DECISION OF THE SOCIAL SECURITY COMMISSIONER

The Commissioner’s decision in summary

1 This appeal fails. The decision of the Leeds appeal tribunal of 29 July 2003 is not erroneous in point of law. It will be no consolation to the claimant and her representative to hear that I found their arguments intuitively attractive, but have felt compelled to dismiss the appeal for the following reasons.

The central issue in this appeal

2 This appeal concerns what appears, on the face of it, to be a very simple point: how should statutory sick pay (SSP) be taken into account in calculating entitlement to income support? The claimant was receiving SSP. Her employer paid her both her salary and then her SSP towards the end of each month in arrears. She later applied for income support. It is agreed that her SSP counted as income for the purposes of calculating her entitlement to income support. The Department, however, did not calculate her income support entitlement on the basis of the standard weekly rate of SSP, as one might reasonably have expected. Instead, the Department took the monthly figure of SSP that her employers had paid her, multiplied that by 12 and then divided by 52, and used the resulting figure in their assessment. At the time in question the normal weekly rate of SSP was £62.20 (for 2001/02) and subsequently £63.25 (for 2002/03). The method used by the Department, based on the monthly payments, arrived at a higher weekly rate, namely £72.98.

3 The question for determination in this appeal is which was the correct approach in law. In short, does one adopt a solution which arrives at the ordinary weekly rate of SSP being taken into account (as the claimant’s representative argues) or, as the Department argues, does one start with the monthly payment from the employer, and then multiply by 12 and divide by 52 to arrive at the weekly rate for income support purposes? The central legal question is thus the proper construction of regulations 29 and 32 of the Income Support (General) Regulations 1987 (SI 1987 No 1967).

The facts of this case

4 The facts (if not the law) in this case are straightforward. The claimant applied for income support on 23 March 2002. The claimant was employed on a part-time contract. She worked 3 days a week (Tuesday-Thursday inclusive) and was paid in arrears on the 25th of each month. Her first day of sickness was 5 March 2002. The Tuesday-Thursday inclusive of that week were waiting days, and so SSP was paid as from 12 March 2002 but the first instalment was actually paid on 25 March. She was also paid sick pay under her employer’s occupational scheme (at the outset at least). According to her employer’s records, she was paid £62.20 SSP on 25 March 2002 (for three days’ sickness) and £316.25 SSP on 25 April 2002 (for 15 days of sickness – i.e. over five calendar weeks as she worked a three day week). Further payments of SSP were made thereafter, apparently of £253.00 in May and June respectively. Her March
pay included both SSP and occupational sick pay, but the payments for April-June inclusive were stated to be just SSP.

5 The Department paid income support of £15.88 for the benefit weeks from 23 April 2002 to 20 May 2002, i.e. at a rate of £3.97 per week. This figure was arrived at by deducting the claimant’s income, assessed at £72.98 a week, from her applicable amount of £76.95. The weekly income figure of £72.98 was itself arrived at by multiplying the payment of SSP of £316.25 (paid on 25 April 2002) by 12 and then dividing by 52. At this time the actual weekly rate of SSP was £63.25 (which is £316.25 divided by five weeks).

6 The Department applied the same process of calculation to subsequent weeks. There were apparently errors in the process of calculation but the issue between the claimant and Department is whether the correct assessment method was used. In terms of the relevant law, the decision maker, and now the Secretary of State, relies on regulation 32(1)(b)(i) of the Income Support (General) Regulations 1987 (SI 1987 No 1967). The claimant, through her representative, relies upon regulation 32(1)(b)(iv), as set out in the very clear letter of appeal of 28 June 2002. I refer in more detail to regulation 32 below.

The appeal tribunal’s decision

7 The claimant’s appeal was heard by an appeal tribunal at Leeds on 29 July 2003. The tribunal dismissed the appeal and confirmed the Secretary of State’s decision, holding that it was correct to apply regulation 32(1)(b)(i). The tribunal issued a very full statement of reasons, comprehensively setting out the background to the case, the submissions advanced on the interpretation of regulation 32 and its reasoning. The key passage in the tribunal’s decision was as follows:

1. The relevant Regulation, for the determination of the weekly amount of income to be applied when calculation [sic] entitlement to Income Support was Regulation 32 of the Income Support (General) Regulations 1989 [this is also obviously a misprint for 1987].

2. That Regulation states that the basis of calculation of the weekly amount is determined by the period in respect of which a payment is made. It was clear from the facts, that in this case, [the claimant] was paid on a monthly basis, albeit that the period over which that month extended, varied according to the number of days in the month to be determined.

3. This being the case, the Decision Maker had correctly applied Regulation 32 in determining that the method of calculation as set out in sub-paragraph (b)(i) was applicable.

8 The claimant’s application for leave to appeal to the Commissioner was initially refused by a tribunal chairman. Leave was then granted by Mr Commissioner Lloyd-Davies, who observed somewhat laconically that “it seems bizarre that SSP should not be taken into account at the weekly rate at which it was paid”. I must confess that I have been troubled by the same point.
A summary of the arguments on the appeal to the Commissioner

9  The Secretary of State’s representative argues that the tribunal reached the correct decision and invites me to dismiss this appeal. He draws my attention to the decision of Deputy Commissioner HH Judge Hague in the earlier decision of R(IS) 10/95 in support of his argument. The claimant’s representative reiterates the argument that the actual weekly amount of SSP should be taken into account. He makes two further points in particular. First, he takes issue with the argument of the Secretary of State’s representative that the April payment was payable in respect of a calendar month (in that case 4 weeks and 3 days). On the contrary, he argues, the employer paid SSP monthly for administrative purposes but for differing weekly periods (thus 5 weeks’ SSP was paid in April and 4 weeks in May). Secondly, he argues that R(IS) 10/95 does not apply on the facts of this case, as that was a case in which payments fluctuated, whereas SSP is a set amount. The Secretary of State has also made a further submission responding to a series of questions which I posed in directions for dealing with this appeal. I shall refer to these points as and when they arise. I must obviously start by considering the effect of R(IS) 10/95.

The Deputy Commissioner’s decision in R(IS) 10/95 and regulation 29 of the Income Support (General) Regulations 1987

10  The Deputy Commissioner’s decision in R(IS) 10/95 concerned a supply teacher who had worked for 6½ days in May 1988 and for 5 days in June 1988 (it may be a sad reflection of the system of appeals at that time that the case was not determined by the Commissioner until March 1992, and then not reported for another three years). It was evident from her contractual terms that she was employed on a short notice basis for a varying number of sessions each month, depending on the needs of local schools. Her employer, the local education authority, calculated her pay according to a daily rate and paid her at the end of each month based on the number of days worked. The fundamental question was whether that pay should be attributed solely to the actual days worked or to each month as a whole. Clearly the answer to that question would at least determine the amount of income support to which the claimant was entitled, and probably affect entitlement itself.

11  In that case the social security appeal tribunal, upholding the decision of the adjudication officer, ruled that the claimant was not entitled to income support as from the end of June 1988. The tribunal gave as its reasons the fact that the claimant’s income exceeded her applicable amount and that she was in remunerative work under the legislation. The Deputy Commissioner set aside the tribunal’s decision on three grounds. First, the tribunal had referred to regulation 9(2) of the (former) Resources Regulations when it should have referred to regulation 29(2) of the 1987 Regulations. Secondly, the tribunal had erroneously applied regulation 31(1)(a) of the 1987 Regulations when regulation 31(1)(b) applied. Finally, the tribunal was wrong to find that the claimant was in remunerative work at the relevant time. Only the Deputy Commissioner’s ruling on the first point has any relevance to the case before me.

12  By way of background, the Deputy Commissioner referred to regulations 28(1), 29(1) and (2), 31(1) and 32(1) of the 1987 Regulations. Regulation 28 provides that a claimant’s income is to be determined in accordance with the following statutory
provisions. That much is unproblematic. Regulation 29 deals with the calculation of earnings and income other than earnings, and particularly with the attribution of earnings and other income to particular periods of time. Regulation 31 specifies the rules governing the date on which income is treated as paid, whilst regulation 32 stipulates the method for calculating weekly income.

13 It is helpful to start with regulation 29 of the 1987 Regulations. Regulation 29(1) states that the attribution of income to particular periods is to be governed by that regulation, whilst the actual calculation of weekly amounts is a matter for regulation 32. Regulation 29(2) (as amended) then states:

(2) Subject to the following provisions of this regulation, the period over which a payment is to be taken into account shall be—
(a) in a case where it is payable in respect of a period, a period equal to the length of that period;
(b) in any other case, a period equal to such number of weeks as is equal to the number obtained (and any fraction shall be treated as a corresponding fraction of a week) by dividing the net earnings, or in the case of income which does not consist of earnings, the amount of that income less any amount paid by way of tax on that income which is disregarded under paragraph 1 of Schedule 9 (income other than earnings to be disregarded) by the amount of income support which would be payable had the payment not been made plus an amount equal to the total of the sums which would fall to be disregarded from that payment under Schedule 8 (earnings to be disregarded) or, as the case maybe, any paragraph of Schedule 9 other than paragraph 1 of that Schedule, as is appropriate in the claimant's case,
and that period shall begin on the date on which the payment is treated as paid under regulation 31 (date on which income is treated as paid).

14 On the construction of regulation 29(2), the Deputy Commissioner in \textit{R(IS) 10/95} found as follows:

\textbf{Decision on the main issue}

12. I turn to the main issue in this appeal. In his submissions, the claimant’s representative has argued that when paragraph 29(2)(a) refers to a payment “payable in respect of a period” it is referring on the facts of this case to the 6½ days worked in May and the five days worked in June. It was those periods for which the payments were made and consequently the payments were “in respect of” those periods. In support of this, the claimant’s representative stresses that there was no monthly contract. The contract was on a daily basis, as shown by the reasoning of the Commissioner in \textit{R(U) 2/87} (referred to above), the facts of which are indistinguishable from those in the present case; with this part of the claimant’s representative’s submission, I agree for the reasons I have set out above. He also stresses that the arrangements made for monthly payment were merely for the administrative and financial convenience of the council. They are not consequent upon the claimant being employed on a monthly or other regular basis. It would be an odd result, he submits, if the
method of payment which an employer happened to adopt affected the employee’s entitlement to income support.

13. These are forceful and attractive arguments, particularly as they do not involve giving the words “in respect of” any forced or unnatural meaning. But after due consideration I have found myself unable to accept them for the following reasons.

14. To start with, in my view it is fallacious to say that the claimant was paid for a period of 6½ days in May and a period of five days in June. She was not. As the claimant’s representative has submitted (and as I agree), the claimant was employed only on a daily basis. So the true analysis is that in May she was paid for seven different periods (six of one day and one of half a day) and in June she was paid for five different periods. Furthermore, even if the claimant had been paid for a single period, for example if she had been engaged for the whole week which she worked in June, there would always be the possibility of the monthly payment covering a further period. That possibility is only avoided if the monthly payment is in respect of an engagement for a month or longer. It follows that, on the claimant’s representative’s arguments, regulation 29(2) must apply where the payment is made for (or “in respect of”) two or more periods.

15. In my view, however, regulation 29(2)(a) clearly only envisages and provides for a payment “in respect of” a single period. Its wording is wholly inapt to cover the possibility of there being two or more periods covered by a single payment. Similar remarks apply to the words at the end of regulation 29(2) “and that period shall begin on the date on which payment is treated as paid under regulation 31 (date on which income is treated as paid)”. It is true that under section 6(c) of the Interpretation Act 1978, which is applicable to the General Regulations by virtue of section 23(1) of that Act, words in the singular normally include the plural. But that is only “unless the contrary intention appears” and in my judgment a contrary intention clearly appears in the case of regulation 29(2). Further, if a single payment could be in respect of two or more periods, it is difficult to see how regulations 29(1) and 32 could operate satisfactorily or indeed at all, and that is a further indication against a construction of regulation 29(2) which would allow that.

16. It follows, in my judgment, that “the period” referred to in regulation 29(2) must be a single period and in the circumstances of this case the only such “period” is the period over which any monies earned would fall to be included in the relevant payment. In other words, a payment which is for the days worked in a particular month is “payable in respect of” that month. That construction gives a perfectly natural and ordinary meaning to the words used, and I find that it is the correct construction.

The decision of the Deputy Commissioner in R(IS) 10/95 was followed by Mr Deputy Commissioner Rowland (as he than was) in CIS/167/1992, albeit “with some regret” (see paragraph 6). In that case the claimant’s partner was a supply teacher whose contractual arrangements were, to all intents and purposes, the same as those of the claimant in R(IS) 10/95. The short question in that case was whether a payment received at the end of the month was “payable in respect of a month or payable in...
respect of six days” (which had actually worked on a supply basis during that month). Mr Deputy Commissioner Rowland followed the reasoning of the Deputy Commissioner in R(IS) 10/95, noting that regulation 31(1) and 32(2) did not permit the attribution of 5 days’ payment to one week and one day’s payment to the next week.

I note that the approach taken in R(IS) 10/95 is subject to some criticism in the commentary in Social Security Legislation 2003 Volume II (p 294). The authors state there that:

“The result of this approach is that the period is determined by the employer’s administrative arrangements for payment, rather than the terms of the employment. But it is surely arguable that the period in respect of which the payment was payable was one day… The Commissioner’s approach equates the period in respect of which a payment is payable with the period for which payment is due to be made, which is not necessarily the same. Moreover, the Commissioner does not seem to have taken account of the fact that ‘payment’ can include part of a payment (reg. 2(1)).”

Initially I took the view that there appeared to be some force in this criticism. Indeed, in my earlier directions, I posed the question whether R(IS) 10/95 had possibly been decided per incuriam (or, in plain English, decided in ignorance of a relevant provision). The Secretary of State’s representative, in his further submission, has referred me to the decisions of Mr Commissioner Rowland in R(JSA) 2/03 (at paragraph 11) and of Mr Commissioner Pacey in CIS/2654/2000 (at paragraph 14), both of which follow and apply R(IS) 10/95. In the light of those authorities, I agree that R(IS) 10/95 is an established precedent which has stood the test of time. It follows that “that ‘the period’ referred to in regulation 29(2) must be a single period and … a payment which is for the days worked in a particular month is ‘payable in respect of’ that month” (R(IS) 10/95 at paragraph 16).

I must also consider whether it is possible to distinguish R(IS) 10/95, in other words to argue that its facts are materially different and so the principle set out in that decision is not applicable to the circumstances of this case. The claimant’s representative points out that the claimant in R(IS) 10/95 received fluctuating amounts, depending on how often she worked as a supply teacher, whereas in this case we are concerned with SSP, which is paid at a standard rate. The crucial point, however, is that both claimants were paid monthly, and so I have no option but to apply the reasoning in R(IS) 10/95 on the proper interpretation of regulation 29 to this case.

I should also add at this point that I have considered whether this conclusion is affected in any way by the primary legislation governing entitlement to SSP, which is determined on a day by day basis under section 151 of the Social Security Contributions and Benefits Act 1992. Assuming the conditions in sections 152-154 are met, SSP is then paid at a standard weekly rate. Indeed, section 157(1) of the 1992 Act states that “Statutory sick pay shall be payable by an employer at the weekly rate of [whatever is the relevant weekly sum prescribed for that year]”. This might seem to support the argument of the claimant’s representative that it is the usual weekly rate of SSP which should be factored into the calculation of any entitlement to income support.
The Secretary of State’s representative, in his further submission, argues that this is not the case. He points out that Part V of the 1987 Regulations provides a code for calculating income and capital for the purposes of income support, which make no cross-reference to sections 151-157 of the 1992 Act. Indeed, he points out, those Regulations were made under section 136(3) of the 1992 Act, which provides that “Income and capital shall be calculated or estimated in such manner as may be prescribed”. I think it may also be necessary for the Secretary of State to rely on the power under section 136(5)(a) of the 1992 Act, which permits regulations to be made treating a person as possessing income (or capital) which he does not in fact possess. In this regard I rely on the comments of Mr Commissioner Mesher in R(IB) 7/03 (and especially paragraphs 13-14 where the Court of Appeal’s decision in Owen v Chief Adjudication Officer (reported as R(IS) 8/99) is discussed). This, I think, is the answer to Mr Commissioner Lloyd-Davies’s comment on granting leave that it seems bizarre that SSP is not taken into account at its normal weekly rate. The fact is that the regulations prescribe otherwise for the purposes of calculating entitlement to income support when an employee is paid monthly.

Regulation 32 of the Income Support (General) Regulations 1987

I must then consider the effect of regulation 32 of the 1987 Regulations, which reads as follows:

**Calculation of weekly amount of income**

32.—(1) For the purposes of regulation 29 (calculation of earnings derived from employed earner’s employment and income other than earnings), subject to paragraphs (2) to (7), where the period in respect of which a payment is made—

(a) does not exceed a week, the weekly amount shall be the amount of that payment;

(b) exceeds a week, the weekly amount shall be determined—

(i) in a case where that period is a month, by multiplying the amount of the payment by 12 and dividing the product by 52;

(ii) in a case where that period is three months, by multiplying the amount of the payment by 4 and dividing the product by 52;

(iii) in a case where that period is a year by dividing the amount of the payment by 52;

(iv) in any other case by multiplying the amount of the payment by 7 and dividing the product by the number equal to the number of days in the period in respect of which it is made.

The Secretary of State argues on the basis of R(IS) 10/95 that the tribunal in this case was correct to conclude that the relevant provision is regulation 32(1)(b)(i) as SSP was paid monthly. The claimant’s argument is that the relevant provision is regulation 32(1)(b)(iv) as SSP is a weekly benefit and R(IS) 10/95 is inapplicable. I have explained above why I have concluded that R(IS) 10/95 applies in this case. Given the direct cross-reference to regulation 29 in the opening words of regulation 32, it follows that the Secretary of State must be right in contending that regulation 32(1)(b)(i) is the provision which must apply.
I also agree with the Secretary of State’s further submission that this interpretation of regulations 29 and 32 is the only one which makes sense of regulation 31, which governs the date on which income is treated as paid. Any alternative construction, which characterised SSP, which was in fact paid monthly, in terms of weekly payments would necessarily involve the attribution of four or five weeks’ payments together for a period of one week from (in this case) the 25th of each month. This would clearly result in a much more substantial anomaly. It is clear in my view that regulations 29, 31 and 35 provide for earnings (in this case in the form of SSP) to be projected forward for a prospective period which reflects the equivalent past period in respect of which they were actually paid. This is demonstrated beyond doubt by the Court of Appeal’s decision in Owen v Chief Adjudication Officer (reported as R(IS) 8/99), where sick pay paid monthly in arrears fell to be taken into account for an equivalent forward period.

Conclusion

For these reasons I am satisfied that the arguments put forward by the Secretary of State are correct. It follows that the tribunal’s decision is not erroneous in law under section 14(8) of the Social Security Act 1998. Accordingly, I have no option but to dismiss the appeal.

(Signed) N J Wikeley
Deputy Commissioner

(Date) 17 March 2004