CPAG

JM/SH/2

Commissioner's File: CSB/327/1990

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 15 August 1990 which confirmed a decision issued by the adjudication officer on 15 February 1989. My decision is as follows:

(1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.

(2) Pursuant to section 101(5) of the Social Security Act 1975 (as amended) the case is referred to the appeal tribunal for determination in accordance with the principles of law set out and referred to in this decision.

2. The case is of a type with which the Commissioners became very familiar. The type was generated by the manner in which the supplementary benefit legislation was drafted. Changes in the relevant provisions of the income support legislation have rendered the type a moribund species. Astonishing as it may seem, however, cases of this type are still regularly coming before the Commissioner in spite of the fact that it is now almost four years since supplementary benefit disappeared from the statute book. It is quite possible that the chairman of the appeal tribunal before which this case comes for rehearing may have had little experience of applying the supplementary benefit legislation. I have thought it worthwhile, accordingly, to set out some guidance as to the application of the erstwhile legislation.

3. Section 5(1) of the Supplementary Benefits Act 1976 made the right of any person to a supplementary allowance subject to the

condition that that person was available for employment; but provision was made for the exception of prescribed cases. Those prescribed cases were the subject of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. That was a long regulation. There were 23 paragraphs directed to the specific circumstances of those who were to be exempted from the requirement of availability for employment. Those paragraphs did not of themselves pose any great difficulties to the adjudicating authorities. But there was a 24th paragraph (which retained the designation (u) which it had been given in the Regulations as they were originally enacted). Paragraph (u) did pose difficulties to the adjudicating authorities - and there is no equivalent thereof in the relevant income support regulation. I set out so much of regulation 6 as appears to be relevant to this appeal:

" 6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8(1)(a) [which has no bearing upon this case] does not apply to him:-

.....

(e) by reason of physical or mental disablement he has no further prospect of employment and in the 12 months immediately preceding has -

(i) on average worked for less than 4 hours a week,

(ii) been available for employment under section 5 for not less than 39 weeks,

(iii) made reasonable efforts to find employment and not refused any suitable employment;

(f) he has no prospect of future employment and lacks the training or experience to be able to enter or re-enter employment and -

(i) he is within 10 years of attaining pensionable age,

(ii) he has not been in employment in the previous 10 years, and

(iii) during that period the requirement to be available for employment pursuant to section 5 has not applied and would not have applied to him had a claim been made for an allowance by or in respect of him;

.....

(p) he is a person aged not less than 60;

....

(u) the preceding paragraphs do not apply to him, but the circumstances are analogous to any circumstances mentioned in one or more of those paragraphs and in the opinion of the benefit officer [now to be read as the adjudication officer] it would be unreasonable to require him to be available for employment."

4. A reading of the passage which I have just quoted shows that, in the context of relief from the condition of being available for employment, Parliament gave precise and explicit consideration to the age of the relevant claimant. Paragraph (p) specified "60" - and left it at that. That paragraph can present no problems whatever. A Tribunal of Commissioners has expressly stated that 59 cannot be treated as "analogous" to 60 (see paragraph 8 of R(SB) 5/87). Where there is no prospect of future employment and the relevant claimant lacks the training or experience to be able to enter or re-enter employment, the 60 year lower limit is relaxed; but precise periods are specified in sub-paragraphs (i) and (ii) of paragraph (f) - and those periods, clearly, cannot be abridged by any analogy. The construction of legislation depends upon the ascertainment of the intention of the legislature as that intention is manifested by the wording of the statute or statutory instrument the subject of construction. Parliament's intention in respect of the effect of age was made very clear. The adjudicating authorities must be vigilant to ensure that when age is raised in the context of regulation 6, they do not fall into the trap of inadmissibly rewriting regulation 6.

5. Somewhat similar considerations apply to the prospects of further employment. I am well aware that in R(SB) 5/87 the Tribunal of Commissioners said that what the claimant had to show was that there were no <u>realistic</u> prospects of his securing employment again; and I respectfully agree with that. But regulation 6 was very specific as to the contexts in which no further prospects of employment came into play. I have already dealt with paragraph (f). There was also, of course, paragraph (e). But that paragraph made it plain that the lack of prospects had to be "by reason of physical or mental disablement". What is conspicuously lacking from regulation 6 is any reference to the state of the employment market. That cannot have been by some type of oversight, because in 1981 (when the Conditions of Entitlement Regulations were enacted) the depressed state of the employment market was very much to the fore. There are no circumstances set out in regulation 6 to which the depressed state of the labour market could - even by remote conjecture -be regarded as analogous. Indeed, in the final sentence of paragraph 19 of R(SB) 5/87 the Tribunal of

Commissioners was at pains to point out that if a claimant's lack of prospects of employment was attributable solely to the state of the labour market, then such lack would avail him nothing. From the many appeals of this type which have been before me I know that certain representatives of claimants have misconstrued - or affected to misconstrue - what the Tribunal of Commissioners said in R(SB) 5/87 and R(SB) 6/87. Many claimants were led into a state of wholly unjustified optimism. For example, claimants were advised that the fact that they had been put on quarterly signing had some bearing upon the question of whether they should be relieved from the condition of being available for employment. That was always a total misapprehension. The issue is expressly dealt with in paragraphs 8 and 9 of decision on Commissioner's file CSB/1331/1989 (to be reported as R(SB) 10/91); but that decision, given on 29 January 1991, came too late in the day to stem the flood of cases in which representatives relied - or affected to rely - on a relationship between quarterly signing and the applicability of regulation 6.

6. In the grounds submitted by the claimant's representative in support of the application for leave to appeal to the Commissioner a reference is made to the decision in CSSB/147/87. I myself have always regarded the claimant in that case as having been somewhat fortunate in obtaining the result which he did. I suspect that that may also have been the view of the relevant Commissioner. I quote from paragraph 9 of his decision:

> "I have decided, however, in the special circumstances which appear to be applicable to the present case that for the period of 52 weeks prior to the time the claimant requested that the condition of availability for employment should be removed (10 July 1986) it was proper to regard the claimant as having no future prospect of employment due to his age."

So the Commissioner himself was making it clear that he was in no way establishing a precedent of general application.

7. In the case now before me the claimant, who had no special skills, became unemployed in 1983. At that time he was only 46 years old. He was transferred to quarterly signing in January 1987 because - I think - he had then attained the age of 50. But, of course, he was not at that time anywhere near to the ages specified, respectively, in either paragraph (f) or paragraph (p) of regulation 6. It is obvious that, from the health point of view, he considered himself completely fit for his normal type of work - for his representative told the appeal tribunal of applications for "numerous jobs both in this country and abroad". (That was amplified in the grounds submitted in support of the application for leave to appeal to the Commissioner: "A point which sets this appeal apart from others is the great extent to which employment has been pursued worldwide including the Falklands (13 firms), Switzerland, Holland, Shetlands, South China seas and through various multi-national firms.") It was not, in fact, until 26 May 1988 (more than a month after the total abolition of supplementary benefit) that it seems to have occurred to the claimant to seek

retrospective waiver of the requirement to be available for employment as a condition of entitlement to supplementary allowance. I dare say that his application for a review was made on advice tendered to him by his representative; but I am bound to say that the application strikes me as having been extraordinarily optimistic. Even more optimistic was the request that any favourable review should be backdated to January 1987. Such backdating would have depended upon the claimant's being able to invoke the erstwhile regulation 72 of the Social Security (Adjudication) Regulations 1986 by way of escape from the limitation imposed by regulation 69 of those Regulations. It would appear from the papers - although I cannot be certain about this - that the sole justification for invoking regulation 72 turned upon the claimant's having been transferred to quarterly signing. The hopelessness of that line of approach is clearly demonstrated by the decision in CSB/1331/1989, to which I have already referred.

8. In view of -

(a) the claimant's comparative youth at the relevant time, and

(b) the absence of any suggestion that the type of work in which the claimant had been engaged throughout his working life had disappeared through obsolescence,

I should have expected his application to have been supported by compelling medical evidence. It was not. The papers do contain a document, dated 3 November 1989, which, although its provenance is not indicated, appears to have been written by a doctor. That document refers to a chronic perineal rash and to haemorrhoids. It says nothing about what effect - if any - those two relatively minor complaints had upon the claimant's prospects of employment. Moreover, it gives no indication of whether the claimant had or had not suffered from those complaints prior to the abolition of supplementary benefit. As I have already said (see paragraph 7 above), the claimant himself does not appear to have regarded his physical condition as in any way inhibiting his employability. I myself cannot find in the papers any direct evidence that the claimant's prospects of employment were adversely affected by either his state of health or his age. Those prospects were undoubtedly poor. But the fresh appeal tribunal must ask itself whether the depressed state of the local labour market was, in effect, the sole cause of such poorness. To put it another way: In a normally healthy labour market, would a fit man aged between 46 and 51 have had any difficulty in obtaining employment of the type which the claimant was seeking?

9. The errors of law into which the appeal tribunal fell clearly appear from paragraphs 5 and 6 of the submission dated 11 April 1991 and made by the adjudication officer now concerned. I need not rehearse them here. A copy of that submission should be before the appeal tribunal which rehears the case.

10. It is not without hesitation that I have referred this case for rehearing. I have carefully considered whether I ought not to dispose of it by myself giving the final decision. But such a course would, in fact, have caused further delay. On form OSSC3, signed on 29 April 1991, the claimant's representative essayed no further comments of his own. That is understandable enough. The adjudication officer now concerned had expressly invited me to refer the case for rehearing by a fresh appeal tribunal. In such circumstances, I could not properly have proceeded to give my own final decision without affording to the claimant's representative an opportunity of making further submissions in writing. All in all, I have decided that the most expedient course is to allow the matter to be entirely reventilated before a fresh appeal tribunal sitting in Liverpool.

11. The claimant's appeal is allowed.

(Signed) J. Mitchell
Commissioner

(Date) **4 March 1992**