

MJG/SH/1

Commissioner's File: CIS/89/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 9 November 1988 as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely that in relation to the claimant's duties as a Councillor for a District Council, the payments to her by the Council shall for income support purposes be treated in the following manner:-

- (a) the payments of attendance allowance to her under section 173(1) of the Local Government Act 1972 shall be treated as income, subject to a £5 per week disregard;
- (b) the payments to her of travelling allowance and subsistence allowance under section 174 of the Local Government Act 1972 are to be disregarded for income support purposes.

Social Security Act 1975, section 101 (as amended).

2. This is an appeal to the Commissioner by the claimant, a woman aged 44 years at the relevant time. The appeal is against the unanimous decision of a social security appeal tribunal dated 9 November 1988 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on

15 March 1988 in the following terms,

"The adjudication officer has decided that the payment of attendance allowance and travelling expenses payable to the claimant by Thanet District Council in connection with her duties as a local councillor, falls to be taken fully into account as earnings, subject to a £5 a week disregard."

3. The appeal was at the claimant's request the subject of an oral hearing before me on 13 December 1989 at which the claimant was present and was represented by Mr D A Merriman of the Association of Councillors. The adjudication officer was represented by Mr P Taylor of the Office of the Chief Adjudication Officer. I am indebted to all concerned for their assistance to me at the hearing.

4. At that hearing Mr Merriman indicated that the appeal was in effect only against that part of the tribunal's decision that dealt with the claimant's payments received from the Council for travelling expenses, holding them to be "earnings" and thus to be taken into account. It was also indicated that the claimant might be entitled to subsistence payments from the council and that those also were in issue. It was not in dispute that the actual payments of attendance allowance in respect of "approved duties" under sections 172 and 177(2) of the 1972 Act had to be treated as "earnings" for income support purposes. That they are "earnings" is undoubtedly so and there is a considerable volume of authority to that effect eg. a decision of a Tribunal of Commissioners in R(S) 6/86.

5. My decision therefore deals only with the question of the separate payments made for travelling expenses to the claimant and any separate payments made to her for subsistence, under the provisions of section 174 of the Local Government Act 1972 (see paragraph 6 below). However, I should point out that it appears that the claimant's appeal to the local tribunal was also on a wider ground, namely that there should be deducted from the actual payments of attendance allowance the claimant's expenses for such matters as books, clothing, telephone, stationery etc. As Mr Merriman indicated that those were not in issue at the hearing before me this decision does not deal with them. There could be considerable problems in relation to such a claim and the matter is in my view not a simple one (see reported Commissioner's Decisions R(U) 5/83; R(FIS) 4/85 at paragraph 13; and R(P) 1/87). If there has been any misunderstanding on this matter then I should be asked to give a supplemental decision (which may necessitate a further oral hearing) because undoubtedly the issue was raised at the tribunal level and indeed Mr Taylor indicated that he had thought that it was an issue in the present case.

6. As it is, however, I will simply deal with the question of the payment to the claimant of travelling expenses and any payments that may be made to her for subsistence allowance. These payments are made under section 174 of the Local Government Act 1972 (c.70) which (as amended) reads as follows,

"174. Travelling allowance and subsistence allowance

- (1) Subject to subsections (2) and (3) below, a member of a body to which this section applies shall be entitled to receive payments by way of travelling allowance or subsistence allowance where expenditure on travelling (whether inside or outside the United Kingdom) or, as the case may be, on subsistence is necessarily incurred by him for the purpose of enabling him to perform any approved duty as a member of that body, being payments at rates determined by that body, but not exceeding, in the case of travel or subsistence for the purpose of an approved duty within the United Kingdom, such rates as may be specified by the Secretary of State.
- (2) [Not relevant]
- (3) [Repealed]." (My underlining)

7. "Approved duty" as referred to in section 174(1) is defined in section 177(2) of the 1972 Act as follows,

- " 177. (2) In sections 173, 174 and 176 above the expression 'approved duty', in relation to a member of a body, means any of the following duties, that is to say -
- (a) attendance at a meeting of the body, or of any of its committees or sub-committees;
 - (b) the doing of any other thing approved by the body, or anything of a class so approved, for the purpose of, or in connection with, the discharge of the functions of the body, or of any of its committees or sub-committees;
 - (c) where, in pursuance of a duty imposed on or a power granted to the body by any enactment or instrument (including a Royal Charter), he has been appointed by or on the nomination of the body to be a member of some other body prescribed for the purposes of this paragraph ..., the doing of anything as a member of that other body for the purpose of, or in connection with, the discharge of the functions of that other body."

8. The position is therefore that any payments by Thanet District Council to the claimant must come within the limited terms of sections 174 and 177(2) of the 1972 Act. The payments are made separately to her or are itemised separately and are not included in the overall payments of attendance allowance under the terms of section 173(1) of the 1972 Act, attendance allowance being defined as "a payment for the performance of any approved duty".

9. The relevant income support legislation is as follows. Regulations 28-32 of the Income Support (General) Regulations 1987 (S.I. 1987 No. 1967 as amended) deal with general provisions as to calculation etc of income but there is no real problem about that in this case. Regulation 36 of the 1987 Regulations provides that "the earnings of a claimant derived from employment as an employed earner to be taken into account shall [subject to disregards in paragraphs 1-13 of Schedule 8 - not relevant in this case] be his net earnings" but "net" is defined in regulation 36(3) in a particular way i.e. simply the gross earnings of a claimant less income tax, primary class 1 social security contributions, and one half of sums paid by the claimant as contributions to pension schemes. Therefore the provision as to "net" income does not assist in this type of case.

10. However, directly in point is regulation 35 of the 1987 Regulations, the relevant parts of which provide as follows,

"Earnings of employed earners"

35. (1) Subject to paragraph (2) 'earnings' means in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes -

(a)-(e) [not relevant in this case]

(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 -

(i) travelling expenses incurred by the claimant between his home and place of employment;

(ii) expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from

home;

(g)-(h) [not relevant in this case]

(2) 'earnings' shall not include -

(a)-(b) [not relevant];

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

(d) [not relevant in this case]."

11. Also relevant is regulation 40(2) of the 1987 Regulations which provides for disregards in the "calculation of income other than earnings" of sums specified in Schedule 9 to the 1987 Regulations. Paragraph 3 of Schedule 9 provides that there shall be disregarded in the calculation of income other than earnings the following,

" 3. In the case of employment as an employed earner, any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment."

The question therefore in this case is how the payments made by the Thanet District Council to the claimant for travelling expenses and any subsistence come within the Income Support Regulations as cited above.

12. The first point to observe, and an important one, is that the expression "expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment", used three times in the 1987 Regulations, is in fact precisely the same wording as is used by the income tax legislation for indicating what expenses may be deducted from earnings before tax is assessed under Schedule E. The current provision is section 198(1) of the Income and Corporation Taxes Act 1988 reading as follows,

"Relief for necessary expenses

198. (1) If the holder of an office or employment is necessarily obliged to incur and defray out of the emoluments of that office or employment the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform those duties, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

13. It should perhaps be observed that the 1988 Act is a consolidation statute, hence no doubt the continuing reference to the "horse". It is clear that regulation 35(1)(f) of the Income Support (General) Regulations 1987 (cited in paragraph 10 above) is intended to follow in all respects the income tax rule. The 'deeming' to be income of "travelling expenses incurred by the claimant between his home and place of employment" and "expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home" are in fact only examples of "expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment" and must be read in that light. As a result of the above provisions, case law on the income tax legislation is of course of considerable assistance in construing the Income Support (General) Regulations 1987.

14. However, in my view, in the present case the issues as to travelling and subsistence allowances are clear. That is because the terms of sections 174 and 177(2) of the Local Government Act 1972 make it clear that any travelling and subsistence allowance paid by the local authority to a councillor must by definition be "in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment". That follows from the strict terms of sections 174 and 177(2) of the Local Government Act 1972 and any payment made by a council outside those terms would of course be ultra vires. No problem certainly appears to attach to subsistence payments.

15. It was suggested by the adjudication officer in a written submission dated 20 September 1989 that the tribunal should have 'apportioned' the travelling expenses paid to the claimant by the council and should not have disregarded any expenses, being "travelling expenses incurred by the claimant between his home and place of employment" (1987 Regulation 35(1)(f)(i)). However, that does not seem to me to be correct for two reasons. First that particular phrase in that regulation is only an example of a payment which is "in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment". But in the case of a councillor the only travelling expenses that can be paid are "where expenditure on travelling .. is necessarily incurred by him for the purpose of enabling him to perform any approved duty" (section 174(1) of the Local Government Act 1972). In so far as any such payments may include eg. bus fares from the claimant's home to a council office that is not in my view caught by the 'prohibition' in regulation 35(1)(f)(i) of "travelling expenses incurred by the claimant between his home and place of employment" because that expression has to be construed in the light of the general phrase "wholly, exclusively and necessarily incurred in the performance of the duties of the employment". A councillor in fact has to do much of his or her business from her home and in travelling from his or her home eg. to a council office or to the home of a constituent he or she is not travelling just to work but travelling as an integral part of her work (compare a similar decision in income tax law, by the House of Lords in Owen v. Pook [1970] A.C. 249).

16. It follows therefore that all subsistence allowances and travelling expenses paid separately from attendance allowance by the council to the claimant are to be disregarded for income support purposes. The only qualification to that would be if the council had made ultra vires payments to the claimant but there is no suggestion of that in the present case. Indeed it would be incumbent upon the Department of Social Security to show that that was the case, since the presumption would be that any such payments were not made ultra vires.

17. I was told at the hearing that this is the first case before a Social Security Commissioner regarding the treatment of attendance and expenses allowances paid by councils to their members. My ruling in paragraph 1 above provides, I hope, a simple rule for local adjudication officers to follow. In the present case the local adjudication officer must implement my decision in dealing with the detailed assessment of the claimant's entitlement to income support. If any difficulty arises in relation to that it can be referred back to me for supplemental decision. I should observe that no point was made to me in the present case about the provisions of sections 175 and 176 of the Local Government Act 1972, relating respectively to "allowances for attending conferences and meetings" and "payment of expenses of official and courtesy visits etc", nor the provisions of section 173 and 173A of that Act relating to "financial loss allowance" (which is not in issue in this case). My decision does not therefore deal with those matters and they would need separate consideration if they should arise.

18. Lastly I ought to say that the Income Support (General) Regulations 1987 are different in many respects from the earlier supplementary benefit legislation. Therefore the principles of earlier Commissioners' decisions on the supplementary benefit legislation, in relation to Councillors, in particular an unreported decision on file CSB/705/1983, may well not apply to income support.

(Signed) M.J. Goodman
Commissioner

(Date) 8 February 1990