FAMILY CREDIT

Normal weekly earnings of employed earners—treatment of expenses and contributions to occupational and personal pension schemes

The claimant claimed family credit for herself, her husband and their 2 children The claimant's husband was not employed, but she was in remunerative work as a student nurse

The claimant claimed various expenses against her earnings, some of which the adjudication officer allowed, such as money spent by her on a stethoscope, and some he disallowed, such as her child minding expenses. The adjudication officer also allowed as an expense half of the contributions by the claimant to a personal pension scheme but did not allow her contributions to her occupational pension scheme. The tribunal overturned the adjudication officer's decision, disallowing all the claimant's miscellaneous expenses, but allowing half her contributions to both her personal pension and her occupational pension. The adjudication officer appealed to the Social Security Commissioner

Held that:

1 as the miscellaneous expenses were payments by the claimant, and not payments by the employer, they were not covered by Regulation 19 of the Family Credit (General) Regulations 1987 Although Regulation 19(2) does not explicitly refer to payments by an employer or third party, it must nevertheless be so confined (paragraph 8),

2. there is no express provision in the Family Credit (General) Regulations for the deduction from earnings of expenses paid out by the employee, but the use of the word "earnings" in Regulation 20 brings into effect the rules laid down by the Court of Appeal in *Parsons v Hogg* (1985) 2 All E.R 897, CA included as the Appendix to R(FIS) 4/85. Consequently, in ascertaining what are a claimant's earnings under the provisions of Regulation 20(1) there must be allowed to a claimant the deduction of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment (paragraph 11),

3. where a claimant is a contributor to both an occupational and a personal pension scheme, half the contributions to each scheme should be allowed as a deduction under the provisions of Regulation 20(3)(b) of the Family Credit (General) Regulations (paragraph 12)

1. I allow the adjudication officers's appeal against the decision of the social security appeal tribunal dated 7 July 1989, as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely that the claimant's earnings should have been calculated for family credit purposes by taking into account the gross earnings of the claimant from her employment as a student nurse over the assessment period less—

(a) Any amount deducted from those earnings by way of income tax and primary Class 1 contributions under the Social Security Act 1975;

(b) One half of any sums paid by the claimant by way of contributions by her towards both her occupational pension scheme and her personal pension scheme;

(c) Any payments by the claimant in respect of expenses wholly, exclusively and necessarily incurred by her in the performance of the duties of her employment.

2. This is an appeal to the Commissioner by the adjudication officer against the unanimous decision of a social security appeal tribunal dated 7 July 1989. That decision varied the decision of a local adjudication officer (issued on 8 December 1988), which dealt with the claim for family credit (dated 9 November 1988) by the claimant, a student nurse living with her husband and their two dependent children. In calculating the claimant's

earnings as a student nurse the adjudication officer had allowed a deduction from those earnings of:

(a) Money spent by the claimant for work shoes, a fob watch, a stethoscope, books and scissors but not money spent by her on child-minding expenses (and one or two other miscellaneous items).

(b) Payments made by the claimant for contributions by her to a personal pension scheme but *not* in addition contributions made by her to her occupational pension scheme, on the ground that one *only* contribution was allowed by regulation 20(3)(b) of the Family Credit (General) Regulations 1987 [S.I. 1987 No. 1973] (see below) and the higher figure should be taken (which in this case was the personal pension contribution).

3. On the claimant's appeal to the social security appeal tribunal, that tribunal varied the decision of the local adjudication officer in the manner specified below (see paragraph 4) by referring to regulations 19 and 20 of the Family Credit (General) Regulations 1987 [S.I. 1987 No. 1973], which (so far as relevant) are as follows,

"*Earnings of employed earners*

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)–(c) . . .

(d) any payment made by the claimant's employer in respect of any expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of—

(i) travelling expenses incurred by the claimant between his home and place of employment;

(ii) expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home;

(e)–(h) . . .

(2) earnings shall not include—

(a) subject to paragraph (3), any payment in kind;

(b) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;

(c) any occupational pension.

(3) [relates to living accommodation provided for a claimant by reason of his or her employment]

Calculation of net earnings of employed earners

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) There shall be disregarded from a claimant's net earnings, any sum, where applicable, specified in Schedule 1. [Relates only to earnings from employment outside the UK, earnings of a child or young person, and banking charges or commission payable in converting non-sterling payments]

(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 the 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 Security Act; and

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

4. Referring to those regulations, the tribunal gave the following reasons for varying the adjudication officer's decision,

"In the view of the tribunal, the Regulations have not been correctly applied in this case in 2 respects. First, the expenses that [the claimant] has put on the claim form should be disregarded entirely in addition to disregarding the baby-minding fee. The tribunal could find no regulation providing for deduction of the expenses. In particular Regulation 19(2)(b) of the Family Credit General Regulations is not the other expenses incurred by employees, but sums of money that are paid by employers to employees wholly in respect of expenses. In the tribunal's view, the whole of Regulation 19 is dealing with the receipts of claimants not payments. The tribunal's interpretation of paragraph 2(b) appears to have borne out by provisions of paragraph 1(d) where expenses payment by an employer which is not in respect of items wholly exclusively and solely incurred in the [performance] of duties, is in fact reckoned as earnings.

Secondly, in the tribunal's view, one-half of the amounts paid by [the claimant] only in respect of contributions towards an occupational pension, and a personal pension, should both be deducted on the gross earnings. In Regulation 20(3)(b) the words 'an occupational or personal pension scheme' are simply descriptive of the payments and not an indication that only one half of an occupational payment or one half of a personal pension payment can be deducted. In the tribunal's view, both payments are in respect of a pension and they are not categorised in the alternative."

5. The adjudication officer has appealed against that decision of the tribunal on the following grounds, (paragraphs 5 to 8 of written submission of 23 October 1989) as follows,

"I submit that the tribunal have erred in law on [the following] 3 counts, namely—

(1) in applying a restrictive interpretation to the word 'payment' in regulation 19(2)(b),

(2) allowing a deduction from the claimant's gross earnings for both an occupation and personal pension.

. . . . . .

> It is my submission that the tribunal have erred in law in deciding that the word 'payment' in regulation 19(2)(b) relates only to payments made by employers. I submit that this interpretation is unnecessarily restrictive and that regulation 19(2)(b) is capable of embracing both payments made by employers and payments made by the claimant.
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> The tribunal also decided that a deduction should be allowed under regulation 20(3)(b) for both an occupational and a personal pension. . . . I submit that the word ["or" in regulation 20(3)(b)] means one or the other and not both, and in deciding that the payments in respect of the occupational and personal pensions are not categorised in the alternative, the tribunal have erred in law. I further submit that as the claimant contributes to both schemes it is proper that the adjudication officer should opt for the higher contribution, which in this case is the personal pension."

6. I should say at once that although I have held the tribunal's decision to be erroneous in law on another ground (see below), I reject both those submissions by the adjudication officer, as I consider that the tribunal came to the correct conclusion in its construction of the relevant parts of regulations 19 and 20. However, in my view, some of the expenses incurred by the claimant are deductible on another principle (see below).

7. I deal first with the question of the payment by the claimant of expenses for e.g. watch, stethoscope etc. It must be borne in mind that these were payments by *her* and not payments by the employer to *her* in reimbursement of expenses or to enable her to incur expenses. If they had been payments by the employer to her they would have come within the provisions of regulation 19(1)(d) and 19(2)(b), according to whether or not they were "wholly, exclusively and necessarily incurred in the performance of the duties of the employment".

8. But as they were not payments by the employer, they are not in my view covered at all by regulation 19 of the 1987 Regulations and I hold that the tribunal was correct in its conclusion that this was the position. Regulation 19(1)(d) refers expressly to "any payment made *by the claimant's employer*" (my emphasis). Regulation 19(2) states that earnings shall not include "any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment". Unlike regulation 19(1), regulation 19(2) does not refer in express terms to a payment by an employer or possibly 3rd party but in my view it must be thus confined. The whole of regulation 19 relates (as indeed the tribunal said) to payments in money or in kind *to the employee*, Regulation 19(2)(b) does *not* provide for *deduction* of expenses paid out by the employee himself or herself, nor indeed is there any express provision in the 1987 Regulations for such deduction.

9. However, I further conclude that a deduction for certain employment expenses incurred by the employee is in fact impliedly authorised by the fact that regulation 20 refers to the "earnings" of a claimant, be they "gross" or "net". There is no express provision. Regulation 20(2) makes provision for disregard from a claimant's net earnings of those items specified in Schedule 1 but they do not include expenses. Regulation 20(3) provides that net earnings shall be calculated by deducting from gross earnings income tax, social security contributions and one-half of pension contributions but makes no further provision. Nevertheless, in my judgment, the use of the word "earnings" brings into play the rules which were enunciated by the Court of Appeal in a Decision (*Parsons v. Hogg* [1985] 2 All E.R.897, C.A; Appendix to R(FIS) 4/85) on the Family Income Supplement Scheme which

preceded the Family Credit Scheme. Because the tribunal, through no fault of its own, did not deal with this point, its decision is erroneous in law.

10. In *Parsons v. Hogg*, the Court of Appeal considered regulation 2(3) of the Family Income Supplements (General) Regulations 1980 [S.I. 1980 No.1437] which provided that, "in so far as a person's *earnings* from any gainful occupation comprise salary, wages or fees related to a fixed period, the gross amount thereof shall be taken into account." (my emphasis). Speaking of this, Slade LJ said, ([1985 2 All E.R. at p. 901 f–j]; R(FIS) 4/85, Appendix, p. 136–B–F),

> "It remains to consider the meaning of the word 'earnings' in reg 2(3). Does it mean simply the remuneration actually received by the person in question? Or does it mean such receipts after payment of the expenses wholly and necessarily incurred in the course of winning them?
>
> This point I find rather more difficult, since I do not think the drafting of reg 2(3) is very happy or clear. Though the word 'earnings' may quite often refer simply to receipts, I think it is well capable of bearing either of the two meanings just mentioned, according to the particular context. If, for example, a barrister is asked what are his earnings at the Bar, he may well reply in either of these two senses, according to the identity of the questioner and the purpose of the question. In the face of this equivocal expression in Regulation 2(3) I think the court is entitled to pay regard to the statutory purpose of the formula for ascertaining the amount of a person's 'earnings from a gainful occupation', which is contained in the regulation to have capital. This is to assist in ascertaining those resources of his family which are to be taken into account for the purposes of the legislation relating to family income supplements. If [an employed] earner, such as Mr. Hogg, has necessarily to incur expenditure of £103.59 per month in order to receive a pay packet of £425.59 per month, it seems to me inherently unlikely that the legislature would have intended that his 'earnings' should be treated as being the full sum of £425.59 for these purposes; the £103.59 simply does not form part of the resources which are available to him or his family. The improbability becomes even more apparent when it is seen that, for the purposes of ascertaining the resources of the family of a [self-employed] earner his receipts would be taken into account (undoubtedly) only after deduction of the expenses necessarily incurred in winning those receipts. There appears to be no reason in logic or justice why [employed] earners should have been subjected by the regulation to such harsh discrimination as is suggested.

11. In my judgment, that principle is equally applicable to the requirement of regulation 20 of the Family Credit (General) Regulations 1987 that what must be taken into account are the claimant's "earnings". Consequently I hold that in ascertaining what are a claimant's "earnings" under regulation 20(1) of the Family Credit General Regulations 1987 there must be allowed to a claimant the deduction of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment since such a deduction would be allowable under the income tax legislation (see now section 198(1) of the Income and Corporation Taxes Act 1988). Such a deduction would *not* include an allowance for child-minding expenses (see the decision of a Tribunal of Commissioners to this effect in R(FIS) 2/88 which is equally applicable in the present case). In a starred decision on file CFC 2/1989 (Parry) another Commissioner has held that child-minding expenses cannot be deducted from the calculation of earnings but has referred this to regulation 19(2)(b) of the Family Credit (General) Regulations 1987. With great respect, I do not consider that this is correct for the

reasons set out above, though the result is nevertheless the same by a direct application of the Tribunal of Commissioners' decision in R(FIS) 2/88.

12. I turn now to the tribunal's decision that under regulation 20(3)(b) of the 1987 Regulations, which allows deduction from gross earnings of a claimant of "one-half of any sum paid by the claimant by way of a contribution towards an occupational or personal pension scheme" that *both* the contributions made by the claimant i.e. one towards an occupational pension scheme and a personal pension scheme could be counted and one-half of each could be allowed. The adjudication officer has submitted (see paragraph 5 above) that this is an incorrect construction of the regulation. I reject that submission. In my judgment the regulation, when correctly construed, should read as if it were framed thus,

> "One-half of any sum paid by the claimant by way of a contribution towards a pension scheme, whether that be occupational or personal."

That would seem to me to be a correct literal construction of the regulation and also a sensible construction. It would envisage that sums paid by way of contributions towards occupational and personal pension schemes should both be deductible.

13. I should now refer to a third ground of appeal submitted by the adjudication officer in the following terms (paragraph 9 of written submission of 23 October 1989),

> "The tribunal which sat consisted of 3 males and although the tribunal have stated that it was not practicable to have a lady member [on Form AT3—their record of decision], they have not shown that every effort had been made to secure compliance with the statutory provision as held by the Commissioner in R(SB) 2/88. Consequently they have, I submit, erred in law."

14. As I have already set the tribunal's decision aside on another ground (see above), I do not consider it necessary for me to comment in detail on this particular ground of appeal. The claimant in her observations on the adjudication officer's submission says (written observations dated 22 January 1990),

> "The only comment I wish to make is that a woman should have been at the tribunal for a more sympathetic hearing."

In fact the tribunal heard the case in the absence of the claimant, so they could not ask the claimant whether she objected to the composition of the tribunal at the hearing (see paragraph 13 of R(SB) 2/88). I will, however, say only that the fact that the adjudication officer has raised this particular ground and the claimant clearly agrees with it is an indication that the statements in R(SB) 2/88 should be carefully borne in mind by a tribunal, particularly if there has not been an opportunity to ask the claimant whether he or she wishes the tribunal to proceed in the circumstances.

15. I should lastly say that the local adjudication officer should implement the principles stated in my decision as soon as possible and now make an award of family credit to the claimant for the appropriate period and the appropriate amount. If any difficulty arises over the computation of either the amount of family credit or of the period in question, it can be referred by either party back to me for supplemental decision.

Commissioners File No: CFC 23/89.

(Signed) M. J. Goodman
Commissioner