

Person who must be 'served'

* 11/98
CRAG ⑦

MJG/SB/ZA/7

Commissioner's File: CIS/450/1997

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

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 25 September 1996 as that decision is erroneous in law and I set it aside. My decision is that at the date of the claim for income support, i.e. 17 July 1996, the claimant, a student nurse, was within the definition of "student" in regulation 61 of the Income Support (General) Regulations 1987 (S.I. 1987 No. 1967 as substituted by S.I. 1991 No. 1559 and S.I. 1992 No. 468) and was, despite her illness at that date, "attending a full-time course of study at an educational establishment". Consequently, she was not on 17 July 1996 nor thereafter, so long as the circumstances remained the same, entitled to Income Support: Social Security Contributions and Benefits Act 1992, section 124(1)(d)

2. This is an appeal to the Commissioner by the adjudication officer against the unanimous decision of a social security appeal tribunal dated 25 September 1996 to the effect that the claimant (a student nurse at the time aged 21) was, "... entitled to Income Support from 17 July 1996 [date of claim] because she is not a student." I deal in detail below with the reasons for that decision and for my setting the tribunal's decision aside.

3. On my direction, the appeal was the subject of an oral hearing before me on 20 January 1997, at which the claimant was neither present nor represented. The adjudication officer was represented by Miss J Hartridge of the Office of the Solicitor to the Departments of Health and Social Security. I have taken into account the oral submissions of Miss Hartridge at the hearing, the adjudication officer's written submissions and in particular the detailed written submission dated 6 January 1997. I have also given full consideration to the

carefully thought-out written representations that the claimant has made to the Commissioner.

4. The facts of the case are as follows. In a statement dated 15 August 1996 the claimant said,

"I started as a Project 2000 student nurse in September 1993. I started at W-Hospital and in March 1995 I transferred to the F-Hospital Training Centre, as the Training Centre at W-Hospital closed down. I have received a bursary every month due on the last Tuesday in every month. I have never been employed by any hospital authority."

5. It also appears from the documents that while a student nurse at the F-Hospital Training Centre the claimant's bursary was paid by the University of N under funds supplied to the University by the Department of Health under an education training contract. The claimant had a 37½ hour week, some of which certainly consisted of practical work on the Wards etc. and some of which was formal instruction. The exact division between the two has not been stated.

6. The amount of her bursary was £375.50 per month. The circumstances in which it is paid (under arrangements made under section 63(6) of the Health Services and Public Health Act 1968) are described by the NHS Executive in a letter to the adjudication officer, dated 3 January 1997, as follows,

"Difference between Project 2000 [i.e. student nurses under a new scheme] and other students. The NHS bursary is greater than the mandatory award grant which undergraduates receive. The bursary for students has been set both to support the recruitment and retention of nursing students and to reflect the fact that these students are required to study for 45 weeks each year to meet statutory requirements. However, NHS bursaried students are not eligible to supplement their income by applying for loans, whereas undergraduates can apply for further financial support in the form of grants and loans administered by their local education authorities and the Student Loan Company."

7. A further significant difference between the bursary payable to the claimant and the normal undergraduate grant emerges from a letter from the University of N to the claimant dated 17 July 1996 reading as follows:-

"SUSPENSION OF BURSARY DUE TO SICKNESS IN EXCESS OF 28 DAYS

In accordance with the College policy on Sickness/Absence for RN/Dip HE students, it is my responsibility to inform you that continuous sickness/absence in excess of 28 days

will result in suspension of your bursary. I note that your current period of sickness has now reached 21 days, therefore if you have not returned to work by 17 July 1996 your bursary will be suspended until further notice. If you have any problems regarding this communication, please contact your Personal Tutor/Programme Director. Furthermore, if you require any advice regarding your likely entitlement to State benefits, please do not hesitate to get in touch with .. the College Bursar .."

8. In fact what had happened is that on 19 June 1996 the claimant had undergone an emergency appendicectomy as a consequence of peritonitis. Her bursary ceased to be paid on 17 July 1996, the date of the letter set out in para 7 above. On that date she claimed Income Support. She clearly was ill for sometime because the tribunal which sat on 25 September 1996 found as a fact, "by virtue of her illness she was unable to return to work until a date to be determined." Her Final Examination was due on 7 October 1996 but she clearly was not well enough to take it then because in a letter by her (accompanying form OSSC4 received on 28 April 1997) she states,

"I have just commenced a new job which has involved going for interviews as well as working full-time in my previous job. I am attempting to get my life back to normal following my illness and the pressures of having to complete my nurse training and take my final exam at a later date due to my period of sickness ..."

9. The issue in this appeal is whether or not a Project 2000 student nurse is a "student" within the meaning of regulations 10(1)(h) and 61 of the Income Support (General) Regulations 1987 (as amended, see references in para 1 above) and therefore not entitled to claim Income Support during the continuance of the course. The social security appeal tribunal in this case held that the claimant was not a "student" and awarded Income Support to her on that basis. The tribunal clearly took the utmost care with this case and gave detailed reasons for arriving at the conclusion they did. However, I have since had the advantage of a detailed written submission dated 6 January 1997 from the adjudication officer which draws to my attention a number of Commissioners' decisions (not, however, relating to student nurses). I have also been supplied with material from the NHS Executive relating to the Project 2000 courses for student nurses, all of which material the original tribunal did not have. After careful consideration (because the issue is difficult) I have ultimately concluded that a Project 2000 student nurse is indeed a "student" and therefore not entitled to income support (1987 Regulations, regulation 10(1)(b)).

10. The original tribunal erred in law, firstly, because in the light of the evidence it was not in my view permissible in law to hold that the claimant was not a "student". Moreover, they further erred in stating that the onus of proof that the claimant was a "student" was upon the adjudication officer. I accept paragraph 10 of the adjudication officer's written submission dated 6 January 1997 (citing R(IS) 21/93 that the onus lay upon the claimant to show that she was not a "student", in order to show entitlement to Income Support, when the facts prima facie pointed to the conclusion that she was a "student". Moreover, the tribunal considered that they had insufficient evidence before them and held that because the adjudication officer had not produced that evidence they must allow the appeal. There again the decision of the tribunal is incorrect. The tribunal has inquisitorial powers and could itself have had enquiries made if it required further information eg. as to the proportion of the time that the claimant spent on the wards and the proportion of time in formal instruction).

11. However, having considered all the evidence before me (and I have fact finding powers under section 23 of the Social Security Administration Act 1992) I have come to the conclusion that, whatever the proportion of practical work and theoretical instruction, a student nurse on a Project 2000 course is "... a person aged 19 or over .. who is attending a full-time course of study at an educational establishment" (regulations 2 and 61 of the 1987 Regulations) and therefore "a student" disentitled to Income support. The tribunal were worried about the F- Hospital (a premier hospital in a large UK city) being described as an "educational establishment". I well understand their hesitation, but in fact the courses and the instruction there were being carried on in the training centre of the hospital under the aegis of the University of N. There is no doubt in my view that for this purpose the F- Hospital was "an educational establishment" (compare a decision on file CIS/050/1990 (paragraphs 20-22), cited by the adjudication officer).

12. The tribunal were also concerned because they thought that the period of 37½ hours a week commitment of the claimant at the F- Hospital sounded "uncannily like a working week" and that the bursary was conditional on the claimant, as they put it, "attending for work". I recognise the force of these arguments. However, information which I have subsequently received via the adjudication officer does deal with these matters. In the detailed letter dated 3 January 1997 from the NHS Executive, it is stated,

"Pre-registration [nursing] students are not liable for income tax on their bursary, do not pay national insurance contributions and are exempt from Council tax. This is in line with other students following designated higher education courses... [student nurses under the

project 2000 Scheme are]... registered full-time students at an institution of higher education and read for a recognised academic award at a minimum of Diploma in Higher Education level. Academic and professional validation of these course ensures that programmes of study lead both to a recognised academic award and eligibility to register with the United Kingdom Central Council for Nursing Midwifery and Health Visiting (UKCC), the statutory body responsible for the regulation of the nursing profession. Students have supernumerary status. This is defined in Statutory Instrument 1456, the Nurses, Midwives and Health Visitors Approval Order (1989). This details the requirements of training which leads to eligibility to register on either Part 12, 13, 14 or 15 of the UKCC Professional Register. Supernumerary status is defined as follows:

'supernumerary status' means, in relation to a student, that she shall not as part of her course of preparation be employed by any person or body under a contract of service to provide nursing care'

This contrasts with the position of student nurses undertaking the 'traditional' programmes of education and training - which preceded Project 2000, who were NHS employees. This is not the case with Project 2000 students who are not employees, are not issued with contracts of employment and who are under no contractual obligation to provide nursing care or any other service to the NHS."

13. Taking into account this information, which is borne out by the other documentary evidence that I have before me, I conclude that the claimant was in truth a "student" within the definition in the 1987 Regulations (see above). Moreover, her illness, though protracted, did not mean that she was no longer "attending a full-time course of study", regulation 61, because that regulation adds that "a person who has started on such a course shall be treated as attending it throughout any period of term or vacation within it, until the last day of the course or such earlier date as [she] abandons it or is dismissed from it." It is not legally possible for there to be a temporary abandonment of a course (Chief Adjudication Officer and Secretary of State v. Clarke and Faul, The Times, 22 February 1995, Court of Appeal). Consequently, the claimant's illness and postponement of her final Examination did not mean that in law she had ceased to attend her course.

14. The practical consequence of this is that, while off sick, the claimant received neither her bursary, nor Income Support. She has made representations to the Commissioner about the harshness of this. However, I have no power to waive or alter the provisions of the legislation. It may be that the Department of Health, as the provider of the bursary,

may wish to re-examine its rule as to non-payment after 28 days' sickness, but that is not a matter for me. The adjudication officer may, however, wish to draw this decision to that Department's attention.

15. Finally, I should mention the possibility that the claimant was not "a student", on the ground that she was excepted from being a "student" by being a person in receipt of a training allowance". Prima facie, there is some attraction in that proposition since the definition of "training allowance" in regulation 2 of the Income Support (General) Regulations 1987 in many ways applies to the arrangements here eg. that the allowance was payable "out of public funds by a Government Department" i.e. the Department of Health. Moreover, in a way, it could be said that the claimant was "following a course of training or instruction provided by or in pursuance of arrangements made with that Department .." (regulation 2(c)). However, in my view, what prevents the bursary in this case being regarded as a training allowance is that the definition in regulation 2 states that such an allowance does ".. not include an allowance paid by any Government Department to or in respect of a person by reason of the fact that [she] is following a course of full-time education ..". For the reasons which I have already given above in relation to the claimant's status as a "student", I conclude that undoubtedly here the claimant was following "a course of full-time education". The bursary payable to her therefore could not be regarded as a training allowance. (Compare the decision in Northern Ireland RI/93(FC), that a student nurse under the Project 2000 Scheme is not entitled to Family Credit).

(Signed) M J Goodman
Commissioner

(Date) 2 February 1998