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~~Copy to Sarah.~~
Attribution of part-time wages for Neil Bateman
supply teaching - paid monthly.

JBM/SH/26

Commissioner's File: CSB/812/1987

Region: London North

SUPPLEMENTARY BENEFITS ACT 1976

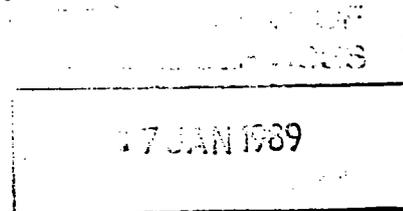
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Freda Margaret Smith (Mrs)

Social Security Appeal Tribunal: Bury St. Edmunds

Case No: 37/8



[ORAL HEARING]

1. My decision is that the decision of the Bury St Edmund's social security appeal tribunal dated 9 December 1986 is erroneous in point of law. Accordingly I set it aside. I find it expedient to give the decision that they themselves should have given namely that the provisions of regulation 9(2)(a), (b), (c) and (e) all of the Supplementary Benefit (Resources) Regulations 1981 are appropriate in this case and that following the attribution of the claimant's wages in accordance with regulation 9(2)(b) of the Supplementary Benefit (Resources) Regulations 1981 the claimant is not entitled to supplementary allowance for the period 27 January 1986 to 27 April 1986.

2. This is an appeal by the claimant to the Commissioner with the leave of the Commissioner against the unanimous decision of the appeal tribunal confirming the decision of the adjudication officer issued on 16 June 1986 to award supplementary allowance of £108.52 for the period 28 April 1986 to 22 June 1986. The claimant requested an oral hearing which request was granted. Accordingly on 20 October 1988 I held an oral hearing. The claimant was present. The claimant was represented by Mr N Bateman, Welfare Rights Officer and the adjudication officer was represented by Mr N Storey of the Solicitor's Office Department of Health and Social Security. To both of them I am indebted.

3. The facts before the adjudication officer as detailed in box 5 of the submission of the adjudication officer first concerned in these appeals are as follows:-

"1. [The claimant] is divorced and lives with her two sons in local authority accommodation. Initially her supplementary benefit claim dated from 3.9.84. She has received an allowance almost continuously to date but with one significant break which is partly the subject of this appeal.

2. [The claimant] qualified for the long-term rate of supplementary benefit requirements from 2.9.85. Payments of benefit calculated on this basis continued up to 26.1.86, [the claimant] having received a payment of wages on 22.1.86.

3. Receipt of earnings as a supply teacher disentitled [the claimant] from benefit up to 20.4.86. As the break in benefit entitlement exceeded eight weeks, [the claimant's] claim could no longer be assessed using the long-term rate of requirements. A fresh qualifying period of one year from 21.4.86 is therefore

necessary.

4. Details of the assessments showing no entitlement to benefit for the weeks in question are attached.

5. [The claimant] works as a supply teacher. The time spent working fluctuates from month to month. She is paid on or around 21st of each month for work done during the period ending on the last day of the previous calendar month.

6. Details of [the claimant's] wages relevant to this appeal are as follows:-

<u>Month Ending</u>	<u>Date Paid</u>	<u>Amount (NETT)</u>
		£
31.12.85	22.01.86	368.98
31.01.86	21.02.86	503.14
28.02.86	21.03.86	357.12
31.03.86	22.04.86	86.02
30.04.86	22.05.86	189.15
31.05.86	20.06.86	13.65 (arrears only)

7. [The claimant] had child minding expenses of £20 per week.

At the time of her appeal these expenses had not been offset against her net earnings. The oversight has now been corrected.

8. From the Forms AT2(A) it will be seen that [the claimant] was not entitled to a supplementary allowance during the period 27.1.86 -21.4.86.

9. The payment of £108.52 which is the subject of this appeal is made up as follows:-

28.04.86-25.05.86 at £ 25.43	£101.72	(4 weeks)
16.05.86-22.06.86 at <u>£ 81.07</u>	<u>£ 6.80</u>	(4 weeks)
	<u>£108.52</u>	

10. These figures were incorrect as they took no account of [the claimant's] childminding expenses."

The issues before the tribunal were the attribution of the claimant's wages to the earlier period 27 January 1986 to 27 April 1986 which caused a break in entitlement to benefit and a consequent loss of qualification to the long-term rate of supplementary allowance. The claimant and the claimant's representative have had the opportunity to comment on the matters contained in this paragraph of the decision and have in fact so commented. Nothing is to be gained by my setting out these matters afresh here.

I would only add that on 29 July 1988 the Nominated Officer made a direction.

4. The relevant statutory provisions are referred to by the adjudication officer now concerned at paragraph 2 of his submission dated 22 March 1988 and are as follows:-

"Regulation 7, Supplementary Benefit (Requirements) Regulations 1983.

and indicated that he placed little reliance on the words in sub-paragraph (2)(e)(i):-

"(e) A monthly payment shall be treated as a payment -

(i) in respect of a calendar month,"

though in so far as it went it supported his submission.

Both advocates submitted that I should make the decision that the appeal tribunal themselves should have made but they of course differed in respect of their submissions as to the decision I should give.

6. In my judgment the decision of the appeal tribunal was erroneous in point of law in their construction of regulation 9(2)(d). However, that is but a pyrrhic victory for the claimant in that in my view the Commissioner in Decision CSB/0622/1986 arrived at the correct construction of regulation 9(2)(a) and I set out paragraph 5 of that decision in full immediately below:-

"5. In a letter dated 13 December 1985 the Assistant County Treasurer to the Royal County of Berkshire wrote to the Department as follows:-

".. [the claimant] should normally submit salary claims for a period ending on the last Sunday of the month. Payment would then be made on the third Tuesday following that day.

...."

It is clear from that letter that the claimant's pay period was monthly, and that her earnings were payable on the third Tuesday of the succeeding month. Such earnings are to be attributed forward for one month from the payable date, and this regardless of the number of weeks or days actually worked in the month. Accordingly, on 30 June 1985 the claimant should have claimed 11½ days pay in respect of work done during that month. The earnings due were payable in respect of a pay period of one month, and fell to be attributed for a period of equal length under regulation 9(2)(a)(i). The earnings were payable on 16 July 1985, i.e. the third Tuesday in the following month, but should be treated as paid on 22 July 1985 under regulation 9(2)(b)(ii), because the method of payment of supplementary benefit made it impracticable to take them into account from the first day of the benefit week in which the earnings were payable. The earnings were therefore attributable to the inclusive period from 22 July 1985 to 21 August 1985, being calculated pursuant to regulation 9(2)(c) at a weekly rate arrived at in accordance with sub-paragraph (e)."

The instant case is indistinguishable on the facts from the Decision CSB/0622/1987 which I think is rightly decided and I follow it. I accept Mr Storey's submission in respect of the painter who receives £5,000 on a commissioned painting and I accept as to the examples of £5,000 received for five days work in a month and £5 paid for five days work in a month that in that regard whichever eventuality arose no unfairness results to the claimant. However, be that as it may the task before me and the Commissioner in CSB/0622/1986 is to construe the relevant provisions of regulation 9(2) set out in paragraph 4 above. The adjudication officer now concerned in his submission dated 2 March 1988 sets out his submission so far as is relevant for present purposes as follows in paragraphs 5, 6 and his second paragraph 6:-

"5. I submit that it is clear from the available evidence that, irrespective of how many days were worked by the claimant in any particular month, her earnings for those days worked were due to be paid in the third week of the succeeding month. In

paragraph 5 of Decision CSB/0622/1986 .. the Commissioner, considering the case of a claimant similarly employed to the claimant in the present case, held that "such earnings are to be attributed forward for one month from the payable date, and this regardless of the number of weeks or days actually worked in the month".

In Decision R(SB) 11/85 the Commissioner held (in paragraph 16(1)) that "when a particular payment of income is "payable" is not the same question as when payment of it is received. The 2 dates may well coincide but may well be different. The date of receipt is the date on which the payment comes to the hand of the recipient payee. The date when a payment is "payable" is the date upon which it first becomes due to be paid". I submit, that in the absence of any evidence that the payment of wages became due on any date other than the date upon which they were paid, the tribunal were not in error in concluding that the wages were payable on the date when they were paid. Wages earned for the month ending 31.12.85, 31.1.86 and 28.2.86 were paid on 22.1.86, 21.2.86 and 21.3.86 respectively and were each payable in respect of a past period of one calendar month. Thus I submit that they fell to be attributed monthly from the dates paid under regulation 9(2)(a)(i) above.

6. Having regard to regulation 9(2)(b)(ii), the method of payment of supplementary benefit made it impracticable to take the wages into account on the first day of the benefit week in which they were payable. Consequently, I submit that the tribunal did not err in law in deciding that the weekly equivalent of the wages received, calculated in accordance with regulation 9(2)(e) by virtue of regulation 9(2)(c), failed to be taken into account in the benefit week following receipt of those wages commencing with 27.1.86 and continuing throughout the period 27.1.86 to 21.4.86. However the tribunal also considered the effect of regulation 9(2)(d) and, in the reasons for their decision .. held that "having regard to the fluctuation in the claimant's income and invariable method of payment it was reasonable in the circumstances to have averaged the payments out over each month". The claimant's representative also asserts that regulation 9(2)(d) may be of assistance to the claimant but does not indicate in what way that may be. I submit that the tribunal erred in their interpretation of the provisions of regulation 9(2)(d) .. . In my submission, that regulation serves to enable the adjudicating authorities to calculate an average rate in respect of a period in relation to other periods of like length (viz fluctuating monthly payments may be averaged out as monthly payments). However, having done so, in the case of monthly payments, regulation 9(2)(e) then has to be applied in order to establish the weekly rate. In misdirecting themselves to the provision of this regulation I submit that the tribunal erred in law.

6. (sic). If the Commissioner agrees with my submission that the tribunal erred in law, I respectfully invite him to set aside the decision of the tribunal and, if he considers that sufficient facts have been found, to hold that the provisions of regulation 9(2)(a), (b), (c) and (e) are appropriate in this case and that following the attribution of the claimant's wages in accordance with reg. 9(2)(b) the claimant is not entitled to supplementary allowance for the period 27.1.86 to 27.4.86."

I accept the above set out submission and adopt it as part of my judgment.

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. I find it expedient to give the decision that the appeal tribunal should themselves have given.

8. Accordingly the claimant's appeal is allowed although for her it is a pyrrhic victory.

(Signed) J.B.Morcom
Commissioner

Date: 24 November 1988