

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF SOCIAL SECURITY COMMISSIONER

389/1982

no reasons of dissenting member

v. to be named of each persons cashing where if only 2 members

1. I allow the claimant's appeal against the decision of the supplementary benefit appeal tribunal dated 11 January 1982 and I set that decision aside as being erroneous in law. I refer the case to a differently constituted tribunal for redetermination in accordance with this decision: Supplementary Benefits Act 1976, section 15A and the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 /S.I. 1980 No 1605, as amended by S.I. 1982 No 407, rules 7(2) and 10(8).

2. This is an appeal by a claimant, a man aged 64 at the material time, against the decision of a supplementary benefit appeal tribunal dated 11 January 1982, in which that tribunal upheld the supplementary benefit officer's determination as to the mode of assessing the claimant's earnings from his business of selling day-old chicks, pullets etc. Because for other reasons (see below) I have set the tribunal's decision aside, I need not comment on the controversies that have arisen as to the mode of assessment of those earnings, as in my view they basically concern questions of fact on which the new tribunal will wish to take evidence and make its own findings of fact. In principle there is no reason why, in my view, a past year's earnings of the business should not be taken as a prima facie measure of earnings in the current year but I leave that to the new tribunal that rehears this case.

3. The reason that I have set the original tribunal's decision aside as being erroneous in law is because that tribunal came to a majority decision but were in breach of rule 7(2)(c) of the above cited Appeals Rules, which provides that a tribunal shall in its written record of the proceedings (form LT 235) "... if a determination is not unanimous, record a statement that one of the members dissented and the reasons given by him for dissenting" (my underlining). Although the tribunal here recorded that the decision was by a majority they did not record the reasons given by the dissenting member. The benefit officer now concerned submits that in failing to record those reasons the tribunal erred in law and supports the claimant's appeal on this ground. I accept that submission and in my view the error is serious enough to oblige me to set the tribunal's decision aside and order a rehearing by a differently constituted tribunal - rule 10(8) of the Appeals Rules.

4. A further procedural matter arises out of a passage in the claimant's grounds of appeal which reads as follows:

"I therefore again applied for a tribunal hearing ... When I arrived to attend the hearing I was told that one member of the panel was not present and would I agree to be heard by the two members. As I had already been waiting over ten months I agreed. In the event my appeal failed due to the casting vote of the chairman."

I have indicated in paragraph 3 above that the decision was reached by a majority i.e. by the use of the chairman's casting vote. In a direction dated 12 January 1983, I requested submissions on "Whether the claimant was informed, before the hearing began, that consent to a two-person tribunal would give the chairman a casting vote. If not, should he have been so informed?".

5. The benefit officer now concerned, in response to that direction, has submitted as follows, (paragraph 3):

"However, as;

- (1) the statements /obtained from the chairman and the clerk to the tribunal/ are inconclusive in that they do not specifically state that the claimant was advised that the chairman would have a casting vote (paragraph 9(3) of Schedule 4 to the Supplementary Benefit Act 1976 as amended), and,
- (2) the benefit officer considers that in the spirit of the rules of natural justice it should have been made clear to the claimant at the time his consent to the appeal being heard by a two-person tribunal was obtained that the chairman would have a casting vote,

it is submitted that there may have been a breach of the rules of natural justice which would constitute an error in law. The benefit officer therefore supports the claimant's appeal on this ground."

I do not accept this submission, in so far as it suggests that the omission would vitiate the tribunal's decision, although I do consider it desirable that the claimant should be told about the chairman's casting vote (see below).

6. The law on this point is contained in the following legislation. Schedule 4 of the Supplementary Benefits Act 1976 (as substituted by the Social Security Act 1979) deals with the constitution, jurisdiction and proceedings of appeal tribunals and provides by paragraph 1 that every tribunal shall consist of a chairman and two members, each with specified 'qualifications'. Paragraph 9(1)(c) of Schedule 4 provides that the Secretary of State may make rules "for authorising proceedings notwithstanding that the members of the tribunal are not all present" and paragraph 9(3) provides that where proceedings take place in accordance with such rules "the tribunal shall, notwithstanding anything in this Act, be deemed to be properly constituted, and the chairman shall have a second or casting vote" (my underlining).

7. The appropriate rule is rule 6(2) of the Appeals Rules which provides,

"6(2) Any matter may, if all interested persons consent, be proceeded with in the absence of any one member of the tribunal other than the chairman"

That rule does not contain any requirements as to what an interested person (including a claimant) should be told before he is asked for his consent to a hearing by a two-person tribunal. In my view it is not correct, contrary to the submission of the benefit officer, that there is a breach of the rules of natural justice if such a party is not told that the consequence of giving his consent is to confer a casting vote upon the chairman, though that may nevertheless be a material factor in deciding whether or not to give such consent. It is theoretically possible for a claimant or other interested party to discover this particular consequence of giving consent, either by a perusal of Schedule 4 of the 1976 Act or from some such document as e.g. the Department's publication "Supplementary Benefits Appeal Tribunals - A Guide to Procedure" (revised edition 1982 - paragraph 39). I do not therefore hold that the failure in this case to advise the claimant that his consent to a two person tribunal would give the chairman a casting vote vitiates the actual hearing or decision.

8. Nevertheless in my view it is desirable that if a claimant has not been informed orally or in writing in advance of this consequence of giving consent to a two person tribunal, then before the hearing commences he should be told by the clerk or the chairman of the possibility of a casting vote by the chairman and be given the opportunity to withdraw consent to a two person tribunal if it has already been given. In so saying, I cast, of course, no reflection on chairmen or the casting vote given to them, but paragraph 1 of Schedule 4 of the 1976 Act (referred to in paragraph 6 above) clearly attaches considerable importance to the actual composition of a tribunal. In my view an interested party ought to be told of the consequences of any departure from the normal constitution of such a tribunal. The existing departmental literature supplied in advance to appellants to tribunals (whether supplementary benefit appeal tribunals or national insurance local tribunals) does not mention the point - perhaps it ought so to do.

9. I ought perhaps to add, though the matter is of course not directly in issue before me, that very similar provisions occur in relation to national insurance local tribunals (see Social Security Act 1975, sections 114, 115 and Schedule 13, and the Social Security (Determination of Claims and Questions) Regulations 1975, /S.I. 1975 No 558/ regulations 11(3) and 12(2)(c)). I see no reason why the rulings that I have given above should not apply equally to the composition of and hearings before those tribunals.

Signed: M J Goodman
Commissioner

Date: 3 June '83

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