FC — Rules About Calculating Earnings

— Presumption Against Retrospectivity [illegible] Revocation of Provision Disregarding Unusual Weeks

Commissioner's File: CFC/044/92

DJM/HJD

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: [redacted]

Social Security Appeal Tribunal: Middlesbrough

Case No: 1:39:20018

RAL HEARING]

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1. At this oral hearing the claimant was represented by Mr English of Cleveland County Council Welfare Rights Service and the adjudication officer by Mr Shaw. My decision is that the decision of the social security appeal tribunal dated 24 September 1992 is erroneous upon a point of law. I set it aside. The decisions the tribunal ought to have made was:-

> "The claimant was entitled to Family Credit at the weekly rate of £17.32 for twenty six weeks from 14 April 1992. It is found that arrears due as a result of this determination should be reduced by the amount of any Family Credit paid for the period of the decision"

I make that decision myself.

2. The Family Credit (General) Amendment Regulations 1992 (S.I. 1992 No. 573) came into effect on 7 April 1992. By virtue of these Regulations, regulations 14 and 17 of the Family Credit (General) Regulations were amended. The effect of the amendment was to alter the basis upon which the normal weekly earnings of employed earners were calculated for family credit purposes. Prior to amendment regulation 17(a)(i) of the Family Credit (General) Regulations provided:-

> "17. For the purposes of ascertaining a claimant's normal weekly earnings there shall be disregarded -
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> (a) for the purposes of regulation 14(1) (normal weekly earnings of employed earners), in the case of an employed earner -
>
> (i) any period in the assessment period where the earnings of the claimant are irregular or unusual; ......"

That provision does not appear in the amended regulations.

3. In the present case the claimant made a claim for Family Credit on 15 April 1992. The adjudication officer issued a decision on 6 May 1992. It was in the following terms:-

"The claimant is entitled to Family Credit at the weekly rate of £16.29 for 26 weeks from 14.4.92."

It is not disputed that the method of calculation of the amount of family credit payable to the claimant made by the adjudication officer involved the application of the method of calculation set out in the current version of the regulations, that is to say, in terms of the amendment, which came into force on 7 April 1992.

4. In the appeal against the adjudication officer's decision the tribunal made the following decision:-

"The claimant is entitled to Family Credit at the weekly rate of £17.32."

It is clear from that decision that the tribunal have accepted that there was an error in the calculation made by the adjudication officer. In the adjudication officer's submission to the tribunal it was said that the original assessment was incorrectly calculated. The adjudication officer then set out the correct calculation. The correct calculation was in the adjudication officer's submission £17.32 per week as opposed to £16.29 per week.

5. The grounds of the appeal to the Commissioner was that the use of the method of calculation set out in the amended regulations was an error in law. Accordingly, if the grounds of appeal are correct the decisions of both the adjudication officer and the tribunal would be fatally flawed. Mr English pointed out that under the regulations prior to amendment regulation 17 allowed there to be disregarded for the purposes of ascertaining the claimant's normal weekly earnings (which for his purposes also included those of her husband) any period in the assessment period where the earnings of the claimant or her husband were irregular or unusual. In the present case the tribunal made the finding that the claimant's husband was employed as a domestic heating engineer until 2 April 1992 when he became sick. Although there are no findings to this effect it was said in the grounds of appeal:-

"Since therefore during the period 3/4/92 to 7/4/92 my client received no pay other than statutory sick pay (which was considered at the time to be likely to continue in payment for the foreseeable future, as has indeed been borne out by subsequent events), and since we know that statutory sick pay was to be payable at a rate of £52.50 p.w., it is submitted that this is the weekly figure to be used for the basis of the calculation of his weekly earnings for the purposes of the family credit claim."

Thus the effect of the legislation in force prior to 7 April 1992 is that the claimant could have prayed in aid regulation 17 to argue that in the circumstances, because of her husband's illness the earnings from his employment within the period specified in regulation 14 were irregular or unusual and that it was the earnings between 3 and 6 April 1992 in respect of the claimant's husband that fell to be used as the basis of the calculation under regulation 14. It was submitted that under the amended regulations such an approach was no longer available in making the calculation. Without expressing any view as to whether such an approach could have effectively and successfully been adopted by the claimant I agree that the regulation as amended would have prevented such an approach.

6. It was submitted by Mr English in these circumstances that what the claimant had lost was the right to have periods disregarded, by the operation of regulation 17 in the form it was prior to 7 April 1992. It was submitted that the effect of the amended regulations was retrospective. In the grounds of appeal it is put this way:-

> "What is not accepted, however, is that this is an appropriate case for the amended legislation to be applied in the first place. This is because, whilst the date of claim (April 15th.) was subsequent to the change in the law (April 7th.), any application of the amended legislation in this case would involve imposing it on a period of time prior to its having come into force. Since the general rule of law is that legislation is presumed not to have any retrospective operation unless the contrary intention appears, and bearing in mind that the amended legislation is not framed in such terms as to enable the tribunal to consider for the purposes of its calculation the period 7 - 15th. April in isolation, it is submitted that, in this case, it is appropriate to consider the claim under the legislation which was in force up until 7 April, 1992."

Mr English for the claimant referred me to 2 cases Yew Bon Tew v Kenderaan Bas Mara 1982 [3 ALL ER 833 and R(F)1 11/92]

It was said by the Privy Council in the former case at page 839 in respect of a Malaysian Act of similar wording to section 16 of the Interpretation Act 1978:-

> "Their Lordships consider that the proper approach to the construction of 1974 Act is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations."

Section 16 of the Interpretation Act 1978 provides:-

> "16. (1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears -
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> ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that section; ..."

The Commissioner said in R(F)1/92 at paragraph 16:-

> "16. The common law presumption against retrospectivity does not apply to procedural legislation. That is because the presumption, like the presumption in section 16 of the Interpretation Act 1978, is against the removal of vested rights and "no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed" (Yew Bon Tew v. Kenderaan Bas Mara [1983] AC 553 at 558G)."

Thus the issue in this case is whether section 16 operates to the benefit of the claimant in this case. That is dependent upon whether the repeal of the existing regulations and their amendment, as described, affected any right or privilege acquired or accrued by the claimant under regulations 14 and 17, in the form they were in, prior to amendment. The position of Mr English was that the claimant had lost the right which he described in his submission which I have outlined above. He referred me to paragraph 19 of what was said by the Commissioner in R(F)1/92. What the Commissioner said was:-

> "19. The fact that there must be some investigation of the facts in order to determine whether good cause has been shown reinforces me in my view that the claimant had an acquired right to a matter of substance - that is the relieving provision of good cause. In *Sri (sic (Free) Lanka Insurance Company Limited v.Ranashinghe* [1964] AC 541 at 552, the Privy Council held that the Plaintiff had "something more than a mere hope of (sic) (or) expectation - .. he had in truth a right .. although that right might fairly be called inchoate or contingent". *They adopted the view of the Privy Council in Director of Public works. Ho Po Sang*[1961] AC 901 at 922 where it was said:-
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> > "It may be..that..a right has been given but that in respect of it some investigation or legal proceeding is necessary. The right is then unaffected or preserved.""

The Secretary of State's representative Mr Shaw however said that the claimant had no accrued right. He said that what the claimant had was a right to payment of benefit when a claim was made. In this case that was on 15 April 1992. The claim had been made under the legislation in force at that time. Mr Shaw said that the benefit was a future benefit. The period of 6 weeks provided for in the regulation as amended was used as a reference point for the method of calculation.

7. I have come to the conclusion that regulations 14 and 17 in the form they were prior to 7 April 1992 and regulation 14 subsequent to amendment do no more than provide a method of calculation for normal weekly earnings which is something that requires to be done in the assessment of the amount of family credit payable. The effect of the amendment was to change the method of calculation not to remove any right from the claimant. Regulations 14 and 17 prior to amendment did not vest any right in the claimant, nor did any rights accrue to her or were acquired by her by virtue of them. The adjudication officer in my view was bound, in respect of a claim dated 15 April 1992, to calculate the normal weekly earnings of the claimant and her husband upon the basis of the method of calculation then in force. That was regulation 14 in the form which it came into effect from 7 April 1992. The claimant is not entitled to the benefit of the method of calculation which existed prior to 7 April 1992. I do not consider that the claimant was assisted by the decision of the Commissioner in R(F)1/92 as Mr English sought to persuade me. In that case the Commissioner took the view that the claimant had acquired a right to a matter of substance in a case which concerned a claim for child benefit and which was described by the Commissioner as the relieving provision of good cause. However in this case there is no right to a matter of substance. In any event it will be noted that in paragraph 20 the Commissioner says:-

"It follows that the operative date for determining the relevant regulation is the date or dates when the right to payment was treated as having arisen."

I agree with that proposition. Thus in this case the right to payment of benefit could not have arisen until after 7 April 1992. As the claim was not made until 15 April 1992, the regulations to be applied were those that came into force on 7 April 1992.

8. The claimant's appeal cannot be sustained on the grounds advanced by her and the decision does not fall to be set aside on these grounds. However the decision errs in law in respect that the tribunal while in substance having corrected the adjudication officer's decision have not in form done so and they have further failed to deal with the question of arrears. They have made no findings in fact in relation to the calculation of benefit nor have they de findings of the arrears and the calculation of the amount of arrears. In these circumstances I require to set their decision aside. I am however able to make the decision that they ought to have made myself and this I have done in paragraph 1. There was no dispute in the appeal in relation to the calculation made by the adjudication officer in his submission to the tribunal other than the attached which found the basis of the appeal. I am thus prepared to accept the calculation made by the adjudication officer and the basis upon which it was made. There will be arrears due to the claimant as can be seen from paragraph 6.8 of the submission, there being a difference between the sum originally awarded of £16.29 per week and the sum of £17.32 per week accepted by the adjudication officer as the sum that should have been awarded. I have taken account of that in my decision.

9. The appeal succeeds.

(signed) D J May
Commissioner
Date: 25 November 1993

SOCIAL SECURITY.

CASE NOTE.

Family Credit: Retrospective Operation of Amended Legislation.

CFC/044/92 25 November, 1993, Social Security Commissioners.

Facts.

Family Credit was claimed on 145/4/92, shortly after the claimant's partner's income was reduced on his becoming sick with an illness which seemed likely, at the time, to be long term. The legislation enabling unrepresentative earnings to be disregarded[1.] in the period immediately preceding a claim had been repealed on 7/4/92.[2.] The adjudication officer applied the new law to weeks prior to 7/4/92 to determine income for the purposes of arriving at a prospective weekly family credit figure. The claimant lost her appeal to the social security appeal tribunal against his decision. She appealed to the Commissioner, citing the presumption against retrospectivity as grounds to assert an accrued right to have any unrepresentative earnings from before 7/4/92 disregarded.

Decision.

The Commissioner distinguished R(F) 1/92 and the Yew Bon Tew[3.] case, holding that, since the legislation did nothing more than provide a method of calculating weekly earnings, then no substantial right was taken from the claimant when the law was

amended, and thus the presumption against retrospectivity did not apply. He added that since no right to payment could have arisen until after 7/4/92, then the law to be applied anyway was that in force at the date of claim.

Comment.

The Commissioner's assertion that "the effect of the amendment ... was not to remove any right from the claimant" seems irreconcileable with his acceptance that the amendation "prevented an approach" which could have relied on regulation 1.

17. The distinguishing of R(F) 1/92 seems questionable because of this, and also because in that case the claimant was allowed to rely on a provision which had been repealed by the time that a request for benefit was made.

Furthermore, there is no comment in the decision on the claimant's submission insofar as it emphasised the extent to which the legislation, both old and new, operated in practice as a limitation provision. Under the old law, the implied limitation period for claiming (for a weekly earner) was 7 weeks from the first day of the week concerned, since it would have to be within this period that a claim for benefit was put in for that week to be taken into consideration in calculating weekly earnings. Since the change in the law of 7/4/92 curtailed the limitation period before the expiry of the old time in respect of certain weeks, and because no alternative time limits were provided, it seems to follow that the issues involved were more than merely procedural such that the principle against

retrospectivity should have been applied.

The claimant is to appeal to the Court of Appeal (subject to the availablity of legal aid).

Bob English. Cleveland Welfare Rights Service.

1. The Family Credit (General) Regulations 1987, regulation 17.

2. The Family Credit (General) Amendment Regulations 1992 (S.I. No. 573).

3. Yew Bon Tew v. Kenderaan Bas Mara (1983) AC 533.