

LA Councils' Allowances For 1993 —
Excess Councils' Allowances Re Deductions
For Tax Allowance In Decision ★ 78/90

DGR/SH/LB/3

Commissioner's File: CS/7934/95

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 18 May 1995 is erroneous in point of law, and accordingly I set it aside. As it is convenient that I give the decision the tribunal should have given, I further decide that the expenses incurred in any week by the claimant for the performance of her duties as a local authority councillor (whether for clothes, telephone rental, telephone calls, subscriptions, travel, or whatever it might be) shall, for the purposes of calculating her entitlement to invalidity benefit, be deducted from the allowance or allowances to which she is entitled in respect of that week. The concept of averaging is not to be applied.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 18 May 1995. In view of the complexity of the case, an oral hearing was directed. At that hearing the claimant was present, and represented by Mr Andrew King from the Bristol Community Law Centre, whilst the adjudication officer appeared by Mr J Heath of the Solicitor's Office of the Department of Social Security.

3. On 20 September 1994 the adjudication officer reviewed the amount of expenses deductible from the claimant's allowances as a local authority councillor. The amount of the expenses accepted as deductible was relevant in calculating whether her invalidity benefit should be reduced or extinguished. The claimant considered that the £375 per year accepted by the adjudication officer as the appropriate cost

of clothing to enable her to carry out her duties as a councillor was insufficient. She contended that the correct figure should have been £900. She also considered that her allowances as a councillor should be averaged over the year rather than attributed to particular weeks. Seemingly, so far as the expenses were concerned, they were so averaged.

4. It would appear that up to the date of the hearing before the tribunal the adjudication officer had, in determining the amount of acceptable expenses, applied the Social Security Benefit (Computation of Earnings) Regulations 1978 [S.I. 1978 No. 1698] ("Computation of Earnings Regulations"), and had proceeded on the basis that averaging was permissible under its provisions. At the hearing neither the claimant nor the adjudication officer sought to disturb this practice. However, the tribunal of their own volition decided that the Computation of Earnings Regulations had no application to section 58 (now section 30E) of the Social Security Contributions and Benefits Act 1992, which was the provision governing how sickness or invalidity benefit should be dealt with when the recipient was a local authority councillor. Or, at any rate, that would seem to have been their approach, although the actual decision they gave is confusing. For instead of saying unequivocally that the Computation of Earnings Regulations had no application, their actual decision seems to suggest that, if the parties were content, they could have resort thereto. Although the adjudication officer and the claimant were invited to agree between themselves the relevant expenses, and only refer the matter back to the tribunal if they could not reach agreement, not surprisingly, in view of the confusing nature of the tribunal's decision, the parties did not understand on what basis they were to proceed.

5. In those circumstances the claimant appealed to the Commissioner against the tribunal's decision on the ground that they had clearly erred in point of law, in that they had made a decision which was contradictory and incomprehensible. Some doubt was entertained at one stage as to whether I had jurisdiction, in view of the fact that there had been no agreement between the parties and no formal reference back to the tribunal. It was suggested that it was arguable that until there had been a final determination of the amount of the expenses, either by agreement of the parties or by a finding of the tribunal on a reference back, there was no actual decision, and therefore nothing appealable to me. However, although it would be true to say that there has been no final determination, in the sense that the expenses have not been agreed upon, or fixed by the tribunal, there has, nevertheless, been finality as regards the principles which are to be applied in determining such expenses. And those principles are the subject matter of complaint, in that it is said that they are contradictory and incomprehensible, and until they are replaced by those more meaningful, no real

progress can be made in determining the expenses. I see the force of this analysis, and consider that in the circumstances I do have jurisdiction to entertain the appeal. Both Mr Heath and Mr King urged this course upon me.

6. The adjudication officer now concerned in his written submissions, submissions which were resiled from by Mr Heath, contended that the Computation of Earnings Regulations had no application. He said as follows:-

"2. Before section 58 of the Social Security Contributions and Benefits Act 1992 was introduced, councillors who worked whilst receiving invalidity benefit were considered under reg (3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 from the point of view of whether they could be deemed to be incapable of work. One of the conditions to be satisfied was that the earnings were below a prescribed amount. Councillors were then, as they still are, regarded as being in gainful employment. The allowances they receive or at least those elements which are not simply reimbursements of expenses, are therefore accepted as being earnings from gainful employment.

3. The situation changed however when Schedule 8 [to] the Social Security Act 1989 came into force on 9.10.89. This was replaced ... on consolidation by section 58 of the Contributions and Benefits Act 1992. This section does not refer to a councillor's earnings but to the net amount of the councillor's allowances which is defined in section 58(4) as:-

'...the aggregate amount of the councillor's allowance or allowances to which he is entitled for the week in question, reduced by the amount of any expenses incurred by him in that week in connection with his membership of the council or councils in question.'

I submit therefore that the question is not one of earnings and in consequence [the Computation of Earnings Regulations] do not apply. In other circumstances councillor's allowances are still considered as earnings. For example, in relation to dependency increases earnings of the claimant or dependant affect entitlement/payability. Therefore the AO needs to decide how much of the councillor's allowances should be regarded as earnings. In section 58 however the AO does not have to make that consideration, he simply decides the allowances the councillor is entitled to in any particular week. Then, from that amount, are deducted any expenses which were -

'incurred in that week'

'in connection with his membership of the council'

....

6. I submit ... that section 58(4) introduces a clear limiting provision which reduces the total allowances to which a councillor is entitled for any week by any expenses incurred in that week. Having regard to this regulation I submit that the tribunal were correct in concluding that there is no provision for an expense, such as the purchase of clothing, to be averaged over a forward period."

7. Mr Heath contended that, although in section 58 (and, for that matter, in section 30E which has replaced it) payments made to councillors were described as allowances, and not earnings, no significance should be attached merely to the label. These payments were still earnings. He pointed out that under section 2(1)(a) of the Social Security Contributions and Benefits Act 1992:-

"'Employed earner' means a person who is gainfully employed in Great Britain either under contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E."

Manifestly, the claimant, who held office as a councillor, fell within that definition. Mr Heath then pointed out that under section 3(1):-

"(a) 'earnings' includes any remuneration or profit derived from an employment; and

(b) 'earner' shall be construed accordingly."

The claimant received remuneration from her employment, and that remuneration, which was described as "allowances" necessarily constituted "earnings". The Computation of Earnings Regulations applied to earnings, and therefore it applied to allowances under section 58. Mr King agreed.

8. The difficulty in this case is that, although it might well be said that allowances were, notwithstanding their description, still to be regarded as earnings (or at least those elements which were not simply reimbursements of expenses), the way they are to be treated for the purposes of calculating sickness or invalidity benefit is specifically fixed, not by the Computation of Earnings Regulations, but by the express provisions of section 58. Although the Computation of Earnings Regulations might allow averaging,

section 58 does not, an interpretation supported by the adjudication officer now concerned in his written submissions.

9. Mr Heath and Mr King both contended that, unless the principle of averaging were adopted, section 58 simply could not be operated in any sensible way. It would be absurd, they argued, to proceed on the basis that the expense of, for example, a £100 dress purchased in one week should be set against the allowance or allowances to which the claimant was entitled for that week, when everyone knew that the dress was not going to last one week, but was to be worn over a significant period of time. Moreover, how were telephone calls and telephone rentals to be dealt with? I see the difficulty, but against that I am faced with the plain words of section 58(4). It specifically provides that the expenses incurred in a particular week have to be deducted from the aggregate amount of the councillor's allowance or allowances to which he or she is entitled for that week. Nor does it matter that the benefit of the expenses incurred in that week are enjoyed in future weeks. It would seem that Parliament deliberately decided, presumably in the interest of simplicity, that the costs incurred in each week should be offset against the allowances of that week, whatever the result might be. It is not open to me to alter the effect of the statute by adding words of my own to it.

10. It follows from what has been said that, although the tribunal expressed their ultimate decision in a wholly unsatisfactory way, they really analysed the matter correctly in the reasons for their decision. I have to set aside the tribunal's decision as being erroneous in point of law, but it is unnecessary for me to remit the matter to a new tribunal for rehearing. I can conveniently substitute my own decision.

11. For the reasons given above, my decision is as set out in paragraph 1.

(Signed) D G Rice
Commissioner

(Date) 25 NOV 1996