

R(FC) 1/93

Mr. M. H. Johnson
11.6.92

CFC/20/1991

Income - claimant a sub-postmistress and her husband a shopkeeper - whether her husband's losses could be offset against her earnings

The claimant owned premises comprising a retail shop and sub-post office. She held the appointment of sub-postmistress and her husband was employed in the retail business. The retail business was running at a loss. The adjudication officer decided that the loss could not be offset against the claimant's earnings as a sub-postmistress. The tribunal confirmed the decision of the adjudication officer. The claimant then appealed to the Commissioner on the ground that sub-postmasters are self-employed earners and that her income and expenses from the retail business and the sub-post office should be aggregated.

Held that:

1. the two occupations of shopkeeper and sub-postmistress, although carried on in the same premises, are two separate and distinct occupations. Regulation 22(11) precludes any loss from one employment being set off against earnings from any other source (para. 8);
 2. a sub-postmaster is an office holder and consequently an employed earner within the meaning of section 2(1)(a) of the Social Security Act 1975 (para. 11).
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DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that:
 - (a) the unanimous decision of the Rochdale social security appeal tribunal given on 13 November 1990 is erroneous in point of law and is accordingly set aside;
 - (b) the claimant was not entitled to family credit on the date of the claim, 28 March 1990, because her income, as calculated, was higher than the level at which family credit would become payable
2. The claimant, to whom I shall refer to as Mrs. G., appeals with my leave against the decision of the tribunal confirming the decision of the adjudication officer, issued on 10 April 1990, which was to precisely the same effect as my decision in paragraph 1(b) above.
3. I held an oral hearing of this appeal on 20 May 1992 at Liverpool when Mrs. G. was not represented and, I regret to say, declined to attend. The adjudication officer was represented by Mr. S. M. Cooper of the Office of the Solicitor to the Departments of Health and Social Security.
4. Mrs. G. claimed family credit for herself, her husband and their two dependant children, on 28 March 1990. Mrs G. is the owner of the premises I am not sure whether solely or jointly with her husband, but for present purposes that is immaterial comprising a retail shop and a sub-post office. Mrs. G.'s husband is, as she puts it, "technically employed ... for purposes of tax, NI, etc." in the shop and Mrs. G. holds the appointment of sub-postmistress. It is common ground that Mrs. G. works at least 45 hours a week, that she received gross monthly earnings of £1,490.36 on 31 January 1990 (£1,103.11 net) and £1,508.98 on 28 February 1990 (£1,115.52 net)

from Post Office Counters Ltd and that, during the 22 week period from 26 October 1989 to 24 March 1990, she paid her husband a total of £952. Mrs. G. produced a profit and a loss account from the start of the business on 26 October 1989 to end of March 1990 which showed that retail business was running at a substantial loss, with sales totalling some £2,300 and expenses amounting to about £9,000. For reasons which will appear later it is not necessary for me to extract the precise figures; it suffices to say that the adjudication officer accepted that the business was operating at a loss but, in brief, held that those losses could not be offset against her earnings as sub-postmistress.

5. In those circumstances, after making the appropriate deductions for tax and national insurance contributions, the adjudication officer calculated Mrs G.'s net income from Post Office Counters as £255.98 per week, and Mr. G.'s net earnings at £43.27 per week. It is accepted that those figures are incorrect and should be £255.99 and £42.38 respectively but, again, that does not materially affect outcome of this matter. The adjudication officer, applying regulations 46, 47 and 48 of and Schedule 4 to the Family Credit (General) Regulations 1987 [SI 1987 No. 1973] and taking into account all items of income and the appropriate family credits in respect of Mr. and Mrs. G. and their children, decided that the maximum family credit as at the date of claim was £48.20 and, as 70 per cent of their "excess income" substantially exceeded that amount, that her entitlement was therefore nil.

6. It is not necessary for me to set out all the relevant regulations and the consequential calculations. Mrs. G., it is apparent from her letters and detailed submissions, which I have read with care, clearly has a good grasp of the principles involved and appreciates that the only way she could bring herself within the family credit limits would be if she could aggregate her income and expenses from her employment as a retail trader and a sub-postmistress and set off her losses from the former against her income from the latter. This is the only issue in this case and I propose to confine this decision to that question.

7. Regulation 22 of the Family Credit (General) Regulations 1987 [SI 1987 No. 1973] ("the General Regulations") is concerned with the "Calculation of net profit of self-employed earners" and paragraph (11) thereof provides that:

"(11) For the avoidance of doubt where a claimant is engaged in employment as a self-employed earner and he is also engaged in one or more other employments as a self-employed or employed earner any loss incurred in any one of his employments shall not be offset against his earnings in any other of his employments."

8. Clearly Mrs. G.'s retail business is self-employment and equally clearly her work as a sub-postmistress is another employment, whether it is also self-employment or employment as an employed earner is irrelevant although, out of deference to Mr. Cooper's careful submission, I shall deal briefly with that question later. The essential feature is that the two occupations of shopkeeper and sub-postmistress, although frequently, as in the present instance, carried on in the same premises, are two separate and distinct occupations and thus fall fairly and squarely within regulation 22(11). It follows that the actual amount of Mrs. G.'s loss on the retail business is immaterial; her income from that source was correctly assessed by the adjudication officer as nil, and as regulation 22(11) of the General Regulations plainly precludes

any loss being set off against earnings from any other source, it can make no difference whether the loss is small or large.

9. However, having said that, I accept that the tribunal adopted the wrong procedure in the calculation of Mrs. G's allowable expenses. In the light of CFC/25/1989 (to be reported as R(FC) 1/91) there were matters which they omitted to take into account or apportion correctly. Accordingly I agree with paragraph 14 of the submission dated 7 October 1991 by the adjudication officer now concerned with the case, which was adopted by Mr Cooper, and I hold that the tribunal's decision is erroneous in point of law and I set it aside.

10. This is a case in which I can and should substitute my own decision pursuant to section 101(5)(a)(i) of the Social Security Act 1975. The erroneous calculation of Mrs. G.'s expenses produced a smaller loss on the retail business than would have been the case had the correct allowances been made. That, of course, merely has the effect of increasing the loss and that, as I have said above, does not effect the outcome; a nil assessment of earnings from the retail business is as low as it is possible to go, and any losses cannot be set off against any income from Mrs. G.'s other occupation. In those circumstances the adjudication officer was right to have regard, for the purposes of calculating entitlement to family credit, only to Mrs. G.'s income as a sub-postmistress. Clearly that was substantially above the maximum at which family credit could be awarded, and I therefore have no alternative but to give a decision in essentially the same terms as that given by the adjudication officer and confirmed by the tribunal.

11. In conclusion, and although it is not necessary to my decision, I deal briefly with Mr Cooper's submission regarding the position of sub-postmasters and sub-postmistresses. I am indebted to him for the various authorities to which he referred me and for the thoroughness with which he had prepared and presented his arguments. No definition of "sub-postmaster" appears in the Post Office Acts 1953 to 1969, although section 87 of the 1953 Act defines an "officer of the Post Office" as including:

"... any person employed in any business of the Post Office, whether employed by the Postmaster General or by any person under him or on behalf of the post Office."

"Postmaster General" must now be read in the light of the Post Office Act 1969.

Halsbury's Law's of England, 4th edition, vol 36, paragraph 642(n), contains the comment:

"... sub-postmasters, ... are independent contractors and not employees, see *Hitchcock v. Post Office* [1980] 1 CR 100 EAT ..."

Sub-postmasters are required to pay Class 1 National Insurance Contributions and are also taxed as "employed earners" under Schedule E although, as I understand it, the Revenue authorities, as a concession, permit some sub-postmasters' income to be dealt with together with their other income as self-employed persons under Schedule D. It seems to me that the description, "independent contractor" is a particularly apt one; a sub-postmaster is subject to a number of stringent contractual conditions by the Post Office Corporation but they nevertheless remain independent in so far as they are not Post Office employees in the sense that, for example, postmen and sorting office

staff are. Section 2(1)(a) of the Social Security Act 1975 defines “employed earner” as:

“... a person who is gainfully employed ... either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E.”

In my judgement a sub-post master is an office holder (see *Edwards v. Clinch* [1982] AC 845) and accordingly an employed earner within the meaning of section 2(1)(a) above.

12. The claimant’s appeal is allowed (see para. 9) and I give my decision in paragraph 1 above.

Date: 11 June 1992

(signed) Mr. M. H. Johnson
Commissioner