Bulletin 170

[SHAT]

File no: CG/4172/2001

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Reading Appeal Tribunal made on 12 June 2001. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal and set aside the Tribunal's decision. In exercise of the power in s.14(8)(a)(i) of the Social Security Act 1998 I make the decision which the Tribunal should in my judgment have made, namely:

   The Claimant's appeal against the decision made on 11 October 2000 is allowed. The Claimant was not entitled to invalid care allowance from 1 July 2000 to 20 August 2000 (both dates included).

2. The Claimant made a claim for invalid care allowance ("ICA") on 31 August 2000, stating that he wished to claim from 1 July 2000. He had recently given up his employment in order to care for his wife. One of the conditions of entitlement to ICA is that the claimant is not "gainfully employed". For that purpose a claimant is not gainfully employed on any day in a week unless his earnings in the preceding week were more than a specified amount (which was then £50). The issue in this case is: during which weeks were the Claimant's earnings more than £50? The difficulty arises mainly because the effect of the Social Security Benefit (Computation of Earnings) Regulations 1996 ("the 1996 Regulations"), which provide for how earnings shall be determined, is unclear in relation to the holiday pay which the Claimant received.

3. I held an oral hearing of this appeal at which the Claimant appeared in person and the Secretary of State was represented by Miss Julie Anderson of counsel.

4. The relevant facts relating to the Claimant's employment were as follows:

   (1) His salary was payable monthly in arrears on the 25th of each month.

   (2) He was entitled to 30 working days' annual leave per annum pro rata .The contract of employment provided that "payment will be made for accrued leave entitlement on termination of ..... employment."

   (3) He gave notice terminating his employment, which expired on Monday 3 July 2000.

   (4) He received the following relevant payments from his employer:

      (a) on 25 June 2000 his last full month's salary of £2029.66 gross ("the first salary payment")

      (b) on 25 July 2000:

(i) a sum of £278.35 gross in respect of salary for the period between 26 June and the date of leaving ("the second salary payment");

(ii) a sum of £1031.13 gross in respect of 14 days' accrued holiday pay, (some of which had been carried forward from the holiday year 1 April 1999 to 31 March 2000) ("the holiday pay").

5. The relevant provisions of the 1996 Regulations are as follows:

"**6**(1) Earnings derived from employment as an employed earner shall be calculated or estimated over a period determined in accordance with the following paragraphs and at a weekly amount determined in accordance with regulation 8 ....

(2) Subject to paragraphs (3) ...., the period over which a payment is to be taken into account –

(a) in a case where it is payable in respect of a period, shall be a period equal to a benefit week or such number of benefit weeks as comprise the period commencing on the date on which earnings are treated as paid under regulation 7 ....and ending on the day before the date on which earnings of the same kind (excluding earnings of the kind mentioned at regulation 9(1)(a) to (j)) and from the same source would, or would if the employment was continuing, next be treated as paid under that regulation;

(b) in any other case, ...

(3) Where earnings not of the same kind are derived from the same source and the periods in respect of which those earnings would, but for this paragraph, fall to be taken into account overlap, wholly or partly, those earnings shall be taken into account over a period –

(a) equal to the aggregate length of those periods, and

(b) beginning with the earliest date on which any part of those earnings would otherwise be treated as paid under regulation 7 ..."

(4) In a case to which paragraph (3) applies, earnings under regulation 9 ..... shall be taken into account in the following order of priority –

(a) earnings normally derived from the employment;

(b) any payment to which paragraph (1)(b) or (c) of that regulation applies;

(c) any payment to which paragraph (1)(i) of that regulation applies;

(d) any payment to which paragraph (1)(d) of that regulation applies.

7 Earnings to which regulation 6 .....applies shall be treated as paid –

(a) *[does not apply in this case]*

(b) in any other case, on the first day of the benefit week in which the payment is due to be paid".

6. Reg. 6(1) requires determination, in respect of each of the three payments which I set out in para. 4(3) above, of (a) the period over which the payment is to be taken into account and (b) the weekly amount of the payment.

7. No issue arises in this case as to (b). It is common ground that, applying Reg. 8 of the 1996 Regulations, the first salary payment and the holiday pay were of a weekly amount in excess of £50, whereas the second salary payment was of a weekly amount less than £50. The issue arises under (a) – i.e. the periods over which the payments should be taken into account.

The first salary payment

8. It is common ground that, under Regs. 6(2)(a) and 7(b), this is to be taken into account over the period between 19 June (the first day of the benefit week in which it was paid) and 23 July (the day before the first day of the benefit week in which the next payment of salary would have been due to be paid if the employment had continued). The Claimant therefore accepts that, in respect of that period, his earnings were in excess of £50 a week. The first salary payment therefore prevented entitlement to ICA before 31 July 2000, the following Monday.

The second salary payment

9. Under Reg. 6(2)(a) it is necessary to determine the start and end date of the period. The start date is (under Reg. 7(b)) the first day of the benefit week "in which the payment is due to be paid." Although the employment terminated on 3 July 2000, this payment was not in fact made until 25 July, the next monthly salary payment date. The Claimant contends that this payment should have been made on the termination of employment. He relies on a letter from his employer stating that there was nothing in certain documents referred to in clause 29 of his contract of employment "which specifically entitled [the employer] to make the final salary payment and payment of holiday pay on 25 July rather than immediately on termination of your employment on 3 July." The Secretary of State contends that the due date was 25 July. In my judgment the Secretary of State is correct on this issue. The contract of employment provided for payment of salary monthly in arrears, which in practice was on 25th of each month. The contract was terminated by notice given by the Claimant in accordance with the contract. There was no express term dealing with when salary for the period between the last contractual payment date and the expiration of that notice should be paid. In the absence of such a term it seems to me that the general provision for payment on 25th of each month in arrears applied. It does not seem to me to be necessary, in ordinary to give business efficacy to the contract, to imply a term that payment should be made on the expiration of the notice. The start date in respect of the second salary payment was therefore 24 July 2000 (the first day of the benefit week in which it was due to be paid). The end date was 20 August 2000 (the day before the first day of the benefit week in which the next salary payment would have been made if the employment had continued).

The holiday pay

10. Reg. 6(2)(a) only applies to this if the holiday pay was payable "in respect of a period". Otherwise a formula set out in Reg. 6(2)(b) applies. The holiday pay was a sum payable in respect of accrued holiday which the Claimant had not taken. I follow the assumptions of Commissioners in CJSA/3438/1998 and in CJSA/4508/1998 and of a Tribunal of Commissioners in para. 20 of R(SB) 23/84 that the holiday pay was payable "in respect of a period" (i.e. the period of holiday not taken). The legislative provisions under consideration in those cases were not identical to those in this case, but they seem to me to have been sufficiently similar to render them a satisfactory guide for this purpose.

11. As to the start date, in my judgment the Claimant is correct in submitting that this payment was due to be made on 3 July. That is in my judgment what the contract means when it states that payment will be made "on termination of employment." The Secretary of State submits that it did not fall due until 25 July, when the final salary payment was due. Miss Anderson, in her clear and helpful submissions, argued that "on termination" could be taken to refer to the final wage payment date, and referred me to the next sentence of the contract, stating that "any excess leave taken in the year of termination will be recovered by [the employer] by adjustment of final pay." However, the fact that that provision is made for adjustment in respect of excess leave does not in my view give the words "on termination" anything other than their ordinary meaning. The start date of the period was therefore 3 July.

12. Considerably more difficulty arises with the end date, by reason of the obscurity of Reg. 6(2)(a), when applied to an item such as holiday pay. The end date is

> "the day before the date on which earnings of the same kind (excluding earnings of the kind mentioned at regulation 9(1)(a) to (j))) and from the same source would, or would if the employment was continuing, next be treated as paid under that regulation."

Reg. 9(1) sets out a list of types of remuneration or profit which are to be included in "earnings." That list includes items such as bonus or commission, and also holiday pay.

13. The difficulty is with the meaning of the words "earnings of the same kind." The intention behind the part of Reg. 6(2)(a) which I set out in para.12 above seems to be that one looks at the next payment date of the type of earning in question. So, the end date for a bonus payment would be the next expected bonus payment date, not the next ordinary salary payment date. The intention behind the words in brackets seems to be that in determining the end date for an ordinary payment of wages the next payment date for the special items listed in Reg. 9(1) is ignored. But what earnings are "of the same kind" as holiday pay? The intention cannot be that only holiday pay itself is "of the same kind" as holiday pay, because if that were so there would be no end date, because holiday pay can only ever be paid once, and would not be paid if the contract was continuing. The only alternative, and a reasonable one if this provision alone is under consideration, would be that the ordinary salary was earnings "of the same kind" as holiday pay.

14. However, that conclusion appears to fly in the face of the meaning of those words in Regs 6(3) and (4). They deal with the position where there is an overlap between the periods in which respect of which two or more payments not of the same kind (but from the same source) fall to be taken into account under Reg. 6(2). In that situation an "order of priority" is established by Reg. 6(4). Although that is a somewhat unusual use of the word "priority", the intention appears to be that the periods which would otherwise overlap take effect successively, in the specified order of "priority". The first category of payment in the order of priority is "earnings normally derived from the employment." The next three categories are by reference to some of the specific types of remuneration or profit which listed in Reg. 9(1) as being included in "earnings." Holiday pay is listed in Reg. 9(1)(d), and so comes last in the order of priority. The problem presented, for present purposes, by Regs. 6(3) and (4) is that it is plain that, for the purpose of those provisions, holiday pay is treated as being not "of the same kind" as earnings normally derived from the employment. That must be so because otherwise Regs. 6(3) and (4) could not – see the opening words of 6(3) – apply so as to establish the intended order of priority between them.

15. But where does that leave my provisional conclusion, set out in para. 13 above, that in Reg. 6(2)(a) holiday pay is earnings "of the same kind" as ordinary salary? Unsatisfactory as it may be, the answer must be that it leaves that conclusion unaffected. I say that that must be the answer because there is no other way of arriving at an end date for the holiday pay, and there must clearly be some end date. I arrive, therefore, at the conclusion that there is no alternative but to construe the words "earnings of the same kind" as having a different meaning in Reg. 6(2)(a) from that which it has in Reg. 6(3) and (4). In the former holiday pay is treated as being as of the same kind as ordinary salary, in the latter it is treated as not being of the same kind.

16. The effect in the present case is therefore that the end date for holiday pay was 23 July 2000. Subject to the effect of the overlap provisions in Regs. 6(3) and (4), the holiday payment is therefore to be taken into account in respect of the period between 3 and 23 July 2000

The effect of the overlap provisions in Regs. 6(3) and (4)

17. However, that period overlaps with the period during which the first salary payment is to be taken into account. The effect of the overlap provisions in Regs. 6(3) and (4), however, is that the holiday pay, having a lower order of "priority", is deemed to be in respect of a period running for 3 weeks from 24 July – i.e. between 24 July and 13 August. But that period – i.e. the period into which the holiday payment is pushed by application of the overlap provisions - itself overlaps with the period for which the second salary payment is to be taken into account. Miss Anderson submitted that the overlap provisions should then be applied again so as to postpone the holiday pay to a still later period. However, I do not think that Reg. 6(3) is capable of being applied more than once to the same payment. That is because it applies where "the periods in respect of which those earnings would, but for this paragraph, fall to be taken into account overlap ..." (my underlining). However, Miss Anderson's argument would involve applying the overlap provisions in a situation where the overlap in question is not one which would arise but for those provisions, but where it arises because of those

provisions. Reg. 6(3) in my judgment contains no indication that it should apply in that situation.

Conclusion

18. The payments are therefore to be taken into account in respect of the following periods:

(a) the first salary payment:	19 June to 23 July 2000
(b) the second salary payment	24 July to 20 August 2000
(c) the holiday payment	24 July to 13 August 2000

Because (a) and (c) were each of a weekly amount of more than £50, but (b) was not, the Claimant was therefore not entitled to ICA until 21 August 2000 (the beginning of the first benefit week which was preceded by a week where his earnings were less than £50). The decision maker's decision, upheld by the Tribunal, had been that he was not entitled to ICA until 28 August 2000. It follows that the Tribunal's decision was erroneous in law. It is not necessary for me to examine further its reasoning. In particular, it did not taken into account the overlap provisions.

(Signed)	Charles Turnbull **(Commissioner)**
(Date)	28 May 2002