

ICA - Annuities Sick Leave Earnings
Claimant from ESO Earnings Rule

CPAG

33/95

MJG/PAH/4

Commissioner's File: CG/011/1994

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALID CARE ALLOWANCE

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I allow the claimant's appeal from the decision of the social security appeal tribunal dated 30 November 1993 as that decision is erroneous in law and I set it aside. My decision is that the claimant is not disentitled to Invalid Care Allowance from and including 30 November 1992 by absence from her employment because in the week including that date and in subsequent weeks the claimant was throughout absent from her employment with the authority of her employer: Social Security Contributions and Benefits Act 1992, section 70(1)(b); Social Security Administration Act 1992, section 23; Social Security (Invalid Care Allowance) Regulations 1976, S.I.1976 No.409 (as amended), regulation 4(2)(b).

2. This is an appeal to the Commissioner by the claimant, a married woman born on 29 May 1942. The appeal is against the majority decision of a social security appeal tribunal dated 30 November 1993, which dismissed the claimant's appeal against the decision of the adjudication officer issued on 14 June 1993 in the following terms:

"[The claimant] is not entitled to Invalid Care Allowance from and including 18.11.92. This is because she is gainfully employed and cannot be treated as not gainfully employed. For this purpose sickness payment from the employer counts as earnings..Social Security Contributions and Benefits Act 1992, sections 4(1)(a)(i) and 70(1)(b) and the Social Security (Invalid Care Allowance) Regulations [1976], regulation 8."

3. The appeal was the subject of an oral hearing before me on 1 November 1994 at which the claimant was not present but was

represented by Mr J Collins of the Claimants Welfare Advisory Association. The adjudication officer was represented by Mr L Varley of the Office of the Solicitor to the Departments of Health and Social Security. I am indebted to Mr Collins and to Mr Varley for their assistance to me at the hearing.

4. The question at issue in this case is purely a question of law. It depends on the construction of regulation 8(2)(b) of the Social Security (Invalid Care Allowance) Regulations 1976, S.I.1976 No.409. Regulation 8 specifies the "circumstances in which a person is or is not to be treated as gainfully employed" within the meaning of section 70(1)(b) of the Social Security Contributions and Benefits Act 1992 which requires for entitlement to invalid care allowance that the claimant should be "not gainfully employed".

5. Regulation 8 of the 1976 Regulations so far as is material, provides as follows,

"Circumstances in which a person is or is not be treated as gainfully employed

(1) For the purposes of section 70(1)(b) of the Act (condition of a person being entitled to invalid care allowance for any day that he is not gainfully employed) a person shall not be treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week have exceeded £50 and subject to paragraph (2) of this regulation, shall be treated as gainfully employed on every day in a week if his earnings in the immediately preceding week have exceeded £50.

(2) There shall be disregarded for the purposes of paragraph (1) above a person's earnings -

(a)

(b) for any week as an employed earner if that week is one throughout which he is absent from the employment by virtue of which he is an employed earner with the authority of his employer; and

(c)"

6. In the present case the claimant was in employment by a hospital as an occupational therapist but from 30 November 1992 the claimant became ill. However, she continued to receive her full salary from the hospital (including statutory sick pay) until 25 April 1993 when the claimant was paid half her usual salary as sick pay (including statutory sick pay). Statutory sick pay ceased to be payable on 29 May 1993 but the claimant continued to be away ill from work and was for a time paid half-salary. For the whole of the time when she was paid by the hospital the net amount of the payment was in excess of the £50 per week limit.

7. The adjudication officer, upheld by a majority in the tribunal, held that when the claimant was away from work due to sickness she was nevertheless in receipt of earnings (that is of course so) and moreover it could not be said that she was "absent from the employment by virtue of which [she] is an employed earner with the authority of [her] employer" (regulation 8(2)(b)). The reason given by the majority on the tribunal for this was that "in absenting herself she was exercising her statutory right to do so when ill." The "statutory right" referred to was to be found in the statutory sick pay legislation now re-enacted in Part XI of sections 151-163 of the Social Security Contributions and Benefits Act 1992. The dissenting member's reasons were, "The claimant's time off was authorised by her employer and her 'earnings' should be disregarded under regulation 8(2)(b)."

8. The majority of the tribunal were doubtless adopting the submission to it of the adjudication officer, paragraphs 12 and 13 of which read as follows,

"I submit that there are certain instances where the adjudication officer is permitted to disregard, in full, any payment made by the employer, when the employed person is absent from his duties with the authority of his employer. An example where this would apply is an employee on paid absence from work to attend to urgent domestic problems or when an employee is paid a retainer during a period when his place of work is closed. Both these instances I submit are absences from work with the full authority of the employer, as is an absence of an employee, although not himself sick, [who] has been in contact with a person suffering from a contagious disease. In this case any earnings received would fall to be properly disregarded under the provisions of regulation 8(2)(b) above. I submit that absence of work through sickness cannot fall into this category. No sick employee needs the permission of his employer to be absent from work. It is the statutory right of the employed person to absent himself from work, provided he follows certain guidelines set down in his contract of employment. One of these is that he submits 'self-certification' for illnesses up to seven days, followed by a medical certificate completed by his general practitioner. I submit that [the claimant] followed these guidelines. She declared herself unfit for work when she completed the statutory sick pay 'self-certification' form and her G.P. stated that she was, and still is, unfit for work by reason of incapacity."

9. Those arguments were elaborated in a written submission by the adjudication officer dated 3 May 1994 in which it is stressed that the employer must pay statutory sick pay to a sick employee provided the statutory conditions are fulfilled and that the employer does not have any option but to pay. Stress is laid on the obligatory character of Part XI of the 1992 Act. Those arguments were reiterated and amplified by Mr. Varley at the hearing before me.

10. The claimant's representative's submissions made on 19 May 1994 (and elaborated at the hearing before me) read as follows,

"I accept that SSP is a statutory scheme, but not that this dispenses with any requirement for the employer to authorise absences. The scheme for instance contains requirements on the employee to give notice (section 156, Social Security Contributions and Benefits Act) and allows employers to refuse payments if notification is not given in accordance with the rules which the employer can, within limits, set themselves (regulation 7, Statutory Sick Pay (General) Regulations 1982). Thus it is possible for absences through sickness to be either authorised or non-authorised, even within the statutory sick pay schemes. Furthermore, the claimant was also in receipt of contractual sick pay. Payments under this scheme depend entirely on her contractual arrangements: if the employer agrees to make such payments it can legitimately be inferred that he has authorised an absence. Further, or alternatively, I submit that regulation 8(2)(b) of [the Social Security (Invalid Care Allowance) Regulations 1976] clearly envisages two alternatives: absence with the authority of the employer and absence without the authority of the employer. It would, I submit, clearly be wrong that [the claimant's] absence was without the authority of her employer. On the other hand, were any reasonable person who is legitimately off sick from work asked 'Are you absent from work with your employer's authority?', they would, I submit, clearly answer 'Yes', and this best establishes the ordinary natural meaning of the words of regulation 8(2)(b)."

11. There is apparently no Commissioner's decision, reported or unreported, on this particular point. Moreover, the legislation does not amplify the meaning of the words "absent from the employment... with the authority of his employer" (regulation 8(2)(b)). It has to be borne in mind that the regulation is prescribing the circumstances in which a person is to be treated as "gainfully employed". There is some authority on the meaning of the phrase "gainfully employed" e.g. Vandyk v. Minister of Pensions and National Insurance [1955] 1 Q.B.29. See also the definition of employed earner in section 2(1)(a) of the Social Security Contributions and Benefits Act 1992. However, the Vandyk case and that definition do not really assist in the solution of the present problem.

12. After the hearing before me on 1 November 1994, I issued a Direction referring to a Report of the National Insurance Advisory Committee on the draft of the Invalid Care Allowance Regulations 1976. The Report is dated 9 March 1976 and is contained in House of Commons Paper No.271 (Sessions 1975/76). I asked for any written submissions on the relevance of that report to the present problem. A copy of the Report has been supplied by the adjudication officer now concerned and a copy supplied to the claimant's representative. Neither the

adjudication officer nor the claimant's representative make any specific reference to the contents of the Report as assisting the present problem. I have however considered that Report in detail. It does not bear directly on the meaning of "absent... with the authority of his employer" in regulation 8(2)(b) but it does make clear that what was involved was that a person should not be able to claim invalid care allowance if, subject to minor exceptions, they were not in a position to devote the minimum of 35 hours a week caring for a severely disabled person which is required by section 70 of the 1992 Act and regulation 4(1) of the 1976 regulations. The selection of an earnings limit had the same purpose.

13. Bearing that general context in mind I can see no reason why, if a person is away from work because of sickness, that he or she should not be said to be "absent... with the authority of his employer". Such a person, provided he satisfies the quite separate 35 hours a week caring requirement in regulation 4, is therefore available to look after the severely disabled person. On principle, I see no difference in the carer being absent due to his own sickness or absent e.g. because of having been in contact with a contagious or infectious disease (see paragraph 8 above).

14. Moreover, I consider that the stress laid by the adjudication officer on the statutory requirements of the statutory sick pay scheme (Part XI of the 1992 Act) is to a certain extent misplaced. The statutory sick pay scheme is merely supplementing the normal rules of contract law by which an employer, according to the express or implied terms of the contract, may have to pay sick pay to an absent employee, as indeed was the case here. Even under the statutory sick pay legislation it must be shown that the claimant was truly incapable of work. The claimant must give notice to the employer of being away due to sickness to be able to claim statutory sick pay. It is a commonplace for employers' records to refer to an employee who is away ill as being on "authorised sick leave" or some such phrase. I do not regard there as being any common-law or statutory right for an employee to absent himself without the authority of the employer, express or implied, when the employee is ill. The authority of the employer is required in all cases whether the illness occurs during a period of statutory sick pay or not. The normal obligation of an employee under a contract of employment is to render service to his employer and it requires the concurrence of the employer in a sickness situation to release the employee from that obligation. Compare Marshall v. Alexander Sloane and Co. Ltd. [1981] I.R.L.R. 264 (Employment Appeal Tribunal) which held that even during an employee's absence from sickness the obligations of the employment still continue and are abrogated only to the extent that the employee is, due to sickness, unable to perform them. In that case it was held that an employee's duty to look after his or her employer's property continues even during sickness absence.

15. I have not overlooked the fact that in various parts of the legislation, e.g. section 4(1)(a)(i) of the Social Security Contributions and Benefits Act 1992, statutory sick pay is included in the definition of "earnings" but that is not conclusive of the issue in this case. It is conceded that the statutory sick pay received by the claimant must be treated as "earnings" but regulation 8(2)(b) envisages that, although a sum would normally be earnings, it is nevertheless disregarded in the particular circumstances set out in regulation 8(2).

16. Lastly, I turn to an entirely separate matter. The claimant's representative has complained of a breach of the rules of natural justice by the social security appeal tribunal that heard this case. He has submitted a copy of a letter dated 6 November 1993 which the dissenting member of the tribunal appears to have written to the independent tribunal service. That letter appears to support the separate ground of appeal of the claimant (set out in representations dated 21 December 1993) as follows,

"The original decision of the Tribunal, reached on the day, was to allow the appeal. Some days later the Tribunal chair contacted the other members to say that she had changed her mind. One member was persuaded by 'phone to agree with her, one was not, hence the majority decision. I submit that there was a breach of natural justice in that the Tribunal could not properly deliberate by telephone. If the chair wanted to alter the decision before promulgation there should have been a reconvened hearing."

17. As I have set the tribunal's decision aside in any event on the ground that they erroneously interpreted regulation 8(2)(b) of the 1976 Regulations, I do not propose to make any final ruling on this point, particularly as I have not had enquiries made of the Tribunal chairman and the two members who sat with her. There may be circumstances of which I am not aware and I merely draw attention to the fact that this particular complaint has been made by the claimant's representative. It may be that the Regional Chairman may wish to look further into this matter but I do not think that I should say anything further about it.

(Signed) M J Goodman
Commissioner

(Date) 1 MAY 1995