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Residential care home - limits pre Freeze Regs -
"reasonable weekly charge for the area" - interpretation of
the then reg 9(6)(b) - the cost of the facilities necessary for the
individual claimant ^{MJC/SH/18/MD} and their personal characteristics can be
taken into a/c.

Commissioner's File: CSB/867/1985

C A O File: AO 2598/85

Reg on: London North

SUPPLEMENTARY BENEFITS ACT 1976

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

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 27 February 1985 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Social Security Act 1973, section 101(5), as substituted by paragraph 7 of Schedule 5 to the Social Security Act 1986.

2. This appeal to the Commissioner on behalf of the claimant, a physically and mentally infirm lady and a widow aged 78 at the material time, was the subject of an oral hearing before me on 21 May 1987 at which the claimant was not present (she is resident in a residential home - see below) but was represented by Mr R Drabble of Counsel. The adjudication officer was represented by Mr E O F Stocker. I am indebted to Mr Drabble and to Mr Stocker for their assistance to me at the hearing.

3. The appeal is from the unanimous decision of the social security appeal tribunal dated 27 February 1985 in which that tribunal affirmed a decision of the local adjudication officer issued on 13 November 1984 as follows,

"Supplementary pension of £151.45 [per week] determined and paid from the prescribed pay-day (Monday) in week commencing 26 November 1984."

That decision was given by the adjudication officer in response to a claim for supplementary benefit made on behalf of the claimant on 19 March 1984, the claimant having been admitted to F.H. Residential Home for the Elderly Mentally Infirm (restricted to members of the Jewish faith) on 15 March 1984. The claimant's appeal was in fact made on behalf of the claimant by Miss E C her appointee and the matron of the Home. The actual weekly charge for the claimant's care, board, maintenance etc at the Residential Home was £206.72 per week.

4. In the notice of appeal to the local tribunal the appointee stated,

"The amount of £141.15 [£151.45?] per week is insufficient for [the claimant] to pay

the cost of her accommodation which is currently £200 per week. F.H. is a Residential Home for the Elderly Mentally Infirm and this Unit has been specially designated, staffed, and equipped to care for people who are unable to do anything whatsoever for themselves. Hence, the high cost of their care."

5. That submission was amplified orally on behalf of the claimant at the hearing before the local tribunal by Mr S of the Jewish Welfare Board and subsequently in detailed written submissions to the Commissioner, which accompanied her grounds of appeal dated 9 September 1983 and were prepared by her Solicitors. I have given careful and detailed consideration to each of those grounds of appeal. They read as follows,

"The claimant relies on the following matters:

- (1) The claimant is an elderly, mentally infirm person. She is an Orthodox Jewess. She requires accommodation of a type suitable to her needs in these respects (including dietary needs).
- (2) Regulation 9(6) [of the Supplementary Benefit (Requirements) Regulations 1983 - SI. 1983 No. 1339] requires the fixing of a maximum amount by reference to the reasonable charge for providing accommodation suitable to the needs of the Claimant and other claimants.
- (3) In determining the maximum amount for the purpose of regulation 9(6)(b)(ii), the Adjudication Officer and the Tribunal did not consider adequately or at all whether the sum of £125.00 a week was a reasonable charge for accommodating an elderly, mentally infirm person who is an Orthodox Jewess.
- (4) The cost of providing accommodation in other homes in the area was wrongly accepted by the Tribunal as determining the issue, even though such homes do not provide accommodation solely for elderly infirm people and do not provide accommodation for Jews.
- (5) The Tribunal wrongly stated that no alternative figures were produced by Mr S [of the Jewish Welfare Board] nor information which contradicted that produced by the Presenting Officer. Mr S produced evidence to show that the homes referred to by the Presenting Officer did not provide comparable accommodation, and that the cost of such accommodation at F. House was £200 per week.
- (6) It was not suggested to, or by, the Tribunal that an elderly infirm Jewess could reasonably be provided with accommodation of a standard suitable for her needs for £125 a week. Nor could she be so provided. Indeed by reason of the maximum amount under regulation 9(6)(b)(ii) being assessed at only £125 a week, and the true cost of providing such accommodation at F. House being £200 a week, F. House was closed in July 1985. Because there is no other suitable Home in the area [the claimant] is now accommodated outside the area.
- (7) The failure of the Adjudication Officer, and thereafter of the Tribunal to consider the reasonable cost of providing accommodation suitable for the needs of the elderly and infirm who are Jewish arises from the fact that until recently, the Local Authority was financing persons accommodated in F. House and the Adjudication Officer did not need to consider the cost of such accommodation.

The claimant therefore submits that the Tribunal erred in Law in failing to find that £125.00 a week was not a reasonable weekly charge for the purposes of Regulation 9(6)(b)(ii) in respect of the standard suitable for elderly, infirm Jewish Residents. The Tribunal either failed to consider the appropriate reasonable charge by reference to

such persons, or it reached a conclusion which no reasonable Tribunal could reach."

6. I examine those grounds of appeal below but I have set the tribunal's decision aside on the straightforward ground that it erred in law in taking into account (see number 5 of its findings of fact on Form AT3) the fact that 'freeze' regulations were coming into force on 20 December 1984 (SI. 1984 No. 2034), a fact which was of course known to the tribunal as its hearing was on 27 February 1985. However the adjudication officer's decision appealed against ante-dated the coming into operation of those Regulations and was made to operate from 26 November 1984 onwards, at which time the 'Freeze' Regulations were not in operation. The tribunal should therefore have judged the matter by reference simply to the tests laid down in the unamended regulation 9 of the Supplementary Benefit (Requirements) Regulations 1983 (SI. 1983 No. 1399). I ought perhaps to add that the claimant's ground of appeal that the tribunal also erred in their reasons for decision in saying that no alternative figures were put forward about the price of accommodation "locally" is correct, since Mr S of the Jewish Welfare Board had put forward a figure for F. House.

7. The most important question in this case is what directions need to be given to the tribunal as to the correct mode of interpreting the law in force as at 26 November 1984, the date from which the adjudication officer's decision of 13 November 1984 started. That is particularly important since the 'Freeze' Regulations have subsequently been held to be invalid and a nullity as being *ultra vires* (outside the powers of the enabling statute) in the case of Secretary of State and Chief Adjudication Officer v. Elkington (Court of Appeal 5 March 1987 - a transcript was available in the appeal papers in this case): Consequently the original law in regulation 9(6) of the 1983 Regulations remained in force even after 20 December 1984 (the operational date of the invalid SI. 1984 No. 2034). Fresh regulations (SI. 1985 No. 613, coming into operation on 29 April 1985) were made but I suggest to the new tribunal that it limits its decision to a period ending immediately before 29 April 1985 as further difficulties have arisen on the 1985 Regulations, and there has been further litigation (the case of R v Secretary of State for Social Services, Ex p. Cotton Court of Appeal - 13.12.85), the effect of which may still be problematic.

8. I return then to the question of the proper interpretation of the law in force at the relevant time (see above). That law is to be found in regulation 9 of the above-cited Requirements Regulations of 1983, the relevant parts of which provide as follows,

"Modification of normal requirements of boarders

9. (1) Where the claimant and any other members of the assessment unit are boarders [their normal requirements] shall be calculated as -

- (a) a weekly amount for board and lodging which ... shall not exceed the maximum amount in respect of the assessment unit as a whole referred to in paragraph (6); and
- (b) a weekly allowance for personal expenses determined in accordance with paragraph (12);

.....
(2)-(3)

(4) The weekly amount for board and lodging referred to in paragraph (1)(a) shall be as follows: where the charge for board and lodging includes all meals, the weekly amount shall be the full weekly amount of that charge; ...

(5)

(6) Subject to paragraphs (7) and (16) the maximum amount in respect of the assessment unit as a whole referred to in paragraph (1)(a) shall be -

(a) [not relevant]

(b) in respect of any member of the assessment unit ... the amount estimated by a benefit officer as representing the reasonable weekly charge for the relevant area for full board and lodging (inclusive of all meals) which is available in that area or, if the level of charges there is unusually high, in an adjoining area, and which is of a standard suitable for claimants resident in the type of accommodation which is provided either -

(i) in a nursing home or mental nursing home within the meaning of sections 1 and 2 of the Nursing Homes Act 1975 ...; or

(ii) in a home which satisfies the provisions of the Residential Homes Act 1980 ...; or

(iii) in any other type of accommodation;

whichever may be appropriate to the accommodation provided in respect of the claimant in that assessment unit ...

(7) Subject to paragraphs (8) and (16) [not relevant], in a Case specified in Schedule 2, the maximum amount specified in paragraph 6 shall be increased by any excess of the actual charge over that maximum up to £15.35 or, if the increase is payable under Case A or C of that Schedule and the claimant is a relevant person, up to £30.70."

The Cases in Schedule 2 to the 1983 Regulations are lengthy but they refer to eg. persons who are over pensionable age (Case A); persons who are infirm by reason of mental or physical disability (Case B); and those for whom special types of accommodation are appropriate, eg. for rehabilitation of alcoholics or drug addicts (Case C).

9. At the hearing before me, Mr Drabble contended that the words "of a standard suitable for claimants resident in the type of accommodation" in regulation 9(6)(b) require a consideration of the individual circumstances of the particular claimant, having regard to the ensuing words in that regulation "whichever may be appropriate to the accommodation provided in respect of the claimant in that assessment unit". In particular he contended that the words "type of accommodation" do not refer to the three sub-categories in regulation 9(6)(b)(i)(ii) and (iii). I reject that contention. It is clear in my view from the construction of the regulation that the words "type of accommodation" do in fact refer to the sub-categories in (i), (ii) and (iii), despite the repetition of the words "other type of accommodation" in sub-paragraph (iii). Consequently the new tribunal will need first to consider what type of accommodation the claimant was resident in and it is of course common ground that, being in a residential home, she was within regulation 9(6)(b)(ii). The tribunal will then need to go on to consider whether within regulation 9(6)(b) the level of charges at F. House was "unusually high" in which case they should consider whether equivalent facilities were available "in an adjoining area".

10. It is clear however that in the case of each and every individual claimant the decision has to be that of a local adjudication officer and is not to be the subject of an arbitrary

executive ruling applicable to a large number of cases and regardless of the individual circumstances of each claimant. That being said however it is equally clear to me from the provisions made as to additional payments in regulation 9(7) that it is contemplated that "the actual charge" (regulation 9(7)) will not necessarily always be reimbursable under regulation 9(6), otherwise there would be no need for the provisions for extra payments in regulation 9(7). It clearly is relevant for the new tribunal to consider the level of charges generally for residential homes in the area in question and to that extent I reject the claimant's written ground of appeal to that effect. But I hold that the words "full board and lodging (inclusive of all meals)" in regulation 9(6)(b) do require the tribunal to take into account the cost of facilities necessary for providing for someone like the claimant who is seriously mentally and physically infirm. Moreover, the personal characteristics, including the religious faith of a claimant, should be taken into account and the fact that the dietary needs of an orthodox Jew were supplied by F. House are also to be taken into account. It is only if there are indiosyncratic dietary requirements that are wholly outside what would normally be comprehended by the expression "full board and lodging", that such payments could be disregarded, but I hold that the dietary requirements of an orthodox Jewess would not come within that category.

11. I should perhaps add that I also do not accept Mr Drabble's alternative contention which I understand to be that if the words "the type of accommodation" in regulation 9(6)(b) do refer to the three sub-categories in (i), (ii) and (iii) (as I have held they do), then the level for each of those categories should be pitched at the highest level possible to make complete reimbursement possible for an individual claimant. That is not the position, as is apparent to me from the provisions of regulation 9(7). Equally, of course, the figure must not be pitched by the new tribunal at the lowest common denominator or done by a matter of simple averaging of costs. The individual requirements of the claimant must be taken into account.

12. I should also add that Mr Drabble also cited to me the sub-categories of section 1(2) of the Residential Homes Act 1980 and the provisions of the current regulation (paragraphs 1, 2 and 3 of Schedule 1A to the 1983 Requirements Regulations (added by SI. 1985 No. 613) containing a detailed analysis of the different types of care that may be appropriate for elderly people, with varying weekly amounts applicable. However, I do not consider that the detailed sub-divisions of Schedule 1A or of the Residential Homes Act 1980 can be imported into the unamended version of the 1983 Regulations.

(Signed) M.J. Goodman
Commissioner

Date: 23rd June 1987