

PD All (VW6) — Use of Plans - #24/98
Mrs Curran Saw for Forestry — Measure of

7

Commissioner's File:

CI/3924/1997 'Lampson'

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

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 March 1997 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal, who will have regard to the matters mentioned below.

2. This is an appeal by the adjudication officer, brought with my leave, against the decision of the social security appeal tribunal of 10 March 1997. The claimant asked for an oral hearing, a request which was acceded to. At that hearing the claimant was present, but unrepresented, whilst the adjudication officer appeared by Mr Srisikandarajah of the Solicitor's Office of the Department of Social Security.

3. On 15 January 1996 the adjudication officer decided that Prescribed Disease All (Vibration White Finger) was not prescribed in relation to the claimant because he had not been employed on or after 5 July 1948 in employed earner's employment in a prescribed occupation. The occupation which fell to be considered was that involving "the use of hand-held chain saws in forestry". The adjudication officer considered that the claimant, although he used hand-held chain saws, was not engaged in forestry.

4. In due course, the claimant appealed to the tribunal, who in the event upheld the appeal. The tribunal gave as the reasons for their decision the following:-

"1. The primary facts are not disputed in this appeal which turns on whether [the claimant's] occupation as an arborist/tree surgeon for the city council comes within

the word 'forestry' in prescribed occupation (i) for PDA11. It is accepted that the chain saws were used.

2. We have concluded that CI/362/94 does not require us to decide this appeal against the appellant.

3. The facts of this case are very different from those of CI/362/94. The use of chain saws or the cutting down of trees was not merely an 'accident of his contract' of employment as an arborist/tree surgeon.

We have concluded that [the claimant's] work as an arborist/tree surgeon does indeed fall within 'forestry'. We do not consider that the regulation was intended to exclude an arborist/tree surgeon such as [the claimant]."

5. The crucial question that arises in this case is what is meant by the word "forestry". In the Shorter Oxford English Dictionary forestry is defined as:-

"1. Wooded country; a vast extent of trees.

2. The science and art of forming and cultivating forests, management of growing timber."

Manifestly, the second definition is that applicable to the present case. But this definition contemplates two different situations, namely (i) the cultivation of forests, and (ii) the management of growing timber. Accordingly, a person might be engaged in forestry if he was employed either in cultivating forests, or merely in managing growing timber. Put another way, a person engaged in forestry is a forester, and a forester is defined in the Shorter Oxford English Dictionary as "an officer having charge of a forest; also one who looks after the growing timber on an estate".

6. Was, during the relevant period, the claimant a forester? In his claim, the claimant stated that he worked as a craftsman/arborist for Liverpool City Council, and in a reply to an enquiry the Liverpool City Council advised that the claimant was employed by them from 4 February 1980 as an "arborist-tree surgeon". The claimant's employer did also add that the industry in which he was engaged was "forestry". An arborist is defined in the Shorter Oxford English Dictionary as "a scientific student or cultivator of trees". A slightly different definition is contained in Chambers Concise Dictionary where an arborist is described as "a person who studies trees". I can find no definition of "tree surgeon" in the Oxford English Dictionary, but I have no doubt that it describes someone who cuts, trims or otherwise prunes trees. What is clear is that someone who studies or cultivates trees or prunes them, or for that matter cuts them down, is not necessarily a forester. He may be concerned as an arborist/tree surgeon with trees which form no part of a

forest and do not qualify as growing timber. They may, for example, simply be ornamental trees designed to improve the appearance of a city such as Liverpool. Where they are grown merely to enhance the scenery eg. along the roadways or in strategic parts of the city centre or in parks, they clearly do not form any part of a forest, nor are they normally "growing timber" cultivated as a crop for eventual sale for commercial use. Of course, when an ornamental tree reaches maturity, it may well be sold off for such a use, but that is not the primary purpose for which it was cultivated. It is merely an incidental consequence of the decorative purpose for which it was initially planted and nurtured.

7. I am not sure what evidence additional to that recited above was before the tribunal as to the functions actually carried out by the claimant. The evidence appears to have been oral and is unrecorded, and the claimant told me that the use to which the trees on whose cultivation he was employed were put was not an issue before the tribunal. The claimant, in his submission to me, laid great store by the fact that he worked in the "Forestry Department" of the local authority, and considered that the tribunal were justified by reason of this nomenclature alone in finding that he was engaged in forestry, but, of course, the label attaching to a particular Department is not conclusive of its activities. Moreover, even if a Department does carry out forestry activities, it does not follow that all the employees in that Department are necessarily engaged in that particular form of activity. However, what is clear to me is that the tribunal failed to explain why "[the claimant's] work as an arborist/tree surgeon does indeed fall within 'forestry'". Manifestly, there was a breach of regulation 23(2)(b) of the Adjudication Regulations. I must therefore set aside the tribunal's decision as being erroneous in point of law, and direct that the appeal be reheard by a differently constituted tribunal who will, in the light of the guidance given above, determine, on the evidence then before them, whether or not the claimant was, throughout the relevant period, engaged in forestry. If he was, then I do not think it is in dispute that he used a chain saw, and was as a result engaged in a prescribed occupation for the purposes of his claim for vibration white finger.

8. A considerable amount of evidence is before me in the file which was not before the tribunal, and at the hearing the claimant enlarged upon the nature of his employment. In the course of his address to me, he stated that his employers had, in 1990 with the aid of a grant from the European Union, commenced the cultivation of a substantial track of woodland, which might be regarded as a forest. This statement was something completely new, as it does not appear in the papers nor was it apparently made to the tribunal. However, it is a factor which the new tribunal will have to consider. The claimant also informed me that the Liverpool City Council cultivated trees with a dual purpose in mind, both for their

decorative effect and also for their commercial utility on maturity. The new tribunal will need to consider these matters. Although, on the face of it, it would seem to me somewhat remarkable that a local authority which planted and cultivated trees along highways, in the city centre and in the public parks did so with the deliberate purpose of producing commercial timber, as distinct from merely creating an aesthetically pleasing environment with the incidental benefit of the sale of the timber when the trees matured, it will be open to the claimant to produce evidence to suggest that this was in fact the intention of the local authority. This will be a matter for the determination of the new tribunal on the evidence then before them.

(Signed) D G Rice
Commissioner

(Date) 17 March 1998