

Meaning of reg 2 SSP Keys

CL 17-97



JBM/SH/14

Commissioner's File: CS/130/1990

**SOCIAL SECURITY ACTS 1975 TO 1990**

**CLAIM FOR STATUTORY SICK PAY**

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the Cleveland social security appeal tribunal dated 24 January 1990 is erroneous in point of law. Accordingly I set it aside and give the decision myself which the tribunal should have given namely that for the period 14 August 1989 to 18 August 1989 (both dates inclusive) the claimant satisfied the conditions in regulation 2(1)(a) of the statutory sick pay (General) Regulations 1982 but did not satisfy the conditions from 19 August 1989. It is not in dispute that from 29 July 1989 to 14 August 1989 (both dates inclusive) the claimant is not entitled to statutory sick pay.

2. This is an appeal by the claimant to the Commissioner with the leave of the tribunal chairman against the unanimous decision of the appeal tribunal confirming the decision of the adjudication officer first involved in these appeals. On 28 November 1991 I directed an oral hearing of the appeal. Accordingly on 16 June 1992 I held an oral hearing. The claimant was present. The claimant was represented by Mr Nigel Thackray of Cleveland WRS. The adjudication officer was represented by Miss F McGregor. To both of them I am indebted.

3. The facts of the case are dealt with by the adjudication officer first involved in these appeals at box 5.1 of his written submission to the appeal tribunal which I set out immediately below:-

"Miss Clark, a veterinary assistant aged 22, was advised on 28.7.89 by her doctor that she was pregnant, expected date of confinement - 23.3.90, and that her job was not suitable for her as it would place the baby at risk. She informed her employer of the situation on 28.7.89 and then went on a pre-arranged holiday for 2 weeks returning on 15.8.89. She informed her employer on her return that she would not return to work sending an unsigned form SCl.. to him.

Around the 23.8.89 Miss Clark submitted a letter from her doctor which confirmed her expected date of confinement and stating that due to the nature of her work it would be unwise for her to continue at work during the pregnancy. Miss Clark's employer, D W M McCabe, then refused to pay Statutory Sick Pay to Miss Clark and gave his reasons in a letter dated 10.9.89 .. Miss Clark then applied to the adjudication officer for a decision on her entitlement to statutory sick pay on form SSP14. Miss Clark also enclosed the letter explaining that she was not working because there would be difficulty in allowing her time off from work for hospital/doctors appointments and because of the risk of toxoplasmosis in her duties involving contact with animals. ... also enclosed was a newspaper article and fact sheets about toxoplasmosis. .."

An issue arises under regulation 17(f) of the Social Security Commissioners (Procedure) Regulations 1987. Accordingly I made the following direction dated 2 July 1992:-

"The employers were not notified of the oral hearing as required by regulation 17(f) of the Procedure Regulations. He had made observations at document AT2 of the case papers. I am minded to decide in favour of the claimant for the period 14 to 18 August 1989 (inclusive) but against her for the rest of the period. The employer should inform me within 30 days hereof whether he wishes to make any representations about whether a new oral hearing should be granted, and if so, would he attend.

The claimant and the Adjudication officer to have a further 30 days for observations from receipt of the above."

By observations dated 22 July 1992 the claimant stated "No comments".

On 15 September 1992 I received the following further submission from the adjudication officer which is as follows:-

"Further to the Commissioner's direction dated 2/7/92, I have no additional observations to make."

The claimant's former employer was sent a copy of my direction accompanying a letter from the Office of the Social Security Commissioners dated 21 July 1992. No reply was received to that letter nor to the further letter from the office of the Social Security Commissioners dated 8 October 1992. Accordingly I proceed to deal finally with the case as I do immediately below in this decision.

4. The relevant statutory provisions are:-

Social Security and Housing Benefits Act 1982, section 1(3).

Statutory Sick Pay (Mariners Eminent Persons Abroad) Regulations, regulation 10.

Statutory Sick Pay (General) Regulations 1982, regulation 2.

Regulation 2 of the Statutory Sick Pay (General) Regulations 1982 provides as follows:-

"2. - (1) A person who is not incapable of work of which he can reasonably be expected to do under a particular contract of service may be deemed to be incapable of work of such a kind by reason of some specific disease or bodily or mental disablement for any day on which either

(a) (i) he is under medical care in respect of a disease or disablement as aforesaid,

(ii) it is stated by a registered medical practitioner that for precautionary or convalescent reasons consequential on such disease or disablement he should abstain from work, or from work of such a kind, and

(iii) he does not work under that contract of service, or

(b) he is excluded from work, or from work of such a kind, on the certificate of a Medical Officer for Environmental Health and is under medical observation by reason of his being a carrier, or having been in contact with a case, of infectious disease."

5. In his helpful submission to me at the oral hearing Mr Thackray referred me to his letter dated 13 February 1991 and in particular the bottom paragraph at page 2 and the top paragraph of page 3 of that letter. He also referred me to R(S) 1/72.

Miss McGregor resiled from the submission dated 8 August 1990 (which conceded error of law) and relied on the written submission dated 28 December 1990 of the adjudication officer now involved in these appeals (which second submission was that there was no error law). At paragraph 2 of that submission it would appear to be submitted that the conditions set out in paragraph 4

above in regulation 2(1)(a) as (i) to (iii) are in the alternative as to (i) and (ii). In argument at the oral hearing Miss McGregor accepted that this submission was wrongly made and that the alternative is as between regulation 2(1)(a) and (b) as set out in paragraph 4 above. If the claimant fails at regulation 2(1)(a)(i) and does not come within (b) that is an end of the matter.

6. In my judgment the decision of the appeal tribunal is erroneous in point of law. Regulation 2(1)(b) has no application in the instant case. There is I am informed no dispute that from 29 July 1989 to 14 August 1989 (both dates included) that the claimant is not entitled to statutory sick pay since the period of entitlement does not arise where at any time the employee is not present in any Member State of the European Economic Community (see regulation 10 of the Statutory Sick Pay (Mariners, Eminent Persons Abroad) Regulations 1982). The only period before me is the period 15 August 1989 to 25 September 1989 both dates included. In Decision R(S) 1/72 the Commissioner was considering whether incapacity could be deemed under the provisions of regulation 3(1) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1967, currently re-enacted as regulation 3(1) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. The case concerned a claimant who was employed in a children's nursery. When she was two months pregnant one child contracted German measles and three other children were suspected of having the disease. Blood tests were carried out. The results showed that the claimant was immune to the disease and consequently she returned to work. At paragraph 18 of the decision the Commissioner held:-

"It was not known whether the claimant was liable to contract German measles if she came into contact with the disease or whether she might have anti-bodies which rendered her immune from it. It may, I think, quite properly be said that during the period in which her doctor certified her to be incapable of work she was in truth and in fact, under medical care. I think it may also properly be said, on the facts of this case, that she was under medical care, in respect of a disease; with German measles."

The Commissioner continued that during the period the claimant did no work and her doctor issued medical certificates, notwithstanding that the diagnosis on one of those certificates showed merely "pregnancy" the claimant could be deemed to be incapable of work under regulation 3(1)(a). In the instant case the benefit under consideration is statutory sick pay and the relevant regulation is regulation 2 of the General Regulations 1982 set out in paragraph 4 above. The claimant's doctor advised her to refrain from work because of the risk of her unborn child should she contract toxoplasmosis. Blood tests were carried out which showed that the claimant was not immune to the disease. Stated somewhat simplistically the effect of German measles would appear similar to the effect of toxoplasmosis on an unborn child. I have before me a

considerable amount of evidence as to the effect of toxoplasmosis which was not challenged before me. A summary of the effect of toxoplasmosis appears to be as follows - I quote from a letter of the Toxoplasmosis Trust dated 15 January 1990:-

"Toxoplasmosis is a disease which is not dangerous to the normal healthy adult, its only consequence is to provide the adult with a lifelong immunity to the infection.

However if a pregnant woman catches the infection she risks passing it to her unborn child with tragic results. The unborn child may be miscarried or stillborn, or suffer from blindness, hydrocephalus, deafness, epilepsy and mental retardation. Recent research suggests that as many as 480 babies are born every year infected by Congenital Toxoplasmosis."

The Toxoplasmosis Trust "General Fact Sheet" dated 11 August 1989 states as follows:-

"How is Toxoplasmosis caught cats and undercooked meat are thought to be principle source of human infection although the exact methods of transmission are still unknown. The significance of the cat is that it is the only known host in which the reproductive cycle of Toxoplasmosis takes place. The domestic cat catches Toxoplasmosis from birds and mice when hunting. For 14 days after having become infected the cat sheds infectious organisms in its faeces. Thereafter the cat will not usually become reinfected. In the earth cat's faeces may remain infected for up to 14 months. Humans are at risk because they can become infected by becoming into contact with cat's faeces or contaminated soil. Vegetables which have been exposed to the parasite will also be a source of infection. Other animals are also infected. Although they do not appear to excrete Toxoplasmosis, humans can catch the infection by eating their meat or by handling the meat."

A blood test was taken on 15 August 1989 and the result was given to the claimant on 18 August 1989 when she again visited her doctor. In my judgment for the period from 19 August 1989 the claimant does not satisfy regulation 2. Pregnancy, of itself, is not a specific disease or bodily or mental disablement in terms of social security legislation and in this regard I refer to Decision CS/221/49(KL) at paragraph 2. In my judgment it is not a correct construction of regulation 2(1)(a) to read "under medical care in respect of a specific disease or bodily or mental disablement" as applying to the diseases a claimant could get by contact in this case toxoplasmosis. The regulation must be read to mean a specific disease or bodily or mental disablement that she has got or is under investigation as to whether she actually has it or is immune from it. In my judgment the period during which the claimant was under investigation (that is the period 14 August 1989 to 18 August 1989) (inclusive) to find out whether she was immune from toxoplasmosis is a period when she can be said in accordance with regulation 2(1)(a)(i) to be "under

medical care in respect of the disease or disablement". Once the investigation was complete and the claimant was so informed (which was on 18 August 1989) that she did not suffer from the disease (though results showed that she was not immune therefrom) from 19 August 1989 it could not in my judgment be said that the claimant was under medical care in respect of toxoplasmosis. Accordingly my decision is that for the period 14 August 1989 to 18 August 1989 (both dates inclusive) the claimant satisfied the conditions in regulation 2(1)(a) but did not satisfy the conditions from 19 August 1989. Accordingly the appeal tribunal erred in law in holding that the claimant was not entitled under the said regulation for the period 14 August 1989 to 18 August 1989 (both dates included).

7. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision. The facts are fully before me and accordingly I give the decision which the appeal tribunal themselves should have made and I set it out in paragraph 1 hereof. To an extent this is but a pyrrhic victory for the claimant as though she succeeds for the period found in paragraph 1 hereof she fails in her claim for entitlement from 19 August 1989.

I arrive at the decision I do on the basis of the relevant statutory provisions in particular regulation 2(1)(a) of the Statutory Sick Pay (General) Regulations 1982. My task is to construe the relevant legislation as I see it. I have no discretionary or overriding powers. Amendment of the law is a matter for Parliament and Parliament alone. In my judgment the legislation presented the claimant with the choice (once she had been informed of her lack of immunity to toxoplasmosis) either of continuing to work in her job as veterinary assistant (involving contact with cats) with the possible results to her unborn child or of leaving her work but without statutory sick pay from 19 August 1989.

8. Accordingly the claimant's appeal is allowed in part.

(Signed) J.B. Morcom  
Commissioner

(Date) 11 November 1992

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SOCIAL SECURITY ACTS 1975 TO 1990

THE SOCIAL SECURITY COMMISSIONERS PROCEDURE REGULATIONS 1987  
REGULATIONS 24(1)

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER - CORRECTION

Page 1, Para 1, Line 5, delete "14 August 1989"  
insert "15 August 1989"  
Page 5, Para 6, Line 49, delete "14 August 1989"  
insert "15 August 1989"  
Page 6. Para 6, Line 7, delete "14 August 1989"  
insert "15 August 1989"  
Page 6, Para 6, Line 12, delete "14 August 1989"  
insert "15 August 1989"

(Signed) J.B. Morcom  
Commissioner

(Date) 7 April 1993

Commissioner's File: CS/130/1990  
Star No: 92/92