

Commissioner's Answer Letter RCH - SIC of Sec 7
Letter to A. P. ... *48/96*
RFMH/SH/1W/MD (CIS)

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(CIS)

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
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 social security appeal tribunal given on 20 December 1994 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 an additional payment of a weekly retainer fee of £161.60 in respect of residential care accommodation at "The Hawthorns" for a period of four weeks from 9 May 1994.
2. This is an appeal on behalf of the claimant against the decision of the social security appeal tribunal of 20 December 1994 leave having been granted by the Chief Commissioner. I held an oral hearing of the appeal in private. The claimant did not attend but was represented by Mr P Charlton, a Welfare Rights Officer from Suffolk County Council. The adjudication officer was represented by Mr L Scoon of the Solicitor's Office of the Department of Social Security.
3. On 4 July 1994 the adjudication officer decided that the claimant was not entitled to payment of a weekly retainer fee of £161.60 in respect of residential care accommodation at the The Hawthorns for a period of four weeks from 9 May 1994 because he was living at The Corner House prior to becoming a permanent resident there. There was an appeal on behalf of the claimant against that decision.
4. The claimant did not attend but was represented at the hearing of the appeal before the tribunal on 20 December 1994. The chairman's note of evidence records that the claimant's representative explained the position as follows:-

"... it had been decided following a reassessment by social services of the appellant who was mentally disabled that The Hawthorns at which he had been residing for some 4 years was no longer suitable. It was felt that The Corner House would be suitable and therefore he was sent there for a trial period of some 4 weeks. It was submitted that this was reasonable firstly to see how the appellant fitted in and secondly to see how the residents at The Corner House reacted to the appellant. As things turned out he stayed there. If things had not worked out for him he would have been returned to The Hawthorns until something else suitable could have been found. The Hawthorns and The Corner House both provided residential accommodation for mentally ill patients although there was a difference in emphasis."

The tribunal also had before them a letter from the Assistant Project Manager of the local office of MIND in which he confirmed:-

"That it is the policy at The Corner House, a residential care home, and considered to be good practice, to accept new residents to the project, on a one month's trial period. This is to ensure that the resident fits in, and accepts the way the project is run and can live harmoniously with the people already in residence."

5. In the event the tribunal dismissed the appeal. The findings of fact read:-

"The appellant is single, aged 44 who lives in a residential care home. He was in a residential care home prior to the 31 March 1993 and therefore has "preserved rights". On the 9 May 1994 he was moved from the place at which he had been residing namely The Hawthorns to another residential care home The Corner House. This was following him being reassessed by the social services and the idea being formed that The Hawthorns was not suitable for him. He went to The Corner House for a trial period of some 4 weeks during which time it was purported to keep open his place at The Hawthorns. The idea was this was to see whether he fitted in with the other residents at The Corner House and whether they fitted in with him. In the event he stayed. The manager of The Hawthorns now seeks some 4 weeks retainer fee. The absence of the appellant from The Hawthorns for the first 4 weeks of his stay at The Corner House cannot be said to be temporary."

The reasons for decision read:-

"The law on this particular subject is set out in Regulation 16 [which presumably should read paragraph 16 of Schedule 7] of the General Regulations. By virtue of those Regulations where a person is temporarily absent

from accommodation where he is liable to pay a retaining fee and but for his temporary absence his applicable amount will be calculated in accordance with Regulation 19 as would the appellant in this case and where the absence is for at least one week then a retaining fee can be paid. In this case however the tribunal find that the absence of the appellant from The Hawthorns cannot be said to be temporary. Where temporary indicates to the tribunal that it is a passing moment in time between leaving the permanent and going back to the permanent or to something else. That was not the case here. The absence from The Hawthorns was for the purpose of seeing if the appellant would permanently fit it at The Corner House. It cannot be said even with the benefit of hindsight that the absence was temporary. It was intended to be permanent as clearly The Hawthorns, it had been decided, was not suitable for the appellant so clearly he was not going to be sent there on any permanent basis in the future."

6. It is not in dispute that the claimant had "a preserved right" because he was living in a residential care home on 31 March 1993. The issue before the tribunal was whether the claimant's weekly applicable amount for income support purposes fell to be determined by reference to regulation 19 and/or regulation 21 of the Income Support (General) Regulations 1987 ("the Regulations"). These provide so far as relevant:-

" 19. - (1) ... where a claimant has a preserved right and either -

(a) lives in a residential care or nursing home; or

(b) ...

his weekly applicable amount shall, except in a case to which regulation 21 (applicable amounts in special cases) or Part II of Schedule 4 (persons to whom regulation 19 does not apply) applies, be calculated in accordance with Part I of that Schedule.

21. - (1) ... in the case of a person to whom any paragraph in column (1) of Schedule 7 applies (applicable amounts in special cases), the amount included in the claimant's weekly amount in respect of him shall be the amount prescribed in the corresponding paragraph in column (2) of that Schedule; ..."

7. Paragraph 16 of Schedule 7 to the Regulations provides so far as relevant:-

"Column (1)

Column (2)

Persons temporarily absent from a hostel, a residential care or nursing home.

16. Where a person is temporarily absent from accommodation for which he is liable to pay a retaining fee, and but for his temporary absence from that accommodation his applicable amount would be calculated in accordance with regulation 19 (applicable amounts for persons in residential care and nursing homes), and -

(a) - (b) ...

(c) he is absent for a period of at least one week from that accommodation being accommodation either in a residential care home or nursing home and he is not required to be available for employment.

16. The amount otherwise applicable to him under these Regulations may be increased to take account of the retaining fee by an amount not exceeding 80 per cent of the applicable amount referred to in paragraph (1)(a) of Schedule 4 (applicable amounts of persons in residential care or nursing homes) and -

(a) ...

(b) in a case of a person to whom only subparagraph (c) of column 1 applies, any such increase shall not be for a continuous period of more than four weeks."

8. Mr Charlton submitted that the question for determination by the tribunal was whether the claimant was "temporarily absent" from The Hawthorns for the purposes of paragraph 16 of Schedule 7. As the term was not defined, it fell to be given its ordinary everyday meaning. All the evidence before the tribunal supported the findings of fact that following the claimant being reassessed by social services "He went to The Corner House for a trial period of some 4 weeks ... The idea was this was to see whether he fitted in with the other residents at The Corner House and whether they fitted in with him.". Mr Charlton argued that in the light of those findings of fact the tribunal erred in law in concluding that the claimant was not temporarily absent from The Hawthorns. Clearly he was. As a result paragraph 16 of Schedule 7 applied. The claimant was liable to pay a retaining fee and "but for his temporary absence" from The Hawthorns, his

applicable amount would be calculated in accordance with regulation 19 of the Regulations. As the claimant satisfied the additional conditions contained in column (1) of paragraph 16(c), his applicable amount fell to be calculated by reference to column (2) of paragraph 16 with specific reference to sub-paragraph (b).

9. Mr Charlton submitted that during the period in issue the claimant was permanently resident in The Hawthorns and temporarily resident in The Corner House. As a result the claimant's weekly applicable amount fell to be calculated by reference to two separate provisions. Such a calculation was not incompatible with the legislation. He referred me to regulation 19(1)(1ZH) which provided that "for the purposes of paragraphs (1ZB) and (1ZF) a person is a permanent resident in residential care home or nursing home where the home is his principle place of abode, and a temporary resident where it is not.". Where a claimant satisfied the conditions set out in column (1) of paragraph 16(c) of Schedule 7, his weekly applicable amount fell to be calculated by reference to the amount prescribed in the corresponding paragraph in column (2) under the provisions of regulation 21. This provided that "the amount otherwise applicable may be increased to take account of the retaining fee by an amount not exceeding 80 per cent of the applicable amount referred to in paragraph 1(1)(a) of Schedule 4 (applicable amount of persons in residential care or nursing homes) ..". In order to calculate the weekly amount of the retaining fee in respect of The Hawthorns it was necessary to calculate the weekly applicable amount in accordance with paragraph 1(1)(a) of Part I of Schedule 4 under the provisions of regulation 19(1). As a result where the conditions of column (1) of paragraph 16 were satisfied, column (2) required the claimant's weekly applicable amount to be calculated in accordance with regulations 19 and 21.

10. Mr Scoon submitted that regulation 19(1) was appropriate "except in a case to which regulation 21 .. applies". The word "except" made it clear that it was impossible to apply regulations 19 and 21 at the same time. It was either one or the other. As a result if a claimant satisfied the conditions of paragraph 16 of Schedule 7, his weekly applicable amount fell to be calculated in accordance with regulation 21 and precluded the operation of regulation 19(1). However the main thrust of Mr Scoon argument was that whether or not the claimant was temporarily absent from The Hawthorns was not decisive of the issue. This was because paragraph 16 was not relevant on the facts of the present case. The heading to paragraph 16 provided for "persons temporarily absent from a .. residential home or nursing home". That did not mean that the person was absent from a particular residential home or nursing home, but from that type of accommodation. He referred me to paragraph 28162 of Volume 3 of Part 28 of the Adjudication Officer's Guide for Income Support which interpreted paragraph 16 as follows:-

"This provision applies to absences from the type of accommodation designed in specific regs that is, absences from RCH and nursing homes. A person who stays temporarily in another RCH or nursing home is not absent from that type of accommodation .. and an amount towards a retaining fee will not be appropriate .."

The Hawthorns and The Corner were both residential care homes for persons with mental health problems. As they were both the same type of accommodation paragraph 16 was of no effect. The claimant's applicable amount continued to be calculated in accordance with regulation 19(1).

11. I reject Mr Scoon's submission and accept Mr Charlton's argument, which in my view does not disregard the words "except in a case to which regulation 21 applies" in regulation 19(1). Schedule 7 details applicable amounts appropriate in special cases set out in regulation 21. Where the conditions in column (1) of paragraph 16 are satisfied, column (2) requires the calculation of the claimant's weekly applicable amount to be to take into account a retaining fee calculated in accordance with "paragraph 1(1)(a) of Schedule 4" which brings into affect regulation 19(1). In other words regulation 21 incorporates part of the provisions of regulation 19(1).

12. I also agree with Mr Charlton that Mr Scoon's interpretation of paragraph 16 is misconceived. If Parliament had intended to restrict the operation of paragraph 16 to a type of accommodation they would have said so. The paragraph was clearly drafted and fell to be interpreted literally. It provided for the position where a person who was temporarily absent from a specific accommodation for which he was liable to pay a retaining fee, was in another specific accommodation. This interpretation was supported by the heading which referred to temporary absence from "a hostel, residential care or nursing home" and later by reference to absence "from that accommodation". That interpretation was consistent with care programmes and practices which were geared to enable people who were normally resident in residential accommodation to have temporary absences in other residential accommodation for whatever reasons, including a trial period, temporary absence caused by difficulties in the original home or a holiday break.

13. I should add for completeness that with effect from 4 October 1993 paragraph 16 was amended by regulation 21 of the Income Related Benefits Schemes (Miscellaneous Amendments) (No.4) Regulations 1993 (S.I. 1993 No. 2119). Mr Scoon submitted that the amendments supported his interpretation of paragraph 16. I do not agree. The statutory instrument makes no reference to "type" of accommodation in its amendment or in

the notes. I can find no justification for the interpretation given by Mr Scoon.

14. In my judgment the claimant satisfied the conditions referred to in column (1) of paragraph 16 and as a result his weekly applicable amount fell to be determined in accordance with column (2) during period in issue. It is not in dispute that a retaining fee was payable for the Hawthorns and that the weekly amount was £161.60.

15. For the reasons stated above the tribunal's decision was erroneous in law. As I consider it expedient to give the decision the tribunal should have given as I am empowered by section 23(7)(a)(i) of the Social Security Administration Act 1992, I give the decision set out in paragraph 1.

16. The claimant's appeal is allowed.

(Signed) R.F.M. Heggs
Commissioner

(Date) 18 JUL 1996