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FROM FCB RM 208 W/HILL RD
FROM FAMILY CREDIT PRESTON

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IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

Commissioner's File: CFC/020/91

MHJ/1/LM

FAMILY CREDIT (GENERAL) REGULATIONS 1987

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [redacted] (Mrs)

Social Security Appeal Tribunal:

Case No:

47/92

[ORAL HEARING]

50 RECEIVED
28 JUN 1992
FAMILY CREDIT

1. My decision is that

- (a) the unanimous decision of the Rochdale social security appeal tribunal given on 13 November 1990 is erroneous in point of law and is accordingly set aside;
- (b) the claimant was not entitled to family credit on the date of claim, 28 March 1990, because her income, as calculated, was higher than the level at which family credit would become payable.

2. The claimant, to whom I shall refer as Mrs G, appeals with my leave against the decision of the tribunal confirming the decision of the adjudication officer, issued on 10 April 1990, which was to precisely the same effect as my decision in paragraph 1(b) above.

3. I held an oral hearing of this appeal on 20 May 1992 at Liverpool when Mrs G was not represented and, I regret to say, declined to attend. The adjudication officer was represented by Mr S.M. Cooper of the Office of the Solicitor to the Departments of Health and Social Security.

4. Mrs G claimed family credit for herself, her husband and their two dependant children, on 28 March 1990. Mrs G is the owner of premises - I am not sure whether solely or jointly with her husband, but for present purposes that is immaterial - comprising a retail shop and sub-post office. Mrs G's husband is, as she puts it, "technically employed ... for purposes of tax, NI, etc" in the shop and Mrs G holds the appointment of sub-postmistress. It is common ground that Mrs G works at least 45 hours a week, that she received gross monthly earnings of £1,490.36 on 31 January 1990 (£1,103.11 net) and £1,508.95 on 28 February 1990 (£1,115.52 net) from Post Office Counters Ltd and that, during the 22 week period from

26 October 1989 to 24 March 1990, she paid her husband a total of £952.00. Mrs G produced a profit and loss account from the start of the business on 26 October 1989 to the end of March 1990 which showed that the retail business was running at a substantial loss, with sales totalling some £2,300.00 and expenses amounting to about £9,000.00. For reasons which will appear later it is not necessary for me to extract the precise figures; it suffices to say that the adjudication officer accepted that the business was operating at a loss but, in brief, held that those losses could not be offset against her earnings as sub-postmistress.

5. In those circumstances, after making the appropriate deductions for tax and national insurance contributions, the adjudication officer calculated Mrs G's net income from Post Office Counters as £255.98 per week, and Mr G's net earnings at £43.27 per week. It is accepted that those figures are incorrect and should be £255.99 and £42.38 respectively but, again, that does not materially affect outcome of this matter. The adjudication officer, applying regulations 46, 47 and 48 of and Schedule 4 to the Family Credit (General) Regulations 1987 [S.I. 1987 No. 1973] and taking into account all items of income and the appropriate family credits in respect of Mr and Mrs G and their children, decided that the maximum family credit as at the date of claim was £48.20 and, as 70 per cent of their "excess income" substantially exceeded that amount, that her entitlement was therefore nil.

6. It is not necessary for me to set out all the relevant regulations and the consequential calculations. Mrs G, it is apparent from her letters and detailed submissions, which I have read with care, clearly has a good grasp of the principles involved and appreciates that the only way she could bring herself within the family credit limits would be if she could aggregate her income and expenses from her employment as a retail trader and a sub-postmistress and set off her losses from the former against her income from the latter. That is the only issue in this case and I propose to confine this decision to that question.

7. Regulation 22 of the Family Credit (General) Regulations 1987 [S.I. 1987 No. 1973] ("the General Regulations") is concerned with the "Calculation of net profit of self-employed earners", and paragraph (11) thereof provides that -

"(11) For the avoidance of doubt where a claimant is engaged in employment as a self-employed earner and he is also engaged in one or more other employments as a self-employed or employed earner any loss incurred in any one of his employments shall not be offset against his earnings in any other of his employments."

8. Clearly Mrs G's retail business is self-employment and equally clearly her work as a sub-postmistress is another employment - whether it is also self-employment or employment as an employed earner is irrelevant although, out of deference to

Mr Cooper's careful submission, I shall deal briefly with that question later. The essential feature is that the two occupations of shopkeeper and sub-postmistress, although frequently, as in the present instance, carried on in the same premises, are two separate and distinct occupations and thus fall fairly and squarely within regulation 22(11). It follows that the actual amount of Mrs G's loss on the retail business is immaterial; her income from that source was correctly assessed by the adjudication officer as nil, and as regulation 22(11) of the General Regulations plainly precludes any loss being set off against earnings from any other source, it can make no difference whether the loss is small or large.

9. However, having said that, I accept that the tribunal adopted the wrong procedure in the calculation of Mrs G's allowable expenses. In the light of CFC/25/89 (to be reported as R(FC) 1/91) there were matters which they omitted to take into account or apportion correctly. Accordingly I agree with paragraph 14 of the submission dated 7 October 1991 by the adjudication officer now concerned with the case, which was adopted by Mr Cooper, and I hold that the tribunal's decision is erroneous in point of law and I set it aside.

10. This is a case in which I can and should substitute my own decision pursuant to section 101(5)(a)(i) of the Social Security Act 1975. The erroneous calculation of Mrs G's expenses produced a smaller loss on the retail business than would have been the case had the correct allowance been made. That, of course, merely has the effect of increasing the loss and that, as I have said above, does not affect the outcome - a nil assessment of earnings from the retail business is as low as it is possible to go, and any losses cannot be set off against any income from Mrs G's other occupation. In those circumstances the adjudication officer was right to have regard, for the purposes of calculating entitlement to family credit, only to Mrs G's income as a sub-postmistress. Clearly that was substantially above the maximum at which family credit could be awarded, and I therefore have no alternative but to give a decision in essentially the same terms as that given by the adjudication officer and confirmed by the tribunal.

11. In conclusion, and although it is not necessary to my decision, I deal briefly with Mr Cooper's submission regarding the position of sub-postmasters and postmistresses. I am indebted to him for the various authorities to which he referred me and for the thoroughness with which he had prepared and presented his arguments. No definition of "sub-postmaster" appears in the Post Office Acts 1953 to 1969, although section 87 of the 1953 Act defines an "officer of the Post Office" as including -

"... any person employed in any business of the Post Office, whether employed by the Postmaster General or by any person under him or on behalf of the Post Office."

("Postmaster General" must now be read in the light of the Post Office Act 1969).

Halsbury's Laws of England, 4th edition, vol 36, paragraph 642(n), contains the comment -

" ... sub-postmasters, ... are independent contractors and not employees, see Hitchcock v Post Office [1980] 1CR 100 EAT ... "

Sub-postmasters are required to pay Class 1 National Insurance contributions and are also taxed as "employed earners" under Schedule E although, as I understand it, the Revenue authorities, as a concession, permit some sub-postmasters' income to be dealt with together with their other income as self-employed persons under Schedule D. It seems to me that the description, "independent contractor" is a particularly apt one; a sub-postmaster is subject to a number of stringent contractual conditions by the Post Office Corporation but they nevertheless remain independent in so far as they are not Post Office employees in the sense that, for example, postmen and sorting office staff are. Section 2(1)(a) of the Social Security Act 1975 defines "employed earner" as -

" ... a person who is gainfully employed ... either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E."

In my judgment a sub-postmaster is an office holder (see Edwards v Clinch [1982] AC 845) and accordingly an employed earner within the meaning of section 2(1)(a) above.

12. The claimant's appeal is allowed (see paragraph 9) and I give my decision in paragraph 1 above.

(Signed) M H Johnson
Commissioner

Date: 11 June 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 (c.4)

Ss. 1-3

equal to the aggregate of all statutory sick pay and statutory maternity pay recovered by employers and others in that year, as estimated by the Government Actuary or the Deputy Government Actuary.

(6) No person shall—

- (a) be liable to pay Class 1, Class 1A or Class 2 contributions unless he fulfils prescribed conditions as to residence or presence in Great Britain;
- (b) be entitled to pay Class 3 contributions unless he fulfils such conditions; or
- (c) be entitled to pay Class 1, Class 1A or Class 2 contributions other than those which he is liable to pay, except so far as he is permitted by regulations to pay them.

Categories of earners.

2.—(1) In this Part of this Act and Parts II to V below—

- (a) “employed earner” means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E; and
- (b) “self-employed earner” means a person who is gainfully employed in Great Britain otherwise than in employed earner’s employment (whether or not he is also employed in such employment).

(2) Regulations may provide—

- (a) for employment of any prescribed description to be disregarded in relation to liability for contributions otherwise arising from employment of that description;
- (b) for a person in employment of any prescribed description to be treated, for the purposes of this Act, as falling within one or other of the categories of earner defined in subsection (1) above, notwithstanding that he would not fall within that category apart from the regulations.

(3) Where a person is to be treated by reference to any employment of his as an employed earner, then he is to be so treated for all purposes of this Act; and references throughout this Act to employed earner’s employment shall be construed accordingly.

(4) Subsections (1) to (3) above are subject to the provision made by section 95 below as to the employments which are to be treated, for the purposes of industrial injuries benefit, as employed earner’s employments.

(5) For the purposes of this Act, a person shall be treated as a self-employed earner as respects any week during any part of which he is such an earner (without prejudice to his being also treated as an employed earner as respects that week by reference to any other employment of his).

“Earnings” and “earner”.

3.—(1) In this Part of this Act and Parts II to V below—

- (a) “earnings” includes any remuneration or profit derived from an employment; and
- (b) “earner” shall be construed accordingly.

(2) For the purposes of this Part of this Act and of Parts II to V below other than those of Schedule 8—

- (a) the amount of a person’s earnings for any period; or
- (b) the amount of his earnings to be treated as comprised in any payment made to him or for his benefit,