

IDENTIFIABLE DECISION  
NOT TO BE SENT OUT OF  
THE DEPARTMENT

Miss. Wigam

CAS



6/94

DGR/SH/27

Commissioner's File: CIS/77/1993

**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**

**[ORAL HEARING]**

1. My decision is that the decision of the social security appeal tribunal given on 5 August 1992 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 5 August 1992. In view of the complexity of the case I directed an oral hearing. At that hearing the claimant, who was present, was represented by Mrs Tessa Colquhoun from the Welfare Rights Unit, Liverpool City Council, whilst the adjudication officer appeared by Mr George Roe of CAS.

3. The question for determination by the tribunal was how certain payments received by the claimant as a city councillor should be dealt with in computing his claim to income support. As a councillor, the claimant received attendance allowance which it is not in dispute constituted earnings, certain other allowances which it was not in dispute were to be disregarded, and a basic allowance of £14.55 per week. In the event, the tribunal decided that the basic allowance, subject to a disregard of £5 per week in accordance with paragraph 7, a clear error for paragraph 9, of Schedule 8 to the Income Support (General) Regulations 1987 [S.I. 1987 No. 1967] (£15 as from 6 March 1992, presumably in reliance on regulation 6 applying), was also to be regarded as earnings, and not to be subject to any further

disregard. The claimant contends that this conclusion was wholly inequitable, in that his basic allowance was absorbed by the expenses wholly, exclusively and necessarily incurred by him in performance of his ward duties as a councillor. The whole sum should therefore have been disregarded pursuant to regulation 35(2)(c) of the Income Support (General) Regulations 1987. For that regulation provided as follows:-

" 35. (2) 'Earnings' shall not include:-

....

(c) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment".

However, regulation 35(2)(c) would not by itself have relieved the claimant of the inclusion of the basic allowance in his income. For regulation 40(4) would have brought back as income any sum disregarded under regulation 35(2)(c). For it provides as follows:-

40. (4) For the avoidance of doubt there shall be included as income to be taken into account under paragraph (1) any payment to which regulation 35(2) or 37(2) (payments not earnings) applies."

But paragraph 3 of Schedule 9 would then have taken the relevant payment out of income. For it provides for the disregard of "in the case of employment as an employed earner, any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment".

4. I agree with the claimant that, if he could establish that he had "expenses wholly exclusively and necessarily incurred in the performance of the duties of" councillor, and that he received payment from the local authority in respect thereof, i.e. reimbursement, he could invoke regulation 35(2)(c), and that such expenses would be disregarded as regards both earnings and income. For the purposes of this appeal, I will assume that the claimant did have such expenses, and that they eat into, or totally absorbed, his basic allowance.

5. However, in my judgment, it was not enough for the claimant merely to incur the relevant expenses. He had, if they were to be deductible from his earnings, to be reimbursed in respect of them by the local authority. The whole of regulation 35 deals with earnings derived from employment as an employed earner, and manifestly the payments referred to in regulation 35(2)(c) must in the present instance mean payments by the employer, namely the local authority. Accordingly, if regulation 35(2)(c) was to

apply, there had to be a payment of the relevant expenses by the local authority. Of course, the payment need not have been made directly to the party to whom the expenses were due; payment could have been made to the claimant by way of reimbursement for expenses initially met by himself. But the payment in question had to be in respect of "expenses wholly, exclusively and necessarily incurred in the performance of the duties of" councillor (see R(IS) 6/92). I have considered the principle adopted by the Court of Appeal in Parsons v Hogg (1985) 2 All E.R. 897 (R (FIS) 4/85) where expenses directly paid by the employee which were wholly exclusively and necessarily incurred were held deductible, but that principle related to the regulations governing family income support before expenses were expressly legislated for. That express legislation was adopted in effect in the regulations applicable to family credit, and in my judgement, the language used clearly indicates that a disregard is only allowable where the relevant payment made in respect of expenses stems, directly or by way of reimbursement, from the employer.

6. Accordingly, the crucial issue for determination by the tribunal was whether or not there was in the basic allowance paid by the local authority a sum to meet expenses wholly exclusively and necessarily incurred in connection with the claimant's duties. Under the statutory instrument setting up the scheme for allowances, the Local Authorities (Members' Allowances) Regulations 1991 [S.I. 1991 No. 351], regulation 8 which is headed "Basic Allowances" provides as follows:-

- " 8. - (1) A scheme made under this Part shall provide for the payment for each year to which the scheme relates of an allowance ("basic allowance") to each member of the authority who is a councillor; and the amount of such allowance shall be the same for each such member.
- (2) The scheme shall provide that, where the term of office of a member begins or ends otherwise than at the beginning or the end of a year, his entitlement shall be to the payment of such part of the basic allowance as bears to whole the same proportion as the number of days during which his term of office as member and councillor subsists bears to the number of days in that year.
- (3) Where a scheme is amended as mentioned in paragraph 2 of regulation 7 and the term of office of a member who is a councillor does not subsist throughout the whole of a period mentioned in sub-paragraph (a) of that paragraph, the scheme shall provide that the entitlement of any such member under this regulation shall be to payment of such part of the basic allowance referable to each such

period (ascertained in accordance with that sub-paragraph) as bears to the whole the same proportion as the number of days during which his term of office as member and councillor subsists in that period bears to the number of days in the period."

Manifestly, there is no reference there to the basic allowance covering payment or reimbursement of expenses, and in the absence of any such reference it could be said that the basic allowance constituted earnings from which there should be no disregard in respect of expenses.

7. However, the Secretary of State for the environment and the Secretary of State for Wales issued a circular (Circular 2/91 (Department of the Environment), Circular 18/91 (Welsh Office)) explaining to all local authorities the "new system of allowances introduced by these regulations made in part under section 18 of the local Government and Housing Act 1989 ('the 1989 Act'), and the changes made by the 1989 Act in other allowances payable under the local Government Act 1972 ('the 1972 Act'). In paragraph 21 of that circular it is stated as follows:-

" 21. Basic allowance is intended to recognise the time devoted by councillors to their work, including such inevitable calls on their time as meetings with constituents and political group meetings, and also to cover incidental expenses (such as the use of their homes and private telephones) for which other provision is not made. Where such incidental costs are incurred in the course of their work, councillors may continue to deduct those expenses from the remuneration received in calculating how much of that remuneration is taxable. The 1991 Regulations make no changes to any powers of a local authority to contribute towards the telephone expenses incurred by their members in the course of their duties."

The claimant told me that what the basic allowance was intended to cover was known only too well by those concerned with local authority matters, and although it might not be spelt out in the scheme itself under the Regulations, it was in practice applied in accordance with the principles set out in the circular. In the event his costs exceeded the basic allowance, and the Revenue accepted this. There was therefore no liability to taxation.

8. In order to determine whether the tribunal reached the right conclusion, I have had to give consideration to whether or not I could have regard to what is said in the circular, bearing in mind that the actual scheme itself is only to be found in the Regulations. I consider that the expression "basic allowance" is really a term of art. It is not an everyday expression, and in those circumstances I take the view that I am at liberty to interpret that expression by reference to any relevant evidence, and the circular issued by the Department of the Environment and the Welsh Office affords excellent evidence as to the meaning of the expression. It would seem to me clear from the circular that

the basic allowance was intended to (a) compensate the councillor for his time and (b) cover the expenses incurred by him in the execution of his duties. Moreover, it would seem to me that it was in contemplation that such expenses might absorb the totality of the allowance. In other words, the basic allowance is a composite figure to cover the two constituent elements, and the proportion that each element bears to the total will vary from case to case. The practical effect of this is that in some, and for all I know all, instances the relevant councillor will receive nothing for his time, the entirety of the payment being absorbed by the costs involved in the performance of his duties.

9. The tribunal allowed no disregard from the basic allowance to cover expenses. They said as follows:-

"Although appellant submitted all of basic allowances used for expenses the scheme of basic allowances provides for time spent as well as incidental costs not otherwise allowed for. The tribunal considered basic allowance cannot be shown to be wholly or exclusively and necessarily incurred in performance of employment as councillor and therefore under General Regulations 35(1) fall to be considered as earnings for purpose of calculation of income support."

The tribunal seem to be saying that, as the basic allowance compensated a councillor for time spent, it could not be wholly attributable to reimbursement of expenses, and therefore none of it will be disregarded. But it is clear that, although the allowance covered time spent by a councillor, it could properly be attributed, where the circumstances so demanded, to expenses only, and accordingly the tribunal's approach was erroneous. I must therefore set aside their decision.

10. I have considered whether I might substitute my own decision. However, as the claimant will have to show that he incurred expenses wholly exclusively and necessarily in the performance of his duties and the extent to which such expenses eat into or absorbed his basic allowance, these are matters which are more fittingly dealt with by a tribunal. Accordingly, I direct that the appeal be reheard by a differently constituted tribunal who will, of course, interpret "basic allowance" in the way explained above.

11. Finally, I should mention that with effect from 18 March 1992 regulation 3(4A) of the Social Security (Computation of Earnings) Regulations 1978 [S.I. 1978 No. 1698] came into operation. This provides as follows:-

"(4A) For the purposes of regulation 7(1)(g)(i) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 there shall be disregarded any payment made to a councillor by way of a basic allowance or special responsibility allowance payable by virtue of regulations made under section 18(1) of the Local Government and Housing Act 1989".

However, the regulation has no relevance to income support. Accordingly payments made by way of basic allowance from 18 March 1992 will be treated differently depending upon whether the relevant claim is for income support or one of the contributory benefits.

12. I allow this appeal.

(Signed) D G Rice  
Commissioner

(Date) 10 January 1994

