SUPPLEMENTARY BENEFITS

Resources—cash in lieu of concessionary coal.

The claimant was a married man with 3 dependent children who stopped work due to a trade dispute on 19.3.84. He claimed supplementary benefit on 27.3.84. His personal requirements fell to be disregarded under section 8 of the Supplementary Benefits Act 1976, but he was entitled to benefit for his wife and children. He normally received tax-free payments of £133.60 a quarter from the National Coal Board in lieu of concessionary coal. On 4.5.84 he received a payment of £89.07 for the quarter 1.2.84 to 30.4.84. This was a reduced amount of two-thirds because he had been on strike for part of the period. The adjudication officer treated the payment as earnings and attributed it forward over 2 months at a weekly rate of £10.26, subject to a disregard of £4. On appeal, the tribunal decided by a majority that the payment was not earnings and should not have been taken into account. The adjudication officer appealed to a Social Security Commissioner.

Held that:

1. the payment constituted "remuneration or profit derived from any employment" for the purposes of regulation 10(1) of the Supplementary Benefit (Resources) Regulations 1981, because it would not have been made had the claimant not been an employee of the National Coal Board (paragraph 4);

2. the provision of regulation 10(3)(a) (the disregard of one daily meal provided free at a person's place of work) was a further indication that regulation 10 was intended to cover miscellaneous remuneration or profit derived from employment; while the practice of the Inland Revenue though relevant, was not conclusive of the question under regulation 10 (paragraph 5);

3. although there were restrictions on the receipt of the money, which was in a sense "a heating allowance", it did not alter the fact that the sum was remuneration or profit from employment (paragraph 6);

4. the exemption given to "the value of any benefit in kind in the form of a concession" under regulation 11(4)(f) could not apply to any payment which was caught by regulation 10; it can only apply to concessions which are not earnings (paragraph 7).

The appeal was allowed.

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1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 2 November 1984 and I set that decision aside as being erroneous in law. I give the decision which the tribunal should have given, namely that the claimant's weekly supplementary benefit for the appropriate period should be assessed on the basis that a sum of £89.07 received from the National Coal Board on 4 May 1984 in lieu of concessionary coal was an earnings resource of the claimant and should be taken into account accordingly: Supplementary Benefits Act 1976, section 2 and the Social Security (Adjudication) Regulations 1984 [SI. 1984 No. 451 as amended], regulation 27.

2. This is an appeal to the Commissioner by the adjudication officer from the majority decision of the social security appeal tribunal of 2 November 1984, to the effect that a sum of £89.07 received by the claimant from the National Coal Board on 4 May 1984 (averaged out weekly as £10.26 a week) and being in lieu of concessionary coal "should not be treated as earnings under regulation 10 of the Resources Regulations and therefore should not have been taken into account as income in computing claimant's entitlement to supplementary allowance". The chairman of the tribunal dissented on the ground that he "considered that the fact that the allowance was paid in cash brought it within the definition of earnings within regulation 10(1) [of the Resources Regulations—see below] and that it specifically represented a 'payment in lieu of remuneration' as defined by regulation 10(1)(d)". The findings of fact of the majority members of the tribunal, actually a mixture of findings of fact and reasons, were as follows,

"1. That the concessionary coal allowance did not amount to earnings as defined by regulation 10(1) Resources Regulations.

2. That it was a heating allowance designed to compensate an employee who was unable to burn coal.

3. That employee had no choice i.e. he was not entitled to choose between the coal and the allowance and the latter ceased to be payable if an employee moved of his own volition to a non-coal burning house.

4. The allowance was non-taxable which reinforced the argument that it was not earnings.

5. If the value of the coal itself fell to be disregarded (paragraph 6664 S Manual) then the allowance in lieu should also be disregarded as an anomalous situation then arose."

3. Paragraph 3 of those findings was based on a memorandum to that effect dated 10 January 1984 from the Head of the Wages Branch of the National Coal Board to "all serving workers in receipt of cash-in-lieu of concessionary fuel", indicating that as from 31 March 1985 payments of cash in lieu of concessionary fuel would be severely restricted. I should also note in this context that in observations dated 17 June 1985 the claimant states "I have now moved address ... The reason for this move is since the cash-in-lieu money has been stopped I have had to move as the NCB offered no compensation for the loss of this money. So I was given the choice of moving and getting coal or staying at my previous address and getting nothing which I feel supports my case that this could not be classed as earnings but as a 'heating allowance' for which that and previous monies were used".

4. That latter is a statement as to facts occurring since the tribunal gave its decision and as such (because the Commissioner can deal only with points of law and not with issues of fact) is not a matter I can take into consideration. However, I should say that it would make no difference to the legal basis of my decision. In my judgment the cash in lieu of concessionary fuel received by the claimant, at a time when he was on strike and not working, had to be taken into account as a resource under regulation 10 of the Supplementary Benefit (Resources) Regulations 1981 [SI. 1981 No. 1527 as amended]. That regulation is headed "Calculation of earnings" and by the opening words of regulation 10(1) it is stated "for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment" (my underlining). There can be no doubt in my view that the cash in lieu of concessionary coal received by the claimant from the National Coal Board was "remuneration or profit derived from any employment". Undoubtedly the sum received by the claimant from the National Coal Board was "derived from any employment", because it would not have been paid to the claimant had he not been at the relevant time an employee of the National Coal Board (the reason he received the payment whilst on strike in fact was due to the payments customarily being made in arrears). There is a list in regulation 10(1) of various examples of remuneration or profit derived from employment including "remuneration in kind" and "any payment in lieu of notice or remuneration". However, in my view, none of the examples listed apply to cash in lieu of concessionary coal (though I consider that the concessionary coal itself is "remuneration in kind"—see below). I do not agree with the dissenting chairman of the local tribunal that the payment to the claimant was payment "in lieu of ... remuneration", since that phrase in my view refers in its context to payments analogous to those made by an employer in lieu of notice e.g. a payment to a person whose fixed term contract has been terminated prematurely.

5. There is a list in regulation 10(3) of the Resources Regulations of those matters which shall be disregarded when calculating a person's earnings "e.g. the value of one daily meal provided free for him at his place of work" (regulation 10(3)(a)) but none are applicable to the payment received by the claimant in this case. The exemption of the value of one daily meal is a further indication that regulation 10 is otherwise intended to cover miscellaneous remuneration or profit derived from employment, such as that in the present case. A not dissimilar question arises in connection with what are taxable emoluments of an employee for income tax purposes and I have considered the tax cases as analogous in this situation (see e.g. those cited at paragraph 4–22 of D. W. Williams—of "Social Security Taxation"—[1st. Edition]). The fact that income tax may not in fact be payable on concessionary coal or cash in lieu does not affect the issue because I

understand that to be by reason of an extra statutory concession by the Inland Revenue. In any event the practice of the Inland Revenue is not necessarily conclusive of the question under regulation 10, though certainly cases on the meaning of emoluments of employment for tax purposes are relevant to the expression in regulation 10(1), "remuneration or profit derived from any employment".

6. The fact that there were restrictions on the receipt by the claimant of this money and that it was in a sense "a heating allowance" (see the tribunal's findings of fact numbers 2 and 3) do not alter the fact that the sum received was undoubtedly remuneration or profit derived from the employment within the meaning of regulation 10(1) and was therefore part of the claimant's earnings. It should therefore be taken into account as a resource save for the first £4.00 thereof, that being a disregard from all earnings (see regulation 10(5)(a) of the Resources Regulations).

7. I ought to observe that there is in regulation 11(4)(f) of the Resources Regulations, headed "Calculation of other income", an exemption from being taken into account as a resource of "the value of any benefit in kind in the form of a concession". In my view, however, that does not exempt the payment received by the claimant in this case since regulation 11 is by its opening words (regulation 11(1)) made applicable only to "all income other than that to which regulation 10 applies". I have already indicated above that in my view regulation 10 applies to the payment made in this case. Hence regulation 11 cannot apply. It can only apply to concessions which are not earnings. I ought also to say, though it is not directly for decision by me in this case, that in my view concessionary coal or other fuels supplied by an employer to the employee do not come within regulation 11(4)(f)—"the value of any benefit in kind in the form of a concession"—since equally such supply of fuel etc. comes within regulation 10(1)(a) i.e. is "any remuneration in kind" and that takes precedence over the exemption in regulation 11(4)(f). If, therefore, as appears from finding of fact no. 5 of the tribunal, the recommendation in the "S Manual" is that the value of the fuel should be disregarded that is not in my judgment supported by the law as laid down in regulations 10 and 11 of the Resources Regulations. In a decision on Commissioner's File: CSB 66/1982, the learned Commissioner held that concessionary coke was not to be regarded as a "payment" by a liable relative under what is now regulation 13 of the Resources Regulations. However, that decision is of course distinguishable because the learned Commissioner in that case caused his decision to depend on the use of the words "payment" or "payable" in the regulation. In that case the claimant was the wife of a miner who herself had been receiving the deliveries of coke. But in the ordinary case where it is the employee himself who receives either the fuel or a payment in lieu thereof, regulation 10 of the Resources Regulations does not use the words "payment" or "payable."

8. I have not remitted this case back to another tribunal, as asked by the adjudication officer, because I consider that I have sufficient facts myself to give the decision the tribunal should have given. The local adjudication officer will now be able to 'apportion' the £89.07 received by the claimant to the relevant period (see regulation 9 of the Resources Regulations) and calculate the claimant's benefit entitlement accordingly. Any difficulty can be referred to me for a further direction or decision.

(Signed) M. J. Goodman
Commissioner