

R(F) 1/92

Mrs. R. F. M. Heggs
27.11.91

CF/22/1989

Payment of benefit not obtained – prescribed time reduced under new regulation – whether claimant entitled to rely on time limit in force when the right to payment arose

Regulation 11(1) of the Child Benefit (Claims and Payments) Regulations 1984 provided that the right to payment of benefit shall be extinguished if *inter alia* payment is not received within twelve months of the date of the instrument of payment if one has been sent or in certain cases such date as the Secretary of State determines. Regulation 11(2) provided that where a question has arisen as to whether extinguishment has occurred, extinguishment will not take place where the claimant, having given written notice after the expiration of twelve months requesting payment of the benefit, had good cause for not giving that notice throughout the relevant period. In that event the period for seeking payment would be extended to the date of determination of the question. Regulation 38 of the Social Security (Claims and Payments) Regulations 1987 replaced regulation 11. Regulation 38 contained no provision for the extension of the twelve month period for good cause. The claimant, who suffered from depression, failed to give written notice requesting payment of the benefit until after expiry of twelve months from the date the sums were payable and after regulation 38 replaced regulation 11. She did however telephone asking for the arrears before regulation 38 was introduced.

Held that:

1. the general rule is that the law to be applied is the law which is in force at the date when the notice requesting payment is given (para. 15);
 2. the claimant's right to payment for the sums was extinguished prior to 11 April 1988 (para. 13);
 3. the claimant could have the benefit of an extension to the twelve month period in regulation 11(1) by virtue of section 16(1)(c) of the Interpretation Act 1978 because at the time regulation 11 was replaced by regulation 38 the period of twelve months had expired and the question of good cause had arisen (para. 18);
 4. the claimant must and could show good cause throughout the period of the delay (paras. 24 and 27).
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DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 16 May 1989 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to give the decision the tribunal should have given, I further decide that the claimant is entitled to child benefit in respect of her son Thomas during the inclusive period from 16 December 1985 to 6 April 1987 because although her written notice requesting payment given on 22 April 1988 was not given within the prescribed time limit, I am satisfied that she has proved that there was continuous good cause for such delay.

2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal of 16 May 1989, leave having been granted by the tribunal chairman. The claimant did not attend the oral hearing of the appeal held before me,

but was represented by her husband Mr. R. Richardson. The adjudication officer was represented by Mr. M. Jenking-Rees from the Solicitor's Office of the Departments of Health and Social Security.

3. The facts as set out in box 5 of form AT2 state that on 22 March 1988 a telephone call was received from the claimant requesting a child benefit claim form for her son William, who was born on 10 December 1985, and arrears for her son Thomas for whom she had not received child benefit since the birth of William. A claim form was sent to the claimant which she duly completed in respect of William. She also noted on the form her request for payment of arrears of payments for Thomas. This form was received at the Child Benefit Centre on 22 April 1988. The records of the Department of Social Security show that the claimant was awarded child benefit for Thomas on 29 August 1983. A renewal order book containing orders dated 6 January 1986 and each fourth week thereafter to 28 April 1986 (the claimant being paid four weekly in arrears) had been returned to the Department from the post office because it had not been collected by the claimant. In the absence of any replies to enquiries regarding the return of the book sent to the claimant's last quoted address, no further payments were issued.

4. On 11 May 1988 the adjudication officer decided that child benefit amounting to £486.85 for the inclusive period from 16 December 1985 to 6 April 1987 could not be paid to the claimant. That was because payment of child benefit for that period was not obtained within twelve months from the date that the claimant had the right to be paid. The right to be paid the benefit was treated as arising from 16 December 1985 to 28 April 1986 on the due dates of each order in the book issued and for the period from 5 May 1986 to 6 April 1987 on those dates and the successive Mondays during that period as decided by the Secretary of State for Social Services.

5. The claimant appealed against the decision on the grounds that very shortly after William's birth she suffered from severe post-natal depression. Her condition had deteriorated further after the birth of her third son on 30 May 1988 and she had been in receipt of continuous medical care and attention for this condition since March 1986.

6. In his written observations on the claimant's appeal the adjudication officer submitted that the claimant's right to payments of child benefit in respect of Thomas during the inclusive period from 16 December 1985 to 2 March 1987 was extinguished with the result that the amount of £422.80 was not payable. The adjudication officer substituted 2 March 1987 for 6 April 1987 because he accepted that the claimant requested payment on 22 March 1988, when she telephoned the Department and made known her current address. The adjudication officer further submitted that the claimant's right to payment of child benefit during the said period was governed by regulation 38 of the Social Security (Claims and Payments) Regulations 1987 because the adjudication officer's decision was issued after 11 April 1988, when those regulations came into effect.

7. The tribunal of 29 November 1988 adjourned the hearing of the appeal because "The tribunal were of the opinion that the date of claim for Thomas should be 22 March 1988 . . . and that any decision should therefore be based on the regulations effective on that date".

8. In a further written submission the adjudication officer submitted that the law relating to the extinguishment of the right to payment was procedural and not substantive so that the law currently in force at the date of the adjudication officer's decision applied i.e. regulation 38 of the Social Security (Claims and Payments) Regulations 1987.

9. In the event the tribunal of 16 May 1989 allowed the claimant's appeal and decided that child benefit in respect of Thomas was payable for the inclusive period from 16 December 1985 to 6 April 1987. This was because "Claims for both William and Thomas were accepted as from 22 March 1988 by both parties" and on that basis regulation 11 of the Child Benefit (Claims and Payments) Regulations 1984 applied. Further, the appeal succeeded because it was not in dispute that the claimant had good cause "for the delay in claiming."

10. Prior to 11 April 1988 regulation 11 of the Child Benefit (Claims and Payments) Regulations 1984 was in operation and provided so far as relevant to the present appeal:

"11- (1) Subject to paragraph (2), the right to payment of any sum on account of benefit shall be extinguished where payment thereof is not obtained within the period of twelve months from the date on which the right is to be treated as having arisen; and for the purposes of this regulation the right shall be treated as having arisen -

(a) in relation to any such sum contained in an instrument of payment which has been given or sent for the purpose of making payment thereof to the payee or to an approved place for collection by him (whether or not received or collected, as the case may be) and notwithstanding that that sum is greater or less than the sum to which the payee has the right to payment -

(i) on the date on which the said instrument of payment; or

(ii)

(b)

(c) . . on such date as the Secretary of State determines.

(2) Where a question arises whether the right to payment of any sum on account of benefit has been extinguished by the operation of this regulation and the determining authority is satisfied that -

(a) after expiration of the said period of 12 months the Secretary of State has received a written notice requesting payment of that sum; and

(b) throughout a period commencing within the said period of 12 months and continuing up to the date on which the said notice was given there was good cause for not giving that notice,

the said period of 12 months shall be extended to the date on which the determining authority decides that question and for the purposes of the operation of this regulation thereafter the right to payment of that sum shall,

notwithstanding the provisions of paragraph (1), be treated as having arisen on that date.

(3) . . .”

11. From 11 April 1988 the above quoted regulation was replaced by regulation 38 of the Social Security (Claims and Payments) Regulations 1987. Regulation 38(1) was couched in similar terms to regulation 11(1) although regulation 38 contained no provision for the extension of the twelve months extinguishment period where good cause for not giving written notice requesting payment had been established. From 9 October 1989, however, the provision for “good cause” was reintroduced by regulation 38(2A) of the Social Security (Claims and Payments) Regulations 1987. There was, therefore, a gap between 11 April 1988 and 9 October 1989 when the “good cause” provision was not available to the claimant. In the present case the question at issue was whether or not the claimant was entitled to retain the benefit of the good cause provision.

12. The right to payment of the sums due for the inclusive period from 16 December 1985 to 28 April 1986 (being the duration of the order book sent by the post office but not collected by the claimant) arose on 6 January 1986 and every fourth Monday thereafter until 28 April 1986. With regard to the remaining sums due from 5 May 1986 it was decided on behalf of the Secretary of State that the right to payments arose on 26 May 1986 and every fourth Monday after that date. The claimant's right to payment of the sums due was extinguished on the anniversary of those dates unless she obtained payment or sought payment within the prescribed period. It follows that the date on which the claimant “requested” payment is crucial. In his written submission to the tribunal the adjudication officer accepted that “The claimant sought payment on 22 March 1988 when she telephoned the Department and made known her current address.” The tribunal found as fact “that the claim was accepted as from 22 March 1988 by both parties.” However, regulation 11(2)(a) of the Child Benefit (Claims and Payments) Regulations 1984 (in force at that date) expressly required written notice to be made to the Secretary of State, as did regulation 38 of the Social Security (Claims and Payments) Regulations 1987 which replaced it. Mr. Richardson referred me to the chairman's note of evidence which recorded that the presenting officer had contacted the Child Benefit Centre “who advised that a telephone claim would be accepted by them.” He submitted that as the Department had accepted that date they could not now retract from it. I do not agree. An error of law cannot be rectified by consent and the tribunal erred in law in so concluding. Manifestly they failed to have regard to the provisions of regulation 11(2)(a). The Secretary of State did not receive written notice requesting payment of child benefit for Thomas until 22 April 1988 which I now find to be the date for the purposes of the appropriate regulation.

13. The claimant's right to payment for sums due in respect of the inclusive period from 16 December 1985 to 6 April 1987 arose at a time when regulation 11 was applicable and the provision of “good cause” was available. The claimant's right to payment for the sums was extinguished prior to 11 April 1988 when regulation 38 came into force. She did not give her written notice until 22 April 1988.

14. In his written submission dated 18 September 1989 the adjudication officer now concerned suggested that for the purposes of determining whether regulation 11 or regulation 38 was to be applied, there were three possible dates:

- (i) the date when the claimant's written notice requesting payment was received;
- (ii) the date or dates when the right to payment was treated as having arisen;
- (iii) the date of the adjudication officer's decision.

15. As a general rule, the law to be applied is the law which is in force at the date when the notice requesting payment is given. It is not in dispute that the claimant was entitled to child benefit in respect of Thomas during the relevant period. On her claim form received on 22 April 1988 the claimant noted "not claimed for Thomas since birth of William". This was not a claim for child benefit for Thomas but in reality a written notice that she required payment of arrears of child benefit already due. In determining whether the date when the claimant's written notice requesting payment was received or the date or dates when the right to payment was treated as having arisen should apply, I have to consider the provisions of section 16 of the Interpretation Act 1978, which provides:

"16. (1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears –

. . .

- (c) affects any right, privilege, obligation or liability acquired, accrued or incurred under that section; . ."

16. The common law presumption against retrospectivity does not apply to procedural legislation. That is because the presumption, like the presumption in section 16 of the Interpretation Act 1978, is against the removal of vested rights and "no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed" (*Yew Bon Tew v. Kenderaan Bas Mara* [1983] AC 553 at 558G).

17. However the rules concerning the extinguishment of the right to payment are not procedural in all cases. Those rules are, in effect limitation provisions. In *Yew Bon Tew v. Kenderaan Bas Mara* the Privy Council were of the opinion that a "limitation Act may . . . be procedural in the context of one set of facts, but substantive in the context of a different set of facts". The Privy Council considered the facts of *The Ydun* [1899] p. 263 and they took the view that the curtailment of a limitation period before the expiry of the old time for bringing the action but after the new time had expired would not be "merely procedural".

18. The question then is to be determined whether, at the date when regulation 11 was replaced by regulation 38, any, and if so what, right or privilege had been acquired or accrued under regulation 11. It is clear that the claimant had acquired a right to payment of child benefit in respect of Thomas, but that was not a right which lasted for evermore. It was a right which would be extinguished at the end of a period of twelve months unless the claimant showed good cause for not giving written notice requesting payment. Her right to payment was subject to the limitation that she must give written notice requesting payment of the sum within twelve months unless she could show good cause for extending that time. That contingency had arisen at the date when regulation 11 was replaced by regulation 38. That is to say, the period of

twelve months had expired and the question of good cause had arisen. That is precisely the position considered by the Privy Council in *Yew Bon Tew v. Kenderaan Bas Mara* when analysing *The Ydun*.

19. The fact that there must be some investigation of the facts in order to determine whether good cause has been shown reinforces me in my view that the claimant had an acquired right to a matter of substance that is the relieving provision of good cause. In *Sri Lanka Insurance Company Limited v. Ranasinghe* [1964] AC 541 at 552, the Privy Council held that the Plaintiff had “something more than a mere hope of expectation . . . he had in truth a right . . . although that right might fairly be called inchoate or contingent”. They adopted the view of the Privy Council in *Director of Public Works v. Ho Po Sang* [1961] AC 901 at 922 where it was said:

“It may be . . . that . . . a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected or preserved.”

20. It follows that the claimant’s right amounted to an acquired or accrued right under section 16(1)(c) of the Interpretation Act 1978. No contrary intention appears in either the Child Benefit (Claims and Payments) Regulations 1984 or the Social Security (Claims and Payments) Regulations 1987. There are no savings or transitional provisions. Hence there is nothing from which it can be inferred an intention that section 16(1)(c) of the Interpretation Act 1978 should not apply. In my view the issues are not procedural but involve consideration of substantive law. It follows that the operative date for determining the relevant regulation is the date or dates when the right to payment was treated as having arisen. I am supported in this conclusion by decision CA/424/1989 where the Commissioner decided however that the good cause “provision did not apply because on 11 April 1988 the twelve months limitation period had not **expired** [my emphasis] so that the accrued or actual right to be considered in October 1988 was during the period when there was no ‘good cause’ provision.”

21. Mr. Jenking-Rees conceded that the date of the adjudication officer’s decision was not an appropriate date and I agree. Were it otherwise it would result in arbitrary justice; the issues being dependent on whether or not the adjudication officer had delayed issuing his decision in cases where, as in the present case, the date was crucial.

22. Mr. Jenking-Rees suggested that I should consider whether regulation 38(2A) of the Social Security (Claims and Payments) Regulations 1987 had retrospective effect so that the provision of good cause subsisted whether or not regulation 11 or regulation 38 was applicable. In view of my decision that the date or dates when the right to payment was treated as having arisen should apply so that regulation 11 is applicable, I express no view whatsoever on this issue.

23. Regulation 11(1) of the Child Benefit (Claims and Payments) Regulations 1984 provides that “the right to payment of any sum on account of benefit should be extinguished where payment thereof is not obtained within the period of twelve months from the date on which the right is to be treated as having arisen”. Further, regulation 11(2) provides that if a claimant can show that she had good cause for being late **throughout** the period of delay, the prescribed time can be extended to the

date when the Secretary of State received written notice requesting payment, with the result that no disentitlement is incurred.

24. The claimant's right to payments of child benefit in respect of Thomas arose during an inclusive period from 16 December 1985 to 6 April 1987. The right to such payments fell to be extinguished on various dates during the inclusive period from 16 December 1986 to 6 April 1988. The claimant's written notice requesting payment on 22 April 1988 was clearly out of time and the claimant can only escape disentitlement if she can establish good cause for being late **throughout** the period of delay.

25. Good cause means some fact, which having regard to all the circumstances (including the claimant's state of health and the information which she has received and that which she might have obtained) would probably have caused a reasonable person of her age and experience to act (or fail to act) as she did (R(S) 2/63 approving CS/371/1949 KL).

26. Although the adjudication officer now concerned did not dispute that the claimant had good cause for the delay in giving written notice requesting payment, Mr. Jenking-Rees submitted that when dealing with "a husband and wife" situation it was also essential to consider whether the spouse had good cause for the delay in giving the written notice requesting payment. I reject this submission. Mr. Richardson was not the claimant's appointee nor are there any circumstances to warrant a finding that he was her agent. The tribunal accepted that the claimant had good cause and again I do not accept Mr. Jenking-Rees' submission that the tribunal should have called for medical evidence in support of this conclusion. The tribunal accepted the claimant's grounds of appeal and there is no legal support for the contention that such evidence must be corroborated by medical evidence. However, at the end of the oral hearing before me, Mr. Richardson assured me that such medical evidence could be supplied. This is now to hand and accounts for the delay in the promulgation of my decision.

27. On 13 August 1991 Dr. Borg issued a medical certificate, on behalf of the claimant's doctor, confirming that the claimant was under continuous medical supervision and treatment for post natal depression from 7 April 1986 to 7 August 1986 and again from 9 November 1987 to the date of issuing the certificate on 13 August 1991. Although this evidence does not show that the claimant was receiving medical treatment from 8 August 1986 to 8 November 1987, I do not consider that this evidence is sufficient to disturb the finding of fact by the tribunal that the claimant had good cause for the delay during the whole of the period in issue.

28. For the reasons stated above the tribunal's decision was erroneous in law. However, I give the decision set out in paragraph I as I am empowered by section 101(5) of the Social Security Act 1975.

29. The adjudication officer's appeal is dismissed.

Date: 27 November 1991
Heggs

(signed) Mrs. R. F. M.
Commissioner