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MJG/SH/7

Commissioner's File: CFC/002/1990

FAMILY CREDIT (GENERAL) REGULATIONS 1987

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal from the decision of the social security appeal tribunal dated 7 December 1988 as that decision is erroneous in law. My decision is that, in relation to her claim for Family Credit made on 28 March 1988, the claimant is entitled to an award of Family Credit from 11 April 1988. The period of the award and its amount is to be calculated forthwith by the local adjudication officer. Any dispute as to the period or amount can be referred to me for Supplemental Decision: Social Security Act 1975.

2. This is an appeal to the Commissioner by the claimant, a married woman born on 9 April 1953. When she made her claim for family credit on 28 March 1988, she was living with her husband and their five dependent children born on 24 July 1970, 2 January 1974, 5 March 1975, 10 November 1976, and 7 March 1978, respectively. The appeal is against the unanimous decision of a social security appeal tribunal dated 7 December 1988, which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 17 August 1988, to the effect that the claimant was not entitled to family credit. That officer's decision in fact was given on an erroneous factual basis, namely on the supposition that neither the claimant nor her husband were "engaged and normally engaged in remunerative work" (Social Security Act 1986, section 20(5)(b)), at the date of claim on 28 March 1988. However it subsequently appeared that although the claimant's husband apparently ceased his paid employment on 25 March 1988 (just before the date of claim), the claimant herself was still trading in her self-employment as a "Fish Grill". The claimant in fact had commenced trading on 23 May 1987 and continued to do so until the business closed down on 11 June 1988. In the weeks ending 19 and 26 March 1988 and 2 April 1988 she had worked 40 hours per week.

3. Prima facie therefore she was entitled to family credit but the claim foundered before the social security appeal tribunal on the ground that the claimant had "failed to provide the necessary accounts, and consequently cannot succeed in her claim for Family Credit, unless she does provide the accounts that have been requested by the Adjudication Officer." (tribunal's reasons).

4. That was a reference to regulation 15(1)(b) of the Family Credit (General) Regulations 1987. Regulation 15(1), as in force at the relevant time, provided as follows,

"Normal weekly earnings of self-employed earners

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 ... by reference to his weekly earnings from that employment -

(a) over a period of 26 weeks immediately preceding the week in which the claim is received; or

(b) where any accounts of the employment are maintained and audited by a person qualified for appointment as an auditor under section 389 of the Companies Act 1985, over a 52 week period in respect of which such accounts are maintained provided that that period terminates within the 26 weeks preceding the date on which the claim is received; or

(c) over such other period of weeks preceding the week in which the claim is received as may, in any particular case, enable his normal weekly earnings to be determined more accurately."

5. In fact the claimant supplied before the hearing before the tribunal a balance sheet as at 11 June 1988 and a profit and loss account for the period 22 May 1987 to 11 June 1988, both prepared by a Chartered Accountant. They were however by the statement on them prepared "without carrying out an audit" but an accompanying letter dated 14 October 1988 from the accountant pointed out that the statutory definition of an audit covered only limited companies etc., whereas the claimant was the sole proprietor of the Fish Grill. The other difficulty about the accounts, so far as concerned regulation 15(1)(b) of the above cited Family Credit Regulations, was that they did not terminate "within the 26 weeks preceding the date on which the claim is received" and did not end until a later date, namely

11 June 1988.

6. That was why the accounts were rejected by the social security appeal tribunal but in my judgment there lies therein an error of law. That is because regulation 15(1) contains three alternative ways of determining weekly earnings from self-employment, of which accounts of the employment are only one. It is plain that where the accounts for some reason do not satisfy regulation 15(1)(b) then the computation must be made "over a period of 26 weeks immediately preceding the week in which the claim is received" or if that cannot be done "over such other period of weeks preceding the week in which the claim is received as may, in any particular case, enable [the claimant's] normal weekly earnings to be determined more accurately." (regulation 15(1)(a) and c)).

7. Normally, of course, it would be appropriate for accounts to be supplied, which did comply with regulation 15(1)(b). However, in the present case the letter dated 14 October 1988 from the chartered accountant states as follows,

"I confirm as a Chartered Accountant that the Profit and Loss Account submitted to you was prepared in accordance with the normal accounting procedures from the books and records which were supplied to us and that they are in accordance therewith. I note also your comment that the accounts were for the 'wrong' period. Again I must inform you that the accounts were prepared for the period of trading in accordance with normal Inland Revenue Regulations. It is clearly possible to allocate the profits on an arbitrary basis as you request and again in accordance with normal procedures would suggest that if you require profits or losses for the 6 months period up to 28 March, then the enclosed accounts be used as a pro rata basis. Accounts cover 386 days from 22 May 1987 to 11 June 1988 and show a loss of £1,654. From 29 September 1987 to 28 March 1988 covers 182 days and on a pro rata basis of 182/386 then the loss for that period amounts to £780."

8. That clearly shows in my view that, taking the period in regulation 15(1)(a) of the Family Credit Regulations, there was a considerable loss for that period and certainly no earnings to be brought into account from the business by the claimant, despite her working 40 hours a week in it. I therefore exercise my power under the amendments to section 101 of the Social Security Act 1975 made by the Social Security Act 1989 to find as a fact that at the time of the claim there were no normal weekly earnings by the claimant from the business in question.

9. The local adjudication officer will therefore need to calculate the claimant's entitlement to family credit on that basis. A problem referred to by the adjudication officer in a written submission dated 6 September 1991.

"It is unclear from the papers whether or not the claimant's husband was employed in a gainful occupation at the date of

claim and consequently whether there were earnings from that employment to be taken into account ... on the claim form dated 21 March 1988 the claimant said she was not receiving child benefit for her eldest child but on the second claim form the claimant said she was receiving child benefit. At the date of claim the child was 17 years old. If he was receiving full-time non-advanced education, by attendance at a recognised educational establishment he may be treated as a child and included in the family."

10. The local adjudication officer will need to ascertain these matters.

11. The submissions from the adjudication officer now concerned have proceeded partly on the basis that as the claim on a family credit claim form was made on 28 March 1988, i.e. before in fact Family Credit replaced Family Income Supplement on 11 April 1988, a question may arise as to whether the claim was in truth a claim for Family Income Supplement. There were different accounting rules for family income supplement. The adjudication officer suggests that I should refer the matter to the Secretary of State to determine whether the claim for family credit could be treated as a claim for family income supplement. However I do not consider that the claimant intended to do this, despite what she said on 2 October 1988 on form FCS2043 when she said "I have applied for FIS since March". The claimant clearly cannot be expected to appreciate the technicalities of the transfer from family income supplement to family credit and I have come to the conclusion that the claim on the family credit claim form was what it said, namely a claim for family credit and not for family income supplement.

12. It follows that any award under the ruling in this decision cannot start until family credit started on 11 April 1988. That is of course only about a fortnight after the date of claim on 28 March 1988. It cannot be treated as a renewal claim for family income supplement under regulation 4 of the Family Credit (Transitional) Regulations 1987 (for the reason see paragraph 2 of a helpful written submission dated 6 September 1991 by the adjudication officer now concerned). However, it is clear that it can be treated as a claim for family credit since it was sent to an appropriate office on or after 1 March 1988 and received there before 11 April 1988 (see regulation 3(1) of the said Transitional Regulations).

(Signed) M.J. Goodman
Commissioner

(Date) 14 February 1992