

RSL/JCB

CHILD BENEFIT ACT 1975

CLAIM FOR CHILD BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.F. 2/81

1. My decision is as follows:-

- (a) The decisions of the insurance officer awarding to the claimant in respect of her son, Peter, child benefit, and the increase of child benefit for a single parent family, for periods falling between 25 April 1977 and 25 March 1979 (both dates included) should be reviewed.
- (b) Such decisions should be revised so as to provide that, save as mentioned below, neither child benefit nor the above-mentioned increase was payable to her for any period between those two dates.
- (c) Provided however that child benefit and the above-mentioned increase were payable to the claimant for weeks between those dates forming part of the inter-term school holidays of Peter (such weeks to be calculated as provided by regulation 16(6) of the Child Benefit (General) Regulations 1976 [S.I. 1976 No 965]) but excluding the two weeks 18 to 31 December 1978.
- (d) Child benefit having been paid to the claimant for the inclusive period 25 April 1977 to 1 October 1978 and the increase for the inclusive period 25 April 1977 to 15 October 1978, an overpayment of benefit was made to her amounting to £101.00 but she is not required to make any repayment.

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2. This is an appeal by the claimant from a decision of the local tribunal dated 13 November 1979. The substance of the decision was that the tribunal upheld a review decision of the local insurance officer, in which he held that the claimant had been overpaid £96.20, representing child benefit and increase of child benefit wrongly paid to her, in respect of periods falling between 25 April 1977 and 15 October 1978 (both dates included), but did not require her to make any repayment.

I have heard the appeal at an oral hearing at which the claimant attended and gave evidence. She was represented by Mr Gold, an officer of her Welfare Association, and the insurance officer was represented by Miss K Lee, of the solicitor's office of the Department of Health and Social Security. I am grateful to the two representatives from whose submissions I derived much help.

3. The claimant is a divorced woman whose son, Peter, was born on 30 November 1962. She has the misfortune to suffer ill health which from time to time necessitates her admission to hospital, and, because of this, at times she has been prevented from providing for Peter's upbringing. Consequently she voluntarily submitted to Peter being taken into care under section 1 of the Children Act 1948 by the appropriate Local Authority on 1 October 1971. The Local Authority continued to have Peter in their care at all times material to this decision.

4. When the time came to decide on Peter's secondary education, he was found to have an exceptionally high IQ and it was decided to place him at a boarding school in Dorset at public expense. I understand that he continued at that school until he was 18 years old, the fees being paid for some years by the Inner London Education Authority. But, of course, the claimant throughout incurred expense in contributing to Peter's upbringing. She made a contribution to the Local Authority who had him in care; she occupied a two-bedroomed flat so as to enable him to live with her when he was not at school; and she fed him and otherwise provided for him during his half-term and inter-term holidays. He spent these holiday periods with her unless he went away to stay with friends, in which case the claimant provided for his expenses.

5. Child benefit was awarded and paid to the claimant for the inclusive period 4 April 1977 to 1 October 1978, and the increase for a one parent family, paid four-weekly in advance, for the inclusive period 4 April 1977 to 15 October 1978. The claimant accepted the benefit in good faith, having no reason to think that she was not entitled to it. But in September 1978 the Local Authority warned her that that was not so, and she surrendered her two order books to the Department of Health and Social Security on 25 September 1978.

6. Two issues are raised by the claimant's appeal. First, she contends that, within the meaning of sections 1(1) and 3(1) of the Child Benefit Act 1975 ("the Act"), she was at all material times the person who was "responsible" for Peter. Secondly, if not, then she contends that she was entitled to child benefit for weeks of Peter's holidays when he was living with her.

7. I accept the claimant's contention that at all material times she was contributing to the cost of providing for Peter at a weekly rate exceeding the weekly rate of child benefit: see section 3(1) of the Act. Ordinarily, this would have entitled her to child benefit and to the increase for a single parent family. But in her case the title derived from sections 1 and 3 of the Act is excluded by section 4(1) of, and paragraph 1(c) of Schedule 1 to, the Act. The relevant passages of the Act read as follows:-

"4.-(1) Regulations may provide that child benefit shall not be payable by virtue of section 2(1)(b) above [not material to this appeal] in such cases as may be prescribed: and Schedule 1 to this Act shall have effect for excluding entitlement to child benefit in other cases.

SCHEDULE 1

EXCLUSIONS FROM ENTITLEMENT

Children in detention, care, etc .

1. Except where regulations otherwise provide, no person shall be entitled to child benefit in respect of a child for any week if in that week the child is -

...

(c) in the care of a local authority in such circumstances as may be prescribed."

The circumstances in which the title of the parent of a child in care is excluded have been prescribed in regulation 16(5) of the Child Benefit (General) Regulations 1976 [S.I. 1976 No 965] ("the General Regulations"). So far as material, this states:-

"For the purposes of paragraph 1(c) of Schedule 1 to the Act ... the prescribed circumstances are that the child is -

(a) received into care under section 1 of the Children Act 1948 ... "

Accordingly, I have to decide the first issue against the claimant.

8. The second issue is now controversial only in relation to a short period which I will define below. In general, the insurance officer has always recognised and given effect to the claimant's title to child benefit, and the relevant increase, for any week throughout which she had Peter living with her. But in order to explain his attitude I have to describe the relevant rules governing the title of a parent whose child is in care but periodically stays in the parent's

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home. The rules are to be found in regulation 16(6) and (7) of the General Regulations. They provide that in certain limited circumstances the parent's disentitlement is negatived, and can be summarised as follows:-

- (a) The parent must have the child living with him throughout the week for which the benefit is claimed, and for benefit purposes a week consists of seven days beginning on a Monday: see section 24(1) of the Act.
- (b) However, if the parent had the child living with him throughout a single day and that day immediately precedes or immediately follows a week for which benefit is payable by virtue of rule (a), then benefit is payable to the parent for the whole week in which the single day occurs; that is to say the immediately preceding or immediately following week as the case may be.
- (c) For the purposes of those rules "a person shall not be regarded as having a child living with him throughout any day or week unless he actually has that child living with him throughout that day or week": see regulation 16(7). I must emphasise the word "actually" in this rule.

9. Peter's half-term school holidays never included a complete week beginning on a Monday and therefore never enabled the claimant to acquire a title to child benefit for one week. For this reason the local insurance officer included in his review decision a declaration that the claimant was not entitled to benefit for the half-term holiday periods and held that she had been overpaid in relation to them. He was in difficulty in defining the half-term holiday periods and may not have achieved accuracy in his attempt to do so. But this is now of no moment because he did not, and I will not, require the claimant to make any repayment of overpaid benefit.

10. On the other hand the insurance officer gave full effect to the claimant's title to benefit in respect to Peter's inter-term school holidays, calculating her rights in accordance with the rules which I have summarised in paragraph 8. No problem now arises on any inter-term school holiday period prior to the 1978 Christmas holiday. This ran from 15 December 1978 to 15 January 1979, the two extreme dates being the days on which Peter travelled to home and back to school. The insurance officer awarded child benefit and the relevant increase to the claimant for the two weeks 1 to 14 January 1979, and the claimant duly received the benefit. The award was correct. The claimant was clearly entitled to benefit for the week beginning 8 January 1979, and "the preceding week rule" (see paragraph 8(b)) applies in relation to the week beginning 1 January 1979.

11. That leaves the two weeks 18 to 31 December 1978 and only these give rise to controversy. Unfortunately, the claimant was admitted as an in-patient in hospital on 15 December 1978, the day on which Peter arrived home. She was discharged on 17 December 1978, and on 19 December 1978 she went to a convalescent home where she stayed until 2 January 1979. These facts compel consideration of rule (c) in paragraph 8 above (regulation 16(7)). In applying that rule I have to answer the question: What distinction does the regulation seek to draw between "living with" and "actually living with"?

12. It seems clear that the word "actually" is imported in order to exclude any notional togetherness of the parent and child, of which examples can be found in section 3(2) (absence of either parent or child) and 3(3) (absence of the child) of the Act. And no exception is allowed; in contrast with regulation 17(1) and (2) of the General Regulations, which allow for temporary absences of the child. Possibly the main thrust of the legal rules is directed to the absence of the child rather than that of the parent, but I do not consider it possible to hold that regulation 16(7) of the General Regulations is limited to circumstances in which the child is absent from the parental home; it also comprises circumstances in which the absence is that of the parent. I am driven to the conclusion that the intention behind the legal rules is that parent and child should be together; at least in most circumstances they must be living under the same roof. Miss Lee directed my attention to paragraph 15 of the reported Commissioner's Decision R(F) 2/79 in which it was said:-

"But 'living with' is not synonymous with 'residing together' nor with 'presence under the same roof'."

But the Commissioner was not then troubled with the word "actually".

13. Some of the consequences of a strict interpretation of regulation 16(7) may be unpalatable. A parent admitted to hospital for one night for a medical investigation could lose a week's benefit; and this could happen precisely when the support of the benefit was most needed because of illness. Against that the context of the rule must be borne in mind. It operates in cases in which substantial sums of public money are already being spent on the child.

14. My conclusion is that the claimant's absence from her home while she was in the convalescent home is too long to allow of any gloss on regulation 16(7) which would regard her as having Peter living with her during this period; even if the days of her departure from and return to her home are disregarded. It might be legitimate to disregard a very brief absence of the parent, for example the two nights of absence of the claimant between 15 and 17 December 1978; on the ground that during such a brief parting the parent and child were still living together. But I am not called on to decide this point. Since the claimant ceased to have Peter living with her on 19 December 1978 at latest, she did not have Peter living with her throughout the week beginning 18 December 1978 (a Monday); and the "preceding week rule"

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(see paragraph 8(b)) does not apply. I hold, therefore, that child benefit was not payable to the claimant for the two weeks 18 to 31 December 1978; nor, of course, was the increase for a one parent family.

15. In his decision the local insurance officer calculated that the claimant had been overpaid £96.20. But he amended this to £101.00 in his submission to the local tribunal, and this is the correct figure.

16. I am constrained to criticise the local tribunal's decision which was stated by their chairman to be: "Appeal disallowed in part. Repayment not required". When I tried to ascertain what part of the appeal had been allowed, I could find no answer. I need not labour the point.

17. For the reasons which I have endeavoured to explain, the appeal is dismissed. My decision is set out in paragraph 1 above.

(Signed) R S Lazarus
Commissioner

Date: 17 June 1981

Commissioner's File: C.F. 2/1980
C I O File: I.O. 2/CHB/80
Region: CBC Washington