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MHJ/1/LM

Commissioner's File: CFC/005/91

FAMILY CREDIT (GENERAL) REGULATIONS 1987

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that -

- (a) the unanimous decision of the Dewsbury social security appeal tribunal given on 21 September 1990 is erroneous in point of law and is accordingly set aside;
- (b) the claimant's entitlement to family credit for the period of 26 weeks from 20 September 1989 is to be recalculated as hereinafter set out.

2. The claimant, Mrs Makda, appeals with leave of the Commissioner against the decision of the tribunal allowing her appeal against the decision of the adjudication officer, issued on 26 October 1989, that she was entitled to family credit at the weekly rate of £34.54 for 26 weeks from 26 September 1989. The tribunal directed that the amount of family credit should be reassessed to include allowance for certain additional business expenses. Mrs Makda contends that other expenses should also be taken into account.

3. I propose to deal with this matter shortly. Mrs M applied for family credit on 21 September 1989; she was not employed, her husband was self-employed as a taxi driver and they have one dependent child. Following enquiries Mr M supplied accounts prepared by his accountants for the year ended 31 August 1989. These showed gross takings for that year of £5,472.00 and expenses (after allowing for private motoring) of £3,455.00, leaving a net profit of £2,017.00. The adjudication officer held that certain expenses should not be taken into account for the purposes of regulation 22 of the Family Credit (General) Regulations 1987 and, in a calculation which is very fully set out on form AT2, arrived at the figure of £34.54.

4. Mrs Makda appealed and, on 21 September 1990, the tribunal, having heard submissions from her representative, Mr G. West of the Kirklees Benefit Advice Service, directed that "the papers should be returned to F.C. Unit to recalculate benefit" to allow

for certain sums in respect of car washing and insurance. In their reasons the tribunal specifically excluded the cost of the road fund licence and repairs.

5. As the adjudication officer now concerned with the case correctly points out in the submission dated 22 April 1991, in CFC/25/1989 (to be reported as R(FC) 1/91) the Commissioner decided that motor expenses, including the cost of road fund licence and repairs and periodic maintenance, as well as insurance and telephone charges, could be apportioned as to business and private use. The tribunal did not and, indeed, could not have had that decision (dated 17 January 1991) before them but that, of course, does not prevent their decision being erroneous in point of law in failing to hold that those expenses were allowable. I so find and accordingly set their decision aside.

6. In his observation dated 7 May 1991 Mr West, while agreeing that the decision was erroneous, submitted that there was sufficient evidence to enable the Commission to substitute his own decision. On 4 November 1991 a nominated officer issued a direction which, although it does not say so specifically, was plainly aimed at obtaining, if possible, agreement between the parties as to the correct amount of family credit in fact payable during the period in issue. On 19 November 1991 the adjudication officer made a further submission, with admirable promptitude but, unfortunately, not specifying the effect of his contentions. He concluded -

"If the Revenue did accept that 80% of the cost of the car was for business use, then I submit that in accordance with decision CFC/25/1989 referred to above, that is acceptable for the purposes of regulation 22 of the General Regulations."

Equally unfortunately, Mr West, in his observations dated 13 December 1991, also fails to submit what the right figure should be.

7. Mr Makda's accounts for the year ended 31 August 1989 show gross receipts (takings) of £5,472.00 which, taking into account his personal allowances for tax purposes, would have meant that he would have submitted a tax return - although, on any footing, he clearly would have had no income tax liability. It would follow that whether or not the Revenue in fact accepted 80 per cent of his car expenses for business use is ascertainable. I regret that neither the adjudication officer nor Mr West have dealt with that, but I do not intend to allow that to interfere with my dealing with this appeal. I have no doubt that 20 per cent private use is a reasonable assessment in the case of a taxi driver. In view of the large measure of agreement it would be a waste of public time and money to remit this matter for rehearing and accordingly I propose to exercise my discretion under section 101(5) of the Social Security Act 1975 to substitute my own decision, in so far as I am able.

7. In my judgment the claimant is entitled to family credit for the period of 26 weeks from 20 September 1989 calculated on the basis that 80 per cent of Mr Makda's car expenses, assessed in accordance with the principles set out in CFC/25/1989, are to be deducted from his gross earnings for the purposes of regulation 22(3A) of the General Regulations. I direct that the appropriate calculation be carried out by the adjudication officer; I trust that the figure can be agreed between the parties but, in the event of any dispute arising, the matter is to be referred to me for determination.

9. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 23 March 1992