

JMfi/SH/4

Commissioner's File: CIS/434/1994

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. My decision is that the decision of the social security appeal tribunal was not erroneous in point of law. I dismiss the appeal.

2. This is an appeal with the leave of the Commissioner from the decision of a SSAT dated 16.5.94 that the claimant was not entitled to income support because her husband (to whom, in this decision, I shall refer as "Mr H") was in remunerative work of not less than 16 hours a week. It is accepted that he works hours a week far in excess of 16. "Remunerative Work" is defined in regulation 5(1) of the Income Support (General) Regulations 1987 as:-

"Work in which a person is engaged ... for not less than 16 hours a week being work for which payment is made or which is done in expectation of payment."

I would note that the operative words are "remunerative work" not "remunerative employment". It is not therefore necessary that a claimant should be an employee and have a contract of employment (whether expressed or implied). Also, it would appear from Perrot v. Sup. Ben. Com. 1980 3 AER 1 1 0 that a business need not show a profit.

3 The decision of the tribunal was a majority decision. The dissenting member held the view that the claimant was entitled to income support as Mr H would not receive payment for at least six months. Reliance was put on the decision of the Commissioner in CFC/3/1989. I shall consider that conclusion later on in this decision

4. Mr H was formerly employed, earning £1 9, 000 p a. and had the

services of a company car. He and an associate ("Mr F") decided to leave and set up a company ("the Company") operating as residential estate agents in Maidstone. The Company was registered on 20.12.92 and commenced trading on 16.8.93. He and the claimant sold their house and moved into rented accommodation in the area, thereby raising some £6,000 of capital. As I understand it, Mr H and Mr F are the only shareholders, each holding a 50% shareholding. (This may not be strictly accurate. The issued capital of the Company is 3,902 shares, which number leads me to suppose that the two shares might be held by others. Nothing however turns on this and in any event Mr H gave evidence to the tribunal that he had a 50% shareholding.) Mr H and Mr F are the only Directors. The Company moved into premises under a three year lease at £17,500 p.a. from 8.8.93. There is, however, an arrangement with the landlord that a lower rent is paid initially, but as I understand it, the full rent over the whole term will in the end be payable.

5 The Company is in its infancy. As with all new ventures, it needs time to get off the ground. Accounts were produced (T20-T21) showing that for the period 1.11.93 to 30.4.94 it had an operating loss on the profit and loss account of £1,523.40. The total loss for the trading year is likely to be £8,000-£10,000 but the Company should succeed in 1995. Mr H said that he did not expect to be drawing any money from the Company as salary until 1995 as the Company would not reasonably be able to afford such payments until then (T30). The tribunal (majority) found (box 4, T31):-

"[The claimant] gave up a well paid job in the expectation he could establish a niche estate agency and has been confident that this will be the case and that success and financial rewards will follow. His optimism and expectations have been dampened by getting off to a slower start than had been hoped for but the acquisition of 10% of the Maidstone residential sales market in barely 6 months is both impressive and underlines the realistic nature of his expectations. He works 12 hours a day in the expectation, the very reasonable expectation that most of the fruits of his labour will be harvested in time."

6 On or about 17 December 1993 (T2) the Board passed the following resolution:-

No payment except business expenses shall be made to the Directors of the Company nor dividends paid to shareholders profit."

At the hearing, Mr H accepted that such a resolution could be rescinded and/or varied at any time but he relied upon its existence as evidence of intention vis that no payments would be made until previous losses had been recovered and there was a healthy profitability forecast. That, in my view, is about the highest that can be said of the resolution: but it can also be said, as one would reasonably suppose, that once the Company was

in profit and past losses accounted for, payments would be made to Mr H and Mr F either as salary, Directors fees, or dividends - it matters not which.

7. The question which I have to address is:-

"Was the work in which Mr H was engaged on behalf of the Company work for which payment was made or which was done in expectation of payment?"

8. The business consisted largely of selling houses for which fees were charged. There was bound to be some time lag between the time that a property was offered for sale and the time the sale was completed and the fee paid. It had been hoped that clients would, in return for a lower fee, pay the fee up front, and, on that basis, it was thought that the Company might be in profit by the end of 1993. I gather, however, that those hopes were frustrated.

9. Now I would have no difficulty in holding that the work done by the Company, or, had Mr H and Mr F been in partnership, the work done by them as partners, was "for work for which payment was made or which was done in expectation of payment." Payment was made when the fees were paid by the client. But Mr H and Mr F are not in partnership in the true sense of the word. (It may be that for certain purposes Mr H and Mr F were in "quasi-partnership" - see Ebrahimi v. Westbourne Galleries Ltd, 1973 A.C. 360.) But I am not concerned with the Company's work: I am concerned with the work of Mr H for and on behalf of the Company. Although I have said that a contract of employment is not necessary for the regulation to apply I have in fact little doubt that there must have been some form of contract of employment of an informal nature. Both and Mr F could and did act on behalf of the Company in building up the business. The fact that they were not paid is immaterial: the prospect of future earnings was enough.

10. At this point I shall deal with the conclusion of the minority member. She concluded that Mr H had no reasonable prospect of payment within six months. Therefore, the six months rule of thumb applied. Therefore Mr H was entitled to income support. This was an application of what Mr Commissioner Mitchell had said in CFC/3/1989. That case concerned a claimant who aspired to be a writer. Like so many who aspire to that ambition, while he was not "a no-hoper" he was nevertheless, so far, entirely without success. In paragraph 10 of his decision the Commissioner said:-

"The case of the claimant with whom this decision is concerned is, of course, somewhere in between those examples. I am not to be taken as seeking to establish any hard and fast principle; but it seems that, as a general rule of thumb, the period of 26 weeks from the date of the claim should normally be the period in which expected payment should be sought."

It seems to me that, if rule of thumb there may be, it is a very tentative rule of thumb and should not be applied in cases like this, where a professional commercial business has been started and is being built up. Mr H and Mr F are not amateurs dabbling in estate agency: they are professionals. The case of the writer is different. At the stage the writer was in that case he was not building up a name for himself: he was hoping to sell articles or other writings on a one off basis. I am satisfied that the circumstances in this case are wholly different and the six month rule of thumb has no application. It is not as though Mr H thought that the Company was a no hoper: on the contrary, he was reasonably optimistic and gave evidence that the Company would pay a salary from 1995. This case is to be contrasted with the sort of situation met in CSB/413/1984 and CIS/815/1992 where the prospective businesses involved, who could not afford to pay salaries, were "no-hopers".

11. I now turn to the nub of the matter. The tribunal sat on 16.5.94. The Company had started training on 16.8.93. The premises were taken on lease as from 8.8.93. on 25.10.93, a claim for income support was first made but was refused as neither Mr H nor the claimant were registered for employment. on 10.11.93 the claimant made a claim. on 6.1.94 the claim was formally refused by the A.O. Getting the Company off the ground was harder than expected but Mr H said he did not expect to be drawing any money from the Company until 1995. He gave evidence (T29) as follows:-

"[The claimant] is optimistic about the future and considers that since [the Company] started business it has gained some 10% of the Maidstone residential sales market - but by the nature of an estate agency the fee income from sales commissions comes in slowly at first."

As I have said the position of the claimant is to be contrasted with "no hopers". Mr H was optimistic and it seems to me that the work he did in getting the Company off the ground was work done in expectation of payment, though payment for the time being might be deferred. I find the judgement of the Court of Appeal in Smith v. CAO (11.10.94) most helpful. That case concerned a young lady who was trying to establish herself as an agent for a number of pop groups. She was in receipt of an Enterprise Allowance. However, her efforts were largely unsuccessful and she earned no more than £200 in the year in question. The Court of Appeal held that the work she was doing was not done either for payment or in expectation of payment. It was all preliminary work. Simon Brown LJ said in his judgement:-

"The essence of Mr Latter's argument [Counsel for the CAO], as I understood it, was this. All that Miss Hussey did, she did in the expectation of payment in this sense that her efforts were all directed, ultimately, to the end of building up her business, obtaining contracts and thus receiving payment. It is, submits Mr Latter, artificial to seek to divide up the business into those hours at work which produce profitable contracts and those that did not.

The business, he submits, once up and running, must be looked at as a whole.

"I readily follow this submission and recognise that in many businesses much the work done will indeed be purely speculative in nature and without a realistic prospect of it ever producing any payment. A nice question may arise as to when the point is reached at which the bulk of the work done, work exceeding [16] hours per week, ceases to be merely preparatory to work for which there is a realistic expectation of future payment - ceases, that is, to be essentially an investment to build up good will - and becomes instead work, including, of course, ancillary work, for which, in a more direct and immediate sense, payment is made or realistically to be expected. Until that point is passed, the business cannot profitably be regarded as up and running; rather, it has been set up.

It seems to me that the business of the Company was set up and running at least by 10.11.93. They moved into the premises on 8.8.93 and the Company started trading on 16.8.93.

12. The business of an estate agent is a professional commercial activity, quite unlike the amateur efforts of the young lady in Smith. While doubtless pre-incorporation and pre-commencement of trading work was not work done in expectation of payment and doubtless in the same category was work done in kitting out the premises, it seems to me that work done by Mr H certainly after 10. 11 .93 was work done in expectation of payment, albeit that payment might be deferred, even having regard to the resolution of the Board of 17.12.93. The Company was up and running and earning fees, although the business was as yet unprofitable, but profitability was expected as was payment of a salary possibly in 1995. In those circumstances, it is my view that Mr H's work was done in expectation of payment. The key, as the majority members of the tribunal correctly identified, is expectation of profit. A person in the position of Mr H does not work, once the Company is up and running, without expectation of payment although it may be deferred. It is a commercial activity run on professional commercial lines.

13. Finally, I think I should note that this is not a case where a question arises whether, for the purposes of SI 24 (1) (d) of the Contributions and Benefits Act 1992, the claimant is available for work. That para. does not apply in relation to the other member of a married or unmarried couple but only to the claimant.

14. My decision is therefore as set out in paragraph 1 above. The appeal is dismissed.

(Signed) J.M. Henty
Commissioner
(Date) 21 February 1995