R(FC) 1/92

CFC/20/1989

19.12.91

Remunerative work - claimant working more than the hours for which she was contracted to work - whether actual working hours to be taken into account

The claimant made a claim for family credit for a family consisting of herself and two children. She was employed as an ambulance transport clerk by her local health authority. Although her contract was for 22½ hours a week she worked more than 24 hours a week because of the nature of her work. The adjudication officer decided that she was not entitled to family credit because she was unable to satisfy the requirements of regulation 4(1) of the Family Credit (General) Regulations 1987 because she was not engaged in work for not less than 24 hours a week, being work for which payment was made or which was done in expectation of payment. The claimant disputed this decision, but the adjudication officer refused to review his original decision. The claimant's appeal was taken to be against the adjudication officer's refusal to review. The tribunal unanimously decided that the claimant was not entitled to family credit because she was only working 22 hours a week "in expectation of payment".

Held that:

1. the decision of the social security appeal tribunal was erroneous in point of law and is set aside (para. 1);

2. the Commissioner had jurisdiction to deal with the initial decision refusing family credit (para. 3);

3. it is necessary to consider both regulation 4 and regulation 5 of the Family Credit (General) Regulations 1987 together, and failure to do so is an error of law (paras. 7 and 8);

4. whether a person satisfies the conditions of regulations 4 and/or 5 of the Family Credit (General) Regulations 1987 is a question of fact determined by examining all the evidence. No one factor, such as the hours of work specified in the contract of employment, is paramount or decisive. In some occupations, such as those connected with the "caring professions" (for example, teaching or the health service), the necessity to work over and above contractual hours is an integral part of the job. It will have to be considered in the particular circumstances of each case what time is necessarily spent carrying out activities in the course of the work in question (para. 12);

5. it was common ground that the claimant was engaged in remunerative work, and as she regularly worked more than 24 hours a week she clearly satisfied the remunerative work condition of entitlement to family credit (para. 13).

R(SB) 1/82, R(P) 1/82 and R(SB) 15/87 considered and followed.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that:

(a) the unanimous decision of the Manchester social security appeal tribunal given on 2 March 1989 is erroneous in point of law and is accordingly set aside;

(b) as at the date of her claim on 14 June 1988 the claimant satisfied the conditions of entitlement to family credit;

(c) family credit is payable to the claimant at such rate and for such period from 14 June 1988 as may be assessed by the adjudication officer and, in the

event of any disagreement arising in respect of such assessment, the matter is to be referred to me for determination.

2. The claimant, Mrs. FLD, who is separated from her husband, has been employed by her local health authority since November 1982 as an ambulance transport clerk. Her contract was for 22½ hours per week but she said that she in fact worked not less than 24 hours a week. Mrs. FLD, who has two children, now aged 20 and 15 respectively, apparently previously received family income supplement and, on 10 June 1988, she completed a claim for family credit which was treated as a claim from 14 June 1988, the date of its receipt. Following enquiries from her employers, her claim was rejected on 4 August 1988; Mrs. FLD appealed and, on 12 September 1988, the adjudication officer issued a decision refusing to review the earlier decision.

3. It is well settled that where, as in the present case, an appeal has been lodged against an adjudication officer's decision, a review is not appropriate unless it offers by way of revision all that is being claimed in the appeal (see R(SB) 1/82 and R(P) 1/82). In the instant case it is clear from the tribunal's decision that the appeal proceeded on the basis that it was against the initial decision refusing family credit rather than the refusal to review that decision. And it is implicit in the submission dated 21 November 1989 by the adjudication officer now concerned with the case that the appeal also comes before me on that basis. In those circumstances, in accordance with the principles set out in R(SB) 15/87, I have jurisdiction to deal with the initial decision. Common sense, not to mention natural justice, plainly required that a claimant was not to be prevented from pursuing an appeal by a subsequent decision reviewing but not revising, or refusing to review, the original decision and, as from 6 April 1990, section 104(3B) of the Social Security Act 1975, as amended by the Social Security Act 1986, gives statutory effect to the principles set out in R(SB) 1 /82 and R(P) 1 /82 in the following terms:

> "(3B) Where a claimant has appealed against a decision of an adjudication officer and the decision is reviewed under this section by an adjudication officer, then -
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> (a) if the adjudication officer considers that the decision which he has made on the review is the same as the decision that would have been made on the appeal had every ground of the claimant's appeal succeeded, then the appeal shall lapse; but
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> (b) in any other case, the review shall be of no effect and the appeal shall proceed accordingly."

4. In the instant case the adjudication officer decided that Mrs. FLD was not entitled to family credit because, although she was "engaged and normally engaged in remunerative work" within the meaning of section 20(5)(b) of the Social Security Act 1986, she did not satisfy the requirements of regulation 4(1) of the Family Credit (General) Regulations 1987 [SI 1987 No. 1973]. This provides that "remunerative work" is:

> "(1) ... work in which a person is engaged, or, where his hours fluctuate, is engaged on average, for not less than 24 hours a week, being work for which payment is made or which is done in expectation of payment."

5. On appeal the tribunal:

> " ... found as a fact that as at 14 June 1988 the appellant was only working 22½ hours for work 'in expectation of payment' even though she was actually working more than 24 hours per week on average."

The tribunal gave as their reasons for disallowing the appeal:

> "Reg. 4(1) of the FC (General) Regs. 1987 was not satisfied.
>
> NB: The wording of such reg. was different from reg. 5(1) of the FIS (General) Regs. 1980 and it must be assumed that Parliament had changed the wording for some specific purpose e.g. to exclude cases of this nature."

6. The tribunal apparently considered that they could only take account of the hours of work for which Mrs. FLD's employers were contractually obliged to pay her, that that was the effect of regulation 4(1) and that it was unnecessary for them to look any further. I cannot agree; if regulation 4(1) had been intended to have that meaning then no doubt it would have said so. As it stands it seems to me principally to be making the distinction between paid and voluntary work. However, it has been held in R(FC) 2/90 that a Salvation Army Officer may be engaged in remunerative work, but (in CFC/3/1989) that an unsuccessful author, who had never had anything accepted, and had no immediate prospect of having anything accepted, for publication was not so engaged for the purposes of the relevant legislation.

7. In my judgment regulation 4 does not stand alone and, in order to determine whether a claimant fulfils the conditions of entitlement, it is necessary also to look at regulation 5. This, in so far as it is relevant, provides that:

> "5.- (1) ... a person shall be treated, for the purposes of section 20(5)(b) of the Act ... as engaged in remunerative work only if he carries out activities in the course of his work for not less than 24 hours in -
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> (a) the week of claim; or
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> (b) either of the two weeks immediately preceding the week of claim,
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> and he is employed at the date of claim."

8. In the present case there is no mention of regulation 5 in the tribunal's decision. Either they did not consider it at all or, if they did so, they thought it irrelevant; I do not know and cannot speculate but, however that may be, that omission is plainly in breach of the requirements of regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 [SI 1986 No. 2218], to make sufficient findings of fact and to give adequate reasons; their decision is consequently erroneous in point of law and accordingly I set it aside.

9. In those circumstances I do not need to consider in detail the note appended to the tribunal's reasons, save to say that as I see it, regulation 4 of the Family Credit Regulations is not comparable with regulation 5(1) of the Family Income Supplement (General) Regulations 1980 [SI 1980 No. 1437], which was concerned with "Circumstances in which a person is to be treated as being or not being engaged and normally engaged in remunerative full-time work". That regulation in my view is more closely comparable with regulation 5 of the Family Credit Regulations, which is headed "Engagement in remunerative work and normal engagement". I agree with

and adopt the note on page 301 of Mesher's Income Support, the Social Fund and Family Credit: The Legislation (1991 edition), where it is said that, "The main changes from the previous FIS rules are that the crucial number of hours became 24 ..., that hours can be averaged and that some content is given to 'remuneration' ".

10. This is a case in which I can and should exercise my discretion under section 101(5)(a)(i) of the Social Security Act 1975, as amended, to give the decision which the tribunal should have given.

11. Among the evidence before the tribunal was a letter dated 16 February 1989 from Mrs. FLD's employers stating that, although her contract was for 22½ hours a week:

> " . . due to the nature of her work she is frequently delayed and works 24 hours per week",

and concluding:

> "At present [Mrs D] is working 25 hours per week to provide cover for a colleague who is on long-term sick leave, but we can only offer her overtime. We cannot, at present, increase her contracted hours."

In her letter of appeal dated 8 November 1988 Mrs. FLD set out in some detail the nature of her work and explained that delays in the ambulance service often meant patients arriving late for special clinics, which meant that she had to:

> " . . work 24 hours which over five days amounts to 1½ hours I'm not paid for. But job satisfaction and patient caring plus of course family credit makes for sincere job satisfaction."

As I have set out in paragraph 5 above, the tribunal found as a fact that Mrs. FLD "was actually working more than 24 hours per week on average".

12. In my judgment, whether or not a claimant satisfies the conditions of regulation 4 and/or 5 of the Family Credit Regulations is essentially a question of fact to be determined upon the evidence as a whole; plainly no one factor, such as the hours of work specified in a contract of employment, is either paramount or decisive. Regard must be had to the realities of the work in question; in some jobs it may be practicable to work to precise time limits, but in others, and particularly those connected with the "caring professions", such as teaching or the health service, it may seldom be possible to stop work at a particular time and acceptance of the necessity to work for some, variable, time over and above the contractual hours is an integral part of the job (as I held, in the case of a part-time teacher, in CFC/8/1990). It will have to be decided in the particular circumstances of each case what time is **necessarily** spent carrying out activities in the course of the work in question.

13. It is common ground that Mrs. FLD was engaged in remunerative work and, in the particular circumstances of this case, I am left in no doubt that she is a conscientious person who, in order properly to perform her duties, regularly worked more than 24 hours a week. It follows that, at the material time, she clearly satisfied the conditions of entitlement to family credit; she was engaged in remunerative employment and, for the purposes of regulation 5(1), she carried out activities in the course of her work for not less than 24 hours during both the week of her claim and also during the preceding weeks.

14. In those circumstances I hold that Mrs. FLD was entitled to family credit on 14 June 1988. I do not have sufficient information to enable me to determine the rate, or rates, at which or the period during which benefit may be payable to her, and accordingly I refer those questions to the adjudication officer to assess. In the event of any dispute arising as to the calculation of Mrs. FLD's benefit I direct that the matter be referred to me.

15. The claimant's appeal is allowed and my decision is set out in paragraph 1 above.

Date: 19 December 1991

(signed) Mr. M. H. Johnson
Commissioner