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MR/TEMP/2 Commissioner's File: CU/108/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: D R Catherall

Appeal Tribunal: Oxford

Case No: 2/13/7311

1. This appeal by the claimant is ultimately unsuccessful. The decision of the Oxford social security appeal tribunal dated 10 June 1993 is erroneous in point of law. I set that decision aside but I give a decision to the same effect as the tribunal's decision. The claimant is not entitled to an increase of unemployment benefit in respect of an adult dependent from 5 August 1992.

2. The claimant sought an increase of unemployment benefit in respect of his partner to whom he was not married. His partner was entitled to child benefit in respect of her child, Henrietta, who lived with them. She had no earnings. It has always been common ground that, by virtue of section 82(4) of the Social Security (Contributions and Benefits) Act 1992 and regulations 4A and 10 of the Social Security Benefit (Dependency) Regulations 1977, the claimant would be entitled to the increase if it could be said that he was wholly or mainly maintaining Henrietta (see regulation 4A(1)(a)(i) of the 1977 Regulations). The adjudication officer and the tribunal applied the "family fund" test in order to decide whether the claimant was wholly or mainly maintaining the child and both concluded that he was not. The tribunal applied that test with obvious reluctance and the chairman gave the claimant leave to appeal at the conclusion of the hearing.

3. Pursuant to that leave, the claimant now appeals and the appeal is supported by the adjudication officer now concerned with the case. Both parties submit that the tribunal erred in law because, like the local adjudication officer, they decided the question whether the claimant was contributing more than half of the actual cost of maintaining the child by looking at the period in respect of which the claim was made. However,

regulation 2(1) of the 1977 Regulations provides:-

> "Subject to paragraph (2), a beneficiary shall not for the purposes of the Act be deemed to be wholly or mainly maintaining another person unless the beneficiary -
>
> (a) When unemployed .... contributes towards the maintenance of that person an amount not less than the amount of increase of benefit received in respect of that person; and
>
> (b) when in employment .... (except in a case where the dependency did not arise until after that time) contributed more than half of the actual cost of maintenance of that person."

Regulation 2(1)(a) has no application to the present case as no increase of unemployment benefit was payable in respect of the child. Regulation 2(1)(b) requires that the "family fund" test be applied by looking at the period while the claimant was in employment. The tribunal looked at the wrong period and their decision is therefore erroneous in point of law.

4. The parties also submit that the tribunal should have regarded money raised by the claimant from cashing insurance policies as a contribution by him to the family fund. That is no doubt right but, as the parties also submit, that contribution was made while the claimant was unemployed and so does not fall to be taken into account if one is looking at the period when he was employed.

5. The claimant further submits that the tribunal erred in treating child benefit as earmarked for the child, contrary to the view of the Commissioner in R(S) 12/83. I accept that submission, on which the adjudication officer now concerned has not commented. The tribunal referred to paragraph 15 of R(S) 12/83 but appeared to have misunderstood it because they applied child benefit only to Henrietta's deficit and not also to that of her mother (see paragraph 13 of R(S) 12/83). In that case, the Commissioner held that child benefit should not be regarded as earmarked specifically for the relevant child but he left open (in paragraph 14) the question whether it should be regarded as a contribution by the recipient of child benefit or by an outsider. It seems to me to follow from R(S) 7/89 (a case concerned with the treatment of supplementary benefit) that child benefit should be treated as a contribution by the recipient (i.e, in this case, by the partner of the claimant).

6. The claimant goes yet further and submits that maintenance payments paid in respect of Henrietta by her father on a voluntary basis while the claimant was employed (but later incorporated into a court order) should be treated like child benefit and not regarded as earmarked for the child. A similar argument was advanced in C.I. 33/49 where a Commissioner said:-

> "I do not think it can be said that the wife, as she then

was, was receiving or entitled to receive those payments for her maintenance. It is one thing not to be able to be compelled to use money that she received for a particular purpose; it is quite a different thing to say that you receive it for a purpose for which you manifestly do not receive it."

Maintenance paid for the benefit of a child should, in my view, always be earmarked for that child and the tribunal in the present case did not err in that respect.

7. An alternative submission made on behalf of the claimant is that the maintenance payments should be treated as payable solely as a contribution to Henrietta's school fees and should not be included in the "family fund" at all. I reject that submission. The maintenance payments cannot be regarded solely as contributions to the school fees. The tribunal relied on the fact that the court order did not specifically refer to school fees. A further ground for rejecting the submission is that it has never been suggested that Henrietta's father would not have remained liable to pay some maintenance even if she had ceased to go to boarding school. In any event, money paid for school fees is money paid for maintaining the child and is properly included in the "family fund". Not only is a proportion (said to be half in this case) of the school fees a payment in respect of board and lodging, but also I can see no distinction between tuition fees and money spent on, say, a holiday for a child. Both types of expenditure are for the benefit of the child and are therefore for the child's maintenance in the broad sense relevant here.

8. The adjudication officer suggests that the tribunal should have considered whether the "unit costs" should be affected by the child being at boarding school for part of the year. However, he fails to suggest what adjustment should be made. The tribunal decided that this 10 year old child should be regarded as being as expensive to maintain as an adult and, in my view, they were entitled to make that decision. Henrietta was still maintained while at school and the whole point of the "family fund" is that it avoids the adjudicating authorities having to break down expenditure on any precise basis. Complicated as it is, the "family fund" test provides a reasonably practicable way of working out the proportions in which various people maintain another. It simply is not practical to assess, or verify, actual expenditure on one member of a family of three.

9. The adjudication officer raises a further matter in paragraph 9 of his submission. He refers to the fact that the claimant had an overdraft and that Henrietta's two grandmothers bought her presents of clothes and shoes. He submits:-

> "The tribunal found as fact that '.... that this household has a cash income of only £124.29 per week, since the loans and gifts which in practice kept the family afloat cannot be treated as income.' However, I submit that the value of any contributions in kind, i.e. gifts, should be included

into the calculation of the 'family fund' as the cost of these items would need to be met from the fund if they were not met by way of gifts (see paragraph 7 of C.I. 111/50 (K.L.) where the Commissioner considered free coal received by a miner). The tribunal have not considered this course of action and have not given any explanation for not doing so."

The tribunal had, of course, been looking at the period when the claimant was unemployed and I am not sure to what extent loans and gifts were a feature of the household finances while the claimant was employed. It has not been suggested that money raised by borrowing should be treated as a contribution by the borrower to the "family fund" and, at any rate in the ordinary case, it appears to me that loans should be disregarded. In suggesting that gifts should not be disregarded, the adjudication officer refers to C.I. 111/50. I do not find that case to be of any assistance. I accept that the mere fact that a person receives a benefit in kind does not prevent that benefit from being treated as income. However, there seems to me to be a considerable difference between the irregular receipt of gifts of varying value from persons under no liability to maintain the recipient and the regular receipt of 14 cwt of coal every 21 days by virtue of employment as a miner. The adjudication officer seeks to draw a distinction between gifts of necessities and other gifts, but it can be argued that some items of clothing and footwear are more necessary than others and, in my view, it would be both unfair and extremely complicated if gifts of attractive clothing given instead of, say, toys by a child's grandmother should be brought into account in calculating the "family fund". In my view, the tribunal were right to exclude both loans and gifts from the calculation in this particular case, there being no compelling reason for including them.

10. I therefore conclude that the tribunal erred in law only on the points identified in paragraphs 3 and 5 above. I am told that the claimant's net earnings when he was in work were £200 per week and it is conceded that, if Henrietta's father's maintenance is to be brought into the "family fund" and earmarked for her, the proper application of the "family fund" test shows that the claimant was not wholly and mainly maintaining Henrietta while he was in employment. In those circumstances, it is not necessary for me to refer the case to a differently constituted tribunal and I give the decision set out in paragraph 1 above.

(Signed) M Rowland
Commissioner

(Date) 24 June 1994

MR. DAVID CATHERALL CASE NO. CU/108/93

RESPONSE TO THE ADJUDICATION OFFICER'S SUBMISSION

While I am pleased to see that the Adjudication Officer agrees that the Tribunal decision is eroneous in law, and specifically that he agrees that the family fund calculations should be applied to the period when Mr. Catherall was employed rather than unemployed, I would like to comment further on the treatment of school fees.

Even if the Court Order does not specify that the money paid by Henrietta's father is specifically for school fees, this is the understanding under which the money is paid and the Court Order is made. If the money were not used for this purpose, Henrietta's father would apply for a reduction in the Court Order. If this money were not paid by Henrietta's father, the private school fees **would not be paid** and the household fund **would not meet this extra expense.**

It is unreasonable to treat a sum of money which is being spent on Henrietta at one and the same time as not being earmarked for Henrietta's school fees (and therefore contributing to an increased unit cost for each member of the family) **and also** as belonging specifically to Henrietta so that it counts towards her deficit alone.

Either this money is given for the private school fees and can be used only for this purpose **or** it is given as general maintenance, in which case it should be divided in the calculation between Henrietta and her mother as in exactly the same way as is the Child Benefit, (in accordance with para 15 of R(S)12/83).

Sandra Figgess,
4.11.93

ADJUDICATION OFFICER'S SUBMISSION TO THE COMMISSIONER

Name of claimant: David Robin CATHERALL

Reference No: CU/108/93 **NI No:** YH 79 42 67 B

Appeal tribunal: Oxford **Date of decision:** 10.06.93

Benefit: Unemployment **Type of case:** Increase of benefit for dependent

1. This is an appeal by the claimant against the unanimous decision of the Oxford Social Security Appeal Tribunal ("the tribunal") (pages T36 to T40). The tribunal chairman granted leave to appeal on 10.06.93 (page T35).

2. It is submitted that the following statutory provisions and authorities are relevant to this appeal:

Social Security Contributions and Benefits Act 1992 section 82(4) ("the Act")

Social Security Benefit (Dependency) Regulations 1977 regulations 2(1) and 4A(1) ("the Dependency Regulations")

Social Security (Adjudication) Regulations 1986 regulation 25(2)(b) ("the Adjudication Regulations")

Commissioner's Decisions Numbered: C.I.111/50(K.L.), C.S.52/50(K.L.), R(S)4/82(T)

3. I submit that the tribunal decision is erroneous in law.

4. In his appeal (pages 43 to 47) the claimant gives his grounds for appealing against the tribunal decision as:-

(a) That there was a breach of natural justice in the way that the tribunal treated the court order of £73.84 in respect of the child's education.

(b) That the tribunal erred in law in applying the "Family Fund Calculation" when considering regulation 2(1) of the Dependency Regulations;

5. Paragraph 26 of R(S)4/82(T) sets out the rules of natural

justice which for practical purposes, should be embodied in the proceedings of local tribunals. These are:

(i) an absence of personal bias or mala fides;

(ii) an obligation to base their decision on evidence; and

(iii) whether or not there is an oral hearing, to listen fairly to the contentions of all persons entitled to be represented.

It is my submission that there is no evidence that the tribunal have failed to observe these requirements and on this point their decision reveals no error of law.

6. In the instant case the claimant is not married to the adult for whom he has claimed an increase of unemployment benefit. However, I submit that an increase of unemployment benefit can be made to the claimant if he satisfies section 82(4) of the Act. To satisfy section 82(4) the claimant has to satisfy regulations 4A(1) and regulation 2(1) of the Dependency Regulations. Regulation 4A(1)(a)(i) of the Dependency Regulations states:-

"(1) For the [purpose] of ..... [section] 41 [now section 82 of the Social Security Contributions and Benefits Act 1992],.....(increase of benefit in respect of .....persons having care of dependent children) a person shall be treated as if he were entitled to child benefit in respect of a child for any period throughout which-

(a) child benefit has been awarded to a parent of that child with whom that child is living and with whom that person is residing and either-

(i) the child is being wholly or mainly maintained by that person; or ....."

7. In the instant case, for the claimant to be entitled to an increase of unemployment benefit in respect of his partner, I submit that he has to satisfy regulation 4A(1)(a)(i) above. In order to satisfy that regulation I submit that he has to satisfy regulation 2(1) of the Dependency Regulations which states:-

"(1) Subject to paragraph (2), a beneficiary shall not for the purposes of the Act be deemed to be wholly or mainly maintaining another person unless the beneficiary-

(a) when unemployed, or incapable of work, or, as the case may be, entitled to a Category A or Category B retirement pension, contributes towards the maintenance of that person an amount not less than the amount of increase of benefit received in respect of that person; and

(b) when in employment, or not incapable of work, or, as the case may be, not so entitled (except in a case where the dependency did not arise until after that time) contributed more than half of the actual cost of maintenance of that person."

8. In the instant case the tribunal have made calculations to decide whether the claimant is wholly or mainly maintaining the child (page T39). However the tribunal have based these calculations on the period whilst the claimant was unemployed. Under regulation 2(1) above the only calculation to be decided on the period of unemployment is whether the claimant contributes an amount not less than the increase of benefit. The tribunal should, I submit, have considered whether the claimant contributed more than half of the actual cost of the maintenance of the child whilst in employment. Consequently, I submit that there has been an error on the face of the record and the tribunal decision is erroneous in law.

9. During the tribunal hearing the claimant stated "I had to cash £4,000 of life insurance, to placate bank manager. The over draft was about £1,000." (page T38). However the tribunal have not investigated whether any part of this amount was paid into the "family fund". There are no findings of fact by the tribunal as to whether this was considered and if not why not. The claimant also stated that the child "...has 2 generous grannies, who give clothes." (page T36), that "The whole summer and winter outfits cost £35.00, second hand, except shoes - her father paid for 2 pairs. Grandmothers dote on their only grandchild, and they but her "mufti"." (page T38) and that "The grandmother buys clothes and shoes for Henrietta instead of presents. I can rely on this." (page T38). The tribunal found as fact that ".....that this household has a cash income of only £124.29 per week, since the loans and gifts which in practice kept the family afloat cannot be treated as income." (page T39). However, I submit that the value of any contributions in kind, ie gifts, should be included into the calculation of the "family fund" as the cost of these items would need to be met from the fund if they were not met by way of gifts (see paragraph 7 of C.I.111/50 (K.L.) where the Commissioner considered free coal received by a miner). The tribunal have not considered this course of action and have not given any explanation for not doing so.

10. Since the tribunal hearing the claimant has given more details concerning the £4,000 he obtained by cashing his life insurance policies. The claimant's appeal (page 45) states, with regard to the £4,000, "This money was spent over a period of 36 weeks and should have added a further £111 to Mr Catherall's weekly income while unemployed." Although I submit that the tribunal were in error in not ascertaining the period that the money was contributed to the "family fund" it is now clear that it related to the period when the claimant was unemployed. As I submit that the "family fund" calculation should be based on the period prior to the claimant's claim to benefit and that money arising from the life insurance policies related to a period after the claimant became unemployed, I submit that the amount should not be included in the "family fund" calculation.

11. The claimant, in his appeal (page 46) maintains that the tribunal were in error to treat the payments made to the family by way of maintenance from the child's father as the child's contribution to the "family fund" as the money was awarded specifically for the child's boarding school fees. However, the tribunal have examined this point and found (page T37) that the

court order does not specify that this is the purpose of the court order. The tribunal have then examined in what way the money should be treated and have decided that such money should be treated as the child's contribution to the "family fund". I submit that the tribunal have taken the correct action with regard to this, because if the payment was not made by the child's father it would be necessary for the school fees to be paid from the household fund and thus the fund is saved that additional charge (see paragraphs 7 & 8 of C.S.52/50 (K.L.)). However, the tribunal have not made findings of fact as to whether the "unit costs" should be affected by the child being at boarding school for some parts of the year and only at home for the remainder of the year.

12. As a consequence of paragraphs 9 and 10 above, I submit that the tribunal decision is also erroneous in law in that it does not satisfy regulation 25(2)(b) of the Adjudication Regulations.

13. If the Commissioner accepts my submission I respectfully invite him to set aside the decision of the tribunal and, should it not be expedient to give the final decision, to remit the case for rehearing with directions as to its correct determination.

Mr A Rice
Adjudication Officer

19 October 1993

SUBMISSION FOR APPEAL TO THE COMMISSIONER
DAVID CATHERALL
Unemployment Benfit - Additional payment

A ERRORS IN LAW

The grounds of this appeal are that the Tribunal erred in law in applying the Family Fund Calculation in the following ways

1 Reg 2(1) Social Security Benefit (Dependency) Regulations 1977 specifies that in order to be deemed to be **wholly or mainly maintaining another person** the beneficiary must
a) *when unemployed* .....contribute towards the maintenance of tha person an amount not less that the amount of increase of benefit received in respect of that person; and
b) *when in employment* .... have contributed more than half of the actual cost of maintenance of that person.

In the present case the amount of increase payable in relation to Henrietta herself under (a) is nil as there is no child's addition payable on unemployment benfit.

The significant calculation is that which applies when Mr Catherall was **in employment** before he became unemployed ie prior to 27.07.92.
Mr Catherall's gross weekly earnings in that period were £253 per week (net income £200 pw)
However both the Adjudication Officer's submission and the Tribunal based their calculations for the Household fund on Mr Catherall's income while unemployed.

2. Even during the period of unemployment all monies contributed by Mr Catherall to defray household expense should have been included in his contribution figure and this should have included £4000 of savings he obtained by cashing in two life insurance polices. This money was spent over a period of 36 weeks and should have added a further £111 to Mr Catherall's weekly income while unemployed.

3 The Tribunal treated the Child Benefit payable for Henrietta as being earmarked to be set against her deficiency in direct contradiction to para 15 of R(S) 12/83:

> *"I hold therefore that Child Benefit ... should not be treated for purposes of the family fund test as earmarked for the children in respect of whom it is applied."*

B BREACH OF THE RULES OF NATURAL JUSTICE

Applying the correct figures but treating the court order of £73.84 per week for Henrietta as income which is included in the household fund (so raising the unit cost for all members of the family) but is then earmarked solely for Henrietta, still means that Mr Catherall does not meet the condition of contributing at least half of Henrietta's unit cost before becoming unemployed:

Family income:

Mr Catherall	£200
Child Benfit	7.35
Court Order	73.84
total	£281.19

Following the Tribunal in counting Henrietta as a whole unit (cf R(S) 7/99 and CS/229/1998), this gives a "unit cost" of £93.73

Mr Catherall's surplus	£200 - £93.73 = £106.27
Mrs Ownsworth	-£93.73 + CB/2 = -£90.05
Henrietta	-£93.73 + CB/2 + Court order = -£16.25

Since £16.25 is less than half of Henrietta's unit cost, Mr Catherall still would not fulfill the condition for being deemed to be entitled to Child benefit for Henrietta.

Although the Adjudication Officers guide (AOG 52575) does specify that a child's school fees should be treated as contributions to the household fund and then allocated specifically to reduce the child's deficiency, there is no firm basis for this opinion in either the regulations or the case law. The present case demonstrates the unreasonableness of treating the payment in this way and I respectfully ask the Commissioner to consider whether monies intended specifically for Henrietta's school cost should be treated in such a way as to increase the unit cost of other members of the family unit while at the same time being earmarked for her.

If the money which is actually awarded specifically for Henrietta's school fees (even if this is not specified in the court order itself) is being treated as though it could be used instead to meet other household expenses, then it would seem to follow that this money should **not** be earmarked solely to meet Henrietta's deficit but should, like the Child Benefit, be apportioned equally between Henrietta and her mother:

ie not earmarked

Mr Catherall's surplus	£200 - £93.73 = £106.27
Mrs Ownsworth	-£93.73 + CB/2 + court order/2 = -£53.14
Henrietta	-£93.73 + CB/2 + Court order/2 = -£53.14

Mr Catherall's surplus is then divided equally giving £53.14 as his contribution. He was thus meeting half her expenses before being unemployed and can therefore be deemed to be entitled to Child Benfit for Henrietta and so to an addition to his Unemployment Benfit in respect of Mrs Ownsworth.

If Henrietta is instead counted as ½ unit then

This gives a "unit cost" of 112.47

Mr Catherall's surplus	*£200 - £112.47 = £87.53*
Mrs Ownsworth	*-£112.47 +2/3(CB + Court order) = -£58.34*
Henrietta	*-£56.23 +1/3(CB + Court order) = -£29.16*

One third of Mr Catherall's surplus is £29.17 so again Mr Catherall is shown to meet one half of Henrietta's unit cost.

Alternatively, if the Court order is to be recognised as providing money *specifically for Henrietta's school fees*, then this money should not be included in the household fund calculation. Henrietta is at school for less than 50% of the year and the remaining 50% of the time her living expenses are met by Mr Catherall. The money used for school fees is not available to assist in meeting these expenses and so the only contribution from "other sources" is the Child Benefit.

16/8/93