Remunerative work - work cycle RECEIVED

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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

Name: Luke Darren Murphy
Lee Thomas Murphy

Social Security Appeal Tribunal: Plymouth

Case No: 328 08739
328 08738

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal in each of the cases below was not erroneous in point of law and accordingly the appeals of the claimants fail.

2. The claimants in these two appeals appeal against the decisions of the Plymouth social security appeal tribunal given on 30 April 1993 which decided in each case that the claimant was not entitled to income support because he was engaged in remunerative work.

3. Section 124(1) of the Social Security Contributions and Benefits Act 1992 (previously section 20(3)(c) of the Social Security Act 1986) provides that one of the conditions of entitlement to income support is that a claimant is not engaged in remunerative work. Regulation 5 of the Income Support (General) Regulations gives a definition of remunerative work and I must set out the material parts of the regulation

> "(1) ....for the purpose of Section 20(3)(c) of the Act" [Section 124(1)(c) of the Benefits Act] "....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 payments is made or which is done in expectation of payment.
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> (2) The number of hours for which a person is engaged shall be determined-
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> (a) where 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, which he is expected to work in a week;
(b) where the number for which he is [illegible] 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) in any other case, the period of five weeks immediately before the date of claim or the date of review, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately.""

It is necessary therefore for a tribunal to identify the appropriate cycle or cycles of work by reference to which income support is to be assessed.

4. The facts of these cases, in so far as they are necessary for the determination of the appeals, are that the claimants, who are brothers, carry on business in common as proprietors of a beach shop and cafe and at the time of the adjudication officer's decision had been carrying on that business for approximately three years. There are seasonal variations in the number of hours worked each week. A greater number of hours are worked from April to September, I refer to his period as the high season and a lesser number of hours are worked each week from early October to the middle of April, I refer to this as the low season. The adjudication officer calculated the average hours worked and later re-calculated them on a basis more favourable to the claimants. He set out in his submission to the tribunal his final calculation which is as follows

"However, if the adjudication officer recalculated the average hours as follows:

07.10.91-17.04.92 = 28 weeks @ 15 hours =	420 hours	
18.04.92-26.09.92 = 23 weeks @ 40 hours =	920 hours (this is the minimum hours worked)	
27.09.92 = 1 week @ 15 hours =	15 hours	
Total	1355 hours over 52 weeks	

the average works out at 26 hours per week, which is still far in excess of 16 hours per week."

On that basis the claimants would not be entitled to income support. The claimants appealed to the tribunal. The findings of the tribunal on questions of fact material to their decision were as follows

"The Summary of Facts not being in dispute were accepted by the Tribunal. The hours worked during the period from Easter to September varied between 40 and 65 hours per week, whereas from September to Easter the hours worked were approximately 15 hours."

The reasons for their decision were stated as follows

"The Tribunal's view was that the business was run on a 52 week cycle and therefore the hours worked had to be averaged throughout the year. The financial position of the appellant could not be considered in connection with the appeal."

Leave to appeal against that decision was granted by a Commissioner.

5. At the hearing before me the claimants were represented by Mr D. Williams, a welfare rights officer with the Cornwall Welfare Rights Unit and Mr A. Cousley from the Solicitor's Office in the Department of Social Security was for the adjudication officer. The principal point argued by Mr Williams was that the claimants do not have an annual cycle of work. He submits that there are two cycles in each of their years of work. He argues that the high season is one cycle and the low season is another and that consequently the claimants were not in remunerative work, as defined in regulation 5, during the low season. Mr Cousley argues that the evidence shows that there are two events which occur every year which add up to a recognisable yearly cycle of events during that cycle the claimants hours of work fluctuate. Therefore the number of hours had to be averaged over the period of one complete cycle of a year. He says that the evidence shows that the pattern recurred year after year and that consequently the members of the tribunal were correct in finding that there was a yearly cycle.

6. Clearly the evidence showed that the claimants hours of work fluctuate. There is a difference between the hours worked in the high season and the hours worked in the low season. It seems to me that the evidence showed that there was a recognised cycle over a period of years. I accept that the regulation does not impose a yearly cycle. Ascertainment of the recognised cycle is a question of fact in each case and it depends to a large extent on the fluctuation. In the instant case there was evidence of yearly periods during which a recognisable round of events occurred. Consequently the finding of the tribunal that the calculation was on a fifty two week cycle is the correct one. I cannot accept that the high season constituted one cycle of events and the low season constituted a different cycle of events. Without the seasonal fluctuations there could be no cycle and the evidence showed that there were two different patterns of work.

7. There is a further point. The claimants in their grounds of appeal to the tribunal had stated that the work in the low season consisted of unpaid maintenance of the premises; this

would appear to have been an afterthought, be that as it may, the tribunal did not deal with their contention that the work in the low season was not remunerative work because payment was not made for it nor was it done in expectation of payment. The tribunal did not deal with the point. I have to ask myself whether it was necessary for them to do so. R(FIS) 6/85 is a case where the claimant was employed as a part-time teacher and also self-employed as a silversmith. The adjudication officer disallowed her claim for family income supplement on the grounds that she was not engaged in remunerative full-time work within the meaning of the then regulation 5(1) of the Family Income Supplement (General) Regulations 1980. On appeal to a social security appeal tribunal the claimant stated that in connection with her work as a silversmith she had only included the hours worked on practical work at her bench. She had not included time spent on visits to and from clients, trips to retailers and wholesalers, at the craft centre and in working out ideas for a design competition. The tribunal upheld the adjudication officer's decision on the grounds that the activities did not constitute remunerative work. The Commissioner held that activities in the course of remunerative work are not, in respect of the self-employed, restricted only to those activities which are costed and that the activities described by the claimant were essential to her self-employment and were therefore carried out with the desire hope and intention of claiming a reward or profit. Applying like reasoning to the case before me I have come to the conclusion that the fact that the claimants may have been engaged in the low season predominantly in maintenance makes no difference. It was necessary for them to maintain their premises in order that they might trade and it seems to me that the work they were then doing was work done in expectation of payment and fell to be taken account of as remunerative work for the purpose of the regulation. It is true that the Commissioner in the case to which I have referred was considering regulation 5 of the Family Income Supplement (General) Regulations 1980, where the words were "undertakes activities in the course of remunerative work" and those words differ from the words used in regulation 5 of the Income Support Regulations. If anything turns on this difference it seems to me that the income support regulation is less favourable to a claimant.

8. It is true that both the findings of fact and the reasons for their decision given by the members of the tribunal are not as full as they might be, but I do not think it right to set aside the decision and substitute a decision of my own to the same effect, but the reasons given by me for upholding the decision explains it more fully to the claimants.

(Signed) J J Skinner
Commissioner

Date: 10 May 1994