(Tribunal decision)
(Scottish case)

SUPPLEMENTARY BENEFIT

Resources—averaging of earnings when a person does not work every week.

Since January 1981 the claimant had been working for three weeks out of every four, being laid off by his employer every fourth week. The supplementary benefit officer decided that the claimant's wages for the three weeks should be averaged over a four week period to arrive at the amount of the weekly resources to be offset against his supplementary benefit requirements for the week he did not work. As a result the claimant was not entitled to benefit because his resources exceeded his requirements. On appeal the tribunal confirmed this decision and the claimant appealed to a Social Security Commissioner. The appeal was heard by a Tribunal of Commissioners.

Held by Mr. Bowen and Mr. Mitchell, Mr. Reith dissenting that:

1. the evidence before the tribunal established the existence of a "regular pattern of work" within the meaning of regulation 9(2)(d) of the Resources Regulations (paragraph 7);

2. where a regular pattern of work is established there is discretion under the terms of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations to apply the averaging provisions and to do so over whatever period is considered reasonable in the circumstances (paragraph 8);

3. section 27(1) of the Supplementary Benefits Act 1976 does not in any way affect the exercise by an adjudication officer or a tribunal of the discretionary power contained in regulation 9(2)(d) (paragraph 8).

The appeal was dismissed.

1. The decision of the Tribunal (Mr. Douglas Reith, Q.C. dissenting) is that the decisions of the supplementary benefit appeal tribunal dated 22 July 1983 that the claimant was not entitled to supplementary allowance (1) in the period from 4 December 1981 to 4 November 1982, and (2) in the periods from 28 January 1983 to 24 February 1983 and 25 February 1983 to 24 March 1983 are not erroneous in law.

Reasons of Mr. E. Roderic Bowen, Q.C., and Mr. J. G. Mitchell, Q.C.

2. The present claimant is one of three claimants who have appealed, with leave of the Commissioner, against decisions of supplementary benefit appeal tribunals refusing supplementary benefit in consequence of the application to their earnings of the averaging provisions of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations 1981. The case references of the other claimants' appeals are CSSB 39–41/84 and CSSB 180/83 and 21/84 respectively. The common feature of the cases is that the claimants were, and had for a considerable period been, only working in 3 weeks out of each 4. Other claimants with the same employment history have been found entitled to supplementary benefit by other supplementary benefit appeal tribunals. The appeals of the present claimant and the other two claimants denied supplementary benefit were heard together at an oral hearing held before us at which the claimants were represented by Mr. O'Kelly of the General, Municipal, Boilermakers and Allied Trades Union and the adjudication officer was represented by Mr. Milledge of the Solicitor's office of the Department of Health and Social Security.

3. The claimant is employed by a firm of distillers. In January 1981 a system of short-time working was introduced by the firm whereby the claimant worked a 40 hour week for 3 weeks out of 4 and was laid off for the fourth week. The employers paid wages one week in arrears. As a result, in each lay-off week the claimant received wages related to his previous week's work. He then did not receive a further wage until the pay day of the second week after resuming work. The claimant received unemployment benefit or a guarantee payment in respect of each lay-off week. Up until December 1981 he also claimed and received supplementary benefit. The payments of unemployment benefit or guarantee payment and supplementary benefit, although made after the claimant resumed work after each lay-off week, in effect filled the gap in the claimant's resources left by his lay-off week.

4. In December 1981 the supplementary benefit officer decided that the claimant was precluded from entitlement to supplementary benefit under the provisions of section 6(1) of the Supplementary Benefits Act 1976 upon the ground that he fell to be treated as engaged in full-time work every week, as a result of the averaging of his hours of work over each 4-week work cycle under the provisions of regulation 9(1)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. That decision was the subject of a successful appeal to the Commissioner (reference CSSB 73/82 decided on 8 December 1982). The appeals of this claimant arise out of 2 further decisions of the supplementary benefit officer. Taking a different approach, he avoided the exclusion from entitlement to benefit of persons engaged in remunerative full-time work by treating each 4-week work cycle as a new "engagement in remunerative full-time work" for the purposes of regulation 9(2) of the same regulations so as to treat the claims for benefit as coming under the concessionary "15 day rule" stated in that provision, but went on to hold that the claimant was nevertheless not entitled to supplementary benefit because his earnings fell to be averaged over each 4-week period under the provisions of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations 1981. We shall refer to the latter regulations as "the Resources Regulations". The application of the 15-day rule has not been questioned or retracted and is favourable to the claimant. We do not propose to comment further on it. No point is taken in the appeals as to the accuracy of the supplementary benefit officer's computation of the effect upon the claimant's resources of averaging his earnings over any of the 4-week periods covered by the decisions under

appeal but it is argued on behalf of the claimant that the tribunal erred in law in approving the application of regulation 9(2)(d) of the Resources Regulations in the circumstances of these cases.

5. Regulation 9 of the Resources Regulations contains the following provisions:—

> "9.—(2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments shall be attributable as follows:—
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> (a) subject to the following sub-paragraphs, a payment of income shall be taken into account—
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> (i) where it is payable in respect of a period, for a period equal to the length of that period, and
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> (ii) .....
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> (b) .....
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> (c) .....
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> (cc) .....
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> (d) where the amount of a person's earnings fluctuates, or a person's regular pattern of work is such that he does not work every week, the preceding sub-paragraphs may be modified so that his earnings are averaged over such period as the benefit officer considers reasonable in the circumstances of the case;"

6. The first and main question in these appeals is whether the provisions of regulation 9(2)(d) apply at all in the circumstances of these claimants. No reliance was placed by the supplementary benefit officer or the tribunal on the first case there mentioned ("where the amount of a person's earnings fluctuates"). For the claimant however Mr. O'Kelly conceded that the tribunal was entitled to hold that the evidence established a "regular pattern of work" within the meaning of the second case mentioned in that statutory provision, that is a regular pattern of work such that the claimant does not work every week. He argued that the application of the sub-paragraph was discretionary, that it could only be exercised to the detriment of the claimants and it should not be applied in the circumstances of these cases to depart from the normal principle derived from sub-paragraph (a)(i) of regulation 9(2) that an income resource paid in respect of a week should be taken into account for a week. He suggested that the averaging provision should only be applied where it would simplify the assessment of the weekly amount of benefit but would not affect the amount of overall benefit. Other tribunals which had found in favour of claimants in similar circumstances by refusing to apply regulation 9(2)(d) had sought justification in the provisions of section 27(1) of the Supplementary Benefits Act 1976. As the averaging provision could only operate to the detriment of claimants the reliance placed by these other tribunals on section 27(1) was, he claimed, relevant.

7. In our judgment the tribunal were well entitled to proceed upon the basis that the evidence established the existence at the relevant periods under appeal of a "regular pattern of work" within the meaning of regulation 9(2)(d) of the Resources Regulations. It was not suggested that, in the case of this claimant or either of the other claimants on appeal before us, the pattern had been subject to more than occasional and immaterial variation and in no case was the duration of the period of working less than 10 months before the benefit officer decided to apply the provisions. The evidence produced to the tribunal showed that the claimants, through their representatives, agreed in January 1981 to the short-time working as a

modification of indefinite duration of the terms and conditions of their normal employment which provided for a 5 day working week every week. Each claimant's working history thereafter provided acceptable evidence of a regular pattern of work coming within the terms of regulation 9(2)(d). (We do not imply that this would now necessarily have become the "normal" extent of each claimant's work for the purposes of other statutory provisions in which that term is used, as to which other considerations may apply.)

8. Having regard to the terms of regulation 9(2)(d) it is apparent that in a case where the relevant necessary pre-condition of a regular pattern of work of the kind specified is held to be established there is a discretion to apply the averaging provisions and to do so over whatever period is considered reasonable in the circumstances. There is no statutory basis for the limitations upon the exercise of the discretion suggested by Mr. O'Kelly. Sub-paragraph 9(2)(d) specifically provides for modifying the preceding sub-paragraphs and the leading sub-paragraph (a) is expressed to apply "subject to the following sub-paragraphs". We accept that it is probable that the use of the averaging provisions of sub-paragraph (d) will work to the disadvantage of claimants but we do not accept that section 27(1) of the Supplementary Benefits Act 1976 is relevant to prevent their application in this connection. Section 27(1) does not in any way affect the exercise by an adjudication officer or a tribunal of the discretionary power contained in regulation 9(2)(d). It relates to the taking of administrative action by the Secretary of State. A pre-condition for the application of regulation 9(2)(d) was established. It was not manifestly unreasonable for the tribunal to exercise the discretion to average the claimant's earnings in these cases and there is nothing unreasonable about the adoption of a 4-week period for averaging purposes. No basis is therefore established upon which we would be entitled to interfere with the tribunal's exercise of the discretion under regulation 9(2)(d).

9. It was not argued on behalf of the claimant that the reasons stated for their decisions by the tribunal were inadequate to comply with the requirements contained (at the relevant time) in rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980. The adjudication officer's representative however very properly raised this issue although he submitted that the tribunal's reasons were in fact adequate. Once one or other of the pre-conditions for the application of the averaging provisions are found to be established, the discretion to apply the provisions is not subject to any specified considerations except in relation to the reasonableness of the period selected. Having made a finding regarding the claimant's pattern of work the reasons given in the decisions of the tribunal for the application of regulation 9(2)(d) are expressed on the basis that it was correct for the benefit officer to apply the provisions as he did and that the period of 4 weeks was a reasonable one. It was, of course, for the tribunal to consider the application of the discretionary provision for themselves, but we think that the fair reading of the terms of their decisions is that the tribunal upheld the decisions of the supplementary benefit officer because their conclusions upon the propriety of exercising the discretionary provision coincided with those of the supplementary benefit officer. In the cirumstances we do not consider that the statement of reasons is so inadequate as to contribute an error of law.

10. Our conclusion upon the whole matter therefore is that the tribunal's decisions are not shown to be erroneous in law. We were pressed by the claimant's representative to provide guide lines for the exercise of the discretion contained in regulation 9(2)(d). It is however neither appropriate nor possible for us to do so beyond stating the obvious, namely that one

or the other pre-condition must first be found to be established and the discretion must be exercised judicially and in a reasonable manner.

11. The appeals of the claimant are refused.

Reasons of Mr. Douglas Reith, Q.C.

12. I have reached a different decision from the above decision given by the majority of the Tribunal of Commissioners (Mr. E. Roderic Bowen, Q.C. and Mr. J. G. Mitchell, Q.C.). The decision reached by these two Commissioners is of course the decision of the tribunal, but it is right that I should give my reasons for disagreeing with their said decision.

13. I would explain that an oral hearing took place before me in respect of 4 appeals relating to two claimants whose cases were thereafter considered by the Tribunal of Commissioners. After the oral hearing I communicated with the Chief Commissioner. The Chief Commissioner decided that these 4 appeals and other appeals which had meantime arisen for decision by a Commissioner should be considered by a Tribunal of Commissioners.

14. The majority of the Commissioners forming the Tribunal decided that supplementary benefit was not payable to this claimant because of the provisions of regulation 9(2)(d) of the Supplementary Benefit (Resources) Regulations 1981. In my view said regulation 9(2)(d) does not preclude the payment of supplementary benefit to the claimant.

15. As is pointed out in the decision of the majority of the Tribunal the first and main question in all the appeals before the Tribunal is whether the provisions of said regulation 9(2)(d) apply at all in the circumstances of the case relating to this claimant and the cases relating to the other claimants whose appeals were before the Tribunal. Said regulation 9(2)(d) provides as follows:—

> "9.—(2) Earnings and other income shall be calculated on a weekly basis and, except in so far as regulations 3(2)(d)(i) and 13 provide otherwise, payments shall be attributable as follows:—
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> .....
>
> (d) where the amount of a person's earnings fluctuates, or a person's regular pattern of work is such that he does not work every week, the preceding sub-paragraphs may be modified so that his earnings are averaged over such period as the benefit officer considers reasonable in the circumstances of the case;"

16. The claimant in the present case was employed at the time under consideration by Scottish Grain Distillers Limited, Glasgow. His written contract of employment set forth that he was employed on a 40 hour week. In other words his regular pattern of work in my view was clearly one which involved working every week. At a meeting which took place on 19 November 1980 of the Plant Consultative Committee attended by members of management and employees it was intimated on behalf of the management that because of adverse conditions in the whisky industry the claimant's employers (part of the DCL group) had decided that there would have to be introduced a system of working only 3 weeks out of every 4 weeks as from 5 January 1981. A member of the management also intimated that the said short-time working could last for some time. It is of importance in my view to note that the claimant's contract of employment was never varied, and although the short-time working continued for a considerable period, the claimant in fact resumed working his regular pattern of employment (i.e. each week) in March 1984. The last-mentioned intimation of the resumption of full-time working in March 1984 in respect of the present claimant was intimated at the original hearing before me.

17. The claimant claimed and received unemployment benefit to cover the lay-off weeks on which he did not work. He also for a considerable period received additional benefit by way of supplementary benefit. Later, however, he was refused supplementary benefit because of the provisions of said regulation 9(2)(d).

18. As already stated I am of the opinion that said regulation 9(2)(d) did not preclude the payment of supplementary benefit to the claimant in respect of the periods under consideration. In my opinion the provisions of said regulation are applicable to persons who are engaged in occupations where the earnings fluctuate or where their contracts of employment do not involve having to work every week. With regard to the provisions relating to fluctuating earnings I consider that the said provisions have in mind persons such as salesmen whose weekly earnings involve payment of commission and accordingly often vary from week to week. I also consider that the provisions of the said regulation relating to a regular pattern of work are concerned with persons whose contracts of employment lay down that they do not work every week. I have in mind such forms of employment as carried out by certain oil rig workers who under their contracts of employment work on oil rigs for specified periods and then remain on shore without payment of wages for specified periods. In my view said regulation 9(2)(d) is not appropriate to be applied to persons who (contrary to their existing contracts of employment) are on short-time working due to adverse industrial conditions.

19. In the course of his submissions before the Tribunal of Commissioners the adjudication officer's representative stated that said regulation 9(2)(d) should be applied to the present claimant and the other claimants in a similar position since the said statutory provision referred to a regular pattern of work and not a normal pattern of work. I am not prepared in the circumstances of this case to attach any significant difference to the meaning of "regular" and "normal".

20. The facts and circumstances relating to persons whose earnings fluctuate or who do not work every week doubtless vary greatly. I can therefore understand why said regulation 9(2)(d) gives adjudicating officers and social security appeal tribunals a wide discretion in regard to the payment of supplementary benefit to such persons. As already stated, however, I consider that the said regulation has no application to persons who have contracts of employment laying down the conditions of employment including rates of pay in respect of each week and these contracts have not been varied on a permanent basis either expressly or impliedly. I would add that the application of the said regulation to persons such as the claimant and his fellow employees has resulted in an almost chaotic situation. Some claimants were refused payment of supplementary benefit at different times. Other claimants living in different parts of Glasgow were receiving supplementary benefit. Also, some tribunals were awarding a supplementary benefit whereas other tribunals were not awarding supplementary benefit. It is clearly unsatisfactory that employees working for the same company should be treated in a different manner, and the view I take in regard to the application of the said regulation in respect of persons who are only working short-time due to adverse industrial conditions prevents that unfortunate situation.

21. As is explained in the decision of the majority of the Tribunal it was conceded on behalf of this claimant and the other claimants in a similar position that there was a regular pattern of work. I do not understand why that concession was made. I am not bound to accept that concession, and I do not do so. I would add that if I had reached the same view as my fellow

Commissioners regarding the application of said regulation 9(2)(d), I would have reached the same conclusions as they did regarding all the other questions at issue in the cases relating to this claimant.

(Signed) Douglas Reith
Commissioner

(Signed) E. Roderic Bowen
Commissioner

(Signed) J. G. Mitchell
Commissioner