FAMILY INCOME SUPPLEMENT

Engaged in remunerative full time work—non-working days under a subsisting contract

The claimant stated that he normally worked 37½ hours a week but during the month preceding the date of his claim he had worked only 22¼ hours a week because his firm was then working a 3 day week On the 2 days on which he was not working he was paid 50% of his wages applicable to those days On appeal the tribunal decided that the claimant was engaged in full time work for not less than 30 hours a week because he had an existing obligation to work full time under a subsisting contract of employment

Held that

1. merely receiving remuneration calculated by reference to a number of hours or being under an obligation to be actively available at any time do not amount to undertaking activities in the course of remunerative work within the terms of regulation 5(1) of the Family Income Supplements (General) Regulations 1980 (paragraph 9)

2. the decision of the appeal tribunal is erroneous in law and is set aside (paragraph 1).

1. My decision is that the decision of the Wigan Supplementary Benefit Appeal Tribunal, dated 22 July 1981, is erroneous in law and is set aside.

2. The claimant and his 4 children are a single parent family. On 1 April 1981, he claimed family income supplement. He stated that he was employed as an assistant buyer and that he normally worked 37½ hours a week and had worked those hours in February but in March 1981 he had worked only 22¼ hours a week because his firm was then working a 3 day week. The supplement officer disallowed the claim on the ground that the claimant was not engaged in full-time work.

3. Section 1(1) of the Family Income Supplements Act 1970 provides:—

"For the purpose of this Act a family shall consist of the following members of a household—

(a) one man or single woman engaged, and normally engaged, in remunerative full-time work;"

Section 1(1)(b) and (c) provides for a wife or woman living with a man as his wife and for a child or children whose requirements are provided for by the person or either of the persons mentioned in the preceding paragraphs. Section 1(2) provides that a family income supplement shall be paid for any family in Great Britain if the weekly amount of its resources, so far as taken into account for the purposes of the Act, falls short of the prescribed amount.

4. Regulation 5 of the Family Income Supplements (General) Regulations 1980 [S.I. 1980 No. 1437] provides:—

"5.—(1) A person shall be treated as being engaged in remunerative full-time work only if he undertakes activities in the course of remunerative work for not less than the minimum weekly hours during—

(a) the week of claim, or

(b) either of the two weeks immediately preceding the week of claim, or

(c) the week immediately following the week of claim.

(2) A person shall be treated as being normally engaged in remunerative full-time work if he is normally engaged in such work for not less than the minimum weekly hours but not otherwise.

(3) For the purposes of this regulation—

'minimum weekly hours' shall mean 30 hours a week, except that where no person is included in a family by virtue of section 1(1)(b) of the Act it shall mean 24 hours a week, and in either case it shall include meal times only if remuneration is received therefor;

'week' shall mean a period of seven days beginning with midnight between Saturday and Sunday;

'week of claim' shall mean the week which includes the date on which a claim is made."

5. Section 6(1) of the Supplementary Benefits Act 1976, as amended, provides:—

"A person who is engaged in remunerative full-time work shall not be entitled to supplementary benefit; and regulations may make provision as to the circumstances in which a person is or is not to be treated for the purposes of this subsection as so engaged."

6. Regulation 9 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981 [S.I. 1981 No. 1526] currently in operation, the language of which is different from that of regulation 9(1) of the Conditions of Entitlement Regulations 1980 [S.I. 1980 No. 1586] as amended, in operation at the time of the claim, but not materially so as affects this decision, specifies the circumstances in which persons are to be treated as engaged in remunerative full-time work and provides, as far as relevant to this decision:—

"9.—(1) For the purposes of section 6(1) (exclusion from supplementary benefit of certain employed persons) a claimant shall be treated as engaged in remunerative full-time work only where:—

(a) subject to paragraph (2), he is engaged in work for which payment is made, or which is done in expectation of payment, on average for not less than—

(i) ....(not applicable)

(ii) in any other case, 30 hours a week,

or he is absent from such work without good cause or by reason of a recognised or customary holiday;"

Paragraph 2 of the regulation provides that paragraph 1(a) shall not apply to a claimant in certain specified circumstances, for example, a person affected by a trade dispute. None of the exceptions applies in this case.

7. The claimant appealed to the appeal tribunal and stated that he was being paid for 30 hours a week (although only working for 22¼ hours a week) while the employers were working a 3 day week, which exceeded the 24 hours a week required of him as a single parent to satisfy the requirement as to remunerative full-time work (regulation 5(3) set out in paragraph 4 above). The claimant normally works for more than 24 hours a week but was on short time work during March and April. He did not therefore work for the required number of hours in any of the 4 calendar weeks as provided by regulation 5(1). It is not in dispute that the claimant satisfied the pro-

visions that he was normally engaged in remunerative full-time work. But he was not engaged in remunerative full-time work at the time of the claim on 1 April 1981.

8. The appeal tribunal found that the claimant was committed to being available to his employer for a full week and might have been called upon by his firm at any time to work. The evidence before them was that the claimant was in attendance at work on 3 days a week, equivalent to 22½ hours, and was paid 50% of his wages for the other 2 days, for which the employers claimed a subsidy from the government. The tribunal decided that "The appellant should be entitled to family income supplement." In their reasons for decision they relied upon *Regina v Ebbw Vale/Merthyr Tydfil Supplementary Benefit Appeal Tribunal, Ex parte Lewis* [1980] S.B. 35, in which a Divisional Court of the Queen's Bench Division decided that, when the claimant was absent from work because of sickness, he was nevertheless engaged in full-time remunerative work because he was under an existing obligation to work full-time pursuant to a subsisting contract of employment. Regulation 5(1) of the said General regulations, which was not in operation at the time of the decision in the *Lewis* case, or for the period covered by that decision, provides that a person shall be treated as being engaged in remunerative full-time work only if he undertakes activities in the course of remunerative work.

9. The claimant contends that, since he was paid for 30 hours a week, although he did not work for the minimum of 24 hours required in any of the 4 weeks prescribed by regulation 5(1), he satisfied the requirement of that regulation. It is to be noted that the regulation provides that a person shall be treated as being engaged in remunerative full-time work only if he undertakes activities in the course of remunerative work for not less than the minimum weekly hours. Merely receiving remuneration calculated by reference to a number of hours or, as the tribunal decided, being under an obligation to have himself actively available at any time, do not amount to undertaking activities in the course of remunerative work. In that respect the decision of the tribunal was erroneous in law.

10. The statutory provisions applicable in the *Lewis* case were different from those applicable in this appeal but the effect of the unamended Act and of regulations since repealed and replaced by the current General Regulations 1980 (paragraph 4 above) is the same. The decision of the Court of Appeal, who overruled the decision of the Divisional Court in the *Lewis* case, in *Regina v Ebbw Vale and Merthyr Tydfil Supplementary Benefits Appeal Tribunal, Ex parte Lewis* [1982] 1 WLR 420 effectively applies to this appeal. With that in mind, I have set out the relevant provisions of the Supplementary Benefits Act 1976, as amended by the Social Security Act 1980, which apply in this case. The Court of Appeal contrasted the provisions of both Acts in relation to engagement in remunerative full-time work. The Court referred to the relevant provisions of the said Act before it was amended and decided that it was, and was intended to be, complementary to the Family Income Supplements Act 1970. Lord Denning M.R. after stating the relevant statutory provisions said at P422 D–G:—

> "In order to solve the question which has arisen in this case, I will take the example of a man who is employed in remunerative full-time work over a long period. Then he falls sick. He then applies for supplementary benefit. In those circumstances, the question is: Is he engaged in remunerative full-time work during the period when he is sick? The common sense answer is that he is not engaged in remunerative full-time work at that time. If his resources are insufficient to meet his

requirements during that time, he will receive supplementary benefits while he is away from work.

Still using the same example, supposing the man applies for family income supplement during the period when he is away from work because of sickness: Is he entitled to it? The answer is that he is not at that time engaged in remunerative full-time work. Therefore he is not entitled at that time to claim family income supplement. He can claim supplementary benefit while he is sick: but not family income supplement.

I will now take the case of a man who is in receipt of a low income and claims the family income supplement. He is entitled to receive that whilst he is in remunerative full-time work for a minimum of 30 hours a week. But, if he falls sick, he must claim supplementary benefit."

Watkins L.J. stated his conclusion thus at P424 G–H:—

"Put in a homely way, the provisions of the Supplementary Benefits Act 1976 are for the benefit of a man when for one reason or another he has had for the time being to abandon his full-time work. The provisions of the other Act with which this appeal is more intimately concerned, namely the Family Income Supplements Act 1970, exists for the benefit of a man who is actually working full-time in paid employment. The two serve different ends; and the only matter which has given rise to difficulty in respect of Mr Lewis' application is the meaning of the expression 'engaged in remunerative full-time work'. It is contained both in section 6(1) of the first Act to which I referred and in section 1(1) of the Family Income Supplements Act 1970. In my judgment, it bears the same meaning in both Acts, which is 'actually working at the material time', which is the time of the claim, 'in paid full-time work'. Once that is understood, the difference between the remainder of the relevant provisions and the reasons why they were enacted becomes plain."

11. Although the decision of the Court of Appeal was dealing with the Supplementary Benefits Act 1976 before it was amended, the provisions as affecting this matter have the same effect as that stated in the passages which I have cited. Additionally, the provisions of regulation 5(1) of the said General regulations seek to clarify that full-time work means actually working at the material time. It is, I think, unfortunate that the regulation contains the nebulous expression "undertakes activities in the course of remunerative work", which is open to a number of interpretations, such as being on call, when language signifying that the person must be actually working would have been more appropriate. The supplement officer has referred to Decision C.S.B. 37/81 (reported as Decision R(FIS) 2/81 and also as Decision R(SB) 21/81). In that case the learned Commissioner expressed no view as to whether being on call and remunerated accordingly constitutes "activities in the course of remunerative employment" (paragraph 9). It follows from the decision of the Court of Appeal in the *Lewis* case that a person on call is not engaged in such activities.

12. I would add that on 3 September 1981 the supplement officer dealing with the appeal to the Commissioner obtained from the claimant's employer "to put the matter beyond doubt", details of the hours worked by the claimant during the weeks beginning 29 March 1981 and 5 April 1981. Such evidence, which was not before the appeal tribunal, is plainly not admissible to show that their decision was erroneous in law. If there is any doubt as to the hours during which the claimant actually worked, the appeal should be remitted to the appeal tribunal for them to determine the matter.

I therefore direct that the claimant's appeal be remitted to the appeal tribunal to determine it subject to my direction on the law.

13. The appeal of the supplement officer is allowed.

(Signed) J. S. Watson
Commissioner