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Careful employment - term-time
working - calculate earnings

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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CG/6329/1997

Starred Decision No: 54/00

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

*Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.*

so as to arrive by 6th December 2000

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

54/00

1. This appeal succeeds. I set aside the decision of the Leeds SSAT dated 29 August 1997. I give my own decision in paragraph 17 below.

2. The appellant is now 39 years old. For many years she has cared for her disabled daughter.

3. In February 1993 she obtained work as a school assistant with the local council. Her contract is for 38 weeks a year. This has the advantage of leaving her free to look after her daughter during the holidays.

4. The appellant's weekly wage in term time is about £100. She does not receive any earnings for the school holidays. Until November 1996 she claimed and was paid invalid care allowance (ICA) during these weeks. But from that date an adjudication officer (AO) decided that because of a change in the law she would be treated as if she were gainfully employed all year round. She appealed against this decision to the Leeds SSAT but was unsuccessful. She now appeals to the Commissioner on the ground that the tribunal decision is erroneous in law.

5. ICA is a non-means tested non-contributory benefit now worth about £40 per week. It is paid to citizens who care for a severely disabled person for at least 35 hours a week. Recipients must not be "gainfully employed". The Secretary of State is empowered to make regulations prescribing the circumstances in which a person is or is not to be treated as "gainfully employed". See section 70(1)(b) and section 70(8) Social Security Contributions and Benefits Act 1992.

6. This power has been exercised to make regulation 8 Social Security (ICA) Regulations 1976:-

"8. (1) For the purposes of section 70(1)(b) of the Contributions and Benefits Act (condition of a person being entitled to an 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.

...."

Accordingly the appellant was paid ICA from the second week of each school holiday and in the first week of each return to work. No amendment to this legislation relevant to this case was made in November 1996.

7. What then was the change in the law? The AO justifies the present decision by the introduction of the Social Security Benefit (Computation of Earnings) Regulations 1996. These deal with a vast range of circumstances in which earnings have to be calculated for the purpose of non-means tested social security benefit claims.

8. I confess to some doubt as to whether these Regulations were originally intended to affect regulation 8(1) ICA Regulations at all. The introductory words refer to no less than 10 empowering sections of the Contributions and Benefits Act. But they omit section 70, which is the parent section for the ICA Regulations. I note also that the Regulations are actually made by the Secretary of State for Social Security even though some of the regulation making powers referred to empower regulations to be made by the Treasury with the consent of the Secretary of State. However, for the purposes of this decision, it is convenient for me to proceed on the basis that the AO is correct when submitting that the new Computation of Earnings Regulations affected the operation of the definition of "gainfully employed" for the purposes of ICA.

9. The AO and the SSAT relied upon regulation 8 of the new Regulations to support their decision. The opening words of regulation 8(1) may also reinforce doubts about their relevance to ICA. Regulation 8(1) Computation of Earnings Regulations begins:-

"For the purposes of regulation 6 (calculation of earnings of employed earners), subject to paragraphs (2) to (4), where the period in respect of which payment is made:-

(a) does not exceed a week the weekly amount shall be the amount of that payment."

Regulation 6 deals with the allocation of payments to a "benefit week". It is, at any rate, not obvious how this means that this also applies for the purposes of regulation 8(1) ICA Regulations.

10. Nevertheless, regulation 8(1)(a) lays down the basic rule that if a payment is made in respect of a period which does not exceed a week then it is taken into account as a weekly amount. Regulation 8(1)(b) deals with the conversion of monthly, quarterly and yearly payments to weekly sums. So far there is nothing to prevent the appellant from continuing to receive ICA. The AO however relies on regulation 8(3) Computation of Earnings Regulations which reads as follows:-

"(iii) Where the amount of the claimant's net earnings fluctuates and has changed more than once or a

claimant's regular pattern of work is such that he does not work every week, the application of the foregoing paragraphs may be modified so that the weekly amount of his earnings is determined by reference to his average weekly earnings -

- (a) if there is a recognisable cycle of work over the period of one complete cycle (including where the cycle involves periods in which the claimant does no work those periods but disregarding any other absences);
- (b) in any other case, over a period of five weeks or such other period as may in the particular case enable the claimant's average weekly earnings to be determined more accurately."

11. There is no doubt that the appellant's regular pattern of work is such that she does not work every week. It follows that regulation 8(3) empowers adjudicators to average the appellant's weekly earnings. But the power is discretionary. The use of the word "may" in the regulation is to be contrasted with the use of the word "shall" when a similar exercise is carried out under regulation 5(2) Income Support (General) Regulations 1987, to which the AO has helpfully referred me.

12. It appears from the tribunal's statement that the Leeds SSAT did not consciously exercise the discretion contained in regulation 8(3) Computation of Earnings Regulations. It follows that their decision is erroneous in law and I must set it aside.

13. Since there is no dispute about the primary facts of this case it seems to me that I should proceed to give my own decision.

14. The AO's submission to the tribunal did not advance any reasons why the discretion should be exercised in such a way as to change the practice which had been followed on the appellant's ICA claim since 1993. And the submission to the Commissioner confines itself to stating that regulation 8(3) "can be applied to this case".

15. I have no doubt that there will be many occasions in the social security scheme when it makes obvious good sense to apply either regulation 8(3)(a) or 8(3)(b) to the facts of the case. It all depends on the context.

16. This takes me back to regulation 8(1) ICA Regulations. On the facts of this case, for the purpose of determining

whether the appellant is gainfully employed and thus excluded from ICA, and especially given that there does not seem to be any fluctuation in the appellant's earnings in term time, I conclude in the exercise of my discretion that the basic rule contained in regulation 8(1) Computation of Earnings Regulations should apply and not the discretionary modification contained in regulation 8(3).

17. It follows from what I have said that, essentially, the appellant's ICA claim can continue as before. She will not be entitled to ICA when she is working and receiving her wage. But she will receive ICA for periods corresponding to those when she is not working and caring for her daughter instead. I leave it to the Secretary of State to work out the precise details of dates and payments. I am sure that agreement can be reached on this but if not either the appellant or the Secretary of State may apply to me to settle any dispute.

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(Signed) Nicholas Warren
Deputy Commissioner

(Date) 14-7-00