

Decision 'overturned' by amendment "reg 15(2) rules
but still arguable as general principle that SSA7
can look at actual earnings down to date of hearing.

RAS/1/LM

Commissioner's File: CFC/014/91

FAMILY CREDIT (GENERAL) REGULATIONS 1987

★ 34/92

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 6 December 1990 is erroneous in law. I set it aside and direct that the case be reheard by a differently constituted tribunal.

2. On 7 June 1990 the claimant made a claim for family credit in respect of herself, her husband and one dependant child. The claimant herself was not employed. Her husband had been a self-employed insurance consultant since 12 March 1990. He provided details of his actual earnings for the period he had been in self-employment and of estimated earnings for the remainder of 26 weeks. His actual earnings from 12 March 1990 to 2 June 1990 were £474.00. His estimated earnings from 3 June 1990 to 10 September 1990 were £4,000.00. Particulars were also given of actual and estimated expenses for those same periods. By a decision issued on 14 July 1990 an adjudication officer decided that "the claimant was not entitled to family credit on the date of claim, 7 June 1990, because the claimant's income, as calculated, was higher than the level at which family credit would become payable". The claimant appealed to the tribunal. Some weeks before the tribunal hearing the claimant produced figures showing that her husband's actual earnings for the period 3 June 1990 to 10 September 1990 were £3,035.00 rather than the £4,000.00 previously estimated. Using those figures and taking account of allowable expenses the claimant would it appears have been entitled to family credit. But the tribunal dismissed the appeal. They gave as their reasons that -

"Sub-section 6 of Section 20 of the Social Security Act 1986 makes it quite clear that entitlement to Family Credit is unaffected by any change of circumstances during the 26 weeks period that it is in payment. In the present case, while Mr Cheney's estimate of his prospective income proved in the event to have been

unduly optimistic, it was nevertheless an estimate made at the time with the benefit of the best available information. There is therefore no power to review the Adjudication Officer's original decision."

The claimant now appeals to the Commissioner with leave of the chairman. I held an oral hearing of her appeal. She was represented by her husband. The adjudication officer was represented by Mr S. Cooper of the Office of the Solicitor to the Departments of Health and Social Security.

3. In general, there is entitlement to family credit if when the claim is made the income of the family from remunerative work does not exceed the prescribed amount or exceeds it by no more than a certain amount: section 20(5) of the Social Security Act 1986. Regulation 15 of the Family Credit (General) Regulations 1987 deals with the calculation of the income of self-employed earners and provides so far as relevant as follows -

"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, subject to paragraph (2), by reference to his weekly earnings from that employment -

(a) except where sub-paragraph (b) applies, over a period of 26 weeks immediately preceding the week in which the date of claim falls; or

(b) not relevant

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

(1A) not relevant

(2) Subject to regulation 17, where the claimant has been in employment as a self-employed earner for less than the period specified in paragraph (1)(a), his normal weekly earnings shall be determined by reference to any earnings received for the period that he has been in that employment and by reference to an estimate of his likely weekly earnings over the remainder of the first 26 weeks of the employment or by reference to such other evidence as may, in any particular case, enable his normal weekly earnings to be determined more accurately.

(3) For the purposes of this regulation, the claimant's earnings shall be calculated in accordance with Chapter IV of this Part."

The adjudication officer quite properly and in accordance with regulation 15(2) made his calculation by reference to the period of actual earnings over the first few weeks of the 26 week period and the estimated earnings for the remainder of that period. The tribunal, who had the actual earnings for the whole 26 week period, thought they were precluded from using those figures apparently because of section 20(6) of the 1986 Act which provides that -

"(6) Family credit shall be payable for a period of 26 weeks or such other period as may be prescribed and, subject to regulations, an award of family credit and the rate at which it is payable shall not be affected by any change of circumstances during that period or by any order under section 63 below."

Now that provision has nothing to do with the calculation. Its effect is that an award of family credit endures for 26 weeks. In the present case of course there had been no award and the task of the tribunal was to determine whether there should be. The appeal to the tribunal was by way of rehearing and, in accordance with long established principle, the tribunal were required to have regard to all relevant events down to the date on which they heard the case: Ponnamma v Arumogam [1905] AC 383 at 390; R(SB) 1/82 and R(FIS) 1/82. Section 20(5) of the 1986 Act which opens with the words -

"Subject to regulation under section 51(1)(a) below, a person ... is entitled to family credit if, when the claim for it is made ... "

does not detract from that principle. It is necessary in accordance with that provision to establish what the income was when the claim was made but that does not mean that regard cannot be had to later figures which show what the income truly was as at that date. That was also the view taken in CFC/24/89. The current adjudication officer had relied on CFC/18/89 as authority to the contrary. That case however concerned a refusal by an adjudication officer to review a decision awarding family credit but at a rate which the claimant contended had been shown to be wrong in light of her evidence as to actual earnings in relation to the period taken into account when the award was first made. The Commissioner there applied section 20(6) of the 1986 Act because he was dealing with an award of benefit and he accordingly concluded that the tribunal were right to uphold the adjudication officer's refusal to review. The present case is crucially different. There was no award and the tribunal had to decide whether, on the basis of the claimant's income as at the date of the claim, she was entitled to an award. Far from being precluded from looking at evidence of the husband's actual earnings obtained since the original adjudication officer's decision, they had to take that evidence into account in order to determine the claimant's income at the relevant time. Regulation 15(2) of the 1987 Regulations which applies to this

case says that the normal weekly earnings are to be determined "by reference to any earnings received ... and by reference to an estimate of his likely weekly earnings over the remainder of the first 26 weeks ... or by reference to such other evidence as may, in any particular case, enable his normal weekly earnings to be determined more accurately". (My emphasis). The tribunal should have dealt with the actual earnings for the period in question pursuant to the "such other evidence" alternative in regulation 15(2).

5. For the reasons to which I have referred the tribunal's decision is erroneous in law and I set it aside. Mr Cooper had very helpfully produced a calculation based on the actual earnings figure in the hope that I could give the final decision. It appeared however on close inspection that the calculation might not be wholly correct. It is therefore necessary for me to remit the case to another tribunal who are to give a decision based on the principles referred to above. They will need to have a further submission from the adjudication officer based on those principles and with a revised calculation. They will also need to take account of CFC/25/89 in which it was decided that motoring expenses, including the cost of the road fund licence and of insurance, relevant to the assessment period should be apportioned between business and private use.

(Signed) R A Sanders
Commissioner

Date: 23 April 1992