

DR/DH

Commissioner's File: CSSB/199/85

C.A.O. File: PA 268/85

L.O. Airdrie

L.O. Ref. No.: 2711/34804

SUPPLEMENTARY BENEFITS ACT 1976

APPLICATION FOR LEAVE TO APPEAL AND APPEAL TO COMMISSIONER
FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION
OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Lanarkshire

/ORAL HEARING/

1. My decision is that the decision of the social security appeal tribunal dated 14 May 1985 is erroneous in point of law and is therefore set aside.

2. The application for leave to appeal in connection with this claimant and the applications in connection with three other claimants were dealt with at two oral hearings before me. This claimant and another were represented by Mr Chris Orr of the Child Poverty Action Group. Another claimant was represented by a representative from the Ruchill Unemployed Workers Centre in Glasgow, and the remaining claimant was represented by Ms. Marie Hamill who is a Welfare Rights Officer with the Strathclyde Regional Council. At the hearings before me submissions on behalf of all the claimants were made by Mr. Chris Orr. My understanding is that if I granted the applications, which I have decided to do, I should treat the applications as the appeals. The adjudication Officers now concerned with the appeals were represented by Mr. d'Eca from the Solicitor's Office of the Department of Health and Social Security. I am obliged to them for the careful and able submissions put forward before me in regard to these four appeals.

3. The facts and circumstances relating to each appeal contain certain differences, and therefore a separate decision must be given in regard to each appeal. Certain matters are, however, common to all the appeals and I have decided that I should give my views in that connection in each decision.

4. Section 5(1) of the Supplementary Benefits Act 1976 provides as follows:-

"5.-(1) The right of any person to a supplementary allowance is subject -

(a)/

- (a) except in prescribed cases, to the condition that he is available for employment; and
 - (b) in prescribed cases only, to the further condition that he is registered in the prescribed manner for employment.
- (2) 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."

The prescribed cases mentioned in said section 5(1)(a) are set forth in paragraphs (a) to (u) of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. Under said regulation 6 it is provided that a claimant shall not be required to be available for employment under section 5 in any week in which one or more of the said paragraphs apply. These paragraphs cover a large variety of situations, but I would merely mention the following -

"(c) he is a person -

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(ii) who, by reason of some disease or bodily or mental disablement, is incapable of work, or

.....

.....

(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,

(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;

.....

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.....

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

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.....

.....

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

5. Some of the paragraphs in regulation 6 raise circumstances which entitle claimants to be relieved of the necessity of proving availability for work for only short periods. What may be important in regard to other claimants who are in receipt of supplementary benefit is that if they do not have to prove availability for employment for one year, they become entitled to the higher rate of supplementary benefit. All the four claimants mentioned above are over 50 years of age but have not yet reached 60 years of age, and none of them satisfies in full any of the paragraphs relating to prescribed cases set forth in paragraphs (a) to (t) in regulation 6 mentioned above. They all contend, however, that because of their age they have no further prospect of employment due to the high unemployment situation in the West of Scotland, and they contend that having regard to the provisions of paragraphs (e) and (u) they should be relieved of the necessity of proving availability for employment which would then enable them in due course to be found entitled to supplementary benefit at the higher rate. One of the claimants also contends that he satisfies most of the conditions set forth in regulation 6(f) quoted above. There are, I understand, a very large number of claimants who may be in similar circumstances to the present four claimants.

6. Before dealing with the main submissions which were put forward in relation to the present appeals I would mention the following two matters:-

(a) . In some of the documents before me issues in regard to registration for employment are raised by adjudication officers and social security appeal tribunals. The four claimants with which I am concerned did not require to be registered for employment. It is in my view clear, however, that the adjudication officers and tribunals in question applied their minds properly to the basic issue regarding whether availability for employment had to be proved albeit mention of registration was made. I therefore do not propose to deal any further with this question of registration except to remind the tribunals who will have to deal with these cases in future that they should disregard the question of registration.

- (b) The four claimants under consideration wished to have reviewed the decisions which necessitated them proving availability for employment. The representative of the adjudication Officers now concerned with the case pointed out that the tribunals who dealt with the claimants' cases had not set forth in their decisions whether they had considered and decided that the claimants had satisfied the review provisions contained in section 104 of the Social Security Act 1975 which also apply to supplementary benefit cases. It is not clear whether the tribunals in fact considered whether the review provisions were satisfied, but I am prepared to proceed on the basis that they did so.

7. One of the main issues which arose for consideration at the hearings before me was connected with the interpretation to be placed on said regulation 6(u) quoted above. The main argument put forward by the adjudication officers' representative in this connection was that under section 5 of the 1976 Act the general rule was that all persons claiming supplementary benefit had to be available for employment. It was then maintained that in those circumstances regulation 6 which set forth exceptions to that rule had therefore to be construed strictly. It was maintained that if a person could not bring himself within any of the exceptions set forth in regulation 6, a proper construction of regulation 6(u) only entitled him to succeed in a contention that he should not be required to be available for employment if he proved that his circumstances were analogous to the whole of the provisions contained in one or more of the preceding paragraphs in regulation 6. He therefore maintained that with regard to paragraph (e) that although the four claimants in question could doubtless satisfy the conditions set forth in (i), (ii) and (iii), they could not be held to have circumstances analogous to said paragraph (e) since in the case of each claimant his age by itself was not analogous to a physical or mental disablement. It was further contended that the provisions of regulation 6(u) did not warrant a person avoiding the said general rule relating to availability for employment by establishing that his circumstances were similar to some, but not all, of the circumstances set forth in one or more of the other paragraphs in regulation 6. In support of these contentions the adjudication officer's representative founded on the rule generalia specialibus non derogant, the rule expressio unius est exclusio alterius and the ejusden generis rule. He cited various cases dealing with these rules. In answer to these contentions it was maintained on behalf of the claimants that if the said submissions put forward on behalf of the adjudication officers had been the intention of the legislature, all that would have been required to be contained in paragraph (u) was that a claimant's circumstances should be analogous to the circumstances mentioned in one of the preceding paragraphs. It was pointed out that paragraph (u) provided that if the preceding paragraphs did not apply to a claimant, that claimant had only to establish that the circumstances were analogous to any circumstances mentioned in one or more of the preceding paragraphs. It was therefore contended that it was permissible for a claimant when founding on paragraph (u) to found on circumstances, but not necessarily all the circumstances, set forth in one or more of the paragraphs (a) to (t) of regulation 6 when putting forward the contention that he did not require to be

available/

available for employment. In this connection it was argued that although a large number of claimants could doubtless satisfy some circumstances in one or more of the paragraphs in regulation 6 as being analogous to their circumstances, the important point to note was that when applying paragraph (u) a claimant had also to satisfy the adjudication officer that it would be unreasonable to require him to be available for employment.

I have reached the conclusion that I should accept the submissions put forward on behalf of the claimants in that connection. It seems clear that paragraph (u) was inserted in general terms to give adjudication officers a wide discretion when dealing with the necessity of proving availability for work in regard to claimants claiming supplementary benefit. In other words it seems to me that when adjudication officers and social security appeal tribunals are applying paragraph (u) they must decide whether a claimant's circumstances are analogous to any circumstances mentioned in one or more of paragraphs (a) to (t), and then exercising a proper discretion must then decide whether it would be unreasonable to require the claimant in question to be available for employment.

8. One of the most important submissions put forward on behalf of the said 4 claimants was that when considering the provisions of regulation 6(e) quoted above in regard to areas of high unemployment age should be considered as analogous, i.e. not the same as but similar, to a physical or mental disability when considering employment prospects. It was also pointed out in this connection that the Department of Employment required persons who were aged 50 years or over to sign only quarterly for employment in an area where it was known that job opportunities for people of that age were very limited. In this whole connection I would mention the following matters:-

- (1) Persons over 60 years of age, even although capable of work, do not have to prove availability for employment - see regulation 6(p).
- (2) Age by itself in regard to persons under 60 years of age is not in my opinion a physical or mental disablement nor is it analogous to a physical or mental disablement.
- (3) A person under 60 years of age who does not suffer from a physical or mental disablement but who lives in an area of high unemployment may have no further prospects of employment. Such a person, however, does not satisfy the provisions of regulation 6(e).
- (4) What is a more difficult question is whether such a person as is mentioned in (3) above who lives in an area of high unemployment should be regarded as having circumstances analogous to a person who through a physical or mental disability has no further prospects of employment.

I have finally decided that a person under 60 years of age with no physical or mental disablement who lives in an area of high unemployment and has no further prospects of employment should not be regarded as having circumstances analogous to a person who by reason of physical or mental disablement has no further prospects of employment.

9. The claimant is a married man who at the time under consideration was 53 years of age. He was living with his wife and 5 children. His normal occupation was that of an assembler, but he was last employed as a club steward from 26 November 1979 to 12 February 1980 which was a temporary job. He has been in receipt of a supplementary allowance since 22 February 1980. He apparently keeps good health, and the information is to the effect that he does not suffer from any illness or disability. His wife, however, suffers from arthritis in her hips, and the claimant maintains that he helps around the house. His wife, however, does not qualify for attendance allowance, and the information before me is in my opinion to the effect that he does not satisfy the provisions of paragraphs (b) or (hh) of regulation 6. On 28 January 1985 a letter was received from the Child Poverty Action Group on behalf of the claimant in which it was requested that the requirement for the claimant to be available for work should be waived, and it was also requested that entitlement to the long term scale rate be back-dated by 2 years. The local adjudication officer refused to review the decision that the claimant was not entitled to have the requirement regarding availability waived. The claimant appealed against that decision, and the majority of a social security appeal tribunal (the legal chairman dissenting) allowed the appeal. The reasons for the tribunal's decision were as follows:-

"Granted (Single Payment) under 6(u). Age is analogous to 6(e) and it would be unreasonable to require appellant to be available for employment. Supplementary Benefit (Conditions of Entitlement) Regulations 1981. Section 6."

10. The majority of the tribunal reached their decision on the basis that in the claimant's case his age was analogous to a physical or mental disablement within the meaning of regulation 6(e). By proceeding on that basis the tribunal in my view erred in law, and their decision must therefore be set aside. I would add that I also consider that the tribunal's said decision is erroneous in point of law in that it did not comply sufficiently with the provisions of regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984. The case must now be reconsidered by another tribunal who after considering the evidence before them, and having regard to what I have stated above, must reach a decision regarding the said question of availability, and they should give adequate reasons for the decision they reach in that connection.

11. The appeal by the adjudication officer now concerned with the case is allowed.

(signed) Douglas Reith
Commissioner
Date: 12 February 1986