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DGR/SH/15

Commissioner's File: CIS/277/1989

★ 32/92

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 the decision of the social security appeal tribunal given on 28 April 1989 is erroneous in point of law, and accordingly I set it aside. As it is expedient that I give the decision the tribunal should have given, I further decide that the claimant is entitled to a social fund payment to meet funeral expenses in the sum of £505.69.

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 28 April 1989. In view of the complexity of the case I directed an oral hearing. At that hearing the claimant was represented by Miss M Teo of Counsel from the Free Representation Unit, whilst the adjudication officer appeared by Mr J Heath of the Solicitor's Office of the Departments of Health and Social Security.

3. The facts of this case are straightforward and not in dispute. The claimant applied for a social fund payment to meet the funeral expenses of her partner who died on 30 June 1988. The claim was received on 5 July 1988, and the claimant was asked for details of her savings. On 12 July 1988 she disclosed that her savings amounted to £1,319.31 as at 9 July 1988. The cost of the funeral, which was conducted by the Burial Society of the United Synagogue came to £1,325. On 28 July 1988 the social fund officer telephoned the Burial Society seeking a breakdown of their bill. He was informed that it was difficult to itemise the cost, but was given some details, namely that the total cost included the expense of the coffin, hearse, bearers and minister etc. However, he was not satisfied that he had been given sufficient detail to enable him to make a decision on the claim. The claimant herself then sought to obtain further itemisation, but without success. Accordingly, on 19 September 1988 the adjudication officer decided that the claimant was not entitled to a social fund payment to meet the funeral expenses because of

her failure to provide a detailed breakdown of the costs involved. On 26 October 1988 the social fund officer received a letter from the Enfield Citizens' Advice Bureau together with a letter from Mr Mark Foreman, the Secretary of the Burial Society of the United Synagogue. In that letter he said as follows:-

"....

The United Synagogue Burial Society undertakes all funeral arrangements for its members. These arrangements consist of a basic funeral according to Orthodox Jewish rite. This is a total package and includes ritual washing of the body, binding in linen shrouds, placing in a simple wooden coffin, transportation to the cemetery, a burial plot and a minister to conduct the Service. No item is costed individually and I therefore regret that I am unable to provide you with a 'price list' for these services. There is only one rate and this was as charged to [the claimant].

...."

The adjudication officer reconsidered the matter in the light of that letter, but concluded that there were no grounds on which he should change his decision.

4. In due course, the claimant appealed to the tribunal who allowed the appeal in part. In the course of his submission to the tribunal, the presenting officer stated that the Department had found the average cost of a funeral to be £700. He added that the Department would from their own extensive experience consider £800 as the top limit, and were prepared to add £75 for the requirements of a religious faith. The claimant was still in no position to itemise the costs of the funeral. In the light of that evidence, the tribunal decided that they would allow £875 in all, and as the claimant was in a position to pay £819 towards the cost of the funeral, this sum being arrived at by deducting £500 from her current savings of £1,319, she was entitled to £56. (Actually her savings were 31p more than the figure relied upon by the tribunal, but this is de minimis.) The claimant now appeals on the basis that the tribunal applied the wrong principle. The tribunal should not have taken a standard figure of £800 as the base figure for a funeral, but should have looked at the actual cost of the funeral in the claimant's case.

5. The crucial regulation is regulation 7 of the Social Fund Maternity and Funeral Expenses (General) Regulations 1987. This, so far as it is material to this appeal, reads as follows:-

- " 7. - (1) ... a social fund payment to meet funeral expenses (referred to in these regulations as a 'funeral payment') shall be made only where -
- (a) the claimant or his partner has, in respect of the date of the claim

for a funeral payment, been awarded either income support, family credit, housing benefit or community charge benefits; and

(b) the claimant, or if he is a member of a family, one of his family takes responsibility for the cost of a funeral (in these Regulations referred to as the 'responsible member) and

(c) the funeral takes place in the United Kingdom; and

(d) the claim is made within the period specified for such a claim in regulation 19 of, and Schedule 4 to, the Social Security (Claims and Payments) Regulations 1987.

(2) the amount of a funeral payment shall be the amount sufficient to meet any of the following essential expenses which fall to be met by the responsible member:-

(a) the cost of any necessary documentation;

(b) the cost of an ordinary coffin;

(c) the cost of transport for the coffin and bearers and one additional car;

(d) the reasonable cost of flowers from the responsible member;

(e) undertaker's fees and gratuities, chaplain's, organist's and cemetery or crematorium fees for a simple funeral;

(f) the cost of any additional expenses arising from a requirement of the religious faith of the deceased, not in excess of £75;

(g) where the death occurred away from the deceased's home, the cost of transporting the body within the United Kingdom to the home or to the undertaker's premises or to a chapel of rest; and

(h) the reasonable travelling costs of

one return journey within the United Kingdom by the responsible member in connection with either the arrangements of or attendance at the funeral.

(3) ..."

6. It is not in dispute that the claimant satisfied regulation 7(1). The items set out in the "total package" referred to in the Burial Society's letter of 20 October 1988 appear to fall within regulation 7(2). But the cost of this package is clearly far greater than that normally involved in a Christian or secular funeral.

7. Mr Heath very helpfully led evidence dealing with the practices of the Burial Society, and the requirements of Jewish law and custom. He produced as witnesses Dr. J Phillips, the Registrar of the Court of the Chief Rabbi, who was able to deal with the activities of the Burial Society, and Dr. I Berger, Dayan, that is an ecclesiastical judge at the Court of the Chief Rabbi, who gave evidence on matters of Jewish law and custom. I found the evidence from both these gentlemen extremely helpful. Dr Phillips explained that it was a requirement of Jewish law - and Dr. Bergen confirmed this - that a deceased Jew should be buried, if at all possible and subject, of course, to the law of the country concerned, on the actual day of death. He stated that more often than not the deceased was buried within 24 hours of death. If this was not possible, then burial should take place as quickly as circumstances permitted. There were certain essential requirements, eg. the body must be properly prepared, washed and shrouded, and in order to ensure that all the proper rites were carried out the Burial Society had a special staff. They knew the number of practising Jews and where they were located, and they could reasonably compute the number of deaths that would take place each year, and could provide accordingly. The crucial feature of Jewish burials was that they had to be done speedily. Therefore there had to be a trained staff prepared to go into action at once. The cost of this team was simply spread over the number of burials during the year. Therefore it was not possible to itemise the various elements that went to make up the "total package".

8. Dr. Berger, in his evidence by implication confirmed what Dr. Phillips had said, and made some additional observations of his own. He explained that in a Jewish funeral a shroud, washing and dressing, a private grave, and the services of a Rabbi were essential. A hearse was not essential, nor was a coffin. Indeed in Israel it was not the custom to use a coffin at all. However, he explained that for centuries in this country a coffin had been used in Jewish funerals and in this day and age a hearse was in practice employed. Flowers were expressly forbidden. He also said that it was the usual practice for kosher food and drink to be supplied, at the time of the funeral, to those attending. However, that was not required by Jewish law or custom. A funeral without them would, however, be regarded as in the nature

of a pauper's burial. He also explained that, for some seven days after the funeral, prayers were said, and it was customary to supply some form of refreshment to those participating. The Burial Society did not give out gratuities to such persons as the hearse driver, the cemetery superintendent or the grave diggers, but it was customary for the relatives of the deceased to do so. At one time the Burial Society sought to stamp out the practice, but owing to the spontaneous expression of generosity typical of the Jewish people, the relatives could not be prevented from making these payments. They were, however, not required by Jewish law or custom.

9. I consider that the claimant's criticism of the approach of the tribunal is well founded. In determining whether the funeral payment of £1,325 fell within regulation 7(2), the tribunal could not take an average figure for funerals generally as the basic measure of comparison, but had to decide whether the cost of the items to which the funeral in question gave rise were expenses allowable under the regulation. I must therefore set aside the tribunal's decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to a new tribunal for rehearing. I have had the benefit of evidence from Dr. Phillips and Dr. Berger, and I can conveniently substitute my own decision for that of the tribunal.

10. It will be noted that regulation 7(2) speaks of "the following essential expenses". It does not say "the following expenses, in so far as they are essential". It treats the expenses set out in sub-paragraphs (a) to (h) as being by definition essential. But what limitation is there on their being exorbitant? In the case of (d) and (h) the word "reasonable" is used by way of qualification, but it is not found elsewhere. In the case of (f) there is a monetary limit of £75. In the case of (b) there is a limitation, in that the cost is restricted to an "ordinary" coffin, and in the case of (c) only "one additional car" is permitted. However, there are still some areas where there is no express limitation on the cost. It must be borne in mind that funeral payments under the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 are drawn from public funds for the benefit of persons who are in receipt of means-tested benefits. In that context, there must inevitably be a restriction on costs, and even where the word "reasonable" is not employed, I consider that it is to be implied. Access to social security funds is not to be exploited.

11. The evidence given by Dr. Phillips and Dr. Berger clearly showed that a Jewish funeral was essentially simple in nature. Every person came into the world with nothing and left with nothing. Moreover, there was only one class of funeral for every deceased Jew. Although no evidence was directed as to how efficiently the Burial Society conducted their affairs, I have no reason to suppose that there was any undue extravagance involved in their activities. Presumably, if an excessive figure was being charged, through administrative incompetence, the Jewish community would have put pressure in the right quarter, and remedial action have been taken. I was informed that the

Burial Society conducted 80% of all Jewish burials. Accordingly, on the balance of probability I am satisfied that the figure of £1,325 is reasonable for the cost of a Jewish funeral. I am also satisfied that the elements that go to make up a Jewish funeral fall within regulation 7(2).

12. However, a difficulty arises out of sub-clause (f) with its imposition of an excess of £75 on "the cost of any additional expenses arising from a requirement of the religious faith of the deceased". Could it be said that a need for the enhanced cost of a Jewish funeral as against a Christian or secular funeral was occasioned by the need to bury on the same day of death or as shortly thereafter as possible, that this need was "a requirement of the religious faith of the deceased", and that any enhanced cost should not exceed £75?

13. The point is not altogether easy. However, on balance I consider that the words "additional expenses" refer to expenses over and above the items set out in sub-paragraphs (a) to (e), and not to the enhanced cost of the items falling within those sub-paragraphs, occasioned by the Jewish faith of the deceased. Thus, if the Jewish faith called for some additional expense such as a reception for guests at the funeral or at prayers thereafter, this would be something falling within sub-paragraph (f) and would be subject to the limitation of £75. Sub-paragraph (f) does not envisage additional expenses in any wider sense. Accordingly, in my judgment, the claimant is entitled to a funeral payment under regulation 7(2) of £1,325.

14. The claimant also sought the cost of kosher wines and refreshments amounting to £110, and certain gratuities paid out to the hearse driver, the cemetery superintendent and the grave diggers amounting to a further £25. I do not consider that the cost of the refreshments was an additional expense "arising from a requirement of the religious faith of the deceased". Dr. Berger stated that such hospitality was not required by Jewish law or custom. It was merely something that was expected. However, I do not think it is any more expected than a wake is expected at a Christian funeral, and I have to consider that what is expected has to be viewed in the context of the need to restrict unnecessary demands on the social security fund. Refreshment of the kind in issue is something which, if it cannot be provided by a relative or mourner from his or her own funds, will simply have to be dispensed with.

15. As regards the gratuities, sub-paragraph (e) of regulation 7(2) contemplates "undertaker's gratuities", i.e. the gratuities actually paid out by the undertaker. It does not contemplate gratuities paid out by any other party. Mr Heath rightly pointed out to me that there was a possibility of abuse if gratuities paid out by all and sundry could in effect be reclaimed. The limitation imposed by sub-paragraph (e) offered a protection to the social security fund, in that the only gratuities allowed to be included in the claim were those dispersed by the undertaker, and commercial considerations would prevent him from being too lavish. I think that approach is correct. The gratuities paid

in this case by someone other than the Burial Society were not a necessary expense called for by Jewish law or custom, and accordingly cannot be included in the amount of the funeral payment.

16. It follows from what has been said above that the claimant is entitled to £1,325 less, of course, the amount by which her savings exceeded £500 pursuant to regulation 9, as it then was, and as a result she is entitled to £505.69.

17. Accordingly my decision is as set out in paragraph 1.

(Signed) D.G. Rice
Commissioner

(Date) 23 April 1992