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(0/91)

Commissioner's File: CIS/242/1989

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Birkenhead social security appeal tribunal given on 5 April 1989, although correct on the main issue arising in the appeal, was erroneous in law and must be set aside. I consider that it is expedient that I should give the decision which the tribunal should have given. I decide that the earnings of the claimant for the work done by her in May and June 1988 should be attributed to the periods set out in paragraph 19 below and her entitlement, if any, to income support for those periods should be calculated accordingly.

The main issue

2. This appeal concerns the earnings of a supply teacher, who is remunerated for days worked at a daily rate but whose pay for that work only becomes due and payable at a later date. The main issue in the appeal is the question of how those earnings are to be attributed in the calculation of the claimant's income for income support purposes.

The facts

3. The facts have not been in dispute and can be summarised as follows. The claimant was registered as unemployed and in receipt of income support (with her benefit week beginning on a Wednesday) when she obtained work as a supply teacher for the Shropshire County Council as the local education authority. She worked as a supply teacher on 9, 10, 12, 13, 16, 17 and 18 (half-day) May 1988, a total of 6¹/₂ days. She was paid at the rate of £42.23 per day. She was due to receive her pay for those days at the end of the following month, i.e. on 30 June 1988, and did so on or shortly after that date. She also worked from 6 to 10 June 1988, a total of 5 days. She was due to receive her pay

for those days likewise at the end of the following month but (apparently because of the school breaking up before the summer holidays) in fact received it earlier, on 22 July 1988.

4. The claimant's pay slip for her May earnings is headed "Pay Period ending 30/06/88". It shows as separate items under the pre-fix TD (which the back of the pay slip shows to be a code reference to Teachers Daily Rate) 2, $\frac{1}{2}$ and 4 "sessions" at the rate of £42.23. The claimant's pay slip for her June earnings is headed "Pay Period ending 31.07.88". It shows under the pre-fix TD 5 "sessions" at the same rate.

5. In reply to a direction from myself for the supply of copies of any correspondence with the Council concerning her employment as a supply teacher in May and June 1988, the claimant produced a letter dated 13 July 1988, --with annexed a "Statement of Particulars and Conditions of Service" which would apply from 1 September 1988. That Statement (which is itself dated June 1988) is thus subsequent to the claimant's employment in question and not directly relevant. But it sets out the sort of conditions which would ordinarily be anticipated in such a case, and the relevant conditions accord wholly with the facts set out above. I will assume (and in so far as necessary I find as a fact) that the claimant's contractual arrangements with the Council were the same at the material times. The Statement is headed: "Statement of Particulars and Conditions of Service for Casual Relief Teachers (i.e. those engaged on a short notice basis)". It begins, by way of a preamble:

"By its nature the employment of teachers on a 'short notice basis' is employment on a day to day basis to provide immediate support and relief to a school ..."

Under heading 1 ("Conditions of Service") it states:-

"Casual relief staff will be engaged by the Authority on a daily, or part thereof basis, by individual schools through the Headteacher acting on behalf of the Authority."

Under heading 4 ("Method of Payment") it says:-

"Payment is made by cheque. Teachers should complete the appropriate form (13.T) in each school they work at, claims being submitted by the school at the end of each month for payment at the end of the following month."

Analysis of contractual arrangements

6. In Decision R(U) 2/87, the Commissioner had to decide for the purposes of unemployment benefit whether a supply teacher was unemployed over the days of school half-term or whether those were days "of recognised or customary holiday". For that purpose, he considered the contractual arrangements in that case and said, at paragraphs 17 and 18 of his decision:-

17. The appointment letters, in my view, are at best evidence of loose arrangements made between the Education

Department and temporary teachers in their area, whereby the Department create a pool or panel of teachers, including the claimant, upon whose services they can call as and when they wish. Equally, the claimant would no doubt have had the right to decline any work offered to him (although, as a matter of practicality, he would probably not do so too often, as he might not be asked again). I cannot see that either party had any legally enforceable rights or duties on the strength of the appointment letters alone, and it seems to me that legal obligations only arose between the parties when the claimant had been offered and had accepted (and was consequently "engaged" for) a particular day's work or period of work; he then had a duty to carry out his work in a proper manner and the Department had a duty to pay him therefor at the appropriate rate.

18. That being the case, in my judgment any contract between the claimant and the Education Department terminated at the end of each day's work or period of work for which he had been engaged. It follows that, in relation to the period in question, after the claimant finished work on 24 May 1985 he was not on holiday (whatever may have been the position for established teachers or the wage earning or salaried public at large), but was unemployed.

The Commissioner had previously pointed out that the contractual arrangements regarding supply teachers depend on the facts of each particular case, as is clearly correct. Nevertheless, in my judgment the paragraphs I have cited above contain a valuable and accurate analysis of the legal position, which is applicable to the facts of the present case, as well as most other typical cases.

Relevant regulations

7. The regulations concerning the calculation of income for the purposes of income support are contained in Chapter II of Part I of the Income Support (General) Regulations 1987 ("the General Regulations"). The parts of the regulations material to the present case, as in force at the relevant time, read as follows:-

Regulation 28

"(1) For the purposes of section 20(3) of the Act (conditions of entitlement to income support), the income of a claimant shall be calculated on a weekly basis -

- (a) by determining in accordance with this Part other than Chapter VI, the weekly amount of his income; and"

Regulation 29

"(1) earnings derived from employment as an employed earner shall be taken into account over a period determined in accordance with the following paragraphs and at a weekly amount determined in accordance with regulation 32 (calculation of weekly amount of income).

(2) the period over which a payment is to be taken into account shall be -

(a) in a case where it is payable in respect of a period, a period equal to the length of that period;

.....

and that period shall begin on the date on which the payment is treated as paid under regulation 31 (date on which income is treated as paid)."

Regulation 31

"(1) a payment of income to which regulation 29 (calculation of earnings derived from employed earner's employment and income other than earnings) applies shall be treated as paid -

(a) in the case of a payment which is due to be paid before the first benefit week pursuant to the claim, on the date on which it is due to be paid;

(b) in any other case, on the first day of the benefit week in which it is due to be paid or the first succeeding benefit week in which it is practicable to take it into account."

Regulation 32

"(1) For the purposes of regulation 29 (calculation of earnings derived from employed earner's employment and income other than earnings), where the period in respect of which payment is made -

(a) does not exceed a week, the weekly amount shall be the amount of that payment;

(b) exceeds a week, the weekly amount shall be determined -

(i) in a case where that period is a month, by multiplying the amount of the payment by 12 and dividing the product by 52;"

I should also mention regulation 5(5) which reads:-

"A person who was, or was treated as being, engaged in remunerative work and in respect of that work earnings to which regulation 35(1)(b) to (d) (earnings of employed earners) applies are paid shall be treated as engaged in remunerative work for the period for which those earnings are taken into account in accordance with Part V."

Decisions of adjudication officer and tribunal

8. On 31 August 1988, the adjudication officer issued the following decision on the claimant's application for income support:-

"The claimant is not entitled to income support from 30 June 1988 because she has earnings from employment as a supply teacher which fall to be taken into account at a weekly amount which exceeds her applicable amount."

The claimant's appeal against that decision was heard by the Birkenhead social security tribunal on 5 April 1989. The main submission of the claimant's representative was to the effect that, as the periods for which the claimant had worked were 6¹/₂ days in May and 5 days in June and had been paid by reference to daily rates, for the purposes of regulation 29(2)(a) the payments made to her were "in respect of" those periods, and not in respect of the one-month pay periods. The tribunal purported to find as a fact that "the [claimant's] earnings in May and June 1988 were each payable in respect of a pay period of one month", but in my view this was clearly a conclusion of law from the primary facts. The tribunal upheld the decision of the adjudication officer, stating that the claimant "is not entitled to income support from 30.6.1988." The tribunal's reasons for their decision reads as follows:-

"[The claimant] has earnings from employment as a supply teacher which fall to be taken into account in accordance with Reg 9(2) Resources Regs at a weekly amount which exceeds her applicable amount. She was in remunerative work 30.6.88 to 30.8.88 under Reg 5(5) of the General Regulations and is not entitled to income support for that period by virtue of Sec 20(3)(c) of the Act. The tribunal had regard to CSB/0622/1986."

Leave to appeal was granted by the chairman.

Errors of law in tribunal's decision

9. In my judgment, the tribunal's decision contains three errors of law. The first, which is of minimal importance, concerns the reference to "Reg 9(2) Resources Regs", which is clearly an accidental mistake for regulation 29(2) of the General Regulations. No doubt the tribunal made this mistake after considering the Commissioner's decision on file CSB/0622/1966, on the identical wording contained in regulation 9(2)(a) of the Supplementary Benefit (Resources) Regulations 1981 ("the Resources Regulations"). I will refer to this decision later.

10. The second error of law arises from the tribunal's apparent adoption of the adjudication officer's submission (set out in paragraph 6.5 of Form AT2) that the payments fell to be treated as paid on 30 June and 29 July 1988 in accordance with regulation 31(1)(a) of the General Regulations. In my view, paragraph (a) is not applicable because the dates when payment was due (30 June and 31 July) were not "before the first benefit week

pursuant to the claim", which was dated 25 June and treated as effective from 13 June 1988 (see paragraph 5.3 of Form AT2). In my judgment paragraph (b) was applicable in each case. The payments must be treated as paid on the first day of the claimant's benefit week in which they became due, i.e. Wednesday 29 June and Wednesday 27 July respectively. (It is immaterial that the latter payment was in fact paid earlier than 27 July, because regulation 31(1) makes it clear that the crucial date is when the payment is due to be made, not when it is actually made.)

11. The third error of law is contained in the tribunal's reason that the claimant "was in remunerative work 30.6.88 to 30.8.88 under Reg 5(5) of the General Regulations and is not entitled to income support for that period by virtue of Sec 20(3)(c) of the Act". In the latest submission to me dated 18 November 1991 (in response to my direction), the adjudication officer now concerned says at paragraph 8:-

"Finally, it is my submission that, contrary to the submissions of the adjudication officers previously involved in this appeal, regulation 5(5) of the General Regulations has no bearing on this appeal in so far as the payments in question are not earnings to which regulation 35(1)(b) to (d) of the General Regulations apply."

I agree with that submission. The earnings mentioned in paragraph (b) to (d) of regulation 35(1) relate to redundancy payments, compensation for loss of office and holiday pay, with which this appeal is not concerned. If the claimant is to be denied income support for certain periods, it will be because her income exceeds the applicable amount under paragraph (b) of section 20(3), and not because she is treated as being in remunerative work under paragraph (c).

Decision on the main issue

12. I turn to the main issue in this appeal. In his submissions, the claimant's representative has argued that when paragraph 29(2)(a) refers to a payment "payable in respect of a period", it is referring on the facts of this case to the 6¹/₂ days worked in May and the 5 days worked in June. It was those periods for which the payments were made, and consequently the payments were "in respect of" those periods. In support of this, the claimant's representative stresses that there was no monthly contract. The contract was on a daily basis, as shown by the reasoning of the Commissioner in R(U) 2/87 (referred to above), the facts of which are indistinguishable from those in the present case; with this part of the claimant's representative's submission, I agree for the reasons I have set out above. He also stresses that the arrangements made for monthly payment were merely for the administrative and financial convenience of the Council. They are not consequent upon the claimant being employed on a monthly or other regular basis. It would be an odd result, he submits, if the method of payment which an employer happened to adopt affected the employee's entitlement to income support.

13. These are forceful and attractive arguments, particularly as they do not involve giving the words "in respect of" any forced or unnatural meaning. But after due consideration I have found myself unable to accept them for the following reasons.

14. To start with, in my view it is fallacious to say that the claimant was paid for a period of 6¹/₂ days in May and a period of 5 days in June. She was not. As the claimant's representative has submitted (and as I agree), the claimant was employed only on a daily basis. So the true analysis is that in May she was paid for 7 different periods (6 of one day and 1 of half a day) and in June she was paid for 5 different periods. Furthermore, even if the claimant had been paid for a single period, for example if she had been engaged for the whole week which she worked in June, there would always be the possibility of the monthly payment covering a further period. That possibility is only avoided if the monthly payment is in respect of an engagement for a month or longer. It follows that, on the claimant's representative's arguments, regulation 29(2) must apply where the payment is made for (or "in respect of") two or more periods.

15. In my view, however, regulation 29(2)(a) clearly only envisages and provides for a payment "in respect of" a single period. Its wording is wholly inapt to cover the possibility of there being two or more periods covered by a single payment. Similar remarks apply to the words at the end of regulation 29(2) "and that period shall begin on the date on which payment is treated as paid under regulation 31 (date on which income is treated as paid)". It is true that under section 6(c) of the Interpretation Act 1978, which is applicable to the General Regulations by virtue of section 23(1) of that Act, words in the singular normally include the plural. But that is only "unless the contrary intention appears", and in my judgment a contrary intention clearly appears in the case of regulation 29(2). Further, if a single payment could be in respect of two or more periods, it is difficult to see how regulations 29(1) and 32 could operate satisfactorily or indeed at all, and that is a further indication against a construction of regulation 29(2) which would allow that.

16. It follows, in my judgment, that "the period" referred to in regulation 29(2) must be a single period; and in the circumstances of this case the only such "period" is the period over which any monies earned would fall to be included in the relevant payment. In other words, a payment which is for the days worked in a particular month is "payable in respect of" that month. That construction gives a perfectly natural and ordinary meaning to the words used, and I find that it is the correct construction.

Previous decisions

17. I find support for the above reasoning and conclusion in the decision of the Court of Appeal in Chief Supplementary Benefits Officer v. Cunningham, reported in the Appendix to R(SB) 23/84.

I think it is implicit in the judgments that regulation 9(2) of the Resources Regulations envisaged only one "period". It appears from that case that in certain circumstances it may be permissible to sever a single payment and treat it as two or more separate payments "in respect of" different periods. But, as the Cunningham case itself shows, such circumstances are unusual. In the present case, the payments were single composite payments for work done in the particular months, and in my view clearly not severable.

18. My conclusion on the main issue accords with the decisions on Commissioners' files CSB/0622/1986 and CSB/812/1987, both decided on the indistinguishable wording of the equivalent provisions in regulation 9(2) of the Resources Regulations. I agree with and follow those decisions in that respect. In paragraph 5 of his decision in CSB/0622/1986 the Commissioner, after finding that the claimant's pay period was monthly and that her earnings were payable on a certain day of the succeeding month, said:-

"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."

Those words are equally applicable to the present case, subject to one modification. It is, I think, clear from the remainder of the same paragraph of the Commissioner's decision that in the above sentence he was using the expression "the payable date" to mean the date when the payment was treated as being paid, under paragraph (b)(ii) of regulation 9(2), the wording of which is similar to that of regulation 31(1)(b) of the General Regulations. On the facts of that particular case, he found that the relevant day was the first day of a succeeding benefit week, under the second limb of paragraph (b)(ii).

Substituted decision

19. I therefore set aside the decision of the tribunal and substitute therefor the following decision:-

- (1) The payment for the claimant's May earnings, which was payable on 30 June 1988, must be attributed to the period of one month.
- (2) That one-month period must be treated, under regulations 29(2) and 31(1)(b) of the General Regulations, as having begun on the first day of the claimant's benefit week in which 30 June 1988 occurred (i.e. Wednesday 29 June) or, if that is impractical, the first day of the first succeeding benefit week on which it is practicable to take the payment into account.
- (3) The payment for the claimant's June earnings which was payable on 31 July 1988 must be attributed to the period of one month.

- (4) That period must be treated as having begun on the first day of the claimant's benefit week in which 31 July 1988 occurred (i.e. Wednesday 27 July 1988) or, if that is impractical, the first day of the first succeeding benefit week in which it is practicable to take the payment into account.
- (5) In each case, a weekly amount must be determined by multiplying the amount of the payment by 12 and dividing the product by 52, in accordance with regulation 32(1)(b)(i) of the General Regulations.
- (6) Where under the foregoing the payment is to be taken into account for part only of a benefit week, the amount to be taken into account must be calculated in accordance with regulation 32(3) of the General Regulations.
- (7) The claimant's entitlement, if any, to income support for these periods must be calculated accordingly.

20. I do not anticipate that there will be any difficulty in making the appropriate calculations in accordance with the last forgoing paragraph and ascertaining the consequences, but if there is, the matter should be restored to me.

(Signed) Judge N.T. Hague
Deputy Commissioner

(Date) 17 March 1992