

MR/MB/1

IDENTIFIABLE DECISION  
NOT TO BE SENT OUT OF  
THE DEPARTMENT

Commissioner's File: CIS/147/1993

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

1. This appeal is allowed. The decision of the Truro social security appeal tribunal dated 3 September 1992 is erroneous in point of law. I set that decision aside and refer the case for determination by a differently constituted tribunal.

2. On 14 July 1992, an adjudication officer decided that the claimant's entitlement to income support should be assessed on the basis that he was to be deemed to have earnings of £15 a week by virtue of Regulation 42(6) of the Income Support (General) Regulations 1987. The claimant appealed. Paragraph 2 of the tribunal's lengthy findings of fact was in the following terms.

"[The claimant] had known the landlord at the 7 Stars Public House because he called there regularly in connection with bottle recycling. He noticed a half-painted job on the premises and, discovering that the landlord had had to stop due to an operation, offered to complete the job free of charge. The tribunal accept that he explained that he was on income support to the landlord, and therefore did not want payment for the work, which he then completed. He declared such work correctly on the appropriate UB form. It is not suggested today that this was a case where the landlord was unable to pay for the work. Moreover no issue is taken as to the adjudication officer's using the £3.75 per hour rate as being reasonable, and in both these matters tribunal concur."

It was not then disputed that the claimant had worked for 4 hours in each of two relevant weeks. However, the tribunal to whom this case is now referred should have regard to the point

correctly made by the adjudication officer in paragraph 12 of his submission of 6 April 1993 where he says that the hours should all be attributed to one week. Although they made an alteration to the adjudication officer's submission on other grounds, the tribunal upheld the adjudication officer's decision in respect of the notional earnings.

3. The claimant now appeals with the leave of the tribunal chairman. The grounds of appeal are totally misconceived. It is suggested that the tribunal should have considered whether the claimant had "good cause" for not knowing that his unpaid work might affect the amount of his benefit and reference is made to R(P)1/79. However, the phrase "good cause" does not appear in regulation 42(6) of the Income Support (General) Regulations 1987 and I do not think that R(P)1/79, which was decided in relation to "good cause" for late claims for benefit (see now regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987), has any bearing on the present case.

4. Nevertheless, the adjudication officer supports the appeal. I broadly agree with the adjudication officer's reasoning and I am grateful to him for his helpful submissions. Regulation 42(6) of the Income Support (General) Regulations 1987 provides:

"Where -

- (a) a claimant performs a service for another person; and
- (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area,

the adjudication officer shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies him that the means of that person are insufficient for him to pay or to pay more for the service; but this paragraph shall not apply to a claimant who is engaged by a charitable or voluntary body or is a volunteer if the adjudication officer is satisfied that it is reasonable for him to provide his services free of charge."

In paragraph 3 of the tribunal's "findings" they said that the case did not come "within the exemptions, e.g. regarding charities, or voluntary bodies etc.". The phrase in the legislation is in fact "claimant who is engaged by a charitable or voluntary body or is a volunteer" (my emphasis). In CIS/191/91, the Commissioner said:

"Unfortunately, there is no definition of the word 'volunteer' in that particular regulation, or elsewhere . . . . It follows that the word must be given its everyday meaning. The Shorter Oxford English Dictionary defines it as 'one who of his own free will takes part in any enterprise'. In the present context, I consider that a

volunteer is one who, whilst not necessarily associated with a charitable or voluntary body, of his own free will, i.e. without any legal obligation, performs a service for another person, and does so without expectation of payment."

It seems to me that the claimant in this case was plainly a volunteer within that definition.

5. It therefore fell for the tribunal to consider whether it was reasonable for the claimant to provide his services free of charge. It is to be noted that the question is whether it was reasonable for the claimant to provide his services free of charge rather than whether it was reasonable for the person receiving the benefit of the services not to pay anything, although the latter consideration will be relevant. In CIS/631/92, the Commissioner said:

"In decision CIS/093/1991 the Commissioner says that one of the relevant factors to be taken into account in considering whether the exemption in the latter part of Regulation 42(6) from the paragraph's main thrust does or does not apply is whether the person for whom the service is performed has the means to pay for that service. I respectfully share that view, especially having regard to the mischief at which this regulation is clearly aimed, namely to prevent an employer, who has the means to pay the going rate, profiting at the expense of the public purse."

In the present case there is some suggestion that the landlord would have paid the claimant if the latter had not said he did not wish to be paid. If that is so, the tribunal to whom the case is now referred may think that it was not reasonable for the claimant to offer his services free of charge. On the other hand, if the landlord would not have had anyone do the painting at all if the claimant had not volunteered, but would have left the work undone until he had recovered from his operation, the tribunal might take a different view because there would have been no element of financial profit to the landlord in the claimant doing the work. CIS/093/91 makes it plain that where services are performed out of a sense of family or, I would add, community duty it may well be regarded as reasonable for the services to be provided free of charge. That is essentially a matter of judgment to be applied considering the circumstances of each case.

6. I do not consider it appropriate for me to give the decision the tribunal should have given and I refer the case to a differently constituted tribunal who should have regard to what I have said in paragraphs 4 and 5 above.

(Signed) M. Rowland  
Commissioner

(Date) 11 January 1994

