Reg 11(2)(h) Resources Regs (MSC allowance to be taken into a/c in full) not in breach of Equal Treatment Directive or Social Security Directive despite fact doesn't allow child care costs to be deducted

ATH/SH/11/MD

Commissioner's File: CSB/372/1987

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Sonia Lisette Jackson

Social Security Appeal Tribunal: Sutton

Case No: 19/41-10

[ORAL HEARING]

1. I disallow this appeal by the claimant. My decision is that the decision of the social security appeal tribunal on 10 December 1986 that the claimant was not entitled to supplementary allowance from 22 September 1986 was not erroneous in law.

2. The claimant is a single parent who at the date of the claim was aged 23. She has one dependent child who at the date of the claim was aged 4 and in respect of whom she received child benefit and one-parent benefit. Since 22 March 1982 she had been in receipt of supplementary allowance. On 15 September 1986 she started a training course (a TOPS course) under the Opportunities Programme arranged by the Manpower Services Commission under the Employment and Training Act 1973. She received while undergoing that training an allowance of £41.55 per week comprising a basic allowance of £38 and an allowance for meals of £3.55. By a decision issued on 3 October 1986 the adjudication officer decided that the claimant was not entitled to supplementary allowance from 22 September 1986. The claimant appealed and on 10 December 1986 the social security appeal tribunal upheld the adjudication officer's decision. The claimant now appeals with my leave.

3. On 11 July 1988 I held an oral hearing. The claimant was present and was represented by Mr. Drabble of Counsel, instructed by Miss Penny Wood, Solicitor, of the Child Poverty Action Group. Mr. Pannick of Counsel, instructed by Miss K. Lee of the Solicitor's Department of Health and Social Security appeared for the adjudication officer and for the her Secretary of State. I am grateful to them for their invaluable assistance.

4. Supplementary Benefit

Supplementary benefit is payable under Section 1(1) of the Supplementary Benefits Act 1976 to "every person in Great Britian of or over the age of 16 whose resources are insufficient to meet his requirements". If the person is over pensionable age, the benefit is supplementary pension. In every other case, it is supplementary allowance. Section 2 provides for the determination of the right to and amount of supplementary benefit by an adjudication officer, a social security appeal tribunal, or a Social Security Commissioner in accordance with regulations. Schedule 1 to the Act sets out provisions for determining the right to benefit and the amount of benefit.

Paragraph 1 of that Schedule provides:

> "1. (1) The amount of any supplementary benefit to which a person is entitled shall, subject to the following provisions of this Schedule, be the amount by which his resources fall short of his requirements."

Paragraph 1(2) of that Schedule provides that

> (i) a person's requirements shall be determined in accordance with paragraph 2 of the Schedule and
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> (ii) a person's resources "shall be calculated in the prescribed manner" and the prescribed manner is set out in the Supplementary Benefit (Resources) Regulations 1981.

Paragraph 2(1) provides that requirements "shall be of three categories, namely, normal requirements, additional requirements and housing requirements".

5. Resources

Regulation 10 of the Resources Regulations deals with the calculation of earnings and provides in regulation 10(1) that "a person's earnings shall consist of all remuneration or profit derived from any employment". By regulation 10(4), in calculating the amount of a person's earnings -

> "there shall be deducted from the earnings which he derives from any employment -
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> (c) expenses reasonably incurred by him without reimbursement in respect of -
>
> (i) [not relevant]
>
> (ii) the making of reasonable provision for the care of another member of the assessment unit because of his own necessary absence from home to carry out his duties in connection with that employment ..."

In other words, if a person is in receipt of earnings received from any employment, he or she can deduct from earnings expenses incurred in providing those for the care of a child - a child minder. Regulation 11(1), however, deals with "all income other than that to which regulation 10 applies" and sets out how that income is to be dealt with. Regulation 11(2), so far as is relevant provides:-

> "11. (2) There shall be treated as income and taken into account in full -
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> (h) any allowance payable pursuant to arrangements made by the Manpower Services Commission under section 2 of the Employment and Training Act 1973 and paid by or on behalf of that Commission to or in respect of any members of the assessment unit -
>
> (i) for his or his partner's maintenance for any period during which a course of training or instruction provided or approved by that Commission is being undertaken ..."

There is no provision under that regulation for deduction of any expenses incurred in providing for the care of a child. In other words, if the claimant in the present case had at the relevant time been in receipt of earnings derived from any employment, she could have deducted from those earnings payments for a childminder. But her training allowance had to

be taken into account in full by virtue of regulation 11(2)(h)(i): R(SB) 39/83. It is this difference of treatment in relation to payments for a childminder that has led to the appeal in the present case.

6. Requirements

I should add that an additional requirement for domestic assistance is permitted in certain circumstances by virtue of regulation 11 of, and paragraph 15 of Schedule 4 to, the Supplementary Benefit (Requirements) Regulations 1983. Paragraph 15 of that Schedule provides that an additional requirement will be payable -

"15. Where -

(a) a charge is made for assistance with the ordinary domestic tasks (for example, cleaning and cooking but excluding window cleaning and errands) of the assessment unit;

(b) such assistance is essential because adult members of the assessment unit are unable to carry out all those tasks by reason of old age, ill-health, disability or heavy family responsibilities;

(c) the assistance is not provided by a local authority, nor by a close relative who incurs any minimal expenses."

The claimant could not claim payments for a childminder as an additional requirement under that paragraph since none of the provisions contained in sub-paragraph (b) were applicable: R(SB) 39/83.

7. The figures for the assessment of supplementary benefit for the claimant are set out in Form AT2(A) (at pages 6 and 7 of the case papers). Those figures show that the claimant's requirements were assessed at £50.30, so that when the claimant's child benefit, one-parent benefit and training allowance (which totalled £53.25) were taken into account the claimant's resources exceeded her requirements by £2.95 and, therefore, there was no entitlement from 22 September 1986. It is the claimant's case that when account is taken of the payments for the childminder, she was left with less than the sum of £50.30 per week. In other words, when account was taken of the payments made for the childminder - whose services were necessary in order that the claimant could attend the course - the claimant was left with a sum which was less than the supplementary benefit rate.

8. In R(SB) 39/83, to which I have referred above, the claimant, like the claimant in the present case, started a TOPs course and incurred expenses for travel and the minding of her child. The Commissioner decided first, that a training allowance was not earnings within regulation 10 of the Resources Regulations and fell to be taken into account as income under regulation 11 of those Regulations and that that regulation did not allow for the deduction of childminding or travel expenses. The Commissioner decided, secondly, that what was then paragraph 14 of Schedule 3 to the Requirements Regulations 1980 (and is now paragraph 15 of Schedule 4 to the Requirements Regulations 1983, see paragraph 6 above) provided for an additional requirement for the cost of domestic assistance where the claimant has "heavy family responsibilities" and that the claimant in that case, having one child, could not be regarded as having a heavy family responsibility or any family responsibility out of the ordinary and that it did not become "heavy" by her opting to undertake a training course. Mr Drabble made it clear at the beginning of the oral hearing that he did not seek to distinguish the present case from that decision in R(SB) 39/83. If that decision alone were to apply, it would follow that I must dismiss the appeal. However, Mr Drabble's contention was that the regulations which I have quoted operated as an indirect discrimination against women contrary to Directives of the European Economic Communities.

9. It was Mr Drabble's contention that the regulations were in breach of the Equal Treatment Directive, 76/207/EEC, and/or the Social Security Directive, 79/7/EEC in that -

(i) of those persons who are single parents with dependent children many more are women than men,

(ii) many more women than men will, therefore, be adversely affected by the requirement of the regulations that the training allowance must be taken into account in full as income and that no deduction can be made for payments to a childminder, and

(iii) the implementation of the regulations has an indirect discriminatory effect against women.

In his very helpful skeleton argument Mr Pannick posed four questions for determination:-

(a) Does the Equal Treatment Directive of 9 February 1976 (76/207/EEC) apply in the present context?

(b) Does the Social Security Directive of 19 December 1978 (79/7/EEC) apply in the present context?

(c) If either of those Directives does apply, do the Regulations have a disparate impact on women?

(d) If so, is that disparate impact justifiable?

Both Counsel agreed that I should decide these questions and not refer the case to the European Court of Justice.

10. Equal Treatment Directive

This Directive is headed:-

> "Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (76/207/EEC)."

I do not think that it is necessary to quote the whole of the preamble but the following two paragraphs appear to me to be of significance:-

> "Whereas the Council, in its resolution of 21 January 1974 concerning a social action programme, included among the priorities action for the purpose of achieving equality between men and women as regards access to employment and vocational training and promotion and as regards working conditions, including pay;
>
> ...
>
> Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments...."

The phrase "subsequent instruments" must there mean subsequent EEC instruments. In other words, "the principle of equal treatment in matters of social security" will be dealt with in subsequent instruments and not the present one. That recital is followed by Article 1 which reads:

"Article 1

1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment'.

2. With a view to ensuring that progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application."

It seems to me plain that that Directive does not apply to social security matters and the European Court of Justice has made that plain in Newstead v. Department of Transport [1988] 1 WLR 612 at page 617 where it is stated in paragraph 24:-

"As the United Kingdom and the Commission correctly observe, Directive 76/207 is not intended to apply in social security matters. That is clear from Article 1(2) [which is there cited]."

And in Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) [1986] 1 CMLR 688 at page 709, the European Court said: "36. However, in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1(2) of Directive 76/207, which excludes social security matters from that direction, must be strictly interpreted."

11. Mr Drabble argued that the present was not a social security matter. He submitted that the claimant was seeking equal treatment for women as regards access to vocational training and he referred to and (if I understood him correctly) relied upon the decision of Schiemann, J, in R v. Secretary of State for Education Ex parte Schaffter (30 July 1986). That case concerned grants from public authorities under the Education (Mandatory Awards) Regulations and the Education (Students' Dependants' Allowances) Regulations, to enable students to have an income whilst they are studying. The parties agreed in that case that "the never married lone parent is worse off than the once married lone parent, inasmuch as the former does not get from any source the amounts which the latter is able to obtain": see page 3 of the transcript. The learned Judge pointed out, as had been agreed between the parties, that the Directive "procribes not merely direct discrimination on the grounds of sex, but also indirect discrimination on the grounds of sex" and said:-

"Indirect discrimination arises where:-

(a) the complainant proves a demographic point, namely, that the practice or enactment complained of although apparently sexually neutral, in fact has a disproportionate impact on one sex; and,

(b) the author of the practice or enactment is unable to establish that the practice or enactment complained of can be explained by objectively justified factors unconnected with the discrimination on grounds of sex - see the judgment of the Court of Justice of the European Communities in the case of Bilk-Kaufhaus GmbH v. Karin Weber Von Hartz ..."

But no question of social security arose in that case. In the present case, on the other hand, the claim is for supplementary allowance under the social security legislation and the complaint of the claimant is that the regulations in that social security legislation operate as indirect discrimination on the grounds of sex. There is no doubt in my mind that the Equal Treatment Directive does not apply in the present context.

12. Social Security Directive

This Directive is headed:-

> "Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. (79/7/EEC)."

The preamble to this Directive provides:-

> "Whereas Article 1(2) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions provides that, with a view to ensuring that progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application; whereas the Treaty does not confer the specific powers required for this purpose;
>
> Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the above-mentioned schemes..."

Article 3 then sets out the matters to which the Directive shall apply, as follows:-

> "Article 3
>
> 1. This Directive shall apply to:-
>
> (a) statutory schemes which provide protection against the following risks:
>
> - sickness,
> - invalidity,
> - old age,
> - accidents at work and occupational diseases,
> - unemployment;
>
> (b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a)."

Mr Drabble referred to Drake v. Chief Adjudication Officer [1986] 3 CMLR 43. In that case the claimant gave up her job in order to look after her mother, a severely disabled person entitled to an attendance allowance; and the claimant applied for an invalid care allowance but at the date of her claim section 37(3) of the Social Security Act 1975 provided that a woman was not entitled to any such allowance if she was married and residing with her husband or she and a man to whom she was not married were living together as husband and wife. Two questions were referred to the European Court and I think it is sufficient for me to quote only the following passages from the judgment. In dealing with the first question the Court said (1986) 3 CMLR at page 53:-

"21. According to Article 3(1), Directive 79/7 applies to statutory schemes which provide protection against, inter alia, the risk of invalidity (sub-paragraph (a)) and social assistance in so far as it is intended to supplement or replace the invalidity scheme (sub-paragraph (b)). In order to fall within the scope of the directive, therefore, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks or a form of social assistance having the same objective.

...

26. The answer to the first question referred by the Chief Social Security Commissioner must therefore be that a benefit provided by a member-State and paid to a person caring for a disabled person forms part of a statutory scheme providing protection against invalidity which is covered by Directive 79/7 pursuant to Article 3(1)(a) of that directive."

Then dealing with the second question, the Court said [1986] 3 CMLR at page 55:-

"34. The answer to Question 2 must therefore be that discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7 arises where legislation provides that a benefit which forms part of one of the statutory schemes referred to in Article 3(1) of that directive is not payable to a married woman who lives with or is maintained by her husband, although it is paid in corresponding circumstances to a married man."

13. Mr Pannick has submitted that supplementary benefit is not a statutory scheme which provides protection against any of the risks specified in Article 3(1)(a), namely sickness, invalidity, old age, accidents at work and occupational diseases and unemployment nor is it social assistance intended to supplement or replace any of those schemes within the meaning of Article 3(1)(b). I agree. Supplementary benefit is payable to a person "whose resources are insufficient to meet his requirements": section 1(1) of the Supplementary Benefits Act 1976. As I understood his argument, Mr Drabble, on the other hand, contended that this Directive did apply since, as I understood it, supplementary benefit is a form of social assistance to supplement a statutory scheme to provide protection against the risk of unemployment.

14. In my judgment, this Social Security Directive is the first stage in the implementation of the principle of equal treatment in matters of social security - see the second preamble which I have quoted above - and Article 3 of this Directive has not brought within its compass claims for supplementary benefit. In my judgment, therefore, the Social Security Directive does not apply in the present context.

15. The disparate impact

Since I have decided that neither the Equal Treatment Directive nor the Social Security Directive applied in the present context the remaining two questions for determination do not, strictly speaking, arise. However, it was common ground that the onus was on the claimant to prove that the Regulations had what Mr Pannick has described as a "disparate impact" on women and that this was a question of fact which, had I decided either of the first two questions in the claimant's favour, would have been required to be remitted to a new tribunal for redetermination. In their reasons for their decision, in Form AT3, box 4, the tribunal stated, in the last paragraph:-

"We considered the EEC Directive 79/7 EEL and found no sexual discrimination. The fact that child care costs are not disregarded applies to male and female single parents."

There were no findings of fact and no references in their decision to the question whether or not the implementation of the Regulations in question adversely affected more women than

men and it is clear, therefore, that had this been a live issue, I would have set aside their decision and remitted the case for redetermination by a new tribunal.

16. Justifiability

Mr. Pannick explained that this issue was one for the Secretary of State and not for the adjudication officer and that was the reason why he also appeared for the latter. This question would arise, of course, only if I had answered the first or second question in favour of the claimant and if there were a finding of fact that "the practice or enactment complained of although apparently sexually neutral, in fact has a disproportionate impact on one sex" to quote the words of Schiemann, J, in Schaffter's case above - the demographic or disparate impact point. However, as I heard argument on the question, it may be helpful if I make a few observations. It is for the author of the practice or enactment "to establish that the practice or enactment complained of can be explained by objectively justified factors unconnected with discrimination on grounds of sex": see, again, the judgment of Schiemann, J, in Schaffter's case. The learned Judge in that passage referred to the judgment of the European Court of Justice in the Bilka-Kaufhaus case and Mr Drabble referred me to paragraph 37 of the judgment in that case in [1986] 2 CMLR 701 at page 721 where it is stated:-

> "37. ... a department store company may justify the adoption of a pay policy involving the exclusion of part-time employees from its occupational pension scheme, regardless of sex, by contending that it seeks to employ as few workers of this kind as possible, if it is found that the means chosen to attain this objective meet a genuine need of the enterprise, are suitable for attaining the objective in question and are necessary for that purpose."

I was also referred to Price v Civil Service Commission [1978] ICR 27 at pages 29,30.

17. Mr Drabble submitted that the person seeking to justify the particular policy must be able to show -

(i) that a clear policy objective is being pursued,

(ii) that the means to attain the objective meet a genuine need, and

(iii) that the means selected are suitable and reasonable for attaining the purpose.

Are those conditions fulfilled? I would take into account the following matters:-

(i) there is no doubt that it is Government policy to encourage people without jobs to undertake training schemes such as the TOPs course arranged by the Manpower Services Commission, now the Training Commission: see Employment Act 1988, s.24(i):

(ii) the implementation of the regulations as in the present case will act as a deterrent rather than as an encouragement;

(iii) it must equally be Government policy to ensure equal treatment for men and for women undergoing such training courses;

(iv) the availability or shortage of Government money is irrelevant: see Schaffter's case at page 16 of the transcript;

(v) it was not until September 1987 that the Manpower Services Commission began an experimental scheme for the payment of child care expenses to persons on training courses, even though there had been, according to Mr Pannick, power to pay such expenses under section 2(2)(d) of the Employment and Training Act 1973;

(vi) in a written answer published in Hansard dated 7 June 1988 at page 499, the Under Secretary of State for the Department of Employment said:-

> "All lone parents who participate in employment training will be entitled to have child care costs of up to £50 a week for each child placed with a childminder, nursery or creche registered with a local authority met by the Training Commission."

(vii) it is reasonable to conclude that the Government recognise the hardship caused by the regulations in relation to childminding expenses - but too late to benefit the claimant.

18. In my judgment, the disproportionate impact on women (on the assumption that that was the finding of fact) was not objectively justifiable - in the sense of being "acceptable to right-thinking people as sound and tolerable reasons": see the words of Eveleigh, L J, in Ojutiku v. Manpower Services Commission [1982] ICR 661 at page 668.

19. If neither Directive applies in the present case, the law has to be applied as decided by the Commissioner in R(SB) 39/83. As I have stated, Mr Drabble does not seek to distinguish that decision. Accordingly, the appeal tribunal came to a correct decision, namely to confirm the decision of the adjudication officer that the claimant was not entitled to supplementary allowance from 22 September 1986. For those reasons, I disallow this appeal.

(Signed) A.T. Hoolahan

Commissioner

Date: 14 September 1988