## SUPPLEMENTARY BENEFIT

**Resources—notional earnings.**

The claimant, who lived alone, was unemployed and had been in receipt of supplementary allowance since 1976. He had no other income. Following the receipt of information, the Department made enquiries which confirmed that he was working 4 days a week for a total of 28 hours. In a statement made at the Unemployment Benefit Office the claimant declared earnings of £8 for 2 days work and his employer subsequently confirmed he was paid £4 each time he worked. The benefit officer basing his findings on information obtained from a special investigator found that a rate of £1.50 per hour was a reasonable working wage and calculated the claimant's earnings at £42 per week which precluded the payment of supplementary allowance from 18 February 1984. On appeal the tribunal confirmed the benefit officer's decision and the claimant appealed to a Social Security Commissioner. The Commissioner held that the tribunal's findings of fact and reasons for decision were inadequate in a number of respects. He referred the case to another tribunal and gave detailed directions as to the points on which findings should be made. The Commissioner adopted the construction of regulation 4(3) of the Resources Regulations set out in CSB 92/1984 and reproduced this as an Appendix.

*Held* that:

1. for the application of regulation 4(3) it was necessary to establish:
   (i) the identity of the employer;
   (ii) the particulars of the services provided by the member of the assessment unit for that employer;
   (iii) the actual payment made for the services (including payment in kind);
   (iv) the amount which would be paid for comparable employment

   and for the purposes of that regulation "person" included a limited company or other corporate employer (Appendix para 10);

2. the onus of proof throughout regulation 4(3) lay with the benefit officer. The standard of proof was that of establishing the facts on a balance of probability (Appendix para 11);

3. the discretion to treat a member as possessing notional earnings should be expressed in a judicial manner taking into account all the circumstances (Appendix paras 13 and 14);

4. notional earnings should be reduced by the amount actually paid by the employer and according to the employer's ability to pay (Appendix para 16).

The appeal was allowed.

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1. My decision is that the decision of the social security appeal tribunal ("SSAT") dated 20 June 1984 is erroneous in point of law. I set it aside and refer the case to a social security appeal tribunal for determination in accordance with my directions.

*Nature of the appeal*

2. This appeal is concerned with the discretion, conferred by regulation 4(3) of the Resources Regulations, to treat a claimant as having actually been paid earnings for a service for which he has been paid nothing, or less than that paid for comparable employment.

*The relevant law*

3. Paragraph (3) of regulation 4 (which is headed "Notional resources") of the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No. 1527] provides:

> "Where a member of the assessment unit performs for another person a service for which that person makes either no payment or a payment less than that paid for comparable employment, an amount of earnings calculated by reference to such employment and the means of that person may be treated as if it were actually paid to and possessed by the member of the assessment unit".

*The benefit officer's decision*

4. On 17 February 1984 a supplementary benefit (now adjudication) officer decided that supplementary allowance was not payable for the period 18 February 1984 to 24 February 1984.

5. The claimant appealed against that decision and in his written submission to the appeal tribunal, set out on Form LT205, the benefit officer said that the facts before him were as follows. The claimant was a divorced man of 38 with no dependants. His income consisted of supplementary allowance only, there being no unemployment benefit entitlement. He had no other source of income and no capital. Being a local authority tenant his housing costs were met under the terms of the Housing Benefit Scheme. An enquiry by a special investigator of the D.H.S.S. was begun, following information received from an anonymous caller that the claimant was working, selling and fitting carpets. Enquiries confirmed that he was working for N[....] Carpets on Tuesday, Wednesday, Friday and Saturday of each week, the working days being of seven hours from ten to five o'clock on those days including travelling time. The claimant completed a B7 form at the Unemployment Benefit Office on 16th February, in which he declared earnings of £8 for two days work on the 11th and 14th February at £4 per day. A letter was received from the employer that the claimant received only £4 each time he worked. The special investigator dealing with the claimant's case "determined that a rate of £1.50 per hour was a reasonable working wage and that the claimant worked 7 hours per day, from ten to five for 4 days per week, and that that

number of hours should be taken into account". The claimant made a new claim for supplementary allowance on 21st February 1984, stating that he had terminated his employment on 18th February.

6. The reasons for the benefit officer's decision were stated to be that he had calculated the claimant's earnings "based on the decision of the special investigator", this was that the claimant earned £1.50 per hour for a 7 hour day giving a total earnings figure per day of £10.50. As he was taken to be working for 4 days per week an earnings per week figure of £42 resulted. Referring to regulation 10(5)(a) of the Resources Regulations he took the whole of these earnings less the first £4 into account against the claimant's requirements, but allowed 48 pence per day (£1.98 for four days per week) for bus fares under regulation 10(4)(c)(i) of the Resources Regulations. This did not affect the decision. The result of offsetting the claimant's resources against his requirements was that for the pay week commencing 18 February 1984 there was no entitlement to supplementary allowance.

*Claimant's grounds of appeal to the SSAT*

7. The claimant, in appealing against this decision, stated in writing:

> "The Department of Social Security "assume" I was getting £1.50 per hour because that's what 'they assess the work worth', I have given letters to the department from Mr.[..] N[...] stating I only received £4.00, I cannot afford for the department to "assume" I got £30.00 on the 18th February, because I never....."

He enclosed a letter from the employer saying that he employed casual labour on a daily basis for which he employed men at £1 an hour.

The men worked for only 4 hours in the day for which he paid them £4. In a further written submission the claimant said that the decision of the special investigator that he was paid £1.50 per hour was a purely arbitrary one and one not based upon the facts. He submitted a detailed calculation as to his requirements and resources for the period in issue showing part time earnings of £16 (4 days of 4 hours at £1 per hour). This sets out figures for his total requirements less resources and gives a supplementary benefit entitlement of £20.88.

*The SSAT decision*

8. The SSAT heard the appeal on 20 June 1984. The record of their decision shows that the claimant was present. In the box for the names of witnesses, that of a Mr. H.[...] who is described there as "Special Investigator" is given. They affirmed, it seems unanimously, the benefit (now an adjudication) officer's decision. Boxes 1, 2, 3 and 4 of the record are in these terms:

> 1. Chairman's note of evidence (*ie concise details of all oral and written evidence put before the Tribunal*)
>
> A letter from Mr. [..] N[...] was submitted to the Tribunal stating that the appellant only worked 4 hours for which he paid him £4.
>
> 2. Findings of Tribunal on questions of fact material to decision (*ie the relevant facts accepted from the evidence available*)
>
> The Tribunal accepted the facts as listed on form LT205.
>
> 3. Full text of *unanimous/*majority decision on the *Appeal/ *Reference (*including amounts and effective date (s) as appropriate*)
>
> That the appellant is not entitled to supplementary benefit for the period 18.2.84 to 24.2.84.

4. Reasons for decision (*ie an explanation of why, when applying the facts to the statutory provisions and case-law, a particular conclusion has been reached. And why, if it is not clear from box 2, certain evidence has been accepted or rejected*).

The appellant was employed by N[. . .] Carpets for 7 hours per day for 4 days a week and under the Resources Regulations, Notional Resources 4(3) an amount of £1.50 per hour should be taken into account as a notional payment. This calculation showed that his resources exceeded his requirements by approximately £6 per week and is therefore not entitled to supplementary benefit.

*Was the decision of the SSAT erroneous in law?*

9. The SSAT's decision was expressly made in reliance on regulation 4(3) of the Resources Regulations. But the tribunal's findings of fact are quite inadequate to support the attribution of a notional resource to the claimant under that regulation. There is nothing in the record to suggest that the question of the employer making "a payment less than that paid for comparable employment" was ever considered at all. There are no findings as to the claimant's actual earnings, followed by consideration of what the work involved and the employer's means. Paragraph 6 of the reasons given for the supplementary benefit officer's decision suggests that there was conflicting evidence concerning the claimant's actual earnings: which the tribunal did not resolve, or, indeed, consider. Nor is there any finding as to whether the employer was Mr. N[.....] trading under the name of "N[. . .] Carpets" or whether the claimant was an employee of N[....] Carpets, a distinct legal person from Mr. N[. . .], which was essential since the employer's means are required to be considered under the regulation. As regards the SSAT's reasons, it is fundamental to regulation 4(3) to appreciate that the provision enabling a claimant to be treated as having earnings which he did not in fact have is discretionary. The record of the SSAT's decision contains nothing to indicate that the SSAT realised that they had a discretion or, if they did, on what basis they were exercising that discretion. The decision of the SSAT is accordingly erroneous in point of law for failure to comply with regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984 (as amended) which requires the record of the SSAT decision to show their findings on the material facts and the reasons for their decision.

*Is it expedient to give the decision that the SSAT should have given?*

10. Since the material facts have not been found, it is neither expedient nor possible to give the decision that the SSAT should have given. The case must accordingly be referred to another social security appeal tribunal which should, in accordance with the usual practice, be entirely differently constituted, for determination in accordance with my directions.

*Directions to the social security appeal tribunal*

11. The social security appeal tribunal to whom the case is now referred should:

(1) re-hear the entire appeal

(2) find the facts as to the claimant's employment and as to his actual earnings, indicating where any evidence given (e.g. by the claimant, the special investigator or the employer) is in conflict, what evidence they prefer and why

(3) in considering the application of regulation 4(3) of the Resources Regulations, adopt the construction of that regulation set out in the decision on Commissioner's file the reference to which is CSB 92/1984

(a copy of which is contained in the case papers). For convenience, the relevant paragraphs are set out in the Appendix to this decision

(4) consider whether the claimant's income resources including any income deemed to be his by virtue of regulation 4(3) of the Resources Regulations (taking care to avoid double counting) exceed his requirements. If they do, supplementary allowance will not be payable. The calculations should be in evidence and it should be possible to identify, from the record of the tribunal's decision, what calculations have been accepted, and their result, any disputed points being stated and the manner in which they are resolved indicated

(5) consider and make findings on all other relevant points raised by or on behalf of the claimant or the adjudication officer.

12. The record of the tribunal's decision should comply with regulation 19(2)(b) of the Social Security (Adjudication) Regulations 1984, as amended, which requires the chairman to record the material facts and set out the reasons for the tribunal's decision. These should include the reasons for the exercise of their discretion: cf. *Eagil Trust Co Ltd v Piggott-Brown and Another* [1985] 3 All. E.R. 119 and *Lennard v International Institute for Medical Science* The Times Law Report, April 29, 1985, (where the Court of Appeal, applying the Eagil Trust case, held that they had no option but to set aside the decision of Mr Justice Nourse (as he then was) because of his failure in this respect.)

13. My decision is set out in paragraph 1.

(Signed): V G H Hallett
Commissioner

**APPENDIX**

[Note: the following paragraphs are taken from decision CSB 92/1984—see paragraph 10(3) above]

"Construction of regulation 4 (3) of the Resources Regulations

*(1) The statutory condition*

10. Regulation 4(3) of the Resources Regulations can have no application unless the statutory condition set out in its opening words is satisfied, namely that "a member of the assessment unit performs for another person a service for which that person makes either no payment or a payment less than that paid for comparable employment". It is accordingly necessary for the adjudicating authority (the adjudication officer or the tribunal, as the case may be) to find the following facts:—

(a) the identity of the employer for whom the services have been performed

(b) particulars of the services provided by the member of the assessment unit for that employer

(c) whether any, and if so what, payment has been made for such services

(d) the amount which would be paid for comparable employment. "Person" in my judgment, includes a limited company or other corporate employer. There is no contrary intention expressed in the regulation which would justify departure from the usual rule, which as regards statutes has been in operation ever since the Interpretation Act 1889 came into force, that "person" includes a corporation. The reference to "comparable employment" shows that the services provided by the member of the assessment unit must be services which would be provided in an employment and the reference to pay in that employment demonstrates that the services must be of a character for which an employer would be willing to pay. "Payment" clearly includes payment in kind. For example, if a claimant is given free beer or meals, in return for his services, a monetary value should be attributed to such items, when working out the pay received for such services.

*(2) The onus of proof*

11. The onus of proof throughout regulation 4(3) lies on the adjudication officer, who must make out the case for notionally treating a claimant, or other member of the assessment unit, as possessed of earnings which he has not in fact had. The standard of proof is that of establishing the facts on a balance of probability.

12. It was submitted, by the adjudication officer, that there are two rebuttable presumptions, which operate against the claimant. First, that in the case of a firm or limited company which is employing the claimant, or other member of the assessment unit, the rebuttable presumption that it is able to pay the going rate of that person's services. Secondly, in the case of an individual, in any case where the services are performed in connection with the activities of any business with which he is concerned, that that individual is able to pay such going rate. Both presumptions are rebuttable by the claimant. I do not accept this submission. It might equally well be argued that the presumption lay the other way and that where an employer is paying less than the going rate for the job it should be assumed that he does not have the means to pay more. In my judgment, both arguments should be rejected and there is no automatic presumption either way. The

adjudication officer should bring such evidence as he is able as to the employer's means and it will also be open to the claimant to adduce evidence on this point.

*(3) Regulation 4(3) confers a discretion*

13. If the statutory condition referred to in paragraph 10 above is satisfied, because the claimant or some other member of the assessment unit is being paid, if at all, less than the payment for comparable employment, the adjudication officer or the tribunal (as the case may be) has a discretion to treat "an amount of earnings calculated by reference to such employment and the means of that person, as if it were actually paid to and possessed by the member of the assessment unit". There is no doubt that regulation 4(3) does confer a discretion, since it uses the word "may", which contrasts with the employment of the word "shall" in the immediately following provisions as to notional earnings: see regulations 4(4), 4(5) and 4(6).

14. The discretion is a judicial one and should be exercised in a judicial manner taking into account all the circumstances. In exercising it, the principal mischief at which regulation 4(3) is aimed should be kept firmly in view, namely that an employer who has the ability to pay a claimant, or other person dependant on supplementary benefit, the full market rate for services should not be enabled to economise on the wages that he pays because the assessment unit is being supported out of a supplementary allowance. Where the services in question are performed by someone such as a neighbour who is helping out an aged, sick or disabled person (e.g. by mowing the lawn) doing for them work for which that person would normally have to pay, or where voluntary work is done on a casual basis, there may be a case for exercising such discretion in favour of the claimant, and Mr. D'Eca, on behalf of the adjudication officer, did not dispute this before me. He did, however, dispute the suggestion that if it was a fact, as it was argued before me by the claimant that it was, that the claimant was being employed by someone purely out of friendship and on a casual non-commercial basis out of entirely charitable motives, there was such a discretion. I do not accept this submission. In cases where it is established that a claimant or other member of an assessment unit is acting from charitable or compassionate motives in helping someone out with some sort of casual work or where an employer is finding some such work for a claimant to do out of charitable or compassionate motives for which he would not normally employ anybody at all and there is in each case *no* intention of getting work done "on the cheap", the question of exercising the discretion in favour of the claimant will arise for consideration. How it is in fact exercised might depend on the exact circumstances of each individual case and will be for the adjudicating officer or tribunal (as the case may be) to determine.

15. In every case, sufficient facts must be found to provide a proper basis for the exercise of the discretion and sufficient reasons must be given for it to be clear why it was exercised in the particular way that it was, whether this be in favour of the claimant, or against him.

*(4) Calculating the notional earnings*

16. The amount of which the claimant or other member of the assessment unit may be treated as having been paid and possessed must, if the discretion is exercised against him, then be determined. There is no discretion as to the maximum, which is the "amount of earnings calculated by reference to such [i.e. the comparable] employment". That maximum must be reduced, if the member of the assessment unit has been paid for his

services, by deducting the pay that he has in fact received, so that this pay is not counted twice. It can also be reduced by having regard to the actual employer's means, to which that regulation expressly refers. If, therefore, the actual employer is unable to pay the market rate for comparable employment, this must be taken into account.

17. It follows that in order to calculate the notional earnings under regulation 4(3) there must be findings (a) as to the means of the employer for whom the member of the assessment unit has been performing services and (b) the difference between the pay in the comparable employment (which must itself be found as a fact) and the pay, if any, actually received."