

MR/SH/3

Commissioner's File: CIS/590/1993

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SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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. I allow the adjudication officer's appeal to the extent that I hold the decision of the Brighton social security appeal tribunal dated 24 May 1993 to be erroneous in point of law and I set that decision aside. However, I substitute for the tribunal's decision one that has the effect that the benefit suspended pending this appeal must be paid to the claimant. My formal decision is set out at paragraph 16 below.

2. The adjudication officer now concerned with this case attended the oral hearing of the appeal and was represented by Mr Mark Shaw of Counsel, instructed by the Solicitor to the Departments of Social Security and Health. The claimant appeared in person. She was able to rely on a written submission prepared for her by the Citizens Rights Office of the Child Poverty Action Group.

3. The facts in this case have never been in dispute. On 2 April 1991, the claimant was dismissed from her employment because she was pregnant. She claimed income support on 8 April 1991 and was paid benefit from that date. Later that year, an industrial tribunal found that the claimant's employer had discriminated against her contrary to section 6(2)(b) of the Sex Discrimination Act 1975. They reserved the question of compensation. By a further decision, registered on 23 March 1992, the industrial tribunal ordered the employer to pay the claimant compensation in the sum of £710. By a review decision, registered on 11 June 1992, they varied the amount of compensation, increasing it to £1,024. That sum was made up as follows:-

Loss of net salary (8.4.91 to 6.5.91)	£	£
<u>less</u> income support received	783	
	<u>242</u>	
	541	541
Injured feelings		275
Loss of tax rebate		<u>208</u>
		1024

It will be noted that the compensation payable in respect of loss of earnings was reduced to reflect the fact that the claimant had received income support during the relevant period.

4. On 28 July 1992, an adjudication officer decided that the whole of the compensation should be taken into account for income support purposes as "earnings" and spread over a period of five weeks from 31 July 1992. Nobody now suggests that that decision was correct and therefore I need not explain the reasoning behind it. The claimant appealed against that decision of the adjudication officer on the grounds that the compensation was not to be treated as earnings at all. In an admirably clear written submission to the tribunal, the local adjudication officer resiled from the decision of 28 July 1992 and submitted that the tribunal should substitute a decision to the effect that the part of the compensation attributable to loss of earnings (£541) should be taken into account as earnings for four weeks from 5 June 1992 to 2 July 1992. The tribunal allowed the claimant's appeal in full and rejected the adjudication officer's submission. They held that no part of the compensation was to be treated as earnings in respect of any period. The adjudication officer now appeals against the tribunal's decision with the leave of the tribunal chairman.

5. Until the hearing itself, the submissions on this appeal were concerned solely with the question whether any part of the compensation was to be treated as "earnings" under regulation 35(1) of the Income Support (General) Regulations 1987 ("the 1987 Regulation") which, so far as is material, provides:-

".... 'earnings' means in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes -

- (a)
- (b) any payment in lieu of remuneration except any periodic sum paid to a claimant on account of the termination of his employment by reason of redundancy;
- (c) any payment in lieu of notice;
- (d)
- (e)

- (f);
- (g) any award of compensation made under section 68(2) or 71(2)(a) of the Employment Protection (Consolidation) Act 1978 (remedies for unfair dismissal and compensation);
- (h)
- (i)"

It was common ground that the part of the award in respect of injured feelings and the loss of the tax rebate was to be regarded as capital rather than as income and would not affect the claimant's entitlement to income support. However, Mr Shaw argued that the £541 paid in respect of loss of earnings was "derived" from the claimant's former employment and was a "payment in lieu of remuneration" within sub-paragraph (b). He submitted that the purpose of the legislation was to put the claimant in the position which she would have been had her employer not acted unlawfully and she had continued in employment.

6. Mr Shaw naturally placed considerable reliance on R(SB) 21/86 which was a decision made under regulation 10(1)(d) of the Supplementary Benefit (Resources) Regulations 1981 in a case where a claimant had received an award of compensation under the Employment Protection (Consolidation) Act 1978. There was no material distinction between regulation 10(1)(d) of the 1981 Regulations and regulation 35(1)(b) and (c) of the 1987 Regulations. The Employment Protection (Consolidation) Act 1978 provides that in most cases an award of compensation for unfair dismissal consists of a "basic award", analogous to a redundancy payment, and a "compensatory award" based on loss of earnings. It was accepted in R(SB) 21/86 that the basic award fell to be treated as a capital resource. The Commissioner then considered the compensatory award.

" 7. Mr Stocker postulated the possibility that a compensatory award might be considered an award of a capital sum, and, as such, something which fell within the claimant's capital resources. However, it is quite clear from the decision of the Court of Appeal in R v. National Insurance Commissioner ex parte Stratton (reported as Appendix II to decision R(U) 1/79) that a compensatory payment cannot be so regarded. The Court of Appeal refused to treat it as equivalent to a redundancy payment - and as such a capital, and not income item. In the words of Lord Denning MR:-

"Compensation for unfair dismissal is to be distinguished from a redundancy payment because its true characteristic is that it is a compensation for loss of future income, not for any loss of capital."

In the same case Templeman LJ (as he then was) observed as follows:-

'I agree with Lord Denning MR that the compensation awards made under section 74 of the Employment Protection (Consolidation) Act 1978 lead to loss of unemployment benefit. Such compensation is given for loss of the benefits of which the employee might reasonably be expected to get in the future. It seems to me, however, that the basic award given for unfair dismissal under section 73 of the Act of 1978 falls into the category of a redundancy payment. Entitlement and quantum depend on past service, not on future loss.'

8. Lord Denning accepted - and his brethren appear to have concurred in this view - that a compensatory award was caught by regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [S.I. 1975 No. 564] [now 1983 - S.I. 1983 No. 1598] being 'payment (whether or not a payment made in pursuance of a legally enforceable obligation) in lieu either of notice or of the remuneration which [the claimant] would have received for that day had his employment not been terminated'.

....

12. Mr Bowles contended that for a payment to fall within [regulation 10(1)(d) of the 1981 Regulations] it had to satisfy the opening words 'or remuneration or profit derived from any employment' and he submitted that the compensatory award was not derived from the claimant's employment, such employment having previously come to an end. On this point Mr Stocker supported him, contending that the compensatory award was something which was imposed by an industrial tribunal and did not arise directly out of any employment. I reject this interpretation. The words 'derived from' are wide. They mean 'having their origin in'. Moreover, 'compensation for loss of future income', to quote Lord Denning MR, necessarily presupposes a past employment. The compensation has its origins in past employment, and it is immaterial that the award is made through a statutory body. The award is payable by the past employer, and not out of some statutory fund. No award would be made at all if there had not been a past employment. Even the express words of regulation 10 do not refer to 'current' employment, but are deliberately made all embracing by the use of the adjective 'any' before 'employment'. But in any event, even if the opening words were to be construed artificially in the way suggested by Mr Bowles and Mr Stocker, I am satisfied that the further words 'and shall include' widen the opening definition so as to bring in 'any payment in lieu of notice or remuneration' and I am also satisfied that in this context the word 'remuneration' means the remuneration which would

otherwise have been payable, had it not been for the termination of the claimant's employment. Accordingly, I agree with the chairman that a compensatory award made by an industrial tribunal constitutes a payment in lieu of remuneration within regulation 10(1)(d)."

7. The claimant's written submission invites me not to follow R(SB) 21/86. I do not consider that that case can be distinguished from the present. There is no material difference in the relevant social security legislation and I can see no reason for drawing a distinction between the compensatory award for unfair dismissal under the Employment Protection (Consolidation) Act 1978 and that part of the compensation in a case under the Sex Discrimination Act 1975 referable to loss of earnings. I accept that the word "derived" may be limited on grounds of remoteness but I agree with the view of the Commissioner deciding R(SB) 21/86 that the express inclusion of "any payment in lieu of remuneration" makes it clear that any compensation for loss of earnings following dismissal from employment is to be regarded as derived from that employment. As Mr Shaw submitted, that phrase is indistinguishable from the terms of regulation 7(1)(d) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 considered in Stratton. It is clear that Lord Denning MR and Templeman LJ both regarded an award of compensation for loss of earnings as "a payment in lieu of the remuneration which [the claimant] would have received for that day had his employment not been terminated". It is submitted in the claimant's written submission that those views were obiter dicta but they seem to me to be very much part of the Court of Appeal's reasoning. However, I would accept that they were made in the context of loss of remuneration under fixed term contracts and that R(SB) 21/86 does represent an extension of the principle considered by the Court of Appeal. Nevertheless, I am content to follow R(SB) 21/86. Where there is a contract which is not for a fixed term, the claimant is entitled to remain in employment until lawfully dismissed. The length of time likely to have elapsed before that event occurred is taken into account in assessing the compensation payable for loss of earnings. I do not consider that there is any distinction in principle between loss of remuneration under a fixed term contract and loss of remuneration under any other contract. The loss of earnings element of a compensatory award of an industrial tribunal is an income receipt rather than a capital receipt and is "earnings" rather than "income which does not consist of earnings".

8. The claimant has always relied strongly on the fact that awards under the Employment Protection (Consolidation) Act 1978 - or, at any rate, the income element of such awards - are now specifically included in regulation 35(1) by virtue of subparagraph (g). The draftsman certainly omitted awards under the Sex Discrimination Act 1975 and the Race Relations Act 1976. The question which arises is whether there is any significance in those omissions. The claimant relied on the maxim generalia specialibus non derogant. I agree with Mr Shaw that that maxim has no application here and that, if one must resort to Latin,

the relevant maxim is expressio unius est exclusio alterius. However, statutory construction is usually a matter of simple English usage. In the present case, the crucial word is "includes". To say that a category includes a number of things does not mean that all other things are excluded. As Mr Shaw submitted, it is quite likely that the draftsman made specific reference to the Employment Protection (Consolidation) Act 1978 in the light of the comments made by the Commissioner at the end of paragraph 13 of R(SB) 21/86 and that either he did not address his mind to the question whether the principle applied to other cases or else he considered it wise not to attempt to provide an exhaustive list of those other cases. I can see no reason for implying the deliberate exclusion of the loss of earnings element of awards under the Sex Discrimination Act 1975 or the Race Relations Act 1976 made by industrial tribunals or, for that matter, awards made by courts on claims arising from breach of employment contracts.

9. For the above reasons, I am of the view that, in this case, the compensation referable to the loss of earnings is to be taken into account as earnings under regulation 35(1) of the 1987 Regulations. The decision of the tribunal is therefore erroneous in point of law. As there is no dispute as to the facts, I can give the decision the tribunal should have given, but that requires me to consider how the earnings should be taken into account.

10. The local adjudication officer was clearly right to submit that, by virtue of regulation 29 of the 1987 Regulations, the earnings should be taken into account over a period of four weeks. However, during the course of the hearing before me, I expressed some concern at the local adjudication officer's submission that they should be taken into account over the period 5 June 1992 to 2 July 1992. Under regulation 29(2), the period over which a payment of earnings is to be taken into account begins on the date on which the payment is treated as paid under regulation 31. Regulation 31(1) of the 1987 Regulations provides:-

"...., a payment of income to which regulation 29 (calculation of earnings derived from employed earner's employment and income other than earnings) applies shall be treated as paid -

- (a) in the case of a payment which is due to be paid before the first benefit week pursuant to the claim, on the date on which it is due to be paid;
- (b) in any other case, on the first day of the benefit week in which it is due to be paid or the first succeeding benefit week in which it is practicable to take it into account."

The local adjudication officer's choice of period was based on advice that an award by an industrial tribunal is due to be made

on the date on which it is registered and 5 June 1992 was the first day of the benefit week in which the review decision of the industrial tribunal was registered.

11. It was conceded by Mr Shaw that that approach was capable of producing unfairness, particularly in the light of regulation 5(5) of the 1987 Regulations which provides:-

"A person who was, or was treated as being, engaged in remunerative work and in respect of that work earnings to which regulation 35(1)(b) to (d) and (i) (earnings of employed earners) applies are paid shall be treated as engaged in remunerative work for the period for which those earnings had been taken into account in accordance with Part V."

A person engaged in remunerative work is not entitled to any income support at all (section 20(3)(c) of the Social Security Act 1986 - now section 124(1)(c) of the Social Security Contributions and Benefits Act 1992). Regulation 5(5) does not apply to earnings to which regulation 35(1)(g) applies. In this case the amount of income support to which the claimant would have been entitled in the period 5 June 1992 to 2 July 1992 (by which time she was a single parent) was considerably higher than it was in the period 8 April 1991 to 6 May 1991, which was the period to which the compensation related. On the adjudication officer's approach, the amount of income support payable to the claimant overall would be less than would have been the case had the employer not acted unlawfully. Moreover, even if the amount of benefit withheld from the claimant between 5 June 1992 and 2 July 1992 had been the same as the benefit paid to her between 8 April 1991 and 6 May 1991, the claimant would still have suffered a double loss, because the earlier payment of benefit led to a reduction in the compensation paid by her employer.

12. Having considered the problem, Mr Shaw submitted that the relevant date for the purposes of regulation 31(1) was the date on which the remuneration was due to be paid under the original contract of employment. That submission was consistent with his principal submission that the award was a payment in lieu of remuneration and also with his submission that the legislation was intended to place the claimant in the position in which she would have been had the employer not acted unlawfully. Mr Shaw also submitted that, in as much as there is a power under regulation 31(1)(b) to attribute earnings to a later period, that power should be exercised so as not to prejudice a claimant where there has been a substantial change in circumstances. However, as the point was a new one, he asked that the adjudication officer should have 28 days in which to make a further written submission if, upon reflection, she wished to do so.

13. I acceded to that request and in due course received from the adjudication officer a further submission reverting to the submission made to the tribunal by the local adjudication

officer. She referred to R(U) 1/88 and the subsequent decision of the Court of Appeal, reported as an appendix to the Commissioners' decision, in which it was held that an award of compensation under section 68(2) of the Employment Protection (Consolidation) Act 1978 was "payable" as soon as the award was made even if the employer is in liquidation, although it would cease to be "payable" if a stay was imposed pending an appeal to the Employment Appeal Tribunal. I note, however, that that decision was made in the context of regulation 7(1)(k) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 and that the days which were not treated as days of unemployment as a result of the decision were the days in respect of which the award was payable and were not the days following the making of the award. I do not think that that decision assists me in my task of construing regulation 31(1) of the 1987 Regulations.

14. The question I must determine is whether the word "payment" in regulation 31(1) refers, in the case of the compensatory element of an award by an industrial tribunal, to the payment of the award or the payment of the lost earnings in respect of which the award was made. In my view, the latter construction is to be preferred. It should always be possible to identify the period to which the award relates and this is, as far as I am aware, the approach taken by adjudication officers when awards to which regulation 35(1)(g) applies are made. In those cases, regulation 7 of the Employment Protection (Recoupment of Unemployment Benefit and Supplementary Benefit) Regulations 1977 has the effect that an industrial tribunal does not adjust the amount of compensation to reflect the payment of income support but instead the Secretary of State may have deducted from the compensation and paid direct to him a sum equivalent to the amount of income support paid during such part of the period covered by the award as precedes the making of the award. It has not to my knowledge ever been suggested that the Secretary of State may not only recoup income support paid immediately after the dismissal but may, in respect of the same part of the award, also derive advantage from a reduction in the claimant's entitlement to benefit after the award has been made. In the present case, the element of the award in respect of loss of earnings is to be attributed to a period in April and May 1991.

15. Mr Shaw had accepted that, if earnings were to be attributed to a period in April and May 1991, the original award of income support could be reviewed but that any overpaid benefit would be irrecoverable because there had been no failure to disclose, or misrepresentation of, a material fact. The claimant therefore, in practical terms, successfully resists this appeal. At the end of the day she is no better off and no worse off than she would have been had her employer not acted unlawfully. The Secretary of State is out of pocket but the gainer is the employer rather than the claimant. The Secretary of State may wish to consider the desirability of legislation permitting recoupment from employers where awards are made under the Sex Discrimination Act 1975 or the Race Relations Act 1976.

16. The decision I substitute for the tribunal's decision is therefore in the following terms:-

"The element of the award of compensation for loss of earnings is to be treated as earnings for income support purposes and attributed to the period 8 April 1991 to 6 May 1991. The claimant is to be regarded as being in remunerative work during that period. The award of income support from 8 April 1991 is reviewed and revised to the extent that no income support was payable during the period 8 April 1991 to 6 May 1991. However, the benefit overpaid during that period is not recoverable from the claimant."

I have attributed the "earnings" to the period covered by the award of compensation. The date on which remuneration was due to be paid is not usually the same as the date in respect of which it was payable. However I do not know the arrangements for payment under the contract of employment in this case and, as any overpayment is irrecoverable, the distinction is of no practical importance. What is clear is that the relevant period would have been long before the decision of the adjudication officer which is under appeal and that the payment suspended pending this appeal must be paid to the claimant.

(Signed) M. Rowland
Commissioner
(Date) 26 October 1994