Rem. Work – Waiting Time – Cab Driver Cases *42/98 (7)

MJG/CW/ZA/9

Commissioner's File: CIS/85/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the social security appeal tribunal dated 19 July 1996 as that decision is not erroneous in law: Social Security Administration Act 1992, section 23.

2. This is an appeal to the Commissioner by the claimant, a man aged 51 at the relevant time. The appeal is against the unanimous decision of a social security appeal tribunal dated 19 July 1996, which dismissed the claimant's appeal from a decision of an adjudication officer issued on 17 November 1995 as follows,

> "[The claimant] is not entitled to income support from 29/10/95 because he is engaged in remunerative work."

At the claimant's request, the appeal was the subject of oral hearing before me on 21 April 1998 at which the claimant was present and was represented by his son who is a Solicitor. The adjudication officer was represented by Mr D Jones of Counsel, instructed by the Solicitor to the Departments of Health & Social Security. I am indebted to all those persons for their assistance to me at the hearing.

3. The relevant part of the tribunal's findings of fact reads as follows:-

> "The tribunal found that the issue was assessing the appellant's actual hours of work [in his occupation as a self-employed mini-cab driver] and that the appellant had completed a series of forms FB B7, the final two of which stated that the total had been 16 hours per week in each instance. As regulation 5(1) of [the Income Support (General) Regulations 1987, S.I.1987 No. 1967] had

defined remunerative work as work in which a person is engaged not less than 16 hours per week, being work for which payment was made or which is done in expectation of payment, the Adjudication Officer considered this evidence and disallowed Income Support with effect from 12 November 1995. [The claimant] appealed against that decision, contending that his hours of work had been 'rounded up' instead of being more accurately counted in hours and minutes, which would have shown totals less than 16 hours. It became clear that the Appellant measured his hours of work as a cab driver in travelling time, taken from the office where he was based to answer a call, deliver a passenger to his or her destination and return to the base office. These times had been carefully recorded. However, [the claimant] was in the habit of driving from his home to the office and waiting there for potential customers, sometimes spending several hours; in his view such waiting time was not work within the definition of [regulation 5(1) of the 1987 Regulations]. By contrast the Presenting Officer argued that such time was undoubtedly working time, which, added to the hours already recorded by the Appellant for calls, brought the claimant's working weeks in each instance to a total well above 16 hours. The appellant's son, who was his Advocate, asserted that there was no obligation on his father to wait for potential customers at the cab office and therefore such waiting time could not be ranked as working time. The tribunal were satisfied on the evidence that such waiting periods were indeed working time, since the waiting was economically motivated by the prospect of receiving a call from a prospective customer, which was the opportunity for the appellant to work and earn money. That kind of activity appeared to come entirely within the scope of regulation 5(1) (work done in expectation of payment). The appellant was therefore engaged in remunerative work."

At the hearing before me on 29 April 1998 the factual matters were amplified somewhat by my being informed that the claimant sometimes used Citizens Band Radio in his car to receive calls from the mini-cab office, even when he was not waiting in the office.

4. The tribunal then gave the following reasons for its decision,

> "The evidence indicated that [the claimant] was engaged in work for in excess of 16 hours per week, since the operations as a free-lance cab driver, based at the cab office, comprised being present there in order to be available to answer calls, answering such calls as might be received, transporting the various customers and returning to the base office each time until the end of the working spell or shift. As the appellant was a free-

lance cab driver he was under no obligation or compulsion to stay at the cab office, waiting for customers, except for economic self interest. It was that factor which came within the scope of the definition in regulation 5(1), 'work....which is done in expectation of payment'. He certainly would not be paid for working time, for there might well be no customers, but if a call came which he dealt with, his charge for that work would incorporate an element to cover expenses including times spent waiting."

5. For the reasons which I give below I consider that the tribunal with its careful reasoning accurately stated the law and correctly applied it to the facts of this case. I note that the tribunal chairman gave leave to appeal to the Commissioner and that in the final sentence of their reasons for decision the tribunal said,

> "Defining accurately the scope of regulation 5(1) was sometimes difficult and [the claimant's] business activity was near the borderline."

I agree with that remark but, after a careful consideration of the arguments adduced to me at the hearing and the relevant caselaw, I have come to the conclusion that undoubtedly the tribunal arrived at the correct conclusion.

6. As to the case law the tribunal itself said, in its reasons for decision,

> "The Presenting Officer drew the tribunal's attention to Commissioner's decision [on file CIS/815/1992 which was upheld by the Court of Appeal in Chief Adjudication Officer v. Ellis - 15 February 1995] where another kind of waiting was in fact held not to be working time, on the basis of the particular facts. In that instance the wife and joint owner, together with her husband, of a small general store, which had persistently lost money, was held not to be engaged in remunerative work in respect of serving in the shop."

7. The tribunal distinguished that decision on its facts and I consider that to have been a correct distinction. As it happened, I was the Commissioner who gave that particular decision. The basis of it undoubtedly was that because the shop was persistently losing money with no prospect of making a profit, it could not be said on the facts of that case that the waiting time of the wife (in case she should be called upon to serve in the shop) was in any way "in expectation of payment". But clearly in the present case the claimant's waiting time was in expectation of payment. I should say at this point that I do not really think there is any fundamental distinction between the words "hope of payment" and "expectation of payment", despite the distinction drawn in

Mesher's book, at p. 117 of the 1997 Edition. Indeed both expressions have been used in the caselaw. (see e.g. R (FIS)6/85, para 67).

8. Regulation 5(1) of the Income Support (General) Regulations 1987, S.I. 1987 No. 1967, as amended by S.I. 1991 No. 1559, provides as follows:-

> "Persons treated as engaged in remunerative work
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> 5(1)...For the purposes of [section 124(1)(c) of the Social Security Contributions & Benefits Act 1992] (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."

9. It should be noted that the word used is "work" and not "employment". The regulation applies both to employees (in the "master/servant" sense) and self-employed persons, Moreover, it is not confined to the actual hours for which payment is made but also includes work "which is done in expectation of payment". I consider that the tribunal arrived at the correct conclusion on the facts of this case, in deciding that the claimant's waiting time was "work in expectation of payment", certainly sufficient of the waiting time at the mini-cab office (and possibly also listening to the CB Radio)that, when added to his actual driving time, brought the total to 16 hours or more. It was common ground at the hearing that waiting time (no matter how little) if taken into account would so to speak 'tip the balance' and bring the total of hours in a week to 16 or more.

10. There were cited to me a number of Commissioners' decisions, reported and unreported, but I do not think that they assist in the present case. In some ways what is involved in this case is not a question of law but a question of fact and it does not assist to consider cases on very different facts. I have already explained this in relation to the Court of Appeal's decision in Chief Adjudication Officer v. Ellis. There was also cited an unreported decision of another Commissioner on file CIS/694/1993 which did deal with a taxi driver but the facts were different in that the taxi driver there, although a casual driver, had to be available for taxi work between fixed hours and indeed was paid to be available for those hours. After discussion of that decision, it was common ground at the hearing before me that, because its facts were different, it did not really assist in the present case.

11. The only case which merited detailed consideration and indeed on which the claimant relied was the decision of the

House of Lords in Suffolk County Council v. Secretary of State for the Environment and Another [1984] Industrial Cases Reports, page 882. In that case a "retained fireman" was paid an annual retaining fee not only to attend at a fire station or at a fire but also for being available for immediate call even when he was involved in other activities e.g. running his own shop. His actual attendance at fire stations or at fires was less than 30 hours in each week. Nevertheless he contended that his waiting time should also be taken into account, so that he came within regulation A3(1) of the Local Government Superannuation Regulations 1974. That regulation provided for a pension for "whole-time employees", which the regulation defined as meaning, "..an employee whose contractual hours of employment regularly or usually amount to 30 hours or more in each week" (my underlining). The House of Lords held that the fireman in question was not a "whole-time employee" because his waiting time could not be taken into account. At page 892 of the Report, Lord Templeman said, contrasting the position of a retained fireman with that of a regular fireman,

> "..A retained fireman is not working for the fire authority until he is called. He is not at the disposal of or under the control or direction of the fire authorities and his services cannot be required until a fire takes place".

12. On his father's behalf the claimant's son stressed that and similar passages in the Suffolk County Council case and asked me to apply them by analogy to his father's situation. He contended that his father was in the position similar to a retained fireman and that it could not be therefore said that his father was at work when he was simply waiting (either listening to his CB radio or in the mini-cab office) to see if a call came. I understand the force of this argument but in my view it cannot be accepted. The issue in the Suffolk County Council case was different. The question was whether or not the waiting time constituted "contractual hours of employment (Local Government Superannuation Regulations 1974, reg. A3(1)). The issue in the present case was not whether the claimant was employed during his waiting time but whether he was "at work" within regulation 5(1) of the Income Support (General) Regulations 1987. That is a different issue and the decision of the House of Lords does not therefore in my view assist. There can be "work" without employment (cf. the Salvation Army case - R(FC)2/90). The claimant was self-employed and his waiting time was undoubtedly "in expectation of payment" (regulation 5(1) of the Income Support (General) Regulations 1987). The retained fireman in the Suffolk County Council case was treated not as a self-employed person but as an employee in the legal sense of that word i.e. under what used to be called a master and servant relationship. I must therefore reject the claimant's son's contention that I should apply by analogy the decision in the Suffolk County Council

case (which being a decision of the House of Lords of course undoubtedly binds me if it applies). For the reasons given above I do not consider that there is any analogy.

13. It follows that, for all the above reasons, I must dismiss the claimant's appeal against the tribunal's decision. I appreciate that the claimant feels that he has been harshly treated over this matter but regulation 5(1) of the Income Support (General) Regulations 1987 is broad in scope. Moreover, it is of course open to a person in the claimant's position to limit his total hours including waiting time so that they do not amount to 16 hours per week or more. But in this case the claimant had not done that, possibly because of ignorance of or doubt as to the legal position. In this connection, I have noted that the question of waiting time being taken into consideration was not raised in the adjudication officer's written submission to the tribunal but was only brought up for the first time orally by the presenting officer at the hearing. However the claimant was represented by his son, who frankly told me that he was quite prepared to deal with this issue at the tribunal. He did deal with it and with the case-law. In those circumstances there can be no question of breach of the rules of natural justice by 'springing' a new issue on the claimant.

(Signed) M J Goodman
Commissioner

(Date) 6 May 1998