JMe **Commissioner's File:** CIS/422/1995

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 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:

[ORAL HEARING]

1. The adjudication officer's appeal is allowed. The decision of the Southend social security appeal tribunal dated 6 May 1994 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to make further findings of fact and to substitute my decision for that of the appeal tribunal (Social Security Administration Act 1992, section 23(7)(a)(ii)). My decision is that from 22 December 1993 until the end of the relevant period under the claim (31 March 1994) the claimant is not entitled to income support because he is engaged in remunerative work (Social Security Contributions and Benefits Act 1992, section 124 (1) (c) and Income Support (General) Regulations 1987, regulation 5).

2 In the claim for income support treated as made on 22 December 1993, the claimant said that he and his wife had ceased work as self-employed persons on 15 September 1993. He declared savings of between £200 and £2,500. He was sent a supplementary form for claimants who had been self-employed.on that form, he said that the business was seasonal, running amusements, and that that was why they had stopped trading and intended to start again at Easter 1994. In answer to the question "Do you own any business assets?" he wrote "Amusement equipment £15,00011. He said that he was not going to sell the assets because he would not be able to trade any longer if he did.

3 On that basis, the adjudication officer decided on 24 January 1994 that the claimant was not entitled to income support. The reasoning was that the claimant's capital exceeded the limit of £8, 000 The business assets could not be disregarded under paragraph 6(1) of Schedule 10 to the Income Support (General) Regulations because the claimant had ceased to be engaged in the business as a self-employed earner and had no intention of disposing of any of the business assets. Paragraph

6 (1) includes in the list of things to be disregarded as capital:

> 11(1) The assets of any business owned in whole or in part by the claimant and for the purposes of which he is engaged as a self-employed earner or, if he has ceased to be so engaged, for such period as may be reasonable in the circumstances to allow for the disposal of any such asset.,'

4. The claimant appealed, explaining why it made no sense for him to sell any of his equipment. The appeal was heard by the appeal tribunal on 6 May 1994, who allowed the appeal and decided that the claimant was entitled to income support from 22 December 1993.

5. The appeal tribunals findings of fact were recorded as follows (I have replaced the names of the claimant and his wife by "Mr B" and "Mrs B"):

> "Mr and Mrs B do carry on the amusement arcade business. He is aged 28 and she 27 and their son Anthony is aged one. He made an application for Unemployment Benefit and Income Support on the 22 December 1'993 and had finished a selfemployed work on 15 September 1993. We do not believe for a moment that the equipment is worth £15,000.00 whatever Mr B says. Looking at the accountant's letter [produced by the claimant] it seems that the book value is £9,236.00 because one has to double the amount appropriated to Mr B in the accounts. We find as a fact, however, that on any forced sale which would be the situation where Mr and Mrs B have to sell during the winter season, a vendor would be extremely fortunate to get anything like the book value.
>
> We further accept that Mr B does do a certain amount of work as set out in Box 1 despite the fact that he tells us that the accountant gets the figures out from April to September each year rather than on an annual basis. It seems therefore that they start a new business every year but we do not believe that it can be said with any certainty or correctness that he has ceased to be engaged as a self-employed earner. Having regard to that background, we believe that it is [not?] reasonable for him, even if he is a person who has ceased to be engaged as a self-employed earner, to expect him to sell the machinery before April 1994. This is because if he did so, he would inevitably have to purchase similar machinery to start the business in April and would obviously suffer considerable loss even if it is only the auctioneer's fees and turn. In addition, however, it is clear that one would get a great deal less trying to sell in September or October than one would have to pay if one was buying at the beginning of the season in April."

The chairman had recorded in box 1 evidence from the claimant that in the off-season he renovated and maintained the electrics, redecorated the arcade and carried out other minor works, such as updating the alarm system.

6 . The appeal tribunal's reasons for decision were recorded as follows.

> 111. We are not satisfied that the equipment is worth more than £8,000.00 Without a valuation, we cannot say what it is worth and we cannot therefore say whether any notional income by virtue of the fact that it is worth over £3,000.00 has to be taken into account even if we are wrong in the following reasoning.
>
> 2. Despite the fact that he carries out occasional minor work during the period September to April, we do not think that, overall, be described as a self-employed earner We believe the true position is that he has really ceased to be so engaged but the period as may be reasonable in the circumstances to allow for disposal cannot be exceeded in the period September to April. Knowing that he is going to need the equipment again in April, it would be economic suicide for him to sell in September knowing that he was going to have to buy at a higher price in the following April."

7. The adjudication officer applied for leave to appeal to the Commissioner, which was refused by the appeal tribunal chairman, but granted by a Commissioner (after a very unfortunate loss of the papers) in January 1996. Payment of benefit on the appeal tribunals award had been suspended by the Secretary of State. There have been a number of written submissions from the adjudication officer, but I need not go through them all as an oral hearing of the appeal was held, at the request of the claimant. The claimant and his wife attended and gave much helpful evidence. The adjudication officer was represented by Mr Scoon of the office of the Solicitor to the Department of Social Security. I am grateful to him also for his helpful submissions. There has been some delay in giving my decision, because I did not want to make a final decision without seeing copies of relevant bank statements and accounts, which were not available at the hearing.

8. I am satisfied that the appeal tribunal did err in law, essentially on the grounds put forward on behalf of the adjudication officer. I am not sure that it is right to say that the appeal tribunal was inconsistent within its decision over whether it regarded the claimant as engaged in self-employment at the date of the claim or not. It is fairly plain that the decision was reached on the basis that he was not so engaged. There is though some force in MrScoon's submission that, in the light of Commissioner's decision CIS/166/1994, the appeal tribunal did not adopt the right basis for deciding that question. However, there were two more fundamental errors First, the appeal tribunal erred in apparently deciding that the disregard in paragraph 6 (1) of Schedule 10 to the Income Support Regulations could apply for six months from September 1993 although the claimant was not engaged in self-employment As the claimant, quite reasonably, had no intention of disposing of the business equipment, there could be no disregard if he had ceased

to be engaged in self -employment. Second, the appeal tribunal (even if it may have intended only to deal with the question of capital) expressed its decision as one that the claimant was entitled to income support. That was a decision which could not b-e made merely as the result of reaching a different decision from the adjudication officer's on the disregarding or value of the business equipment. There might still be a problem with the capital limit, given the savings declared by the claimant and the possibility that there were other business assets whose capital value had to count. But in addition, there was no investigation of whether the claimant satisfied the other conditions of entitlement, in particular that his income did not exceed his applicable amount and that he and his partner were not engaged in remunerative work.

9. For those reasons, the appeal tribunals decision of 6 May 1994 must be set aside as erroneous in point of law. one of the reasons for holding an oral hearing was the hope that enough evidence would be forthcoming for me to substitute a final decision on the claim. That has proved to be the case, although it has taken longer than I hoped. My decision is set out formally in paragraph 1 above. I now explain why I have had to come to that decision.

10. I begin with the evidence given at the oral hearing. The claimant and his wife explained that they had been running the business of the amusement arcade together since 1990. The pattern of opening up the arcade for the season at the beginning of April and closing at the end of September had been unchanged since the outset. During the season, the arcade would be open for 12 hours a day seven days a week, with some reductions according to the weather and the time of year. The claimant would be there most of the time that the arcade was open. During the off-season, the claimant would do the necessary maintenance. Because of the corroding effects of sand and salt, maintenance was necessary for health and safety purposes. Most of that work would be done in the weeks before re-opening, and it would take perhaps two weeks to check over all the electrics. In the rest of the off-season, he did mainly bits and pieces of minor work, averaging perhaps one day a fortnight. I entirely accept that evidence. In addition, the claimant indicated that he did not wish the December 1993 claim to extend beyond the date on which the arcade was opened for the season in 1994. As Good Friday in 1994 fell on 1 April, I take that as an express withdrawal from the claim of the period from 1 April 1994 onwards. Thus the period covered by my decision is from 22 December 1993 to 31 March 1994.

11. I fear that for all of that period the claimant is caught by the effect of regulation 5 of the Income Support Regulations. I have already mentioned that it is a condition of entitlement to income support that the claimant and any partner is not engaged in remunerative work (Social Security Contributions and Benefits Act 1992, section 124(1)(c)). Regulation 5(1) to (3A) provided, as in force in December 1993:

11 (1) Subj ect to the following provisions of this regulation, for the purposes of [section 124(1)(c) of the Contributions and Benefits Act] (conditions of entitlement to income support), remunerative work is work in which a person is engaged or, where his hours of work fluctuate, he is engaged on average, for not less than 16 hours a week being work for which payment is made or which is done in expectation of payment.

(2) The number of hours for which a person is engaged in work shall be determined--

(a) where no recognisable cycle has been established in respect of a person's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours, which he is expected to work in a week;

(b) where the number of hours f or which he is engaged fluctuate, by reference to the average of hours worked over--

(i) if there is a recognisable cycle of work, the period of one complete cycle (including, where the cycle includes' periods in which the person does no work, those periods bur disregarding any other absences);

(ii) in any other case, the period of five weeks immediately before the date of claim or the date of review, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately.

(3) A person shall be treated as engaged in remunerative work during any period for which he is absent from work referred to in paragraph (1) if the absence is either without good cause or by reason of a recognised, customary or other holiday.

(3A) A person shall not be treated as engaged in remunerative work on any day on which the person is on maternity or is absent from work because he is ill."

12. Those provisions certainly contain many difficulties, but it seems to me clear that the claimant in the present case falls within regulation 5 (2) (b) (i) . Plainly, all his activities in connection with the arcade business were done in expectation of payment. The number of hours for which he was engaged in work fluctuated as between the on-season and the off-season. A recognisable cycle of work had been established by 1993 in the unchanged pattern of the on-season and the off-season, and that was a yearly cycle. I do not think that it can be argued that there were separate periods of engagement in self-employment, followed by separate periods when the claimant was not selfemployed. That would be contrary to the evidence about the claimant's activities in the off-season. Then the hours engaged in work must be calculated by taking an average over the whole yearly cycle. In the claimant's case that produces a figure well

over the limit of 16 hours. Even making the most favourable assumptions, that he only worked for 84 hours a week during 12 weeks of the season and for 63 hours a week in the other 14 weeks, and counting nothing for the weeks of the off-season, produces a total for the yearly cycle of 1,890 hours. That averages out over 52 weeks at more than 36 hours a week. The effect of the averaging process under regulation 5(2) (b) (i) must be that the person concerned is to be treated as engaged in work for the calculated number of hours even in weeks forming part of the cycle in which he was not actually engaged in work. Thus in each week from 22 December 1993 to 31 March 1994 the claimant here has to be treated as engaged in remunerative work, as he was not absent from work because of illness or maternity leave under regulation 5(3B).

13. For that reason, the claimant cannot be entitled to income support from 22 December 1993 to 31 December 1994. Although I do not have to go into detail on other reasons, the same result would follow from looking at the rules on earnings. The income support regulations on capital and earnings for the self-employed form a package. In broad terms, so long as a person is engaged in self-employment the capital @alue of the assets of the business is ignored, but the earnings from self-employment have to be taken into account and set against the claimant's applicable amount. If the person ceases to be engaged in selfemployment, then earnings from self-employment are not taken into account, but the capital value of the assets of the business have to count against the limit of £8,000 (subject to the extension of the disregard if the claimant is seeking to dispose of the assets) . In this case, applying the approach set out in paragraph 15 of Commissioner's decision CIS/166/1996 (which is in the appeal papers) I am satisfied that the claimant and his wife were gainfully employed as self-employed earners throughout the offseason as well as the on-season. Therefore, the capital value of assets of the business (including money put at risk in the business) is not a problem, and the personal savings of the claimant and his wife at the relevant time seem to have been below £3,000. (The bank statements produced show a balance of more than £3,000 at the beginning of the period, but the account seems to have been used at least in part for business purposes) . However, earnings must be considered. The basic rule at the time for the self-employed under regulation 30(1) of the Income Support Regulations was that average weekly earnings over a period of a year should be taken. I have the prof it and loss account for the year ended 30 April 1993, which would have been the most recent evidence available during the period in issue. But looking at the gross receipts of £28,639 and expenses of £14,243, remembering that regulation 38(5)(b) of the Income Support Regulations prohibits any deduction for depreciation of capital assets, produces a figure of average weekly earnings which, even after deductions for income tax, social security contributions and any personal pension contributions, would be well over the applicable amount for the claimant and his family. That figure would have to be applied to weeks in the off~season, even though no takings would be coming in in those weeks.