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**SUPPLEMENTARY BENEFIT**

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**Aggregation—whether a person can simultaneously be a member of more than one married or unmarried couple.**

The claimant had been in receipt of supplementary allowance since 1977. On 10 June 1983 she declared that a Mr. G. had moved into her accommodation before Christmas 1982 and that she had since then been living with him as his wife. Further information indicated that Mr. G. was in full-time work, was a married man, and was separated from but maintaining his wife and child. The supplementary benefit officer determined that the claimant and Mr. G. were living together as husband and wife and their resources and requirements should be aggregated. He further determined that there had been an overpayment of benefit which was recoverable. On appeal the tribunal decided that there had been a recoverable overpayment though of a different amount. The claimant appealed to the Commissioner on the grounds that during the period of the alleged overpayment she had not been living with Mr. G. as his wife because his main place of residence was elsewhere with his actual wife, from whom he was not in fact separated and whom he rejoined every weekend.

*Held that:*

1. in the context of the supplementary benefit legislation a person cannot at any given time be a member of more than one household, and cannot therefore be a member of more than one married or unmarried couple (paragraph 12);
2. if a person was maintaining and, from time to time, living in a home which included that person's lawful spouse, there was an initial presumption that that person and his or her spouse were a married couple, though that presumption could be readily displaced by the evidence (paragraph 13);
3. regulation 7 of the Supplementary Benefit (Aggregation) Regulations conferred a substantial measure of discretion upon the adjudication officer. Where a tribunal found that a husband and wife relationship existed between an unmarried couple in circumstances such as the present case, careful consideration should be given to regulation 7.

The appeal was allowed.

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1. This is a claimant's appeal, brought by my leave, against a decision of the supplementary benefit appeal tribunal dated 27 September 1983 which varied a decision of the benefit officer (now the adjudication officer) issued on 25 July 1983 and "corrected" by the benefit officer on or about 26 August 1983.

2. The fundamental issue raised by this appeal is whether, for the purposes of the supplementary benefit legislation, a man or a woman can be, at one and the same time, a member of more than one married or unmarried couple. I held an oral hearing of the appeal. The claimant was represented by Mr. R. D. Prew, a welfare rights worker of the National Association of Citizens Advice Bureaux. The adjudication officer was represented by Mrs. G. M. V. Leslie. To both advocates I am indebted for interesting and helpful submissions. By the close of the hearing, remarkably little remained in contention.

3. The claimant, now aged about 27, was, at the material time, a single woman living in local authority accommodation with her 6 years old son. She had been in receipt of a supplementary allowance since 1977. On 10 June 1983 she declared to the Department of Health and Social Security that a Mr. G. had moved into her accommodation before Christmas 1982 and that she had since then been living with Mr. G. as his wife. At the same time she voluntarily surrendered her supplementary benefit order book. Further information given to the Department at or about that time indicated that Mr G.—

- (a) was in full-time work;
- (b) was a married man; and
- (c) was separated from, but maintaining, his wife and child.

4. Paragraph 3(1) of Schedule 1 to the Supplementary Benefits Act 1976 provides, of course, that where two persons are a married or unmarried couple their resources and requirements shall, for the purposes of supplementary benefit, be aggregated. The benefit officer, accordingly, aggregated Mr. G.'s resources and requirements to those of the claimant and her son—with the result that no supplementary benefit was payable in respect of the assessment unit of which the claimant was a member. (Mr. G., being in full-time work, was, in any event, excluded from supplementary benefit—see section 6 of the 1976 Act). Moreover, the benefit officer decided that there had been an overpayment of benefit to the claimant in the sum of £798.95, which sum was recoverable by the Secretary of State. (He later invoked the Social Security (Correction and Setting Aside of Decisions) Regulations 1975 [S.I. 1975 No. 572] and corrected the sum to £1,238.60.)

5. The claimant appealed to the appeal tribunal. She put no specific grounds into writing, simply stating that she wished to "get this matter sorted out as soon as possible".

6. The chairman's note of the evidence given to the appeal tribunal is laconic to a fault:

"[The claimant] attended the hearing and said that Mr. G. still had a key to her accommodation."

The findings of material fact were recorded thus:

"[The claimant] is a single woman living with a dependent son in local authority accommodation. On 6.6.83 she declared she had been living with Mr. G. as his wife. Mr. G. moved in before Christmas 82. Mr. G. is in full-time work."

(I have written "Mr. G." where the record gives his name.) The tribunal's decision was that there had been an overpayment in the sum of £825.45, which sum was recoverable by the Secretary of State.

7. There is no indication, either on the relevant form LT 235 or anywhere else in the papers, as to how the sum of £825.45 was reached. (It is neither the sum the subject of the benefit officer's original decision nor the sum substituted by him by his correction of that decision.) As I have recently pointed out, that of itself amounts to such error of law as calls for the setting aside of the tribunal's decision (see Decision on Commissioner's File No. C.S.B. 339/1984). With characteristic objectivity, the adjudication officer now concerned concedes that that is so.

8. Apart from that shortcoming, however, the decision of the appeal tribunal would appear, on the face of the record, to be unassailable. But the true position is not so simple. The claimant's application for leave to appeal to the Commissioner contained the following passage:

"[The claimant] gave evidence that during the period in question she was not living with [Mr. G.] as his wife, since his main place of residence throughout was in Portsmouth with his actual wife, from whom he was not in fact separated and whom he rejoined every weekend. The Tribunal do not appear to have considered this question at all."

9. Pursuant to a direction issued by me, the benefit officer made enquiry of the presenting officer and the chairman of the appeal tribunal as to whether they recalled the giving of evidence to the foregoing effect. The presenting officer replied thus:

"Regrettably I am unable to recall precise details of the above hearing. However, as I recall [the claimant] admitted that [Mr. G.] was her boyfriend and that he lived there 5 nights a week but didn't give her much money. She did say that he went home at weekends but I think she mentioned that the couple were estranged."

The Chairman, in his reply, substantially amplified the aforesaid laconic note of evidence. I quote his opening sentences:

"[The claimant] said at the hearing that she met [Mr. G.] in a pub and formed a relationship immediately with him. He was unhappy at home and she felt sorry for him. He lived with her at her home, going to his wife's home some weekends. She was also lonely, she said, and very happy with him, he had and still had at the time of the hearing a key to her property. She fed him, but he said he could not afford to pay, but he did take her out socially for which he paid."

10. Upon the basis of what is set out in paragraphs 6, 8 and 9 above, I might have found it somewhat difficult to decide whether the appeal tribunal had erred in law in taking at its face value—i.e. without further investigation—the claimant's original declaration that she was indeed living with Mr. G. as his wife (cf paragraphs 3 and 6 above). Since, however,—

- (a) the case will, pursuant to what I have said in paragraph 7 above, have to go back for rehearing by the appeal tribunal, and
- (b) the question of Mr. G.'s relationship with his wife is bound to be raised in the course of that rehearing,

it is necessary that I should deal with the issue set out in the first sentence of paragraph 2 above.

11. I go first to two definitions from section 34(1) of the 1976 Act:

"'married couple' means a man and a woman who are married to each other and are members of the same household;"

“‘unmarried couple’ means a man and a woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances;”.

(Hereafter in this decision I use the unqualified word “couple” to cover both a married and an unmarried couple.) Now it is settled beyond all doubt that if a man and a woman are to be held to be living together as husband and wife, they must be members of the same household (see, e.g. paragraph 11 of Decision R(SB) 17/81—the Commissioner being fortified by the High Court authority to which he refers in paragraph 6). Can a person, then, be a member of more than one couple where the couples in contemplation live in separate households? Not unless, in the context of the supplementary benefit legislation, a person can be, at one and the same time, a member of more than one household.

12. I was not referred to, and have not been able to find, any decision in which the Commissioner has ruled categorically upon simultaneous membership of more than one household. In Decision R(SB) 13/82 the door was left open—or, at least, ajar:

“Since the claimant acquired his lease, he has his own separate household and he cannot, at least in the absence of the most unusual circumstances, be a member simultaneously of any other household.” (Paragraph 11.)

In that case a categorical ruling was not called for. In the case now before me it is. I have come to the firm conclusion that, although the point is nowhere explicitly dealt with, the legislation as a whole indicates that it is the clear intention of the legislature that a given person, at a given time, cannot be a member of more than one household. The identification of the assessment unit is fundamentally linked to the concept of membership of a household. (See, eg, the treatment of couples as outlined in paragraph 11 above; the treatment of dependants as provided in paragraph 3(2) of Schedule 1 to the 1976 Act; and the whole tenor of regulations 2 to 6 of the Supplementary Benefit (Aggregation) Regulations 1981 [S.I. 1981 No. 1524].) It is obvious that, if a person could be simultaneously a member of more than one household (and, accordingly, of more than one assessment unit), that person might well qualify for more than one award in respect of his normal and/or additional and/or housing requirements; or more than one claimant might be entitled to have him treated as a dependant. And it is equally obvious, in my view, that the legislation contemplates no such thing.

13. Mrs. Leslie was in no way disposed to contest the reasoning which I have set out in paragraphs 11 and 12 above. She agreed that the adjudicating authorities must look at the overall situation and, by applying the criteria as set out and explained in R(SB) 17/81, identify the couple or couples constituted by the parties whose position is under review. She further agreed that, if those parties include a person who is maintaining and, from time to time, living in a home which includes that person’s lawful spouse, there is an initial presumption that that person and his or her spouse are a married couple within the meaning of the 1976 Act. That presumption can, of course, be readily displaced by the evidence. It may, for example, be quite obvious that the relevant marriage has broken down—and that one of the parties thereto is, pending further arrangements, living in his or her own separate household in the erstwhile matrimonial home; or simply spending the odd night in that home so as to facilitate discussions as to the future. But the present case was by no means as clear-cut as that. The fact that Mr. G. was spending 5 days a week away from his wife was readily explicable upon grounds which in no way suggested marital disharmony. It

was a facet of his employment. In the reply to which I have referred in paragraph 9 above, the chairman of the tribunal wrote:

[“Mr. G.] had previously lived when away from his home in accommodation paid by his company. Whether his company was still paying him at the time of the hearing we did not know.”

(That, of course, was based upon the evidence of the claimant. Mr. G. did not attend the appeal tribunal hearing.) There must be at the least a suspicion that Mr. G.—like many a man before him—was seeking to have his cake and eat it. Had he lost his employment, he might have had no hesitation in claiming supplementary benefit upon the basis that his wife and child were part of his assessment unit. Those are the sort of questions which will have to be considered by the appeal tribunal which rehears this matter.

14. In his submission, the adjudication officer now concerned referred to the criteria set out in R(SB) 17/81, and continued:

“In my submission, it is therefore possible for a person to live together as husband and wife with more than one person as, for example, in a menage a trois where all three people live as members of one household. However, it is submitted that, for a couple to be living together as husband and wife, it is axiomatic that they live as members of the same household, and it is therefore less likely where one of the parties lives elsewhere. In my submission, if the relationship between any two persons is akin to that of husband and wife and providing that this decision is made by reference to the criteria, then there is no bar to such a relationship existing between one person and two others.”

15. This case is not, of course, concerned with a menage a trois. I think, however, that I ought to point out that the first and last sentences of the foregoing passage may lead to error in the application of the supplementary benefit legislation. Regulation 8 of the Aggregation Regulations provides:

“8.—(1) Where between members of the same household there is a polygamous relationship—

- (a) Two of the members of that relationship shall be treated as a married or, as the case may be, unmarried couple within the meaning of those definitions in section 34(1) of the Act; and
- (b) the requirements and resources of all the members, and of any person who would be a dependant of any member if that member were a claimant, shall be aggregated with and treated as those of such member of that couple as may be appropriate in the circumstances.

(2) A person shall be treated as a member of a polygamous relationship where, but for the fact that the relationship includes more than two persons, he would be one of a married or unmarried couple.”

That demonstrates that, even where all the “cohabitators” live in the same household, only one *couple* is recognised for supplementary benefit purposes. That, of itself, lends considerable support to the conclusion expressed by me in paragraphs 11 and 12 above.

16. Mr. Prew raised an issue which stands quite independent of the fundamental issue which I have been discussing so far. He cited the somewhat algebraically worded regulation 7 of the Aggregation Regulations:

“7.—(1) Where a person (in this regulation referred to as A) has been in receipt of a pension or allowance determined by reference to requirements and resources which did not include those of another

person (in this regulation referred to as B) but did by virtue of paragraph 3(2) of Schedule 1 to the Act (aggregation of requirements and resources of dependants) include those of another person or persons (in this regulation referred to as C) of whom B is not the parent and—

- (a) a benefit officer has determined that A and B are living together as husband and wife so that the requirements and resources of A would, but for this regulation, by virtue of paragraph 3(1) of Schedule 1 to the Act (aggregation of requirements and resources of couples), be aggregated with those of B and A would no longer be entitled to that pension or allowance; and
- (b) if B made a claim for a pension or allowance he would not be entitled to it in respect of himself and the persons (including A) whose requirements and resources would be aggregated with and treated as his by virtue of the said paragraph 3(1) and (2) (in this regulation those persons and B being referred to as 'B's assessment unit'); and
- (c) the immediate reduction in income of B's assessment unit which would result from the loss of the pension or allowance payable to A would, in the opinion of the benefit officer, be disproportionate,

for a period of adjustment A and B shall not be an unmarried couple (within the meaning of that expression in section 34(1) of the Act).

(2) In this regulation 'period of adjustment' means the period of 4 weeks beginning on the day on which the determination that A and B are not to be an unmarried couple is made, except that if within that period it is in the opinion of the benefit officer likely that the income of B's assessment unit will soon be increased, that period may be extended until that increase in income or for a further period of 6 weeks, whichever is the shorter period.

(3) Where by reason of this regulation A and B are not an unmarried couple, no person other than C shall be treated as a member of the same household as A for the purposes of any claim for a pension or allowance."

(I have set out the regulation in full because it is neither set out nor summarised in the case papers.)

17. As can be seen, that regulation confers a substantial measure of discretion upon the adjudication officer and, accordingly, upon the appeal tribunal. But in this case it was never considered at all. Manifestly it should have been—the more so in the light of the claimant's evidence that Mr. G. did not give her any money (cf paragraph 9 above). In the event that the fresh appeal tribunal shall find that there was a husband/wife relationship between Mr. G. and the claimant, careful consideration will have to be given to regulation 7 of the Aggregation Regulations.

18. The last point with which I must deal is the complaint made by Mr. Prew that, notwithstanding the appeal to the Commissioner then pending, the Department embarked upon the recovery of the sum found by the appeal tribunal to have been overpaid, by making deductions from the supplementary allowance which has been paid to the claimant since Mr. G. left her. (He even expressed fears that, no matter what the final outcome of the case might be, the claimant would never be reimbursed in respect of those deductions.) Mr. Prew invited me to rule that such deductions were unlawful. He referred to section 20 of the Act and, in particular, subsection (4):

“(4) Where any amount paid by way of supplementary benefit is recoverable under this section, it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.”

No sum is “recoverable”, urged Mr. Prew, until all rights of appeal have been spent either by their exercise or by effluxion of the prescribed time.

19. This is an issue into which I have no jurisdiction to go. The position was succinctly and clearly set out by the Commissioner in Decision R(SB) 44/83:

“It is for the benefit officer, or, on appeal, the tribunal or Commissioner, as the case may be, to determine whether any sum is recoverable and, if so, the amount (see section 20(2)). However, if a proper determination has been made by the relevant authority, declaring a specific sum recoverable pursuant to section 20, it is for the Secretary of State, and him alone, to decide upon the method of recovery. Moreover, it is for him to consider, should the question arise, whether the right to recover has, for some reason or other, become extinguished or ceased to be enforceable, and it is for him, if he thinks fit, to test this issue in the courts.” (Paragraph 4)

The civil courts of the land are, of course, equally available to claimants who have behind them favourable decisions by the adjudicating authorities. Should the final resolution of this case demonstrate that deductions have been made from the claimant’s benefit which should not have been made, she will have an action in the County Court for the shortfall. I cannot think, however, that the Department would let matters get to that stage.

20. Powerless though I am to intervene in respect of this aspect of the case, I feel bound to express the view that it would be in the general interest if the Department were to adhere to its practice as set out in its own “Supplementary Benefits Handbook”:

“15.8 When the Department notifies the person concerned of the benefit officer’s decision that he is required to repay a specified sum, he is advised of his appeal rights, but is also asked for his proposals for the method and rates of repayment. Should he appeal, no further recovery action is taken until the appeal is heard.” (1983 Edition, pages 125–6.)

If that passage is being interpreted as referring only to the first exercise of a claimant’s “appeal rights” (i.e. appeal to the appeal tribunal), then I can see no good or logical reason for such restriction.

21. My decision is as follows:

- (1) The claimant’s appeal to the Commissioner is allowed.
- (2) The decision of the supplementary benefit appeal tribunal dated 27 September 1983 is erroneous in law and is set aside.
- (3) The case is referred to the social security appeal tribunal, which must be constituted differently from the supplementary benefit tribunal which gave the decision which is hereby set aside, for determination in accordance with the principles of law set out in this decision.

(Signed) J. Mitchell  
Commissioner