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AWEW/SH/2

Commissioner's File: CIS/460/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant against a decision of a social security appeal tribunal dated 6 April 1990 that the claimant was not entitled to income support for the period from 9 October 1989 to 16 January 1990 because she was engaged in remunerative employment. My decision is that this appeal be allowed and that the claimant's appeal be remitted for a rehearing before a differently constituted tribunal.

2. This appeal can only succeed if the claimant can show an error of law in the decision of the appeal tribunal. I consider that in this case the tribunal erred in law in that their decision failed to comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 in that it did not contain an adequate statement of the reasons for the decision or of the tribunal's findings on questions of fact on which the decision was based.

3. The claimant is a single parent in her twenties and is handicapped by having two artificial legs below the knee. She was in receipt of income support until an adjudication officer decided on 9 January 1990 that her entitlement to benefit had ceased because she was engaged in remunerative work within the meaning of section 20(3)(c) of the Social Security Act 1986. The claimant appealed to the appeal tribunal and, with the leave of the appeal tribunal's chairman, appeals now to the Commissioner from the appeal tribunal's decision.

4. By section 20(3)(c) of the 1986 Act, a person is not entitled to income support if he is engaged in remunerative work. Regulation 5 of the Income Support (General) Regulations 1987 provides that for the purposes of section 20(3)(c), 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 24 hours a week the work for which payment is made or which is done in expectation of payment. There are further provisions, some of them extremely complex, relating to the definition of remunerative work in regulations 5 and 6 of the 1987 Regulations but in the context of this appeal they are not relevant.

5. In deciding that the claimant was not entitled to income support in respect of the period in question because she was engaged in remunerative work, the appeal tribunal gave its findings and reasons as follows -

- " 2. (1) Appellant is a single parent with a 4 year old child and is physically handicapped by having 2 artificial legs below the knees.
- (2) The physical handicap does not appear to have any material effect on the Appellant's mobility or her earning capacity.
- (3) On 9.10.89 the Appellant started in business running a canteen and purchased catering equipment with a loan from her boyfriend and then employed a friend, Miss Pinder, to assist her.
- (4) The Appellant and Miss Pinder shared out the work each week but always tried to work alternative Saturdays. Miss Pinder received £15 a week and Appellant entitled to the balance although she only took over £20 per week.
- (5) Observations were kept on Miss Pinder and Miss Dore by Department Officials on 8.1.90, 9.1.90 and 10.1.90 and both were observed going to and remaining in the canteen on those days.
- (6) Appellant was interviewed on 15.1.90 and indicated that Miss Pinder worked 3 days per week in a morning or in an afternoon saying about the business 'Its mine so that I can work when I like and get someone to fill in on the other days'.
- (7) Both Miss Pinder and the Appellant would remain in the canteen during the hours from 11.30am to 1.00pm when the cafe was officially closed although on occasion the canteen would be locked and unattended during those hours.
- (8) The Appellant accepted that there was some overlaps when both of them were at the canteen together.

4. The Tribunal had considerable sympathy with the Appellant who as a single parent with a 4 year old child and a physical handicap obviously had a hard struggle to make

ends meet.

However the Tribunal decided that looking at all of the facts they could not accept that a self-employed person having invested at least £450 in a business would not be concerned to make sure that the business succeeded. The Tribunal did not accept that the Appellant only worked for the hours she claimed, namely an average of $22\frac{1}{2}$ hours per week neither did they accept that the canteen was totally closed during the hours between 11.30 am and 1.00pm or that no work was done during that period. There was also an overlap of work when both girls were present and the Tribunal felt that a self-employed person would always be anxious to ensure that a business ran smoothly and would tend to supervise even when an employee was present. The Tribunal were satisfied that the Appellant worked more than 24 hours per week - average and that her physical handicap did not restrict her earning capacity in any way."

6. It is clear that the issue at the heart of this appeal is the finding by the appeal tribunal that the claimant worked on average more than 24 hours per week. The grounds of appeal filed by the claimant's representative challenged that conclusion on the basis that insufficient findings of fact were made by the appeal tribunal and that because they failed to explain satisfactorily how that conclusion was reached, their reasons were inadequate.

7. There is merit in this ground of appeal and in the submissions in support of it. In my view the findings and reasons given by the appeal tribunal fell short of what was required. In the light of the evidence and of the findings which they did make, it seems to me that the appeal tribunal were obliged to make a specific finding of fact on the important question of what hours the claimant worked between 11.30 am and 1.00 pm. It was not enough for them to find, as they did find, that the canteen was not totally closed during that period. In particular, having regard to the fact that this was clearly a borderline case in that the claimant admitted that she worked an average of $22\frac{1}{2}$ per week, a specific finding of fact was called for on this point and it was not forthcoming. The same criticism can be made of the finding by the appeal tribunal that there was an overlap of work between the claimant and her assistant. It is apparent that the appeal tribunal attached considerable weight to this factor. Yet they failed to make a specific finding as to the extent of that overlap and nor did they explain precisely how that affected the equation. It cannot be over-emphasised that what should be set out fully are the findings of the tribunal on questions of fact material to their decision and that it is not sufficient that there is a full record of the evidence before them. While there should of course, be such a record, the decision of the tribunal depends upon the evidence which they accepted and this should be spelt out in their decision.

8. For these reasons, I allow this appeal, set aside the decision of the appeal tribunal and direct that the matter be reheard by a fresh tribunal. It will be open to the claimant, if she so wishes, to place before the fresh tribunal the additional evidence which it was sought to place before me in my appellate capacity but which, in all the circumstances, I have declined to consider.

(Signed) A.W.E. Wheeler
Commissioner

(Date) 30 March 1992