appeal]

(3) For the purposes of paragraph (1)(b), regulation 9(2) of the Resources Regulations shall be modified to the extent that where the claimant receives -

(a) by way of earnings to which paragraph (1)(b) applies a payment of bonus or commission in respect of a period different from that in respect of which the other earnings are paid, that payment shall be treated as earnings in addition to the other earnings for a period estimated by reference to a five-day week on the basis of periodical earnings normally paid to him;

(aa) a payment of bonus or commission by way of earnings to which paragraph (1)(b) applies, in respect of the same period as other earnings which are paid on a different day, that payment of bonus or commission shall be treated as earnings for the same period as those other earnings [(aa) was inserted by SI 1983/1000 with effect from 15.8.83 and is reproduced because it is referred to in paragraph 22 below]

(b)

(4) The relevant regulations in Part III of the Resources Regulations are regulations 9, 10 and 11. Since the Commissioner in decision CSB/184/1983, which is referred to in paragraph 3 above, considered the opening words of regulation 3(2) from Part I to be of crucial importance, these are also set out below:

"Calculation of resources

3. - (1)

(2) For the purposes of these regulations resources shall consist of capital resources and income resources, and in particular -

(a) any grant or gratuity paid under the Social Security Act shall be treated as a capital resource

.....

"PART III
INCOME RESOURCES

"Calculation of income resources

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 partner of his, the earnings of any dependant being disregarded, calculated in accordance with regulation 10;
 - (b) the whole of any other income of the assessment unit, calculated in accordance with regulations 11, 12 and 13.
- (2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments shall be attributable as follows:-
- (a) subject to the following sub-paragraphs, a payment of income shall be taken into account -
 - (i) where it is payable in respect of a period, for a period equal to the length of that period, and
 - (ii) in any other case, for the period to which it is fairly attributable;
 - (b) a payment of income shall be treated as paid on -
 - (i) in the case of a payment 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,
 - (ii) in any other case, 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 pension or allowance is payable in the particular case, it would be practicable to take it into account;
 - (c) where a payment of income is payable in respect of a period which exceeds one week, it shall be attributable at a weekly rate, calculated in the case of a monthly payment in accordance with sub-paragraph (e), beginning with the appropriate date ascertained in accordance with sub-paragraph (b);
 - (d)
 - (e) a monthly payment shall be treated as a payment -
 - (i) in respect of a calendar month,
 - (ii) at a weekly rate determined by multiplying the payment by 12 and dividing the result by 52."

"Calculation of earnings"

10. - (1) Subject to the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment and shall include -

- (a) any remuneration in kind;
- (b) any bonus or commission;
- (c)
- (d) any payment in lieu of notice or remuneration;
- (e) any holiday pay other than any received more than 4 weeks after termination of employment;
- (f)
- (g)
- (h)

....."
"Calculation of other income"

11. - (1) For the purpose of the calculation of the income resources of the claimant, all income other than that to which regulation 10 applies shall be taken into account and calculated on a weekly basis in accordance with the following paragraphs and regulation 9(2).

(2) These shall be treated as income and taken into account in full -

- (a) except in so far as the following paragraphs provide otherwise, any benefit under the Social Security Act

....."
supplementary benefit officer's decision

The claimant ceased full-time remunerative employment on 12 November and claimed supplementary benefit on 15 November 1982. By a decision dated on 1 December 1982 a supplementary benefit officer decided that the claimant was not entitled to supplementary benefit until 2 February 1983.

objections to the SBAT

The claimant appealed against this decision on 17 December 1982. A letter dated 14 December 1982, his grounds of appeal are set out:

"You go on to state that 'your wages cover your requirements to 02.02.83'. I query that remarkable statement. In my previous employment I was paid monthly in arrears. On 12th November I was paid £608.17 which represented my salary for November up to and including 12th November plus one day's holiday pay still owed to me. I was paid a further cheque for £2,330.77 being seven weeks' salary up to the end of 1982!!! This was paid to me in lieu of notice. By no stretch of the imagination can it be construed that I have been paid to 02.02.83".

8. In his written submission to the SBAT on form LT205, the benefit officer stated that the facts before him were that the claimant was a married man with two dependent children aged 5 and 3 years. He was employed from 14 June 1982 to 12 November 1982. On 12 November 1982 he ceased full-time employment, receiving 2 weeks' final earnings, 1 day's holiday pay and 7 weeks' salary in lieu of notice amounting in total to £2,938.94. He had received his previous month's salary on 30.10.82 and would normally have received his next salary on 30.11.82. He claimed supplementary benefit on 15.11.82 and declared capital amounting to £1,668.61. His wife was in part-time employment. The claimant had stated that he would be without resources at the end of December. The benefit officer's reasons for his decision were that he had decided that the claimant should be treated as in remunerative full-time employment until 2 February 1983, when the claimant's final earnings should be deemed to be exhausted.

"Evidence" before the SBAT

9. The chairman's "note of evidence" before the SBAT is in these terms;

"The Appellant's letter of 14/6/82 to DHSS was seen by the Tribunal. This requested the necessary form to claim benefit until his first salary was paid.

The letter was marked A7 sent 29/6/82. This form was not received by the Appellant, who received benefit for w/c 10/6/82 and 17/6/82".

The SBAT decision

- On 18 January 1983 the SBAT unanimously confirmed the benefit officer's decision. They made the following findings of fact -

"The Appellant received a month's salary on 30/10/82. He ceased employment on 12/11/82, and received two weeks' final earnings, 1 day's holiday pay and seven weeks in lieu of notice. Supplementary benefit was claimed on 15/11/82. The Appellant worked from 14/6/82 to 12/11/82."

- The SBAT gave as the reasons for their decision -

"The Tribunal, having fully examined the facts, were satisfied that there was no entitlement to Supplementary Benefit until 2/2/83 by virtue of the final earnings received. Reg 9 and 10 of the Resources Regs. refers and Reg 9 of the Conditions of Entitlement Regs. refers. It was noted that the Appellant apparently did not receive the A7 form on commencing work and so did not follow up his claim then since he was monthly salaried."

Grounds of appeal to the Commissioner

11. The claimant appealed against the SBAT decision on the ground that it was wrong in law because the benefit officer appeared to have simply added up the total number of weeks covered by his earnings and debarred him from benefit for the total number of weeks running consecutively, when in fact 2 weeks' final earnings, 1 day's holiday pay and 7 week's salary in lieu of notice all became payable simultaneously and should run concurrently, not consecutively, so that by his reckoning he was eligible for supplementary benefit from 3 January.
[Note: 3 January is the first Monday (i.e. payday) after the end of the period of 7 weeks and 1 day calculated from either 12 or 13 November 1982].

Submissions on the appeal

12. On behalf of the claimant, Mr Drabble adopted the written submission of the supplementary benefit officer now concerned with the appeal that the SBAT decision was erroneous in law and should be set aside. In failing to record the payable date or dates of the payments made to the claimant and the representative periods to which they should be attributed the SBAT had failed to comply with rule 7(2) of the Appeals Rules which required the SBAT's findings of the material facts to be recorded.

13. In Mr Drabble's submission, although 3 separate sums were paid, one on 30 October 1982 for a month's pay, one by cheque on 12 November 1982 for 2 weeks' pay and one day's holiday pay and another by a different cheque also on 12 November 1982 for 7 weeks' wages in lieu of notice, there were 4 separate payments since the holiday pay stemmed from a different obligation to that relating to the 2 weeks' wages. Regulation 9 of the Resources Regulations operated in the following way. First a "payment of income" must be identified: see the opening words of regulation 9(2)(a). Then the length of period must be identified: see regulation 9(2)(a)(i). The payable date must next be ascertained: see 9(2)(b)(i). Finally the payment must be converted, if for more than a week, to a weekly rate, starting with the payable date: see 9(2)(c). The payable date was the date when the payment in question was due to be paid under the contract or in consequence of a breach of contract. In the case of the one month's wages it was, Mr Drabble submitted, the date of payment namely 30 October 1982. In the case of the other 3 payments it was also the date of payment, namely 12 November 1982. As regards the length of the period, the payment made on 30 October related to a period of 1 month, that of two weeks' wages paid on 12 November related to a period of two weeks and that of one day's holiday pay to a period of 1 day. As regards the 7 weeks' wages in lieu of notice the period to which that related was the contractual period of notice. The "start date" for the payment was correctly analysed in paragraph 19 of Commissioner Monroe's decision the reference to which on Commissioner's file was CSB 1008/82. The payment in lieu of notice was equivalent to damages for breach of contract and was therefore payable from the moment the employee accepted the repudiation of the contract and was therefore entitled to damages.

14. On behalf of the benefit officer, Mr James submitted that the manifest purpose of the Supplementary Benefits Act 1976 and of the regulations was that supplementary benefit should be a benefit of last resort i.e. it was only payable if there were no other resources. That was the reason why income resources were projected forward although paid retrospectively. In the present case one payment was received on 30 October 1982 and on 13 November 1982 an amount was received in respect of 3 different liabilities. All 4 liabilities should be run together to arrive at a total period that takes one up to 2 February 1983, a total of 13 weeks' plus 1 day. Even if this submission was

rejected, the period must still be 9 weeks plus 1 day running from 13 November consecutively so that the whole of the claimant's income was taken account. It was for consideration that the payment in lieu of notice was not in respect of a period at all. Amounts paid on one day or separated by a relatively close interval of time should be treated as a composite payment falling within paragraph (2)(a)(ii) of regulation 9 as a payment not made in respect of a period, and the period to which it was "fairly attributable" should be ascertained, that period being the total of the periods to which the payments relate, treated as running consecutively and not concurrently. There was difficulty in submitting that payments separated by as much as a fortnight could be treated as composite payment. Seven days was the limit of what might be regarded as close together but probably this was not sufficiently close. It might be that the period of time or separation was not relevant and that what should be considered was the context in which it was made. On this view, 30 October 1982 was not relevant as the payment was not made in the context of the dismissal. But all payments made on 13 November were made in that context and should be treated as a composite payment falling within regulation 9(2)(a)(ii).

Construction of the statutory provisions

Introductory

15. The supplementary benefit scheme has, since the parts of the Social Security Act 1980 relating to supplementary benefit and the regulations made thereunder came into force on 24 November 1980, been governed very much more firmly by the law and in particular by the supplementary benefit regulations which lay down claimants' rights and substitute precise provisions for matters which previously fell within the discretion of the Supplementary Benefits Commission, a body which has been abolished. The discretion conferred by the regulations considered below is minimal.

Persons in full-time work: the basic principle: no supplementary benefit

16. Section 6(1) of the Supplementary Benefits Act 1976 (as amended) lays down the basic principle that a person who is engaged in remunerative full-time work is not to be entitled to supplementary benefit and states that regulations may provide as to when a person is to be so treated. Regulation 9(1)(a) of the Conditions of Entitlement Regulations specifies the precise conditions which must apply for a person who is engaged in work to be treated as engaged in full-time remunerative work. A person engaged in work can only be so treated if he satisfies these conditions: see the opening words of the regulation.

Termination of full-time work: deemed continuance while earnings "fall to be taken into account"

17. Under regulation 9(2)(b) of the Conditions of Entitlement Regulations, a person (not being self-employed) who was engaged in remunerative full-time work as provided in regulation 9(1)(a) is to be treated as still so engaged, after the termination of his employment, during the period subsequent to such termination for which his earnings fall to be taken into account by virtue of regulation 9(2) of the Resources Regulations as modified by paragraph (3) of this regulation.

Earnings that "fall to be taken into account"

18. Regulation 9(2) of the Resources Regulations relates to "Earnings and other income": see the opening words of that regulation. But only earnings are relevant for the purpose of treating a person whose employment has been terminated as still in full-time remunerative work: see paragraph 17 above. "Earnings" are, for this and other purposes, defined in regulation 10 of the Resources Regulations. Any earnings (subject to certain exceptions not relevant here) that fall within that regulation must, in our judgment, be treated as income for the purposes of regulation 9 of the Resources Regulations, whether or not they are otherwise to be regarded as capital. Regulation 9(1) states that the whole earnings are income resources and both paragraph (1) and paragraph (2) of regulation 9 treat such earnings as income, for they both refer to earnings and then to "other income". Payments in lieu of notice, holiday pay, bonuses and commission and the particular ex gratia payments specified in regulation 10 accordingly fall within regulation 9 and must be treated (unless they are to be disregarded in accordance with regulation 10) as payments of income whether they are income in other contexts and for other purposes or not. Decision CSB/354/81 is in this respect correct. Decision CSB/184/1982, which is to the effect that any payment which on analysis proved to be a capital resource cannot fall within regulation 9 or 10 of the Resources Regulations is, in our judgment, erroneous and should not be followed in this respect. Mr Drabble's concession, on behalf of the claimant, that payments in lieu of notice and holiday pay were "payments of income" for the purpose of regulation 9 of the Resources Regulations, was accordingly rightly made.

19. Once a payment of earnings falling within regulation 10 has been identified, the period to which those earnings are to be attributed is ascertained in 2 stages, which are respectively set out in sub-paragraphs (a) and (b) of regulation 9(2) of the Resources Regulations. The first stage is to determine the length of the period. The second stage is to identify the starting date for that period. The basic principle in the first stage is that if the earnings were paid (and there can be no payment unless they have been paid) "in respect of a period", then the period to be taken into account must be of equal length: see regulation 9(2)(a)(i). If, however, the earnings were not paid in respect of a period, then the period to which they are fairly attributable must be determined: see regulation 9(2)(a)(ii). It is only when they have not been paid in respect of a period that the discretion to determine what is "fairly attributable" applies at all. It is then, as the second stage, necessary to ascertain the starting date of the period. In the present appeal, it is not in dispute that all the payments in issue were payable before the starting date of the first benefit week pursuant to the claim, that is to say the first Monday after the date of the claim, and in this judgment we confine our attention to this type of case. The starting date for the period, in such a case, is the date on which the payment is "payable": see regulation 9(2)(b)(i) of the Resources Regulations. "Payable" is an ordinary word in the English language and, for the reasons given in Cozens v Brutus [1973] A.C.854 at page 861 it is not desirable to define it. It clearly does not simply mean the date on which the payment is received, since the word "payable" was substituted for "received" in the regulations. It may, and often will, be the same date. But in order to discover when a payment was in fact payable, which may in some cases be before or after the date of receipt, the first step must be to look at the claimant's contract

with his employer or, if there is no written contract, his terms of employment, in order to see when the payment ought to have been made. If the contract has been repudiated by the employer, it may then be necessary to look at the circumstances of the repudiation and to determine the date on which such repudiation was accepted by the claimant.

20. Wherever earnings falling within regulation 10 are paid in respect of a period, regulation 9(1)(a)(i) of the Resources Regulations must be applied to that payment. If a single cheque comprises payments in respect of two distinct periods, whether or not those periods overlap and even if they coincide, regulation 9 should be applied to each payment separately. This is the clear and obvious meaning of the regulation. Applied thus, there is no difficulty at all in dealing with individual cases. To take the present case, four sums of money were paid to the claimant in respect of four distinct periods. For clarity of the example, it will be assumed that each payment was paid on the payable date. First, a month's wages were paid on 30 October 1982, being wages in arrear. As regards these wages, the relevant period is one calendar month (see regulation 9(2)(e) of the Resources Regulations) the start date is 30 October 1982 and the relevant period is 30 October 1982 to 29 November 1982. The weekly rate is determined in the way set out in regulation 9(2)(e)(ii). Secondly, two weeks' wages were paid on 12 November 1982. The period here is two weeks and the start date (again assuming that the date of payment and the payable date are, in this particular case, the same) is 12 November 1982 (not 13 November 1982, as suggested by Mr James): see regulation 9(2)(b)(i). Thirdly, one day's holiday pay was paid. The period here is one day and the start date is the date of payment (on the same assumption as to the payable date). Fourthly, seven weeks' wages in lieu of notice were paid on 12 November 1982. Here, it is necessary to determine when the claimant's contract of employment was repudiated, applying principles set out in paragraph 19 of Commissioner Monroe's decision CSB/1008/1982 (unreported) with which in this respect we are all in agreement. Then it is necessary to determine the period of notice to which the claimant was entitled under his terms of employment or, if that period is longer, by statute. It is that period, be it more or less than 7 weeks, in respect of which the payment must have been made. We do not accept Mr James's submission that a payment in lieu of notice can be made in respect of no period.

21. If the position in the present case is that the claimant was entitled to 7 weeks' notice of termination of his employment, then that period of 7 weeks, which starts (on the assumption already made) on 12 November 1982 lasts up to 31 December 1982. All the other periods overlap with it. But since it is the longest period and commences before the date of claim (15 November 1982) it is this period which fixes the period of deemed continuance in employment. If, on the other hand, the claimant had only been entitled to, say, 10 days' notice, but was paid 7 weeks' wages in lieu of that notice, the period would be only 10 days' long, starting on 12 November 1982. On that basis, the longest period would be that for which wages were paid on 30 October 1982 and (assuming that was the payable date) the claimant would be deemed to remain in full-time employment until 29 November 1982. Decisions CSB/184/1982, CSB/532/1982 and CSB/1008/1982, all of which add the separate overlapping periods relating to different payments together so as to form one continuous period without overlapping are, in our judgment, wrongly decided and should not be followed. All of them ignore the mandatory and express provisions of regulation 9(2)(b)(i) of the Resources Regulations that the date of commencement of a payment shall be treated as the date on which that payment was payable.

22. We, for our part, can find no warrant at all, anywhere in the regulations, for the suggestion that any of the above mentioned sums of money, all of which were paid in respect of distinct periods should, in defiance of the clear words of regulation 9(2) of the Resources Regulations, be treated as not having been paid in respect of a period at all. There is nothing in the regulations to support the suggestion that the intention was that such payments should be treated as consecutive. The only provisions expressly relating to overlapping periods are contained in regulation 9(3) of the Conditions of Entitlement Regulations and here, both paragraph (a) which was in force at the date of the present claim and paragraph (aa) which was inserted later, clearly envisage that earnings periods can and do, as regards bonuses and commissions, in any event, overlap. Paragraph (aa) was evidently introduced to ensure that such overlap should be complete and coincident, by prescribing an identical starting date in cases where bonus and commissions were payable on different days but for the same period as other earnings by providing that they should be treated as payable on the same day.

23. A principal mischief at which the 1980 legislation was aimed is well known to be that, in the absence of precise legal rules, the abundance of discretionary payments resulted in lack of consistency in a scheme originally designed for a comparatively small number of claimants, but which was by 1978 serving over 3,000,000 claimants and paying benefits to some 5,000,000 people including dependants: see, for example, Social Assistance (DHSS 1978), Ogus and Barendt, *The Law of Social Security*, 2nd Edition at pages 453-4 and *The Law of Supplementary Benefits*, by M. S. Rowel and A. M. Wilton at pages 9-11. It is accordingly particularly desirable that, in construing the statutory provisions introduced pursuant to the 1980 reforms, claimants should be entitled to rely on the express wording of the regulations and that the statutory authorities should not do violence to the words used unless the result is wholly unreasonable and defeats the obvious intention of the legislature. We can find no obvious intention that all payments of earnings should be treated as consecutive, although made in respect of overlapping periods, which would justify doing violence to the words of the regulations. Accordingly, applying the general principle of construction set out by Lord Reid in Luke v Inland Revenue Commissioners [1973] A.C.767 at page 577, the words of the regulation should prevail. In Lumsden v Inland Revenue Commissioners [1914] A.C.877, where at page 892, Viscount Haldane, the Lord Chancellor said:

"it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation".

These words are, in our view, equally applicable to the construction of statutory regulations. It may perhaps be conjectured that Parliament might have provided for the payments under consideration in this decision to be consecutive. But this is the purest speculation and is quite insufficient reason for departing from the literal interpretation of the regulations.

Was the SBAT decision erroneous in law?

24. The SBAT decision was clearly erroneous in point of law since they did not record the payable dates or dates of the payments made to the claimant or the period or periods to which they should be attributed, which are material facts, and it is impossible from reading their decision to ascertain by what process of reasoning they arrived at their conclusion. There are no findings at all as to the terms of the claimant's employment or as to what the period of notice was to which he was contractually entitled on termination of that employment. Indeed, the nature of the claimant's employment and its terms remain in total obscurity. Rule 7(2)(b) of the Appeals Rules, which requires the record of the SBAT decision to state the material facts and to give the reasons for their decision has not been complied with.

Is it expedient to give the decision the SBAT should have given?

25. It is neither expedient nor possible for us to give the decision that the SBAT should have given, in the absence of the necessary findings of fact. Accordingly, the case must go back to another SBAT, which in accordance with the usual practice, should be entirely differently constituted, to find such facts and to give a decision in accordance with our directions for determination.

Directions to the fresh SBAT

26. The SBAT to whom the case is now referred should:

- (1) hear evidence from the claimant, if he wishes to give evidence. The chairman's note of evidence should record the names of those persons, if any, who give evidence and what that evidence is. The record of the tribunal decision should indicate whether that evidence is accepted or rejected.
- (2) enquire as to the claimant's terms of employment. If the contract of employment is available, it should be examined.
- (3) record the nature of the claimant's employment and its terms including in particular the period of notice of termination of employment to which he was entitled.
- (4) record the dates on which the various payments discussed in this decision were payable, in terms of regulation 9(2)(b) of the Resources Regulations.
- (5) record the actual dates of payment, the amounts and the method of payment of all the earnings in issue.
- (6) determine the period for which the claimant should be treated as in full-time employment in accordance with the principles set out in the majority decision of this Tribunal of Commissioners.

Decision of Commissioner Rice

27. I regret that I differ from the view taken by my fellow Commissioners. I agree that the tribunal erred in point of law through failure to comply with rule 7(2)(b) of the Appeals Rules, but unlike them I am of the opinion that the payment made on 12 November 1982 of two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice should be attributable to the inclusive period from 12 November 1982 to 14 January 1983. If the matter lay solely with me, I would consider it expedient that I give the decision which the tribunal should have given, all the relevant facts having been determined, and my decision would be that the claimant is not entitled to supplementary benefit for any period prior to 15 January 1983.

28. On 12 November 1982 the claimant, whose employment was terminated with effect from that date, received a payment comprising 2 weeks' final earnings, one day's holiday pay and 7 weeks' salary in lieu of notice totalling in all £2,938.94. On 30 October 1982 he had also received one month's salary in respect of the previous month, and had he not been dismissed, he would have expected to receive a further month's salary on 30 November 1982. On 15 November 1982 he claimed supplementary benefit, but the benefit officer disallowed it on the ground that the claimant should be treated as in remunerative full-time employment until 2 February 1983. On appeal the Tribunal upheld the benefit officer.

29. The relevant statutory provisions are set out in paragraph 5 of the majority judgment and there is no merit in my repeating them here. The question at issue is the date up to which, by reason of the claimant's earnings, he must in the light of the aforesaid statutory provisions be treated as having been engaged in remunerative full-time work and consequently by virtue of section 6(1) of the Supplementary Benefits Act 1976 ineligible for benefit. The two relevant payments are those made on 30 October and 12th November 1982 respectively. The tribunal failed to make appropriate findings of fact and to give adequate reasons for their decision, on the basis of which their confirmation of the benefit officer's decision could be justified, and manifestly they were in breach of rule 7(2)(b) of the Appeals Rules. It follows that their decision must necessarily be set aside. However, for the reasons hereinafter appearing, if the matter were solely mine, I would substitute my own decision for that of the tribunal and disentitle the claimant to benefit for any period prior to 15 January 1983.

30. Before construing the relevant provisions it is important to bear in mind what is manifestly the underlying purpose of the supplementary benefit legislation. Supplementary benefit is the benefit of last resort. Its purpose is to safeguard everyone from falling below a standard of living accepted by society at large as being the minimum subsistence level, and it is paid for out of public funds without any contribution on the part of the beneficiaries. Not surprisingly, safeguards have been built into the system, so as to ensure that a claimant does not need to have resort to supplementary benefit if he already has adequate income or capital resources of his own. Accordingly, if on ceasing to be in full-time employment a claimant receives back-pay, albeit such back-pay indisputably relates to work which he has done in the past pursuant to his contract of service, nevertheless for the purpose of supplementary benefit it will be treated as an income resource available to him for a period in the future. The philosophy behind the legislation is that, if a claimant has resources (regardless of the period during which they were earned), which he can for a period in the future employ to meet his living expenses, he will to this extent be independent of any need for supplementary benefit. Public funds are not to be distributed where they are not properly required.

31. Now, where the policy of the legislation is so self-evident, I consider that I should be slow to interpret any of the relevant provisions giving effect to the scheme as conferring on a claimant an entitlement of which by reason of his income or capital resources he does not stand in need. Of course, if the language of any part of the relevant legislation goes manifestly counter to the underlying philosophy of the supplementary benefit scheme, then effect must be given to such language, regardless of the consequences. However, to bring this result about the language must, in my judgment, be clear and unequivocal.

32. The tribunal found as a fact, and I do not think it has ever been in dispute, that on 12 November 1982 the claimant received two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice. It would appear that he received two cheques on that day, one for £608.17 representing the first two items, and a further cheque for £2,330.77 representing a payment of seven weeks' salary in lieu of notice. Although he received two cheques on the same day, in my judgment this is wholly immaterial. It would not have mattered if the cheques had been paid on different days or, if there had been three cheques, each representing a different item, or, for that matter, any number of cheques paid on any number of days. The crucial point is that the claimant received what can conveniently be called, and often is called, "severance pay". He was dismissed from his employment, and in accordance with normal practice, he received a sum of money in satisfaction of various entitlements.

33. Severance pay normally includes a payment for arrears of salary up to the date of dismissal, any holiday entitlement, a payment in lieu of notice if the circumstances so demand, and frequently redundancy payment. The mechanics of how this payment is dealt with varies from case to case. Sometimes there will be a separate cheque for each entitlement, which may or may not be paid on the same day, and sometimes there will be one single payment covering all the relevant items. It is a matter of accountancy convenience, varying from case to case. However, the crucial point, in my judgment, is whether the relevant payment or payments arise out of one event, namely the dismissal of the person concerned. If the nexus which serves to connect the various entitlements is the discharge of the person concerned from his employment, the latter will in effect receive a composite payment, i.e. a payment in discharge of the various heads of claim to which he is entitled, and it is immaterial whether such composite payment is received as a single payment or a series of payments or whether it is received on a single date or a series of dates. In the present case I consider that the claimant received such a composite payment.

34. Regulation 9 of the Resources Regulations provides that there shall be taken into account as the claimant's income resources, inter alia, the whole of his earnings, and in regulation 10(1) his earnings are defined as including any remuneration in kind, any payment in lieu of notice or remuneration, and any holiday pay. Accordingly, the two weeks' back pay, the one day's holiday pay and the seven weeks' pay in lieu of notice are all relevant resources which have to be taken into account. The crucial issue in this case is the period to which these three heads of entitlement are to be attributed, and for this purpose the relevant provision is regulation 9(2) of the Resources Regulations.

35. Of course, in a very simple case where, for example, there is only one head of entitlement, e.g. two weeks' back pay, there is little difficulty in determining the forward period to which this particular payment shall relate. It will be two weeks. The position is governed by regulation 9(2)(a)(i). The back-pay was payable in respect of a period of two weeks and for the purposes of supplementary benefit it will be attributed forwards for a period of two weeks. In other words, the claimant will be regarded as having income resources of that amount for two weeks. However, often - doubtless in most cases nowadays - the position is not as simple as in the illustration just given. The severance payment will be a composite payment, and to deal with the complication to which this gives rise paragraph (2)(a)(ii) of regulation 9 has been specifically enacted. It provides that the relevant payment shall be taken into account "for the period to which it is fairly attributable".

36. In the present case the total severance payment received by the claimant produced an income sufficient to cover him in all for nine weeks and one day. In my judgment "fairness" dictates that it should be attributable to a period of nine weeks and one day. Moreover this period should start from the date when the relevant payment is to be treated as having been paid. And this issue is determined by regulation 9(2)(b).

37. Unfortunately, it is not altogether easy to construe paragraph (2)(b). The relevant date is the date on which the income "is payable". This is not the same thing as "paid". The question was considered in paragraphs 17 to 19 of the unreported decision on Commissioner's file CSB/1008/1982, with which I respectfully agree. Fortunately, in the present case no real problem arises, in that the employer clearly repudiated the contract on 12 November 1982, whilst the claimant both accepted such repudiation and took in satisfaction of all claims arising out of this contract the sum paid on 12 November 1982. The sum was both payable and paid on that day. It follows that the period to which the relevant sum shall be fairly attributable expired on 14 January 1983, and the claimant became entitled to benefit from 15 January 1983.

38. It remains for me to consider the earlier payment made on 30 October 1982. Manifestly, this was payable in respect of the month of October and therefore, pursuant to regulation 9(2)(a)(i), must be taken into account for a period equal thereto, namely for the month of November. As the claimant was not dismissed until 12 November, it could be said that in addition to what he received on 12 November, the claimant also obtained a further sum which covered him for the period from 13 November to the end of the month. Is this to be added to the two payments made on 12 November 1982, so as to increase the period of disentitlement beyond the 14 January 1983? In my judgment, the payment received on 30 October is unrelated to the claimant's dismissal on 12 November. There is no evidence to suggest that at the time the claimant was paid on 30 October the dismissal was ever in contemplation. The payment was a routine one at the end of the month. There is no nexus between this payment and the claimant's discharge from employment, and accordingly, in my judgment, no part of that payment can properly be included in the composite payment made on 12 November 1982.

39. I find support for the approach taken by me in the two unreported decisions on Commissioner's file CSB/532/1982 and CSB/1008/1982 respectively. These decisions were arrived at by different Commissioners, and although no detailed reasons were given for their conclusions, they support my interpretation of the relevant regulations.

40. In the present appeal my fellow Commissioners take the view that the payments received on 12 November 1982 should be treated as applying to a concurrent, and not a consecutive period, but I am afraid I find their arguments unconvincing. I think the matter can be tested this way. Suppose there are two claimants, A and B, of whom B is in a position similar to that of the claimant in the present appeal. A was dismissed on full notice at a time when he was earning £100 per week payable fortnightly in arrear, and he received full wages of £200 (less deductions) on the last day of his employment, which incidentally was also the day on which the remuneration was payable. It is, as I understand it, the view of the majority (which I share), that the period, for which he would be treated as being in full-time work under the relevant regulations after the termination of his employment, is the period of two weeks from the date of payment, and that he could not, even if the employers made separate payments in respect of the two weeks, successfully contend that the period for which he is to be treated as being in full-time work should be limited to two concurrent periods of one week each. Let us suppose, however, in the hypothetical case that B on the other hand was dismissed without notice when he was earning £100 a week payable weekly in arrear. In these circumstances he will be paid on the last day of his employment (the day on which the remuneration was payable) final wages of £100 (less deductions) and £100 in lieu of the week's notice to which he was entitled, this latter payment being, of course, for present purposes regarded as remuneration. In this case, the majority take the view that the claimant is to be treated as engaged in full-time employment for two concurrent periods of one week each. It has not been explained to me what it is in the relevant regulations that justifies this distinction, which, of course, as explained above, frustrates the manifest purpose of the relevant provisions. In the absence of such an explanation, why should not A also be entitled to limit the period for which he was to be treated as engaged in full-time employment to two periods of one week each? And if so, why not, on this view to 14 (or 10) periods of a day each?

41. Accordingly, if the matter rested solely with me, my decision would be set out in paragraph 27.

Signed I O Griffiths
Chief Commissioner

Signed V G H Hallett
Commissioner

Signed D G Rice
Commissioner

Date: 27 February 1984

CSB 326/1983

T/AJ

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Name: David Henry

Supplementary Benefit Appeal Tribunal: Aylesbury

Case No: 11/20

[ORAL HEARING]

Arrangement of paragraph in this decision

Our decision is arranged as follows:

	<u>Paragraph(s)</u>
Decision	1
Representation	2
Nature of the appeal	3, 4
The Law	5
The supplementary benefit officer's decision	6
Submissions to the SBAT	7, 8
"Evidence" before the SBAT	9
The SBAT decision	10
Grounds of appeal to the Commissioner	11
Submissions on the appeal	12, 13, 14
Construction of the statutory provisions:	
Introductory	15
Person in full-time work: the basic principle: no supplementary benefit	16
Termination of full-time work: deemed continuance while earnings "fall to be taken into account"	17
Earnings that "fall to be taken into account"	18-23

Was the SBAT decision erroneous in law?	24
Is it expedient to give the decision the SBAT should have given?	25
Directions to the fresh SBAT	26
Dissenting judgment of Mr Rice	27-41

Decision of Chief Commissioner and Commissioner Hallett

1. Our decision (Mr Rice dissenting) is that the decision of the supplementary benefit appeal tribunal ("the SBAT") dated 18 January 1983 is erroneous in point of law. We set it aside and refer the case to another tribunal for determination in accordance with our directions.

Representation

2. We held an oral hearing of this appeal by the claimant. The claimant was represented by Mr Richard Drabble of Counsel, instructed by the Child Poverty Action Group. The supplementary benefit officer was represented by Mr D James of the Solicitor's Office, Department of Health and Social Security. We are grateful to them both for their submissions.

Nature of the appeal

3. This appeal concerns the treatment of the final payments from an employer where a claimant for supplementary benefit has lost his employment. It raises the question of the correctness of three unreported decisions of the Commissioner, the references to which on Commissioner's file are CSB/184/1982, CSB/532/1982 and CSB/1008/1982. The Chief Commissioner has directed that the appeal, which involves a point of law of exceptional difficulty, should be heard by the present Tribunal of Commissioners.

4. The general principle is that when an employed person stops work he is excluded from benefit for a period equal to the period covered by his last earnings: see regulation 9(1)(b) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [SI 1981 No.1526], which we shall call "the Conditions of Entitlement Regulations". Holiday pay, bonuses and commission and payments in lieu of notice or remuneration are taken into account as well as normal wages when working out the period of exclusion. The question at issue is whether payments in satisfaction of different legal obligations (in the present case, wages for past weeks, holiday pay and a payment in lieu of notice) when all are made on the same date, should be treated as concurrent or consecutive, when calculating the period of exclusion. The appeal also raises the question as to the treatment of wages, paid on different dates, in the calculation of this period.

The law

5. (1) The relevant law is set out in the Supplementary Benefits Act 1976 as amended, the Conditions of Entitlement Regulations (referred to in paragraph 4) and the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No.1527], which we shall call "the Resources Regulations".

(2) Section 6(1) of the Supplementary Benefits Act 1976 as amended provides as follows -

"A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this sub-section as so engaged."

(3) The relevant provision is made in regulation 9 of the Conditions of Entitlement Regulations. Regulation 9(1) reads as follows -

"(1) For the purposes of section 6(1)..... a claimant shall be treated as engaged in remunerative full-time work only where:-

(a) subject to paragraph (2), he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than -

(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 per cent or less of what he would, but for that disablement, be reasonably expected to earn, 35 hours a week,

(ii) in any other case, 30 hours a week,

or he is absent from such work without 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 a person affected by a trade dispute, and

(ii) he has received in respect of the employment in which he was so engaged earnings calculated in accordance with Part III of the Resources Regulations (calculation of income resources) which, by virtue of regulation 9(2) of those regulations as modified by paragraph (3) of this regulation, 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 a person affected by a trade dispute;

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)

"(2) [Not relevant to this appeal]

(3) For the purposes of paragraph (1)(b), regulation 9(2) of the Resources Regulations shall be modified to the extent that where the claimant receives -

(a) by way of earnings to which paragraph (1)(b) applies a payment of bonus or commission in respect of a period different from that in respect of which the other earnings are paid, that payment shall be treated as earnings in addition to the other earnings for a period estimated by reference to a five-day week on the basis of periodical earnings normally paid to him;

(aa) a payment of bonus or commission by way of earnings to which paragraph (1)(b) applies, in respect of the same period as other earnings which are paid on a different day, that payment of bonus or commission shall be treated as earnings for the same period as those other earnings [(aa) was inserted by SI 1983/1000 with effect from 15.8.83 and is reproduced because it is referred to in paragraph 22 below]

(b)

(4) The relevant regulations in Part III of the Resources Regulations are regulations 9, 10 and 11. Since the Commissioner in decision CSB/184/1983, which is referred to in paragraph 3 above, considered the opening words of regulation 3(2) from Part I to be of crucial importance, these are also set out below:

"Calculation of resources

3. - (1)

(2) For the purposes of these regulations resources shall consist of capital resources and income resources, and in particular -

(a) any grant or gratuity paid under the Social Security Act shall be treated as a capital resource

.....

"PART III
INCOME RESOURCES

"Calculation of income resources

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 partner of his, the earnings of any dependant being disregarded, calculated in accordance with regulation 10;
 - (b) the whole of any other income of the assessment unit, calculated in accordance with regulations 11, 12 and 13.
- (2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments shall be attributable as follows:-
- (a) subject to the following sub-paragraphs, a payment of income shall be taken into account -
 - (i) where it is payable in respect of a period, for a period equal to the length of that period, and
 - (ii) in any other case, for the period to which it is fairly attributable;
 - (b) a payment of income shall be treated as paid on -
 - (i) in the case of a payment 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,
 - (ii) in any other case, 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 pension or allowance is payable in the particular case, it would be practicable to take it into account;
 - (c) where a payment of income is payable in respect of a period which exceeds one week, it shall be attributable at a weekly rate, calculated in the case of a monthly payment in accordance with sub-paragraph (e), beginning with the appropriate date ascertained in accordance with sub-paragraph (b);
 - (d)
 - (e) a monthly payment shall be treated as a payment -
 - (i) in respect of a calendar month,
 - (ii) at a weekly rate determined by multiplying the payment by 12 and dividing the result by 52."

"Calculation of earnings

10. - (1) Subject to the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment and shall include -

- (a) any remuneration in kind;
- (b) any bonus or commission;
- (c)
- (d) any payment in lieu of notice or remuneration;
- (e) any holiday pay other than any received more than 4 weeks after termination of employment;
- (f)
- (g)
- (h)"

....."

"Calculation of other income

11. - (1) For the purpose of the calculation of the income resources of the claimant, all income other than that to which regulation 10 applies shall be taken into account and calculated on a weekly basis in accordance with the following paragraphs and regulation 9(2).

(2) These shall be treated as income and taken into account in full -

- (a) except in so far as the following paragraphs provide otherwise, any benefit under the Social Security Act

....."

The supplementary benefit officer's decision

6. The claimant ceased full-time remunerative employment on 12 November 1982 and claimed supplementary benefit on 15 November 1982. By a decision issued on 1 December 1982 a supplementary benefit officer decided that the claimant was not entitled to supplementary benefit until 2 February 1983.

Submissions to the SBAT

7. The claimant appealed against this decision on 17 December 1982. In a letter dated 14 December 1982, his grounds of appeal are set out:

"You go on to state that 'your wages cover your requirements to 02.02.83'. I query that remarkable statement. In my previous employment I was paid monthly in arrears. On 12th November I was paid £608.17 which represented my salary for November up to and including 12th November plus one day's holiday pay still owed to me. I was paid a further cheque for £2,330.77 being seven weeks' salary up to the end of 1982!!! This was paid to me in lieu of notice. By no stretch of the imagination can it be construed that I have been paid to 02.02.83".

8. In his written submission to the SBAT on form LT205, the benefit officer stated that the facts before him were that the claimant was a married man with two dependent children aged 5 and 3 years. He was employed from 14 June 1982 to 12 November 1982. On 12 November 1982 he ceased full-time employment, receiving 2 weeks' final earnings, 1 day's holiday pay and 7 weeks' salary in lieu of notice amounting in total to £2,938.94. He had received his previous month's salary on 30.10.82 and would normally have received his next salary on 30.11.82. He claimed supplementary benefit on 15.11.82 and declared capital amounting to £1,668.61. His wife was in part-time employment. The claimant had stated that he would be without resources at the end of December. The benefit officer's reasons for his decision were that he had decided that the claimant should be treated as in remunerative full-time employment until 2 February 1983, when the claimant's final earnings should be deemed to be exhausted.

"Evidence" before the SBAT

9. The chairman's "note of evidence" before the SBAT is in these terms;

"The Appellant's letter of 14/6/82 to DHSS was seen by the Tribunal. This requested the necessary form to claim benefit until his first salary was paid.

The letter was marked A7 sent 29/6/82. This form was not received by the Appellant, who received benefit for w/c 10/6/82 and 17/6/82".

The SBAT decision

10. On 18 January 1983 the SBAT unanimously confirmed the benefit officer's decision. They made the following findings of fact -

"The Appellant received a month's salary on 30/10/82. He ceased employment on 12/11/82, and received two weeks' final earnings, 1 day's holiday pay and seven weeks in lieu of notice. Supplementary benefit was claimed on 15/11/82. The Appellant worked from 14/6/82 to 12/11/82."

The SBAT gave as the reasons for their decision -

"The Tribunal, having fully examined the facts, were satisfied that there was no entitlement to Supplementary Benefit until 2/2/83 by virtue of the final earnings received. Reg 9 and 10 of the Resources Regs. refers and Reg 9 of the Conditions of Entitlement Regs. refers. It was noted that the Appellant apparently did not receive the A7 form on commencing work and so did not follow up his claim then since he was monthly salaried."

Grounds of appeal to the Commissioner

11. The claimant appealed against the SBAT decision on the ground that it was wrong in law because the benefit officer appeared to have simply added up the total number of weeks covered by his earnings and debarred him from benefit for the total number of weeks running consecutively, when in fact 2 weeks' final earnings, 1 day's holiday pay and 7 week's salary in lieu of notice all became payable simultaneously and should run concurrently, not consecutively, so that by his reckoning he was eligible for supplementary benefit from 3 January.

[Note: 3 January is the first Monday (i.e. payday) after the end of the period of 7 weeks and 1 day calculated from either 12 or 13 November 1982].

Submissions on the appeal

12. On behalf of the claimant, Mr Drabble adopted the written submission of the supplementary benefit officer now concerned with the appeal that the SBAT decision was erroneous in law and should be set aside. In failing to record the payable date or dates of the payments made to the claimant and the representative periods to which they should be attributed the SBAT had failed to comply with rule 7(2) of the Appeals Rules which required the SBAT's findings of the material facts to be recorded.

13. In Mr Drabble's submission, although 3 separate sums were paid, one on 30 October 1982 for a month's pay, one by cheque on 12 November 1982 for 2 weeks' pay and one day's holiday pay and another by a different cheque also on 12 November 1982 for 7 weeks' wages in lieu of notice, there were 4 separate payments since the holiday pay stemmed from a different obligation to that relating to the 2 weeks' wages. Regulation 9 of the Resources Regulations operated in the following way. First a "payment of income" must be identified: see the opening words of regulation 9(2)(a). Then the length of period must be identified: see regulation 9(2)(a)(i). The payable date must next be ascertained: see 9(2)(b)(i). Finally the payment must be converted, if for more than a week, to a weekly rate, starting with the payable date: see 9(2)(c). The payable date was the date when the payment in question was due to be paid under the contract or in consequence of a breach of contract. In the case of the one month's wages it was, Mr Drabble submitted, the date of payment namely 30 October 1982. In the case of the other 3 payments it was also the date of payment, namely 12 November 1982. As regards the length of the period, the payment made on 30 October related to a period of 1 month, that of two weeks' wages paid on 12 November related to a period of two weeks and that of one day's holiday pay to a period of 1 day. As regards the 7 weeks' wages in lieu of notice the period to which that related was the contractual period of notice. The "start date" for the payment was correctly analysed in paragraph 19 of Commissioner Monroe's decision the reference to which on Commissioner's file was CSB 1008/82. The payment in lieu of notice was equivalent to damages for breach of contract and was therefore payable from the moment the employee accepted the repudiation of the contract and was therefore entitled to damages.

14. On behalf of the benefit officer, Mr James submitted that the manifest purpose of the Supplementary Benefits Act 1976 and of the regulations was that supplementary benefit should be a benefit of last resort i.e. it was only payable if there were no other resources. That was the reason why income resources were projected forward although paid retrospectively. In the present case one payment was received on 30 October 1982 and on 13 November 1982 an amount was received in respect of 3 different liabilities. All 4 liabilities should be run together to arrive at a total period that takes one up to 2 February 1983, a total of 13 weeks' plus 1 day. Even if this submission was

rejected, the period must still be 9 weeks plus 1 day running from 13 November consecutively so that the whole of the claimant's income was taken account. It was for consideration that the payment in lieu of notice was not in respect of a period at all. Amounts paid on one day or separated by a relatively close interval of time should be treated as a composite payment falling within paragraph (2)(a)(ii) of regulation 9 as a payment not made in respect of a period, and the period to which it was "fairly attributable" should be ascertained, that period being the total of the periods to which the payments relate, treated as running consecutively and not concurrently. There was difficulty in submitting that payments separated by as much as a fortnight could be treated as composite payment. Seven days was the limit of what might be regarded as close together but probably this was not sufficiently close. It might be that the period of time or separation was not relevant and that what should be considered was the context in which it was made. On this view, 30 October 1982 was not relevant as the payment was not made in the context of the dismissal. But all payments made on 13 November were made in that context and should be treated as a composite payment falling within regulation 9(2)(a)(ii).

Construction of the statutory provisions

Introductory

15. The supplementary benefit scheme has, since the parts of the Social Security Act 1980 relating to supplementary benefit and the regulations made thereunder came into force on 24 November 1980, been governed very much more firmly by the law and in particular by the supplementary benefit regulations which lay down claimants' rights and substitute precise provisions for matters which previously fell within the discretion of the Supplementary Benefits Commission, a body which has been abolished. The discretion conferred by the regulations considered below is minimal.

Persons in full-time work: the basic principle: no supplementary benefit

16. Section 6(1) of the Supplementary Benefits Act 1976 (as amended) lays down the basic principle that a person who is engaged in remunerative full-time work is not to be entitled to supplementary benefit and states that regulations may provide as to when a person is to be so treated. Regulation 9(1)(a) of the Conditions of Entitlement Regulations specifies the precise conditions which must apply for a person who is engaged in work to be treated as engaged in full-time remunerative work. A person engaged in work can only be so treated if he satisfies these conditions: see the opening words of the regulation.

Termination of full-time work: deemed continuance while earnings "fall to be taken into account"

17. Under regulation 9(2)(b) of the Conditions of Entitlement Regulations, a person (not being self-employed) who was engaged in remunerative full-time work as provided in regulation 9(1)(a) is to be treated as still so engaged, after the termination of his employment, during the period subsequent to such termination for which his earnings fall to be taken into account by virtue of regulation 9(2) of the Resources Regulations as modified by paragraph (3) of this regulation.

Earnings that "fall to be taken into account"

18. Regulation 9(2) of the Resources Regulations relates to "Earnings and other income": see the opening words of that regulation. But only earnings are relevant for the purpose of treating a person whose employment has been terminated as still in full-time remunerative work: see paragraph 17 above. "Earnings" are, for this and other purposes, defined in regulation 10 of the Resources Regulations. Any earnings (subject to certain exceptions not relevant here) that fall within that regulation must, in our judgment, be treated as income for the purposes of regulation 9 of the Resources Regulations, whether or not they are otherwise to be regarded as capital. Regulation 9(1) states that the whole earnings are income resources and both paragraph (1) and paragraph (2) of regulation 9 treat such earnings as income, for they both refer to earnings and then to "other income". Payments in lieu of notice, holiday pay, bonuses and commission and the particular ex gratia payments specified in regulation 10 accordingly fall within regulation 9 and must be treated (unless they are to be disregarded in accordance with regulation 10) as payments of income whether they are income in other contexts and for other purposes or not. Decision CSB/354/81 is in this respect correct. Decision CSB/184/1982, which is to the effect that any payment which on analysis proved to be a capital resource cannot fall within regulation 9 or 10 of the Resources Regulations is, in our judgment, erroneous and should not be followed in this respect. Mr Drabble's concession, on behalf of the claimant, that payments in lieu of notice and holiday pay were "payments of income" for the purpose of regulation 9 of the Resources Regulations, was accordingly rightly made.

19. Once a payment of earnings falling within regulation 10 has been identified, the period to which those earnings are to be attributed is ascertained in 2 stages, which are respectively set out in sub-paragraphs (a) and (b) of regulation 9(2) of the Resources Regulations. The first stage is to determine the length of the period. The second stage is to identify the starting date for that period. The basic principle in the first stage is that if the earnings were paid (and there can be no payment unless they have been paid) "in respect of a period", then the period to be taken into account must be of equal length: see regulation 9(2)(a)(i). If, however, the earnings were not paid in respect of a period, then the period to which they are fairly attributable must be determined: see regulation 9(2)(a)(ii). It is only when they have not been paid in respect of a period that the discretion to determine what is "fairly attributable" applies at all. It is then, as the second stage, necessary to ascertain the starting date of the period. In the present appeal, it is not in dispute that all the payments in issue were payable before the starting date of the first benefit week pursuant to the claim, that is to say the first Monday after the date of the claim, and in this judgment we confine our attention to this type of case. The starting date for the period, in such a case, is the date on which the payment is "payable": see regulation 9(2)(b)(i) of the Resources Regulations. "Payable" is an ordinary word in the English language and, for the reasons given in Cozens v Brutus [1973] A.C.854 at page 861 it is not desirable to define it. It clearly does not simply mean the date on which the payment is received, since the word "payable" was substituted for "received" in the regulations. It may, and often will, be the same date. But in order to discover when a payment was in fact payable, which may in some cases be before or after the date of receipt, the first step must be to look at the claimant's contract

with his employer or, if there is no written contract, his terms of employment, in order to see when the payment ought to have been made. If the contract has been repudiated by the employer, it may then be necessary to look at the circumstances of the repudiation and to determine the date on which such repudiation was accepted by the claimant.

20. Wherever earnings falling within regulation 10 are paid in respect of a period, regulation 9(1)(a)(i) of the Resources Regulations must be applied to that payment. If a single cheque comprises payments in respect of two distinct periods, whether or not those periods overlap and even if they coincide, regulation 9 should be applied to each payment separately. This is the clear and obvious meaning of the regulation. Applied thus, there is no difficulty at all in dealing with individual cases. To take the present case, four sums of money were paid to the claimant in respect of four distinct periods. For clarity of the example, it will be assumed that each payment was paid on the payable date. First, a month's wages were paid on 30 October 1982, being wages in arrear. As regards these wages, the relevant period is one calendar month (see regulation 9(2)(e) of the Resources Regulations) the start date is 30 October 1982 and the relevant period is 30 October 1982 to 29 November 1982. The weekly rate is determined in the way set out in regulation 9(2)(e)(ii). Secondly, two weeks' wages were paid on 12 November 1982. The period here is two weeks and the start date (again assuming that the date of payment and the payable date are, in this particular case, the same) is 12 November 1982 (not 13 November 1982, as suggested by Mr James): see regulation 9(2)(b)(i). Thirdly, one day's holiday pay was paid. The period here is one day and the start date is the date of payment (on the same assumption as to the payable date). Fourthly, seven weeks' wages in lieu of notice were paid on 12 November 1982. Here, it is necessary to determine when the claimant's contract of employment was repudiated, applying principles set out in paragraph 19 of Commissioner Monroe's decision CSB/1008/1982 (unreported) with which in this respect we are all in agreement. Then it is necessary to determine the period of notice to which the claimant was entitled under his terms of employment or, if that period is longer, by statute. It is that period, be it more or less than 7 weeks, in respect of which the payment must have been made. We do not accept Mr James's submission that a payment in lieu of notice can be made in respect of no period.

21. If the position in the present case is that the claimant was entitled to 7 weeks' notice of termination of his employment, then that period of 7 weeks, which starts (on the assumption already made) on 12 November 1982 lasts up to 31 December 1982. All the other periods overlap with it. But since it is the longest period and commences before the date of claim (15 November 1982) it is this period which fixes the period of deemed continuance in employment. If, on the other hand, the claimant had only been entitled to, say, 10 days' notice, but was paid 7 weeks' wages in lieu of that notice, the period would be only 10 days' long, starting on 12 November 1982. On that basis, the longest period would be that for which wages were paid on 30 October 1982 and (assuming that was the payable date) the claimant would be deemed to remain in full-time employment until 29 November 1982. Decisions CSB/184/1982, CSB/532/1982 and CSB/1008/1982, all of which add the separate overlapping periods relating to different payments together so as to form one continuous period without overlapping are, in our judgment, wrongly decided and should not be followed. All of them ignore the mandatory and express provisions of regulation 9(2)(b)(i) of the Resources Regulations that the date of commencement of a payment shall be treated as the date on which that payment was payable.

22. We, for our part, can find no warrant at all, anywhere in the regulations, for the suggestion that any of the above mentioned sums of money, all of which were paid in respect of distinct periods should, in defiance of the clear words of regulation 9(2) of the Resources Regulations, be treated as not having been paid in respect of a period at all. There is nothing in the regulations to support the suggestion that the intention was that such payments should be treated as consecutive. The only provisions expressly relating to overlapping periods are contained in regulation 9(3) of the Conditions of Entitlement Regulations and here, both paragraph (a) which was in force at the date of the present claim and paragraph (aa) which was inserted later, clearly envisage that earnings periods can and do, as regards bonuses and commissions, in any event, overlap. Paragraph (aa) was evidently introduced to ensure that such overlap should be complete and coincident, by prescribing an identical starting date in cases where bonus and commissions were payable on different days but for the same period as other earnings by providing that they should be treated as payable on the same day.

23. A principal mischief at which the 1980 legislation was aimed is well known to be that, in the absence of precise legal rules, the abundance of discretionary payments resulted in lack of consistency in a scheme originally designed for a comparatively small number of claimants, but which was by 1978 serving over 3,000,000 claimants and paying benefits to some 5,000,000 people including dependants: see, for example, Social Assistance (DHSS 1978), Ogus and Barendt, *The Law of Social Security*, 2nd Edition at pages 453-4 and *The Law of Supplementary Benefits*, by M. S. Rowel and A. M. Wilton at pages 9-11. It is accordingly particularly desirable that, in construing the statutory provisions introduced pursuant to the 1980 reforms, claimants should be entitled to rely on the express wording of the regulations and that the statutory authorities should not do violence to the words used unless the result is wholly unreasonable and defeats the obvious intention of the legislature. We can find no obvious intention that all payments of earnings should be treated as consecutive, although made in respect of overlapping periods, which would justify doing violence to the words of the regulations. Accordingly, applying the general principle of construction set out by Lord Reid in Luke v Inland Revenue Commissioners [1973] A.C.767 at page 577, the words of the regulation should prevail. In Lumsden v Inland Revenue Commissioners [1914] A.C.877, where at page 892, Viscount Haldane, the Lord Chancellor said:

"it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation".

These words are, in our view, equally applicable to the construction of statutory regulations: It may perhaps be conjectured that Parliament might have provided for the payments under consideration in this decision to be consecutive. But this is the purest speculation and is quite insufficient reason for departing from the literal interpretation of the regulations.

Was the SBAT decision erroneous in law?

24. The SBAT decision was clearly erroneous in point of law since they did not record the payable dates or dates of the payments made to the claimant or the period or periods to which they should be attributed, which are material facts, and it is impossible from reading their decision to ascertain by what process of reasoning they arrived at their conclusion. There are no findings at all as to the terms of the claimant's employment or as to what the period of notice was to which he was contractually entitled on termination of that employment. Indeed, the nature of the claimant's employment and its terms remain in total obscurity. Rule 7(2)(b) of the Appeals Rules, which requires the record of the SBAT decision to state the material facts and to give the reasons for their decision has not been complied with.

Is it expedient to give the decision the SBAT should have given?

25. It is neither expedient nor possible for us to give the decision that the SBAT should have given, in the absence of the necessary findings of fact. Accordingly, the case must go back to another SBAT, which in accordance with the usual practice, should be entirely differently constituted, to find such facts and to give a decision in accordance with our directions for determination.

Directions to the fresh SBAT

26. The SBAT to whom the case is now referred should:

- (1) hear evidence from the claimant, if he wishes to give evidence. The chairman's note of evidence should record the names of those persons, if any, who give evidence and what that evidence is. The record of the tribunal decision should indicate whether that evidence is accepted or rejected.
- (2) enquire as to the claimant's terms of employment. If the contract of employment is available, it should be examined.
- (3) record the nature of the claimant's employment and its terms including in particular the period of notice of termination of employment to which he was entitled.
- (4) record the dates on which the various payments discussed in this decision were payable, in terms of regulation 9(2)(b) of the Resources Regulations.
- (5) record the actual dates of payment, the amounts and the method of payment of all the earnings in issue.
- (6) determine the period for which the claimant should be treated as in full-time employment in accordance with the principles set out in the majority decision of this Tribunal of Commissioners.

Decision of Commissioner Rice

27. I regret that I differ from the view taken by my fellow Commissioners. I agree that the tribunal erred in point of law through failure to comply with rule 7(2)(b) of the Appeals Rules, but unlike them I am of the opinion that the payment made on 12 November 1982 of two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice should be attributable to the inclusive period from 12 November 1982 to 14 January 1983. If the matter lay solely with me, I would consider it expedient that I give the decision which the tribunal should have given, all the relevant facts having been determined, and my decision would be that the claimant is not entitled to supplementary benefit for any period prior to 15 January 1983.

28. On 12 November 1982 the claimant, whose employment was terminated with effect from that date, received a payment comprising 2 weeks' final earnings, one day's holiday pay and 7 weeks' salary in lieu of notice totalling in all £2,938.94. On 30 October 1982 he had also received one month's salary in respect of the previous month, and had he not been dismissed, he would have expected to receive a further month's salary on 30 November 1982. On 15 November 1982 he claimed supplementary benefit, but the benefit officer disallowed it on the ground that the claimant should be treated as in remunerative full-time employment until 2 February 1983. On appeal the Tribunal upheld the benefit officer.

29. The relevant statutory provisions are set out in paragraph 5 of the majority judgment and there is no merit in my repeating them here. The question at issue is the date up to which, by reason of the claimant's earnings, he must in the light of the aforesaid statutory provisions be treated as having been engaged in remunerative full-time work and consequently by virtue of section 6(1) of the Supplementary Benefits Act 1976 ineligible for benefit. The two relevant payments are those made on 30 October and 12th November 1982 respectively. The tribunal failed to make appropriate findings of fact and to give adequate reasons for their decision, on the basis of which their confirmation of the benefit officer's decision could be justified, and manifestly they were in breach of rule 7(2)(b) of the Appeals Rules. It follows that their decision must necessarily be set aside. However, for the reasons hereinafter appearing, if the matter were solely mine, I would substitute my own decision for that of the tribunal and disentitle the claimant to benefit for any period prior to 15 January 1983.

30. Before construing the relevant provisions it is important to bear in mind what is manifestly the underlying purpose of the supplementary benefit legislation. Supplementary benefit is the benefit of last resort. Its purpose is to safeguard everyone from falling below a standard of living accepted by society at large as being the minimum subsistence level, and it is paid for out of public funds without any contribution on the part of the beneficiaries. Not surprisingly, safeguards have been built into the system, so as to ensure that a claimant does not need to have resort to supplementary benefit if he already has adequate income or capital resources of his own. Accordingly, if on ceasing to be in full-time employment a claimant receives back-pay, albeit such back-pay indisputably relates to work which he has done in the past pursuant to his contract of service, nevertheless for the purpose of supplementary benefit it will be treated as an income resource available to him for a period in the future. The philosophy behind the legislation is that, if a claimant has resources (regardless of the period during which they were earned), which he can for a period in the future employ to meet his living expenses, he will to this extent be independent of any need for supplementary benefit. Public funds are not to be distributed where they are not properly required.

31. Now, where the policy of the legislation is so self-evident, I consider that I should be slow to interpret any of the relevant provisions giving effect to the scheme as conferring on a claimant an entitlement of which by reason of his income or capital resources he does not stand in need. Of course, if the language of any part of the relevant legislation goes manifestly counter to the underlying philosophy of the supplementary benefit scheme, then effect must be given to such language, regardless of the consequences. However, to bring this result about the language must, in my judgment, be clear and unequivocal.

32. The tribunal found as a fact, and I do not think it has ever been in dispute, that on 12 November 1982 the claimant received two weeks' final earnings, one day's holiday pay and seven weeks' salary in lieu of notice. It would appear that he received two cheques on that day, one for £608.17 representing the first two items, and a further cheque for £2,330.77 representing a payment of seven weeks' salary in lieu of notice. Although he received two cheques on the same day, in my judgment this is wholly immaterial. It would not have mattered if the cheques had been paid on different days or, if there had been three cheques, each representing a different item, or, for that matter, any number of cheques paid on any number of days. The crucial point is that the claimant received what can conveniently be called, and often is called, "severance pay". He was dismissed from his employment, and in accordance with normal practice, he received a sum of money in satisfaction of various entitlements.

33. Severance pay normally includes a payment for arrears of salary up to the date of dismissal, any holiday entitlement, a payment in lieu of notice if the circumstances so demand, and frequently redundancy payment. The mechanics of how this payment is dealt with varies from case to case. Sometimes there will be a separate cheque for each entitlement, which may or may not be paid on the same day, and sometimes there will be one single payment covering all the relevant items. It is a matter of accountancy convenience, varying from case to case. However, the crucial point, in my judgment, is whether the relevant payment or payments arise out of one event, namely the dismissal of the person concerned. If the nexus which serves to connect the various entitlements is the discharge of the person concerned from his employment, the latter will in effect receive a composite payment, i.e. a payment in discharge of the various heads of claim to which he is entitled, and it is immaterial whether such composite payment is received as a single payment or a series of payments or whether it is received on a single date or a series of dates. In the present case I consider that the claimant received such a composite payment.

34. Regulation 9 of the Resources Regulations provides that there shall be taken into account as the claimant's income resources, inter alia, the whole of his earnings, and in regulation 10(1) his earnings are defined as including any remuneration in kind, any payment in lieu of notice or remuneration, and any holiday pay. Accordingly, the two weeks' back pay, the one day's holiday pay and the seven weeks' pay in lieu of notice are all relevant resources which have to be taken into account. The crucial issue in this case is the period to which these three heads of entitlement are to be attributed, and for this purpose the relevant provision is regulation 9(2) of the Resources Regulations.

35. Of course, in a very simple case where, for example, there is only one head of entitlement, e.g. two weeks' back pay, there is little difficulty in determining the forward period to which this particular payment shall relate. It will be two weeks. The position is governed by regulation 9(2)(a)(i). The back-pay was payable in respect of a period of two weeks and for the purposes of supplementary benefit it will be attributed forwards for a period of two weeks. In other words, the claimant will be regarded as having income resources of that amount for two weeks. However, often - doubtless in most cases nowadays - the position is not as simple as in the illustration just given. The severance payment will be a composite payment, and to deal with the complication to which this gives rise paragraph (2)(a)(ii) of regulation 9 has been specifically enacted. It provides that the relevant payment shall be taken into account "for the period to which it is fairly attributable".

36. In the present case the total severance payment received by the claimant produced an income sufficient to cover him in all for nine weeks and one day. In my judgment "fairness" dictates that it should be attributable to a period of nine weeks and one day. Moreover this period should start from the date when the relevant payment is to be treated as having been paid. And this issue is determined by regulation 9(2)(b).

37. Unfortunately, it is not altogether easy to construe paragraph (2)(b). The relevant date is the date on which the income "is payable". This is not the same thing as "paid". The question was considered in paragraphs 17 to 19 of the unreported decision on Commissioner's file CSB/1008/1982, with which I respectfully agree. Fortunately, in the present case no real problem arises, in that the employer clearly repudiated the contract on 12 November 1982, whilst the claimant both accepted such repudiation and took in satisfaction of all claims arising out of this contract the sum paid on 12 November 1982. The sum was both payable and paid on that day. It follows that the period to which the relevant sum shall be fairly attributable expired on 14 January 1983, and the claimant became entitled to benefit from 15 January 1983.

38. It remains for me to consider the earlier payment made on 30 October 1982. Manifestly, this was payable in respect of the month of October and therefore, pursuant to regulation 9(2)(a)(i), must be taken into account for a period equal thereto, namely for the month of November. As the claimant was not dismissed until 12 November, it could be said that in addition to what he received on 12 November, the claimant also obtained a further sum which covered him for the period from 13 November to the end of the month. Is this to be added to the two payments made on 12 November 1982, so as to increase the period of disentitlement beyond the 14 January 1983? In my judgment, the payment received on 30 October is unrelated to the claimant's dismissal on 12 November. There is no evidence to suggest that at the time the claimant was paid on 30 October the dismissal was ever in contemplation. The payment was a routine one at the end of the month. There is no nexus between this payment and the claimant's discharge from employment, and accordingly, in my judgment, no part of that payment can properly be included in the composite payment made on 12 November 1982.

39. I find support for the approach taken by me in the two unreported decisions on Commissioner's file CSB/532/1982 and CSB/1008/1982 respectively. These decisions were arrived at by different Commissioners, and although no detailed reasons were given for their conclusions, they support my interpretation of the relevant regulations.

JA

40. In the present appeal my fellow Commissioners take the view that the payments received on 12 November 1982 should be treated as applying to a concurrent, and not a consecutive period, but I am afraid I find their arguments unconvincing. I think the matter can be tested this way. Suppose there are two claimants, A and B, of whom B is in a position similar to that of the claimant in the present appeal. A was dismissed on full notice at a time when he was earning £100 per week payable fortnightly in arrear, and he received full wages of £200 (less deductions) on the last day of his employment, which incidentally was also the day on which the remuneration was payable. It is, as I understand it, the view of the majority (which I share), that the period, for which he would be treated as being in full-time work under the relevant regulations after the termination of his employment, is the period of two weeks from the date of payment, and that he could not, even if the employers made separate payments in respect of the two weeks, successfully contend that the period for which he is to be treated as being in full-time work should be limited to two concurrent periods of one week each. Let us suppose, however, in the hypothetical case that B on the other hand was dismissed without notice when he was earning £100 a week payable weekly in arrear. In these circumstances he will be paid on the last day of his employment (the day on which the remuneration was payable) final wages of £100 (less deductions) and £100 in lieu of the week's notice to which he was entitled, this latter payment being, of course, for present purposes regarded as remuneration. In this case, the majority take the view that the claimant is to be treated as engaged in full-time employment for two concurrent periods of one week each. It has not been explained to me what it is in the relevant regulations that justifies this distinction, which, of course, as explained above, frustrates the manifest purpose of the relevant provisions. In the absence of such an explanation, why should not A also be entitled to limit the period for which he was to be treated as engaged in full-time employment to two periods of one week each? And if so, why not, on this view to 14 (or 10) periods of a day each?

41. Accordingly, if the matter rested solely with me, my decision would be as set out in paragraph 27.

Signed I O Griffiths
Chief Commissioner

Signed V G H Hallett
Commissioner

Signed D G Rice
Commissioner

Date: 27 February 1984

Commissioner's File: CSB/326/1983
CSBO File: 328/83
Region: London North