## SUPPLEMENTARY BENEFIT

**Conditions of Entitlement—availability for employment of pupil barrister.**

The claimant had commenced six months pupillage as a barrister. He was to receive no remuneration during that period. The adjudication officer decided that the claimant was no longer entitled to supplementary benefit because he had not demonstrated his availability for employment. On appeal the tribunal upheld the adjudication officer's decision by a majority but relied in part upon Regulation 8(b) of the Claims and Payments Regulations. The claimant appealed to the Social Security Commissioner.

*Held* that:

1. compliance with regulation 8(b) of the Supplementary Benefit (Claims and Payments) Regulations 1981 is a requirement to be imposed only by the Secretary of State (paragraph 8);

2. a pupil barrister is not a student for the purposes of regulations 2(1) and 8(1)(a) of the Conditions of Entitlement Regulations in that the pupillage is neither a course nor education but is training (paragraph 9);

3. a pupil barrister undertaking a proper pupillage cannot be available for employment within the meaning of regulation 7(1) of the Conditions of Entitlement Regulations unless he unequivocally gives up his pupillage (paragraph 10).

The appeal was dismissed.

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1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 25 April 1985 is erroneous in point of law, and accordingly I set it aside. However, as it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is not entitled to supplementary benefit for the inclusive period from 23 November 1984 to the expiry date of his six months' pupillage as a barrister.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the majority decision of the social security appeal tribunal of 25 April 1985. I directed an oral hearing. At that hearing the claimant, who was present, was represented by Ms Jenny Creasey, of the Tooting and Balham Law Centre, whilst the adjudication officer was represented by Miss R Kearns of the Solicitor's Office of the Department of Health and Social Security. I am indebted to both of them for their submissions.

3. The facts of this case are simple and straightforward. On 25 September 1984 the claimant claimed and was awarded supplementary benefit. On 1 October 1984 he commenced a six months' pupillage as a barrister. Needless to say, he was not to receive any remuneration during that period. On 23 November 1984 the adjudication officer decided that the claimant was no longer entitled to benefit because he had not demonstrated his availability for employment.

4. In due course, the claimant appealed to the tribunal who by a majority upheld the adjudication officer. The tribunal gave as the reasons for their decision the following:—

"The tribunal considered the facts of the case.

They found—

(1) that the appellant, by his failure to register in the prescribed manner, had not made himself available for employment within section 5 of the Supp. Ben. Act.

(2) that none of the exceptions within Regulation 6 (Conditions of Entitlement) Regulations were applicable to the applicant, in particular subsection (u) and the tribunal could find no analagous circumstances in the preceding paragraphs that would relate to him

(3) that having heard the evidence of the applicant, and taking into consideration section 5 of the S. Ben. Act, in conjunction with regulation 8 (Claims and Payments) Regulations, the applicant had not been available for employment, due to the conditions of his pupillage, and his inability to attend the unemployment office, and to sign in the prescribed manner."

5. Section 5 of the Supplementary Benefits Act 1976 provides as follows:—

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

(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."

6. The relevant regulations are the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [S.I. 1981 No. 1526], of which regulations 6, 7 and 8 are material. In so far as they affect the present appeal, these provisions read as follows:—

"6. A claimant shall not be required to be available for employment under section 5 in any week in which one or more of the following paragraphs apply and regulation 8 does not apply to him:—

(a)–(u) ....

7.—(1) Subject to regulation 8, 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 the purposes of unemployment benefit) or regulations made under it, or if he is a person to whom paragraph (2) applies.

(2)–(5) ....

8.—(1) A claimant shall not be treated as available for employment if he is a person to whom one or more of the following sub-paragraphs apply:—

(a) he is a student and regulation 6(a)(i) or (j) does not apply to him;

(b)–(e)....,

(f) he has placed restrictions on the nature, hours, rate of remuneration or locality or other conditions of employment which he is prepared to accept and as a consequence of those restrictions has no reasonable prospects of securing employment; so however that this sub-paragraph shall not apply where—

(i) he is prevented from having reasonable prospects of securing employment consistent with those restrictions only as a result of adverse industrial conditions in the locality or localities concerned which may reasonably be regarded as temporary, and, having regard to all the

circumstances, personal and other, the restrictions which he imposes are reasonable, or

(ii) the restrictions are nevertheless reasonable in view of his physical condition, or

(iii) the restrictions are nevertheless reasonable having regard both to the nature of his usual occupation and also to the time which has elapsed since he became unemployed;

(g) he has been disallowed unemployment benefit on the ground that he failed to claim in the manner prescribed by regulation 4 of the Social Security (Claims and Payments) Regulations 1979 by virtue of the fact that the form approved by the Secretary of State for the purpose of claiming was not duly completed so far as it related to his availability for employment.

(2) ....

(3) ...."

7. Regulation 8(b) of the Supplementary Benefit (Claims and Payments) Regulations 1981 [S.I. 1981 No. 1525] reads as follows:—

"8. Every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such certificates and other documents and such information of facts affecting the right to benefit, or to its receipt, as the Secretary of State may require (either as a condition on which any sum or sums shall be receivable or otherwise), and in particular—

" (a) ....

(b) in the case of a beneficiary required to be available for employment pursuant to section 5—

(i) shall at such intervals as the Secretary of State may direct sign a form approved by the Secretary of State which includes a declaration as to his unemployment and availability for employment within the meaning of that section, and

(ii) shall in that connection attend at the relevant unemployment benefit office on such occasions and in such manner as he is required or would be required to attend for the purposes of claiming unemployment benefit."

8. The tribunal very properly directed their attention to section 5 of the Supplementary Benefits Act 1976 and to regulation 6 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. As regards the latter provision they concluded that none of the paragraphs applied and that there were no analogous circumstances. In reaching this conclusion the tribunal were undoubtedly right. In the unreported decision on Commissioner's file CSB 997/1982 a pupil barrister endeavoured to rely on paragraph (u)

('analogous circumstances') of regulation 6, contending that his pupillage should be regarded as analogous to the circumstances applying under paragraph (m) or (q). However, such a contention was rejected for the reasons set out in paragraphs 7 and 8 of that decision. For convenience, those paragraphs are set out in the Appendix hereto. However, the tribunal based their decision on regulation 8(b) of the Supplementary Benefit (Claims and Payments) Regulations 1981 combined with section 5. They took the view that the claimant had failed to satisfy regulation 8(b), and could not be regarded as available for employment pursuant to section 5. However, compliance with regulation 8(b) is a requirement to be imposed only by the Secretary of State, and there was no evidence in this instance that the claimant had ever been called upon to comply. Accordingly regulation 8(b) had no bearing on the matter, and in consequence the tribunal erred in point of law in basing their decision on it. It follows that their decision must be set aside.

9. However, is it open to me to substitute my own decision? This depends upon whether all the relevant findings of fact have been made. Ms Creasey contended that this was not so, and that the matter should be referred to a differently constituted tribunal to determine whether the claimant could bring himself within regulation 7(1). She put her case as follows. First, she conceded that there was no question of the claimant being able to rely on regulation 6. As regards regulation 8(1), paragraphs (f) and (g) could have no disentitling effect without findings to the effect that the claimant was caught by either of those provisions, and there had been no such findings. I agree. The only other paragraph which presented, in Ms Creasey's submission, a danger was paragraph 8(1)(a). But she contended that on no footing could the claimant be regarded as a student. A student was defined in regulation 2(1) as "a person aged 19 or over but under pensionable age... who is attending a course of full-time education....". Ms Creasey argued that pupillage did not involve a course nor was it educational. To constitute a course, there had to be some set form of curriculum, but pupillage involved the assimilation of *ad hoc* material at the discretion of the pupil-master. Attendance on a pupil-master was not, therefore, participation in a course. Moreover, pupillage was not educational in essence. Education called for the acquisition of knowledge and learning in isolation from the assimilation of specific vocational skills directed to a particular trade, service, profession or calling. Pupillage constituted training for the due performance of the profession of a barrister. Moreover, a course to fall within regulation 2(1) had to be implemented through an organisation whose primary purpose was educational and pupillage failed to fulfil that criterion. I accept that submission. Although in paragraph 10 of the unreported decision on Commissioner's file CSB 997/1982 I left open the question whether or not a pupil was a student within regulation 8(1)(a), I am now satisfied, on the submissions specifically directed to this issue, that he is not such a student. Moreover, Miss Kearns did not resist this conclusion.

10. Ms Creasey went on to contend that throughout his pupillage the claimant was always available for employment, and accordingly brought himself within regulation 7(1). This was something which the tribunal had not considered, and the reason for this was that they had been misled into believing that the claimant could not possibly be regarded as available to be employed because of his failure to comply with regulation 8 of the Claims and Payments Regulations. However, Miss Kearns argued that, if the tribunal had applied their minds to whether or not the claimant was available to be employed within the meaning of section 17(1)(a)(i) of the Social Security Act 1975, they could only have come to one conclusion. The

fact was that the claimant was at the relevant time completing a pupillage and as he never abandoned it, he could at no time have been available for employment; nor was it open to him to say that had a suitable job presented itself, he would have forsaken the pupillage and taken it up. This was not a case of someone undertaking charity work to fill in time in a useful way pending the resumption of employment as and when it was obtainable—in such circumstances the person concerned was clearly available for employment—nor was it a case of taking up a basically unsuitable job pending finding more satisfactory employment. The claimant had passed all his bar exams, had been or was about to be called to the bar, and was undertaking something which was essential if he was ever going to practice at the bar. So long as he continued with that pupillage—and a proper pupillage involves attendance on the pupil-master during the working day or the major part thereof—he was simply not available for any other form of employment. There was no point, in Miss Kearns' submission, to remit the matter to a new tribunal, in that even if the claimant did say that he always intended to abandon the pupillage should suitable employment present itself, and even if he honestly meant that, his conduct was fatal to his case. I accept that submission. In my judgment, a pupil cannot bring himself within regulation 7(1) unless he unequivocally gives up his pupillage. A pupillage is not intrinsically a stop-gap measure pending taking up some suitable employment, but is an automatic and necessary step in the progress of a newly qualified barrister towards his ultimate goal of setting up in practice. Accordingly, no further facts have to be found, and it is open to me to substitute my own decision for that of the tribunal.

11. For completeness, I should add that in this particular case the claimant did not lead any evidence before the tribunal to the effect that he was willing to abandon his pupillage, if the opportunity for suitable employment presented itself, nor did he lead any evidence suggesting that he had during his pupillage applied for numerous jobs and had regularly presented himself at the Job Centre. In other words, no evidence had been presented indicating that the claimant had taken any positive step in support of Ms Creasey's contention that he was at all times available for employment.

12. Accordingly, I am satisfied that on the evidence there could only be one conclusion, namely that the claimant could not bring himself within regulation 7(1), and he was therefore not entitled to benefit throughout his pupillage.

13. My decision is therefore as set out in paragraph 1.

(Signed) D. G. Rice
Commissioner

## APPENDIX

Extract from the unreported decision on Commissioner's file CSB 0997/1982:—

"7. Mr Stocker argued that it was common knowledge that those who were following an Open University course could do so at home and over any length of period, and that although they might for a short spell attend a residential course, this was not the normal practice. It was an essential characteristic of the Open University that residential attendance was not called for. Accordingly, paragraph (m) dealt with a somewhat unusual situation where for a short period a person who was attending an Open University course in fact went into residence. During this period a claimant need not be available for employment. Mr Stocker argued that the claimant's position in the present case had no real similarity with the situation catered for under paragraph (m). The claimant was not resident, he was not following any kind of university course whatsoever, and the essential nature of what he was doing was learning the practical work of a practising barrister. His position was more analogous to that of "an apprentice". I agree with that submission. Moreover, the claimant himself accepted that he was not in residence. I do not see a sufficient similarity to enable the claimant to invoke the benefit of paragraph (u).

8. The claimant also relied on an analogy to the circumstances mentioned in paragraph (q). However, the purpose underlying that particular provision appears to be that availability for work is excused where a claimant is required in some way to assist the Court. In the case of the claimant in the present case his pupillage is in no sense of any assistance to the Court; it is designed simply to benefit the pupil. Of course, in a very broad sense, the Court has an interest in the proper training of barristers who will in future appear before it, but this is far too remote for the underlying purpose of paragraph (q). The claimant endeavoured to argue before me that he had been of assistance to the Court, in that from time to time, whilst attending hearings with his pupil-master, he had kept notes, which were on occasion read out and were, as a result, of assistance to the Court, as far as concerned the particular proceedings to which they related. Whether or not he used that argument before the local tribunal, I do not know. There is nothing to suggest that he did, and I cannot in any way criticise the tribunal for ignoring something, if it was never argued before them. However, in any event I do not think that there is any force in the contention. The presence of the claimant as distinct from that of his pupil-master was not required by the Court, and such assistance as was rendered by the claimant's notes was *de minimis*. The claimant's position is in no way analogous to the circumstances set out under paragraph (q)."