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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No:

56 MAY 1999
C.A.S.
CIS/17020/1995

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER H LEVENSON

Claimant :

Tribunal :

Tribunal Case No :

1. In this case both parties are agreed (although not for identical reasons) that the decision of the social security appeal tribunal of 11 September 1996 was erroneous in point of law. I am prepared to accept this for reasons given below. However, this is of no assistance to the claimant. In accordance with the provisions of section 23(7)(a) of the Social Security Administration Act 1992 I set aside the decision of that tribunal. I substitute my own decision to the same effect but on a different basis.

2. I held an oral hearing of this appeal on 19 April 1999. The claimant attended together with his representative, Mr Walker a welfare rights officer from Lancashire County Council. The adjudication officer was represented by Mr MacEvelly from the Office of the Solicitor to the Department of Social Security. I am grateful to all of them for attending and for their assistance. At the hearing I was handed a document entitled "Carer and Agency Agreement" which had been seen by the tribunal but had not been placed in the Commissioner's bundle of papers. Mr MacEvelly was given an opportunity to peruse and comment on this document. Meanwhile Mr MacEvelly had very helpfully produced a written summary of his argument. A copy of this was given to Mr Walker who had an opportunity to consider and comment on it.

3. By virtue of the provisions of section 124(1) of the Social Security Contributions and Benefits Act 1992 a person is entitled to income support, subject to other conditions which are not at issue in this case, if he has no income or his income does not exceed the applicable amount and if neither he nor his partner is engaged in remunerative work. This case concerns the treatment of particular income received by the claimant. Regulation 29 of the Income Support (General) Regulations 1987 provides for the calculation of earnings derived from employed earner's employment and income other than earnings. Regulation 30 provides for the calculation of earnings of self-employed earners. Although there had been some confusion on both sides, it is clear to me that the relevant income of the claimant is income other than earnings. This is because, as will be seen below, the claimant is involved in providing board and lodging accommodation for which a charge is payable and by virtue of regulation 37(2)(a) any payment by way of such a charge is excluded from the meaning of "earnings". Regulation 37(2)(b) makes similar provision in respect of payments to which paragraph 27 of Schedule 9 refers. However, as indicated below, I find that in this case there are no such payments. Regulation 14(4) makes clear that payments referred to in regulation 37(2) are income although they are not earnings. Regulation 40(2) provides that there shall be disregarded from the calculation of a claimant's gross income any sum, where applicable, specified in Schedule 9.

4. Two paragraphs of Schedule 9 are relevant. Paragraph 20 provides as follows:-

20. Where the claimant occupies a dwelling as his home and he provides in that dwelling board and lodging accommodation, an amount, in respect of each person for whom such accommodation is provided for the whole or any part of the week, equal to -

- (a) Where the aggregate of any payments made in respect of any one week in respect of such accommodation provided to such person does not exceed £20, 100% of such payments; or
- (b) where the aggregate of such payment exceeds £20, £20 and 50% of the excess over £20.

There is no doubt that the claimant's situation comes within paragraph 20 and that the income he derives in the present case is subject to the disregard specified in paragraph 20(b).

5. The main issue in this case is whether the payments received by the claimant also come within paragraph 27 of Schedule 9. This provides:-

27. Any payment made by a ... local authority ... to the claimant in respect of a person who is not normally a member of the claimant's household but is temporarily in his care.

As I have indicated above, to the extent that payments come within paragraph 27, they are not "earnings". Regulation 6(k) also provides that a person shall not be treated as engaged in remunerative work insofar as he is engaged in caring for a person who is accommodated with him by virtue of arrangements made in accordance with paragraph 27 and is in receipt of payments specified in that paragraph."

6. At various stages in the proceedings the adjudication officer suggested that the claimant be treated as a self-employed person but the claimant has strenuously opposed this suggestion. Ironically, the suggestion was made in an attempt to assist the claimant to offset certain expenses against his income. However, it is clear from the provisions of regulation 37(2) that the relevant income cannot be treated as earnings from self-employment. It seems to me that the disregard provided by paragraph 20 of Schedule 9 was designed to offset certain expenses for the very reason that a person in the position of the claimant cannot be treated as self-employed in this context.

7. I now turn to the facts, over which there is little dispute. The claimant, who is below pensionable age, lives with his partner in an owner occupied house. The claimant

suffers from angina and was at the relevant times in receipt of income support. On 20 May 1995 Mr A, an adult suffering from cerebral palsy, was placed with the claimant by Lancashire County Council. Mr A was himself in receipt of income support, from which he paid the claimant £232 weekly for his care and accommodation. The County Council paid the claimant a further amount of about £6 weekly. The placement was made in accordance with the Carer and Agency Agreement to which I have referred above. The claimant undertook to provide board, lodging and appropriate care for Mr A, to "uphold the rights of people coming to live in our home and care for them as we would a member of our own family" and to give eight weeks notice to the Social Services Department of any intention to withdraw from providing the service. The Social Services Department of the County Council guaranteed that the claimant would receive the appropriate weekly rate specified by the Department which would include a contribution from Mr A and, where this was insufficient to meet the full cost, a contribution from the Department to meet the deficit.

8. The agreement further provided that there was a three month trial placement and that after three months the Department would either terminate it or formally approve the placement as a long-term placement. A long-term placement would be reviewed after a further 12 months and thereafter annually, or more frequently if necessary. Shortly after Mr A came to live with the claimant, the claimant's entitlement to income support was reviewed by an adjudication officer. The adjudication officer decided that in accordance with paragraph 20, £106 of the £232 paid by Mr A must be treated as the claimant's income. This is calculated by deducting £20 from £232 and deducting 50% of the balance. The additional amount paid by the County Council (and which in one form or another continued to be paid for some time) has always been disregarded.

9. The claimant appealed to the social security appeal tribunal against this decision on the grounds that the payments came within paragraph 27 because this was a temporary arrangement. The tribunal considered the matter on 27 January 1995. The tribunal found that the placement could be terminated at any time by Mr A or by the claimant and accepted that Mr A was in the temporary care of the claimant. However, it confirmed the decision of the adjudication officer on the basis that paragraph 27 only applies where a payment is made to the claimant by the local authority. In the present case the payment was made by Mr A.

10. The County Council was alarmed at the implications of this decision for their adult placement policy and the policy considerations were also raised by Mr Walker at the hearing before me. It is apparently difficult to find placements for adults in need of care, and if potential carers are to lose part or the whole of their income support, they are less

prepared to come forward. This is a particular problem when children who have been cared for under similar schemes approach adulthood. I appreciate and am sympathetic to these problems but if the difficulty is financial, then it is a matter for local authorities and the relevant government Departments to decide the appropriate level of payment to carers. I do not think that the answer lies in distorting the meaning of provisions for disregard in relation to income for the purposes of income support. However, the response of the County Council in this case was to set up a new arrangement by which carers were paid. From 3 April 1995 the County Council would send Mr A a bill for his care and accommodation. He would pay the money claimed to the County Council out of his income support. The Council would then pass that sum on to the claimant, together with the supplement to which I have referred. It was hoped that this would bring the payment within paragraph 27 of Schedule 9. On 6 April 1995 the claimant requested a further review of entitlement to income support, on the grounds that there had been a change of circumstances. On 2 September 1995 an adjudication officer reviewed but confirmed the previous decision and on 6 September 1995 the claimant appealed again to the social security appeal tribunal. The social security considered this appeal on 11 September 1996. It confirmed the decision of the adjudication officer but the chairman of the tribunal granted leave to appeal to the Social Security Commissioner. The claimant was represented at the hearing by Mr Walker, and the tribunal's reasons included the following statement:-

"The next question was whether the earlier decision should be revised. It was common ground that the crucial question was whether under paragraph 27 of schedule 9, Mr A was 'normally a member of the claimant's household' or was 'temporarily in his care'. The previous tribunal had apparently unanimously and without doubt concluded that Mr A was temporarily in the claimant's care and that the receipts ... should be disregarded.

Did the passage of time convert what was once a temporary placement into a situation where the resident was 'normally a member of the claimant's household'? There was no definition of the words concerned in paragraph 27 'temporary' and 'normally' were to be given their everyday meanings. Could it be said that after some 16 months what was originally a temporary arrangement had become normal? Mr Walker argued that because the arrangement could be terminated at will by either party it was not permanent. The tribunal found that it was of no consequence that the arrangement was not permanent. The draftsman of the relevant paragraph did not use the word 'permanent' which would have been the natural antonym to 'temporary'; he used instead the word 'normally'. Normally meant usually or ordinarily. Since there was no evidence that Mr A had any other residence

during the period from May 1994 to the date of the decision to review it was difficult to see that he could be described otherwise than as normally resident with the claimant and this left only the question of whether he was a member of the claimant's household. No argument was put forward that he was not a member of the household but for the sake of completeness the tribunal confirmed that in its view Mr A was a member of [the claimant's] household. It appeared from the details of the adult Placement Scheme provided that this was the essence of the arrangement. There was no question of Mr A having a separate household within a building also occupied by [the claimant]. The nature of the arrangement was that the carer provided support and care within his home.

Mr Walker asked what period of time had to elapse before a placement ceased to be temporary and become normal. The tribunal decided that there was no fixed period of time. Each case had to be decided on its own facts. Suffice it to say that in this case the tribunal had no hesitation in deciding, that by the date of review the placement was no longer temporary but had become normal."

11. The grounds of appeal are set out in 10 numbered paragraphs, but these are not all separate grounds and Mr MacEvilly's note has helpfully identified four separate grounds of appeal. The first relates to the fact that the second tribunal took a different view from that of the first tribunal regarding whether Mr A was not normally a member of the claimant's household but was temporarily in his care. I do not accept this ground. The decision of the first tribunal was based on the previous method of payment, the periods under consideration were different, and the second tribunal considering the matter as from April 1995 was not bound by the tribunal making a decision for the period from 20 May 1994 when one of the issues was whether the claimant was temporarily in the claimant's care.

12. The second ground relates to the lack of certain information before the tribunal in relation to the nature of the arrangements between the County Council and the claimant. It seems to me that the tribunal had ample evidence on which to make findings and to reach its decision.

13. The third ground, and the one accepted by the adjudication officer is that the tribunal failed to have regard to evidence that was placed before it. On 5 September 1996 the County Council's Adult Placement Officer wrote to Mr Walker confirming that "in the near future Mr A will be moving from his placement with [the claimant] ... The Adult Placement Scheme places clients on a short or long-term basis, in which either side can give four weeks notice, and in exceptional circumstances notice can be less than this. The

placement should not be seen as permanent as security is limited".

14. Although the tribunal considered the question of permanence, it did not consider the point that Mr A was shortly to leave the claimant's house and this information might have affected its decision, especially since it acknowledged that each case had to be decided on its own facts. On this basis the tribunal's decision was made in error of law and for that reason I set it aside. Mr A did in fact leave the care of the claimant on 17 October 1996, but that fact itself is not really relevant to the decision made by the tribunal five weeks earlier.

15. The next ground of appeal relates to the question of whether the claimant was "not normally a member of the claimant's household but temporarily in his care". It is not necessary to comment on the tribunal's approach to this question but it is important to clarify the meaning of the terms in this context. The first question is whether Mr A was a member of the claimant's household. There have been many decisions and a great deal of discussion in social security law on what is meant by the concept of "household". However, in the present case it is quite clear from the terms of the placement that the intention and the actuality was that Mr A was a member of the claimant's household. The next question is what is meant by "normally a member of the claimant's household" in paragraph 27. Mr Walker argued that "normally" referred both to the manner of membership of the household and to the period of membership. He argued that Mr A did not live as a normal member of the household, for example as would a person who was the claimant's "flesh and blood". He was subject to a high degree of supervision on behalf of the County Council with very detailed contingency and breakdown plans. Mr MacEvilly argued that households might have all sorts of domestic arrangements, including supervision of children by social workers and others, and that the phrase "normally a member of the claimant's household" had a temporal meaning only. I was tempted by Mr Walker's argument, but on reflection it seems to me that living arrangements are so varied that it would be virtually impossible to identify a "normal" household or a person who lived normally in a household. Further, paragraph 27 does not refer to a normal member of the household but to a person who is normally a member of the household. On this point I agree with Mr MacEvilly.

16. The next issue is the relationship between normally being a member of the household and being temporarily in the claimant's care. I think this must refer to whether Mr A is a member of the claimant's household when he is not in the claimant's care. In this case there was no evidence that Mr A was ever a member of the claimant's household except when he was in the claimant's care and it seems to me, although I do

not have to finally decide this, that Mr A was not normally a member of the claimant's household. That leaves the question of whether Mr A was temporarily in the claimant's care or was in his care for a period that was other than temporary. A similar question has arisen in relation to the meaning of "temporary absence from Great Britain" in regulation 4(1). Ultimately, this is a question of fact for the tribunal which must take account of the original intention of the parties and the length of the absence. Had the tribunal in this case taken proper account of the letter of 5 September 1996 it would have been entitled to form its own view on whether Mr A was in the care of the claimant temporarily or otherwise. I only comment that an arrangement which is not permanent is not necessarily temporary. It might be indefinite. In this case the County Council described the placement as "long-term" and depending on the facts of any particular case a long-term placement may be described as temporary or not temporary.

17. However, the basis of my decision is that the money which was paid by Mr A to the County Council and which the County Council then paid to the claimant was not a "payment made by a ... local authority ..." It is clear from the terms of the placement arrangement that the role of the local authority is to supplement any payment made by Mr A or those in similar circumstances in order to bring the payment up to a particular amount. The supplementary payments have not been taken into account in this case. The fact that Mr A changed from making payments directly to the claimant to making payments to the County Council which then paid the claimant on behalf of Mr A should not make any difference. I suggested a scenario in which Mr A, the claimant, and an official from the County Council were present in the same room. Mr A produced a wad of notes from his pocket to pay what was due to the claimant. He handed the money to the County Council official, who handed it over to the claimant. Mr Walker maintained that this would be a payment made by the local authority. I cannot accept that. It seems to me that the whole structure of the scheme and of the disregards is that the reference in paragraph 27 to a payment made by a local authority is to a payment made by the local authority from its own resources, and not to money that it hands over, having been given it by a person who is being placed. As I find this to be the law, nothing is to be gained from referring the matter to a fresh tribunal for a new hearing and it is expedient to substitute my own decision as indicated in paragraph 1 above. The adjudication officer was correct to apply paragraph 20 to the payment but to refuse to apply paragraph 27 and my decision is to the same effect as the decision made by the tribunal.

(Signed) H Levenson
Commissioner

(Date) 22 April 1999