

Bulletin 170

[DHCA]



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CTC/4880/2001

SOCIAL SECURITY ACTS 1992-1998

**APPEAL FROM DECISION OF AN APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr H Levenson

Claimant : Roger MIGHTLY
Tribunal : Wakefield 22nd August 2001
Tribunal Case No : U/01/008/2001/01902

Decision

1. This appeal by the Board of Inland Revenue (“the Board”) does not succeed. I confirm, although for slightly different reasons, the decision of the Wakefield tribunal of 22nd August 2001. I substitute my own decision. This is to the effect that the claimant is (subject to the mathematical calculations) entitled to working families tax credit (“WFTC”) in respect of his claim made on 22nd January 2001. I remit to the Board the precise calculation of any entitlement on this basis. In the event of any difficulty with this or failure of the parties to agree the appropriate calculations, either party may refer the matter back to me for decision on this point.

Background and Procedure

2. The claimant was born on 18th April 1966. He is a lone parent with a son who was born on 26th April 1999. On 6th September 2000 he became a full time Youth Offending Team Officer for the local Metropolitan Council (“the Council”). The Council covers an area in England. The claimant’s task was to liaise with young offenders and with people who could offer them work opportunities. He was appointed under the Council’s Positive Action Training Scheme (“PATS”). The legal basis on which he was working is the subject of this appeal.

3. The Council’s fact sheet on the PATS states as follows:

“ The Council targets people with disabilities and people from the black and ethnic minority communities because of their under-representation in our workforce. At the end of a [PATS] placement the trainee will have a qualification and work experience which will enable them to apply for Council and other vacancies with more confidence and a better chance of success.

A total of 10 placements are being offered this year for people with disabilities. Training Placements are for 37 hours per week and will last for 2 years. They include work experience, internal training courses and a college course of study on a day-release basis.

Trainees receive a training allowance of £6000 during their first year which is increased by a cost of living increment (3%) last year during the second year. This is currently exempt from income tax and NI deductions. Trainees do not have employee status and do not accrue employment rights from their time on the scheme.

The PATSs are funded from the Council’s mainstream budget. There is no external funding at the present time”.

4. On 22nd January 2001 the claimant made a claim for WFTC. On 7th February 2001 the Board decided that there was no entitlement to WFTC because the claimant “was not in paid work for at least 16 hours a week”. On 16th February 2001 the claimant appealed to the tribunal against the decision of the Board. The tribunal considered the matter on 22nd August 2001 and allowed the appeal. On 15th November 2001 a District Chairman of the tribunal granted the Board’s application for leave to appeal to the Social Security Commissioner against the decision of the tribunal.

5. The Board's submission to the tribunal raised a number of arguments based in essence on treating the claimant as a student. They were not considered by the tribunal and were not further referred to in the submissions to the Commissioner from the Board. It is not necessary for me to consider them. I simply note that it is possible for students to be entitled to WFTC (see, for example, the detailed provisions in regulations 37 to 45).

The Legal Framework

6. Section 128 of the Social Security Contributions and Benefits Act 1992 provides that, subject to other conditions of entitlement, a person is entitled to WFTC if, at the date of claim, he is "engaged and normally engaged in remunerative work".

7. Regulation 4 of the Family Credit (General) Regulations 1987 (as amended) deals with the question of who is to be treated as engaged in remunerative work. So far as is relevant it provides as follows:

4. (1) For the purposes of ... the Act as it applies to [WFTC], and subject to paragraph (3), a person shall be treated as engaged in remunerative work where—
 - (a) the work he undertakes is for not less than 16 hours per week;
 - (b) the work is done for payment or in expectation of payment; and
 - (c) he is employed at the date of claim ...

- (2) A person who does not satisfy all the requirements of subparagraphs (a) to (c) of paragraph (1) shall not be treated as engaged in remunerative work.

- (3) A person who otherwise satisfies all the requirements of paragraph (1) shall not be treated as engaged in remunerative work insofar as—
 - (a) ...
 - (b) ...
 - (c) he is engaged on a scheme for which a training allowance is being paid ...

The Issues

8. The original decision on the claim was confused. It was based on a finding that the claimant was not "in paid work". However, the phrase "paid work" is used in neither the Act nor the regulations. The requirements in regulations 4(1)(a) and (b) were obviously satisfied. The claimant was working for more than 16 hours weekly and was doing so for and/or in expectation of payment. The questions are whether he satisfied the condition in 4(1)(c) and whether he was excluded by the provisions of 4(3)(c).

The Tribunal's Reasoning

9. The basis of the tribunal's conclusion that the claimant was entitled to WFTC is found in the following extracts from its full statement:

7. The tribunal took the view that it was its duty to look in more detail at the type of work involved, the method of payment, and the general provisions with regard to the [claimant's] employment.

8. ... the pay cheque issued by the Council ... shows that the [claimant] is paid a salary rather than a training allowance. ... Although he has fixed hours of work he has to adopt some degree of flexibility in certain circumstances depending upon the job's requirements. For example, he may have to see people out of working hours. He also has 22 days per annum holiday entitlement.

9. Additionally, in connection with his job [he] has to use his own car for travelling (for example to visit young offenders that he has to help in connection with his job ...). For this he gets a specific mileage allowance. Additionally, if in fact, for any reason, he is unable to do his own assigned job, then there is a facility to enable him to go on to redeployment to a job that he can do. This is identical to the provisions for all employees of [the] Council.

10. Accordingly, although [his] role with [the] Council may be labelled a training scheme the Tribunal was persuaded ... that it was a training scheme in name only and that in reality [he] was doing a worthwhile job under normal conditions of employment that applied to all employees of the Council and, perhaps most importantly, it was clear from documentary evidence produced that [he] was receiving a salary and ... was entitled in addition to a mileage allowance for travelling undertaken by him in his own vehicle."

10. Clearly, the tribunal was wrong to say that the conditions of employment applied to all employees of the Council. However, there was no intrinsic reason why the claimant could not have been employed on conditions of employment that did not apply to all employees of the Council.

Regulation 4(1)(c) – Employed at the Date of Claim

The Board's Argument

11. Before me the Board argues that the claimant is not "employed". The argument is that although the word "employed" in regulation 4(1)(c) is not defined, regulation 2(1) does define the term "employed earner" by reference to section 2(1) of the 1992 Act.

12. Contrasting the definition of "self-employed earner" in section 2(1)(b), section 2(1)(a) provides that:

2(1) In this Part of this Act and Parts II to V below [my emphasis]-

- (a) “employed earner” means a person who is gainfully employed in Great Britain under a contract of service, or in an office (including an elective office) with emoluments chargeable to income tax under schedule E ...

13. However, even if the word “employed” in regulation 4(1)(c) can be defined by reference to the phrase “employed earner” in regulation 2(1), the definition in section 2(1) of the 1992 Act applies to Parts I to V of the 1992 Act. These deal with contributions, contributory benefits, and non means tested benefits. Section 128 appears in Part VII of the Act, which has the general heading “Income-Related Benefits”. The 1987 regulations (as amended) are made either under section 128 or under different legislation, but not under Parts I to V of the 1992 Act. Thus, the argument put by the Board fails.

The Income Support Position

14. The evidence shows that for income support purposes participants on the PATS are treated as being in remunerative employment. However, it seems that although this is the practice of the Benefits Agency (which I would not wish to discourage) it does not seem to be based on any legal ruling that can assist in this case.

Emphasis on the “Date of Claim”

15. The Board is really seeking to put the emphasis on the concept of “employed” in regulation 4(3)(c). However, the provision makes more sense if the emphasis is put on the reference to “date of claim”.

16. First, it is clear that self-employed people can be entitled to WFTC. Section 128(1)(b) of the 1992 Act refers to “being engaged and normally engaged in remunerative work”. It does not refer to being employed. Regulation 21 to 23 of the 1987 regulations set out rules for relevant calculations in relation to self-employed claimants for WFTC.

17. Second, if the Secretary of State were correct, a claimant could be working for at least 16 hours per week for payment but not be employed. What then would he be? Entitlement to WFTC (if other conditions are satisfied) is not excluded for those who are self-employed, independent contractors, office-holders or students. A claimant who was unemployed or a non-working employer would already have failed the test in regulation 4(1)(a).

18. The correct approach is to see regulation 4(1)(c) as a provision about timing. When is it that the claimant must be working for at least 16 hours a week for or in the expectation of payment? It is (subject to other detailed provisions in the regulations) at the date of claim that this must be the case. The word “employed” in regulation 4(1)(c) is simply shorthand for the provisions in 4(1)(a) and 4(1)(b).

Employment of Claimant

19. In any event, I refer to what Lord Justice Somervell said in Cassidy –v-Ministry of Health [1951] 2KB 243 at page 352: “One perhaps cannot get much beyond this, was the contract a contract of [employment] within the meaning which an ordinary person would give under the words?” In the present case, the claimant had what looks like a contract of employment with the Council. He could be employed but not (as the Council’s fact sheet put it) accrue “employee rights” in the sense that those employed under different conditions of employment might be able to. However, this provision could not by itself be read as excluding rights conferred by the general law and could not by itself define the nature of the relationship.

Regulation 4(3)(c) – Training Allowance

20. “Training allowance” is defined in regulation 2(1) (for England) by reference to an allowance payable out of public funds by a Government Department or by or on behalf of the Secretary of State or the Learning and Skills Council for England. The evidence from the Council’s fact sheet shows that none of these was the source for the payment to the claimant. Accordingly, what he was paid was not a “training allowance” within regulation 4(3)(c). The tribunal also reached this conclusion but by a different route which does not appear to be correct, this matter being dealt with by definition in the regulations.

21. I appreciate that the Council’s fact sheet also stated that the payment “is currently exempt from income tax and NI deductions”. I assume that the exemptions have been agreed with the Board since the Council itself has no power to provide for such exemptions. However, it cannot be right that the Board, by agreeing tax concessions, can exclude a claimant from entitlement to WFTC (also administered and financed by the Board) which in nearly all cases would be worth far more to the claimant

Conclusion

22. For the above reasons this appeal by the Board does not succeed and I made the decision in paragraph 1 above.

H. Levenson
Commissioner

14th May 2002