Bulletin 172

CIB/1650/2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal to the Commissioner is allowed. The decision of the Coventry appeal tribunal dated 22 August 2001 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute the decision which the appeal tribunal should have given on the facts it found (Social Security Act 1998, section 14(8)(a)(i)). My decision is that the transitional award of incapacity benefit to the claimant from 13 April 1995 falls to be superseded with effect from 28 December 1998 on the ground of relevant change of circumstances, but that the superseding decision is that the increase of incapacity benefit for the claimant's wife continued to be payable to him from that date. Accordingly, no overpayment was made to the claimant in the period from 14 January 1999 to 24 November 1999 and no question of recoverability arises. Indeed, arrears will be due to the claimant.

2. This case turns mainly on regulation 4(2) of the Social Security Benefit (Computation of Earnings) Regulations 1996:

> "(2) Where--
> (a) a claimant performs a service for another person; and
> (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,
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> the adjudicating authority shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies the adjudicating authority that the means of that person are insufficient for him to pay or to pay more for the service; but this paragraph shall not apply to a claimant who is engaged by a charitable or voluntary organisation or is a volunteer if the adjudicating authority is satisfied in any of those cases that it is reasonable for him to provide his services free of charge."

There were subsequent amendments within the period covered by this case to take account of the change to all initial decisions being made by the Secretary of State, but the substance of the provision was unchanged. Under regulation 2(1) "claimant" includes a claimant's spouse in respect of whom a claim for an increase of benefit is made.

3. I have concluded, for the reasons given below, that regulation 4(2) is not validly made, as there is no statutory power authorising the making of a provision in the terms above. It is ultra vires and not to be applied.

4. The claimant had been in receipt of invalidity benefit continuously since November 1983. His award was converted to a transitional award of long-term incapacity benefit in April 1995. The award included an increase for the claimant's wife, which I think must have been payable in accordance with regulation 24(1) and (3) of the Social Security (Incapacity Benefit) (Transitional) Regulations 1995, which allow the increase to continue to be payable where a

spouse is residing with a beneficiary although the conditions in operation from April 1995 are not met. Regulation 24(4) provides for the main parts of the Social Security (Incapacity Benefit - Increases for Dependants) Regulations 1994 to apply to such an increase, including regulation 10 containing the earnings rule. In the present case, the effect of regulation 10(2) is that the increase for the claimant's wife is not to be payable for any benefit week immediately following any benefit week in which she "has earnings which exceed the amount for the time being specified in regulation 79(1)(c) of the Jobseeker's Allowance Regulations 1996 (age related amount for a claimant who has attained the age of 25)". As from April 1998, that amount was £50.35, and as from April 1999, £51.40.

5. The award of the increase had been made on the basis that the claimant's wife had no earnings. In December 1998, on the date now agreed to have been 28 December 1998, she began to work for a family friend who owned a launderette. She usually worked for 24 hours a week, sometimes doing more and occasionally less. The arrangement was that she was paid £25 per week regardless of the hours worked. In a statement to an investigator signed on 10 November 1999 the owner said that, because the claimant and his wife were friends, he only paid her £25 each week so that her husband's benefit was not affected. He also said that he appreciated that the minimum hourly rate was now £3.60, but that he could not afford to pay the claimant's wife any more as business was not good. He subsequently declined to produce any accounts or figures to show the financial position of the business.

6. The claimant gave evidence to the appeal tribunal that he informed the Benefits Agency that his wife had started work, but the appeal tribunal rejected that. I proceed on the same basis. The Benefits Agency received information in August 1999 that the claimant's wife was working and on 2 November 1999 interviewed the claimant, who gave a statement about her work. On 30 November 1999 a decision was given superseding the award of incapacity benefit effective from 13 April 1995, on the ground of relevant change of circumstances. The new decision was that the increase was first not payable, and then the claimant ceased to be entitled to the increase, from 11 April 1999. An overpayment of £1238.45 was calculated for the period from 22 April 1999 to 24 November 1999 and was found to be recoverable from the claimant. This decision was explicitly on the basis that the National Minimum Wage Act 1998 came into operation on 1 April 1999. It was said that although it was accepted that the owner of the launderette could not afford to pay her more, from that date the hourly rate of the national minimum wage had to be applied under regulation 4(2) of the Computation of Earnings Regulations.

7. The claimant appealed. Following an adjourned hearing, the Secretary of State revised the decision of 30 November 1999 for error of law. The revised decision was that the increase was not payable to the claimant from 14 January 1999, with the date of non-entitlement being correspondingly brought forward. An overpayment of £1621.70 was calculated for the period from 14 January 1999 to 27 October 1999 and found to be recoverable from the claimant on the ground of misrepresentation. It was now submitted that the claimant had not shown that the owner of the launderette did not have the means to pay the claimant's wife more than £25 per week. It was said that it was reasonable to use the statutory minimum hourly rate in calculating a rate for comparable employment prior to 1 April 1999, unless there was evidence that a higher

rate was payable. The appeal was treated as continuing against the decision as revised.

8. The appeal tribunal of 22 August 2001 dismissed the appeal. On regulation 4(2) the chairman said in the statement of reasons that he "considered it appropriate that the minimum national wage shall be taken as a reasonable amount of money that the [claimant's wife] should be treated as receiving." The claimant now appeals against that decision with my leave. The initial written submissions concentrated on the application of regulation 4(2) and the effect of the National Minimum Wage Act 1998. The representative of the Secretary of State supported the appeal on the ground that the appeal tribunal had not had evidence of what was paid for comparable employment in the area. Payment of less than that amount had to be established before it could be asked what was reasonable for the claimant's wife's employment. The claimant's representative, Mr Mark Hemingway of Coventry Law Centre, replied that the Secretary of State had not dealt fully with the relationship between regulation 4(2) and the national minimum wage and also wished to pursue the fact that the Appeals Service had failed to provide him with a copy of the appeal tribunal's record of proceedings. He requested an oral hearing.

9. I granted the request for an oral hearing, directing that the Secretary of State identify the statutory provision said to authorise the making of regulation 4(2) and deal with the question of whether it was validly made. The claimant did not attend the oral hearing, but was represented by Mr Hemingway. The Secretary of State was represented by Miss Deborah Haywood of the Office of the Solicitor to the Department for Work and Pensions. I am grateful to them for their submissions. I directed further written submissions, which as it turns out have not advanced matters.

The validity of regulation 4(2) of the Computation of Earnings Regulations

10. The Secretary of State has identified the statutory power under which regulation 4(2) was made as section 3(2) of the Social Security Contributions and Benefits Act 1992. I think that that must be right. None of the other powers mentioned in the preamble to the Computation of Earnings Regulations appears relevant, and I can see no other power in the 1992 legislation which might be relevant. To provide some context I set out section 3(1) to (3), as in force in 1996:

> "(1) In this Part of this Act and Parts II to V below--
> (a) "earnings" includes any remuneration or profit derived from an employment; and
> (b) "earner" shall be construed accordingly.
> (2) For the purposes of this Part of this Act and Parts II to V below other than Schedule 8--
> (a) the amount of a person's earnings for any period; or
> (b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,
> shall be calculated or estimated in such manner and on such basis as may be prescribed.
> (3) Regulations made for the purposes of subsection (2) above may prescribe that payments of a particular class or description made or falling to be made to or by a person shall, to such extent as may be prescribed, be disregarded or, as the case may be,

deducted from the amount of that person's earnings."

Parts II to V of the Act deal broadly with non-income-related benefits, including incapacity benefit and increases for dependants. In relation to income-related benefits, section 136(3) to (5) provides:

> "(3) Income and capital shall be calculated or estimated in such manner as shall be prescribed.
> (4) A person's income in respect of a week shall be calculated in accordance with prescribed rules; and the rules may provide for the calculation to be made by reference to an average over a period (which need not include the week concerned).
> (5) Circumstances may be prescribed in which--
> (a) a person is treated as possessing capital or income which he does not possess;
> (b) capital or income which a person does possess is to be disregarded;
> (c) income is to be treated as capital;
> (d) capital is to be treated as income."

11. I need first to mention the decision of Mr Commissioner Henty in CG/1768/2000, which was said by the Secretary of State in a written submission to decide that section 3(2)(b) has a wide enough scope to include the power to make regulation 4(2) of the Computation of Earnings Regulations. The Commissioner was concerned there with regulation 6(2)(a) of the Computation of Earnings Regulations, which provides that the period over which any payment of earnings from employment is to be taken into account is to start on the date on which the earnings are treated as paid, ie in most cases the first day of the benefit week in which they are due to be paid. The claimant appears to have received a month's salary at the end of April 1999 on terminating his employment and found himself not entitled to invalid care allowance (ICA) for the period from 1 May 1999 to 30 May 1999 (and possibly the following week) on the ground of being gainfully employed. The ICA regulations provided that a person was to be treated as gainfully employed in any week if the person's earnings in the previous week exceeded £50. The Commissioner accepted that regulation 6(2)(a) of the Computation of Earnings Regulations was authorised by section 3(2)(b). He said:

> "In this case the enabling power is contained in section 3(2)(b) SSC&BA 1992. In CAO v Owen (CA 29.4.99) the enabling power was section 136(5) of the same Act, which, to all intents and purposes, is similar. The Court of Appeal in Owen refused the claim on this ground. While that case is not precisely on all fours, since the benefit involved was different, I am nevertheless quite satisfied that I should consider that decision as binding on me and, accordingly, in my judgment, the enabling power is amply wide enough to have enabled the Secretary of State to have brought in regulation 6(2)(a) of the [Computation of Earnings] Regulations."

The Secretary of State submitted that if section 3(2)(b) had a similar scope to section 136(5) it plainly authorised regulation 4(2).

12. With respect to Mr Commissioner Henty, I consider that that passage is not supported by

the Court of Appeal's decision in Owen v Chief Adjudication Officer, now reported as an appendix to R(IS) 8/99. That would not necessarily undermine the result of CG/1768/2000, as regulations 6(2)(a) and 7 of the Computation of Earnings can be supported on a much narrower interpretation of section 3(2)(a) and (b). The power in section 3(2)(a) could be interpreted to cover the making of a regulation prescribing that a payment of earnings actually received is to be taken into account in the period for which it is available to the person concerned, rather than in the period in respect of which it was earned.

13. In Owen's case the claimant received a payment of four weeks' sick pay on the day that his employment was terminated. In accordance with regulation 29(2) of the Income Support (General) Regulations 1987, that payment was taken into account for four weeks beginning with that date, excluding him from entitlement to income support for that period. Another provision secured that a final payment of wages or salary was to be left out of account for that purpose, but did not apply to sick pay. That was the anomaly referred to by the Commissioner and the Court of Appeal. Counsel for the claimant in the Court of Appeal submitted that regulation 29(2) was not within the powers in either section 136(3) or (5). In relation to section 136(3), the submission was as follows:

> "Regulation 29(2) is also ultra vires section 136(3). That regulation only allows income to be "calculated or estimated" in a prescribed manner. Regulation 29(2) does not prescribe that income is "calculated" or "estimated" in a particular manner at all. The effect of regulation 29(2) is to create income for a forward period or to transpose income to a period following the period for which it was paid or to impute to Mr Owen income for the first four weeks of Mr Owen's claim which does not relate to that period. When income is "calculated or estimated" the process must have some correspondence with reality - either to the mathematical process of calculating actual figures or to an estimate of true values. The regulation simply shifts income from one period to another. That is neither calculation nor estimation. This regulation does not have the effect permitted by section 136(3). It is ultra vires."

14. Mummery LJ (with whom the other Lords Justices agreed) rested his decision on section 136(5) alone, holding that it authorised a provision spreading or apportioning income possessed by a claimant over a stated period by treating it as possessed in a period in which he did not in fact possess it. He therefore did not need to consider the submission on section 136(3). It seems to me that the decision is neutral on the question of whether a provision like regulation 29(2) of the Income Support Regulations would be authorised by a provision like section 136(3) in terms of calculation or estimation. However, for present purposes it seems to me clear that the Court of Appeal did not regard subsections (3) and (5) of section 136 as having the same or similar scope. The very careful recording of counsel's submission on subsection (3), without any adverse comment on the analysis of its scope, and the careful reliance only on subsection (5), shows that.

15. For that reason, I conclude that I should not regard the decision in CG/1768/2000 as containing any ruling binding me to hold that section 3(2) of the Social Security Contributions and Benefits Act 1992 authorised the making of regulation 4(2) of the Computation of Earnings

Regulations. Nor does the decision of the Court of Appeal in Owen contain any ruling binding me to reach either that conclusion or the opposite conclusion.

16. Looking at the terms of section 3(2), I adopt the basis of counsel's submission on section 136(3) in Owen. Section 3(2) authorises the making of regulations with some correspondence to the arithmetical process of calculating actual figures or to making an estimate of true values. That at any rate must, in the ordinary use of the English language, be its core meaning. The first meanings of "calculate" in the seventh edition of the Concise Oxford Dictionary are "ascertain by mathematics; ascertain esp beforehand (nature of event, date etc) by exact reckoning". The first meanings of the noun "estimate" are "approximate judgement (of number, amount etc); quantity assigned by this". The verb is first defined as "form an estimate of or that; fix (number etc) by estimate at (so much)".

17. Miss Haywood submitted that regulation 4(2) was authorised by the "estimate" part of section 3(2). I reject that. Estimating must involve some process of making an approximate judgment of true values. The process in regulation 4(2) is entirely different. It does not establish any mechanism for making any judgment of a person's true earnings by an approximation from the available evidence. It is a condition of its application that the person actually receives no or a restricted amount of earnings in return for providing services. Regulation 4(2) then, if all its conditions are met, deems the person to have notional earnings in addition to what has already been found to be the actual earnings.

18. It seems to me that a stronger case for the Secretary of State would be based on the "calculate" part of section 3(2). However, I have no doubt that regulation 4(2) falls outside the scope of any general power to prescribe how earnings are to be calculated. The process, as described in the previous paragraph, is entirely different from any attempt to ascertain what the person's actual earnings are, or to prescribe how an average figure is to be taken or used for the future, or even to prescribe the weeks in which actual earnings are to be taken into account for benefit purposes. The process is of treating a person who by definition has no or a restricted amount of actual earnings as having additional earnings which he or she does not actually have. That is not, in any use of the English language, a process of calculation.

19. I am fortified in both those conclusions by the fact that elsewhere in the same Act, ie in section 136, a separate power was considered necessary to authorise the making of regulations treating a claimant as possessing income or capital which he does not possess. Miss Haywood submitted that the words "calculate" and "estimate" are wide ones, but to accept the result contended for by the Secretary of State would take their meaning beyond anything which can legitimately attached to the words.

20. I must, though, look at the precise words of paragraphs (a) and (b) of section 3(2), because there is not a simple power to make regulations as to how earnings are to be calculated or estimated. Paragraph (a) allows the amount of a person's earnings for any period to be calculated or estimated in such manner and on such basis as prescribed. The reference to a period does not seem to add anything for the purposes of the present case, and I conclude that the words are directed to calculating or estimating actual earnings. Paragraph (b) allows the

amount of a person's earnings to be treated as comprised in any payment to him to be calculated or estimated in such manner and on such basis as prescribed. This is a rather obscure formulation. At several points the Secretary of State has seemed to rely particularly on paragraph (b). I was puzzled why, but I now suspect that it is because it includes the word "treated". However, paragraph (b) gives no power to make regulations which treat a person as having earnings which they do not have. I am not at all sure for what purposes it may be necessary to know what amount of earnings is to be treated as comprised in a payment (possibly it is relevant for some contribution purposes). But paragraph (b) appears to be directed towards payments which have actually been made and what part of the payment is to be treated as earnings (as I do not think that the elements that comprise a payment can add up to more than the payment itself). In any event, whatever it is directed at, it does not allow the making of regulations treating a person as having earnings which they do not have.

21. I record briefly that Mr Hemingway's initial submission at the oral hearing was that regulation 4(2) produced an absurd result (by treating a people as having what they did not have) and was to be invalidated for that reason. There is nothing in his initial submission. The rule expressed in regulation 4(2) is a perfectly sensible and proper anti-avoidance rule, which would also operate to discourage collusion between employers and employees resulting in the subsidy of low wages by the state. There is nothing absurd or irrational in treating a person in circumstances covered by regulation 4(2) as having earnings which he or she does not actually have. The central question, though, is whether the Secretary of State had the statutory power to make that provision. I have decided that he did not.

The National Minimum Wage Act 1998

22. That might seem to be enough to decide the case in favour of the claimant, given that no-one has ever suggested that the claimant's wife's actual earnings were anything other than the £25 per week already admitted. However, the provisions of the National Minimum Wage Act 1998, and in particular section 17, create a significantly different framework for determining a person's actual earnings. Unfortunately, I did not appreciate this point until shortly before the oral hearing. When I raised it there, Miss Haywood understandably asked for some time in which to make written submissions. I am confident that Miss Haywood saw the potential significance of section 17, but my written direction confirming what was agreed at the hearing did not spell that out. As it turned out, the submission dated 12 September 2002 on behalf of the Secretary of State, written by somebody else, did not get to grips with the point at all. Mr Hemingway then added no comments.

23. I am afraid that this illustrates a common problem. Some new point or avenue of inquiry emerges at an oral hearing. A Commissioner directs further written submissions, either at the request of one of the parties or of his own motion. The submission on behalf of the Secretary of State is then written, not by the person who represented him at the oral hearing, who would understand the points to be dealt with and how they arose, but by somebody else. And that person often appears not to have consulted the representative at the oral hearing, with the result that the written submission does not deal with the necessary points, either in part or in whole. The claimant or a representative then has nothing or little of substance to which to reply. This can result in delay, if yet more submissions have to be directed, or at the least in a

Commissioner being denied the assistance of genuinely competing arguments on a point. This is a matter which must be sorted out between those responsible in the Adjudication and Constitutional Issues Branch for the writing of submissions on behalf of the Secretary of State and those responsible in the Office of the Solicitor to the Department for Work and Pensions for arranging representation of the Secretary of State at oral hearings.

24. Section 1 of the National Minimum Wage Act 1998 provides that a worker who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work at a rate not less than the national minimum wage. The wage is in terms of an hourly rate, set at £3.60 from the coming into force of the Act on 1 April 1999. Section 3(1A)(a) of the Act allows regulations to be made preventing a person aged 26 or over from qualifying for the national minimum wage for the first six months of employment, but no such regulations have been made. Therefore, from 1 April 1999, the owner of the launderette was obliged to pay the claimant's wife £3.60 per hour for her work.

25. Section 17(1) of the Act provides:

> "(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, the amount described in subsection (2) below."

Under subsection (2) the amount is the difference between the remuneration received and the remuneration which would have been received if the worker had been paid at the national minimum wage rate. Thus, as well as enforcement of the Act through inspection by officers of the Inland Revenue and the issue of enforcement notices, a worker may bring an action to enforce the deemed contractual right to remuneration at the national minimum wage rate. It is to be noted that there can be no contracting out of the national minimum wage by agreement (section 49) and that it is no defence to a contract claim that the employer cannot afford to pay the national minimum wage rate.

26. What effect does that have on the Computation of Earnings Regulations apart from regulation 4(2)? Could a person be regarded as having actual earnings of the amount required under the Act, regardless of any provisions on notional earnings? Those are the questions on which I sought submissions, but they have not been addressed. As will emerge below, I have decided the questions in favour of the claimant. In those circumstances, natural justice does not require giving the parties any further opportunity to make submissions. The Secretary of State has had his opportunity and has failed to take it.

27. The questions arise because of Commissioners' decisions suggesting that for the purposes of the Social Security Benefit (Computation of Earnings) Regulations 1978, earnings were what the person in question was entitled to receive, not what he actually received. If the same applies to the 1996 Regulations, then it could be said that the claimant's wife's earnings from 1 April 1999 were the amount of her deemed contractual entitlement, not the amount she actually received.

28. There are first a couple of relatively old decisions about retirement pensions. In R(P) 5/53 it was held that where part of a pensioner's first week's wages were withheld by the employer, to be paid when he finished working, the amount of the wage constituted his earnings for that week, not the payment he received. The decision was followed in R(P) 1/70. There, the pensioner's wife ran a typing agency in Italy and, because of currency regulations, was not allowed to transmit the profits to England. Mr Commissioner Shewan said that:

> "a man `earns' that which he is entitled to receive in return for his work or services, whether he is paid at the time or not."

It therefore did not prevent the earnings counting that they were not transmitted to England. The profits were her earnings. The condition for receiving an increase of retirement pension for a wife, that she was not engaged in any gainful occupation from which her weekly earnings exceeded a set amount, was not met.

29. Neither of those cases expressly mentioned any Computation of Earnings Regulations and might be regarded as dealing with special cases where the full width of the principle stated by Mr Commissioner Shewan was not necessary to the decision. In both cases, actual payment would have been made at some date. However, in the decision of the Tribunal of Commissioners in R(S) 6/86, the 1978 Computation of Earnings Regulations were central. The claimant was incapable of his main job, but carried on performing his duties as a local authority councillor. Under regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, as he had good cause for doing the work as a councillor, he could be deemed incapable of work if his earnings from the work did not normally exceed a set amount. He did not claim the attendance allowances to which he was entitled for attendance at council meetings. In paragraph 8, the Tribunal said:

> "We consider that in the context of regulation 3(3) `earnings' means amounts to which a claimant is entitled and is not limited to payments which he actually receives. The definition of earnings in section 3 of, and Schedule 20 of the Social Security Act 1975 by virtue of section 11 of the Interpretation Act 1978 apply equally to regulations under the Act. Section 3(3) of the 1975 Act provides for the calculation or estimation of earnings on such basis as may be prescribed; the Social Security Benefit (Computation of Earnings) Regulations 1978 made under the power contained in section 3(3) of the 1975 Act defines `earnings' as meaning `earnings derived from gainful employment'. We conclude that in the absence of a context to the contrary that is the meaning of earnings throughout the 1975 Act and regulations made thereunder. Consequently we read into regulation 3(3) after `earnings' the words `derived from gainful employment'. In our judgment the word `derived' adds nothing to the context and means emanates. It does not mean actual payment. This question of construction does not lend itself to elaboration. The fact that a claimant may from the start never intend to claim his councillor's attendance allowance is we think immaterial as on our view of the construction of `earnings' in the context of regulation 3(3) the earnings emanate from

'gainful employment' as the employment is a gainful one because attendance allowance can be claimed."

The Tribunal went on to reject the view expressed in some unreported decisions that there could be no entitlement to an attendance allowance, or earnings, until a claim had been made.

30. The ruling in R(S) 6/86 is a powerful one, based as it is on the definition of "earnings" which is still in substance in section 3(1)(a) of the Social Security Contributions and Benefits Act 1992 and in regulation 9(1) of the 1996 Computation of Earnings Regulations. There are obvious factual differences between a councillor who declines to claim an attendance allowance which would be paid without difficulty on a claim being made and a person whose employer has restricted the amount of wages which he has agreed to pay and who might only give effect to a deemed contractual entitlement after legal action was taken. Nevertheless, if the test is entitlement resulting from the work done, it would appear to cover the circumstances of the present case. However, in paragraph 8 of its decision the Tribunal of Commissioners put considerable stress on the legislative context in which the word "earnings" was used. I do not see anything in the various regulations on incapacity benefit (see paragraph 4 above) which provides any useful context. The context of the 1996 Computation of Earnings Regulations must therefore be examined.

31. There was a significant change in the techniques used in the 1996 Computation of Earnings Regulations compared with the 1978 Regulations. There was an adoption of many of the provisions which had previously been in regulations on various income-related benefits. Most of the regulations are in terms of what payments are to be taken into account and how. Regulation 3(1) says that earnings for the purposes of benefits including incapacity benefit are to be calculated by determining the weekly amount of earnings in accordance with the Regulations. Then for employed earners, regulation 6 deals with the period over which "a payment" is to be taken into account. Regulation 7 deals with the date on which earnings are treated as paid by reference to the date on which "the payment" is due to be paid. Regulation 8 deals with the calculation of a weekly amount of earnings by reference to the period in respect of which "a payment" is made. Regulation 9 defines earnings for employed earners as "any remuneration or profit derived from that employment" and then expressly includes and excludes certain payments and types of earnings. Regulation 10 deals with deductions to reach a figure of net earnings. By contrast, the 1978 Regulations provided that the whole of earnings derived from a gainful occupation were to be taken into account, subject to the disregard of specified payments and specified deductions.

32. I have concluded that the general structure of the provisions for employed earners in the 1996 Computation of Earnings Regulations establishes a context which shows that what are to be taken into account are payments actually received, not entitlements which have not resulted in payments. I also take into account regulation 4(3) on notional earnings (which still has a valid application to the estimation of earnings under regulation 4(1) where they are not ascertainable at the date of decision):

"(3) Where a claimant is treated as possessing any earnings under paragraph (1) or (2)

> these Regulations shall apply for the purposes of calculating the amount of those earnings as if a payment had actually been made and as if they were actual earnings which he does possess... [subject to exceptions for calculating deductions for notional income tax, and social security and pension contributions]."

That, it seems to me, is a clear illustration of the legislative context. That context is sufficient to displace the general principle stated in paragraph 8 of R(S) 6/86. I am satisfied that there is power under sections 3(2) and (3) of the Contributions and Benefits Act to make regulations prescribing such a basis for the identification of earnings from employed earner's employment.

33. I have reached that conclusion by a process of construing the terms of the 1996 Computation of Earnings Regulations. I have not had to enter into any discussion of whether the National Minimum Wage Act 1998, which was presumably intended to confer benefits on workers actually paid less than the statutory rate, should found to have some adverse consequences for some such workers. Nor have I had to enter into any general considerations of policy about the effects of the benefits system in subsidising employers who are not prepared to pay the statutory rate.

34. Accordingly, in the present case, the earnings of the claimant's wife to be taken into account under the Computation of Earnings Regulations, disregarding regulation 4(2), are the payments she actually received from the owner of the launderette. No-one has ever disputed that the actual payments received were £25 per week, well below the limit for qualification for the increase of incapacity benefit. It would make a difference if either the claimant's wife successfully brought an action to enforce her contractual entitlement under section 17 of the National Minimum Wage Act 1998 or an enforcement notice or subsequent proceedings produced additional payment for the period in issue. But until either of those events happens, the claimant's wife's earnings to be taken into account are limited to the weekly payments of £25. There can be difficult questions in other circumstances over whether amounts which have been diverted in some way to a third party or retained by the employer are to be treated as having been paid to an employee, but in the present case such problems do not arise.

<u>Conclusion</u>

35. The result is that, although there was a relevant change of circumstances when the claimant's wife started to work at the launderette, justifying the making of a superseding decision, the superseding decision should not change the decision in effect before 28 December 1998. The claimant's wife cannot be treated as having notional earnings under regulation 4(2) of the Computation of Earnings Regulations, which was not validly made. Her actual earnings as calculated according to the Regulations are below the limit within which an increase is payable. Therefore the increase remains payable from and including 28 December 1998.

36. The appeal tribunal erred in law by applying regulation 4(2) and by reaching a different result. Its decision must be set aside for those reasons. I do not have to decide whether a Commissioner can find a decision to be erroneous in point of law when a record of proceedings is part of the papers before the Commissioner, but had not been provided to the claimant or a representative by the Appeals Service on a request within time. This decision is already long

enough without discussion of that point, although I appreciate Mr Hemingway's argument in favour of there being some sanction for bad practice by the Appeals Service in failing to comply with regulation 55(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999.

37. I substitute the decision in paragraph 1 above giving effect to the conclusion in paragraph 35. The claimant's entitlement to an increase for his wife must now be given effect for the period from 25 November 1999, subject to any changes of circumstances that I do not know about. No overpayment has been made for the period from 14 January 1999 to 24 November 1999, so that no question of recoverability arises.

(Signed) J Mesher
Commissioner

Date: 11 November 2002