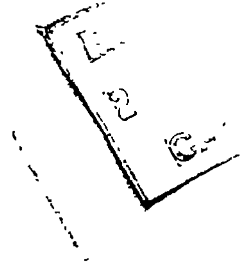
JMe/2 Commissioner's File: CIS/507/94

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER



[ORAL HEARING]

1. The claimant's appeal is allowed as a matter of law, although there is no practical advantage to him. The decision of the Newcastle social security appeal tribunal dated 5 May 1994 is erroneous in point of law, for the reasons given below, and I set it aside. I consider it expedient to make the necessary findings of fact and to give the final decision on the appeal (Social Security Administration Act 1992, section 23(7)(a)(ii)). My decision is set out in paragraph 2 below.

2. My decision is that the award of income support to the claimant made prior to 14 January 1994 falls to be reviewed on the ground of a relevant change of circumstances on the monthly payment of earnings being made to the claimant on 14 January 1994 (Social Security Administration Act 1992, section 25(1)(b)), and that the revised decision on review with effect from 12 January 1994 should be that the claimant's entitlement to income support should be calculated on the basis that amounts of training expenses allowance and travelling expenses allowance paid to him in respect of Royal Naval Reserve service are to be included as part of his earnings within regulation 35 of the Income Support (General) Regulations 1987 and that no amounts expended by the claimant on the expenses of travelling to and from duty are to deducted in ascertaining his gross earnings under regulation 36. The result from the benefit week starting on 12 January 1994 until the start of the benefit week in which the next monthly payment was made is that the claimant's entitlement to income support was properly calculated at £10.62 per week. The claimant's entitlement to income support from that latter benefit week onwards until the running of his claim terminated on his commencing employment is to be calculated by the adjudication officer on the same legal basis. If there is any unresolved dispute as to the result of that calculation, the appeal is to be returned to a Commissioner for further decision.

The background

3. The issue which arises in this appeal is the proper treatment under the income support legislation of various payments received by the claimant as a serving member of the Royal Naval Reserve ("RNR"). The question has been raised in relation to the payments made to him on 14 January 1994, but whatever the proper principles are will govern later payments as well. The claimant claimed income support on 4 January 1994. The pay statement for 14 January 1994 showed gross payments of £44.15 for "drill" from 14 November 1993 to 29 November 1993 and of £88.30 for "SA" from 4 to 5 December 1993. There were total payments of £13 for training allowances (£3.25 each for 14 November 1993, 2 December 1993, 6 December 1993 and 9 December 1993). There were total payments of travelling expense allowances of £97.20 (£16.20 for 14 November 1993, £16.20 for 2 December 1993, £32.40 for 4 to 5 December 1993, £16.20 for 6 December 1993 and £16.20 for 9 December 1993). Income tax of £33 was deducted, leaving a net payment of £209.65. The adjudication officer decided that the whole of the net payment should be taken into account as earnings, converting to a weekly amount of £48.38. £15 was disregarded under paragraph 7(1) of Schedule 8 to the Income Support (General) Regulations 1987 ("the Income Support Regulations"), leaving £33.38 to be set against the claimant's applicable amount of £44.00 as a single claimant aged not less than 25.

4. The claimant appealed against that decision, arguing that the payment of travelling expenses was not earnings and that the expenses could not be said to be "not wholly, exclusively and necessarily incurred in the performance of the duties of the employment" because he could not carry out his duties without travelling to his place of duty. The adjudication officer's written submission on form AT2 relied on regulation 35(1)(f) of the Income Support Regulations as requiring any payment made by an employer in respect of travelling expenses between the claimant's home and place of employment to be treated as earnings. An attached form AT2A showed the calculation of income support at £10.62 per week starting from 12 January 1994. The claimant sent in some further written comments and copies of extracts from RNR regulations describing the conditions for payment of training expenses allowances and travelling expenses allowances.

5. The claimant attended the hearing before the appeal tribunal on 5 May 1994 and gave evidence. He explained the entries on the pay statement. For instance, "drill" referred to an evening attendance of two hours, for which the pay was a quarter of a full day's pay, or £11.04. A payment of £44.15 therefore covered four drill attendances. "SA" referred to weekend training. He did not dispute that training expenses allowances, paid for drill attendances to cover the cost of meals, counted as earnings. But he submitted that payments of travelling expenses allowances could not be earnings, because remuneration means payment for services rendered, and that regulation 35(1) was self-contradictory.

The appeal tribunal's decision

6. The appeal tribunal disallowed the appeal and decided that the weekly amount of £48.38 was to be taken into account "for the relevant period", subject to the £15 disregard. In its reasons for decision, the appeal tribunal referred to Commissioner's decision CIS/89/1989 and to regulation 35(1)(f) of the Income Support Regulations. It continued:

> "3. Whilst the tribunal gave careful consideration to the submission of the appellant that the wording of the regulation was anomalous, on the basis that "remuneration or profit" clearly contemplate a payment for services, whereas travelling expenses contemplate reimbursement of money expended, nonetheless the wording of the regulation is quite specific. Had there been any ambiguity as to the wording, it might have been possible for the tribunal to construe it in favour of the appellant, but paragraph (f) sub-paragraph (i) "specifically" includes in the definition of "earnings" travelling expenses incurred by the claimant between his home and place of employment. The appellant in his evidence said that he does not do any work at home and he could not therefore be assisted by the decision in CIS/89/1989.
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> 4. The tribunal must apply the regulations as they stand unless there is any ambiguity open to interpretation by the tribunal, which is not the case here. Accordingly, the claimant's income for the relevant week was correctly calculated, the disregard of £15 is the only one available and travelling expenses from home to place of employment cannot be disregarded. The tribunal therefore found the adjudication officer correct in paragraph 6.5 of his submission and the weekly amount of £48.38 is therefore to be treated as an income, less the £15 disregard."

Subsequent proceedings

7. The claimant applied for leave to appeal to the Commissioner, which was refused by the appeal tribunal chairman, but granted by a Commissioner on 8 August 1994. The appeal was supported to a limited extent in the adjudication officer's submission dated 13 September 1994, in that it was submitted that the training expenses allowance did not fall within the meaning of earnings and that the appeal tribunal erred in failing to consider the classification of this payment. The claimant's request for an oral hearing of the appeal was granted. I shall not set out the written submissions made by the claimant after the appeal tribunal's decision, because all the points were covered in the oral hearing.

8. The claimant attended the oral hearing. The adjudication officer was represented by Mrs J Majumdar of the Office of the Solicitor to the Department of Social Security. The author of the submission dated 13 September 1994 was also present, as were officers from the local office concerned with the claim. I am

grateful to all concerned for their assistance.

9. The claimant set out his case very clearly. He emphasised the consequences of the approach taken initially by the adjudication officer and confirmed by the appeal tribunal. Since he had to continue to incur travelling expenses to carry out his duties in the RNR, which could not be abandoned because of his responsibilities as an instructor and the five year term of his engagement, he was in effect forced to carry out those duties for nothing. He was left worse off than if he had not been carrying out his duties. He was unable to make the payments for his board and lodging to his parents which he had agreed to make and was forced to rely on their charity. He contended that the argument that everyone had to travel to work if they chose to follow part-time employment, and was catered for by the standard disregard of the first £5 or £15 of weekly earnings, did not apply to him. Because of the nature of the RNR, with only 13 centres, travel for long distances to carry out duties was inevitable. The claimant contended that the results contradicted most ordinary people's ideas of justice and logic. I certainly take those arguments seriously and I bear in mind the adverse effects on the claimant of the decision under appeal. However, as he recognised, my essential task is to decide what the legislation actually requires. In particular, I have no power to create exceptions from those requirements in circumstances of individual hardship. If the legislation is unambiguous, any unfair results can only be removed by some amendment to the legislation.

10. Therefore I turn to the claimant's submissions directly related to the relevant income support legislation, and in particular to regulation 35 of the Income Support Regulations. So far as relevant, that provides:

> "(1) Subject to paragraphs (2) and (3), "earnings" means in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes--
>
> ...
>
> (f) any payment made by the claimant's employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of--
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> (i) travelling expenses incurred by the claimant between his home and place of employment;
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> (ii) expenses incurred by the claimant under arrangements made for the care of a member of the claimant's family owing to the claimant's absence from home;
>
> ...
>
> (2) "Earnings" shall not include--
>
> (a) any payment in kind;
>
> (b) any remuneration paid by or on behalf of an employer to the claimant in respect of a period throughout which the claimant is on maternity leave or is absent

from work because he is ill;

(c) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;

(d) any occupational pension."

Regulation 36 requires that net earnings be taken into account, subject only to the disregards contained in Schedule 8, in calculating entitlement to income support and that the figure of net earnings be reached by deducting from gross earnings the amount of income tax and social security contributions deducted from the earnings and half of any pension contribution made by the claimant.

11. The claimant submitted that regulation 35(1) was ambiguous and contradictory, because the plain and ordinary meaning of remuneration or profit did not cover payments which were purely reimbursements of expenses actually incurred by an employee, yet sub-paragraph (f) purported to bring some such payments within the definition of earnings. He pointed out that the regulations for the payment of travelling expenses allowances restricted the amounts to out-of-pocket expenses and that the mileage allowance was modest. He also submitted that his travel expenses were wholly, exclusively and necessarily incurred in the performance of his duties because he could not carry out his duties without travelling. He believed that travel from home to duty was covered by the Ministry of Defence insurance. Since the travelling expenses allowance was not taxable, the same approach should be taken for social security purposes. He finally referred to Commissioner's decision CG/52/1992, in which, for the purposes of a claim for invalid care allowance, it was agreed by the adjudication officer's representative that the training expenses allowance and travelling expenses allowance paid to a member of the RNR were not to be treated as earnings.

12. Mrs Majumdar submitted that there was no internal contradiction or ambiguity in regulation 35. First, she argued that a payment purely in reimbursement of expenses actually incurred could be remuneration or profit, in the sense of a payment derived from employment. If that was wrong, she submitted that the words "and includes" in regulation 35(1) have the effect of extending the definition of earnings to the categories of payment listed, whether they would be said in the ordinary use of language to be remuneration or profit or not. She relied on the decision R(SB) 21/86, where similar words were used. Mrs Majumdar argued that in the same way the terms of sub-paragraph (f) have the effect that the expenses of travelling between home and the place of work are deemed not to have been wholly, exclusively and necessarily incurred in the performance of the employee's duties. If that last point was wrong, or if regulation 35(2)(c) reinstated the "wholly, exclusively and necessarily" test, she submitted that the expenses of travelling from home to work were not incurred "in the performance of" an employee's duties, but in order to enable the employee to perform those duties. That conclusion would not be altered in the claimant's case if the Ministry of Defence insurance did cover the journeys

or the Inland Revenue did not tax the payments of travelling expenses allowance. Thus, Mrs Majumdar submitted that the appeal tribunal did not err in law in treating the payments of training expenses allowance as part of the claimant's earnings. She submitted that the appeal tribunal did err in law in the way identified in the submission dated 13 September 1994. Since the regulation on training expenses allowance described the allowance as "to meet the cost of meals and other incidental expenses to which officers or ratings may be put by reason of their service", the allowance was to reimburse expenses wholly, exclusively and necessarily incurred in the performance of RNR duties. The appeal tribunal should have given consideration to the classification of that allowance, although the claimant had not challenged the adjudication officer's decision in that respect.

Was the appeal tribunal's decision erroneous in point of law?

13. I have concluded that appeal tribunal did not err in law in any of the ways put forward by the claimant or by the adjudication officer. Apart from the point about the meaning of "remuneration or profit", I consider that Mrs Majumdar's construction of regulation 35(1) of the Income Support Regulations is right. I reject the claimant's submissions to the contrary. I have no doubt that in the context the words "remuneration or profit" do not cover payments purely in reimbursement of expenses actually incurred by an employee. That would be in line with the income tax cases in which such payments have been held not to be emoluments of employment (see paragraph 8 of Commissioner's decision R(FIS) 4/85). But the fact that such payments, not being emoluments, are not taxable, does not decide the question of whether the expenses concerned were incurred wholly, exclusively and necessarily in the performance of the employee's duties. I also have no doubt that the effect of listing the various categories of payments including those in sub-paragraph (f) is not merely to provide a list of payments which might, in some circumstances, count as remuneration or profit. The effect is to deem that the payments listed are earnings for the purposes of calculating an income support claimant's income, whether they come within the ordinary meaning of "remuneration or profit" or not. Otherwise there would be no useful purpose in listing sub-paragraphs (a) to (i). Although the words used in the supplementary benefit provision in issue in R(SB) 21/86 were somewhat stronger ("shall include"), I consider that the effect in regulation 35(1) is the same as held to exist in R(SB) 21/86. There is nothing internally contradictory in that conclusion: the ordinary meaning of "remuneration or profit" is simply extended for the particular purposes of calculating an income support claimant's income. I also conclude that there is no ambiguity in the words used.

14. Commissioner's decision CG/52/1992 does not assist the claimant. The benefit in issue in that case was invalid care allowance. The decision does not disclose the reason why the payments of travelling expenses allowance and training expenses did not count as earnings in that case. However, I suspect that the conclusion must have resulted from the application of

regulation 3(3) of the Social Security (Computation of Earnings) Regulations 1978, which requires the annual bounty paid to members of the reserve forces and payments in respect of up to 16 drill night attendances in each bounty year to be disregarded. However, regulation 3(3) only applies for the purposes of asking whether a claimant of invalid care allowance is in gainful employment and of ascertaining the earnings of unemployment benefit claimants. It does not apply for the purposes of income support.

15. I do not need to decide whether or not the effect of paragraph (2)(c) of regulation 35, to which paragraph (1) is expressly subject, is that payments in respect of travelling expenses between home and the place of work are excluded from the definition of earnings in those cases where the expenses are wholly, exclusively and necessarily incurred in the performance of the duties of employment. That is because the present case is a straightforward case of travel between home (which was not a place of duty) and a regular place of employment. In such circumstances it is firmly settled in the income tax context, where the "wholly, exclusively and necessarily" test has been used for many years, that the expenses of such travel are not incurred <u>in the performance of</u> the duties of employment. The expenses are incurred in order to enable the duties to be performed and that is not good enough. The statement of that fundamental distinction in <u>Taylor v Provan</u> [1975] AC 194 has recently been approved by the House of Lords in <u>Smith v Abbott</u> [1994] 1 All ER 673. The same distinction applies to regulation 35(1)(f) and (2)(c). Therefore, I reject the claimant's submission that his travelling expenses were wholly, exclusively and necessarily incurred in the performance of his RNR duties because he could not carry out those duties without incurring the travelling expenses. The expenses were not incurred <u>in the performance of</u> those duties.

16. For the same reason, I reject the adjudication officer's submission that the payments of training expenses allowance were in respect of expenses wholly, exclusively and necessarily incurred in the performance of RNR duties. The evidence that the allowance went to meet the cost of meals and other incidental expenses to which RNR personnel might be put by reason of their service fell well short of showing that such expenses were incurred <u>in the performance of</u> their RNR duties, rather than merely in order to enable those duties to be performed. The claimant confirmed that the allowance was paid automatically at a flat rate for every duty attendance, whether or not any expenses were actually incurred on the occasion in question. I note that there is a specific provision in section 316(4) of the Income and Corporation Taxes Act 1988 deeming training expenses allowances and training bounties paid to members of the reserve forces not to be income for income tax purposes, which suggests that otherwise such payments would have been taxable. Therefore, the appeal tribunal did not err in law in including the payments of training expenses allowance as part of the claimant's earnings, and, since that conclusion had not been challenged by the claimant, did not err in failing to give specific reasons.

17. However, the appeal tribunal did err in law in a number of respects. First, it did not state the period to which its decision applied, merely referring to "the relevant period". The appeal tribunal, in common with the adjudication officer's decision as transcribed onto the first page of form AT2, did not state a date from which the decision was to operate. Since the claim was made on 4 January 1994, the appeal tribunal should have established the nature of the decision made on 14 January 1994. Was it the initial decision on the claim? In that case, a start-date for entitlement was required and, in so far as the decision covered dates prior to 14 January 1994, the amounts paid on 14 January 1994 were irrelevant. If the decision was a revised decision on review of the initial decision on the claim, it should have been properly treated as such and a ground of review identified. Second, the decision stated that a defined weekly amount was to be taken into account as income, when it was clear that the amounts of earnings which the claimant would have received in months subsequent to January 1994 would have been different. Either the appeal tribunal should have dealt with the evidence as to each monthly payment down to the date of its decision or it should have made it clear that its decision related to the principles on which the claimant's income was to be calculated, leaving the precise calculations to the adjudication officer. It was an error of law to state a precise figure in a decision which apparently covered an indefinite period, for part of which the precise figure could not be supported by evidence. Third, I have concluded that the appeal tribunal should have given some consideration to the questions whether any expenditure by the claimant could have been deducted in identifying the amount of gross earnings under regulation 36 of the Income Support Regulations and what under regulation 29(2) was the period in respect of which the payment was payable, although, as explained below, I do not think that that would have altered the decision in the claimant's favour.

18. For those reasons, the appeal tribunal's decision dated 5 May 1994 must be set aside as erroneous in point of law. The essential primary facts are not in dispute and no-one argued that there is any point in sending the appeal back to another appeal tribunal. I consider it expedient to make the necessary findings of fact and to give the final decision on the appeal.

The Commissioner's decision on the appeal

19. I adopt the matters set out in paragraph 3 above as findings of fact. The nature and purpose of the payments made to the claimant were not in dispute and are as described above. The claimant secured employment in September 1994 (although I do not know the precise date) and that terminated the running of the open-ended claim for income support made on 4 January 1994. I am sufficiently satisfied by what was said by the officers from the local office at the oral hearing that the adjudication officer's decision of 14 January 1994 was a revised decision on review, operative from 12 January 1994 as the first day of the benefit week in which the change of circumstances occurred. I am satisfied that an earlier decision was given by an adjudication

officer on the claim, based on the information then available, although the first day of entitlement, in the light of the expiry of the claimant's 312 days of unemployment benefit, remains obscure. I am also satisfied that the practice was followed of making a determination of entitlement for an indefinite period, leaving it to be reviewed on change of circumstances as and when evidence of each succeeding monthly payment was received.

20. I am immediately concerned with the decision made on 14 January 1994 and the evidence relevant to that decision, but on general principle I must deal with the whole period from 12 January 1994 until the termination of the running of the claimant's open-ended claim for income support.

21. It is obvious that the payment made to the claimant on 14 January 1994 constituted a relevant change of circumstances requiring review of the existing decision under section 25(1)(b) of the Social Security Administration Act 1992. By virtue of paragraph 7 of Schedule 7 to the Social Security (Claims and Payments) Regulations 1987, any consequent change in the amount of income support takes effect from the first day of the benefit week in which the change of circumstances occurs. In the present case that was 12 January 1994.

22. For the reasons fully set out in paragraphs 13 to 16 above, I conclude that all the payments made to the claimant on 14 January 1994 count under regulation 35 of the Income Support Regulations as his earnings. How those earnings are to be taken into account for income support purposes is defined by regulation 36, which in paragraph (3) requires one first to identify the claimant's gross earnings. It has been decided in Commissioner's decision CIS/317/1992, to be reported as R(IS) 16/93, that the principle in Parsons v Hogg [1985] 2 All ER 897, appendix to R(FIS) 4/85, applies to the meaning of "gross earnings" in regulation 36(3). At some points the Court of Appeal in that case refers to gross earnings as equal to the claimant's taxable earnings. Since in the present case it is agreed that the payments of travelling expenses allowance and training expenses allowance to the claimant were not taxable, it might be argued that their amount should be excluded from his gross earnings. However, at other points, the Court of Appeal holds that gross earnings are the receipts from employment, less only the expenses wholly and necessarily incurred by the claimant in the course of winning those receipts. That fuller statement makes it clear that no wider class of expenses is to be deducted in defining the amount of gross earnings than is covered by the category of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment. Therefore, in the present case all the amounts which are the claimant's earnings as defined in regulation 35 count as gross earnings for the purposes of regulation 36.

23. Then the only deduction to be made under regulation 36 is of the amount of income tax deducted, since there seems to have been no deduction of social security contributions and there is no evidence of any occupational or private pension contributions

having been made by the claimant. Finally, by virtue of regulation 36(2), any amounts specified in Schedule 8 are to be disregarded. The only provision in Schedule 8 which applies to the claimant is paragraph 7, which requires the first £15 of weekly earnings derived from employment as a member of the reserve forces to be disregarded.

24. I should also mention the provisions of regulation 29 of the Income Support Regulations, which were briefly discussed at the oral hearing. The adjudication officer has assumed that because the claimant was paid monthly each payment was "payable in respect of" a month. Then, by virtue of regulation 29(2)(a), each payment is to be taken into account for a month, starting with the first day of the benefit week in which it was due to be paid (regulation 31(1)(b)). It seemed to me that there might be an argument that in the claimant's circumstances each payment, although made monthly, was payable in respect of the number of days on which he had carried out RNR duties. For the payment made on 14 January 1994, that appeared to be nine days. Commissioner's decision CIS/242/1989 holds to the contrary. The reasoning there was that regulation 29(2)(a) contemplates only a payment in respect of a single period, so that, even where the claimant was separately engaged for each day's work as a supply teacher, a payment for the days worked in a particular month was "payable in respect of" a month. I have considerable doubts about the correctness of that decision on its facts, because it does not deal with the implications of the definition of "payment" in regulation 2(1) of the Income Support Regulations to include a part of a payment or with the possible application of regulation 29(2)(b). However, I need not pursue those difficult matters. The claimant expressed himself to be quite content with the treatment of each monthly payment made to him as payable in respect of a month. In contrast to the circumstances of CIS/242/1989, his engagement with the RNR was a continuing one. In those circumstances I am prepared to accept that each monthly payment was payable in respect of a month, although I stress that that should not be regarded as a conclusion of law which has any force in any other case (including other cases concerning members of the reserve forces).

25. The provisions identified above are those which were applied by the adjudication officer in reaching the conclusion that from 12 January 1994 weekly income of £33.38 was to be set against the claimant's applicable amount of £44.00 in calculating his entitlement to income support, resulting in the figure of £10.62. The adjudication officer has proved that that is the proper revised decision on review with effect from 12 January 1994. I do not have the evidence from which to determine the claimant's entitlement with effect from the benefit week in which the February 1994 payment was received. My decision is that the entitlement from that week until the claimant started full-time work should be determined on the same legal basis as applied to the benefit week starting on 12 January 1994. It appears most likely that the result of applying that legal basis will be identical to what was in fact decided about the claimant's entitlement. The adjudication officer should formally confirm to

the claimant whether or not he considers that that is so, and, if not, what he determines the claimant's entitlement to income support to be week by week throughout the period in issue. If the claimant disputes the calculation of entitlement for any week from the benefit week in which the February 1994 payment was made onwards, and the dispute cannot be resolved by agreement between the claimant and the adjudication officer, the appeal is to be returned to a Commissioner for further decision.

26. Although I have technically allowed the claimant's appeal, because I have found the appeal tribunal's decision to have been erroneous in point of law, I have rejected the arguments which he put forward. He no doubt will still see the result as unfair, although I hope that I have explained how the result is compelled by the income support legislation as it currently stands. I suggest to him that the source of the unfairness, as he sees it, is in the absence of any provision in the income support legislation which takes account of the actual expenditure by members of the reserve forces on travel to and from duty on an individual basis. Instead, paragraph 7 of Schedule 8 to the Income Support Regulations provides a fixed disregard of earnings (at a higher figure than enjoyed by "ordinary" employees) which applies irrespective of the expenses actually incurred by the individual claimant. I have drawn attention in my decision to examples of a more individualised approach to the earnings of members of the reserve forces taken for the purposes of income tax and for unemployment benefit and invalid care allowance.

(Signed) J Mesher
Commissioner

Date: 1 March 1995