

MHJ/12/LM

Commissioner's File: CIS/6/1988

Region: London North

SOCIAL SECURITY ACT 1986**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that -

- (a) the decision of the social security appeal tribunal given on 17 May 1988 is erroneous in point of law and is set aside;
- (b) it is expedient that I should give the decision which the tribunal should have given, namely that the claimant is not entitled to receive an additional payment of £1.30 by way of benefit for the week commencing 4 April 1988.

2. This is an appeal by the adjudication officer against the unanimous decision of the tribunal allowing the claimant's appeal against the decision of the adjudication officer, issued on 25 March 1988 that she was "not entitled to an extra payment of £1.30 in respect of general rates for the week commencing 4.4.88".

3. I held an oral hearing of this appeal on 21 March 1989, at which the adjudication officer was represented by Mr N. Storey of the Solicitor's Office of the Departments of Health and Social Security. The claimant was represented - as she has been throughout - by Mr R. Kirkpatrick, a welfare officer with the Notting Hill Housing Trust. I am indebted to both Mr Storey and Mr Kirkpatrick for their assistance.

4. The claimant is an elderly lady who is a tenant of the Trust and, as such, is responsible for paying rent and general and water rates. She has been in receipt of supplementary benefit for some time and, up to the week beginning 4 April 1988, she also received housing benefit which covered her rent and her general rates. However, under new housing benefit regulations which came into force on 4 April 1988 the claimant became entitled to payment of only 80 per cent of her general and water rates, although her rent continued to be paid in full. With effect from 11 April 1988 the claimant's supplementary benefit was replaced by income support, pursuant to the Income Support (General) Regulations 1987 [SI 1987 No. 1967], which she received at the same rate, but during the week 4-11 April 1988, she was obliged to pay 20 per cent of her rates amounting to £2.02. The claimant's supplementary benefit was increased by £1.17 during that one week so that she was 85p out of pocket.

5. The claimant contended through Mr Kirkpatrick that she was entitled to receive an additional payment of £1.30 for the week in question pursuant to regulation 9(4)(b) of the Income Support (Transitional) Regulations 1987 [SI 1987 No. 1969] which provides -

"(4) If, in respect of his first benefit week, a former beneficiary who is entitled to supplementary benefit in respect of that benefit week is also entitled to housing benefit in the form of a rate rebate, his total benefit income in that benefit week shall be increased by -

- (a) if he is a single claimant aged under 25, £1.00;
- (b) in any other case, £1.30."

Regulation 2 of the Transitional Regulations includes the following definitions -

"first benefit week" means the benefit week beginning on a day during the period of 7 days commencing on 4th April 1988";

"former beneficiary" means a person who, for a period immediately preceding 11th April 1988, is entitled to supplementary benefit"; and

"second benefit week" means the benefit week beginning on a day during the period of 7 days commencing on 11 April 1988."

The claimant is a former beneficiary who was entitled to supplementary benefit and housing benefit in the week commencing on 4 April 1988 and, as she is over 25 years of age, it would follow that her "total benefit income" fell to be increased by £1.30. What is in issue here is whether that sum is payable in respect of the week in question. The adjudication officer took the view it was not and the claimant appealed.

6. On 17 May 1988 the tribunal allowed the claimant's appeal. They gave as their reasons that they -

"... were totally convinced that it was not the intention of the Income Support legislation, that any Claimant should be detrimentally affected by the legislation so as to receive a lesser amount of benefit in either the 'first benefit week' (4 April 1988 to the 11 April 1988) or any subsequent benefit week; they were further convinced in their belief by the explanatory note to the Income Support (Transitional) Regulations 1987 which clearly states in paragraph 2 that 'part 2 makes provision for persons whose total benefit income in the week before the 11 April 1988 is in excess of their benefit income in the following week to be entitled in addition to Income Support to amount of benefit equal to the difference ('a transitional addition') and provides for a person's benefit income in the week before the 11 April to be increased if before that date he is entitled to a rate rebate (Regulations 9 and 10)!." (the tribunal's emphasis).

The tribunal continued that they therefore accepted that -

"... the benefit week as defined in paragraph 4 of Regulation 9 ... is not merely a notional figure, there in order to calculate the subsequent award of Income Supplement, but also a real income figure to be taken into account when considering payment for the week in question ..."

Their decision was that the claimant was -

"... entitled to an extra payment of £1.30 in respect of general rates for the week commencing 4 April 1988."

7. The adjudication officer appealed. The question in issue is, as Mr Storey said, a very short but complex one. It also, I understand, potentially affects many claimants. In summary Mr Storey contended that regulation 9 of the Transitional Regulations is concerned

only with the definition of "total benefit income", while regulation 10 deals with entitlement to payment of any transitional addition, the overall purpose being to "top-up" where necessary the amount payable by way of income support to the benefit previously received by the claimant.

8. The claimant complains, with some reason, that, at any rate during the week in question, her benefit fell short, albeit by only 85p, of what it had been. However, the answer to that, it is submitted, lies in the fact that the housing benefit changes came into effect one week before income support came into force and it was not the result of any misinterpretation or misapplication of the transitional provisions. (See further paragraphs 36 to 41 of the decision of a Tribunal of Commissioners in CSB/886/1988).

9. I am persuaded that Mr Storey is correct. Regulation 9(1) of the Transitional Regulations provides that, "subject to paragraphs (2) to (5) and (7)" a person's "total benefit income" in the week beginning 4 April 1988 (the "first benefit week") means the total of any of ten specific benefits or payments, which are then set out and which include supplementary benefit. Paragraph (2) deals with the manner in which supplementary benefit is to be "taken into account for the purpose of calculating ... total benefit income in [the] first benefit week" where "a change of circumstances" takes effect in a person's second benefit week; and paragraph (3) is concerned with the calculation of supplementary benefit in the first benefit week where a beneficiary's requirements include housing benefit and he has been absent from his home for 52 weeks or more. Paragraph (7) provides that mobility allowance, mobility supplement and attendance allowance are to be disregarded to the extent that they were disregarded under the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1527]. Apart from paragraph (4), the remaining paragraphs - (6) and (8) - are purely explanatory.

10. Paragraph (4) is set out at paragraph 5 above and, looking at it, as one must, in the context of the rest of the regulation it is in my judgment plain that it should be construed as defining the addition to be made to a beneficiary's income for the purpose of calculating his entitlement to income support where he was entitled to housing benefit during the week beginning 4 April 1988. Unlike the rest of the regulation it specifies actual amounts by which such income shall be increased, whereas the other paragraphs refer to such amounts as are or should actually be in payment at the relevant time - the "first benefit week".

11. It is perhaps unfortunate that it was felt necessary to use the terminology of "first" and "second" benefit weeks which, at first sight, might appear to refer to benefits which would become payable during those weeks, whereas the "first benefit week" is simply the period by reference to which a person's income is assessed for the purpose of payment of such transitional addition as may be appropriate during the "second benefit week", which is, of course, the first week during which Income Support was in force. But I am satisfied that is the only possible interpretation of regulation 9 and it cannot, as Mr Kirkpatrick contended, "stand on its own" and provide for a "one-off" payment during the "first benefit week". Indeed, he was necessarily and very properly constrained to conclude that regulation 9 was "largely concerned with the definition of benefit income". He went on, however; "... but also contains instructions as to how the first week's benefit is to be assessed". It would be surprising if the regulation were a hybrid creature of that sort and I am satisfied that it is not. In those circumstances I am unable to accept Mr Kirkpatrick's submission.

12. Accordingly I find that the tribunal misdirected themselves as to the correct construction of regulation 9 and their decision is consequently erroneous in point of law. I also, incidentally, find that they erred in law in taking into account what they conceived to be "the intention of the Income Support legislation" and in relying upon the explanatory note to the Transitional Regulations when, as I have held, the regulation in question is capable of interpretation without recourse to such extraneous aids. Indeed, even if it had been permissible to look at the explanatory note, it could not bear the meaning the tribunal

attributed to it. The first $3\frac{1}{2}$ lines of the paragraph concerned with Part II of the regulations plainly deal with regulation 10; the tribunal appear to have been under the misapprehension that the subsequent passage, which deals with deals with increase of benefit income under regulation 9, meant that there was also provision for "a transitional addition" to be payable under that regulation. In my view that was not a conclusion which could properly be drawn from the wording of the note.

13. The tribunal's decision is set aside and, as it is possible for me to give the decision which they should have given without the necessity to find additional facts, it is clearly right that I should exercise my discretion to do so pursuant to section 101(5)(a)(i) of the Social Security Act 1975, as amended by the Social Security Act 1986. My decision is accordingly set out in paragraph 1(b) above.

(Signed) M H Johnson
Commissioner

Date: 5 April 1989