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RAS/9/LS

Commissioner's File: CSSB/212/87

Region: Scotland

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

ENTITIFIABLE DECISION  
IT TO BE SENT OUT OF  
THE DEPARTMENT

1. My decision is that the decision of the social security appeal tribunal dated 27 May 1986 is erroneous in law. I set it aside and direct that the case be reheard by a differently constituted tribunal.

2. The claimant appeals against the tribunal's decision upholding an adjudication officer's decision that the claimant was required to be available for employment as a condition of entitlement to a supplementary allowance. That condition which is imposed by section 5(1) of the Supplementary Benefits Act 1976 does not apply if any of the paragraphs of regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 applies to the claimant and regulation 8 of those Regulations does not apply. The question for the tribunal was whether any of the regulation 6 paragraphs applied. It was apparently not in issue that regulation 8 did not apply. The somewhat lengthy provisions in question have been fully set out in the submissions of the adjudication officer who is now concerned with the case and there is no reason for me to set them out again here. All I need say is that paragraphs (a) to (u) of regulation 6 provide over twenty different circumstances in which a person is not required to be available for employment, and it appears from the tribunal's reasons for their decision that the claimant relied on paragraph (u) on the basis that his circumstances were analogous to those in paragraph (e), possibly also paragraph (f).

3. The grounds for this appeal put forward on behalf of the claimant are -

- a) they have made no notes of evidence, this is a breach of natural justice (CSB 613/83 page 25 of Tribunal Procedure manual)
- b) they have used the wrong test for prospects 'nil', 'not hopeless' the correct test should be no prospect in work he could reasonably be expected to do
- c) in considering alternative forms of employment they have given inadequate reasons as they have not considered the personal factors of age, education, experience (R(S)11/51)."

As to (a) it is, as I understand it, the submission of the adjudication officer who is now concerned with the case that a failure on the part of a tribunal chairman to provide a note of the evidence can never amount to an error of law. She relies on CSB/0610/86 and CSB/613/83. It is true that in the first of those cases the Commissioner said that there was "no duty to make a verbatim record of all that transpired". (my underlining). That however is a long way from supporting the adjudication officer's proposition. In the second of the two cases the chairman had stated in the box provided for the note of the evidence that a note would be supplied if needed for an appeal. The Commissioner said, and I agree, that

that is an undesirable practice. He did not say however that the failure to provide a note of the evidence would never amount to an error of law. It may be that there are cases where the need for a note is less compelling e.g. where there is a simple point of law which disposes of the case and in respect of which no evidence could make any difference. But in the instant case where the findings of fact may well be crucial it seems to me to be fundamental that the parties must be able to see from the decision from what evidence the findings of fact were derived. It has long been held that where the findings show that certain evidence has been rejected the tribunal must explain why. Equally, where there is conflicting evidence the tribunal must explain why they preferred the evidence they did. A tribunal's failure to provide such an explanation is an error of law. And if that is so, it seems to me to be equally an error of law to leave the parties in the dark as to how the findings came to be made. There is some support for this view in R(I) 81/51, R(I) 42/59 and in R(SB) 8/84, a decision of a Tribunal of Commissioners. The Tribunal remitted the case they were considering for rehearing and their directions to the new tribunal included (see paragraph 25) -

"If the claimant does give such evidence [the tribunal must] ensure that there is a chairman's note of such evidence identifying clearly where such evidence begins and where it ends. It is quite impossible to tell from the chairman's note of evidence given in the decision now set aside by us whether any evidence was given at all and, if so, who gave that evidence?"

In that case there was a note of the evidence but it was deficient. The Commissioners' approach to the matter as shown by the passage I have just quoted must apply with even greater force where, as in the present case, there is no note of the evidence at all. The parties cannot possibly know what evidence the tribunal considered or how they came to make their findings of fact. And of course on appeal from the tribunal the Commissioner does not know and cannot guess whether the facts were correctly found or indeed whether there was any evidence at all to justify any of the findings. In my view the failure in this case to make any note of the evidence - it does not need to be a verbatim account - is an error of law and I set the decision aside. I should perhaps add that in my view it makes no difference at all to the need, as I have explained it, for the chairman to make a note of relevant evidence that there is no statutory duty imposed on him to do so.

4. With regard to the other grounds of appeal I think I need say only that the tribunal's decision came before CSSB/189/1985 which was a decision of a Tribunal of Commissioners and which dealt with the test for satisfying "no further prospect of employment" in paragraph (e), "no prospect of future employment" in paragraph (i), the application of paragraph (u) and the interaction of that paragraph with paragraph (e) and the other paragraphs of regulation 6. The new tribunal must have careful regard to the principles as explained by the Tribunal of Commissioners. There is a convenient summary in paragraph 23 of their decision - the point made in paragraph 23(g) must not be overlooked. And in relation to the reference in the tribunal's reasons to CSSB/177/85 the new tribunal will see that the Tribunal of Commissioners have expressly disapproved paragraph 8 of that decision with regard to whether age can be analogous to disablement.

(Signed) R A Sanders  
Commissioner

Date: 20 January 1988