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MHJ/1/LM **Commissioner's File:** CIS/015/90

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the unanimous decision of the Birkenhead social security appeal tribunal given on 14 June 1989 is erroneous in point of law. Accordingly I set it aside and remit the matter for rehearing.

2. The claimant appeals with leave of the chairman against the decision of the tribunal rejecting his appeal against the decision of the adjudication officer, issued on 23 December 1988, that income support was not payable to the claimant because he was "engaged in remunerative work".

3. Section 20(3)(c) of the Social Security Act 1986 provides that there is no entitlement to income support if the claimant is "engaged in remunerative work" which, in so far as it is relevant to the present case, is defined by regulation 5(1) of the Income Support (General) Regulations 1987 as -

> " ... work in which a person is engaged, or, where his hours of work fluctuate, he is engaged on average, for not less than 24 hours a week being work for which payment is made or which is done in expectation of payment."

4. In the instant case the claimant had been in receipt of supplementary benefit and, latterly, income support, since 15 January 1987. Following enquiries by the Department it became apparent that the claimant had been working for 24 hours a week, for which he was paid £30.00, and his benefit was accordingly stopped with effect from 7 December 1988. He reclaimed income support on 19 December 1988 when he declared that his hours of work had been reduced to 20 hours a week, for which he was still paid £30.00. The adjudication officer took the view that the claimant was still employed for 24 hours a week and that income support was not therefore payable; his reasoning was that it was "inherently improbable that an employer would pay the same wages for fewer hours work". The claimant appealed.

5. As the adjudication officer now concerned with the case correctly says in the helpful submission dated 29 March 1990 -

" ... the issue before the tribunal was whether the claimant was engaged in remunerative work ... As it does not appear to be in dispute that the claimant was working and being paid ... the crucial question ... is the number of hours being worked."

6. The tribunal's findings on questions of fact consisted of -

"Facts accepted (and agreed by Appellant) as set out in Summary of Facts in AT2."

That summary set out the history of the matter, the claimant's contentions (as summarised in paragraph 4 above) and the adjudication officer's opinions and conclusions. In brief, there was total conflict between the claimant's statement that he worked 20 hours a week and the adjudication officer's decision that he in fact worked for 24 hours. The fact that that disagreement existed was no doubt agreed by the claimant, who was unrepresented, but it is not suggested that he conceded that the adjudication officer was right. In these circumstances the tribunal plainly failed to make the crucial finding of fact regarding the number of hours the claimant actually worked.

7. Neither am I able to deduce from the tribunal's reasons for their decision any such finding. Indeed, those reasons seem to me more a recital of the evidence although, at paragraph 4, it is noted that -

"The issue is the number of hours; the earnings are relevant for their probative value";

and at paragraph 6 -

"6. Applying principles of Commissioner's decision R(I) 2/51 to contradictory nature of the evidence on behalf of the appellant, oral and written, the Tribunal rejected the explanations as inherently improbable. Considering the evidence as a whole, the Tribunal were of the opinion that the balance of probability was in favour of the conclusion that Appellant's hours of work had not decreased and that he was continuing to work for 24 hours per week. Appellant not entitled to income support as he was by definition in remunerative employment."

I agree with paragraph 5 of the submission of 29 March 1990 that the tribunal failed to record what specific matters led them to the conclusion that the claimant's explanation was inherently improbable, and that he is accordingly left in the dark as to why his evidence - and the written statement from his employer - failed to satisfy the tribunal.

8. For the above reasons I hold that the tribunal's decision fails to comply with the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 and is accordingly erroneous in point of law. I set it aside and, as I do not consider it expedient to decide the matter myself, I

remit the case for rehearing by an entirely differently constituted tribunal. They will hear the matter afresh and will no doubt have the benefit of receiving evidence from both the claimant and his employer. In my view the local tribunal is the appropriate forum to decide the facts, of which they will record a full record of their findings. They will also give a reasoned decision and in all respects comply with regulation 25(2)(b).

9. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 21 February 1992