

CPA 21

WMW/JOB

Commissioner's File: CFC/005/90

SOCIAL SECURITY ACTS 1975 - 1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I hold the decision of the Sunderland Social Security Appeal Tribunal dated 5 December 1989 to be erroneous in point of law. For that reason I set it aside. Because I consider it expedient so to do I give myself the decision which the tribunal ought to have given upon the case in light of the findings of fact made by them and of those which follow. That decision is given in exercise of the power conferred by section 101(5)(a)(ii) of the Social Security Act 1975. My decision is that the claimant was entitled to family credit on the date of claim, 3 May 1989. The case is remitted to the adjudication officer to calculate the appropriate amount thereof in light of the direction appearing in paragraph 15 below.

2. This case came before me by way of an oral hearing at which the claimant was represented by Mr Ian Liddle, of the Haughton and District Advice and Support Centre and the adjudication officer was represented by Mr Paul Cackette, Solicitor, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful to both for their assistance.

3. In May 1989 the claimant was refused family credit by a decision of an adjudication officer because, by his calculation, the income which had to be attributed to the family, that of Mr Lay and as determined in accordance with the Family Credit (General) Regulations 1987, was too great. The claimant appealed to the tribunal.

4. The unanimous decision of the tribunal was that family credit was payable and they specified a weekly rate of £2.49. They clearly took considerable care over recording the evidence, making findings of fact and determining the amount payable. Before me both parties contended that the tribunal decision was erroneous in law because they had not indicated by what logical process they had reached their decision. The nub of the case concerned the weeks prior to the date of claim over which Mr Lay's income fell to be taken into account - or, more accurately, those weeks which fell to be disregarded in that process. I deal with that myself in paragraph 11 *et seq* below. But what the tribunal did, in their reasons, having noted all the relevant principal and subordinate legislation, was then simply to add that -

"On the basis of the information before the Tribunal and the evidence (both written and oral) the tribunal was satisfied that the appellant's entitlement to family credit has been correctly awarded as .. [in their decision]."

That is really not sufficient to explain why the tribunal had disregarded the weeks which they had. And that failure is an error in law.

5. The weeks disregarded, according to finding of fact 1, were those which "included holiday pay". The reason, given in the findings of fact, was that "They were unusual weeks and did not form part of his normal weekly wage structure ..". The only finding dealing with the question of which weeks were to be regarded was this -

"(2) Opportunities for the appellant's husband to work overtime in any particular week should not be taken into account in considering weeks to be disregarded ..."

I consider that Mr Liddle was well founded in criticising the first of these findings or explanations because it was not the nature of the work, or the absence of it, in particular weeks that mattered when considering what was "unusual" but only "the earnings" therefrom. It thus appears that the wrong approach was adopted by the tribunal and that is another error in law.

6. On the other hand the tribunal were largely following the approach of the adjudication officer in whose submission to them it had been suggested that four weeks should be excluded - "as being unrepresentative of normal due to the inclusion of absences ..": the absences were in fact days of holiday. In light of a fuller statement of Mr Lay's pay during the 27 weeks preceding the date of application the adjudication officer made a further submission which excluded all irregular or unusual earnings upon the ground that "days of holiday cannot be said to represent normal earnings and must therefore be disregarded." The schedule listing the 27 weeks is document T42 in the bundle. Document T43 includes an analysis of the number of times Mr Lay's net wages fell within each £10 bracket between £100 and £189. T42 as before me does not include a column showing net pay weekly, only the gross. I was told that the original did include such a column. But it is not difficult to follow the value of the document for present purposes once it is understood that weeks 4, 7 and 20 refer in ascending order to the three brackets in the table to which has been assigned only one "1" indicating a net wage within it. These three weeks were founded upon for the claimant as those to be excluded. But the tribunal have not explained what they made of the contention that week 4 should be removed as not representative. That failure concerns an important part of the case for the claimant. She is left in the dark as to what the tribunal made of it. That is a further error in law.

7. Document T50 is the adjudication officer's re-calculation based upon T42. It showed an entitlement to credit of £2.49. That led to the decision ultimately given by the tribunal. The adjudication officer had, as T50 bears, removed a number of weeks, including 9-12. 10, 11 and 12 included holidays and so it can perhaps be seen why they were taken out. But week 9 does not bear to have contained any holiday and so it is not clear why it was taken out. The tribunal have not addressed that matter. Mr Liddle explained, and I accept, that week 9 contained a payment of three weeks' holiday pay which is shown in total in brackets for that week and again is repeated in the form of a gross payment for that week and each of the following two weeks. But holiday pay is not of itself to be excluded from the calculation - General Regulation 19(1)(b).

8. Mr Cackette suggested that the failure to explain about week 9 by itself was an error of law because the figures were at the least ambiguous until Mr

Liddle gave his explanation. I doubt whether that is really an error of law such as to warrant setting aside the tribunal decision. But I am satisfied that their acceptance without comment of the adjudication officer's listing of weeks 9-12 upon the basis that holiday periods are to be excluded, when only three of these refer to holidays, without further indication as to what was "unusual" about week 9 is an error in law. It is upon the basis of these errors of law that I have felt obliged to set aside the tribunal decision.

9. That having been done the issue is necessarily large before me. As all the relevant information is present and I have had the benefit of helpful submissions on both sides as to the proper approach. As noted all that is missing is the net equivalents of the week's earnings recorded in T42. Nonetheless I can give a decision which hopefully will leave only the mechanics of calculation to the adjudication officer.

10. General Regulation 14 broadly provides how are to be calculated the normal weekly earnings of employed earners. 14(1)(b) provides for this case that -

".. where a claimant's earnings fluctuate or are not likely to represent his weekly earnings .."

then in place of the normal five consecutive weeks his earnings are to be assessed -

".. over such other period preceding the week in which the date of claim falls as may, in any particular case, enable his normal weekly earnings to be determined more accurately."

There was no dispute but that this was a case in which the relevant earnings fluctuated. That was and is obvious from T42. Nor was there any dispute that the appropriate period over which to assess the earnings in this case was one of 27 weeks. I accept that.

11. The next question is what if any periods are to be disregarded from the 27 weeks. General Regulation 17 provides by paragraph (a)(i) that there is to be disregarded in a case such as this -

"Any period in the assessment period where the earnings of the claimant are irregular or unusual;"

And the rest of the paragraphs so far as applicable provide that the weekly earnings in the remainder of the period are then to be used. As noted, regulation 19(1)(b) provides that holiday pay is to be included as earnings of an employed earner such as Mr Lay. The fact that Mr Lay took most of his holidays as a day or two at a time scattered across the year may make those weeks indeed unusual in the sense of his working pattern. But that is not to say that they produced anything unusual or irregular in his earnings. And as Mr Liddle was at pains to emphasise it is the "earnings" therein that have to be irregular or unusual to warrant a week to be excluded by General Regulation 17(a)(i). I entirely accept that contention. It is necessary then to look at the pattern of earnings across the 27 week period. Mr Cackette submitted that the whole 27 week period should be taken into account. Mr Liddle's contention was that, having regard to T43, weeks 4, 7 and 20 were each sufficiently irregular or unusual to require their earnings to be disregarded. The basis for that was that each had produced a unique rate of net earnings.

I have come to the opinion that neither submission is wholly correct.

12. It has to be borne in mind that this is a case of fluctuating earnings under General Regulation 14(1)(b). The question that then arises under regulation 17 is what is irregular or unusual, given that fluctuation. Each case must be judged of within its own picture of fluctuation and a value judgment made as to what appears irregular or unusual within that picture.

13. Mr Cackette suggested that as two of the unique payments are almost in the middle of the overall range covered by the analysis in document T43 they should not be disregarded. With that I agree. That is because they are within the pattern of the picture as a whole. But he also contended that the final single payment, in the bracket £180-£189, fell to be included since it was but little above the lower figures. As I understood him, had the pattern appeared more smoothly to approach a peak at that point then he would have accepted that it might have been appropriate then to delete the peak. But because this was simply one blip above the next bracket of £170-£179, which contained seven weeks, it was difficult to justify the exclusion. Thus if there had been two weeks in the blip would they have fallen to be excluded?

14. Fortunately I do not have to deal with the Mr Cackette's hypothetical question. I have concluded that if the pattern approaching the single payment in bracket £180-£189 had been, graphically, in the shape of a peak then I would have seen no reason to exclude it. It would have been an acceptably regular part of the picture. But, again viewing the matter graphically, it does appear to me to be more like a blip above a fairly firm top level formed by the seven weeks the £170-£179 bracket immediately below. Accordingly I have decided that it falls to be excluded. As otherwise the spread is more or less even between the top and bottom brackets I see no reason to exclude any other weeks.

15. Accordingly the adjudication officer will now have to calculate the amount of family credit due to the claimant upon the basis that Mr Lay's earnings for the purposes of the General Regulations are to be calculated upon the basis of those received net in respect of all the weeks in document T42 save No. 20. He will, of course, also have power to deal with any question of arrears now falling due.

16. The appeal succeeds.

• (signed) W M Walker
Commissioner
Date: 4 March 1992