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SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 29 October 1990 is not erroneous in law and accordingly this appeal does not succeed.

2. The claimant, now in his early 20s, is both physically and mentally handicapped. He lives with his parents and is in receipt of an attendance allowance, a severe disablement allowance and income support. On 5 September 1985 his mother applied to the Secretary of State to be appointed to act in relation to social security matters on her son's behalf on the grounds that "My son Martyn is unable to manage his own affairs. He is mentally handicapped and unable to read or write". The appointment was duly made. On 28 November 1989 Derbyshire Welfare Rights Service on the mother's behalf in effect requested that the award of income support to the claimant should be reviewed so as to entitle the claimant to an additional weekly sum by way of what is called the severe disability premium. The method of income support is that a basic "applicable amount" is paid in accordance with regulation 17(a) of the Income Support (General) Regulations 1987. Regulation 17(d) then provides for premiums to be applicable in accordance with Schedule 2 to the Regulations. That Schedule provides for premiums to be payable under various headings including, as relevant to this case, the severe disability premium which is applicable in accordance with paragraph 13. There are various conditions that have to be satisfied. The condition which is in issue in this case, all other conditions being satisfied, is that imposed by paragraph 13(2)(ii), that -

"subject to sub-paragraph (3) he has no non-dependants aged 18 or over residing with him ... "

I do not need in this case to be concerned with sub-paragraph (3). It is the definition of "non-dependant" in regulation 3 which is crucial to this case. That extremely

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troublesome definition has been amended several times and there are decisions dealing with its meaning in its different versions down to 1 October 1990 from which date it was amended, by S.I. 1990/1776, to read as follows -

"3.-(1) In these Regulations, "non-dependant" means any person, except someone to whom paragraph (2) applies, who normally resides with a claimant.

(2) This paragraph applies to -

- (a) any member of the claimant's family;
- (b) a child or young person who is living with the claimant but who is not a member of his household by virtue of regulation 16 (membership of the same household);
- (c) a person who jointly occupies the claimant's dwelling and either is a co-owner of that dwelling with the claimant or his partner (whether or not there are other co-owners) or is liable with the claimant or his partner to make payments in respect of his occupation of the dwelling;
- (d) any person who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of the occupation of the dwelling;
- (da) any person to whom or to whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;
- (db) any other member of the household of the person to whom or to whose partner the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of the occupation of the dwelling;
- (e) a person who lives with the claimant in order to care for him or a partner of his and who is engaged by a charitable or voluntary body (other than a public or local authority) which makes a charge to the claimant or his partner for the services provided by that person.

(3) ...

(4) For the purposes of this regulation a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area but not if each person is separately liable to make payments in

respect of his occupation of the dwelling to the landlord.

(5) In this regulation "communal area" means any area (other than rooms) of common access (including halls and passageways) and rooms of common use in sheltered accommodation."

That, as I say, is the provision I have to consider in relation to the remaining issue in this case. In fact there have been further amendments but I am not directly concerned with them.

3. I have said that it was first suggested that the claimant was entitled to the severe disability premium on 28 November 1989. It was then contended that the claimant was entitled to the premium backdated to 11 April 1988 the date the income support scheme was introduced. By a decision issued on 29 November 1989 an adjudication officer decided that the claimant was not entitled to the premium either then or from 11 April 1988 because he did not satisfy the conditions. The claimant appealed and a social security appeal tribunal on 10 January 1990 decided that he was entitled on the basis of the provisions to which I have referred as they stood in the period 11 April 1988 to 9 October 1989. The tribunal then adjourned for further consideration of the question of entitlement as from 9 October 1989. On 29 October 1990 a differently constituted tribunal decided that the claimant also satisfied the conditions as they were in the period 9 October 1989 to 30 September 1990 but not from 1 October 1990 from which date the provisions were, as I have said, again amended to read as set out above. I do not need to set out the earlier versions. It is enough for me to say that the adjudication officer accepts that the tribunal were right to decide that the claimant did satisfy the earlier versions and in fact the claimant has been paid in respect of those earlier periods. This present appeal concerns the contention on behalf of the claimant that on the evidence the claimant's parents are persons such as are described by regulation 3(2)(da) and that accordingly the claimant satisfies the condition in paragraph 13(2)(a)(ii) of Schedule 2 that he has no non-dependants residing with him. With some reluctance I held an oral hearing in relation to that particular matter. The reluctance derived from another matter which I must now briefly mention. As is well known to those concerned with these matters there is an issue whether paragraph 13(2)(ii) and (iii) of Schedule 2 are ultra vires and that issue is to be determined by the House of Lords in the Foster case. It had been my first intention to defer my decision in this case until after the result in Foster was known. However the claimant's representative strongly urged for the various reasons he put forward that I should not wait for Foster but give my decision on the assumption that the provisions in question were intra vires. And I was finally persuaded to do that. At the oral hearing the claimant was represented by Mr R. Allen of Counsel. The adjudication officer was represented by Mr Jenkins-Reece of the Office of the Solicitor to the Departments of Health and Social Security. I turn now to the construction of regulation 3(2)(da).

4. According to the chairman's note, the claimant's mother told the tribunal that "She took £20.00 per week from his benefit. This amount was taken first and the rest of his money was used for his own benefit. There was normally nothing spare". And the tribunal found as a fact that the claimant "... lives in his parents' house as a licensee and pays them £20 per week in respect of his occupation of it. His occupation however is not on a commercial basis". They accordingly decided that on the facts as they found them the parents were not persons to whom regulation 3(2)(da) applied and there was no entitlement to the premium from 1 October 1990. The reasons they gave were -

"There was no dispute on the facts of the case and the only issue was the effect of the amendments to Regulation 3(2).

We accepted that the appellant was a licensee of his parents and that he paid £20 per week for his occupation of the house and that he was liable to make such payments in the sense that if he did not do so his parents would be legally entitled to require him to leave the house.

We therefore took the view that that his parents were persons to whom Regulation 3(2) (d) applied for the period 9.10.89 until 30.9.90.

When the Regulations were amended as from 1.10.90 the appellant also had to show that the payment he made to his parents was on a commercial basis.

We accepted that the facts that the payment may have been less than the market level would not necessarily prevent the arrangement from being a commercial basis but we found it difficult to accept that the relationship between parents and a child (particularly a severely disabled child) would be on a commercial basis unless there was a compelling evidence to that effect.

Our view was that this was a case where caring parents were loyally looking after their disabled child in the way that most parents in this situation would wish to do and there was nothing in the relationship to indicate that there was a commercial basis behind it."

Now Mr Allen and Mr Jenkins-Reece both agreed that the claimant was a licensee of his parents and that he was liable to pay his £20.00 per week at least in the sense that if he did not do so his licence to remain could terminate. They also agreed that the liability obtained notwithstanding the claimant's mental handicap - he was capable of incurring a liability though probably could choose to avoid it; the "contract" was voidable rather than void. But they differed on whether that liability could be said to be "on a commercial basis". As to that they both agreed (as had been held in CSB/1163/88 in relation to the same phrase in a quite different context) that "commercial basis" did not necessarily mean that the arrangement had to have been intended to produce a profit and

I think Mr Jenkins-Reece in the end agreed with Mr Allen that, notwithstanding what might be taken to be a suggestion to the contrary in CSB/1163/88 in the different context to which that case related, there could be a "commercial basis" for the purpose of the provision even between say close relatives. In relation to that particular matter it is perhaps interesting to note that in a further amendment having effect from 11 November 1991 (see regulation 2 of S.I. 2334/91) it has been expressly provided that the provisions equivalent to (da) and (db) of regulation 3(2) do not apply in relation to a person who is a close relative of the claimant or his partner. One does not know of course and is not to speculate whether that amendment was made to change the original intention or to correct what was thought to be a drafting error. Mr Allen pointed out that regulation 3(1) defined "non-dependant" as a person who "normally resides with a claimant" and that regulation 3(2) was in effect a list of those persons who, while normally residing with the claimant in the regulation 3(4) sense, were to be treated as exceptions. So the regulation was to do with people who ordinarily lived in close proximity but who nevertheless did so "on a commercial basis". A lodger would be such a person. So could an adult family member. Mr Allen concluded that in that context "on a commercial basis" involved something more than what he referred to as "nominal" - there had to be, as he put it, an arms-length basis as distinct, in a family situation, from an arrangement simply deriving from family ties. Mr Jenkins-Reece took the view that in a case such as the present where parents were no doubt concerned to look after their severely handicapped son there was unlikely to be an arms-length arrangement and the fact that the son paid part of his benefit over to his parents each week was not sufficient to enable the arrangement to be characterised as being on a "commercial basis".

5. I cannot see that "on a commercial basis" has any very precise or any technical meaning. The Shorter Oxford Dictionary defines "commercial" as meaning 1. "engaged in commerce, trade", 2. "of or relating to commerce or trade" and 3. "viewed as a matter of profit or loss" and it seems to me that what one has to consider, on the facts of each case, is whether it is the sort of arrangement that might perhaps have been entered into by those concerned had they e.g. taken in a lodger. It is in my view possible but unlikely that an arrangement between close family members would ever be likely to be properly described as being on a commercial basis and perhaps even less likely in the case of a mentally and physically handicapped person living within his own family. At all events it seems to me to be entirely a matter of fact and this is how the tribunal approached it when they said -

"We accepted that the facts that the payment may have been less than the market level would not necessarily prevent the arrangement from being a commercial basis but we found it difficult to accept that the relationship between parents and a child (particularly a severely disabled child) would be on a commercial basis unless there was a compelling evidence to that effect.

Our view was that this was a case where caring parents were loyally looking after their disabled child in a way that most parents in this situation would wish to do and there was nothing in the relationship to indicate that there was a commercial basis behind it."

I see nothing wrong with that. On the contrary it seems to me to be an entirely correct approach and a perfectly sensible conclusion on the facts. There is in my view no error of law on the part of the tribunal and this appeal accordingly does not succeed.

(Signed) R A Sanders  
Commissioner

Date: 8 April 1992