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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

Name: [redacted]

Social Security Appeal Tribunal: [redacted]

Case No: [redacted]

1. This is an appeal by the claimant against the decision of the Bristol social security appeal tribunal given on 21 July 1994. The tribunal allowed in part the claimant's appeal against the decision on review of an adjudication officer refusing to revise an adjudication officer's decision given on 16 March 1993 that -

> "... [the claimant's] housing costs should be restricted to the costs of other suitable housing in the area, namely The Finchley (price £55,250) which is a new house built and available at Brookfields, a new housing development in Wingfield Road, Trowbridge, a few hundred yards from the claimant's present address."

In making that review decision the adjudication officer said that he had "reached the conclusion that [the claimant] was not able to afford the financial commitments on his house when they were taken on in 1989". The tribunal did not agree with that conclusion. Their decision was -

> "... [the claimant is entitled to housing costs for 6 months from the date of the review on 16 March 1993 but not thereafter as there is no evidence that the property was being offered for sale from 16 September 1993."

2. The grounds put forward for this appeal are -

> "(1) The tribunal failed to record adequate findings of fact in regard to the availability of rented accommodation. This has a strong bearing on the decision, which rests on the reasonableness of

expecting Mr Stanley to seek alternative cheaper accommodation.

(2) The tribunal has erred in law insofar as it '*considers that the restriction on housing costs imposed by the decision of the AO constitutes appropriate notice of an intention to review the issue of housing costs*'. We submit that the requirement to put the claimant on notice of an impending restriction on housing costs demands a full and explicit forewarning as to the steps the claimant must now take, and that the 6 months' grace can only run as from such notice."

An oral hearing of the appeal was directed. Mr J Eames of Thamesdown Community Law Centre represented the claimant who was also present. The adjudication officer was represented by Mr D Jones of Counsel.

3. The rules relating to housing costs are in Schedule 3 to the Income Support (General) Regulations 1987. Eligible housing costs include mortgage interest payments: paragraph 1 (a) of the Schedule. More detailed rules are in paragraph 7 which contains the formula for determining the weekly amount to be allowed. Originally the claimant's housing costs were, I think, allowed in full. Then it appears that further information was brought to the attention of an adjudication officer who, on 16 March 1993, made the decision on review to which I have referred. That decision was based on paragraph 10 of the Schedule which provides for restrictions on meeting otherwise eligible housing costs in the circumstances of that paragraph.

4. Sub-paragraph 10(3) to (6) contain the rules relating to restrictions that appear to be relevant to this case. These rules are -

"(3) Where the amounts to be met under paragraphs 7 to 9 and, subject to any deduction applicable under paragraph 11 are excessive, they shall be subject to restriction in accordance with sub-paragraphs (4) to (6A).

(4) The amounts to be met shall be regarded as excessive where -

(a) the dwelling occupied as the home, excluding any part which is let, is larger than is required by the claimant and his family and any child or young person to whom regulation 16(4) applies (foster children) and any other non-dependants having regard, in particular, to suitable

alternative accommodation occupied by the household of the same size; or

(b) the immediate area in which the dwelling occupied as the home is located is more expensive than other areas in which suitable alternative accommodation exists; or

(c) the outgoings of the dwelling occupied as the home in respect of which the amounts to be met under paragraphs 7 to 10 are higher than the outgoings of suitable alternative accommodation in the area, but for the purposes of this sub-paragraph no regard shall be had to the capital value of the dwelling occupied as the home.

(5) Where, having regard to the relevant factors, it is not reasonable to expect the claimant and his family to seek alternative cheaper accommodation no restrictions shall be made under sub-paragraph (3).

(6) Where sub-paragraph (5) does not apply and the claimant (or other member of the family) was able to meet the financial commitments for the dwelling occupied as the home when these were entered into, no restriction shall be made under this paragraph during the first 6 months of any period of entitlement to income support nor during the next 6 months if and so long as the claimant uses his best endeavours to obtain cheaper accommodation or, as the case may be, no restriction shall be made under this paragraph on review during the 6 months from the date of the review nor during the next 6 months if and so long as the claimant so uses his best endeavours."

5. The "relevant factors" referred to in sub-paragraph (5) are set out in sub-paragraph (7) which reads -

"(7) In sub-paragraph (5) "the relevant factors" are -

(a) the availability of suitable accommodation and the level of housing costs in the area; and

(b) the circumstances of the family including in particular the age and state of health of its members, the employment prospects of the claimant and, where a change in accommodation is likely to result in a change of school, the effect on the education of any child or young person who

is a member of his family, or any child or young person who is not treated as part of his family by virtue of regulation 16(4) (foster children)."

The scheme therefore is that if (a) or (b) or (c) of sub-paragraph (4) applies there must be a restriction unless sub-paragraph (5) applies. And if sub-paragraph (5) does not apply then, provided the claimant "was able to meet the financial commitments for the dwelling occupied as the home when these were entered into" paragraph (6) provides that there should be no restriction during the first six months with the possibility that the next six months may be free of retriction "if and so long as the claimant uses his best endeavours to obtain cheaper accommodation".

6. In relation to the application of sub-paragraph (6) and entitlement to "the next six months" free of restriction I should, at this stage, mention R(SB) 7/89 which seems to have decided that a claimant could be penalised for failing to use his best endeavours to obtain cheaper accommodation only if he has been given advance notice of the necessity to do so. This principle accounts for the second ground for this appeal to which I referred in paragraph 2 above. There are other cases on the point to which I will refer below.

7. It is not plain to me, from the way in which the adjudication officer recorded his decision of 16 March 1993, which of (a) or (b) or (c) of sub-paragraph (4) he had applied but it must have been one of them. It is implicit that he took the view that sub-paragraph (5) did not apply and he expressly decided that no period could be free of restriction under sub-paragraph (6) because he concluded that the claimant was not able to meet the original financial commitments.

8. The tribunal took the view that restriction was appropriate under one or other limb of sub-paragraph (4), that, as in their view, it would be reasonable to expect the claimant and his family to seek cheaper alternative accommodation, sub-paragraph (5) did not apply but as the claimant could, in their view, meet the original financial commitments, he was entitled, under sub-paragraph (6), to six months free of restriction; but he was not entitled to a further six months because "there is no evidence that the property was being offered for sale from 16 September 1993". The reasons the tribunal gave for their decision were -

"The Tribunal answers the questions posed by Regulation 10(4) as follows.

The dwelling is not larger than required by the claimant, his family and any child or young person and any other non-dependent. But the immediate area in which the dwelling occupied as the home is located is more

expensive than other areas in which suitable accommodation exists. There is suitable accommodation within ½ a mile and this, in the opinion of the Tribunal, is sufficient to constitute an appropriate area. The outgoings of the dwelling are higher than the outgoings of suitable alternative accommodation available within ½ a mile.

With regard to the relevant factors it is reasonable to expect the claimant and his family to seek alternative cheaper accommodation because his mortgage arrears are increasing greatly, he is unemployed, his past record is strongly against any possibility that he will obtain another mortgage.

He was able to meet the financial commitments for the dwelling occupied as the home when these were entered into, as he then had employment and a reasonably high salary (whether or not it was being properly paid) and he was able to borrow virtually the whole of the purchase price. It is therefore appropriate not to make any restriction within 6 months of the review under paragraph 10(6) but from 6 months after that because Mr Stanley has not got the property on offer, it is appropriate to impose a restriction upon the payments made. The Tribunal takes judicial notice of the fact that in every town and city there is a certain amount of rented accommodation available particularly as the housing market has become much freer because of people's inability to sell their property at appropriate figures.

The Tribunal considers that the restriction on housing costs imposed by the decision of the AO constitutes appropriate notice of an intention to review the issue of housing costs."

9. Mr Eames, in his grounds of appeal, had explained in some detail why he took the view that the tribunal's findings of fact were inadequate to justify the conclusions expressed in those reasons. He said -

"It is submitted that the tribunal has substituted speculation for findings of fact, as far as the question of availability of rented accommodation is concerned. The tribunal took '*judicial notice of the fact that there is in every town and city some accommodation available for rent*'. Whilst this statement *may* have some truth to it, it is not completely unassailable. some would say it is highly debatable. We take issue with the implication that it is so incontrovertibly true that it can fairly be the object of judicial notice. Judicial notice obviates the need for evidence, but only on matters so uncontroversial that, effectively, the parties agree on them.

Following on from this, there is then a potential error of logic for the tribunal to go on to assume that such accommodation is both suitable for, and available to, the claimant in question. This error seems to have been made. It led, in our view, to the misapplication of **Paragraph 10(5)** of the **Income Support (General) Regulations.**

In the event, neither party to the proceedings was able to provide any evidence as to the availability of *any* rented accommodation in Trowbridge, much less *suitable* rented accommodation, in other words accommodation suitable for a family with a young child, as opposed to bedsitter-type accommodation suited to single people. As Mr Stanley's representative, I recall suggesting to the tribunal that it was common knowledge that rented accommodation for families is difficult to find, particularly in small country towns like Trowbridge. At least one tribunal member suggested that the field of search should be widened to include Bristol (which is about 20 miles away). Although these points are not recorded in the Note of Evidence, I believe they informed the tribunal's thinking.

Our view that an error of law was made is based therefore on the submission that **Paragraph 10(5)** of the **Income Support (General) Regulations** was misapplied because the test of whether or not it was reasonable to expect Mr Stanley to seek alternative cheaper accommodation has not been properly answered.

Whilst the possibility of his obtaining a mortgage was investigated with some thoroughness, and found to be very remote, the possibility of his obtaining accommodation to rent was not duly investigated. Although not strictly relevant to the point of law here, the facts - as subsequently investigated by ourselves - incidentally point to a dearth of such accommodation locally, and evidence on this might have produced a different decision."

10. Mr Jones for the adjudication officer accepted that the tribunal's findings were deficient in the respects referred to by Mr Eames. I agree that the tribunal's findings of fact are insufficient and on that account the tribunal's decision is erroneous in law.

11. Mr Eames' point about notice derives, as I have indicated, from R(SB) 7/89. In that case it was held, in relation to the like provisions of the supplementary benefit scheme, that a claimant should have notice that he should use his best endeavours to obtain cheaper accommodation before being deprived of a second restriction-free six months.

Mr Eames submitted that not only did the decision of 16 March 1993 not give any explicit notice but, furthermore, notice could not be implied from its terms because the crux of that review decision was that the claimant was not able to meet his original financial commitments and therefore sub-paragraph (6) had no application at all; if, said Mr Eames, that sub-paragraph did not apply at all it could hardly be said that a decision to that effect gives notice under that provision in accordance with what was said to be required by R(S) 7/89.

12. There is no express requirement in sub-paragraph (6) that notice should be given that a further six months notice without restriction is possible if the claimant uses his best endeavours to obtain cheaper accommodation. In R(SB) 7/89 it is said (paragraph 8) that the requirement of such a notice is implicit because to hold otherwise "would be to fly in the face of commonsense, let alone common justice". It is not clear from the decision in that case in what terms the adjudication officer had expressed his decision. In another case on the same point, R(IS) 13/92, housing costs from the outset had been restricted on the basis that it was reasonable to expect the claimant and his family to obtain alternative accommodation. That is apparently why the Commissioner in that case took the view that that decision gave adequate notice to the claimant that he should use his best endeavours to obtain cheaper accommodation.

13. In a further written submission following a direction given at the hearing of this appeal Mr Eames says -

> "7 The core of our submission in this respect is that at no point did the department explicitly put Mr Stanley on notice. Indeed it could not, because, as outlined above, it had no intention of deferring the restriction. If there was to be no deferral, how could notice be an issue?
>
> 8 In that case then, we would argue that the date from which Mr Stanley can be taken as being put on notice should be the earliest date by which both of two factors are satisfied:
>
> (i) a decision is made to invoke the limb of 10(6) requiring 'notice' and 'best endeavours', instead of the limb ignoring these concepts; and
>
> (ii) the claimant has been told clearly by an adjudicating authority that he is henceforth on notice to use his 'best endeavours' to seek different accommodation.

As to (i), the first date when this is satisfied was that of the tribunal hearing, 21 July 1994. Until then, no decision requiring notice had been made.

As to (ii), given that Mr Stanley was being represented, it is reasonable to suppose that he was put on notice by a combination of the tribunal decision (which was given orally on the day) and advice on what this meant - in principle - from his representative, myself.

9 Period 1 should start on 21 July 1994, and Period 2 should therefore start 6 months later on 21 January 1995. On that basis, Mr Stanley is entitled to unrestricted housing costs

- from 21 July 1994 until 20 January 1995 if he could afford the housings costs when he purchased the property, and
- from 21 January to 20 July 1995 if, not only could he afford the housings costs when he purchased the property, but if also he was using his best endeavours during that period to seek alternative accommodation.
- From 21 July 1995 onwards, a restriction in line with 10(6) is permissible."

Mr Jones conceded that that submission is correct if it is decided that, contrary to Mr Jones' contention, notice was not given by the adjudication officer's decision. I have however come to the conclusion that Mr Eames' submission is misconceived.

14. The adjudication officer's decision on 16 March 1993 was, as I have said, a decision on review. Accordingly, the last few words of sub-paragraph (6) apply namely -

> "... no restriction shall be made under this paragraph on review during the 6 months from the date of the review nor during the next 6 months if and so long as the claimant so uses his best endeavours."

So it is plainly not a question of finding any period of six months free of restriction and any further such period after notice is given. In effect, on review, there is a possible maximum entitlement of two successive periods of six months free of restriction.

15. The tribunal in this case should first have considered whether the adjudication officer who made the decision of 16 March 1993 had grounds for review. If he did not then the original award could not be varied. If the tribunal had found

that the adjudication officer did have grounds for review then they had to consider whether restriction was appropriate under sub-paragraph (4) and (5) and, if so, whether, under sub-paragraph (6), the six months from the date of the review should be restriction-free having regard to whether the claimant was able to meet the original financial commitments. Then, if those six months were allowed, the question arose whether the next six months should be restriction-free on the basis that the claimant had used his best endeavours to obtain cheap accommodation. I cannot see however that a failure to give notice could affect the matter. Sub-paragraph (6) plainly does not allow any discretion as to when the second six months should begin; in my view, it is not open, on the plain wording of the provision, to an adjudicating authority to decide that the second six months should begin only after notice had been given. Neither R(SB) 7/89 nor R(IS) 13/89 deals with this point; although the Court of Appeal dismissed the Secretary of State's appeal against the latter decision no mention was made of the point in question.

16. I have come to the conclusion that it is desirable, highly desirable for the reasons referred to in R(SB 7/89, that when a restriction is imposed but postponed for the first six months pursuant to sub-paragraph (6), the claimant should be clearly told that a further six months could be had if he uses his best endeavours to obtain cheaper accommodation. But there is, in my view, no basis on which that can be turned into a legal requirement because there is no basis on which a restriction can continue to be postponed until a notice or warning is given. I derive support from this view from CIS/104/1991 in which the Commissioner said (paragraph 19) -

> "For my part, I am firmly of the view that a clear prospective adjudication officer's decision should be made and notified in writing <u>at the commencement</u> of the first six months period. There should be no practical difficulty. By definition, all the relevant factors will by then be ascertainable. Should circumstances materially change during those six months, a review decision can be made and notified. Likewise, a review decision can be made and notified if the situation justifies the further six months period; and those six months can be abridged by review in the event that the relevant claimant should cease to use his best endeavours to obtain cheaper accommodation. I wish to make quite plain, however, that my use of the word "should" in the first sentence of this paragraph reflects what I consider <u>ought</u> to be the position. I cannot - and do not - pretend that that position can be confidently extracted from the legislation as it currently stands."

That represents the position as I see it.

17. I allow this appeal for the reasons to which I have referred, set aside the tribunal's decision and remit the case for rehearing by a differently constituted tribunal. The new tribunal should deal with the case as I have indicated in paragraph 15 above. With regard to whether sub-paragraph (5) was satisfied they must make all necessary findings of fact as to whether it was, in all the circumstances, reasonable to expect the claimant and his family to seek alternative cheaper accommodation. And, if it arises, they must make full findings of fact as to all the matters made relevant to the restriction-free periods provided for in sub-paragraph (6).

(Signed) R. A. Sanders
Commissioner

(Date) **23 August 1996**