

family credit and overpense allowance

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JM/24/LM

Commissioner's File: CFC/3/1989

Region:

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: 617/01939

[ORAL HEARING]

1. This is an adjudication officer's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 6 October 1988 which reversed a decision issued by the adjudication officer on 21 June 1988. My decision is as follows:

- (1) The aforesaid decision of the appeal tribunal is erroneous in point of law and is set aside.
- (2) Without making fresh or further findings of fact I can myself give the decision which I consider that the appeal tribunal should have given.
- (3) Family credit is not payable further to the claim made on 18 May 1988 because neither the claimant nor her husband ("Mr B") was, at any relevant time, engaged in remunerative work within the meaning which the relevant legislation assigns to that term.

2. I held an oral hearing of the appeal. Both the claimant and Mr B attended - and their side of the case was ably and fluently presented by Mr B. I am grateful too to the adjudication officer's representative, who had obviously taken the trouble to acquaint himself thoroughly with both the relevant facts and the relevant law. I cannot pretend to have found this an entirely straightforward matter. In the substantial period during which I have reflected upon it, my mind has swung from one side to the other. One cannot but have sympathy for the claimant and for Mr B. At the end of the day, however, I have concluded that the relevant legislation is incompatible with their claim.

3. In so far as the material facts are objective, they are not in dispute. The claimant was born in 1949 and Mr B in 1946. They have three young children. Mr B had been employed as an audio engineer - but he lost that employment by reason of redundancy. Commendably, he then set about equipping himself with alternative skills so that he might resume the role of bread-winner for his family. He enrolled - and persisted - in a correspondence course in computing. But in his teens he had tried writing. He had maintained an ambition in that direction. From 16 November 1987 he regarded and treated himself as a self-employed writer. He made a modest investment in equipment. He kept accounts. He told the appeal tribunal that he devoted at least 48 hours a week to his writing. (It has been accepted by the adjudication officer throughout that Mr B devoted to his writing at least the prescribed minimum of 24 hours a week.) It appears that Mr B had taken a correspondence course in

writing. To the appeal tribunal he produced copies of manuscripts which he had submitted to publishers. He is recorded as having said to that tribunal: "The only way was to keep sending scripts." It is common knowledge that many, many people have the ambition to be professional writers; and that the great majority of them have no realistic hope of attaining that ambition. I am satisfied that Mr B did not fall into the category of the manifest "no-hopers". He was awarded an enterprise allowance of £40 a week for 12 months in respect of his writing activities. At the hearing before me he referred to letters which he had received from publishers. At least one of those letters was very discouraging; but another, which rejected the script which had prompted it, stated that the relevant publishers looked forward to seeing further scripts from Mr B. There was also a letter, written a few months after the appeal tribunal hearing, which likewise was not too discouraging.

4. This appeal is, of course, about family credit. Family credit was introduced, with effect from 11 April 1988, as the successor to family income supplement. The two schemes differ somewhat in their detailed application. Common to both, however, was and is an underlying intention to give financial assistance to families where the remuneration of the bread-winner (or bread-winners) is below what is regarded as an acceptable sum for the maintenance of the relevant family. Some of those who are without work are entitled to unemployment benefit. Those whose work is for less than a prescribed number of hours a week may be entitled to income support (formerly to supplementary benefit, although the prescribed maximum number of hours was different). Family income supplement was and family credit is designed to plug the poverty gap (in respect of families) between sufficiently remunerated work, on the one hand, and unemployment or short-hour work, on the other. There is an obvious public interest in encouraging family bread-winners to engage in poorly remunerated work rather than do no work at all; for in the latter case the whole cost of maintaining them and their families will fall on public funds. Inevitably, accordingly, both the family income supplement scheme and the family credit scheme called and call for consideration of the concept of "remunerative work". And it is that concept which lies at the core of this appeal.

5. Family credit was introduced (subject to the relevant Commencement Orders) by the Social Security Act 1986. I quote from section 20(5) thereof:

"(5) Subject to regulations under section 51(1)(a) below [which relates to the form of and time for making a claim], a person in Great Britain is entitled to family credit if, when the claim for it is made or is treated as made -

(a) .....

(b) he or, if he is a member of a married or unmarried couple, he or the other member of the couple, is engaged and normally engaged in remunerative work; and

(c) ....."

Regulation 4 of the Family Credit (General) Regulations 1987 [SI 1987 No 1973] is entitled "Remunerative work". Paragraph (1) thereof provides thus:

"(1) Subject to the following provisions of this regulation [which are directed to the computation of the number of hours of work], for the purposes of section 20(5)(b) of the Act (conditions of entitlement to family credit) and these Regulations, remunerative work is work in which a person is engaged, or, where his hours of work fluctuate, is engaged on average, for not less than 24 hours a week, being work for which payment is made or which is done in expectation of payment."

Did Mr B's writing activities, at the time relevant to this case, fall within the words which I have emphasised?

6. So far as I am aware, the Commissioner has not hitherto pronounced upon the aforesaid regulation 4(1) - in the context, at any rate, of the words which I have emphasised. In the course of the hearing I was referred to decisions R(FIS) 1/83 and R(FIS) 6/85. Those are both significant decisions; but they are both, of course, directed to the family income supplements legislation. That legislation used the phrase "remunerative full-time work" (see, eg, section 1(1)(a) of the Family Income Supplements Act 1970 and regulation 5 of the Family Income Supplements (General) Regulations 1980 [SI 1980 No 1437]) but no explanation or definition of that term was essayed. R(FIS) 1/83 concerned a claimant who for 39 hours a week attended a training workshop provided under the Youth Opportunities Programme. The Commissioner held that she was not entitled to family income supplement. His precise grounds are not material to the present appeal. But in paragraph 7 he said this:

"In my judgment, remunerative work means work performed for an employer in return for wages, salary or some other quantifiable consideration, or, where the person concerned is self-employed, work carried out with the desire, hope and intention of claiming a reward or profit." (Again, my emphasis.)

In R(FIS) 6/85 a different Commissioner cited and agreed with that passage. And, of course, the claimant in this case relies upon it. My own comments immediately follow.

7. "Hope", in the context in which the Commissioner used it in R(FIS) 1/83, must, in my view, have some basis in objective reality. We have all come across people in whose bosoms some particular hope "springs eternal"; but, in the eyes of everyone else, that particular hope is fanciful beyond all belief. Some years ago I myself gave a decision (so unremarkable that I could not now hope to identify its reference number) which concerned a claimant whose invalidity benefit had been terminated on the ground that, by his own admission, he was not incapable of work. The facts were that, although he was quite seriously incapacitated, he whiled away his time at home by penning (literally) articles which he submitted for publication to a variety of well-known magazines. He brought some examples to the oral hearing. (To be fair to the lower adjudicating authorities, they had never seen any examples of that claimant's "work".) It took me about 60 seconds to satisfy myself that there was not the slightest realistic chance that anything which that claimant wrote would ever be published by anyone. But his own, subjective, hope was undoubtedly sincere. I am certainly not equating the claimant in this case to that claimant. I am concerned solely to demonstrate that "hope", as used in R(FIS) 1/83, must be approached with a measure of objectivity.

8. But, as the adjudication officer's representative stressed, the interpretative lacuna which the Commissioner sought to fill in R(FIS) 1/83 has now been filled (to some extent, at least) by the legislation itself. The crucial words are now "work .... which is done in expectation of payment" (cf paragraph 5 above). In the submission of the adjudication officer now concerned are set out the meanings attributed to "expectation" by the Shorter Oxford English Dictionary. I need not rehearse them here. I am in no doubt that, as a matter of ordinary English usage, "expectation" imports a materially higher element of probability than "hope"; but I do not consider that any useful purpose can be served by trying to express, in terms of percentages, racing odds or otherwise, the precise degree of probability imported by either term.

9. What then, at the material time, was Mr B's "expectation of payment"? On the claim form, signed on 17 May 1988, the claimant wrote:

"My husband is self-employed as a writer. To date all his manuscripts have been rejected and he does not anticipate any sales in the near future."

Further enquiries were made. On 26 May 1988 Mr B signed a questionnaire in which he had written:

"Do not expect any sales for next 6 months."

And I quote at some length from the response which Mr B made to the submission of the adjudication officer now concerned:

"When I attended the tribunal on behalf of my wife which took place in Wigan on 26th September 1989 [something has gone wrong with the date], with regard to regulation 4(1) I made the following points: That I intended to write a play which I expected to take up to six months to complete and was doing so, to quote the form of words used in paragraph 7 [of R(FIS) 1/83], 'with the desire and hope and intention of obtaining reward or profit', either within that period or beyond that period, for work carried out within that period. If this were not so, would I not have saved myself the risks attached to self-employment, the inconvenience of keeping records and accounts etc and continued to claim Unemployment Benefit? ....

Is the adjudicating officer qualified to judge my ability as a writer? Has he seen any of my scripts? Can any writer, even an established and well known [one], be sure of having his/her work accepted by a publisher? ....

I am glad at least that the Inland Revenue have confidence in me, because they have estimated that over this period I have earned £8000.00."

10. The answer to the question which I posed in the first sentence of the immediately preceding paragraph requires consideration of the length of the prospective period in which payment is to be "expected". I have not found it easy to decide that ancillary issue. The adjudication officer's representative submitted that that period should not in any event be longer than 6 months from the date of claim. He stressed that family credit is awarded for periods of 26 weeks at a time (in contrast to family income supplement, where the basic award period was 52 weeks). He stressed that family credit is intended to supplement low incomes - but not to relieve those who have no income whatsoever (cf my paragraph 4 above). This issue goes to the very heart of what is sometimes called "the intendment of the legislature"; and I am by no means sure that I can confidently ascertain that intendment. A family man made redundant from regular employment may set up in self-employment as a jobbing gardener. It may be some days - even weeks - before there is any response to his advertisements in the local press and the local shop windows. But there will be a reasonable expectation that, in due course, he will obtain some remunerative work. He would appear to be clearly entitled to family credit - although the calculation of the appropriate sum might present a measure of difficulty. At the other end of the spectrum can be posited the sculptor or painter who embarks upon a most substantial work which is likely to occupy him for a year but for which, at the end, he is virtually certain to receive a substantial sum. It is my view - but I may well be wrong - that the family credit scheme was not devised or intended to finance the family of that artist or sculptor whilst the relevant artefact is being produced. The case of the claimant with whom this decision is concerned is, of course, somewhere in between those examples. I am not to be taken as seeking to establish any hard and fast principle; but it seems to me that, as a general rule of thumb, the period of 26 weeks from the date of claim should normally be the period in which expected payment should be sought.

11. By way of reinforcement of the argument with which I have dealt in the preceding paragraph, the adjudication officer's representative referred me to paragraph (2) of regulation 14 ("Normal weekly earnings of employed earners"), paragraph (2) of regulation 15 ("Normal weekly earnings of self-employed earners"), regulation 20 ("Calculation of net earnings of employed earners") and regulation 22 ("Calculation of net profit of self-employed earners"). He invited me to note what he called "the twin threads" running through those regulations, namely -

- (a) provisions for dealing with situations where employment (including, of course,

self-employment) has been for specified periods before the date of claim; and

- (b) provisions for dealing with situations where employment has been for less than such periods.

And he suggested that I might import those threads into my construction of regulation 4(1). It is an ingenious - and in no way negligible - submission. But the provisions for ascertaining normal weekly earnings, net earnings and net profits are (no doubt inevitably) complex. I am loath to import them into the relatively straightforward wording of regulation 4(1). That wording should, so far as possible, be given its ordinary meaning. The only gloss which, in this decision, I seek to put upon that wording is that which I have set out at the end of the preceding paragraph.

12. So, applying to the facts of this case the construction which I have put upon regulation 4(1), I am driven to conclude that, at the date of the relevant claim, Mr B was neither engaged nor normally engaged in "remunerative work". (There has never been any suggestion that the claimant herself was so engaged.) I cannot pretend to be entirely satisfied with the outcome. In the event, Mr B renounced most of the second half of his 12 months' enterprise allowance - and claimed unemployment benefit. I am by no means persuaded that that was really meant to be the combined effect of the schemes for unemployment benefit, income support and family credit. Mr B has been the victim of somewhat complex legislative provisions which he could not - at any material time - have been reasonably expected fully to understand. In the submission to the appeal tribunal the local adjudication officer wrote:

"Whilst considering the claim the adjudication officer contacted the Enterprise Allowance Board who confirmed that [Mr B] did not have to have any expectation of payment to qualify for enterprise allowance."

That is no doubt so. But I am left with an uneasy suspicion that, if Mr B had claimed unemployment benefit whilst he was drawing his enterprise allowance and worked for 48 hours a week at his writing, the adjudication officer would have decided that he was not "unemployed". Yet I have felt obliged to find that he was not engaged in "remunerative work". It is impossible to draft legislation which makes full provision for the infinite permutations of human life. But I do feel that Mr B has been unlucky.

13. Finally, I deal briefly with the forensic history of the case. The local adjudication officer's decision was set out thus:

"Family Credit is not payable because a condition of entitlement is that on the date the claim was made the claimant or her partner must have been contracted to do paid work for an average of at least 24 hours a week. This condition was not met."

That, of course, was entirely misconceived. The claimant was - and had never contended that he was other than - self-employed. When the case came before the appeal tribunal the claimant herself did not attend. That was not significant. Mr B did attend - and it was his evidence which was directly in point. Like myself, the appeal tribunal did not regard the material objective facts as being in dispute. On the relevant form AT3 was simply recorded "Facts as AT2" in the box devoted to findings on questions of material fact. But I consider that the other entries on form AT3 were too abbreviated to comply with the provisions of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 [SI 1986 No 2218]. The tribunal's unanimous decision was recorded as -

"The appeal is allowed."

The reasons were set out thus:

"The Tribunal are satisfied that the claimant satisfies the requirements of Regulation 4(1) of Family Credit Regulations in that he was working with the expectation of earning eventually."

No one could reasonably expect an appeal tribunal to set out its reasons at the length at which I have set out my own reasons in this decision. But I do not think that a case of this difficulty was properly dealt with, at appeal tribunal level, by less than five lines of entries on the reverse side of the AT3. But, in any event, I myself have - on an issue of construction - reached a conclusion contrary to that reached by the appeal tribunal; and that is certainly a point of law.

14. The adjudication officer's appeal is allowed.

(Signed) J Mitchell  
Commissioner

Date: 25 January 1990