

whether claimant's wife who ran guest house providing farm house ^{was} a seasonal worker.

MASTER

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Region: Wales & South Western

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Thomas Ben Morris

Social Security Appeal Tribunal: Haverfordwest

Case No: 19/6

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 10 September 1986 as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Social Security Act 1975, section 101(5), as substituted by paragraph 7 of Schedule 5 to the Social Security Act 1986.
2. This is an appeal to the Commissioner by the claimant a married man aged at the material time 43 living with his wife then aged 41 and their two children then aged 10 and 13 respectively. At the claimant's request the appeal was the subject of an oral hearing before me at which the claimant was present and was represented by Ms P Wood, Solicitor of the Child Poverty Action Group. The adjudication officer was represented by Mr N. Butt. I am indebted to Ms Wood and to Mr Butt for their considerable assistance to me at the hearing.
3. The appeal is against the unanimous decision of the social security appeal tribunal dated 10 September 1986, disallowing an appeal from a decision of the local adjudication officer issued on 12 February 1986 which (as revised) provided that the amount of the supplementary benefit payable to the claimant from the prescribed payday (Thursday) in the week commencing 20 January 1986 should be £71.16 per week. That figure was arrived at by taking into account as a resource of the claimant "wife's seasonal earnings", the gross amount being calculated as £99.37 per week and the net amount (after deduction of a £4.00 'disregard') being calculated as £95.37 per week.
4. The attribution to the claimant of his wife's 'seasonal' earnings was made under regulation 4(9) of the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No 1527] providing as follows,

"Notional Resources

4. (9) Where a claimant, or his partner, is a seasonal worker or both of them are seasonal workers and -
 - (a) a claim for pension or allowance is made in respect of any day in his or their off-season; and

- (b) his or their total net earnings from his or their last period of normal employment exceed either two and a half times the total normal and additional requirements which would, during that period, have been applicable to the assessment unit or three times the total of normal requirements, which would, during that period, have been applicable to a person to whom paragraph 4 of the table in paragraph 2 of Schedule 1 (ordinary rate for householders) applies, whichever is the greater,

the amount of the excess mentioned in sub-paragraph (b) shall be divided by the number of weeks in his off-season and the result treated as earnings for those weeks; and in this paragraph 'normal employment', 'off-season' and 'seasonal worker' have the meanings assigned to them in regulation 19 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 (additional conditions with respect to the receipt of unemployment benefit by seasonal workers) but as if the definition of employment in that regulation included a reference to employment as a self-employed earner."

That reference to regulation 19 of the Unemployment Sickness and Invalidity Benefit Regulations 1975 must now be read as referring to regulation 21 of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 [SI 1983 No. 1598] - merely a consolidation with no change in the law involved.

5. The important question in this appeal is whether the claimant, who together with his wife runs a guest-house and farm holiday business in Wales, comes within regulation 4(9) of the Resources Regulations. If so, there must be attributed to the claimant the appropriate proportion of the total net earnings to the off-season. In his original calculations, the local adjudication officer took only a gross figure (see paragraphs 11 to 13 below).

6. The local tribunal, which clearly took considerable trouble with this case, accepted the local adjudication officer's submission on the facts as their own findings of fact and added,

"We did not accept the facts and figures submitted by the claimant, produced in order to prove that the guest-house was not a normal guest-house and that the market garden and small holding was a separate business linked to the guest-house. The nature of [the claimant's wife's] occupation had to be looked at in its geographical context. Pembrokeshire was a well-known tourist area and the 'high season' occurs between May and September. There were very many guest-houses of the same nature which were closed during the 'off-season' because of lack of demand by members of the public."

They stated in their reasons for decision

"Since 1981 the nature of the occupation in its geographical context as a tourist area with a 'high season' from May to September was to provide holidays during those months and only during those months. Due to circumstances beyond her control ie [the claimant's] occupation was part of the seasonal trade in a tourist area; she was an involuntary seasonal worker because there was no demand to justify her keeping the guest-house open all the year R(U)2/82 paragraph 12; R(U)11/55 paragraph 16 following R(U)14/53 applied."

7. The tribunal made the following additional findings of fact,

"[The claimant's wife] works hard during the 'off-season' preparing the garden, tending the animals and poultry, maintaining the buildings and taking the bookings but this activity leads up to the opening of the guest-house during the 'high season', when [the

claimant's wife] works excessively hard. It is only during the high season that [the claimant's wife's] business is operative. This is the time that people stay in her guest-house for the purpose of a 'farm holiday' eating her house produce products for which she receives payment. During the off-season the lounge, dining room and bar are closed. We appreciate that [the claimant's wife] was an involuntary seasonal worker in the sense that, if there was a demand, she would take in guests at periods outside the 'high season'. She had run her guest-house since 1981 for approximately the same periods on the same basis each year. Had the guest-house been open for meals during the 'off-season' and the bar kept open, that fact might have altered the nature of the occupation. The size and nature of the property comprising a half acre of garden with greenhouse and the use of a five acre field for the two sheep, two pigs and poultry did not amount to a separate market-garden or small holding, as a separate entity because [the claimant's wife] did not sell her produce all the year around to either wholesalers or directly to members of the public on a market stall on a profit making basis. The produce was used for the meals for the guest and part of it for the family."

8. On those findings of fact Ms Wood on behalf of the claimant submitted that the tribunal had erred in law in at one and same time accepting that the claimant's wife worked in the small holding, the produce of the venture being used for "meals for the guests", and yet not taking the small holding business into account and the work therein in deciding whether the claimant's occupation was truly seasonal within the above-cited regulations. Mr Butt made an 'open' submission on the point. I accept Miss Wood's submission. As this is essentially a factual matter and local knowledge will be of assistance I must remit the case for rehearing and redetermination to a new tribunal to ascertain whether in truth having regard to the very considerable amount of work done by the claimant's wife in the 'off-season', using that term in a non-technical sense, it could be said that the claimant's wife's occupation was seasonal at all. Regulation 4(9) of the Resources Regulations attributes to a claimant a notional resource ie a resource which he does not necessarily have and therefore there must be strict compliance with the terms of that regulation before it should be applied so as to attribute a resource.

9. When considering this matter the tribunal will wish to have regard to the definitions of "off-season" and "seasonal worker" in regulation 21(1) of the Unemployed, Sickness and Invalidity Benefit Regulations 1983 and consider the claimant's submission that at no time in the year does his wife have an inactive time as long as 7 days (see the definition of "off-season" and compare the definition of "part or parts only of a year" in regulation 21(1)(i)). The tribunal will also find helpful the decision on the meaning of "seasonal worker" of a Tribunal of Commissioners in R(U) 2/82 (see particularly paragraph 12).

10. A further point raised on the appeal was the proper basis for attribution of the guest-house etc. earnings. If the claimant's wife's occupation were "seasonal", regulation 4(9) of the Resources Regulations will have to be applied, but only the "net" earnings are to be attributed. If she were not a "seasonal worker", then her net earnings should be calculated by reference to the annual profit and loss account and spread equally over 52 weeks (see Resources Regulations 10(1) and 10(2)(a)). A legal point arises however in connection with the provisions of regulations 10(1), 10(2)(b) and 10(3)(e) of the Resources Regulations which, so far as is relevant, read as follows,

"Calculation of earnings

10. (1) Subject to... the following paragraphs, for the purposes of these regulations a person's earnings shall consist of all remuneration or profit derived from any employment [this includes running a business] ...
- (2) Paragraph (1) shall be subject to the following provisions -

- (a)
 - (b) where accommodation for which a charge for board and lodging is payable is made available in the home, income consisting of payments of such a charge shall be treated as earnings only where such accommodation is made available in the home for three or more persons [which is the case here - 10 adults and 5 children can be taken] (whether or not at any time such accommodation is occupied by three or more persons).
- (3) In calculating the amount of a person's earnings the following shall be disregarded -
- (a)-(d)
 - (e) in relation to any income which falls to be treated as earnings under paragraph (2)(b),
 - (i) two-thirds of that income, and
 - (ii)"

11. The point at issue is to whether the disregard of two-thirds of such income is the only expense that can be charged against the kind of income that the claimant receives from her guests in this case or whether there can also be charged the various items of expenses provided for by regulation 10(4) of the Resources Regulations such as "any other expenses reasonably incurred by him without reimbursement in connection with or for the purposes of that employment", which are very considerable in the present case (cf. R(SB) 44/84). Ms Woods submitted that such expenses could be taken into account in addition whereas Mr Butt submitted that that they could not.

12. That is a difficult point of construction but I consider that the question need not be decided by me in this case, because I do not regard the proper basis of assessment of the claimant's wife's earnings from her guest-house etc. as being an assessment under regulation 10(2)(b). That regulation is, in my judgment, intended to apply only to the ordinary case where a private person takes lodgers in his home, whereas here the charge made to the guests is not simply "for board and lodging" but is a general charge for a holiday, including the opportunity to enjoy the farm atmosphere with the animals etc. In any event regulation 10(2)(b) is expressly made subject to the general provision of regulation 10(1) that there shall be taken into account "all.. profit derived from any employment" and that in my view involves an ascertainment of the net profit (including expenses allowable under regulation 10(4) in the present case) and it is not realistic to separate out a separate charge for board and lodging in the present case, as the local adjudication officer did. I would have thought that regulation 10(2)(b) is applicable only to cases of simple receipt of payments for board and lodging from lodgers etc and does not apply to cases of running guest-houses and hotels even if also the "home" of the claimant (see Resources Regulation 2(1)).

13. Consequently, the new tribunal will need to ascertain in accordance with the normal rules and looking at the claimant's annual accounts what net profit was attributable to the weeks for which supplementary benefit was claimed and, in addition, if they conclude the occupation was seasonal they will need to take into account additionally the special

attribution provision of regulation 4(a) of the Resources Regulations (see paragraph above). In that event regulation 18 of the Supplementary Benefit (Urgent Cases) Regulations 1981 may also need to be considered.

(Signed) M J Goodman
Commissioner

Date: 5 October 1987