CAS

NJI-J/1/MB/LM Commissioner's File: CIS/493/93

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

1. This is an appeal against a decision of the Barnstaple Social Security Appeal Tribunal held on 24 March 1993. My decision is that the decision of that tribunal was erroneous in point of law, and therefore I set it aside. However the point of law on which I set the tribunal's decision aside is that it failed, contrary to regulation 25 of the Social Security (Adjudication) Regulations 1986, by its chairman, to include an adequate statement of the reasons for its decision in the written record. The facts were agreed. I am therefore able to use my powers under section 23(7) of the Social Security Administration Act 1992 to give the decision which I consider the tribunal should have given. That decision is to the same effect to that given by the social security appeal tribunal namely that the appellant is not entitled to income support from 15 October 1992 because he is to be treated as being in remunerative work. Accordingly, although technically successful, this appeal effectively fails.

2. The undisputed facts, so far as they affect this appeal, are as follows. The appellant claimed unemployment benefit on 15 October 1992, and also made a claim for income support which the Secretary of State treated as made on the same date. When asked what he was doing in the 6 months prior to his claim, the appellant stated that he had been working in his self-employed guest house business and stopped work on 3 October 1993 when his last guests left. He started trading at Easter.

3. In response to further questions the appellant stated that the season was mid-April to 3 October 1992. He intended to trade by way of running the guest house again next year and would take bookings in the closed season. The appellant stated that the first season of trading was 1992 and that prior to this he was doing up the property. The income from the guests was swallowed up by the bank to which they have repaid the sum of £10,000 out of £24,000 borrowed in November 1991. He and his wife have no resources for the winter.

4. By way of further explanation the appellant explained that he worked for a year on the property and lived solely from the loan. By Easter 1992 he was ready to open but had used all the money. He did not have too many customers and, over the top of meagre living expenses, every penny had to go back to the bank to pay the loan. He still owed the bank £14,000 and had no money to last the winter.

5. Further investigation of the documents show that some work is done by the appellant during the winter since he takes bookings. On 24 March 1993, at the hearing of this appeal before the social security appeal tribunal, the appellant explained that his guest house was open for trading at that date.

6. At page T28 of the appeal bundle, on the basis that the claimant worked 7 days a week and the guest house is open and that such work would be at least 40 hours a week, the number of hours per annum worked would be 960 hours, ignoring any winter work, but averaged over a year would be 18.46 hours a week. There is no dispute with regard to this. This is an important figure because both parties agreed that the important regulation for the purpose of this appeal is regulation 5 of the Income Support (General) Regulations 1987. Regulation 5(1) reads as follows:-

> "(1) Subject to the following provisions of this regulation for the purpose of section 20(3)(c) of the Act [SSCBA Section 1241(c)] (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 an average, for not less than 16 hours a week being work for which payment is made or which is done in expectation of payment."

7. The substantive matter of this appeal concerns the question as to whether between 3 October 1992 and the date of reopening of the guest house for guests on or before 24 March 1993 the appellant was engaged on average for not less than 16 hours a week in his work. There is no question that this work was done in expectation of payment.

8. I say that this is the substantive matter of this appeal. This is the first matter complained of in the extremely able grounds with which the appeal is supported. The other two matters complained of are the failure to give reasons to which I have already adverted, but which falls to the ground if I give reasons. The third is a matter of natural justice. This, in the event of a decision by me also falls to the ground sofar as any complaint to the tribunal is concerned. This is particular so where the facts, as here, are agreed. Of course if I commit a breach of natural justice, that can be put right elsewhere.

9. I return therefore to the substance with the rival contentions which, if I may say so have been so ably expressed. they concern regulation 5(2) of the Income Support (General) Regulations 1987 which reads as follows:-

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

(a) when 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, to which he is expected to work in a week;

(b) where the number of hours to 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 involves periods in which the person does no work, those periods but disregarding any other absences);

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

10. The reasons advanced by the adjudication officer were that there was a cycle to be observed from the running of this guest house, that it was an annual cycle, and that regulation 5(2)(b)(i) applied, and that the average of the work was in the excess of 16 hours a week. The argument which was advanced on behalf of the appellant was that the cycle applied by the Department was incorrect and that in fact regulation 5(2)(b)(ii) applied. This applies where there is no cycle. The reasons given by the appeal tribunal coming to their decision were as follows:-

"Cycle is a yearly cycle and on this basis the average of hours worked is in excess of 16 per week".

In my view the reasons given were deficient in that they did not explain why the tribunal found there was a recognisable cycle of work established and why they found that the cycle was an annual cycle. If I may say so I have great sympathy with the social security appeal tribunal in this matter. Regulation 5(1) and 5(2) referred to above are notoriously difficult to understand and even more difficult to apply. I entirely agree with Mr. Mesher in his comments, often repeated, on this regulation that it needs a thorough overhaul. That whatever one may think about the regulation, it must be applied.

11. The argument in support of the appeal are on somewhat different grounds. The basic submission is that there are two distinct and separate cycles of work during each annual period

that made up from April to October, and that made up from October to March the closed season. Moreover if that is right, it is said that each of these periods (to use a neutral word) constitutes a period where hours of work do not fluctuate, but rather a six months period of work of non-fluctuating hours, followed by a six month period of non-remunerative work. This is expanded by way of answer to the adjudicating officer's submissions in the following paragraph:-

> "It is our argument that there are two clearly separate recognisable cycles of work every year, the open season and the closed season. During the open season, our client works for a regular 16 hours or more every week. Therefore he falls outside the provisions of regulation 5(2) within the provisions of regulation 5(1), in this cycle. During the closed season, he is not engaged in remunerative work at all."

This, I think, contains the nub of the competing arguments.

12. Regulation 5(2) is expressly to be used to determine the number of hours for which a person is engaged in work. The difficulty with this regulation is that there appears to be no perfect dichotomy created by regulation 5(2)(a) and 5(2)(b). That is because regulation 5(2)(a) opens with the words "where no recognisable cycle has been established ..." and regulation 5(2)(b) opens with the words "where the number of hours for which he is engaged fluctuate ...".

13. However, in my view, this inexactness of dichotomy is probably more apparent than real. It is very difficult to see how there could be a cycle, rather than a straight line, where hours do not fluctuate. In any event, in my view, the first task for the tribunal was to decide whether there was a recognisable cycle or not, and to give reasons for their decision. The second task was to decide whether, within that cycle, the hours for which the appellant was engaged fluctuated. The first question, therefore, to be decided is whether the appellant's contentions that there are two cycles both set out above is correct: or whether the adjudicating officer's contention that there is one cycle is correct. In my view it is the adjudicating officer's contention which is correct. I reach this view for the following reasons.

14. A definition contained in the shorter Oxford English Dictionary of the word "cycle" is "a recurrent round or course". That cited by the appellant in his reasons is "a recurrent round or period (of events, phenomena etc.)". In my view the distinguishing features of the cycle, so far as this regulation is concerned is that it is a cycle of work, that it may include periods where the person does no work, and, by inference from regulation 5(1) and 5(2)(b)(ii) that it may include a period of more than one week. Indeed if it does not do so, it is hard to make sense of whether reference of a cycle, since hours of work are measured by the hours of work done in one week. It is also to be noted that if there is a recognisable cycle of work, it is

the period of a complete cycle which is to be taken into account.

15. The common feature of the definitions referred to above are the words "a recurrent round". This, in my view, is important because when one goes round a circle once, one comes back to the point from which one started. It is my view that one of the features of a cycle should be that, within it, it contains a complete description of the work done by the person in question so one can say of the cycle, effectively, that it recurs, and it is a complete example of what that person does. The end of one cycle should be the beginning of the next cycle, and each should be a full microcosm of the work done by the appellant. In my view this is precisely what the two "cycles" contended for by the appellants fail to do. The "cycle" which commences in April and ends in October (the open season) contains a description of what will happen in those months year after year. It does not contain a description, it is not an example of, what will happen in the months from October to April (or March) year after year. The end of one "cycle" contended for by the appellant is not the beginning of a similar cycle. It is the beginning of a dissimilar cycle.

Another way of approaching the matter is to ask whether each of the cycles contended for by the appellant contain a complete demonstration of the pattern of the appellant's work. Once again, in my view, they do not.

Accordingly I prefer the contention of the adjudicating officer. I find that there is a recognisable cycle and so far as the appellant's work is concerned. It is an annual cycle. The hours are fluctuating hours. The average of those hours is 18.46 a week, as explained above, and accordingly the appellant is engaged in remunerative work for an average of not less than 16 hours a week being work for which payment is made or which is done in the expectation of payment.

I should add, obiter, that in my view, assuming that the appellant continues to run his guest house, and the same is successful, the example taken in this case is probably the most favourable to the appellant. He says that his work during winter months is merely to take bookings and that by the end of December he had merely taken two of these, approximately a quarter of an hour's work. I suspect that in future years work will be done on the guest house before the same opens preparing it for the coming season. This work may be substantial if decorative repairs are undertaken. This year the appellant says that he cannot afford to do any, and I decide this case on that basis.

(Signed) N J Inglis-Jones
Deputy Commissioner

Date: 18 May 1994