

JGM/CDB

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Region: Midlands

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Alexander Webster Robertson

Supplementary Benefit Appeal Tribunal: Mansfield

Case No: 9/52

[ORAL HEARING]

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 10 February 1984 was erroneous in point of law and it is set aside. I consider it expedient to give the decision which the tribunal should have given, based on the reasons set out in the following paragraphs viz: the supplementary allowance (if any) payable to the claimant for the period from 18 November 1983 is to be computed on the basis that his employers' sick pay represented an income resource under regulation 11(2)(f) of the Supplementary Benefit (Resources) Regulations 1981 (the Resources Regulations) and that his statutory sick pay represented an income resource under regulation 11(5)(e) of those Regulations.
2. The claimant became incapable of work in the autumn of 1983. He became entitled to statutory sick pay and also to some further money paid to him by his employers (which I will call "employers' sick pay"), the aggregate of the two being £71.62 after the deduction therefrom of income tax and contributions under the Social Security Act 1975 but before the deduction of his contribution to his employers' contributory occupational pension scheme. This figure when added to the amount of child benefit received brought his total resources slightly over his total requirements and the benefit officer decided that no supplementary allowance was payable. This decision was confirmed on appeal by the appeal tribunal and the claimant now appeals to the Commissioner. He was represented at the oral hearing before me by Miss Lorna Findlay of the Child Poverty Action Group and the adjudication officer was represented by Mrs. A.M. Stockton of the Solicitor's Office of the Department of Health and Social Security.
3. The benefit officer had concluded that both the employers' sick pay and the statutory sick pay constituted income resources within regulation 11(2)(f) of the Resources Regulations. Regulation 11(1) provides for all income other than that to which regulation 10 applies (my underlining) to be calculated on a weekly basis in accordance with the provisions of the regulation. Regulation 11(2)(f) requires that there shall be treated

as income and taken into account in full any remuneration paid by or on behalf of any employer to an employee who is for the time being unable to work owing to sickness. Notwithstanding the words "in full" the benefit officer allowed the deduction of income tax and social security contributions under the provision of regulation 11(6). But he allowed no other deduction. The appeal tribunal accepted this as correct.

4. Miss Findlay contended that this was an entirely incorrect approach. Regulation 10, she submitted, dealt with earnings, and earnings covered by regulation 10 were excluded from the operation of regulation 11 by the words of paragraph 11(1) underlined above. She submitted that sick pay constituted earnings in the ordinary sense of the word and that they fell to be treated as such under regulation 10. If that view was right there would under regulation 10(4) be deductible therefrom not merely income tax and social security contributions but also contributions to the employers' occupational pension scheme, and there was also a disregard of £4 under regulation 10(5). She had to accept that if her submission was right regulation 11(2)(f) was of no effect and simply beat the air.

5. It is in fact the usual consequence of a claimant (as contrasted with a member of his assessment unit) having earnings within regulation 10 that he will be found to be engaged in employment or treated as engaged in employment, so that he is excluded by section 6(1) of the Supplementary Benefits Act 1976 from all title to a supplementary allowance. However, even if sick pay of any kind is "earnings" within regulation 10, I do not think it has the effect of treating the sick person as engaged in employment, but it might suggest that sick pay was not intended to be treated as earnings. I would entirely accept Miss Findlay's submission that sick pay is remuneration in the normal sense of the term. I think that the Inland Revenue would be surprised, not to say dismayed, to be told that it was not; and cases as between master and servant (e.g. Marrison v Bell [1939] 2 KB 187) seem to treat it as such. But the true question that I have to determine is whether there is in the Resources Regulations a context which suggests that things are different under them. Regulation 11(2)(f) refers to the sick pay comprehended in it as remuneration; while regulation 11(1) seems to treat it as something not covered by regulation 10. In my judgment there is a clear context here to indicate that remuneration paid to an employee while incapable of work on account of sickness was intended to be dealt with under regulation 11(2)(f) (which specifically covers the case) and that the more general provisions of regulation 10 were not intended to derogate from this. I hold therefore that the benefit officer and the appeal tribunal were right to treat the sick pay as comprehended under regulation 11 and not under regulation 10. This incidentally obviates any risk that there might otherwise be of a person receiving sick pay being treated as engaged in employment.

6. How then is the claimant's sick pay to be treated? I have no doubt that the employers' sick pay element must fall within regulation 11(2)(f) and must be taken into account in full subject to the deductions allowed by regulation 11(6). But statutory sick pay is, I think, different. Although it is paid by the employer it is paid at the expense of the Department of Health and Social Security (the employers being permitted to

deduct any statutory sick pay paid from the amount due from them in respect of contributions). Moreover it is payable only to an employee as defined in section 26 of the Social Security Housing Benefit Act 1982, which broadly corresponds with the definition of a person required to be insured as an employed earner. Statutory sick pay, though not the same thing as sickness benefit, has enough of the character of sickness benefit for it not to be classified as remuneration at all. In relation to statutory sick pay (as opposed to employers' sick pay) Miss Findlay's argument that it should be included under regulation 10 thus falls to be rejected for another and perhaps more cogent reason than that given above. I accept, of course, that for certain limited purposes statutory sick pay is declared by section 23 of the 1982 Act to be remuneration, but this confirms my view that it is not normally to be treated as remuneration.

7. But, if it is not remuneration for general purposes, it is not remuneration within regulation 11(2)(f) and does not fall within it. In truth statutory sick pay was introduced after the Resources Regulations came into force and no amendment has been made specifically to cover it. It has to be fitted in where it fits best. Mrs. Stockton invited me to hold that it fell within regulation 11(2)(a) as being "any benefit under the Social Security Act [1975]". I accept that, by virtue of section 20(2) of the Interpretation Act 1978, the reference to the Social Security Act 1975 includes any Act amending it and thus embraces the 1982 Act. But the whole tenor of the latter Act including in particular section 10 and Schedule 2, which are concerned with the relationship between statutory sick pay and certain benefits, suggests to me that statutory sick pay (though it replaces benefit under the Act in certain cases) is not a benefit under the Act, and I do not think that regulation 11(2)(a) applies to it. I hold that it can be brought only under the residual provision in regulation 11(5)(e) and so is subject not only to the deductions allowed by regulation 11(6) but also to a disregard of £4.

8. I hold therefore that the tribunal were in error in accepting that it fell within regulation 11(2)(f) and the decision is set aside accordingly. It may be that, as was submitted by the adjudication officer now concerned, the reasons for the decision were inadequately stated. But provided that the facts are sufficiently found I think it expedient to give the decision that the tribunal should have given. The only deficiency in the facts found (which are substantially undisputed) is that I do not know the apportionment between employers' sick pay and statutory sick pay. I know however enough about the three rates at which statutory sick pay was payable in the tax year 1983/4 to say that, even if the claimant were on the lowest rate, it must have been enough to take up the £4 disregard and leave something over. I give the decision in paragraph 1 accordingly; and the practical effect is to give the claimant a small improvement on the decision actually given.

Signed: J.G. Monroe
Commissioner

Date: 21 February 1985