SUPPLEMENTARY BENEFIT

Conditions of Entitlement—recognised or customary holidays.

The claimant claimed supplementary benefit for a period when the company he had recently joined closed down for a holiday. The supplementary benefit officer decided the claimant was on a recognised holiday, and fell to be treated as being in remunerative full-time work under regulation 9(1)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. On appeal the tribunal awarded a supplementary allowance on the grounds that the claimant was on an enforced holiday and was therefore not absent on account of a recognised holiday. The supplementary benefit officer appealed to a Social Security Commissioner.

Held that:

1. the expression "recognised or customary holiday" in regulation 9(1)(a) of the Conditions of Entitlement Regulations 1981 bears the same meaning as it does where used in the regulations relating to unemployment benefit (paragraph 14);

2. the case law, in particular Umpire's Decision 18284/32 (subject to the qualification in decision R(U) 8/64), applicable to the expression in unemployment benefit cases is equally applicable to the construction of the same expression in the Conditions of Entitlement Regulations (paragraph 14);

3. the tribunal's apparent conclusion that because the claimant was on an enforced holiday that holiday could not be a recognised or customary holiday showed that they had applied the wrong test; see R(U) 2/51; (paragraph 16).

The appeal was allowed.

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 15 February 1982 is erroneous in point of law. I set it aside and refer the case to another tribunal for determination in accordance with my directions.

2. This is an appeal by a supplementary benefit officer on a point of law against the decision of a supplementary benefit appeal tribunal on 15 February 1982 awarding the appellant supplementary benefit from 23 December 1981 to 30 December 1981.

3. I granted leave to appeal against the decision of 15 February 1982 and held an oral hearing of the appeal. The supplementary benefit officer was represented by Mr. E. O. F. Stocker. The claimant appeared in person.

Benefit officer's decision

4. According to the written submission made by the supplementary benefit officer to the tribunal, the appellant was, at the relevant time, aged 42. He lived with his wife and 2 children and had been employed by C[.....] Windows Ltd since 7 December 1981. On 16 December 1981 the appellant claimed supplementary allowance for the period 23 December 1981 to 30 December 1981 because his firm was closing down for a holiday period (22 December 1981 to 1 January 1982). His wife had income of Child Benefit (£10.50 a week) and earnings of £26 a week. The benefit officer decided that the appellant was not entitled to supplementary allowance from 23 December 1981 to 30 December 1981. His reasons for this decision were that the claimant was not entitled because he was considered to be in remunerative full-time work, as his absence from work was due to a recognised holiday. Payment under the Urgent Cases Regulations was considered by the benefit officer not to be appropriate due to wages received by the appellant and other earnings received by the assessment unit (his wife's earnings and Child Benefit).

5. The claimant appealed against the benefit officer's decision, stating that he had only been employed by his company for some 3 weeks and they would close down for the Christmas holidays on Tuesday 22 December and re-open on Monday 4 January 1982. He would only receive 3 days' pay for the above-mentioned period. He had only just got back to work after some 18 months and was trying to find his feet and the loss of a complete week's pay when it was not his fault in any way would really set him back.

Supplementary benefit appeal tribunal proceedings and decision

6. The Chairman's signed note of evidence is as follows:—

> "Not in remunerative employment at the time. Not advised by Department to sign on and did not sign on."

7. The facts found, decision and reasons for the decision of the tribunal are set out on form LT 235. The facts found were:—

> "The Appellant claimed benefit for period 23/12/81 to 30/12/81. His firm closed down for the holiday period 22/12/81 to 1/1/82. He received three days pay in total. The Appellant's wife had earnings of £26 per week and child benefit of £10.50."

The majority decision of the tribunal was:—

> "To award supplementary benefit from 23/12/81 to 30/12/81."

The tribunal's reasons were:—

> "The Tribunal as a majority consider Reg. 9 of the Conditions of Entitlement Regs, is not appropriate, since it is considered the Appellant was not absent on account of a customary holiday. The Tribunal consider the Appellant was available for employment due to being on enforced holiday. The dissenting member fully sympathises with the need of the Appellant but does think the holiday was a customary one."

The relevant statutory provisions

8. Section 6(1) of the Supplementary Benefits Act 1976 as amended by the Social Security Act 1980 provides:—

> "6.—(1) A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this subsection as so engaged."

Regulation 9(1)(a) of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [S.I. 1981 No. 1526] (which I shall call "the 1981 Conditions of Entitlement Regulations") provides:—

> "9.—(1) For the purposes of section 6(1) (exclusion from supplementary benefit of certain employed persons) a claimant shall be treated as engaged in remunerative full-time work only where:—
>
> (a) subject to paragraph (2), he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than—
>
> (i) in the case of a claimant who is mentally or physically disabled and whose earning capacity is by reason of that disablement reduced to 75 per cent. or less of what he would, but for that disablement, be reasonably expected to earn, 35 hours a week,
>
> (ii) in any other case, 30 hours a week,
>
> or he is absent from such work without good cause or by reason of a recognised or customary holiday."

Note: Paragraph (2) of regulation 9 has no relevance in the present case.

Rule 7(2)(b) of the Supplementary Benefit and Family Income Supplements (Appeals) Rules 1980 [S.I. 1980 No. 1605] provides that the tribunal shall, in their written record of determination:—

> "(b) include in every such record a statement of the reasons for their determination and of their findings on material questions of fact."

Questions arising in this appeal

9. Three questions arise in this appeal. First, what is meant by "a recognised or customary holiday" in regulation 9(1)(a) of the Conditions of Entitlement Regulations? Secondly, did the supplementary benefit appeal tribunal apply the correct test? If they did not, their decision must be erroneous in point of law. Thirdly, if erroneous, is it expedient to give the decision which they should have given or must the case be referred back to another tribunal?

Submissions on the appeal

10. On behalf of the benefit officer, Mr. Stocker submitted that the Umpires Decision 18284/32 on unemployment benefit and the case law on that benefit interpreting the meaning of the expression "recognised or customary holiday" should be applied to supplementary benefit cases on the basis that that expression in regulation 9(1)(a) of the Conditions of Entitlement Regulations has the same meaning it bears in the relevant unemployment benefit regulations, where that expression is also used.

11. The case law showed

(a) that a recognised or customary holiday only exists if agreed between the employer and the employees that there shall be a *holiday:* see paragraph 1 of Umpire's Decision number 18284/32; and Commissioners decision R(U) 11/53 at paragraphs 6 and 8.

(b) Long usage is relevant only as inference of such an agreement: principles 9, 11(a), 12 and 13 of the said Umpire's Decision and paragraph 6 of R(U) 11/53.

(c) It must be established by evidence whether there is a recognised or customary holiday for any particular date. The onus of showing this is on the benefit officer: see paragraph 9 of decision R(U) 11/53, principles 12, 13 and 20 of the Umpire's Decision and

paragraph 7 of decision on Commissioner's file CWSB 34/81 (not reported).

(d) If the only evidence is that for the period in question the employer had imposed a non-working day by closing down his factory or establishment, then one is entitled to conclude that that day was not a recognised or customary holiday: see decision on Commissioner's file CWSB 34/81. Contrast Commissioner's decision R(U) 2/51.

12. Mr. Stocker did not support the written submission made on behalf of the benefit officer that during the period in question the claimant was absent from work by reason of a recognised or customary holiday. In his submission, the decision of the tribunal was erroneous in point of law for failure to apply the principles outlined above but it was expedient for me to give the decision that the tribunal should have given, which should be that the benefit officer had not discharged the onus of proving that any of the days during the period in question (23 December 1981 to 30 December 1981) were days of recognised or customary holiday and that the claimant was accordingly not disentitled to benefit.

13. The claimant said that in fact the firm employing him did have people who worked on Sundays and holidays.

Construction of the expression "recognised or customary holiday".

14. In my judgment, the expression "recognised or customary holiday" in regulation 9(1)(a) of the 1981 Conditions of Entitlement Regulations (and in its predecessor, the Supplementary Benefit (Conditions of Entitlement) Regulations 1980 [S.I. 1980 No. 1586]) bears the same meaning as it does in the regulations relating to unemployment benefit, which use the same expression. The current regulation of that character is regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983 No. 1598] which consolidate, amongst others, the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975. The 1975 regulations contain the same provision under regulation 7(1)(i). The use of the expression "recognised or customary holiday" in unemployment benefit law has a long history, and the main principles established by the case law were set out more than half a century ago. In my judgment, that case law sets out principles which are equally applicable to the construction of the same expression as used in regulation 9(1)(a) of the 1981 Conditions of Entitlement Regulations. I agree with the Commissioner who decided the appeal on Commissioner's File CWSB 34/81 who said, in paragraph 6 of his decision, that the principles set out in Umpire's Decision 18284/32 afford "valuable guidance as to how to determine whether certain days are days of a recognised or customary holiday, in so far as a particular claimant is concerned." It must have been the intention, in employing this unusual expression, which is not used in ordinary speech, and has such a long history in unemployment benefit law, that it should receive the same interpretation in both sets of regulations.

15. Umpire's Decision 18284/32 set out 21 main principles for the determination of this question. In decision R(U) 11/53, the Commissioner said (in paragraph 7) that these principles ought to be followed. So far as I am aware, this has never been questioned and those principles have always been applied, subject only to the gloss or qualification set out by the Commissioner in Decision R(U) 8/64. In view of the difficulty of obtaining copies of the Umpire's Decision, I have, for convenience, set out these principles, and the qualification above mentioned, in the Appendix to this decision.

Did the supplementary benefit appeal tribunal apply the correct test?

16. No, the supplementary benefit appeal tribunal did not apply the correct test in ascertaining whether any of the days falling within the period 23 – 30 December 1981 were days of recognised or customary holiday. The majority decision was that the claimant was available for employment because he was on an enforced holiday and they apparently thought that because he was on an enforced holiday that holiday *could not* be a recognised or customary holiday in terms of regulation 9(1)(a). This was clearly erroneous: see decision R(U) 2/51 which establishes the correct principle. The claimant in that case had joined his employers so short a time before the annual holiday that he was unable to qualify for a holiday with pay and was thus obliged to take an enforced holiday without pay. The holiday was the recognised summer holiday and, since he was on holiday, the Commissioner held that he was not entitled to unemployment benefit. The principle on which that case was decided is clear. Unless there is definite evidence to the contrary, a claimant who has taken employment in a particular establishment is subject to the holiday conditions prevailing there: see Appendix, principle 1, second paragraph. The tribunal accordingly asked themselves the wrong question.

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

17. No, it is not expedient to give the decision myself. I do not have the necessary facts to enable me to determine whether any, and if so which, of the days falling within the period 23 – 30 December 1981 were days of recognised or customary holiday. Mr. Stocker suggested that I could hold that the decision that the tribunal should have given was that the benefit officer had not proved that any of the days in question are days of recognised or customary holiday. I cannot agree that it would be proper to do so in the present case. This is quite a different case from that considered by the Commissioner in the decision on Commissioner's file CWSB 34/81 where the Commissioner held that the tribunal had asked themselves the right questions and then had concluded, after asking these questions, that the evidence fell short of establishing that the days in the period in question were days of recognised or customary holiday so far as the members of the normal work force were concerned or, if they were, that this was not so in relation to the group of 12 of which the claimant formed a part. In the present case the majority of the tribunal did not ask themselves the right questions or apply the right principles. The jurisdiction of a supplementary benefit appeal tribunal, like that of a local tribunal in connection with contributory and other non means-tested benefits, is investigatory. They should have inquired into the position in an adequate way. Their first step should have been to ascertain whether the employer and his workers had agreed upon those days which should be holidays: see principle 1 in the Appendix. If, after investigating the facts, and asking themselves the right questions the tribunal had, in respect of any particular day in question, found that the benefit officer had not established by evidence that that day was a day of recognised or customary holiday, it would have been able to decide the appeal in the claimant's favour in respect of that day, on the ground that the onus of proof had not been discharged: see the authorities referred to in paragraph 11(c) above. But it would be quite wrong for me to hold that the benefit officer's case had not been made out in a case where the tribunal had demonstrably failed to investigate the facts or ask themselves the right questions. The case must accordingly go back to another, entirely differently constituted tribunal, which should consider whether any of the days in issue in the present case were days of recognised or customary holiday, applying the principles set out above, and in Appendix 1. In this connection, they should also have before them, and

consider, decision R(U) 11/53, which contains a helpful example of the way in which the principles should be applied in practice.

18. My decision is set out in paragraph 1.

(Signed) V. G. H. Hallett
Commissioner

THE APPENDIX (see paragraph 15 above)

(Reproduced from Jenkins' Digest)

Main principles
Generally

"1. Customary or recognised holidays are those days which the employers and workers concerned have agreed (whether expressly or by implication based upon acquiescence) shall be non-working days. When those holidays have been defined and determined they become a normal incident of employment and an implied term of contracts of service which cannot be varied except by an express or implied agreement between the parties.

Unless there is definite evidence to the contrary, a claimant who has taken employment in a particular establishment is subject to the holiday conditions prevailing there.

Literally read and applied, the Umpire's *dictum* [see 1st sentence of '1.' above] would mean (as I see it) that if employers and employees in a given employment agreed that (say) Saturday working should be given up, and the work spread over Monday to Friday only, Saturday would become a day of holiday; or if they agreed to go on short-time working, say from Monday to Thursday, the remaining days of the week would become days of holiday. The proprietor of a seaside hotel might well agree with his staff that the hotel business should be conducted in some months of the year only, so that the rest of the year would be a non-working period (so far as that employment was concerned); and thus a period of holiday. But if that were so, claims for unemployment benefit in respect of such days could then, presumably, be dealt with shortly and simply under regulation 6(1)(e)(i). So far as I am aware this has never been done. On the contrary; difficult and complicated legislation has been introduced to prescribe to what extent and in what circumstances such days are not to be treated as days of unemployment. Such legislation (e.g. that relating to 'normal idle days', 'seasonal workers' and so on) would appear to have been unnecessary if the law is that any day which the employers and employees have agreed shall be a non-working day is thereby made a 'holiday' in the sense of regulation 6(1)(e)(i). I cannot think that this is the law.

In all the Umpire's cases which I have looked at, the day or period in question was in fact a day or period which, as matter of common knowledge, would be recognised as a day or period of holiday (in the ordinary non-technical sense of the word) for some sections of the community at least. In those decisions which I have looked at, the Umpire was dealing with days such as Good Friday, Easter Monday, a specific week in August, Christmas Day, or New Year's Day. I suspect that the true question which he was considering was whether a day which was known to be a day of holiday for some people was a day of holiday for the person whose case was under determination; and that his purpose in framing his *dictum* was not to extend the normal definition of holiday so as to include all non-working days, but rather to restrict it to those days of holiday or potential holiday which had been adopted into the terms of employment of the person concerned. (R(U)8/64)

2. The existence or duration of a recognised holiday in any particular establishment must be determined by the agreement or practice observed within that establishment. It is only when no definite agreement or practice can be shown to exist there that it is permissible to have regard to any agreement or pactice operating outside that establishment.

When this is permissible and there is a well-known period of holiday locally recognised by employers in the district in an industry which is well represented in the district it may be inferred, in the absence of definite evidence to the contrary, that that is the period of holiday for any particular employer in the district in the same industry, and that any extension of the period of closing by such particular employer is due to his business exigencies and is not a recognised extension of the local holiday.

3. A recognised holiday does not cease to be such merely because it falls during a time when the establishment is closed owing to economic causes, or because it falls at a time when a particular claimant would in the ordinary course have been 'stood off' under a system of short-time working, or because it falls on a day upon which no work is usually done, either in the establishment generally or by a particular shift or by the particular claimant.

4. A recognised holiday implies a defined, certain and recurrent incident of employment, but the actual time when it is to be observed may be determinable by an employer alone or in conjunction with the workers concerned, e.g. a defined annual holiday need not be held in the same week or month each year.

5. When a holiday is found to have become recognised the original reasons for its institution, or the uses which are made of it by an employer, are not relevant considerations; but this does not exclude evidence that an extension of a previously recognised holiday had its origin in depression in trade and that the same cause has been responsible for the continued extension of the holiday.

Express agreement

6. The terms of an express agreement may be such as to operate generally or within defined limits or in respect of a specified occasion only. It may in any of these ways vary or terminate a holiday which has become recognised by practice as hereinafter described.

7. Notwithstanding that an agreement specifies particular days as agreed holidays or provides for extra payment for work done on specified holidays, this does not preclude a finding, if the evidence warrants it, that in the particular establishment concerned there are other days which have become recognised as holidays.

8. An express agreement to convert a day of recognised holiday into a working day cannot be made by an individual compact between the employer and each employee, but can only be made by compact between the employer and the whole body of employees. Hence, if a large number of the whole body disregard the collective agreement so that it cannot be carried into effect it ceases to operate and must be treated as not having been made.

Implied agreement

9. In the absence of an express agreement the existence or duration of a holiday in an establishment may be proved by facts and circumstances from which it can reasonably be inferred that there has been a practice to recognise the day in question as a non-working day and that this practice has been acquiesced in by the workers concerned.

It follows from this that the existence or duration of a recognised holiday, based upon the acquiescence of the parties concerned, is an issue of fact, the determination of which must depend solely upon the practice and

conduct of the parties in past years. Its determination is not facilitated by asking the parties what they would do, or would expect to be done, in future in a set of hypothetical circumstances.

10. It does not serve any useful purpose to attempt to determine the existence of a recognised holiday by asking whether there is any legal obligation to work on days of alleged holiday, because the legal obligation must depend upon whether the alleged holiday has in fact become a recognised holiday. If it has become such by past practice the worker is entitled to keep it as a holiday if he so desires, and this negatives any legal obligation on his part to work during the holiday even if his employer desires him to do so.

11. When determining the existence or duration of an alleged recognised holiday, which is said to be based upon an implied agreement, the following considerations require attention:—

(a) The length of time during which the period has been observed as a non-working period.

(b) The amount of work, if any, which in the past has usually been done during the alleged holiday, either in the establishment generally or in the particular department under discussion.

(c) Whether extra payment is agreed for work which is done during the holiday period.

(d) Whether there are any limitations on the application of the holiday, that is to say, whether it is limited to a particular department of the establishment or whether any department or any grades or classes of workers are excluded from enjoyment or full enjoyment of the holiday.

Period of observance

12. The longer the practice of observing a day as a non-working day the easier it is to infer that it is recognised as a holiday by acquiescence. But the recognition of a day as a holiday may be proved, however short the period during which it has been observed as a holiday, when the circumstances are such as to justify a finding of acquiescence, e.g. when a firm announce their intention to observe a given holiday and no objection is raised to this at the outset and no attempt has been made by the workers to claim benefit during that period.

13. Where during a substantial number of years a holiday has been observed over a fixed period it must be inferred, unless there are facts which negative the inference, that that holiday satisfied the requirements of a recognised holiday, even though the period of holiday does not synchronise with that generally recognised as a holiday period in the district.

Working during an alleged holiday

14. When during an alleged holiday a large proportion of the general body of employees in the whole establishment, or in a department thereof, have usually been found to be working at ordinary rates of pay it can generally be inferred that the day is not one of recognised holiday for the whole establishment, or for the department, as the case may be, but that the closing has taken place for the convenience of the employer.

15. Holidays are periods which present a favourable opportunity for effecting repairs and maintenance and workers are often willing (especially in these days) to forego their holiday and secure extra employment. Hence

the fact that some work is always done during the period of an alleged holiday does not of itself justify as inference that there is no recognised holiday. This does not preclude the possibility of finding, if evidence warrants, that certain claimants or classes of workers are excluded from participation in a general holiday or participate in it to a limited extent only.

Extra Pay

16. The right to extra pay for work done on an alleged holiday is very strong evidence of the existence of a holiday for the worker entitled to such higher pay, but this is not necessarily conclusive if there is sufficient evidence to account otherwise for the extra payment.

17. The absence of any extra payment for work done on an alleged holiday may raise a doubt whether that day is in fact a recognised holiday, but it is only one factor to be considered and a recognised holiday may be found to exist notwithstanding the fact that there is no agreement to give such extra payment.

18. Extra payment for specified holidays does not preclude a finding that other days are recognised holidays.

Excluded grades and classes

19. If the evidence of practice justifies the finding it may be found that particular grades or classes of workers e.g. maintenance and process men, are excluded from the operation of a holiday which exists for the general body of workers in the establishment or that their holidays are not similar in extent.

20. The onus of proving that there is no holiday, or only a limited holiday, for a particular grade or class of workers, rests upon those who affirm it, and the fact must be proved by clear and definite evidence.

21. There cannot be a recognised holiday for only a part of a grade or class of workers."