

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL TO THE COMMISSIONER FROM DECISION
OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL
UPON A POINT OF LAW

- a person cannot be in full time work if accepted by
the IO as available

CSSB 73/1982

- wrong to average no. hrs worked
over periods not actually worked

Note to be reported QR 23/83

1. My decision is that the decisions of the supplementary benefit appeal tribunal dated 26 February 1982 are erroneous in law and are set aside. The decision which I substitute as the decision which the tribunal should have given is that the claimant is not precluded from entitlement to supplementary benefit by the operation of regulation 9(1)(a)(ii) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 in respect of the periods under appeal.

2. This is an appeal by the supplementary benefit officer, with leave, against 2 decisions of a supplementary benefit appeal tribunal dated 26 February 1982 whereby the tribunal by a majority allowed claims by the claimant for supplementary benefit. An oral hearing was held before me at which, of consent, a similar case, reference C.S.S.B.105/82, which was an appeal by another claimant against a decision of a supplementary benefit appeal tribunal refusing supplementary benefit in similar circumstances, was also dealt with. The supplementary benefit officer was represented by Miss L. Shuker and the claimants who both attended were represented by Mrs. Martin of the General and Municipal Workers Union.

3. The claimant in the present case is employed by a firm of distillers. In January 1981 a system of short-time working was introduced by the firm whereby the claimant normally worked a 40 hour week for 3 weeks out of 4 and then was laid off for the 4th week. This has been a continuing pattern of work since that time. The claimant's employers pay wages in arrears on the "one week's lie time" wage system whereby the wages received by employees in any week relate not to that week's work but to the preceding week. In each lay-off week the claimant therefore receives a week's "lie time" wage. He does not then receive a further wage until the pay day of the second week after he resumes work. The claimant receives unemployment benefit in respect of each lay-off week. Up until December 1981 he also claimed and received supplementary benefit. The payments of unemployment benefit and supplementary benefit, although made after the claimant resumed work after each lay-off week, in effect filled the gap in the claimant's resources left by his lay-off week.

4. On 21 December 1981, however, the supplementary benefit officer decided that the claimant was not entitled to supplementary benefit for the period from 11 to 17 December 1981, initially upon the ground that his income exceeded his requirements. That decision was subsequently revised and the revised ground of disallowance was that the claimant was not entitled to supplementary benefit as he fell to be treated as engaged in remunerative full-time work and so came under the exclusion from benefit in section 6(1) of the Supplementary Benefits Act 1976. The reasoning of the supplementary benefit officer, in brief, was that the average of the claimant's working hours over the 4 week cycle in question exceeded the figure of 30 hours per week specified in regulations. That revised decision has given rise to the issues considered in this appeal (and in C.S.S.B.105/82). A similar decision was also given in the present case by the supplementary benefit officer on 13 January 1982 disallowing supplementary benefit for the further period from 8 to 14 January 1982. Both decisions were appealed to the supplementary benefit appeal tribunal and dealt with by them upon the same basis in 2 decisions dated 26 February 1982.

5. Section 6(1) of the Supplementary Benefits Act 1976 provides:-

"6.-(1) 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 subsection as so engaged."

Regulation 9(1)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 provides as follows:-

"9.-(1) For the purposes of section 6(1)(exclusion from supplementary benefit of certain employed persons) 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;"

6. The majority decision of the supplementary benefit appeal tribunal was reached on the basis that the claimant was not employed during the lay-off week of each 4 week cycle when he claimed (and received) unemployment benefit and it was therefore wrong to average the claimant's working hours to include that week. On behalf of the supplementary benefit officer Miss Shuker contended that that approach did not take account of the full wording of regulation 9(1)(a) quoted above dealing with circumstances in which a person was to be treated as engaged in remunerative full-time work. She also submitted that the tribunal were wrong to conclude that a pattern of working was not established in light of the tribunal's own finding that short-time had been worked on this basis for nearly a year. I agree with Miss Shuker on this last point. She submitted that it was logical and appropriate to take a 4 week cycle of working and apply an average of hours, on the basis of which the claimant fell to be treated as employed on average for not less than 30 hours a week, including his lay-off week, and was therefore excluded from entitlement to supplementary benefit. Mrs. Martin contended that it was not open to take non-working weeks into a calculation of average working hours per week.

7. It was submitted by Miss Shuker that it was immaterial to the application of regulation 9(1)(a) that for unemployment benefit purposes the days of the claimant's lay-off week are regarded as "days of unemployment" under section 17(1)(a)(i) of the Social Security Act 1975. I am unable to agree and I consider that in this connection there arises a preliminary point upon the applicability of regulation 9(1)(a) with which I must deal. Section 5 of the Supplementary Benefits Act 1976 as in force at the relevant time provided:-

"5.- Except in prescribed cases the right of any person to a supplement allowance shall be subject to the condition that he is registered for employment in such manner as may be prescribed and is available for employment; and regulations may make provision as to -

- (a) what is and is not to be treated as employment for the purposes of this section; and
- (b) the circumstances in which a person is or is not to be treated for those purposes as available for employment."

Regulation 4 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 provides as follows:-

"4. For the purposes of section 5 (requirement to register and be available for employment) "employment" means work in employed earner's employment within the meaning of the Social Security Act -

- (a) which the claimant can reasonably be expected to do;
- (b) for which payment is made; and
- (c) for which he would normally be engaged for not less than 30 hours a week

/Regulation

Regulation 5 of the same regulations as in force at the relevant time provided:-

- "5. A claimant required to register for employment pursuant to section 5 shall, except where the Secretary of State decides otherwise, be so registered by registering with the Manpower Services Commission or a local education authority."

Regulation 7(1) of the same regulations contains the following provision:-

- "7.-(1), a claimant shall be treated as available for employment if he is available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act (available to be employed for purposes of unemployment benefit) or regulations made under it,"

The claimant is a person whose right to supplementary allowance was subject to the condition that he be registered and available for employment under the provisions of section 5 quoted above. At the material time the claimant was registered for employment in his lay-off week, and was not only accepted as available for employment in that week for unemployment benefit purposes but must also be treated under the provisions of regulations 4 and 7(1) of the Conditions of Entitlement Regulations as available for, in effect, full-time employment in that week for supplementary benefit purposes under section 5. In my view therefore the claimant must be regarded as satisfying the conditions of section 5 and the regulations relative thereto and to be accepted as such by the supplementary benefit officer, and in these circumstances I consider it quite impossible for the supplementary benefit officer to attempt to apply to the claimant the exclusion provisions of regulation 9(1)(a), made under section 6(1) of the Act so as to treat the claimant as engaged in remunerative full-time work in the same week.

8. On that short point the supplementary benefit officer's appeal fails in the present case. In the circumstances it is unnecessary to decide the other issues on regulation 9(1)(a) which were argued before me and I propose to deal only briefly with them. There are two distinct questions, namely, 1) is regulation 9(1)(a) apt to cover the averaging of working hours over weeks which include non-working weeks so that a 30 hour average can be derived from 3 weeks of 40 hours work and 1 week of lay-off?, and 2) does the regulation enable a week's holiday to be used as a notional 40 hours of work for the purposes of averaging a person's hours of work? This second question arises because the 4 week cycles taken for the purposes of averaging the claimant's hours under regulation 9(1)(a)(ii) were not in fact 4 week cycles of 3 weeks' work and 1 week of lay-off. The facts found show that each cycle chosen included 1 week's holiday instead of a working week.

9. I have considerable doubts whether regulation 9(1)(a) is apt to cover either of these situations. Regulation 9(1)(a) provides for treating a person as engaged in remunerative full-time work in certain circumstances where the person is engaged in some variable paid work, and also in certain circumstances (to be found in the alternative provision at the end of the sub-paragraph) where the person is absent from work. Although the wording is obscure the averaging provision appears to relate only to circumstances in which the person is engaged in work, suggesting that the weeks to be used in calculating the average are weeks in which the person is to some extent engaged in work. The alternative provision deals with absence from work in two widely different circumstances (but not with absence by reason of lay-off.) Furthermore, under these alternative provisions a claimant who is absent on a recognised holiday for a week is no doubt to be treated as engaged in remunerative full-time work, but it does not necessarily follow that that can be used as 40 hours of work for the purposes of calculating average hours of work under regulation 9(1)(a)(ii). I am therefore not satisfied that the application of regulation 9(1)(a)(ii) would, even if otherwise appropriate, enable the claimant to be treated as engaged in remunerative full-time work at any rate in relation to the relevant 4 week cycles chosen in this case, although I prefer not to express any concluded view upon that matter.

10. In the result I agree, although for different reasons, with the conclusion reached by the majority of the supplementary benefit appeal tribunal that regulation 9(1)(a)(ii) does not apply to disentitle the claimant from receiving supplementary benefit for the periods under appeal. It does not however necessarily follow that the claimant is entitled to supplementary benefit since that depends upon the relevant assessment of his requirements and resources. In that connection, notice was very properly given by Miss Shuker that in the event of regulation 9(1)(a)(ii) being held inapplicable the benefit officer would wish to have regard to the provisions of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations 1981 which modify the normal calculation of income resources. Regulation 9(2)(d) provides:-

"9.-(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:-

.....

(d) where the amount of a person's earnings fluctuates, or a person's regular pattern of work is such that he does not work every week, the preceding sub-paragraphs may be modified so that his earnings are averaged over such period as the benefit officer considers reasonable in the circumstances of the case;"

It was presumably upon the basis of this regulation that the supplementary benefit officer originally disallowed the claimant's claim. Since upon the face of it that regulation appears relevant to the circumstances of

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the present case, and indeed to have been framed with just such circumstances in mind, it cannot at this stage be decided that the claimant is entitled to supplementary benefit. To this extent the decision of the supplementary benefit appeal tribunal in the claimant's favour goes too far and must be set aside as erroneous in law. I am satisfied that in the circumstances of this case it is expedient that I should substitute the decision which the tribunal should have given, merely holding that regulation 9(1)(a)(ii) of the Conditions of Entitlement Regulations does not operate to preclude the claimant from entitlement to supplementary benefit.

11. In substance the appeal of the supplementary benefit officer is refused.

J. G. Mitchell
Commissioner
Date: 8th December 1982

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