

Liable relative - payment of school fees by father.
- could be disregarded as unreasonable to take them into a/c
under Reg 4(5) Resources Regs.

JM/SH/14/MD

Commissioner's File: CSB/0601/1986

C A O File: AO 2709/SB/1986

Region: Wales & South Western

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Janet Ryan (Mrs)

Social Security Appeal Tribunal: Bristol

Case No: 3/86/04

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by my leave, against a decision of the social security appeal tribunal dated 23 January 1986 which allowed the claimant's appeal against a decision issued by the adjudication officer on 14 May 1985. My decision is that there is no error of law in the aforesaid decision of the appeal tribunal.

2. I held an oral hearing of the appeal. The claimant attended and gave evidence before me. She was ably represented by Mr E F P Lloyd-Cape, solicitor, of Messrs Roy Douglas & Co, St Paul's, Bristol. The adjudication officer was represented by Mr E O F Stocker. I am much indebted to the characteristic objectivity with which Mr Stocker presented the adjudication officer's side of the matter. I have not found it an easy appeal to decide. But the appeal tribunal grappled most conscientiously with the relevant (and complex) regulations - and came up with a solution which was, if I may say so, pragmatic and just. fair. After much reflection, I am happy to reach the conclusion that it was also sound in law.

3. The claimant has been separated from her husband since 1975. At the material time she lived in a privately rented flat with her son Lawrence, then aged about 13. Pursuant to a maintenance order her husband paid a nominal £0.50 in respect of Lawrence. By agreement, he also paid the rent of the flat (£15 a week). In and between the academic years 1981/82 and 1984/85 Lawrence attended a boarding school. The relevant fees were paid (albeit somewhat irregularly) direct to the school by the claimant's husband. (Since the end of the academic year 1984/85 Lawrence has attended as a day pupil at the senior branch of the aforesaid school - but I do not have any further details of that aspect of the case.) The decision to send Lawrence to a boarding school was taken voluntarily by the claimant and her husband. But the circumstances were somewhat exceptional. The claimant's social worker is recorded as having told the appeal tribunal that -

"the Educational Psychologist's view was that Lawrence's general condition gave him a special educational need that could be met only in the private sector."

4. In the spring of 1985 the claimant, who is seriously disabled, finished her part-time

employment. She then claimed supplementary benefit. But the local adjudication officer disallowed her claim. He calculated her weekly income resources thus:

Child benefit	£ 6.85
One parent benefit	£ 4.25
Voluntary payment (ie the rent)	£15.00
Court order	£ 0.50
Voluntary payment by way of school fees at £632.00 per term	£36.46

That totals £63.06 a week. The requirements of the assessment unit were assessed at £47.60 a week. So - on the figures used by the local adjudication officer - there was no entitlement to benefit. (It will be noted that the sum of £15 was taken into account as an income resource although it was, in fact, appropriated to the rent which did not, of course, feature among the claimant's requirements. But the housing benefit aspect of the case is not argued in the papers and was not argued before me - and I say no more on it.)

5. The appeal turns upon the local adjudication officer's treatment of the sum paid by the claimant's husband by way of school fees. As his starting point, he took the view that Lawrence remained a member of the claimant's household throughout the periods when he (Lawrence) was away at boarding school. That, I think, was well founded - and Mr Lloyd-Cape was not disposed seriously to contest it.

6. The local adjudication officer then took the view that the sum paid by the claimant's husband by way of Lawrence's school fees fell to be taken into account in full as an income resource of the assessment unit. He reminded himself of the following words from regulation 13(1) of the Supplementary Benefit (Resources) Regulations 1981:

"(1) Any periodical payment made, whether in pursuance of a court order or otherwise, to a member of the assessment unit, by or derived from a liable relative shall be taken into account in full as income."

Of course, the local adjudication officer readily acknowledged that payment of the school fees was made neither to the claimant nor to Lawrence. But he prayed in aid the following words from regulation 4(5) of the Resources Regulations:

"Any payment made -

(a) by a person in respect of a member of the assessment unit (but not to another member) shall be treated as possessed by that member notwithstanding that it is made to a third party;

(b)

unless, having regard to the purpose of the payment, the terms under which it is made and its amount, it is unreasonable to do so."

His submission to the appeal tribunal continued thus:

"The Adjudication Officer decided that it was not unreasonable to take into account Lawrence's school fees as a payment made by a liable relative because both [the claimant's husband and the claimant] had been informed early in 1983 that the Department could not continue to ignore [the claimant's husband's] payment of the fees, but had given them the time to make alternative arrangements for Lawrence's education. The fact remained that by September 1983 both [the claimant's husband and the claimant] had decided that Lawrence should continue in private education in the full knowledge that this would affect [the claimant's] entitlement to a supplementary allowance."

Mr Stocker was not - I need hardly say - disposed to support the reasoning in that passage. No serious attempt is made to grapple with "the purpose of the payment, the terms under which it is made and its amount". The local adjudication officer's reasoning amounts to this: It cannot be unreasonable to apply the provisions of regulation 4(5)(a) where a claimant has ignored the Department's warning that it (the Department) intends to apply those provisions. That is altogether too circular.

7. The claimant appealed to the appeal tribunal. She obtained - and duly laid before the tribunal - a letter from the bursar of Lawrence's school which stated that, although the school did not break its boarding fees into components, the educational element of the boarding fees could be assumed to be 65% of the total.

8. I am greatly assisted by the care with which the relevant form AT3 was completed. I have already (in paragraph 3 above) adverted to evidence which is recorded as having been given by the claimant's social worker. It was also recorded that the claimant believed that if Lawrence were removed from the school the claimant's husband would not make to the claimant any payment in lieu of the sum which he would then be saved by way of fees.

9. I quote from the findings of fact made and recorded by the appeal tribunal:

"3. The school fees paid in respect of Lawrence are paid by his father direct to the school. The only contractual relationship is between [the claimant's husband] and the school. At no time has either Lawrence or [the claimant] been able to divert the school fees payments to their own benefit.

.....

5. During the school term (30 weeks of the year) Lawrence is provided at school with all his normal requirements. His mother however has to buy his clothes. During the school holidays, Lawrence lives with his mother (who is entitled to custody under a Divorce Court Order) and she pays for all his requirements.

6. There were strong educational reasons for Lawrence being educated at the school in question."

10. In its reasons, the appeal tribunal began by rejecting the relevance of regulation 13 of the Resources Regulations. It stressed that that regulation refers expressly to payments "made to a member of the assessment unit". Those words could not legitimately be enlarged by conflation with regulation 4(5) which refers to payments being "treated as possessed" by a member of the assessment unit. With that Mr Stocker agreed - and so do I.

11. The appeal tribunal then went on to direct itself that the payments of the school fees fell squarely within the scope of regulation 4(5)(a). Here again Mr Stocker agreed - and so do I. And that took the appeal tribunal to the full-out words -

"unless, having regard to the purpose of the payment, the terms under which it is made and its amount, it is unreasonable to do so."

I quote from the tribunal's reasons as set out on the relevant form AT3:

"4. Dealing first with the purpose of the payment, this was clearly in order to provide Lawrence with an education, and with accommodation and food whilst he was receiving that education during term-time. We think, therefore, that it would not be unreasonable to take account of part of that payment since it covers most of Lawrence's normal requirements (as defined by regulation 4 of the Requirements Regulations) during term-time. It is however equally clear that a substantial part of the payment relates to the provision of facilities which are not within the definition

of 'normal requirements' - ie the provision of education.

5. As indicated in the facts found above it is clear that there were no circumstances in which either Lawrence or his mother reduced the payments made in respect of school fees into possession for their own use and benefit. So far as they were concerned, schooling (and with it accommodation etc) was provided, but there was no way in which they could have obtained access to any other benefit. The school fee benefit was thus totally unconvertible by them.

6. So far as the amount of the payment is concerned, it is of course significant; but this seems to us to be immaterial given the other facts relating to it set out above.

7. There was presented in evidence to us a statement by the bursar of the school seeking to apportion the payments between maintenance and education, but this apportionment did not seem to us to be wholly satisfactory for the present purpose. To adopt that apportionment would result in a finding that some £30 weekly was being paid for board and lodging during term time; but the fact nevertheless remains that this would be merely ancillary to the provision of education. No one would be accepted at the school (unlike at a hotel) for accommodation and food only, and therefore we think it unrealistic to take that apportioned figure into account as the determining factor.

8. It seems to us that paragraph 5 of regulation 4 gives a discretion to the adjudicating authority. We are quite satisfied that it would be unreasonable to take the whole payment of school fees into account for the reasons set out above; and the question therefore arises what part of them should be taken into account as possessed by Lawrence.

9. There seems to us to be a fairly simple answer to this question. The reality of the matter is that during the school term Lawrence is being maintained at the school and virtually the whole of his normal requirements are then being met. It is equally clear that during the school holidays no part of those requirements is being met. We think therefore that on the assumption which we have made above ie that the date of claim was a school holiday it would be wrong to take into account any part of the payment of the school fees. For that week (on that assumption) there was no way in which any financial assistance towards meeting Lawrence's normal requirements could be obtained by him or his mother. On that basis the amounts falling to be taken into account in calculating the resources of the assessment unit (as set out on Form AT2(A)) should be reduced by £36.46, ie to £26.60. [The claimant's] requirements amounted to £47.60 and these therefore significantly exceeded her resources. It follows that she was at that date entitled to benefit.

10. During the school term it seems to us that Lawrence's requirements should be treated as being wholly satisfied by the provision of accommodation etc at the school, and for that period therefore it would be right to treat him as having resources of £14.35 which would fall to be aggregated with his mother's other income to give a total amount to be taken into account of £40.95. The result would still be that [the claimant's] requirements would exceed her resources."

12. That is a long quotation. But it demonstrates - in my respectful view - the care with which the appeal tribunal set about finding a resolution of this case which was in harmony both with the relevant law and practical commonsense. Mr Stocker invited me to consider whether the tribunal had gone in sufficient depth into the need for Lawrence to stay at that particular school. He referred me to decision on Commissioner's file CSB/247/1983. That case, too, concerned the payment of school fees by a "liable relative". The decision was neither reported nor designed for reporting. It assumes that those who will read it are

already well acquainted with the papers in the case. (I hasten to add that I make no criticism of that approach. I have myself - in appropriate cases - adopted it many times.) It seems plain, however, that the relevant appeal tribunal had wholly overlooked regulation 4(5)(a) of the Resources Regulations. The Commissioner set the appeal tribunal's decision aside and remitted the case for rehearing by a differently constituted tribunal. One of the questions to which he directed the attention of the fresh tribunal was expressed thus:

- "(a) Would the child's education be severely affected by treating the payments of £20 as possessed by the claimant. For example, the child's continuance at the fee-paying school might reasonably be expected were he to be taking examinations of importance in the near future and a change of school could disadvantage the child's prospects of success in such examinations."

But - I repeat - that was a case in which the appeal tribunal had overlooked regulation 4(5) altogether. The Commissioner (and I say this with respect) very properly set out the sort of questions the answers to which would assist the fresh tribunal in the application of that regulation. But that is a very different thing from saying that, unless each and every one of those questions is asked and answered, an appeal tribunal will (in this type of case) inevitably fall into error of law. For my part, I am satisfied that the appeal tribunal in the case now before me -

- (a) properly directed itself as to the construction to be put upon regulation 4(5);
- (b) made relevant findings of fact which were sustainable upon the evidence; and
- (c) in the light of (a) and (b), came to a conclusion with which I (confined as I am to points of law) have no jurisdiction to interfere - even were I minded so to do.

13. The adjudication officer now concerned invited me to have regard to section 17 of the Supplementary Benefits Act 1976. That section declares that for the purposes of that Act "a man shall be liable to maintain his wife and his children". But - and Mr Stocker readily conceded this - it is difficult to see how that generalisation can bear upon a situation in which a court with matrimonial jurisdiction had considered and pronounced upon the issue of maintenance.

14. The adjudication officer's appeal is disallowed.

(Signed) J. Mitchell
Commissioner

Date: 15th July 1987.

Rec of proceedings of Social Security Appeal Tribunal held on...../...../ 19

Full name of Appellant		(Surname) RYAN	(Other names) JANET	Case List No. /
Local office			Tribunal Reg No.	
BRISTOL HORFIELD			3 / 086/04	
Constitution of tribunal			Names of others present (write "None" where appropriate)	
*Full/Chairman and Members Chairman and Members			Appellant's representative (state organisation if any)	
Names of Tribunal Chairman and Members			Mr Cape (Solicitor Brown and Co, Grosvenor R Mr Gilbert (Social Worker)	
Prof Cretney Mr Lynch Mr Cromwell			Witness(es)	
Appellant notified of hearing on	Appellant		Others (state capacity)	
6 / January 19 86	Present*/ not present		Adjudication officer Mr R Tucker	

Consent to hearing by less than full Tribunal

*Appellant's consent given on tear-off portion of form AT6.

I consent to this case being proceeded with in the absence of a member of the Tribunal other than the Chairman.

I understand the Chairman will have a casting vote if required.

Appellant's signature

1 Chairman's note of evidence (ie concise details of all oral and written evidence put before the Tribunal)

A typed copy can be produced on request.

2 Findings of Tribunal on questions of fact material to decision (ie the relevant facts accepted from the evidence available)

1. We accept the facts stated in paras 1 and 2 of para 5 "Facts Before The Adjudication Officer" Form AT2. We also accept paras 5 and 6.
2. It appears that the payment of £15 weekly referred to in para 3 of the Facts Before The Adjudication Officer is in fact a voluntary payment. We were also told in evidence that the total school fees were now £2,846 per annum.
3. The school fees paid in respect of Lawrence are paid by his father direct to the school. The only contractual relationship is between Mr Ryan (the father) and the school. At no time has either Lawrence or Mrs Ryan been able to divert the school fees payments to their own benefit.
4. The payments of school fees have in fact been somewhat irregular.

CONTINUED ON (SHEET 1)

3 Full text of *unanimous/*majority decision on the *Appeal/*Reference (including amounts and effective date(s) as appropriate)

The appeal is allowed; the claimant was entitled to a payment of Supplementary Benefit as at the date of claim (21 March 1985) her income did not exceed her requirements.

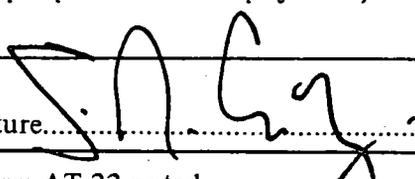
***Reasons for dissent if Tribunal not unanimous**

4 Reasons for decision (ie an explanation of why, when applying the facts to the statutory provisions and case-law, a particular conclusion has been reached. And why, if it is not clear from box 2, certain evidence has been accepted or rejected).

1. Regulation 13 of the Supplementary Benefit Resources Regulations 1981 provides that any periodical payment made to a member of the assessment unit by or derived from a liable relative shall be taken into account in full as income. However the payments in respect of school fees are not paid to Lawrence or to Mrs Ryan. They are therefore not made "to" a member of the assessment, and this regulation is therefore not applicable.
2. Regulation 4(5) of the Resources Regulations provides that any payment made by a person "in respect of a member of the assessment unit" shall be treated as possessed by that member notwithstanding that it is made to a third party. However, the same regulation also provides that that general principle shall not apply if "having regard to the purposes of the payment, the terms under which it is made and its amount, it is unreasonable to do so".
3. We have no doubt that the school fee payments are made "in respect of" Lawrence. We must therefore turn to consider the purpose of the payment, the terms under

CONTINUED ON (SHEET 1)

Date 23 January 1986

Chairman's Signature..... 

For Clerk's use only

Form AT 22 noted

SSAT decision notified to interested parties on 73 80 19..... Initials.....  Date..... 19.....

**Delete as necessary*

(Surname)

(Other Names)

Benefit Reference Number

RYAN

JANET

1007/38625

CONTINUED FROM BOX 2 ON FORM AT3

(5) During the school term (30 weeks of the year) Lawrence is provided at school with all his normal requirements. His mother however has to buy his clothes. During the school holidays, Lawrence lives with his mother (who is entitled to custody under a Divorce Court Order) and she pays for all his requirements.

(6) There were strong educational reasons for Lawrence being educated at the school in question.

NB. We were unable to ascertain whether the date of claim (21 March 1985) was during school holiday or during the school term. For the purposes of this decision we assume that it was during the school holiday.

CONTINUED FROM BOX 4 ON FORM AT3

which it is made and its amount in order to determine whether it is reasonable or otherwise to treat it as being possessed by Lawrence.

4. Dealing first with the purpose of the payment, this was clearly in order to provide Lawrence with an education, and with accommodation and food whilst he was receiving that education during term-time. We think, therefore, that it would not be unreasonable to take account of part of that payment since it covers most of Lawrence's normal requirements (as defined by Regulation 4 of the Requirements Regulations) during term-time. It is however equally clear that a substantial part of the payment relates to the provision of facilities which are not within the definition of "normal requirements" - i.e. the provision of education. We therefore turn to the terms under which the payment was made.
5. As indicated in the facts found above it is clear that there were no circumstances in which either Lawrence or his mother could reduce the payments made in respect of school fees into possession for their own use and benefit. So far as they were concerned, schooling (and with it accommodation etc) was provided, but there was no way in which they could have obtained access to any other benefit. The school fee benefit was thus totally unconvertable by them.
6. So far as the amount of the payment is concerned, it is of course significant; but this seems to us to be immaterial given the other facts relating to it set out above.
7. There was presented in evidence to us a statement by the bursar of the school seeking to apportion the payments between maintenance and education, but this apportionment did not seem to us to be wholly satisfactory for a present purpose. To adopt that apportionment would result in a finding that some £30 weekly was being paid for board and lodging during term-time; but the fact nevertheless remains that this would be merely ancillary to the provision of education. No-one would be accepted at the school (unlike at a hotel) for accommodation and food only, and therefore we think it unrealistic to take that apportioned figure into account as the determining factor.
8. It seems to us that paragraph 5 of Regulation 4 gives a discretion to the Adjudicating Authority. We are quite satisfied that it would be unreasonable to take the whole payment of school fees into account for the reasons set out above

CONTINUED ON (SHEET 2)

15

Sheet Number (2)

(Surname)

(Other Names)

Benefit Reference Number

RYAN

JANET

1007/38625

CONTINUED FROM BOX 4 (SHEET 1)

and the question therefore arises what part of them should be taken into account as possessed by Lawrence.

9. There seems to us to be a fairly simply answer to this question. The reality of the matter is that during the school term Lawrence is being maintained at the school and virtually the whole of his normal requirements are then being met. It is equally clear that during the school holidays no part of those requirements is being met. We think therefore that on the assumption which we have made above i.e. that the date of claim was a school holiday it would be wrong to take into account any part of the payment of the school fees. For that week (on that assumption) there was no way in which any financial assistance towards meeting Lawrence's normal requirements could be obtained by him or his mother. On that basis the amounts falling to be taken into account in calculating the resources of the assessment unit (as set out in Form AT2(A) should be reduced by £36.46, i.e. to £26.60. Mrs Ryan's requirements amounted to £47.60 and these therefore significantly exceeded her resources. It follows that she was at that date entitled to benefit.
10. During the school term it seems to us that Lawrence's requirements should be treated as being wholly satisfied by the provision of accommodation etc at the school, and for that period therefore it would be right to treat him as having resources of £14.35 which would fall to be aggregated with his mother's other income to give a total amount to be taken into account of £40.95. The result would still be that Mrs Ryan's requirements would exceed her resources.

13

JANET RYAN BRISTOL TRIBUNAL HELD ON 23.1.86:

CHAIRMAN'S NOTE OF EVIDENCE CONTINUED:

1. Mr Cape stated that he had a letter from the Bursar of Prior Park stating that the educational element of the total fee would be assumed to be 65% of the total school fee of £2846. The maintenance element was thus £996 pa, averaging some £30 weekly for board and lodging.
2. He also stated that there is a voluntary payment of £15.00 weekly by Mr Ryan to Mrs Ryan, where it was conceded should be taken into account, together with the sum paid another court order of £0.50 weekly.
3. The Chairman's notes of evidence given at the hearing on 14 August 1985 were summarised, and it was conceded that they were not in dispute.
4. Mr Cape stated that Mrs Ryan does have legal custody of Lawrence under an order of the divorce court. She believes that even if Lawrence were removed from the school her former husband would not make any further payment to her.
5. He relied on the letter from the school Bursar of 21 June as showing that the former husband did not in fact regularly make payments of school fees.

(Mr Gilbert, Mrs Ryan's social worker, interposed that they had been given the impression that Lawrence would not necessarily be withdrawn from the school if the fees were not paid. Hence, said Mr Cape, it would be wrong to draw any inference from the fact that he was still at school. Mr Gilbert also subsequently stated that the Educational Psychologist's view was that Lawrence's general condition gave him a special educational need that could be met only in the private sector.

6. Term time is 30 weeks of the year.
7. In answer to questions it was not possible to ascertain whether:

Assume that date of claim (21 March 1985) is a school holiday.

PROFESSOR CRETNEY
Chairman
23/1/86