

★ 18/96

JMe

Commissioner's File: CFC/836/1995

**SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ADMINISTRATION ACT 1992****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. The claimant's appeal is allowed. The decision of the Sutton social security appeal tribunal dated 19 July 1994 is erroneous in point of law, for the reasons given below, and I set it aside. I consider it expedient to substitute my decision for that of the appeal tribunal, having made the necessary findings of fact (Social Security Administration Act 1992, section 23(7)(a)(ii)). My substituted decision is that the adjudication officer's decision dated 8 December 1993 falls to be reviewed on the ground that it was erroneous in point of law (Social Security Administration Act 1992, section 25(2)). The revised decision on review is to be made following the calculation of the claimant's income on the basis set out in paragraph 17 below. The calculation is to be carried out by the adjudication officer, who is then to determine whether the claimant is entitled to family credit on the claim made on 15 October 1993 and, if so, of what amount. If the claimant disagrees with the adjudication officer's determination, the appeal is to be returned to a Commissioner for further decision.

2. The appeal tribunal was concerned with the claim for family credit made on 15 October 1993. The adjudication officer's initial decision was that the earnings of the claimant's husband from his office as a sub-postmaster and from the associated shop business were too high for there to be entitlement to family credit. The adjudication officer on 23 January 1994 refused to review the initial decision. It was the refusal to review which was appealed to the appeal tribunal.

3. The approach taken by the adjudication officer was as follows. The payments received by the claimant's husband from Post Office Counters Ltd were treated as earnings from employment. Although he contracted with Post Office Counters Ltd as an independent contractor, he was appointed to an office and

so was within the definition of "employed earner" in regulation 2(1) of the Family Credit (General) Regulations 1987, which refers on to section 2(1)(a) of the Social Security Contributions and Benefits Act 1992. Payments were received monthly, so that the assessment period was the three consecutive months immediately preceding the week of claim (Family Credit Regulations, regulation 14(2)). The adjudication officer took the gross payments received in July, August and September 1993 subject to the deduction of national insurance contributions, since no income tax was deducted and no pension contributions were made (regulation 20(3)). Those payments were eventually calculated to give a weekly earnings figure of £291.63.

4. So far as the shop part of the business was concerned, the claimant had on the claim form signed on 14 October 1993 estimated the takings at £60 per day. The adjudication officer grossed that up over a 26 week period of six days per week to £10,920. On another form the claimant gave details of business expenses for the period from 11 April 1993 to 9 October 1993. The way that these were dealt with by the adjudication officer was set out in schedules to the written submission to the appeal tribunal (pages T47 and T52):

	Amount claimed	Amount not allowed	Amount allowed for FC
Rent	928.08		928.08
Light & Heat	271.56		271.56
Cleaning	30.00		30.00
Repairs	411.61		411.61
Property insurance	377.76		377.76
Telephone	504.73		504.73
Stationery	30.00		30.00
Postal services	20.00		20.00
Petrol	240.00	24.00	240.00
Bank charges	434.21		434.21
Thames water rates	107.64		107.64
Sutton water rates	49.75		49.75
Purchases	7967.58		7967.58
Road tax	60.00		60.00
Insurances	198.36	19.83	198.36
Repairs	125.00	12.50	112.50
Loan car replacement	792.72	79.27	713.45
Freezer replacement	204.15		204.15

That gave a total of £12,617.55 expenses allowed, which easily exceeded the figure of takings. However, a number of corrections and explanations need to be noted. The figure against the label "rent" was in fact for interest on the loan taken out to acquire the post office and shop as a going concern, and was given by the claimant as the monthly figure. Therefore, the £928.08 should have been multiplied by six to produce the figure for 26 weeks. The figure for repairs included the cost of a new floor. The figure for property insurance included the insurance of stock. The figure of £198.36 for insurance and £125 for repairs were for motor insurance and servicing, and the claimant's estimate of 10% private use was accepted. The figure for freezer replacement

represented the five instalments to repay a loan.

5. The adjudication officer applied the rule that a loss on one employment could not be set off against the profit in another employment (Family Credit Regulations, regulation 22(11)), so that the net earnings from the office of sub-postmaster (calculated as above) were taken as the claimant's net earnings.

6. When the claimant applied for a review of the initial adverse decision she noted that accounts had become available, although they had not yet been agreed by the Inland Revenue. She enclosed the accounts, which were described as trading and profit and loss accounts for the period from 24 March 1992 to 5 April 1993. The claimant's husband had started business on 24 March 1992. The accounts were as follows:

	£	£
Store sales		27045
Cost of sales		<u>21300</u>
Gross profit		5745
Post office salary (gross)		<u>18952</u>
		24697
Operating expenses:		
Rates	1082	
Light and heat	600	
Insurances	897	
Bank charges	333	
Loan interest	10579	
Telephone	936	
Post office licence fee	4502	
Miscellaneous	255	
Motor expenses	1630	
Accountancy	350	
Repairs	<u>141</u>	
		<u>21305</u>
Net profit		<u>3392</u>

The claimant said that that net profit was not enough to make a living. The adjudication officer on 26 January 1994 had that evidence before her when she refused to review the initial adverse decision.

7. The claimant attended the hearing before the appeal tribunal on 19 July 1994, having earlier made the points that her husband was not an employee of Post Office Counters Ltd and that his payments had been reduced on annual review. No representative of the adjudication officer attended. The appeal tribunal dismissed the claimant's appeal. Its findings of fact were as follows:

1. The claimant and her husband run a post office and stores, her husband receiving a salary as a postmaster.
2. The shop is, and has been since before the date of

claim, running at a loss. It has been kept going by use of the salary. The salary is too high to allow payment of family credit."

Its reasons were as follows:

"1. We accept the adjudication officer's submission on the law, in which the salary and loss from the shop are treated separately, and not offset. It seems to us that the regulations do not permit earnings as an employee, i.e. the salary, to be offset against the loss made by self-employment.

2. However, it may be that we are mistaken in this view. If so it would be possible either to appeal against our decision on this point, it being a point of law, or to apply to set our decision aside so that this point can be argued."

8. The appeal tribunal chairman later granted the claimant's application for leave to appeal to the Commissioner. The adjudication officer at first, in the submission dated 15 March 1995, opposed the appeal. He relied on Commissioners' decisions R(FC) 1/93 (Commissioner's file no CFC/20/1991) and CFC/16/1992 for the proposition that sub-postmasters, although independent contractors, were office-holders and accordingly employed earners for the purposes of section 2(1)(a) of the Social Security Contributions and Benefits Act 1992. The Commissioners held that the two occupations of shopkeeper and sub-postmaster, although frequently carried on in the same premises, are two separate and distinct occupations. Then, regulation 22(11) of the Family Credit Regulations provides that:

"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."

The adjudication officer submitted that the appeal tribunal applied the correct legal rule in following that approach.

9. There is no doubt of the legal effect of the Commissioners' decisions cited above and of regulation 22(11). However, in her observations in reply dated 9 July 1995 the claimant raised some pertinent points. She said that the post office occupied retail space and that the majority of customers were for the post office. The post office would continue if the shop closed. Therefore, she argued, expenses such as heating and lighting should be attributed solely to the post office, as should most of the loan interest, since the bulk of the goodwill which had to be bought derived from the post office. She enclosed a copy of the sub-postmaster's contract with Post Office Counters Ltd, which clearly provides that the sub-postmaster is an agent, not an employee. Section 13(1) of the contract provides that the sub-postmaster must, at his own expense, provide reasonable office accommodation and fittings needed to carry on Post Office

Counter's business. Section 13(3) provides that the sub-postmaster must also, at his own expense, clean, decorate and maintain the premises inside and out to a good standard, heat and light the premises and provide other facilities. In a letter dated 15 February 1996 she estimated that 90% of the overall business expenses were attributable to the post office operation.

10. An oral hearing was ordered, to deal in particular with the possible apportionment of expenses. It took place on 6 March 1996. The claimant did not attend. The adjudication officer was represented by Mr Leo Scoon of the Office of the Solicitor to the Department of Social Security. I am grateful to Mr Scoon for his assistance.

11. Mr Scoon submitted (in agreement with the further written submission dated 20 February 1996) that Commissioner's decision R(FC) 1/90, applying Parsons v Hogg, governs the calculation of a person's gross earnings from employment as an employed earner under regulation 20(3) of the Family Credit Regulations. It holds that there must be deducted the expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment. He also submitted, by analogy with Commissioner's decision R(FC) 1/91 on the apportionment of expenses between business and personal use, that in the present case there could be an apportionment of expenses between the shop and the carrying out of the office of sub-postmaster. I agree. The failure of the appeal tribunal to deal with that point (although understandable, because it was not expressly put to it) was an error of law. As a result I do not have to decide definitely whether the appeal tribunal erred in law in not acknowledging that the decision under appeal was the refusal to review, not the initial adverse decision. I do consider, though, that in view of the evidence before the appeal tribunal of the submission of accounts, the appeal tribunal erred in law in not considering the possible application of regulation 15(1)(b) or (c) of the Family Credit Regulations on the period over which the claimant's husband's earnings from self-employment should be assessed.

12. For those reasons, the appeal tribunal's decision must be set aside. Mr Scoon submitted that I should substitute my decision for that of the appeal tribunal, as I was able to make the necessary findings of fact. I have concluded that I should take that course. My substituted decision is set out in paragraph 1 above. It is plain that the adjudication officer on 23 January 1994 should have reviewed the adjudication officer's adverse decision dated 8 December 1993 on the ground that it was erroneous in point of law, in failing to apply Commissioner's decision R(FC) 1/90 and to consider the possible deduction of expenses from the gross receipts of the claimant's husband's employment as an employed earner. I find that ground of review made out, and so must go on to make a revised decision on review. I explain that decision below, and deal further with Mr Scoon's submissions.

13. It seems helpful first to identify the period over which the earnings of the claimant's husband are to be assessed. In

normal as at the date of claim. In the present case, the period covered by the profit and loss account ran from the start of the business. The account might for that reason not be expected to give an accurate picture of earnings once the business was up and running. The period covered ended about six months before the date of claim. Figures, whose accuracy has not been challenged, are available for the period of 26 weeks before the week of claim. Finally, where, as in this case, there is a somewhat artificial splitting of the overall business into two employments, and in respect of the employment as an employed earner a period immediately before the week of claim has to be looked at, it seems desirable to look at some comparable period in assessing the earnings from self-employment. For all those reasons I am satisfied that a more accurate determination of the normal earnings from self-employment as at the date of claim is to be gained from the figures for the 26 weeks before the week of claim.

15. I deal first with the claimant's husband's earnings from employment as an employed earner. It is not disputed that in the period of assessment he actually received the three monthly payments set out on page T54, subject to no deduction of income tax, but subject to the deduction of national insurance contributions. How should the principle of Parsons v Hogg and R(FC) 1/90 be applied to those receipts? Mr Scoon put forward a number of possible methods of apportioning the overall expenses set out in paragraph 4 above (with its corrections) as between the shop business and what was wholly, exclusively, and necessarily incurred in performing the duties of sub-postmaster. These involved adopting the split between the two activities in terms of turnover, or of profits or of floor-space occupied. The claimant of course had put forward a 90/10 split. None of those approaches can simply be applied to the total of the expenses set out in paragraph 4 above. That is because some of those expenses can only be related to the shop business and not to the office of sub-postmaster. In particular, the figure for purchases can only refer to purchases for sale through the shop business. The same applies to the repayments on the loan for freezer replacement. The various motor vehicle expenses are not quite so clear, but I can on the current evidence see no reason why carrying out the duties of a sub-postmaster requires the running of a motor vehicle. I think that the motor vehicle is much more likely to be used for the shop business, for instance to transport purchases of stock or possibly to make deliveries. As I say below, I have decided that it is better in the present case to make a broad judgment on the evidence available, rather than to impose the further delay which would be involved in requiring a new appeal tribunal to consider more detailed evidence. Therefore, I would exclude as not necessitated by the duties as sub-postmaster, the expenses of purchases, repayments on the loan for freezer replacement, petrol, motor insurance, motor servicing and repayments on the loan for motor vehicle replacement.

16. That leaves the other expenses which could fairly be regarded as covering both activities, either as relating to the general expenses of running the common premises and both

activities or having funded the acquisition of both activities. I am satisfied that the appropriate proportion of those expenses was wholly, exclusively and necessarily incurred in the performance of the duties of sub-postmaster, especially in view of the express provisions in the contract with Post Office Counters Ltd for the provision and maintenance of premises. I am certainly not going to lay down any particular method of apportionment of such expenses as appropriate in other cases, even in very similar cases or in later claims by the claimant in the present case. I make a broad judgment in the circumstances of this particular claim only, on the rather limited evidence available. It is already over two years since the claim was made, and all that is strictly in issue is whether family credit can be awarded for the 26 week period on that claim. I do not propose to impose the further delay of requiring evidence to be produced about the amount of floor area or shelf or counter space occupied by the post office side of the activities and the shop side of the activities. In the absence of such evidence a 50/50 split might seem the obvious solution. I take the point made by the claimant that the primary activity, which prompts the majority of customers to enter the premises, is the post office. Mr Scoon accepted the general force of that point. But I do not think that I can assume the 90/10 split which she proposed. Taking a broad view I think that it is fair to allocate 75% of the expenses in question to the employment as sub-postmaster and 25% to the shop business.

17. I leave the detailed calculations to be made by the adjudication officer. The adjudication officer is, in calculating the earnings from employment as an employed earner in the three month assessment period, to deduct from the gross receipts from Post Office Counters Ltd 75% of the expenses identified in paragraph 4 above (with the correction mentioned), having first taken out the expenses solely relating to the shop business (see paragraph 15) and scaled the figures down to three months from six months. In calculating the earnings from employment as a self-employed earner in the 26 week assessment period, the adjudication officer is to take into account all of the expenses identified in paragraph 15 above (subject to the existing deduction for private use) and 25% of the expenses identified in paragraph 16 above. Having made those calculations on what basis, the adjudication officer is to make a determination whether or not the claimant is entitled to family credit on the claim of 15 October 1993 and, if so, of what amount. In making that determination the adjudication officer must of course apply regulation 22(11) of the Family Credit Regulations if there is a loss in any one of the employments. If the claimant disagrees with the adjudication officer's determination, the appeal is to be referred to a Commissioner for further determination.

18. I stress again the point made in paragraph 16 above, that my decision is limited to the claim of 15 October 1993. The approach which I have taken on the evidence available to me about the allocation of expenses between the two employments is not necessarily to be applied to later claims, where different or more detailed evidence may be available.

(Signed) J Mesher
Commissioner

Date: 21 MAR 1996