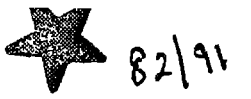

RAS/1/SH/LM Commissioner's File: CFC/004/91

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]

1. My decision is that the decision of the social security appeal tribunal dated 12 June 1990 is not erroneous in law. Accordingly this appeal does not succeed.

2. The claimant, a married woman living with her husband and four dependent children, made a claim, on 22 September 1989, for family credit. At that time she was unemployed. Her husband who had about a month earlier started a construction business was self-employed. At first an adjudication officer took the view that the claimant was not entitled to family credit because neither she nor her husband were engaged and normally engaged in remunerative work: section 20(5)(b) of the Social Security Act 1986. The claimant appealed and on making further enquiries the adjudication officer revised his first decision and then, apparently, made a further decision to the effect that the claimant was not entitled to family credit because "her" income (that is to say the husband's income) exceeded the applicable amount: section 20(5)(a)(i) of the 1986 Act. I say "apparently" because there has not been produced any record of the revised decision but that does not matter for present purposes.

3. The claimant's husband had started the construction business on 28 August 1989. The further enquiries made by the adjudication officer following the appeal against his first decision showed that in mid-November 1989 the claimant's brother-in-law had lent the business £5,500 to enable her husband to take on a job for Wirral Borough Council. The contract for that job was worth £7,719 and, according to the evidence, the claimant having received an interim payment of £4,000 from the Borough Council paid that sum to his brother in part repayment of the loan. And the adjudication officer, when calculating the weekly earnings of the self-employed husband as required by regulation 15 of the Family Credit (General) Regulations 1987, included both the £5,500 loan from the brother-in-law and the

interim payment of £4,000 notwithstanding that that sum was on its receipt repaid to the brother-in-law. That meant, as I have said, that the claimant's earnings exceeded the applicable amount and she was not entitled to family credit. She unsuccessfully appealed to the tribunal. She now appeals to the Commissioner. She was represented at her appeal by Mr J Strang of Goldsmith Williams, Solicitors. The adjudication officer was represented by Mr P Hull of the Office of the Chief Adjudication Officer.

4. Regulation 15 of the General Regulations, which I do not need to reproduce here, has the effect, so far as relevant to this case, that because the claimant's husband had been self-employed for less than 26 weeks his earnings from that self-employment had to be determined by reference to any earnings received for the period he had been self-employed, 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 might enable his weekly earnings to be determined more accurately: see regulation 15(2) of the General Regulations. I do not need to be further concerned with that provision however as it is accepted that the only issue in this case is whether the loan of £5,500 is to be included in the claimant's "earnings". If it is, Mr Strang agrees that the adjudication officer's decision that the claimant was not entitled to family credit is correct. If it is not, there has to be a recalculation.

5. Self-employed earners and their earnings to be taken into account for family credit purposes are dealt with by regulations 15 (to which I have already referred) and 21 to 23 of the General Regulations. Regulation 23 (deduction of tax and contributions for self-employed earners) is not relevant to this case. Regulations 21 and 22, so far as relevant, provide as follows -

> "21. - (1) Subject to paragraph (2), "earnings", in the case of employment as a self-employed earner, means the gross receipts of the employment and shall include any allowance paid under section 2 of the Employment and Training Act 1973 to the claimant for the purpose of assisting him in carrying on his business unless at the date of claim the allowance has been terminated.
>
> 22. - (1) For the purposes of regulation 15 (normal weekly earnings of self-employed earners), the earnings of a claimant to be taken into account shall be -
>
> (a) in the case of a self-employed earner who is engaged in employment on his own account, the net profit derived from that employment;
>
> (2) There shall be disregarded from a claimant's net profit any sum, where applicable, specified in Schedule 1.

(3) For the purposes of paragraph (1)(a) the net profit of the employment shall, except where paragraph (3A), (9) or (10) applies, be calculated by taking into account the earnings of the employment received in the assessment period, less -

(a) Subject to paragraphs (5) to (7), any expenses wholly and exclusively defrayed in that period for the purposes of that employment;

(b) an amount in respect of -

(i) income tax; and

(ii) social security contributions payable under the Social Security Act,

calculated in accordance with regulation 23 (deduction of tax and contributions for self-employed earners); and

(c) one-half of any qualifying premium payable.

(5) Subject to paragraph (6), no deduction shall be made under paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be, in respect of -

(a) any capital expenditure

(b) the depreciation of any capital asset;

(c) any sum employed, or intended to be employed, in the setting up or expansion of the employment;

(d) any loss incurred before the beginning of the assessment period;

(e) the repayment of capital on any loan taken out for the purposes of the employment;

(f) any expenses incurred in providing business entertainment.

(6) A deduction shall be made under paragraphs (3)(a), (3A)(a), (4) or (4A), as the case may be, in respect of the repayment of capital on any loan used for -

(a) the replacement in the course of business of equipment or machinery; and

(b) the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair."

Mr Hull's submission in relation to those provisions was to the effect that as "earnings" is defined by regulation 21(1) to mean "the gross receipts of the employment" and as the loan was such a receipt and as there is no provision to disregard it in Schedule 1 and no permitted deduction under paragraphs (5), (6) or (8) of regulation 22, it followed that the original adjudication officer and the tribunal were right to include the amount of the loan in the calculation of the claimant's earnings. Mr Strang did not dispute that the loan was a "receipt of the employment" for the purposes of regulation 21(1) but contended that under normal accounting procedures the amount of the loan would not be included in the net profit, that it could not possibly have been intended that the loan should be counted notwithstanding that it had been repaid, and that the result was unfair. I should say that Mr Hull did not challenge the first or last of those contentions. Mr Strang found support for all of his propositions in CFC/241/89.

6. It is of course necessary to establish the claimant's husband's income to see whether her income exceeds the relevant applicable amount: section 20(5)(i) of the 1986 Act. Regulation 13(1) of the General Regulations provides that for the purposes of section 20(5) the income of a claimant is to be calculated on a weekly basis by ascertaining the amount of his "normal weekly income". Regulation 15(1) requires that where the income consists of earnings from self-employment the "normal weekly earnings" are to be determined by reference to the weekly earnings from the employment over the appropriate period. Regulation 21(1) defines "earnings" for this purpose as "gross receipts of the employment". And regulation 22(1) requires that it is the "net profit" of the employment which is to be taken into account, having regard to the further provisions of regulation 22 as to the disregards and deductions which may and may not be made. That is the scheme of the provisions which, as it seems to me, is not entirely satisfactory because of the way it goes from "gross receipts" in regulation 21(1) to "net profit" in regulation 22(1). Furthermore, the drafting of regulation 21(1) is problematic in that if, as Mr Hull contended, "gross receipts of the employment" included everything without exception that comes in in relation to the employment - including the loan in question in this case - it is odd to find training allowances under section 2 of the Employment and Training Act 1973 expressly referred to as included. If "gross receipts" includes everything why refer to training allowances? Does that express inclusion suggest that other "receipts" in the course of the self-employment might not be included? There is also the point that if Mr Hull is right what would otherwise presumably be a capital receipt is turned into income. But that would not be unprecedented - regulation 31 provides for certain income payments to be treated as capital and regulation 25 provides for certain capital payments to be treated as income.

7. In CFC/24/89 the facts were very similar to those in this case except that the sum in question was not a loan but a grant of £900 from the Prince's Youth Business Trust to assist the claimant in setting up his business. Of course unlike the present case where the loan or most of it was repaid the grant was not. And it was decided that, notwithstanding - or indeed because of the fact - that under regulation 22(5)(c) it was expressly provided that no deduction is to be made in respect of "any sum employed ... in the setting up or expansion of the employment", the grant was not to be brought into account. The Commissioner said (paragraph 10) -

> " 10. I now turn to the second point taken by Mrs Wild, namely that the tribunal were wrong in law in deciding that the Prince's Young Business Trust grant was not to be treated as income. She emphasises the words used in regulation 21(1) "earnings ... means the gross receipts of the employment...", and submits that the true interpretation of those words is that any money which is received by a business are earnings for the purpose of the calculations. It seems to me that this phrase is unambiguous and means the gross figure received by the claimant from employment without excluding any sums spent in obtaining such amount. But like the tribunal, I cannot accept that it includes capital expenditure used to establish the business. I am reinforced in this view by a reading of regulation 22(5) which specifies that no deductions are to be made in the calculation of net profits of self employed earners in respect of any capital expenditure. It would be indeed odd if the gross earnings of such people were to include a grant made for the purpose of initial capital expenditure, and then when it was expended, it had to be ignored for the calculation of net profits. I cannot believe that it was the intention of the legislature to remove the incentive to start new businesses by so providing..."

I should perhaps mention that the reference in that paragraph to Chapter III of the General Regulations really should be a reference to Chapter IV as the claimant in that case was throughout treated as a self-employed earner. I have to say that I agree with most of what is said in that paragraph particularly where it is asserted that "gross receipts of the employment" in regulation 21(1) is unambiguous and means the gross figure received by the claimant from employment without excluding any sums spent in obtaining such amount. Now it may be that the grant in that case for setting up purposes is to be distinguished in relation to "gross receipts of the employment" from the kind of working capital loan in the present case. Whether that be so or not, I have come to the conclusion that, having regard to the plain and unambiguous words of regulation 21(1) and notwithstanding the drafting idiosyncrasies to which I have referred and notwithstanding that the effect of regulation 22(5)(e) is that in the calculation of net profit no deduction is to be made in respect of the repayment of capital on any loan taken out for the purposes of the employment and the apparent

unfairness of the result, the original adjudication officer and the tribunal correctly applied the provisions in deciding that the £5,500 loan had to come into the calculation by virtue of regulation 21(1) and was not allowed out by reference to any of the provisions of regulation 22 even though £4,000 of the loan was repaid. The result might be thought to be "odd indeed" as was said in CFC/24/89 but that does not in my view allow me to disregard what seems to be the comparatively plain meaning of the provisions. The phrase "the gross receipts of the employment" in regulation 21(1) is wide enough to include what would ordinarily be regarded as a capital receipt. I would not be justified in reading into that definition of "earnings" that it is limited to receipts in the nature of income.

8. There being, as far as I can see, no error of law on the part of the tribunal I must disallow this appeal.

(Signed) R A Sanders
Commissioner

Date: 6 November 1991