

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]

Social Security Appeal Tribunal: Liverpool

Case No.: [REDACTED]

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 12 July 1988 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to give the decision the tribunal should have given, I further decide that family credit is not payable to the claimant because at the date of claim his income exceeded the amount of family credit appropriate to the family, calculated in accordance with the relevant regulations.

2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal given on 12 July 1988 reversing the adjudication officer's decision issued on 4 May 1988, leave having been granted by the tribunal chairman. The claimant attended the oral hearing of the appeal held before me. The adjudication officer was represented by Mr M Jobbins. I am grateful to him for his very detailed and helpful submission.

3. On 13 April 1988 the claimant made a claim for family credit. He stated that he was a single parent of three children then aged 9, 11 and 12; he worked 42 hours a week as a fireman; he was paid 4-weekly and his last two payments of earnings had been £533.93 net on 22 February 1988 and £534.33 net on 21 March 1988; as he went out to work he had to employ a childminder, the fees being £40 per week; he and his children had no capital.

4. In reply to an enquiry the claimant's employers stated that his last two payments of earnings had been £853.42 gross from which the following deductions were made - income tax £123.39; national insurance contributions £61.84; occupational pension contributions £91.74 (only half of which can be deducted for family credit purposes).

5. The adjudication officer calculated the claimant's entitlement to family credit in accordance with the relevant regulations. He calculated that the claimant's net weekly earnings were £155.57. He did not allow the childminding fees as an expense against the claimant's earnings. He decided that the claimant had no entitlement to family credit as his earnings were in excess of the appropriate maximum credit. Thereupon the claimant appealed to the tribunal.

6. The claimant attended the hearing of the appeal before the tribunal on 12 July 1988. The chairman's note of evidence records that the claimant stated that he worked night shifts and at weekends and was obliged to employ two pensioners to look after his sons when he was on duty. He was unable to work without such help. In the event the tribunal allowed the appeal. Their findings of fact read:-

"The tribunal decided that in the special circumstances the expenses of looking after the children were wholly exclusively and necessarily incurred in the performance of the duties of his employment, since without incurring the expense it would be impossible for the appellant to carry out his employment."

The reasons for decision read:-

"Expenses allowed under Reg 19(2)(b) of the Family Credit (General) Regulations 1987. N.B.Reg 19(1)(d)(ii) does not apply since the payment is not made by the employer."

7. Regulation 19 of the Family Credit (General) Regulations 1987 provides for the calculation of gross earnings of employed earners as follows, so far as material:-

- "19. - (1) Subject to paragraph (2), "earnings" means in the case of employment as an employed earner, any remuneration or profit derived from that employment and includes -
- (a)-(h) ...
- (2) Earnings shall not include -
- (a) ...
 - (b) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;
 - (c) ...
- (3) ... "

8. Regulation 20 of the General Regulations provides for the calculation of net earnings of employed earners as follows, so far as material:-

- "20. - (1) For the purposes of regulation 14 (normal weekly earnings of employed earners), the earnings of a claimant derived or likely to be derived from employment as an employed earner to be taken into account shall, subject to paragraph (2), be his net earnings.
- (2) ...
- (3) For the purposes of paragraph (1), net earnings shall, except where paragraph (4) applies, be calculated by taking into account the gross earnings of the claimant from that employment over the assessment period, less -
- (a) any amount deducted from those earnings by way of -
 - (i) income tax;
 - (ii) primary Class 1 contributions under the Social
- 2

Security Act; and

- (b) one-half of any sum paid by the claimant by way of a contribution towards an exceptional or personal pension scheme.

(4) ..."

9. It will be seen that before the claimant's net earnings can be calculated under regulation 20 of the Family Credit Regulations, it is essential to establish the amount of the claimant's gross earnings calculated in accordance with regulation 19. In other words "gross earnings" in the present context means before the deduction of the amount specified in regulation 20(3) but after deduction of payments specified under regulation 19(2) (see The Chief Adjudication Officer v. Hogg Appendix to Commissioners Decision R(FIS) 4/85). It is not in dispute that if the claimant's childminding expenses fall to be excluded from the calculation of his gross earnings under regulation 19(2)(b), his claim will succeed. If they do not, his claim will fail.

10. It follows that the crucial issue is the interpretation of "wholly, exclusively and necessarily incurred in the performance of the duties of the employment" for the purposes of regulation 19(2)(b). Section 189(1) of the Income and Corporation Taxes Act 1970, now superseded by section 198(1) of the Income and Corporation Taxes Act 1988, is couched in identical terms. It is well established that childminding expenses are not deductible for the purposes of income tax. (Halstead v. Condon (1970) 46T.C. 289). In Decision R(FIS) 2/88 a Tribunal of Commissioners considered a case involving childminding expenses, albeit for the purposes of family income supplement, and in the light of the judgment of Slade LJ in the Hogg case, they concluded that the words "taxable earnings" should be interpreted as follows (paragraph 7):-

- "7. .. we are in no doubt that the phrase was employed by Slade LJ to mean a person's earning after the deduction of expenses wholly, exclusively and necessarily incurred in order to perform the employment in question, for example, work clothes, or, in the case of a self-employed carpenter (or, for that matter, a dressmaker), the cost of materials, but before deduction of any allowances for tax purposes, such as mortgage interest or personal allowances. Those are matters which depend solely upon a person's personal circumstances; whether he is married, has children, is self-employed or has a mortgage, and have no connection with his particular occupation. It seems plain to us that, in ordinary everyday speech, "taxable earnings" means the gross figure less any sum necessarily spent to obtain those earnings, and that it would be unusual, indeed extraordinary, if personal tax allowances, mortgage interests and, if eligible, pension contributions were brought into any such assessment."

As a result, it was held that childminding expenses did not fall within the meaning of "expenses wholly, exclusively and necessarily" incurred in the performance of the duties of employment.

11. Mr Parry readily accepted that regulation 19(2)(b) fell to be given the same interpretation as for income tax purposes. However, he argued that if he described the childminder as a housekeeper, he would be entitled to an allowance. The issue turned on the job description given. This is not correct. A housekeeper allowance of £100 could be claimed under section 12 of the Income and Corporation Tax Act 1970. The amount of the allowance was never increased. Stringent conditions were imposed. The claimant had to be a widow or widower with children and the housekeeper had to be resident, although the duties were not defined. Housekeeper relief was abolished by the Finance Act 1988. Further, the allowance was given against a claimant's earnings before the deduction of income tax but after the deduction of expenses that were allowable in arriving at the

taxable sum.

12. For the reasons set out above, the adjudication officer's decision not to allow the claimant's childminding fees as an expense against his earnings was correct. The tribunal erred in law in reversing that decision.

13. Mr Jobbins explained that although at first sight it appeared that the claimant, as a single parent, was at a financial disadvantage by being in full-time employment as opposed to part-time employment, the position was remedied to some degree by the credit given to a single parent being the same as that given to a couple and the additional disregard of single parent benefit which was at a higher rate than child benefit. (Paragraph 15 of Schedule 2 to the General Regulations.).

14. I have great sympathy with the claimant who is no doubt worse off in full-time employment than in part-time employment. I agree that this anomalous position does not encourage full-time employment. However my jurisdiction is limited to the interpretation of the statutory regulations as they are currently enacted. I have no power to amend them or apply them in an arbitrary way. The facts are not in dispute and under my powers contained in section 101(5)(a)(i) of the Social Security Act 1975, I give the decision the tribunal should have given, which is set out in paragraph 1.

15. The adjudication officer's appeal is allowed.

(Signed) R.F.M. Heggs
Commissioner

Date: 13 June 1989