

U3 — Commissioner's Allowance  
Are "Garnishes" — Excessor Can  
Be Deemed

CPAG

MJG/SH/11

73/93

Commissioner's File: CU/001/1993

**SOCIAL SECURITY ACTS 1975 TO 1990**

**SOCIAL SECURITY ADMINISTRATION ACT 1992**

**CLAIM FOR UNEMPLOYMENT BENEFIT**

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 14 July 1992 (tribunal register no.7:1560224) as that decision is erroneous in law and I set it aside. My decision is that for the purposes of regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, S.I. 1983 No. 1598, there shall be treated as earnings by the claimant as an employed earner:-

(a) the basic and special responsibility allowances payable to the claimant by the F. Borough Council

(b) the attendance allowance payable to the claimant for his attendance at a council meeting on Friday 21 February 1992, less non-reimbursed expenses calculated as indicated in this decision.

The adjudication officer shall forthwith determine the claimant's entitlement (if any) to unemployment benefit for 21 February 1992. Any difficulty arising from the local adjudication officer's decision can be referred to me for Direction or Supplemental Decision: Social Security Administration Act 1992, section 23.

2. This is one of seven appeals to the Commissioner by the claimant, a man born on 7 December 1943. All the appeals concern the claimant's entitlement to unemployment benefit for particular days in 1992 on which he attended Council meetings as a Councillor for F. Borough Council. I have given decisions on the other appeals on files CU/002-008/93.

3. All seven appeals were the subject of oral hearings before me, the first on 10 June 1993 (when I issued a Direction requiring further information). the second on 28 October 1993. At both hearings the claimant appeared in person and addressed me and the adjudication officer was represented by Mr L Scoon, Counsel, of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to the claimant and to Mr Scoon for their assistance to me at the hearings.

4. This present appeal is against the unanimous decision of the social security appeal tribunal dated 14 July 1992, which dismissed the claimant's appeal from a decision of the local adjudication officer as follows,

"[The claimant] is not entitled to unemployment benefit for 21 February 1992. This is because he was engaged in employment and has not proved that his earnings were £2 or less a day .. Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [S.I. 1983, No. 1598] regulation 7(1)(g)(i)."

5. That regulation provides as follows,

"Days not to be treated as days of unemployment ...

7. (1) For the purposes of unemployment ... benefit -

(a)-(f) .....

(g) ... a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless -

(i) the earnings derived from that employment, in respect of that day, do not exceed £2, or, where the earnings are earned in respect of a longer period than a day, the earnings do not on the daily average exceed that amount; and

(ii) he is available on that day to be employed full-time in some employed earner's employment; and

(iii) if the employment in which he is engaged is employed earner's employment, it is not in his usual main occupation or it is done for, or organised through, a local authority, health authority, preserved board or health board in providing a service which is capable of being provided by a charity, or it is done for, or organised through, a charity;"

6. There is no doubt that in carrying out his duties as a Councillor the claimant could nevertheless bring himself within regulation 7(1)(g) if he could show either that he had no earnings from his office as Councillor or alternatively if he did have earnings that the correct amount of those did not exceed £2 in respect of any day for which unemployment benefit was claimed. It is rightly conceded that the requirements of sub-paragraphs (ii) and (iii) of regulation 7(1)(g) are fulfilled by the claimant, even in respect of days in which he was attending Council meetings.

7. On appeal to the Commissioner, the claimant contended that as there had been new legislation (set out below) since the relevant reported Commissioner's decisions on this subject, e.g. R(U) 6/77 and R(U) 5/83, those decisions should be disregarded and it was open to the Commissioner to accede to the claimant's contention that the sums payable to him by way of attendance allowance for his attendance at Council meetings etc did not constitute "earnings" at all (contrary to what was decided in the reported cases).

8. It is therefore incumbent on me to examine that contention. When R(U) 6/77 and R(U) 5/83 were decided, the law as to attendance allowances was contained in section 173(1) of the Local Government Act 1972. In R(U) 5/83, paragraph 8 the learned Commissioner expressed the matter in this way,

"The Council's power of paying an attendance allowance was only that conferred by statute (the Local Government Act 1972) and in my judgment I have to look at that Act and not in the way in which the Council expressed their intentions in their minutes to ascertain the true nature of an attendance allowance. Section 173(1) of that Act provides as follows:-

'Subject to subsection (6) below, any member of a local authority who is a Councillor shall be entitled to receive a payment by way of attendance allowance, that

is to say, a payment for the performance of any approved duty, being a payment of such reasonable amount, not exceeding the prescribed amount, as the local authority may determine.'

Approved duty is defined in section 177(2) and includes attendance at a meeting of the body or of any committee or sub-committee, and the doing of any other thing approved by the body, or anything of a class so approved, for the purpose of, or in connection with, the discharge of the functions of the body, or of any of its committees or sub-committees."

9. The learned Commissioner then stated (paragraph 9 of R(U) 5/83),

"It is already established by Commissioners' decisions that a person holding an elected office in a local authority is engaged in employment for the purposes of regulation 7(1)(h) and that an attendance allowance constitutes earnings in terms of that regulation (see Decision R(U) 6/77 and C.U. 1/80 (not reported))."

A similar conclusion was reached in the context of Income Support by the Commissioner in R(IS) 6/92 (see in particular paragraphs 4 and 5 of that decision). //

10. However, the legislation was altered by the Local Government and Housing Act 1989 (c. 42), which amended section 173 of the Local Government Act 1972 to limit its application to Parish and Community Councils. (1989 Act, section 195 and Schedule 11, paragraph 26). Consequently the position of a Councillor of eg. a borough council such as the claimant is no longer governed by section 173 of the Local Government Act 1972, cited by the Commissioner in R(U) 5/83.

11. Instead section 18 of the Local Government and Housing Act 1989 provides as follows,

"Schemes for basic, attendance and special responsibility allowances for local authority members"

18. (1) The Secretary of State may by regulations authorise or require any such relevant authority as may be specified or described in the regulations to make a scheme providing for the payment of -

- (a) a basic allowance for every member of the authority who is a Councillor;
- (b) an attendance allowance in relation to the carrying out by any such member of such duties as may be specified in or determined under the regulation; and

- (c) a special responsibility allowance for any such member who had such special responsibilities in relation to the authority as may be so specified or determined."

In pursuance of that power, there have been made the Local Authorities (Members' Allowances) Regulations 1991, S.I. 1991 No. 351, amended (as to amounts of allowances only) by S.I. 1992 No. 540).

12. Regulations 8 and 9 of the 1991 Regulations make provision for the payment to councillors each year of a basic allowance and, in appropriate cases, a special responsibility allowance. It is not in dispute that those allowances constitute earnings by the Councillor but on and after 18 March 1992 (some of the decisions in this case relate to days after 18 March 1992) that point becomes academic in that regulation 2 of the Social Security Benefits (Computation of Earnings) Amendment Regulations 1992, S.I. 1992 No. 300, adds a new regulation 3(4A) to the Social Security (Computation of Earnings) Regulations 1978 (S.I. 1978 No. 1698) as follows,

" 3(4A). For the purposes of regulation 7(1)(g)(i) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 there shall be disregarded any payment made to a councillor by way of a basic allowance or special responsibility allowance payable by virtue of regulations made under section 18(1) of the Local Government and Housing Act 1989."

It follows that in such of the seven appeals where there have been payments of basic or special responsibility allowances on or after 18 March 1992 those allowances will not be taken into account as part of the claimant's earnings.

13. As to the main issue i.e. the question of the proper treatment under present legislation of the "attendance allowance" provided for by section 18(1)(b) of the Local Government and Housing Act 1989, regulation 10 of the Local Authorities (Members Allowances) Regulations 1991, S.I. 1991, No. 351, makes detailed provisions for the duties for which attendance allowances are payable. The relevant provisions of regulation 10 are as follows,

"Attendance allowances

10. (1) Subject to paragraph (2), a scheme made under this Part may provide for the payment to each member of the authority who is a councillor of an allowance ('attendance allowance') in respect of -
- (a) the carrying out of such of the duties referred to in paragraph (3) and not excluded by paragraph (4) as may be

- specified in the scheme; and of
- (b) the time spent in travelling to and from the location at which any such duty so specified is performed.
- (2) .....
- (3) The duties referred to in this paragraph are attendance at -
- (a) a meeting of the authority or of any committee or sub-committee of the authority, or of any other body to which the authority makes appointments or nominations, or of any committee or sub-committee of such a body;
- (b) any other meeting the holding of which is authorised by the authority, or a committee or sub-committee of the authority, or a joint committee of the authority or one or more other authorities, or a sub-committee of such a joint committee, provided that -
- (i) where the authority is divided into two or more political groups, it is a meeting to which members of at least 2 such groups have been invited, or
- (ii) if the authority is not so divided, it is a meeting to which at least 2 members of the authority have been invited;
- (c) a meeting of any association of authorities of which the authority is a member.
- (4) The duties excluded by this paragraph are those in respect of which the member received remuneration otherwise than under a scheme.
- (5) The amount of the attendance allowance shall be specified in the scheme and may vary according to the time of day and the duration of the duty; but shall be the same for all members of the authority entitled to the allowance in respect of a duty of any description at the same time of day and at the same duration.
- (6) .....

(7) The scheme may provide that a member shall not be entitled to more than one attendance allowance in respect of any period of 24 hours beginning at such time as the authority may determine."

14. The Scheme for F. Borough Council closely follows the provisions of regulation 10 and provides that the attendance allowance shall be £12 per meeting in any 24 hour period (commencing at 3.00 am), that it should be payable to all councillors, at the same rate and that the maximum claimable allowance in any 24 hour period is £24 (i.e. two duties).

15. When I consider the provisions of section 18(1) of the 1989 Act and the provisions of regulation 10 of the 1991 Regulations, I come to the clear conclusion that the allowances are payable only, as indeed section 18(1)(b) of the 1989 Act provides, "in relation to the carrying out by any such member of such duties as may be specified or determined under the Regulations" plus travelling time (My underlining). There is nothing in either section 18(1) of the 1989 Act or in regulation 10 of the 1991 Regulations to suggest that the attendance allowance is anything more than a quid pro quo for the actual carrying out by a councillor of duties i.e. travelling to and attendance at the relevant meetings. I note that regulation 10(5) provides that the attendance allowance "may vary according to the time of day and the duration of the duty". That is another indication that it is intended to be a form of remuneration for the duty of actually attending the relevant meetings and is not intended to be any general reimbursement for out of pocket expenses, loss of wages etc. as to which there is separate limited provision (see section 18(2) of the Local Government and Housing Act 1989).

16. Consequently, I have no doubt that on general principle the Councillor's attendance allowance does in fact constitute "earnings" i.e. "emoluments chargeable to income tax under Schedule E" of an "elective office", within sections 2(1)(a) and 3(1) of the Social Security Act 1975, now re-enacted in sections 2(1)(a) and 3(1) of the Social Security Contributions and Benefits Act 1992. I take the claimant's point that the word "allowance" is not particularly apposite to a description of "earnings". The meaning of the word "allowance" sometimes carries an element of bounty in it but I am satisfied that in the general context of the legislation here it in fact constitutes "earnings" within the meaning of the above - cited legislation.

17. I have arrived at this conclusion, as a question of principle without at this stage consideration of the earlier reported Commissioners' decisions eg. R(U) 5/83, in view of the claimant's contention that there being new legislation since those decisions the matter should be looked at entirely afresh. However, I should add that the learned Commissioners' in R(U) 6177; R(U) 5/83; and R(IS) 6/92 came to a similar conclusion on very like wording in section 173(1) of the Local Government Act 1972 (see paragraph 8 above). In that section the attendance

allowance is stated to be "a payment for the performance of any approved duty" instead of, as in section 18(1)(b) of the 1989 Act, "in relation to the carrying out by any such member of such duties .." but that is a distinction without a difference. Moreover, section 173(1) of the 1972 Act referred to an attendance allowance being "a payment for the performance" whereas section 18(1)(b) of the 1989 Act refers to attendance allowance "in relation to the carrying out by any such member of such duties;". I do not consider that that connotes any different meaning, though it could be argued that the words "in relation to" are wider than the word "for". In any event, I am satisfied that even in relation to the wider wording, if such it is, in the 1989 Act the payment of the attendance allowance still constitutes "emoluments" of an elective office and therefore "earnings" of that officer.

18. I therefore turn to the subsidiary question, which was also argued before me at the hearing on 28 October 1993. That is the claimant's assertion that even if attendance allowances were "earnings", there should be deducted from them reasonable expenses incurred by him in carrying out his duties as a Councillor. He conceded correctly that the attendance allowance, if "earnings", could be regarded only as earnings for the day on which the relevant meeting is attended and cannot be spread out over the entire year. (cf. paragraphs 10 and 11 of R(U) 5/83). He, however, indicated that in the relevant year, i.e. the year from 6 April 1992 to 5 April 1993, his overall claim for such expenses as postage, stationery, subscription to his group, costs of printing and circulating a newsletter, costs of heating and lighting in his house, and car mileage amounted overall to £776. These were all expenses not reimbursable by the council. In my judgment the claimant is entitled in calculating his net earnings to deduction from attendance allowances of unreimbursed expenses reasonably incurred in connection with his attendance at the meetings for which the allowances were payable but not otherwise. That could, for example, include expenses of preparation for the meeting (cf. R(U) 5/83, paragraphs 14 and 15 and regulation 4 of the Social Security Benefit (Computation of Earnings) Regulations 1978, S.I. 1978 No.1698.) I leave to the adjudication officer (with liberty to apply to me by the parties if necessary) to determine what proportion of the claimant's claim for expenses for 1992/93 is attributable to his attendance at council meetings. When such figure is ascertained, then in my judgment it should be divided by 67 i.e. the number of meetings in 1992/93 the claimant attended. The 1/67th thus calculated can be deducted from the attendance allowance for each relevant meeting to determine whether or not the claimant's earnings on any meeting day did not exceed £2.

19. Lastly, I should explain that although the tribunal in this case took the utmost care with these difficult cases I set their decision aside as being erroneous in law simply because due to no fault of their own they were not considering the correct legislation i.e. the 1989 Act and the 1991 Regulations cited above.

(Signed) M.J. Goodman  
Commissioner

(Date) 19 November 1993