WMW/AB

**Commissioner's File:** CSIS/4/90
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**SOCIAL SECURITY ACTS 1975-1990**

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW**

**DECISION OF SOCIAL SECURITY COMMISSIONER**



**Name:**

**Social Security Appeal Tribunal:** Edinburgh

**Case No:** 505 4507

1. This appeal by the adjudication officer fails. I find no error of law in the decision of the Edinburgh Social Security Appeal Tribunal dated 30 October 1989 such as to require my interference. The appeal is accordingly dismissed.

2. The claimant appealed to the tribunal against a decision of an Adjudication Officer issued on 16 August 1989 holding her not entitled to housing costs in respect of a building insurance premium. Her case was that she required help to pay for the renewal of the house building insurance which was mandatory in terms of her mortgage. The material presented in her appeal and accepted by the tribunal demonstrated that she was at risk of being caught between having insufficient money to pay the premium, even monthly, and breaching the terms of her mortgage thereby becoming at risk of losing her home. The insurance payments were not aggregated with the mortgage payments.

3. The unanimous decision of the tribunal was to award the claimant housing costs in respect of the said premiums. Their reasons were these:-

> "It is within the Tribunal's knowledge that it is an essential part of every mortgage that buildings insurance be effected. More often than not the insurance is effected by the lender and the cost of the premium is spread out over the 12 monthly repayment. There are however types of mortgage where the mortgagee is responsible for effecting and maintaining the buildings insurance and the effecting and maintaining of such buildings insurance is an essential part of the mortgage.
>
> This brings these insurance premiums into the same category as service charges. These charges are made normally on occupants of a block of flats or such similar residential developments. Service charges normally include an element to pay the block insurance premium for all the building.
>
> That being so we consider that the insurance premium in [this] case is an analogous payment to a service charge and we therefore granted housing costs in terms of Income Support (General) Regulations 1987 17(E) and Schedule 3 paragraphs (f) and (h)." [The reference to regulation "17(E)" clearly should be to "17(e)"]

The adjudication officer now appeals, with leave of the Chairman.

4. The Income Support (General) Regulations 1987 (ISGR) by Regulations 17 and 18 and, in particular, paragraph 1 of Schedule 3 thereto prescribe the eligible housing costs to be taken into account in determining income support.

Paragraph 1(f) prescribes "service charges" and (h) prescribes "payments analogous to those mentioned in this paragraph." The questions posed for the tribunal by the adjudication officer were as to whether this premium was listed in said paragraph 1 or was analogous to those so listed. The tribunal were left to deal with the matter apparently without further guidance, and came to the view already set out.

5. The adjudication officer's submission on the appeal is that the tribunal were not entitled to interpret "service charges" and things analogous thereto so as to include a building insurance premium under reference, in part, to the definition of "service charges" and "services" provided in Regulation 10(7) of the Housing Benefit (General) Regulations 1987 (HBGR) which governs these concepts both in that Regulation and in Schedule 1 to those Regulations. Paragraph 1 of Part 1 of the latter lists what are therein defined as "ineligible service charges". The list ends with a general provision, paragraph (g), excluding -

> "charges in respect of any services not specified [in the list] which are not connected with the provision of adequate accommodation."

The purpose of the submission was to point to Regulation 9(2)(b) of Schedule 3 of the ISGR whereby, in respect of:-

> "..ineligible service charges within the meaning of paragraph 1 to Schedule 1 of the Housing Benefit (General) Regulations 1987 [there are to be deducted for ISGR purposes]..the amounts attributable to those ineligible service charges.."

The adjudication officer also referred to Commissioner's decision CIS/17/88 wherein it was held that insurance costs which had been voluntarily undertaken were held not to be "service charges".

6. Whilst this case was pending some guidance was given on the scope of the expression "service charges" for the purpose of income support in an appendix to decisions now reported as R(IS)3 and 4/91. [The appendix is attached to the latter only: hence I refer only to it hereinafter.] By a Direction dated 2 July 1991, given at the procedural stage, I invited the adjudication officer to consider whether the restriction on what might be a service charge under the HBGR provisions cited above affected charges that were only analogous thereto and, further, whether a charge for insurance made as a condition of a mortgage might or might not be "connected with the provision of adequate accommodation" and so for the purposes of the HBGR provisions to be regardable as an eligible service charge. I had then in mind CIS/109/89 whereby it was held that premiums for insurance paid to a landlord in terms of a lease were held to be part of service charges and not excluded by the HBGR provisions because they were indeed "connected with the provision of adequate accommodation".

7. When the case came before me for determination I was much persuaded by the submissions for the adjudication officer as they then stood - to the extent that I had drafted a decision to give effect thereto. But I became concerned as to whether there might not be some support for the tribunal decision in the approach to the concept of "analogy" set out in paragraph 8 of R(SB)5/87 by a Tribunal of Commissioners. Further, I wondered whether the insurance premium in this case might not be analogous, in that sense, to "mortgage interest payments" as provided for in paragraph 1(a) of the Schedule. The

adjudication officer has again helpfully and fully responded thereto. And again the claimant, given of course an opportunity to respond thereto, has simply but understandably founded upon the awkwardness of her position in regard to paying the premium and the extent to which that has been worsened by delay. I appreciate what she says, but my jurisdiction is concerned solely with matters of law and the soundness or otherwise of the tribunal decision against that standard.

8. The adjudication officer's submission in response to my first Direction accepted that the insurance premium in this case had every appearance of a service charge in light of paragraph 11 of the Appendix to R(IS) 4/91. But, he submitted, it fell foul of paragraph 1(g) of Schedule 1 of the HBGR because the insurance premium was not connected with the adequacy of the accommodation. I am inclined to agree and so to doubt the soundness of CIS/109/89 but need not come to a final view because of the decision which I have reached on this case. Accordingly I reserve my opinion on CIS/17/88 and CIS/109/89. The adjudication officer went on to deal with the issue about what might be analogous to a service charge. I accept his submission on that. As he points out it was said in the Appendix to R(IS)4/91 that it is difficult to conceive of anything that might be analogous to a service charge which was itself properly not to be called a service charge. I adhere to what was said in that regard by the Tribunal.

9. In response to my second Direction the adjudication officer has carefully pointed to the distinctions between contracts of mortgage and those of insurance and to the differing purposes of, and of the payments provided for under, each. I accept what he has said on that. He went on to point out that buildings insurance payments had been provided for in the former Supplementary Benefit provisions. He then pointed to paragraph 9 of the Appendix to R(IS) 4/91 and the normal canon of construction that where there has been a change, even by omission, in what might be regarded as succeeding legislation, as here, it is to be assumed that that was deliberate. I adhere to what was said in said paragraph 9 and to accept the principle of the adjudication officer's submission in that regard. He concludes that it is then not possible within the Tribunal decision for insurance premiums to be treated as analogous to mortgage payments because, such as a class having been expressly omitted by the current and successive legislation, they do not in the Commissioners' words, fall "squarely within some express provision" of paragraph 1 (a) to (g) of ISGR Schedule 3. I cannot go as far as that. But I would have agreed had it been submitted that if in any particular case building insurance premium was to be an eligible housing cost it must first be brought within paragraph 1(a) to (h) of the Schedule. I emphasise the inclusion of "(h)". That has led me to consider more closely the particular payment and the terms of (h).

10. It is clear that it is the particular payment and its circumstances that require to be looked at. That appears from the passage quoted by the adjudication officer from paragraph 9 of the Tribunal decision. There the question was not whether cess pit charges in general were included. They too had been included in the preceding legislation. The question was whether the terms, and the context within which fell to levied the particular cess pit charges, fell within any of the provisions of paragraph 1 (a) to (h) - and again not just (a) to (g). Paragraph 1(h) is not on the same lines as that dealt with in R(SB) 5/87 to which I had drawn attention earlier. There it was in the terms, following a list of circumstances -

"... but the circumstances are analogous to *any* circumstances mentioned in one or more of those paragraphs..."

Here the terms of paragraph 1 (h) are -

"payments analogous to *those* mentioned in this paragraph."

[My emphasis in both quotations.]

1(h) thus appears to me expressly not concerned only with what may be analogous to *any* particular factor mentioned earlier. It is in my opinion concerned also with possible additions, *ejusdem generis* with all those listed. I have reached that opinion because it seems to me that, unlike the list considered in R(SB) 5/87, there is here a fairly clear common thread linking the list. That is to say that there does appear to be a *genus* involved. Indeed the *genus* has more than one thread or link in common. In the first place all the payments in question have some relationship to the dwelling occupied as the home. But they are also all payments exigible by *another* than the occupant(s) and relate directly not to the dwelling but to what that other is doing to facilitate either the claimant's occupancy or the sufficiency of the building for such occupancy. Further any failure to pay can put at risk the occupancy, even in the case of 1 (b) - "interest on loans for repairs and improvements to the dwelling..." albeit depending upon the terms of the particular contract.

11. I have not lost sight of the adjudication officer's submission about what is to be taken from the change in the wording of the list as it is in the ISGR from its effective predecessor in the Supplementary Benefit (Requirements) Regulations 1983 (SB) at regulation 18(1). Insurance was therein expressly mentioned only in so far as that relating to common areas was given as an example of "service changes" - regulation 18(1)(e). Paragraph 9 of the appendix to R(IS) 4/91 indeed made the point that an omission from the list in the ISGR as against that in the SB could be taken to be deliberate so that such charges could come within the ISGR -

"... only if they fell squarely within some express provisions thereof."

But that was said in a context dealing with cess-pit charges which had had an express mention in the SB list. Insurance so far as mentioned in that list had only been by way of an example. The Tribunal conclusion was that the omission of an expressly provided for item means that the intent of the ISGR -

"... is that any such automatic right was deliberately excluded."

But, of course, insurance of the structure of an owner-occupied home had been earlier fully mentioned in SB regulation 16. Its omission in that respect from the ISGR is more on all fours with the omission of cesspit charges. But the result is only to have to return to the basic question as to whether the premium in this case falls within any of the heads of the ISGR list, including (h).

12. I pause to note at this stage that the SB list ended, as the appendix to R(IS) 4/91 noted, without comment, with -

"(g) outgoings analogous to those mentioned in this Part. [ie the preceding list and the four preceding regulations at the least.]"

I have been unable to trace, and am not aware of, any case in which SB 18(1)(g) has been interpreted. That may be because it came in a regulation dealing with miscellaneous following regulations dealing with specific outgoings which as a whole covered much more ground than does the ISGR list so that analogy never had to be - or never was - called in aid. Having considered the matter I am not struck by any necessary objection to the construction of SB(g) in line with that which I have set out herein in respect of ISGR (h).

13. Upon the approach set out in the preceding paragraphs I have come to the conclusion that the insurance premiums in this case are analogous to the series of payments listed in paragraph 1 of Schedule 1 although not to any particular one of them. It is required to be made to another than the occupier and that under contract; it relates not directly to the building but to its insurance and to the mortgagor's interest therein which is the means by which has been facilitated the claimant's occupancy. That there is here a risk of loss of occupancy if the payment is not made was never in dispute. I think I am entitled to assume and do assume that the contractual requirement here was not unique in regard to this claimant's occupancy of her home. Mortgagors normally impose standard terms in similar cases. And they were, I consider, entitled to find that such standard terms about insurance are issued. All that seems to flow from the tribunal's findings. Because upon the approach that it is not necessary to consider analogy only in regard to any particular sub-paragraph, the question of the limitation on service charges imposed by the HBGR Schedule becomes irrelevant.

14. I was about to sign this decision when that in CIS/201/89 was drawn to my attention. It dealt with a situation identical to that herein. I do not in any way dissent from what the Deputy Commissioner there said. He followed R(IS) 4/91 and held a premium for building insurance required by the mortgager not to be a service charge. He agreed that it is difficult to conceive of an analogy to one and I may add that having considered the rest of the list further in light of that I now tend to the view that none of the other items therein readily admits of an analogy - a consideration which in turn tends to support the interpretation of (h) which I have adopted. I do not think that in any of the previous cases, CIS/109/89, R(IS) 4/91, CIS/201/89 or even for that matter CIS/17/88, was the question of the scope for "analogy" considered by anyone involved therewith to be other than in regard to one or other of the preceding items on the list. It was only when considering the adjudication officer's submission in response to my reference to that scope in regard to R(SB) 5/87 that I became struck by the contrast between the "any" (particular) and "those" (general). And as was pointed out by the adjudication officer under reference to R(IS) 4/91 it is for consideration that if different formulations of words are used in similar legislative situations, it is legitimate to assume that a different meaning was intended. It would have been simple to have written "any" instead of "those" in paragraph 1(h). Accordingly I do not consider that I am differing from the earlier decisions cited, merely taking the matter a step further. Had I thought otherwise I of course, would have followed those earlier decisions.

15. Reverting to the tribunal decision, I am satisfied that they came to a decision, in the sense of what they actually decided, which was open to them. Their reasoning, in light of what has been set out above, was in my judgment

too narrow by limiting their consideration to the question of analogy to a service charge or indeed necessarily to any other particular provision in the ISGR list. But since, upon the broader approach, in all probability they would have come to the same decision, and fuller reasoning has now been set out herein, I have felt it appropriate not to set aside their decision. I feel that it would be rather semantic to describe as in error of law an answer reached upon an interpretation of a statutory provision that was narrower than necessary even if some of the logic of that approach appears rather strained. Of course it follows that had I come to the other view I would have given the same decision as the tribunal, at my own hand and reasoned as above.

16. The appeal fails.

(signed) W M Walker
Commissioner
Date: 14 October 1992