

File



**THE SOCIAL SECURITY COMMISSIONERS**

*Commissioner's Case Nos: CIB/2858, 2859 and 2864/2001*

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEALS FROM DECISIONS OF AN APPEAL TRIBUNAL ON A QUESTION OF LAW

**DECISIONS OF THE SOCIAL SECURITY COMMISSIONER**

**MR COMMISSIONER JACOBS**

<i>Appellant:</i>	<i>Brenda Hugill</i>
<i>Respondent:</i>	<i>Secretary of State</i>
<i>Tribunal:</i>	<i>Bristol</i>
<i>Tribunal's Case Nos:</i>	<i>U/03/186/2000/00080, 02460 and 02461</i>

## DECISIONS OF THE SOCIAL SECURITY COMMISSIONER

1. My decisions are as follows. They are given under section 14(8)(b) of the Social Security Act 1998.
  - 1.1. The decisions of the Bristol appeal tribunal, held on 22<sup>nd</sup> February 2001, are erroneous in point of law.
  - 1.2. I set them aside and remit the cases to a differently constituted appeal tribunal.
  - 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that arise for decision in accordance with my analysis of section 30E of the Social Security Contributions and Benefits Act 1992.

### The appeals to the Commissioner

2. These are three appeals to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman of tribunals on the recommendation of the chairman of the tribunal.
3. Case management directions were given by Mr Commissioner Bano.
4. After written observations were received from the parties, the cases came before me for determination. I was not persuaded by the written arguments and found the issues difficult, especially in view of conflicting decisions of Commissioners. I, therefore, directed an oral hearing. It was held before me in Cardiff on 4<sup>th</sup> April 2002. The claimant did not attend, but was represented by Mr P Moorhouse of her local Council's Money Advice Service. The Secretary of State was represented by Mr H James. I have derived great help from the discussions at the oral hearing.

### The issue

5. The claimant is a councillor. The issue in each case is whether and how the cost of clothing purchased by her is deductible from her councillor's allowance for the purpose of determining the amount of incapacity benefit payable to her.

### The law

6. The relevant legislation is section 30E of the Social Security Contributions and Benefits Act 1992:

'(1) Where the net amount of councillor's allowance to which a person is entitled in respect of any week exceeds such amount as may be prescribed, an amount equal to the excess shall be deducted from the amount of any incapacity benefit to which he is entitled in respect of that week, and only the balance remaining (if any) shall be payable.'

[Subsection (2) defines 'councillor's allowance.].

'(3) In subsection (1) above "net amount", in relation to any councillor's allowance to which a person is entitled, means the aggregate amount of the councillor's allowance or allowances to which he is entitled for the week in question, reduced by the amount of any expenses incurred by him in that week in connection with this membership of the council or councils in question.'

7. The combined effect of section 30E(1) and (3) can be expressed as a formula. The benefit payable is:

incapacity benefit – (excess of councillor's allowance above threshold – expenses).

The higher the councillor's expenses, the lower the net amount of the councillor's allowance that is taken into account, and the smaller the reduction in the amount of benefit payable. If an expense is not taken into account in the actual week that it is incurred, the result will be an underpayment of benefit to the claimant. This can be remedied retrospectively.

8. There are three features of this section which are obvious to anyone familiar with social security law.

9. The first obvious feature is that there is no requirement that the expenses must be wholly, exclusively or necessarily incurred.

10. The second obvious feature is that there is no provision made for a number of problems that may arise in the calculation of the expenses. The expense may relate to both council and private use. The amount of the expense may not be immediately identifiable. The expense may be met in one week but relate to a number of future weeks. It may be administratively inconvenient, both for the councillor and the Secretary of State, to adjust the amount of benefit that is paid week by week. Dealing with expenses retrospectively may cause cash flow problems for the councillor. The Secretary of State and the councillor might find it more convenient to average expenses over a period. The councillor might prefer expenses to be estimated in advance. These issues are usually dealt with by detailed regulations made under the authority of an enabling provision. No regulations have been made in this case. There is no specific enabling provision allowing regulations to be made. Although I have not made a search, I would be surprised if there were not a general enabling power that could be used to allow regulations. But none has been exercised. I find these omissions from the norm significant.

11. These two features may reflect the third, that the law in this section, as elsewhere in social security law, makes express and lenient provision for those who are councillors.

### **The views of others Commissioners**

12. The equivalent provisions that applied to invalidity benefit were considered by Mr Commissioner Rice in *CS/7934/1995*. Before Mr Rice, both the claimant and the Secretary of State argued that averaging of expenses was permissible. Examples were given of the purchase of a dress and payments for telephone calls and line rental. It was argued that it was absurd to deduct the whole cost of the dress in one week and that telephone costs could only be dealt with by averaging. The Commissioner rejected those arguments. His reasoning is in paragraph 9:

'I see the difficulty, but against that I am faced with the plain words of section 58(4) [equivalent to section 30E(3)]. It specifically provides that the expenses incurred in a particular week have to be deducted from the aggregate amount of the councillor's allowances or allowances to which he or she is entitled for that week. Nor does it matter that the benefit of the expenses incurred in that week are enjoyed in future weeks. It would seem that Parliament deliberately decided, presumably in the interest of simplicity, that the costs incurred in each week should be offset against the allowances of that week, whatever the result might be. It is not open to me to alter the effect of the statute by adding words of my own to it.'

13. Mr Commissioner Williams took a different view of section 30E(3) in *CIB/6331/1999*. Mr Williams distinguished between the incurring of an expense (when the liability was assumed) and the defraying of it (when the liability was discharged). He analysed Mr Rice's decision and concluded that 'the Commissioner and the parties may have been thinking of defraying bills rather than incurring expenses.' He gave examples to show that the price paid could not simply be taken as the expense incurred. Although he did not use these terms, his examples covered both averaging and apportionment. One example was of a dress bought, worn only for two council functions and then sold. The Commissioner wrote that the expense was incurred on each occasion the dress was worn and was half of the difference between the purchase and sale prices, which could only be calculated after the dress was sold. This involved averaging of the expense. Another example was of a dress bought for both council and other use. This involved apportionment of the expense between the different use. His final example was of heating and lighting bills. These involved first apportionment and then averaging.

14. In giving case management directions, Mr Commissioner Bano suggested another approach. He gave the example of a councillor who spent £40 on a pair of trousers because he had to use them for council functions, but would only have spent £30 if he had not been a councillor. The Commissioner suggested that the expense might be the additional cost of £10.

15. Left to my own devices, unhampered by the united opposition of the parties and without having the benefit of the views of my fellow Commissioners, I would have simply interpreted section 30E as Mr Commissioner Rice did the earlier legislation. In view of the arguments of the parties and the views of my colleagues, I have considered the other interpretations that have been suggested.

### **The arguments that I accept**

16. I accept three of the arguments that were put by the parties at the oral hearing.

17. First, I accept that the language of the section 30E should be interpreted as a whole. It is not appropriate to split it up into 'expenses', 'incurred' and 'in connection with', interpreting each in isolation from the other.

18. Second, I accept that there is a limitation of reasonableness on the expenses that may be taken into account in deduction from the excess of the councillor's allowance. The parties at the oral hearing put this as an implied requirement that each expense must be reasonable. I prefer to put it as a limitation that is inherent in the requirement that the expenses be incurred 'in connection with' the membership of the council. Either way, the result is the same.

19. Third, I accept that 'expenses' cannot be interpreted in the way the tribunal did. The tribunal confined 'expenses' to items of revenue rather than capital expenditure, mainly (but not exclusively) items of a recurring nature like fares, telephone calls and stamps. That is not the usual interpretation that 'expenses' bears in law. The tribunal was obviously influenced by the apparent breadth that the section would otherwise have – it gave the example of a councillor who built an extension on a house in order to deal with council business. On my interpretation, the section is not that broad.

### **The arguments that I reject**

20. Otherwise, however, I have concluded that the interpretation of Mr Commissioner Rice is correct. His interpretation is in accordance with the clear wording of the legislation, which requires the issue to be determined on a week by week basis. It must be significant that no specific provision was made for regulations to deal with the application of this section and no general power has been exercised to make such regulations. The potential difficulties are so obvious that the omission must have been a deliberate decision taken by those responsible for the legislation. To my mind, there is only sensible explanation for the omission. It is that the potential problems that I have set out in paragraph 10 do not arise. And that can only be the result of applying the legislation in a simple straightforward way that prevents these potential difficulties arising.

21. The Secretary of State argued that the approach of Mr Commissioner Williams was correct and not that of Mr Commissioner Rice. New guidance had been issued to local officers, based on Mr Williams' analysis. That analysis was to the claimant's benefit and, not surprisingly, the claimant supported it as the correct interpretation of section 30E. The argument was that the section left issues of implementation to the discretion and good sense of local decision-makers. They would take the approach that was best suited to the expenses involved and to the circumstances of the case as a whole. Apportionment, averaging and estimating were all permissible in appropriate circumstances. The intervals at which and the periods over which these could be done would depend on the individual case. The suggestion made by Mr Commissioner Bano was a sensible one that could be taken if it was appropriate. Broad discretions can lead to local practices and differences of treatment, but that would be limited by guidance issued to decision-makers.

22. I have been tempted to accede to the Secretary of State's argument. The legislation is the Secretary of State's and, to the extent that it does not make specific provision, it is for the Secretary of State to determine how it should be implemented. However, on reflection I am unable to accept that in the closely regulated world of social security law this subsidiarity of approach is a correct interpretation of section 30E.

23. I respectfully agree with Mr Commissioner Williams that an expense is incurred when the liability arises rather than when it is discharged. However, I do not agree that an expense is incurred in the week in which the item is used. If a dress is bought in one week for use in the next, the expense is incurred when it is bought. Mr Williams has in effect interpreted 'any expenses incurred by him in that week' as meaning 'any expenses incurred by him in respect of that week'.

24. A consideration of variations on one of the examples given by Mr Commissioner Williams shows, with respect, the problems which his interpretation creates. In his example, a dress was bought, used twice and then sold. But how would section 30E apply if those events

had not all occurred in the period that the decision-maker was considering? Without knowing how often the dress would be used, it is impossible to know over how many weeks to spread the expense. And without knowing how much the dress would be sold for, it is impossible to know what allowance to make for this. I do not accept that these complex issues have simply been left to the good sense of a decision-maker in the context of a particular case, even if that good sense is moderated by considered guidance issued centrally by the Secretary of State.

25. So, my conclusion is that section 30E has to be applied week by week. That can be done in each week or retrospectively over a past period. An expense is incurred in the week in which the liability arises and can only be used to reduce the reduction in incapacity benefit for that week.

### **Summary**

26. The decisions of the appeal tribunal are wrong in law and must be set aside. As the claimant did not attend the oral hearing before me, I was unable to investigate the facts and make findings on the reasonableness of each item of expenditure. There must, therefore, be a rehearing to determine this issue.

**Signed on original**

**Edward Jacobs  
Commissioner  
16<sup>th</sup> April 2002**