FAMILY INCOME SUPPLEMENT

Period of award

Family income supplement was awarded at the weekly rate of £12.00 for a 52 week period The claimants appealed against this award because it failed to have regard to the expected birth of a third child and the consequent loss of the wife's earnings The appeal tribunal decided that the period of the award should be reduced to 26 weeks as the expected change in circumstances could be foreseen at the time of the award and so that a fresh claim could be made after the birth of the additional child and the loss of earnings

Held that:

1. the only regulation which has any bearing, Regulation 3(1) of the Family Income Supplements (General) Regulations 1980, does not enable an award to be made for a period of less than 52 weeks unless at the time when the matter is considered there is doubt as to the rate at which benefit is then payable The regulation does not apply where there is doubt as to the rate of benefit which would be payable if a claim were made later in the 52 week period (paragraphs 7 and 11);

2 the decision of the appeal tribunal is set aside (paragraph 19).

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1. I set aside the decision of the supplementary benefit appeal tribunal dated 12 June 1981 and I remit the appeal to a differently constituted supplementary benefit appeal tribunal for rehearing in accordance with this decision. The appeal of the supplement officer against the said decision of the supplementary benefit appeal tribunal is therefore allowed: Supplementary Benefit and Family Income Supplements (Appeals) Rules, 1980, [S.I. 1980 No 1605] Rules 8–11.

2. This is an appeal by a supplement officer (for which I gave leave on 19 August 1981) against the decision of a supplementary benefit appeal tribunal, dated 12 June 1981, by which that tribunal unanimously decided, "Family Income Supplement to be paid at the weekly rate of £12.00 for the period 31 March 1981 to 22 September 1981". That decision had the effect of allowing the claimants' appeal because it substituted, for a decision of the supplement officer that family income supplement at the weekly rate of £12.00 should be awarded to the claimants for *52 weeks*, the tribunal's decision that family income supplement at £12.00 a week should be awarded for only *26 weeks*. The reason that the tribunal made that reduction in the period of the award and thereby allowed the claimants' appeal is because the female claimant was expecting another child in August 1981 and had therefore appealed against the award of a fixed sum of £12.00 per week (based on her existing family of two children) lasting as far ahead as 29 March 1982.

3. The female claimant explained, in a letter dated 27 April 1981, that she was afraid that there might be trouble (as there had been with the previous child) with the pregnancy and she expected to have to stop work for at least two months. Written representations dated 4 September 1981 from the female claimant state that she had spent the last four weeks in hospital because she had become unwell while carrying her baby, and as a result the birth had been induced two weeks early. As to that, I should say at once that although the law compels me to uphold the Supplement Officer's appeal in this case that does not imply any lack of sympathy for her and her husband in the medical and financial problems they have had with their children.

4. Because of the expected birth of the third child, the tribunal reduced the period of the award of £12.00 a week family income supplement from 52

weeks to 26 weeks. That would enable the claimant to apply again for family income supplement in September 1981 (when the tribunal's award ended), on the footing that the family would then consist of three children and their mother would not be earning, with a consequent increase of the amount of family income supplement. The question in this appeal is whether the tribunal had power to make that reduction in the period of the award. For the legal reasons set out below I hold that they had no such power on the facts of this case and I have therefore set aside their decision.

5. Section 6 of the Family Income Supplements Act 1970 (as amended by the Pensioners and Family Income Supplement Payments Act 1972 section 3(1) and the Social Security Act 1980 section 7) provides as follows:

> "6(1) Any question as to the right to or the amount of a family income supplement shall be referred to and determined by a supplement officer, whose decision shall be final, subject to the provisions of this Act as to appeals, and regulations may provide for different aspects of the same question to be dealt with by different supplement officers.
>
> (2) Unless regulations otherwise provide, any such question shall be determined as at the date when the claim to the family income supplement is made.
>
> (3) Any family income supplement determined by a supplement officer to be payable shall be payable for a period of fifty-two weeks, or such other period as may be prescribed by regulations, beginning with the said date or some other date so prescribed and, subject to any provision of regulations, the rate at which it is payable shall not be affected by any change of circumstances during that period" (my underlining).

6. The tribunal gave as its reasons for decision,

> "It appeared to the tribunal that the expected change in the circumstances could be foreseen at the time that the FIS was awarded and that it would have been more equitable to have made the award for a shorter period than 12 months. Accordingly the period of award has been reduced to 26 weeks".

However the tribunal would have had no power to make such a reduction in the award, and in particular not to take into account "any change of circumstances" (section 6(3) of the 1970 Act), unless there is some specific provision in regulations which allowed them so to do.

7. The only regulation which has any bearing on this particular set of circumstances is regulation 3(1) of the Family Income Supplements (General) Regulations 1980 [S.I. 1980 No 1437], which provides as follows:

> *"Circumstances in which benefit may be made payable otherwise than for 52 weeks beginning with the date of the claim therefor and in which the rate of benefit payable may be increased*
>
> 3(1) Where the available evidence leaves the determining authority in doubt as to the rate at which benefit should be payable, but satisfies it that benefit should be payable at not less than a certain weekly rate, it may determine that benefit shall be payable at the latter rate for a period of less than fifty-two weeks, but not less than four weeks".

8. That particular regulation was considered in the High Court by Woolf J in the case of *Secretary of State for Social Services v Williams* (dated 19 March 1981—unreported). A transcript of the judgment in that case has

been supplied as part of the appeal papers. In that case the learned Judge was concerned with the question whether, if another child was born into the family, a 52 week award of family income supplement could be reviewed and shortened so as to enable a further application to be made for family income supplement at a higher rate. The learned Judge held that it could not. The legal issues were virtually identical with those in this case. The only factual difference is that in this case the claimant's appeal is based not only on the fact that an additional child was due to be born into the family, but that also her income as a part-time cleaner of £19.00 per week would cease for a while at the time of the birth of the child. However, after careful consideration of the judgment of Woolf J, I have come to the conclusion that that judgment is sufficient to cover the circumstances of this case also.

9. The learned Judge said of an earlier regulation 3(1), (page 8, paragraphs E and F of the transcript),

> "Regulation 3(1) refers to doubt as to the rate at which benefit should be payable, and then goes on to provide that where that situation is concerned the benefit should be payable for a period at the rate which would, in effect, be the minimum entitlement for that period. It seems to me that it is contemplating a situation where what is uncertain is the existing entitlement to benefit, and not an uncertainty as to the future entitlement to benefit".

10. The learned Judge was considering the Family Income Supplements (General) Regulations 1971, regulation 3(1), the wording of which was identical on this point, though I note that he took into account the fact that the 1971 Regulations did not purport to be made under section 6(3) of the 1970 Act (see transcript of judgment, page 9, paragraphs D, E and F) whereas the 1980 Regulations *are* expressed to be made under section 6(3) of the Act. However, I do not consider that that in any way justifies me in distinguishing Woolf J's judgment.

11. In the *Williams* case the learned judge added, (transcript page 9, paragraph H and page 10, paragraph A),

> "It is having regard to the scheme as a whole, emphasised by section 6(3), that I have come to the conclusion that it is not reasonable to use regulation 3(1) in a case where, at the time the matter is considered, there is no doubt as to the rate at which benefit was then payable, but there is doubt as to what rate of benefit would be payable if a claim were to be made at a later date during the 52 week period".

12. That statement is wide enough to cover the problem with which I am faced in this appeal, and I regard myself therefore as bound to apply the learned Judge's ruling to the relevant provisions of the Family Income Supplements Act 1970 and the Family Income Supplements (General) Regulations 1980 (even taking into account the slight difference between the 1971 and the 1980 Regulations—see paragraph 10 above). It is noteworthy that a similar conclusion was reached in the High Court of Justice in Northern Ireland by Hutton J. A transcript (undated) of that judgment is also part of the appeal papers.

13. As I have indicated above, one significant feature that does distinguish this present case from the cases considered by both Woolf J, and Hutton J, is that in this case there was taken into account in assessing the family income supplement the earnings of the wife, and the point of her appeal was, in large measure, that those earnings would cease at the time she had her third child. That element was not present, or at least not stated to be present, in the two cases considered by Woolf J and Hutton J. I there-

fore have given very careful consideration to whether in any way that circumstance in this case should cause me to distinguish the decisions of Woolf J and Hutton J. However, for reasons given in the following paragraphs, I have come to the conclusion, because of the breadth of the reasons given by Woolf J and Hutton J, that I ought not to distinguish those decisions.

14. Section 4 of the Family Income Supplements Act 1970 provides,

> "4(1) The resources of a family taken into account for the purposes of this Act shall be the aggregate of the normal gross income of its members, excluding, except where regulations otherwise provide, the income of any child.
>
> (2) For the purposes of this Act a person's normal gross income and the weekly amount thereof shall be calculated or estimated in such manner as regulations may provide;...."

15. The relevant regulation is regulation 2(1) and (2) of the Family Income Supplements (General) Regulations 1980, which provides,

> "2(1) For the purposes of the Act, a person's normal gross income and the weekly amount thereof shall be calculated or estimated in the manner provided in paragraphs (2)–(6).
>
> (2) In so far as a person's normal gross income consists of earnings from a gainful occupation, the weekly amount of that person's normal gross income therefrom shall be calculated or estimated by reference to the average of his earnings from that occupation over the period of the five weeks (being pay weeks if in respect of that occupation he is paid weekly) or the two pay-months (if in respect of that occupation he is paid monthly) immediately preceding the date on which the claim is made, save, however, that in any case, and in particular in a case where a person has been working abnormally long or short hours in a gainful occupation, or has commenced working in a gainful occupation shortly before the claim is made, or is following a gainful occupation from which his earnings normally fluctuate at approximately the same time or times each year, or is following a gainful occupation otherwise than under a contract of service, the determining authority may have regard to the average of a person's earnings from a gainful occupation over such other period or periods as may appear to it to be appropriate in order properly to determine what is that person's normal weekly income therefrom".

16. That meant that in this case, for example, the supplement officer assessed the wife's earnings as being her earnings for the 5 weeks prior to the date of claim (3 March 1981). There was no evidence that she had worked abnormally long or short hours or had commenced working (in her occupation as part-time cleaner) shortly before the claim was made, or that the earnings normally fluctuated. The question is therefore whether under the general provision of regulation 2(2) this was a situation where the 5 week rule should be abandoned. Was it "any case...[in which] the determining authority may have regard to the average of a person's earnings from a gainful occupation over such other period or periods as may appear to it to be appropriate in order properly to determine what is that person's normal weekly income therefrom" (Regulation 2(2))?

17. I have concluded that this was not such a case and that that provision of regulation 2(2) refers to a situation where for some reason the "rule of

thumb" of taking the previous 5 weeks or two pay-months income would produce an inaccurate result *as at the date of claim.* I do not consider that it should be a reason for departing from the 5 week or two pay months rule because it is envisaged that *in the future* the income of a family will diminish or increase. The whole scheme of family income supplements, as emphasised by Woolf J, in the *Williams* case, is that a once and for all assessment should be made of 52 weeks forward from the date of the claim and that fluctuations of income, family membership, etc thereafter shall not normally affect the rule that the assessment must be for a fixed period of 52 weeks, based on the financial and family circumstances at the beginning of those 52 weeks (see section 6(3) of the 1970 Act cited in paragraph 5 above).

18. Regulation 3(1) of the General Regulations (cited in paragraph 7 above), as construed by Woolf J in the *Williams* case, refers only to a situation where as at the date of claim it is not clear exactly what the financial circumstances of the family are, and therefore the supplement officer is given the power to make a "holding award" of the minimum amount payable, with a possibility that it may be increased later. However, that refers only to a situation where *as at the date of claim* the financial circumstances of the family are not clear. It does not refer to a situation where it is envisaged that those financial circumstances may change at some time in the future, whether by reason of the coming of an additional child into the family or the foreseen loss (or indeed gain) of income of any member of the family.

19. Consequently, I am obliged to allow the appeal of the supplement officer in this case, which means that under rule 10(8) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980, I must set the decision of the tribunal aside and refer this case for rehearing to another supplementary benefit appeals tribunal. That appeals tribunal is required by rule 10(8) to follow directions given by me for the determination of this case, and the practical effect of my decision in this case is that the new tribunal must, in my view, make an award of family income supplement to the claimants in the same terms as that made originally by the supplement officer, i.e. of £12.00 per week for the inclusive period from 31 March 1981 to 29 March 1982.

(Signed) M. J. Goodman
Commissioner