

AJG/HJD

Commissioner's File: CIS/725/93

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:****Social Security Appeal Tribunal:****Case No:**

1. My decision is that the decision of the social security appeal tribunal of 14 May 1993 is not erroneous in law.

2. The claimant applied for income support on 7 October 1992. In his claim form he disclosed that he had savings of £16,000. In a paper attached, he stated that "This money is capital I have raised towards starting my own business." Also at the end of the claim form he alludes to "the capital I have raised for my venture." Further, in the claim form he stated that he had received a three week sick note from his doctor, having had an abscess removed in hospital. However he also stated that he was engaged on a course of Business Enterprise Training of 30 hours per week. The possession of capital of over £8,000 would normally exclude from an award of income support by virtue of the terms of regulation 45 of the Income Support (General) Regulations 1987. The claimant was duly refused income support by an adjudication officer's decision of 26 October 1992. He appealed to a social security appeal tribunal and on 14 May 1993 the tribunal upheld the adjudication officer's decision. Subsequently an application to set that decision aside under regulation 11 of the Adjudication Regulations 1986 was unsuccessful. The claimant now appeals with leave of a Commissioner.

3. In his letter of appeal to the tribunal and at the oral hearing before them, the claimant argued that the above sum of £16,000 fell to be disregarded as being capital required to start up his business. It appears from the note of evidence and also the letter written by the claimant in support of his setting aside application that he did in fact commence in business on 7 December 1992. That argument was rejected by the tribunal. Their decision was:-

"The appeal fails and [the claimant] is not entitled to Income Support from 7 October 1992."

Their findings of fact were:-

1. [The claimant] is married and aged 33. He has one dependent son.
2. He became unemployed on 1 September 1992.
3. He claimed Income Support on 7 October 1992.

4. As at 7 October 1992 he had capital of £16,000."

Their reasons for decision were:-

"1. The Tribunal accepted that the sum of £16,000 was intended to be capital for the business which [the claimant] hoped to start.

2. However that business was not in existence on 7 October 1992. It was a pipe-dream at that stage. The sum of £16,000 could only be regarded as capital and a claimant with capital exceeding £8,000 could not claim Income Support.

3. The appeal accordingly failed."

4. The claimant's ground of appeal is that the tribunal misapplied paragraph 6 of Schedule 10 of the Income Support (General) Regulations 1987. That Schedule deals with capital which falls to be disregarded. Paragraph 6 is in the following terms:-

"(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 disposal of any such asset.

(2) The assets of any business owned in whole or in part by the claimant where -

- (a) he is not engaged as self-employed earner in that business by reason of some disease or bodily or mental disablement; but
- (b) he intends to become engaged (or, as the case may be, re-engaged) as a self-employed earner in that business as soon as he recovers, or is able to become engaged, or re-engaged, in that business; for a period of 26 weeks from the date in which the claim for income support is made, or is treated as made, or, if it is unreasonable to expect him to become engaged or re-engaged in that business within that period for such longer period as is reasonable in the circumstances to enable him to become so engaged or re-engaged."

In particular the claimant's submits that he is entitled to a disregard of his savings of £16,000 by virtue of paragraph 6(2)(b) as cited above. The adjudication officer now concerned has made very full and helpful written submissions to which I am much indebted. In these he dissents from the interpretation of paragraph 6 advanced by the claimant. However he invites me to set aside the tribunal decision on other grounds. I accept his submission in regard to the interpretation of paragraph 6. However although the tribunal's record of decision is open to criticism, I do not consider it to be so flawed in the circumstances of this case as to require me to set it aside.

5. The key point in this appeal is whether the claimant had commenced business at the date of claim or was rather preparing to commence business. I do not consider that even the claimant disputes that his attendance at a business training course or his preparation of a business plan fall into the latter category. Thus as at the date of claim the claimant had not commenced business. At that date he was preparing to commence business. I consider that the analogy drawn in his

written submissions by the adjudication officer with Birmingham and District Cattle By Products v Inland Revenue Commissioners (1919) 12 TC 92 is almost exact and is very helpful. The activities involved in that case of looking at other businesses to see how one would conduct one's business when it was actually set up are very similar to the activities referred to by the claimant in paragraph 6 of his letter of 12 July 1993 viz;

"I believe that my work record at Walker Hall Associates, where I was learning the 'ins and outs' of running a business and receiving counselling in order for me to produce my business plan, should be sufficient proof as to my intention to start trading as soon as I was able to do so."

The claimant's business had not commenced at the date of claim. He concedes this himself in the above letter in the paragraph 5 viz;

"At 7th October 1992, the business was not, and could not be in existence as a trading company at that stage, due to the process of having to produce a sound business plan in order to merely open a bank account etc."

Given all of this it is obvious that paragraph 6(1) cannot avail the claimant. Attention must then turn to paragraph 6(2). The opening words of that sub-paragraph are crucial viz "the assets of any business owned in whole or in part by the claimant." In my opinion, the sub-paragraph falls to be construed as a whole and thus it cannot avail the claimant unless he already has a business which has assets. This approach in my judgment is confirmed when one compares the terms of paragraph 6 with those of paragraph 2 of Schedule 10. That provision allows for the disregard of;

"Any premises acquired for occupation by the claimant which he intends to occupy as his home within 26 weeks of the date of acquisition or such longer period as is reasonable in the circumstances to enable the claimant to obtain possession and commence occupation of the premises".

In contrast paragraph 6(2) makes no reference to an intended business. If it did the claimant's appeal would succeed. In my opinion, paragraph 6 in both sub-paragraphs (1) and (2) requires there to be an actual business in existence not a prospective or intended one before it can benefit a claimant and secure a disregard of capital for him. By the claimant's own admissions referred to above at the date of claim he had no actual business but only a prospective or intended business.

6. Given the view that I have expressed that paragraph 6(2) falls to be construed as a whole, the claimant's argument that he is covered by paragraph 6(2)(b) necessarily falls. This is so not only for the reasons given above but also because of the placing and meaning of the word "but" in paragraph 6(2). These require that paragraph 6(2)(a) be fulfilled before paragraph 6(2)(b) can come into play at all. The claimant has never suggested that he was prevented from engaging in business because of disease or disablement. It appears to be largely fortuitous that at the date of claim he was submitting a sick note during the course of his period of preparation to commence his business. The reason why the claimant was not engaged in business was primarily because he was so preparing himself not because of the short term disability.

7. I note the submission of the adjudication officer now concerned with the case that a claimant whose business concern has reached such a degree of advanced preparation that only his good health is wanting for the commencement of production or trade may also obtain the advantage of paragraph 6(2). I do not consider that I need to comment on this very narrow point as clearly in this case the claimant's situation would not be covered by it. His activities were definitely preparatory in nature as at the date of claim. Subject to that, I basically accept the adjudication officer's submissions in respect of the interpretation of the provisions of paragraph 6 and reject those of the claimant.

8. So far as the adjudication officer's other submissions are concerned I can deal with them briefly.

- (a) It would have been much better if the tribunal had made definite findings on the claimant's activities and whether they amounted to the commencement of a business or not and, if so, from which date rather than stating a bald conclusion in box 4. However it is conceded by the claimant that that conclusion i.e. that his business was not existence on 7 October 1992 was in fact the case. Indeed the claimant himself states that it only commenced on 7 December 1992. That has all along been his position.
- (b) Once again a fuller statement of reasons would have been highly desirable on the distinction between the treatment of the assets of an actual business and those of an intended business. Given the opinion I have formed on the interpretation of paragraph 6 as explained in detail above and the facts as accepted both by the adjudication officer and the claimant it would however be pointless for me to set the decision aside and remit it for a rehearing at this stage.
- (c) Fuller findings on the details of the £16,000 savings would no doubt have been helpful. However the amount does not appear to have been in dispute at any point. The £16,000 appears to have been kept on cash deposit or in some other liquid form. The claimant describes it as "money". By the date of claim the "investment property" referred to by the claimant in the note of evidence had already been sold and it appears to me that the £16,000 was the net proceeds of that sale which had taken place at some earlier and undisclosed date. It was therefore in my view unnecessary for the tribunal to go into any detail as to the origins of the £16,000 although it may well have been appropriate for them to have made a finding as to the manner in which it was invested as at the date of claim. It is unlikely in any event that any detailed findings on valuation would have reduced the claimant's total capital below £8,000.

9. The claimant's appeal is unsuccessful.

(signed)

A J Gamble
Deputy Commissioner
Date: 11 August 1994