

~~After~~ evidence of earnings for employed ~~for~~
carer does not amount to change of circumstances

JBM/SH/tp/6

Commissioner's File: CFC/018/1989

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: Christine Anne Trigg (Mrs)

Social Security Appeal Tribunal: Neath

Case No: 2:10

[ORAL HEARING]

1. My decision is that the decision of the Neath social security appeal tribunal dated 1 June 1989 is erroneous in point of law. Accordingly I set it aside and give the decision that they themselves should have given namely that the claimant is entitled to family credit at the weekly rate of £2.47 for 26 weeks from 14 February 1989.

2. This is an appeal by the adjudication officer to the Commissioner with the leave of the chairman of the tribunal against the unanimous decision of the appeal tribunal in respect of the decision of the adjudication officer set out at page T22(a) of the case papers to the following effect:-

"I refuse to review the decision of the adjudication officer covering the period from 14.2.89 to 14.8.89 (both dates included) because I am not satisfied that the decision was given in ignorance of or was based on a mistake as to some material fact. The decision was not erroneous in point of law.

Social Security Act 1975, section 104. Social Security Act 1986, section 52."

The decision that the adjudication officer refused to review was that issued on 22 February 1989 and is so far as relevant (omitting the statutory provisions) as follows:-

"The claimant is entitled to family credit at the weekly rate of £2.47 for 26 weeks from 14.2.89."

3. I directed an oral hearing. Accordingly on 23 January 1991 I held an oral hearing. Mr M Jobbins represented the Chief Adjudication Officer's Office. Mr I Bowen of Keith Thomas and Partners, Solicitors represented the claimant who was not present. I am indebted to both of them.

4. The facts of the case are dealt with by the adjudication officer now involved in these appeals at paragraphs 2 and 3 of the submission dated 30 August 1989 which I set out below as follows:-

"The claimant's partner started work on 16.1.89 as a car salesman. Although details of pay received on 31.1.89 were provided on the claim form .. the claimant said .. that he would receive commission but the amount was unknown; it was based on cars sold and would not start being paid until the end of March. In providing details of estimated earnings .., the employer said on 16.2.89, "profits related commission is totally subjected to fluctuations on monthly vehicle sales". The forecasted earnings would be:-

" For 28.2.89 £550
For 31.3.89 £600
For 30.4.89 £650."

3. The adjudication officer decided that because the partner had been in employment for less than 2 months, the employer's forecast of future earnings was to be used in determining normal weekly earnings. The actual earnings received 31.1.89 were ignored as being unrepresentative. The tribunal decided that the amount actually received during an appropriate period should be used and directed that the adjudication officer should "accordingly re-calculate, review and make a new decision accordingly".

In respect of those matters and of the entirety of the submission dated 30 August 1989 the claimant has through her legal representatives had the opportunity of commenting both in writing and at the oral hearing. I have in that regard the written comments of her legal representatives in their letters dated 16 November 1989, 28 November 1989 and 30 November 1989. No useful purpose would be served by my setting out the matters therein detailed again afresh here.

5. The relevant statutory provisions are:-

Sections 101(5) and 104 of the Social Security Act 1975

Sections 20(5) and 20(6) of the Social Security Act 1986

Regulation 14(2) of the Family Credit (General) Regulations 1987.

6. Mr Jobbins helpfully addressed me in opening and in reply. In the light of the view I take of the case I see no useful purpose in setting out his submissions at the oral hearing here. Mr Bowen in his able address to me submitted that the relevant adjudication officer's decision was not that at page T22(a) of the case papers reproduced at paragraph 2 of this decision above but was issued by the adjudication officer on 22 February 1989 also reproduced at paragraph 2 of this decision above. The decision Mr Bowen submitted before the appeal tribunal was the original decision of the adjudication officer. He also referred to confusion arising over the use of the word "review" in the appeal tribunal's decision. He referred me to section 104(1) of the Social Security Act 1975 now part of the 1968 Act. He submitted that the question of review does not need to be considered. The appeal before me is about the power of the tribunal to consider an appeal and to consider an appeal against the adjudication officer's decision in the light of the fact that new evidence as to the actual earnings has come to light.

Bowen referred me to section 102 of the 1975 Social Security Act and submitted that there was scope for an appeal tribunal to look at information on matters which had come to light. He also referred to section 117(2) of the Social Security Act 1975. He disagreed with the adjudication officer in that given the information in front of the adjudication officer concerned that is not the only decision which could reasonably have been made on the basis of the information before him. Mr Bowen referred me to regulation 14 of the Family Credit (General) Regulations 1987 and submitted that even though the adjudication officer is obliged to make estimates it does not follow that the information provided by the employer had then to be taken quite literally and put into the calculations. Mr Bowen submitted that the adjudication officer has a discretion to look at the estimates and that a member of the tribunal (who might have special local or other experience) has a discretion to say the estimates are wrong. If the appeal tribunal is sitting later and where they have an element of discretion and they do have the actual wages to hand they might, so submitted Mr Bowen, then in keeping with the Regulations use the actual wages. Although the appeal tribunal did not refer in their reasons for decision to precise Regulations they did indicate that they felt that to ignore later obtained figures was contrary to common sense. Mr Bowen submitted as to the powers of the Commissioner that in the light of the amount of confusion and the lack of reference to any regulations in the appeal tribunal's decision it is erroneous in point of law and I have power to make the decision myself on all the facts now known. It is no disrespect to the two advocates who appeared before me at the oral hearing that I do not set out in full their submissions then made.

7. In my judgment the decision of the appeal tribunal is erroneous in point of law in that they have ex facie on the face of their record misconstrued the effect of the relevant statutory provisions and in particular section 20(5) of the Social Security Act 1986. The claimant started work on 16 January 1989 and made a claim for family credit on 8 February 1989. A decision was

issued by the adjudication officer on 22 February 1989 - all with commendable speed. In family credit cases such as the present the speed with which a case can be dealt with is of course of the essence. People who start work need to have their claims decided as quickly as possible. I understand that there is a special fast procedure for such cases. The Department of Employment has claimant advisors who will initiate claims for family credit, liaise with employers and check with employers to see the person has worked 24 hours or more in the week in which they start and a claim is passed to a family credit unit in Blackpool. This claim is then identified as one requiring speedy action. In this speedy procedure there is of course little time to see what has actually transpired. The present case was dealt with under regulation 14(2). I would of course add that I am not in any way influenced in arriving at the conclusion which I do on the relevant statutory provisions by the existence of a fast and speedy procedure. It is with the specific statutory provisions that I am concerned. The relevant statutory provisions have been amended since the claim in the instant case was made. I need concern myself here only with the relevant Regulations referred to in paragraph 5 above in force at the date of claim. There are two parts of regulation 14(2) and they are quite distinct. Where a person has not had earnings or his earnings would not represent normal earnings than a formula for estimating is provided. The two provisions are mutually exclusive and one cannot partake of both. The employer in the instant case was asked for details and these were provided. They show estimates increasing by £50 each month. I construe it as not individual commission by a particular employee but commission related to the profit the company makes from all its activities. The claimant in her letter received in the family credit branch and set out at page T21(a) of the case papers gave details of lower earnings. The matter was referred to the adjudication officer who refused to review and that decision is set out in paragraph 2 of my decision. In my judgment that decision was correct. There were no grounds for review. In my judgment the appeal tribunal were concerned about the refusal to review the decision and because they were concerned about that aspect their decision had to be set out in a way which was different from the way they would have had to set it out if the appeal had been against the original adjudication officer's decision also dealt with in paragraph 2 of this decision. In my judgment the decision under appeal was the refusal to review. The appeal tribunal decided that the adjudication officer should have reviewed and that is the essence of their decision which I set out as follows on the face of their record being box 4 which record is dated 1 June 1989:-

"While at the time the claim was made, the Adjudication Officer had no alternative but to rely on forecast of future wages provided by the employer, that did not mean however that the Adjudication Officer must be fettered by those forecast figures when in fact due to the passage of time, actual figures became available. It would make nonsense of the situation for it to remain so static and unmovable."

In so doing the appeal tribunal erred in law because the adjudication officer was fettered by those figures. There was no other basis on which to make an estimate of what the claimant's partner's earnings were likely to be under regulation 14(2). There is no power under the Act or the Regulations for decisions based on estimates to be reviewed unless they were made in ignorance of a material fact or on grounds of a mistake as to a material fact. The grounds on which a decision or a claim for Family Credit may be reviewed are contained in section 104(1) and (1A) of the Social Security Act 1975, subject only to the limitation for changes of circumstances imposed by section 20(6) of the Social Security Act 1986. There is no change of circumstances where an amount received is less (or more) than the estimate but that, even if they were, review would not be possible because of that limitation. Review of the determination based on estimated earnings would only be available if it could be shown that (1) the adjudication officer's use of an estimate was inappropriate, or in the alternative (2) the calculation was mathematically wrong, in the alternative (3) a different assessment period should have been used, and in the fourth alternative the figures on which the estimate was based were incorrectly stated according to the information available at the time. Under regulation 14(2) when you look forward the estimate is based on estimates of earnings at the date of claim. To my mind this appears clearly from section 20(5) of the Social Security Act 1986. Further in my judgment the appeal to the appeal tribunal was from the adjudication officer's decision refusing to review. This is a minor procedural matter and I do not see that any real difference would arise had the appeal been from the earlier decision of the adjudication officer dated 22 February 1989. Finally the issue of fresh evidence was ventilated at the oral hearing. What is fresh evidence is of a limited character and I do not propose to rehearse those aspects of the law here. Suffice it to say that evidence of actual earnings is not fresh evidence when estimates were made by the adjudication officer of the forward earning position such estimates being made as at the date of claim. I am fortified in my view by the decision of the Commissioner (now of long standing) being Decision R(I) 73/53. In particular I draw attention to paragraphs 15, 16 and 17 of that decision with which I respectfully agree and which in my view apply equally in the instant case of family credit. In summary I would state that although it is well established in relation to other benefits that a tribunal should consider the circumstances of a claim down to the date of hearing, that principle does not apply to family credit, which must be decided on the circumstances existing at the date of claim. Evidence of actual earnings is not admissible as fresh evidence in regard to estimates made under regulation 14(2)(b) of the Family Credit (General) Regulations 1987.

8. In accordance with my jurisdiction my decision is as set out in paragraph 1 of this decision.

9. Accordingly the adjudication officer's appeal is allowed.

(Signed) J.B. Morcom
Commissioner

(Date) 7 February 1991