VGHH/1/LM **Commissioner's File:** CFC/026/1989

FAMILY CREDIT (GENERAL) REGULATIONS 1987

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

Decision

1. My decision is

(1) the decision of the social security appeal tribunal dated 6 September 1989 is erroneous in law and I set it aside

(2) the family credit payable to the claimant for the period of 26 weeks from 2 February 1989 is to be re-calculated by the adjudication officer

(3) the following expenses relevant to the assessment period (whether or not defrayed in that period) are to be apportioned between the business and any private use:

(a) all motor expenses of the van including the cost of the road fund licence, insurance, repairs and maintenance

(b) all telephone expenses including rental charges

(4) the apportionment made by HM Inspector of Taxes of the expenses referred to in paragraph (3) is cogent evidence of the amount wholly and exclusively incurred for purposes of the business which the adjudication officer is entitled to and (in the absence of contrary evidence) should, accept

(5) the allowance by the Inspector of Taxes of the office and workshop expenses shown in the accounts is cogent evidence that those expenses were wholly and exclusively incurred for the purposes of the business which the adjudication officer is entitled to (and in the absence of contrary evidence) should accept

(6) the adjudication officer and the claimant are at liberty to apply in the event of any dispute in carrying out the terms of this decision

Representation

2. See decision CFC/025/1989 (Bulman) a copy of which accompanies this decision.

Nature of this appeal

3. This is the second of the 3 appeals referred to in Bulman and the second appeal relating to family credit. As with the other two appeals, the main point with this appeal is concerned is the extent to which motor and telephone expenses are apportionable. In Bulman, the business was a partnership. In the present case, it is not. It is the husband's own business in which he is self-employed.

The period in issue

4. The period in issue is the period of 26 weeks from and including 2 February 1989: see paragraph 7 below.

The relevant law

5. The relevant law is set out in the Appendix to Bulman, a copy of which accompanies this decision.

The adjudication officer's decision

6. The facts forming the background to the adjudication officer's decision are not in dispute. On 2 February 1989 the claimant made a renewal claim for family credit. Included in the household are her husband and two dependant children. She declared she was not employed. Her husband declared that he was self-employed as a gas fitter/plumber for 50 hours per week. The original claim was disallowed on the ground that details of the claimant's income and expenditure of his business for the 26 week period immediately preceding the week in which the claim was received had not been supplied. After this, the husband provided a trading and profit and loss account for the year ended 18 January 1989 and, Mr Butt accepted, there was a fresh claim. No question of review of the original claim in fact arose.

7. The decision which was issued on 17 May 1989 was:

"I have reviewed the decision of the adjudication officer disallowing family credit from and including 2.2.89. I am satisfied that the decision was given in ignorance of a material fact. This was that all the required information had not been received. (Social Security Act 1975 Sec 104(1)(a). Social Security Act 1986 sec 52).

My revised decision for the period from and including 2.2.89 is as follows:

The claimant is not entitled to benefit for the period from and including 2.2.89 because the claimant's income, as calculated, was higher than the level at which family credit would become payable.

(Social Security Act 1986 Section 20(5)(a)ii and 21(3), Family Credit (General) Regulations 46, 47 and 48)."

The appeal tribunal's decision

8. The appeal tribunal heard the appeal against the decision of 17 May 1989 on 6 September 1989. The chairman's note of evidence is as follows:

"The Claimant did not attend. Mr Burr attended as a witness.

Adjudication Officer: The expenses in issue are:-

Motor travel	£1,726.00 (£1,075 allowed)
Telephones	£209.00 (£74.00 allowed)
Depreciation	£785.00

The Adjudication Officer referred to Family Credit (General) Regulations 1987, Regulations 15(1)(b) - Profit and Loss Account. Regulation 22(1)(a) and Regulation 23(3)(A) - expenses to be deducted "wholly and exclusively incurred".

Depreciation is not allowable - Regulation 22(5)(b).

On motor travel nothing has been allowed for tax and insurance and repairs and sixth-sevenths of the petrol has been allowed.

The telephone rental is for business purposes. £42 for business rental may be allowable.

Mr Burr: I have no private car."

9. The tribunal's decision was:

"The Claimant's appeal against the disallowance of family credit is allowed. The case is referred back to the Family Credit Section to enable them to calculate the Claimant's family credit on the basis of the principles set out in the reasons for this decision. The case is to be referred back to the Tribunal in case of disagreement."

Their recorded findings of fact were:

"The Claimant is self-employed. He has incurred expenditure in the year ending 18.1.89 for motor and travel amounting to £1,726. This includes fuel £1,234, tax £110,

insurance £105, repairs £187 and other miscellaneous expenditure. The Claimant has incurred expenditure of £209 on telephones. In his accounts there is an item for depreciation of £785."

Their recorded reasons for their decision were:

"1. Depreciation is not an allowable deduction - Family Credit (General) Regulation 22(5)(b).

2. Under Regulation 22(3A) expenses are deductible "which were wholly and exclusively incurred for the purposes of that employment". The Tribunal consider that the purpose for which expenses are "incurred" must be judged at the moment that those expenses are incurred. Once the expenses have been "earmarked" as either wholly and exclusively or not any subsequent events cannot alter their nature for the purposes of Regulation 3A.

3. Applying this test, for example, to repairs to the motor vehicle the Tribunal would regard them as being wholly and exclusively incurred for the purpose of the business because at the moment that those expenses are paid for to the repairer it is not known and indeed cannot be known whether and to what extent, if at all, the vehicle will be used for non-business purposes after the expenditure has been incurred.

4. The Tribunal would apply the same test to the car insurance and tax and other miscellaneous expenditure.

5. With regard to fuel, in the absence of specific records as to what petrol was purchased for private use and what for business use the Tribunal would accept the "rule of thumb" used by the Family Credit Section of making a deduction of one-seventh from the petrol for private use.

6. The Tribunal consider that the telephone account should be dealt with in the same way and allowed as a deduction in full except to the extent that there are call charges which are for private purposes."

10. The adjudication officer appeals, with the chairman's leave, against this decision on the following grounds:

"in arriving at their decision the tribunal have allowed as a business expense the full cost of the car insurance and tax and a portion of the telephone rental charge not considered to be for private use. It is my contention that such items of expenditure where not incurred entirely for business purposes, and therefore they cannot be said to have been "wholly and exclusively incurred for the purpose of that employment" under regulation 22(3A) of the Family Credit (General) Regulations. I further contend that no portion of those expenses could be allowed as business expenses."

Was the decision of the appeal tribunal erroneous in law?

11. Yes, it was. The decision of the tribunal was contrary to the evidence; for in answer to the question in respect of transport expenses, "state what % is for private" the claimant answered "1/7th for private use". In the light of that reply, the finding that the purpose for which the expense was incurred was entirely for business is in my judgment perverse and erroneous in law.

12. There is a further error. In giving reasons for their decision, the Tribunal say that the purpose for which expenses are incurred must be judged at the moment when they are incurred and once they have been "earmarked" as either wholly and exclusively or not subsequent events cannot alter their nature. So the Tribunal considered that if a claimant's motive at the time of the expenditure was user wholly and exclusively for business purposes that was decisive, and that earmarking something for such a purpose fixes the purpose. That is not the law. What is present in a claimant's mind at the time of the expenditure does not conclude the case: see Mallalieu v Drummond [1983] 2 A.C. 861 at page 875 letters A to E. Nor does "earmarking" make any difference. In Hillyer v Leek (1976) T.C. 90, a case arose under Schedule E but the first ground of the decision was equally applicable to Schedule D, which uses the same words in respect of expenses as those in regulation 22(4A) of the Family Credit Regulations 1987 as amended. The taxpayer was a computer engineer. His work involved travelling to the establishments of his firm's customers. His employers required him to wear a suit. When present on a customer's premises he might be called upon to assist the customer's engineer at short notice without an opportunity to change his overalls or a boiler suit. The taxpayer therefore maintained two working suits which he wore only for the purposes of his work. He claimed a deduction of £50 for their upkeep. This was disallowed by the inspector. The Commissioners confirmed the assessment. Goulding J. upheld the Commissioner and in the course of his judgment said, at page 93:

> "The truth is that the employee has to wear something, and the nature of his job dictates what that something will be. It cannot be said that the expense of his clothing is wholly or exclusively incurred in the performance of the duties of the employment.... In the case of clothing the individual is wearing clothing for his own purposes of cover and comfort concurrently with wearing it in order to have the appearance which the job requires.... Does it make any difference if the taxpayer chooses, as apparently Mr. Hillyer did, to keep a suit or suits exclusively for wear when he is at work? Is it possible to say, as Templeman J. said about protective clothing in the case of Caillebotte v. Quinn [1975] 1 W.L.R. 731, that the cost of the clothing is deductible because warmth and decency are merely incidental to what is necessary for the carrying on of the occupation? That, of course, was a Schedule D and not a Schedule E case, but the problem arises in a similar

way. The answer that the Crown makes is that where the clothing worn is not of a special character dictated by the occupation as a matter of physical necessity but is ordinary civilian clothing of a standard required for the occupation, you cannot say that the one purpose is merely incidental to the other. Reference is made to what Lord Greene M.R. said in Norman v. Golder (1944) 26 T.C. 293, 299. That was another case under Schedule D, but again, in my judgment, applicable to Schedule E cases, where the learned Master of the Rolls said, referring to the food you eat and the clothes that you wear: 'But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being.' In my judgment, that argument is conclusive of the present case, and the expenditure in question, although on suits that were only worn while at work, had two purposes inextricably intermingled and not severable by any apportionment that the court could undertake."

Lord Brightman, with whom Lords Diplock, Keith of Kinkeland Roskill agreed, set out this passage in Mallalieu's case and commented, at page 876 letter H of the report:

"I find myself in complete agreement with Goulding J. and I regard his remarks as appropriate in their entirety to the case before your Lordships."

The case of MacKinlay v Arthur Young [1990] 2 A.C. 239 also affirms the principle that the object to be served by a disbursement or expense cannot answered simply by evidence of what the paper says he intended to achieve: see page 255 letters F-H.

13. I set aside the decision of the appeal tribunal as erroneous in law. My own decision, which I substitute for that of the appeal tribunal, is set out in paragraph 1. In re-calculating the benefit the adjudication officer should apply the principles set out in Bulman, a copy of which accompanies this decision. Motor and telephone expenses require to be apportioned. The adjudication officer should have an opportunity of considering whether there is evidence to cast doubt on the apportionment of 6/7th for business and 1/7th for private purposes. In the absence of such evidence, the adjudication officer is entitled to act on that agreed apportionment made by the Inspector of Taxes: see paragraphs 26-35 of Bulman. This is the type of case envisaged by Goulding J. in the passage approved by the House of Lords in Mallalieu's case where the purposes are not so inextricably intertwined that an apportionment cannot be made. It is one where an apportionment can and should be made, as explained in Bulman.

14. Mr Butt suggested that the expenses of an office were income of the claimant under regulation 24(1) of the Family Credit

Regulations. I can see no ground whatever for such this view and reject it. The expenses of an office at home are capable of apportionment: see Horton v Young [1972] Ch 157; Caillebotte v Quinn [1975] 1 WLR 731 at page 734, letter F and my decision in Bulman at paragraph 34. The position would be the same in the case of a workshop.

15. The claimant's net profit and expenses are calculated on an earnings, not a cash, basis: see paragraph 22(3A) of the Family Credit Regulations 1987, as amended, which, in common with paragraph 22(4A) provide for earnings to be taken into account if relevant to the period, whether or not received in that period and for expenses wholly and exclusively incurred for the purposes of the employment to be taken into account whether or not defrayed in that period. If the year for which accounts are made up for tax purposes is the same as that in the case papers i.e. for the year ended 18 January 1989, the adjudication officer is entitled to act on the expenses accepted by the Inspector as evidence of the expenses wholly and exclusively incurred for the purposes of the business, unless there is evidence to cast doubt on what he accepted. I was told by the claimant, at the initial hearing on 4 April 1990 that the accounts had been agreed for tax purposes; but it is desirable that this should be confirmed in writing.

16. My decision is set out in paragraph 1. I grant liberty to apply in the event of dispute in carrying out the terms of my decision.

(Signed) V G H Hallett
Commissioner

Date: 17 January 1991