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PLH *Commissioner's File: CJSA 2507/02*

JOBSEEKERS ACT 1995
SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Claim for:	Jobseekers Allowance
Appeal Tribunal:	Nottingham
Tribunal Case Ref:	
Tribunal date:	2 April 2002
Reasons issued:	8 April 2002

1. This claimant's appeal is dismissed, as in my judgment there was no error of law in the admirably clear and well-reasoned decision of the Nottingham appeal tribunal which dealt with the case on 2 April 2002 (Mr J M Thomas, chairman, sitting alone).

2. This case is one of a number extensively delayed because of unresolved issues over the validity of the provisions in regulation 77 of the **Jobseeker's Allowance Regulations** 1996 SI No. 207, which prevent separated parents on jobseeker's allowance receiving any addition for their children in "shared care" cases when the other parent is the one getting the child benefit as the "primary carer" of the child or children concerned. Following the judgment of the Court of Appeal in *Hockenjos v. Secretary of State* [2004] EWCA Civ. 1749 and the subsequent submissions of the parties confirming that the decision was not to be appealed further, it is now at last possible to say how the relevant domestic, human rights and EU legislation applies to that situation.

3. The appellant in this case was a jobseeker's allowance claimant, who under the rule in regulation 77 failed to qualify for any addition or "family premium" for her children even though she looked after them for part of the time. In the great majority of cases it is the children's father who is in this position, as the "minority carer" looking after the children for the smaller part of the time and thus not prevented from looking for work: this is one of the very small proportion where things are the other way round. The claimant was the jobseeker following the separation and it was her husband who stayed at home and mainly looked after their two young children, which he did throughout normal school weeks and for approximately two-thirds of the year in total. He was the

one who was regarded by the Secretary of State as having the primary or major responsibility for their care and was awarded the child benefit for them.

4. The facts as summarised by the tribunal chairman in the decision notice and statement of reasons at pages 32 to 36 are that the claimant separated from her husband in November 1999, and on 17 November 2000 the two of them were awarded joint residence in respect of their two children, then respectively 4½ years and 16 months. The terms of the order, and the arrangements in place at all material times, were that she had the children from the end of school on Friday and for Friday and Saturday nights, and also for half of the school holidays, I think including every other Christmas. For the rest of the time, they lived with their father and were looked after by him. On the days the children were with her - in all, about one-third of the year on that basis - she was solely responsible for them, but she was the "minority carer" in the sense that he had that responsibility for much the greater part of the time.

5. The claimant applied for and awarded jobseeker's allowance from 9 November 2000: the means-tested or "income based" variety, since she had no contribution record to qualify her for it in any other way. The JSA award was made to her only as a single person, and did not include any "family premium" or other addition to reflect the costs of caring for the children. The reason she did not get any such addition was the rule embodied in regulation 77 already mentioned, that only one parent can be treated as "responsible" for a child in any benefit week so as to qualify for the addition in respect of him or her, and that is the one who gets the child benefit. By separate determination of the Secretary of State, reconsidered and confirmed after an earlier challenge by way of judicial review, the recipient of the child benefit for both children throughout the period at issue had been their father as the primary carer; not their mother, the minority carer.

6. On those facts, the tribunal chairman confirmed the Secretary of State's decision that the claimant had no entitlement to family premium or addition for her children on her jobseeker's allowance claim. That was right beyond argument in terms of the **Jobseekers Act 1995** and the regulations as in force at the material time, since the additions to the "applicable amount" under regulation 83 for a child who is a member of the claimant's family extend to a separated parent only when the child is a member of his or her household for whom he or she is "responsible" (section 35(1) of the Act); and where one parent is receiving child benefit for a child, that parent is (by paragraphs 12 and 13 of Schedule 1, and regulations 77 and 78) to be treated as responsible for him or her and the child as a member of that parent's household, and the other parent as not so responsible. As the tribunal chairman correctly observed, the receipt of the child benefit

is conclusive for the purposes of jobseeker's allowance, and there is no element of discretion about these qualifying (and disqualifying) conditions in the JSA regulations.

7. The argument at the tribunal therefore centred on whether the domestic law rules were overridden under section 6 **Human Rights Act 1998** because they violated her right to respect for her private and family life, contrary to Article 8 of the Convention. On this the chairman rejected the submissions of the claimant's representative, and accepted those of the Secretary of State that the rule in regulation 77 did not interfere with her Convention rights as it did not deprive her of her right to family life; although there were of course financial constraints on her, Article 8 did not require that the State should actually pay out money in order to help with the costs of maintaining contact with her children.

8. The three main grounds now relied on for challenging that decision are (first) the one put forward by the claimant's solicitor Mr S Ennals on which leave to appeal was originally granted by the chairman in May 2002, that the view taken of the scope of Article 8 was too narrow and this was a case where the claimant's primary rights under that Article had been breached; (second) that there was a breach of Article 8 in conjunction with Article 14, in that the domestic law rule had a discriminatory effect against a person in the claimant's position; and (third) the argument later put forward by the Secretary of State as his reason for supporting the appeal, that in EU law the rule in regulation 77 has been held inconsistent with Article 4 of Council Directive 79/7/EEC on equal treatment for men and women in matters of social security, and must therefore be disapplied: see the submission dated 30 August 2005 at pages 172 to 173 that the Court of Appeal's judgment in *Hockenjos* should be "applied in its entirety to the case" and the claimant awarded benefit as a "substantial minority carer".

9. It is convenient to deal with that last argument first, as in my judgment it is misconceived and based on a fundamental misunderstanding of the doctrine of direct effect of a Community instrument under EU law. The reason, and the only reason, why the restriction in regulation 77 fell to be disapplied so far as the claimant was concerned in the *Hockenjos* case was that he was a man, and he was able to show (indeed it was conceded) that the link in regulation 77 between jobseeker's allowance additions for children and entitlement to child benefit was indirectly (and heavily) discriminatory in favour of women and against men. That in turn was because of the much greater proportion of men sharing the care of their children who were prevented from getting any addition to their JSA by the award of the child benefit to the other parent: 92%, as against only 8% of women in a comparable position, on the statistical evidence put

before the Commissioner (*Hockenjos*, per Scott Baker LJ paras 14 to 15). Consequently even though the domestic law regulation was on its face neutral between the sexes its *effects* were not, and Mr Hockenjos as a member of the disadvantaged sex was able to rely on the EU Directive to override those discriminatory effects against him as a man. As Scott Baker LJ said at paragraph 73:

> **"In the present case the same rule, linking the supplement for looking after a child to child benefit, applies to both sexes. The problem arises because it operates in such a way as to favour women."**

And per Ward LJ at paragraphs 152, 154:

> **"The statistical evidence establishes that the receipt of child benefit operates discriminatorily against men. ... The evidence shows overwhelmingly that mothers with child benefit are treated as the responsible parent and fathers are excluded."**

10. Despite references elsewhere in the judgments to the structure of regulation 77 being discriminatory against "the substantial minority carer", and not being objectively justifiable for that reason, there can be no doubt that the only complainant able to take advantage of the doctrine of direct effect in such circumstances is a substantial minority carer who is a man. The claimant in the present case, who is a woman, cannot show any direct or indirect discrimination against *her* in the operation of the rule on the ground of her sex. Even though she happens to be a minority carer who does not get the child benefit she cannot therefore show any infringement of the equal treatment Directive so far as she is concerned that could enable her to use it to disapply the domestic law regulation. The point is neatly put by Scott Baker LJ in paragraph 77:

> **"[Mr Hockenjos'] directly effective right not to be discriminated against has been infringed. The result however is not that the offending parts of regulation 77 are struck down altogether. There is nothing to stop them being applied where they do not operate in a discriminatory fashion. They are properly applied for example, to Mrs Hockenjos, to small minority carers and others who cannot establish discrimination on the facts of their cases. Directives are not directly enforceable; the rule is that a national provision cannot be applied in a way that breaches the Directive."**

11. The claimant in the present case cannot show any direct or indirect discrimination against her as a woman in the operation of regulation 77 and cannot therefore rely on the community instrument to override that provision of the national law, which so far as EU law is concerned thus continues to apply to her according to its terms.

12. Reverting to the grounds put forward by her own representative, in my judgment the tribunal chairman was entirely right to reject the argument that the child benefit link, and her consequent failure to qualify for any addition to her jobseeker's allowance to cover her children, amounted to a violation of her right to respect for her

private and family life contrary to Article 8 of the human rights Convention. The right to family life under Article 8 is of course a fundamental right for which a State is required to provide safeguards, but in my judgment it is clear that it does not follow that the principles of respect and non-interference embodied in the Article extend so far as to make the Convention or a court dictate to a State that a cash benefit must be provided out of public funds in circumstances such as these, or allocated in any particular way as between separated parents sharing the care of their children. Article 8 does not impose any positive obligation on States to provide financial assistance of this kind: *Petrovic v. Austria* (1998) 33 EHRR 307 paragraph 26; these facts being nowhere near the kind of extreme situation envisaged as an exception to the general rule in *Anufrijeva v. Southwark LBC* [2003] EWCA Civ. 1406, [2004] QB 1124 paragraph 43.

13. I therefore agree with the Secretary of State's submission that the tribunal chairman was right on that aspect of the case. I also agree with the comments of Cooke J on 19 November 2002 in these proceedings, rejecting the second attempt at judicial review of the Secretary of State's decision on child benefit ([2002] EWHC 2648 Admin), that on facts such as these there is no question of a direct breach of Article 8 in the claimant not qualifying for extra benefit out of public funds in respect of her children.

14. That leaves the possible argument based on Article 14 in conjunction with Article 8, that by analogy with *Petrovic* the extra allowance sought by the claimant was one provided by the State "as a means of demonstrating respect for family life" within the meaning of Article 8, so bringing the anti-discrimination provisions of Article 14 into play, and its non-payment to her therefore amounts to unlawful discrimination. The difficulty with this, never sufficiently addressed by the submissions on behalf of the claimant despite an express direction I gave on 22 July 2002 asking for argument on the point, is in identifying a ground based on personal characteristics or other "status" within Article 14 by reference to which she can say the child benefit link in regulation 77 unlawfully discriminates against her.

15. It cannot of course be discrimination on the ground of sex against her as a woman, for the reasons already gone into in the context of the EU Directive and *Hockenjos*, supra. Nor does it fall within any of the other established "suspect categories" of discrimination within Article 14, such as race, colour, language, religion and so forth, where differences of treatment are exposed to particularly severe judicial scrutiny, as explained by the House of Lords in *R v. Secretary of State ex p Carson and Reynolds* [2005] UKHL 37, [2005] 2 WLR 1369. Nor in my judgment is a category such as "being a substantial minority carer not in receipt of child benefit" remotely like the

kind of ground that could possibly be admitted as an additional "suspect category" of discrimination infringing fundamental principles of respect for the individual and equality in the protection of Convention rights, so as to attract additional scrutiny in the way contemplated by their Lordships, e.g. by Lord Hoffmann at paragraphs 14 to 17. The reasons why this claimant is treated differently from one who does qualify for the extra allowance appear to me to depend entirely on the facts and events of her case being different, as distinct from discrimination against her as one of a group of people separately identifiable in some way by reference to who they are, rather than the events they complain of: cf. *C v Home Office* [2004] EWCA Civ. 234, paragraph 37 per Sedley LJ. I doubt therefore whether even a prima facie case of discrimination on a ground contrary to Article 14 is made out.

16. However even assuming that being a "minority carer" is a sufficient personal characteristic to constitute a group of people potentially able to complain of differences of treatment contrary to Article 14, it still does not seem to me that the difference of treatment in this case (in essence, that an addition to means-tested subsistence benefits for children is awarded to the primary carer and not the minority one) is an area where the judiciary can or should interfere with the practical and social judgments embodied in the domestic legislation. That legislation has of course been approved under the relevant Parliamentary procedure and it has (rightly) not been argued that it could be irrational for a State to legislate for such a rule. It might for example be quite reasonably thought that the best way of providing on a continuing basis for the cost of the children's subsistence needs - that is of course the purpose of the child or family additions whether paid to the majority carer on income support, or the minority one on jobseeker's allowance - would be to put the money in the hands of the parent having the major financial and practical responsibility for looking after them throughout the year; not excluding days or weeks when they were physically with the other parent and some handover of cash for fares and other expenses could be fairly expected.

17. In my judgment there is a rational and factual basis for treating parents who are "minority carers" differently in relation to these means-tested benefits from those who have the major responsibility for the children's care, and the consequence is that the difference of treatment embodied in regulation 77 does not amount to unlawful discrimination contrary to Article 14. Applying the principles laid down by the House of Lords in *Carson* the precise boundaries and ways in which the two different situations are treated differently for the purposes of means- tested social security benefits are for the legislature to determine, and not matters which have to be justified to a court under Article 14 in any more detailed way than that. I recognise that on the question of

"objective justification" in *Hockenjos* there were some observations by the members of the Court of Appeal that suggest a willingness to subject the legislative provisions to more extensive or detailed scrutiny, but that was in the context of the case being one of admitted sex discrimination: it was also before the judgments of the House of Lords in *Carson* which apply more directly to the requirements under Article 14 here at issue.

18. For those reasons, the decision of the tribunal chairman to uphold that of the Secretary of State was in my judgment correct for the reasons he gave, and neither of the two further grounds of argument raised against it subsequently provide any reason for interfering with it or holding that regulation 77 is other than fully applicable to this case in accordance with its terms. The appeal is dismissed accordingly.

(Signed)

P L Howell
Commissioner
17 January 2006