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*Assessment is 'A Decision'; Evidence to Actuarial
Examiners of Self-Employed Earnings After Deductions*

JGHI/JOB

Commissioner's File: CSFC/8/90

*Com. 11/90
Adm. 11/90. Ref. 11/90
SST*

SOCIAL SECURITY ACTS 1975-1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: [REDACTED]

Case No: [REDACTED]

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 17 September 1990 is erroneous in law and is set aside. The decision which I give in its place is that the claimant is entitled to an award of family credit for the period of 26 weeks from 30 January 1990. In the calculation of the appropriate rate of family credit reference will be had to the normal weekly earnings of the claimant and her husband as established by the actual net profit of their business in the said period of 26 weeks. The claimant's case is remitted to the adjudication officer to determine the amount of the award accordingly.

2. This is an appeal by the adjudication officer with leave on a question of law against the above-mentioned tribunal decision. The appeal was dealt with at an oral hearing held before me at which the adjudication officer was represented by Mr D Cassidy of the Office of the Solicitor in Scotland to the Department of Social Security. The claimant did not attend but her husband who had previously represented her attended the hearing and the claimant's case was conducted by Mr C B Grieve of Citizens Advice Scotland.

3. On 30 January 1990 the claimant made a claim for family credit in respect of herself, her husband and one dependent child. It was stated on the claim form that the claimant and her husband were self-employed, having started such self employment on 29 January 1990, and that each normally worked 40 hours per week. It was also stated that they were in receipt of Enterprise Allowance. In response to enquiries the claimant's husband provided an estimate of the income and expenditure of the business in the first 26 weeks of trading. On 14 February 1990 and on 21 February 1990 he provided further financial details. On 22 February 1990 the adjudication officer decided that the claimant was entitled to family credit at the rate of £9.20 for 26 weeks from 30 January 1990. Thereafter on 15 March 1990 the claimant's husband wrote to the family credit branch with a revised (lower) estimate of the business's income for the relevant period. He asked for the family credit to be recalculated. By letter dated 24 March 1990 the claimant was informed that his claim could not be reviewed because it had been based on his estimate. He was however informed that he had a right of appeal. The claimant duly appealed to a social security appeal tribunal.

4. On 17 September 1990 the social security appeal tribunal upheld the claimant's appeal. Their decision stated:-

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"Appeal succeeds. Applicant made a mistake in the calculation of his estimated income and should be allowed to correct that mistake. The case is therefore adjourned for recalculation of the claimant's entitlement to Family Credit."

The tribunal included the following in their findings of fact:-

"2. In his estimate of his income the applicant over-estimated his income for the period of 26 weeks, since he was in a new business which had just started up. His income should in fact have been £3,030.

3. The applicant made a mistake in the calculation of his estimate and that should be taken into account in the calculation of his entitlement to Family Credit."

The tribunal's reasons for their decision were stated in the following terms:-

"Social Security Act 1985 Section 104, an award may be reviewed if it was made in ignorance of or under a mistake as to a material fact. In this case, the applicant made a mistake as to a material fact i.e. the calculation of his estimated income for 26 weeks and that mistake was passed on to the Social Security Officer and used to calculate applicant's entitlement to Family Credit."

5. The first question which might be thought to arise in this case is whether the decision of the tribunal above quoted was a decision susceptible of appeal in terms of section 101 of the Social Security Act 1975. Mr Cassidy submitted that it was an appealable decision and that view was not challenged on behalf of the claimant. Although the tribunal adjourned the case for recalculation of the claimant's entitlement to family credit so that the case would apparently have to return to the tribunal for a decision on the amount, the tribunal had decided the appeal in the claimant's favour and as they had indicated how the adjudication officer should recalculate the award there would be no need for a further tribunal hearing unless the arithmetic was disputed. The decision therefore closely resembles the decision considered by the Commissioner in the decision on Commissioner's File CSIS/118/90. As the Commissioner pointed out in paragraph 17 of that case that decision in turn closely resembled many decisions given by the Commissioners which have never been suggested to be other than "decisions" in the statutory sense and capable of appeal. I agree with the Commissioner on that matter and I also substantially agree with his reasons for declining to follow decision CA/126/89, the decision of a Tribunal of Commissioners. A copy of decision CSIS/118/90 accompanies this decision. I hold the decision of the tribunal to be a "decision" for the purposes of section 101 of the Social Security Act 1975 and capable of appeal to a Commissioner.

6. I therefore turn to consider the adjudication officer's appeal against the decision of the tribunal. It is clear that the tribunal treated the appeal by the claimant as raising a question regarding the right of review of the adjudication officer's decision and that they found grounds of review established by way of a mistake as to material facts. However in the circumstances narrated in paragraph 3 above it is in my judgment clear that the claimant appealed against the adjudication officer's decision which, as reproduced on form AT2, was a decision awarding family credit at a specified rate. In these circumstances Mr Cassidy accepted, and I agree, that the claimant's appeal was an appeal against the decision awarding benefit and not

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an appeal against a refusal to review.

7. As the claimant's case was based on the statutory right of appeal conferred by section 100(1) of the Social Security Act 1975 and did not raise a review issue under section 104 of the Act it follows that, as was conceded by the claimant's representative, the tribunal decision is erroneous in law and must be set aside. I consider it expedient for me to exercise the power to give the decision which the tribunal should have given.

8. The case raises sharply the question of the scope of an appeal against an award of family credit. There is no express statutory restriction upon such right of appeal so that questions of entitlement and assessment of family credit are upon the face of the matter open for consideration afresh. In that connection section 20(5) of the Social Security Act 1986 contains the following material provisions:-

"(5) Subject to regulations under section 51(1)(a) below, a person in Great Britain is entitled to family credit if, when the claim for it is made or treated as made -

(a) his income -

(i) does not exceed the applicable amount; or

(ii) exceeds it, but only by such an amount that there is an amount remaining if the deduction for which section 21(3) below provides is made;..."

Section 20(6) provided as follows:-

"(6) Family credit shall be payable for a period of 26 weeks or such other period as may be prescribed and, subject to regulations, an award of family credit and the rate at which it is payable shall not be affected by any change of circumstances during that period."

The Family Credit (General) Regulations 1987 contain the following material provisions:-

"13.-(1) For the purposes of section 20(5) of the Act (conditions of entitlement to family credit), the income of a claimant shall be calculated on a weekly basis -

(a) by ascertaining in accordance with this Chapter and Chapter V of this Part (other income) the amount of his normal weekly income; and

.....

15. -(1) Subject to regulation 17 (periods to be disregarded), where a claimant's income consists of earnings from employment as a self-employed earner, his normal weekly earnings shall be determined, subject to paragraph (2), by reference to his weekly earnings from that employment -

(a) except where sub-paragraph (b) applies, over a period of 26 weeks immediately preceding the week in which the date of claim

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falls; or

(b)...[inapplicable] or

(c)...[inapplicable]

....

(2) Subject to regulation 17, where the claimant has been in employment as a self-employed earner for less than the period specified in paragraph (1)(a), his normal weekly earnings shall be determined by reference to any earnings received for the period that he has been in that employment and by reference to an estimate of his likely weekly earnings over the remainder of the first 26 weeks of the employment or by reference to such other evidence as may, in any particular case, enable his normal weekly earnings to be determined more accurately. ..."

9. The question that arises on the foregoing provisions is how far the provisions of section 20(5) and 20(6) govern the evidence that may competently be taken into account in an appeal against an award of family credit.

In the case on Commissioner's File CFC/024/1989 the Commissioner said this in paragraph 9:-

"9. I now move to the argument that, because it is a fundamental principle of adjudication that the adjudicating authorities deal with the circumstances at the date of the claim and because there is no specific provision to negate that principle in relation to regulation 15(2), the tribunal must only decide the issue before them on the figures that were available to the adjudication officer at the date of the claim. I do not agree. The hearing before the tribunal is a complete rehearing of the case and I consider that the members are entitled to take into account for the purpose of the calculation of the earning at the date of claim events which ensued since the date when the adjudication officer made his decision. I am not persuaded that the question which arises on the rehearing is only to be decided by reference to an estimate of the claimant's likely weekly earnings over the remainder of the first 26 weeks of the employment. Regulation 15(2) provides that if a person has been in self employment for less than 26 weeks the adjudication officer can decide the question on either an estimate of the likely earnings over that period or on other evidence which may lead to a more accurate determination. In many cases an adjudication officer will only be able to deal with the calculation by way of an estimate because there will be no real evidence before him. In effect, he has to do the best he can when calculating the claimant's earnings. However, a tribunal, who has to rehear the case, may be in a much better position, as was the tribunal in the case before me. They had before them evidence as to the true position during the 26 weeks and, on the basis of such evidence, were able to determine accurately the claimant's normal weekly earnings for the period. To do otherwise would be to produce an artificial calculation and to reach a decision which the members knew was not founded on the correct calculation on the evidence before them. I see no reason why the tribunal should not have looked at the case with the benefit of hindsight. The hearing before them was a complete rehearing

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of the case and regulation 15(2) allowed them to decide the calculation on the basis of evidence, which would lead to a more accurate determination, rather than predicting the earnings. I have considered the decision in R(I)5/82 which decided, in relation to special hardship allowance, the question whether a claimant satisfied the requirements of section 14(4) of the National Insurance (Industrial Injuries) Act

1946 can only be decided on the facts as they existed at the date of the insurance officer's decision, and that it was not enough for a claimant to show at some later date a total loss of earnings over a period of 12 months. That decision does not appear to me to be helpful here because it cannot be said that any facts as to the earnings during the 26 weeks existed at the time the adjudication officer gave the initial decision, his decision was given by reference to an estimate only. It does not appear to me that the tribunal erred in law in dealing with the calculation on the basis that the actual figures provided the best indication of the claimant's normal earnings in the case before them."

10. However in the case on Commissioner's File CFC/018/1989 where a similar question arose in connection with the normal weekly earnings of an employed earner under regulation 14 of the Family Credit (General) Regulations the Commissioner stated his conclusion at the end of paragraph 7 in the following terms:-

"In summary I would state that although it is well established in relation to other benefits that a tribunal should consider the circumstances of a claim down to the date of hearing, that principle does not apply to family credit, which must be decided on the circumstances existing at the date of claim. Evidence of actual earnings is not admissible as fresh evidence in regard to estimates made under regulation 14(2)(b) of the Family Credit (General) Regulations 1987."

11. In my judgement decision CFC/018/1989 falls to be distinguished from the present case and CFC/024/1989. CFC/018/1989 involved the case of an employed earner whose normal weekly earnings had to be ascertained in accordance with the provisions of regulation 14. That regulation, as in force at the material date, provided - in regulation 14(2)(b) - that where a claimant had not been employed for the requisite period before the claim was made and any earnings he had received were unrepresentative, his normal weekly earnings must be determined on the basis of an estimate of likely earnings provided by his employer. CFC/018/1989 was a regulation 14(2)(b) case and in those circumstances the Commissioner's conclusion that evidence of actual earnings was not admissible is clearly correct. It is not however applicable to the case of self-employed earners whose normal weekly earnings fall to be ascertained in accordance with the broad provisions of regulation 15(2) quoted above.

12. A further point of distinction between CFC/018/1989 and the present case is that decision CFC/018/1989 was not an appeal against the award of family credit but an appeal against a refusal to review that award. The Commissioner considered the difference to be of little significance in that case. There is however a difference of importance in the reverse situation of the present case where the question arising on appeal was not as to the scope of review but the scope of appeal.

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13. There is in my judgement no doubt as Mr Cassidy accepted that in the case of self-employed earners evidence of actual earnings after the date of claim may in appropriate cases be taken into account under regulation 15(2) in an appeal against an adjudication officer's decision upon the claim. Reported decision R(FIS)1/82, the decision of a Tribunal of Commissioners, dealing with the analogous situation under family income supplement is of at least persuasive authority to the same effect. I also accept the reasoning of the Commissioner in CFC/024/1989 that evidence of actual earnings will in the circumstances of cases such as that case and the present case be the best evidence of the claimant's "normal weekly earnings". The provisions of section 20 of the Social Security Act 1986 quoted above do not preclude such evidence because as recently pointed out in the decision on Commissioner's File CFC/014/91 it is still evidence directed to establishing what is to be taken to be the normal weekly earnings as at the date of claims. Although the claimant originally appealed on the basis of a revised estimate containing actual figures for the first month and a revised estimate for the remainder of the period, by the date of the tribunal hearing actual figures of the earnings in the 26 week period were available and could have been supplied and utilised.

14. I conclude that it is both competent and appropriate to find the claimant entitled to an award of family credit from 30 January 1990 calculated on the basis of evidence of the actual earnings of the business in the first six months period. I so find and as evidence of those earnings is not before me I shall remit the case to the adjudication officer to make the appropriate calculation on production of the requisite details. His decision will carry the normal rights of appeal should any dispute arise. My substituted decision is therefore as set forth in paragraph 1 above.

15. Although the decision of the tribunal has been set aside as erroneous in law, for practical purposes the claimant is the victor in this appeal.

(signed) J G Mitchell
Commissioner
Date: 3 June 1992