

CF 16/1981

MJG/ME

CHILD BENEFIT ACT 1975

CLAIM FOR CHILD BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

CF/3/81

1. My decision is as follows:

- (i) The decision of the insurance officer dated 18 September 1980, awarding an increase of child benefit to the claimant for his daughter (increase for a one-parent family) from and including 17 September 1979 was properly reviewed because it was given in ignorance of a material fact, namely that from 15 November 1979 onwards the claimant's daughter no longer lived with the claimant: Child Benefit (Determination of Claims and Questions) Regulations 1976, regulation 9(1)(a).
- (ii) The said decision of the insurance officer was properly revised so as to make the increase of child benefit not payable to the claimant from and including 14 January 1980, because from that date the claimant's daughter could not in law be regarded as living with the claimant: Child Benefit Act 1975, section 3.

The insurance officer's appeal against the decision of the local tribunal is therefore allowed.

2. On 8 September 1980 the claimant claimed an increase of child benefit (for a one parent family) for his daughter, then aged 14. He stated that his daughter was living with him. Consequently, on 18 September 1980 an insurance officer awarded the increase of child benefit to the claimant, from 17 September 1979 onwards (i.e. for the 52 weeks prior to the date that the claimant's claim was received by the Department - the maximum time for which a claim can be back-dated - see Social Security Act 1975, section 82(2)).

3. However, it subsequently transpired from information given by the claimant to the Department, that his daughter ceased to "live with" (for the meaning of this expression, see below) him on 15 November 1979. She was temporarily staying with friends, according to the claimant's statement dated 31 October 1980, until the claimant could get a council house. The claimant also explained in a number of statements that his

daughter lived apart from him because he worked away from home a great deal and for unsociable hours. He also explained that she came to stay with him every weekend, arriving at about 11.30 am and going back at 6.30 pm on Saturday and again on Sunday. That weekend arrangement apparently continued when his daughter went to live with another daughter of the claimant in another town.

4. When he received that information, the local insurance officer revised the original award of increase of child benefit, by making it payable only up to 13 January 1980. That was 56 days after the claimant's daughter had ceased to live with him (see Child Benefit Act 1975 section 3(2) - the extensions of the 56 days period by section 3(3) of the 1975 Act do not apply on the facts of this case).

5. The claimant appealed to the local tribunal against that revised decision of the local insurance officer and by a majority the local tribunal allowed the claimant's appeal, giving as their reasons that "Matter is so borderline that discretion should be exercised in claimant's favour. Borderline case - claimant very clearly does utmost relative to daughter's benefit". They found as a fact "Dividing line between allowance and disallowance very fine". The insurance officer has, however, appealed against the decision of the local tribunal, with the result that payment of the increase of benefit for the period after 13 January 1980 has been withheld pending the Commissioner's decision. As I have allowed the insurance officer's appeal, the increase of benefit will not be payable from 13 January 1980 onwards.

6. Although I understand that the majority of the local tribunal were anxious to do what they regarded as justice in this case, there is in fact no discretion for them to exercise in the claimant's favour. The law is quite clearly specified by the Child Benefit Act 1975 and regulations made thereunder. The statutory authorities, including local tribunals and the Commissioner, have no power to depart from the terms of the Act and regulations, no matter how deserving a particular case may seem to be.

7. The legal position is quite straightforward. The increase of child benefit for a one parent family is provided for by regulation 2(2) of the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, which at the relevant date provided that the increase should be payable,

"Where in any week a person is entitled to child benefit in respect of a child of whom he is a parent, being a child for whom he is treated as responsible under section 3(1) of the Act....".

8. Turning therefore to the 1975 Act, section 3(1) reads as follows,

"3 (1) For the purposes of this part of this Act, a person shall be treated as responsible for a child in any week if -

(a) he has the child living with him in that week; or

(b) he is contributing to the cost of providing for the child at a weekly rate which is not less than the weekly rate of Child Benefit payable in respect of the child for that week."

9. The claimant and the majority in the local tribunal appear to have attached importance to the fact that the claimant was contributing towards the cost of providing for the child. However, that comes only within section 3(1)(b) of the 1975 Act (see para 8 above), whereas the increase of Child Benefit for a one parent family is, by the 1976 Regulations, made applicable only to section 3(1)(a) of the 1975 Act. That refers only to a case where the parent "has the child living with him in that week". It does not include the case where a child is not living with the parent but the parent is contributing towards the cost of providing for the child.

10. The remaining question, therefore, is whether after 15 November 1979, when the claimant's daughter went to stay first with friends and then with the claimant's other daughter, the daughter could be said still to be living with her father, in view of the fact she spent most of every Saturday and Sunday with him. The insurance officer now concerned in his appeal (paragraph 9) points out that section 24(1) of the Child Benefit Act 1975 defines "week" as a period of 7 days beginning with a Monday. That does not, however, mean that in order to satisfy the condition for the increase of child benefit of having a child living with a parent in any given week, the parent would necessarily have to have the child living with him at the beginning of that week, i.e. immediately after midnight on Sunday. It is true that on the facts of this case, by the beginning of Monday in any week, the claimant's daughter was not living with him, she having left at 6.30 pm on the Sunday, but that is not, in my view, conclusive one way or the other.

11. The issue is not as narrow as that and that is why I consider that the majority in the local tribunal may have been misled. Section 3(1)(a) of the 1975 Act refers to a child "living with" a parent "in that week". That involves something more than were transitory presence, in my view, and if a child just happens to be in the parent's home at the beginning of a Monday in a week, but was not there for most of the remainder of the week, that would not, in my judgment, constitute a situation where the child could be said to be "living with" the parent. Conversely, a child could be living with its parent in a particular week even if it were away from home on the Monday.

12. Neither the 1975 Act, nor Regulations made under it, define what is meant by "living with", but I consider that it means that the child must live in the same house or other residence as the parent and moreover be carrying on there, with the parent, a settled course of daily living. Comparison may be made with reported Commissioner's Decision R(F) 1/71 on the expression "living with" in the then Family Allowances Legislation. There the learned Commissioner held that, where a child was living under the same roof as its mother but there was virtually no contact with the mother and no normal parent-child relationship with the mother, the mother and child could not be said to be living together.

The learned Commissioner stated (para 15)

"I accept that 'living with' in section 3, involves the presence, as opposed to the absence, of the child; for section 3 contains elaborate provisions for deeming an absent child to be 'living with' a person. But 'living with' is not synonymous with 'residing together' nor with 'presence under the same roof'. Nor does it necessarily involve the exercise of de facto care and control.

But where care and control is in fact exercised by the person with whom the child is staying, this is an important factor which may well lead to the conclusion that the child was living with the person concerned in terms of section 3. But it is not the only feature that requires consideration.... The question ... must always be a question to be decided on all the relevant evidence."

13. On the facts of this case, it appears to me clear that as from 15 November 1979 the claimant's daughter was not living with him. That would, in my judgment, have been equally so even if in any particular week after 15 November 1979 she had not left the claimant's house until after midnight on Sunday instead of 6.30 pm on Sunday. I do not consider that the question is to be determined by such fine distinctions as that.

(Signed) M J Goodman
Commissioner

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