R(FIS) 2/83
(*Tribunal decision*)
(*Welsh case*)

FAMILY INCOME SUPPLEMENT

Calculation of normal gross income—claimant engaged in short-time working.

During the 2½ months preceding the date of claim the claimant's working hours had been reduced from 37½ to 30 per week and his earnings were reduced accordingly. The supplement officer calculated an award of family income supplement based on earnings for a period prior to the commencement of short-time working on the ground that at the date of claim the claimant had been working abnormally short hours (Family Income Supplements (General) Regulations regulation 2(2)). On appeal the tribunal decided that since short-time working had existed for 2½ months and was likely to continue, normal gross earnings were those in the 5 weeks immediately preceding the date of claim.

Held that:

1. the adoption of any rule of practice as to a particular period of short-time working being needed before earnings are accepted as normal for the purposes of regulation 2(2) of the Family Income Supplements (General) Regulations was wholly inapt; the statutory provisions clearly contemplate and require an individual appraisal of the circumstances of each individual case (paragraph 15(2));

2. since section 6(2) of the Act requires entitlement to be determined as at the date of claim, the tribunal misdirected themselves in taking account of the continuance of short-time working down to the date of the hearing before them (paragraph 18);

3. the tribunal were not on that account precluded from taking into contemplation whether or not short-time working should at the date of claim have been regarded as likely to continue (paragraph 20);

4. in some cases where short-time working has recently commenced, it will be appropriate to make an award for less than 52 weeks under the power conferred by regulation 3(1) of the Family Income Supplements (General) Regulations (paragraph 17).

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1. (1) This appeal by a supplement officer is brought by leave of a Commissioner from the decision dated 2 March 1982 of a supplementary benefit appeal tribunal ("the tribunal") and our decision follows an oral hearing on 16 November 1982 at which the supplement officer was represented by Mr A. D. Roberts of the Solicitor's Office, Department of Health and Social Security, but the claimants did not attend and were not represented.

We are indebted to Mr Roberts for his cogent and helpful presentation of the appeal.

(2) The appeal does not succeed. Our unanimous decision, whilst arrived at upon reasoning which differs in one particular from that expressed by the tribunal's decision, upholds the tribunal's decision in practical effect; and is that they did not err in law in holding (as they did) that the decision dated 8 December 1981 of a supplement officer that the claimants were entitled to family income supplement ("FIS") for 52 weeks from 8 December 1981 to 6 December 1982 at the rate of £3.60 a week should be varied by substituting £59.90 for £74.90 as the weekly total gross income of the family for the purposes of sections 1(2) and 4 of the Family Income Supplements Act 1970 ("the Act") in the computation of such entitlement (the practical result of which was to substitute the rate of £11.05 a week for the rate of £3.60 a week referred to in the supplement officer's decision).

(3) Payment of FIS was awarded as from 8 December 1981 in the circumstance that FIS was under a previous award already payable down to 7 December 1981.

2. The material facts are not in dispute, and are as follows:—

(1) The claimants are husband and wife who have two young children born respectively in 1972 and 1974.

(2) The husband was at all material times employed as a panel beater by the firm of AE. At all material times prior to 31 August 1981 he had worked a 37½ hour, 5-day working week at a weekly wage which was from 6 March 1981 onwards £74.90 gross for those days and hours, unaffected by bonus or overtime.

(3) As from 31 August 1981 the husband was put on "short-time"—namely a 30 hour, 4 day week at a weekly wage of £59.90.

(4) That continued over 19 November 1981, the effective date of a renewal claim made for FIS by the claimants.

(Indeed it is now known to have continued at least into September 1982—i.e. long after the date of the tribunal's decision).

Thus almost 12 weeks of such "short-time working" had run by 19 November 1981.

(5) The family circumstances were such that, it is not in dispute, FIS was duly payable pursuant to such claim.

3. (1) The sole practical issue is "in what weekly amount"?

The supplement officer arrived at £3.60 by a computation which took gross weekly income at the "full-time" level of £74.90. The

claimants contend that he should have taken the "short-time" level of £59.90 instead.

The other material ingredients in the computation are common ground, as is also that the correct weekly amount is £3.60 if the supplement officer is right as to taking the £74.90 and that £11.05 is the correct amount if £59.90 properly falls to be taken into computation instead of the £74.90.

(2) The tribunal took the view that the supplement officer had incorrectly applied the law in point in using the figure of £74.90 and varied his decision accordingly. The supplement officer now concerned has appealed from that decision on the ground that it is the tribunal who have erred in law.

4. Whilst the immediate issue for our decision is, in effect, what is the correct application of the law in point to the—undisputed—facts in the present case, it was from an early stage made clear that the object of the supplement officer's appeal was to obtain an authoritative ruling upon a particular provision in the material regulations, with—if possible—an approval of an existing practice in regard thereto.

And it is on that account that a Tribunal of Commissioners was convened to decide the appeal.

5. (1) Section 1(2) of the Act provides that:

"(2) A benefit, to be known as a family income supplement, shall be paid (on a claim duly made thereto) for any family in Great Britain if the weekly amount of its resources, so far as taken into account for the purposes of this Act, falls short of the prescribed amount."

(2) Section 2 of the Act provides as to what is to be the prescribed amount. It is unnecessary for us to set out in full either that section or the material regulations thereunder, as it is common ground that the correct amount in the present case is £82.00, which has been correctly taken into computation.

(3) Section 4(1) of the Act provides that:

"(1) The resources of a family taken into account for the purposes of this Act shall be the aggregate of the normal gross income of its members, excluding, except where regulations otherwise provide, the income of any child."

(4) Section 4(2) of the Act materially provides that for the purposes of the Act "a person's normal gross income and the weekly amount thereof shall be calculated or estimated in such manner as regulations may provide. . . ."

It is, however, not in dispute that in the present case the husband's weekly wages as a panel beater are the only material income source upon which section 4 of the Act bears.

(5) Section 6(1) of the Act as in force at all material times provides for any questions as to the right to or the amount of a family income supplement to be referred to and determined by—in the first instance, a supplement officer—with provisions for appeal therefrom.

(6) Section 6(2) of the Act provides that:

"(2) Unless regulations otherwise provide, any such question shall be determined as at the date when the claim to the family income supplement is made"

—and as to that:—

(i) "any such question" clearly refers back to "any question" in section 6(1);

(ii) there are no regulations which "otherwise provide"; and

(iii) the date in point is in the present case 19 November 1981.

(7) Section 6(3) of the Act as in force at all material times provides:

"(3) Any family income supplement determined by a supplement officer to be payable shall be payable for a period of fifty-two weeks, or such other period as may be prescribed by regulations, beginning with the said date or such other date so prescribed and, subject to any provision of regulations, the rate at which it is payable shall not be affected by any change in circumstances during that period."

It is not in dispute that:

(i) although "the said date" would be 19 November 1981 the supplement officer was, by force of regulations made in reference to section 6(3) which it is unnecessary for us to detail, correct in starting his—continuation—award as from 8 December 1981 as he did; and

(ii) the provisions of the Family Income Supplements (General) Regulations 1980 ("the General Regulations") below referred to are made in reference to section 6(3).

6. (1) Regulation 2 of the General Regulations materially provides as follows:—

"Computation of normal gross income of members of a family

2.—(1) For the purposes of the Act, a person's normal gross income and the weekly amount thereof shall be calculated or estimated in the manner provided in paragraphs (2)–(6).

(2) In so far as a person's normal gross income consists of earnings from a gainful occupation, the weekly amount of that person's normal gross income therefrom shall be calculated or estimated by reference to the average of his earnings from that occupation over the period of the five weeks (being pay-weeks if in respect of that occupation he is paid weekly) or the two pay-months (if in respect of that occupation he is paid monthly) immediately preceding the date on which the claim is made, save, however, that in any case, and in particular in a case where a person has been working abnormally long or short hours in a gainful occupation, or has commenced working in a gainful occupation shortly before the claim is made, or is following a gainful occupation from which his earnings normally fluctuate at approximately the same time or times each year, or is following a gainful occupation otherwise than under a contract of service, the determining authority may have regard to the average of a person's earnings from a gainful occupation over such other period or periods as may appear to it to be appropriate in order properly to deter-

mine what is that person's normal weekly income therefrom.

(3) 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; and in so far as a person's earnings from any gainful occupation do not comprise salary, wages or fees related to a fixed period, the net profit derived from that occupation shall be taken into account.

(4) In so far as a person's normal gross income does not consist of earnings from a gainful occupation, the weekly amount thereof shall be calculated or estimated on such basis as appears to the determining authority to be appropriate in the circumstances of the particular case."

(2) Paragraphs (5) and (6) of regulation 2 have no bearing on this appeal and paragraph (4) has no bearing on the facts of the case but is of some assistance in construing the General Regulations as a whole.

7. Regulation 3 of the General Regulations materially provides as follows:

"Circumstances in which benefit may be made payable otherwise than for fifty-two weeks beginning with the date of the claim therefor and in which the rate of benefit payable may be increased.

3.—(1) Where the available evidence leaves the determining authority in doubt as to the rate at which benefit should be payable, but satisfies it that benefit should be payable at not less than a certain weekly rate, it may determine that benefit shall be payable at the latter rate for a period of less than fifty-two weeks, but not less than four weeks."

8. (1) What in the present case the supplement officer did in purporting reliance upon regulation 2(1) and (2) of the General Regulations was to disregard the husband's gross weekly wage of £59.90 for the five weeks immediately preceding 19 November 1981 and take into computation instead the claimant's gross weekly wage of £74.90 for the five weeks ended just before the husband's commencement as from 31 August 1981 of short-time working. The tribunal substituted by their decision the gross weekly wage of £59.90, attributing this to the five weeks immediately preceding the claim date in purporting reliance also on regulation 5(2).

(2) By the operation of regulation 2(3) it was, in the circumstance that the husband was on a pay basis of receiving wages related to a "fixed period",—a week—clearly correct to take his *gross* wages into account in arriving at his "normal gross income" under regulation 2(2), as did both the supplement officer and the tribunal.

9.—(1) The tribunal were told that "the supplement officer has to determine NORMAL pay and in doing so considers as a rule of practice that short time working is not normal until it has been in operation for 6 months AT THE DATE OF CLAIM".

(2) We were told, and accept, that such had been the settled practice of the Supplementary Benefits Commission, which had been continued by supplement officers. And it appeared that although

the basis on which the practice had been adopted was not entirely clear, it might have been upon the footing that since FIS is normally awarded for a 52 week period, it had (in the light of a Commissioner's Decision in regard to unemployment benefit and a person working, or not working, to the "full extent normal in his case" that something should be regarded as "normal" if it occurs in more than half of a period in question) been considered that half of that length of period—i.e. six months—should here also apply.

(3) Mr Roberts did not, however, seek to have such "6 months" rule of practice upheld. What he did submit was that:

(a) when "short-time working" commenced in succession to "full-time working" it must be conceptually regarded as other than "normal";

(b) conceptually it might once started so long continue as to *become* the "normal"; but that

(c) in view of the delays and practical problems attendant upon any requirement that a local supplement officer must look in each case at local economic conditions, or attempt to decide their likely duration if adverse, it was highly desirable that there be *some* approved general yardstick—and that whilst having regard to the intendment of Parliament that FIS should provide quick financial support for low-income families a "6 months" period might be considered excessive, a period of *13 weeks* might properly, and should, be approved by the tribunal in place of that.

10. (1) Whilst not, we hope, unmindful of the practical problems with which supplement officers are faced in their important duties in connection with FIS, we find ourselves quite unable to endorse the application of any "fixed period" rule of practice in the context of regulation 2 and "short-time working".

(2) In our view the regulations in point are both clear in their meaning and intendment and capable of application in practice without undue difficulty if properly understood.

If, contrary to our view, there is a need for a "fixed period" test to be applied it must rest with Parliament to amend the material regulations to so provide.

11. (1) In our judgment the word "normal" as used in section 4 of the Act and in regulation 2 of the General Regulations bears its ordinary everyday meaning—aptly described in the judgment of Widgery J (as he then was) in *Peak Trailer & Chassis Ltd v Jackson* [1967] 1 W.L.R. 155 at 161 as under:

> "In my view the word 'normally' has a perfectly ordinary meaning which would be given to it by ordinary people in everyday use as a man might say: 'I normally get to the office every morning at 9.30 but this morning I was delayed by fog and only arrived at 10 o'clock'. In using the word 'normally', one is referring to something which is in contra-distinction to abnormal or exceptional".

(2) We are far from indicating or implying on that account that such decisions in regard to unemployment benefit and "full extent normal" as Decision R(U) 13/60 have proceeded on any wrong footing in taking a particular period, or periods, as their basis for comparison. But "cases are not talismans"—and in construing

statutory provisions close attention is always required to the particular contexts in which and in reference to which particular words are employed.

12. (1) Under regulation 2(1) it is incumbent upon the supplement officer to reach a conclusion in respect of all relevant persons as to the person's normal gross income and the weekly amount thereof.

(2) Regulation 2(2)—which is concerned only with a person's normal gross income "In so far as" [it] "consists of earnings from a gainful occupation", and with arriving at "the weekly amount of that person's normal gross income therefrom"—starts off with a general rule to which exceptions are then added.

Accordingly the general rule falls to be applied in every case which does not fall properly within the range of the exceptions.

The general rule is that the material weekly amount is to be determined by calculation or estimate "by reference to the average of his earnings from that occupation over the period of five weeks (if paid weekly) or two months (if paid monthly) immediately preceding the date on which the claim is made".

(3) The general rule is to be departed from only if in any case, it appears to the determining authority that, in order "properly" to determine what is a person's normal weekly income from a gainful occupation, regard should be had instead to the average of a person's earnings from the gainful occupation over some other period or periods appearing to such authority to be "appropriate".

13. (1) Thus the first step must always be to see what is the product of applying the general rule and consider whether in the circumstances of the case that appears to "properly" determine the weekly amount of normal gross income; for it is implicit from the provision of the exception in discretionary terms that it is to be invoked, or not invoked, with due regard to whether or not an application of the general rule itself produces a "proper" determination.

(2) It is in our judgment clear also that in these contexts "proper" carries the sense of fair and sensible in the light of the realities of the case, viewed as at the date of claim and with foreknowledge of the purpose to which the figure so taken is to be put.

(3) The supplement officer is, in applying those criteria, to take particular account of the specific circumstances cited in regulation 2(2) immediately following "and in particular..." as circumstances which may require departure from the general rule; but is to appreciate that these are not exhaustive, and that departure may be warranted "in any case".

14. (1) If in a given case the supplement officer, applying those criteria, has doubt as to whether the product of the general rule *is* a "proper" determination (and the more so if he is clear that it does not), he must then direct his attention to the potential afforded him by the alternative computations open to him—which are limited to taking the average of the person's earnings from the gainful occupation over some other period or periods which may appear to him to be "appropriate in order properly to determine" the figure to be taken as the person's normal weekly income therefrom.

(2) We will below discuss that potential further. But we would here stress that unless the supplement officer can identify within that potential a computation which *will* produce a figure which in his judgment will better conform with the requisite criteria than does the product of applying the general rule, the general rule must be left to apply.

That is because the provision that in any case the determining authority "may" have regard to the alternative mode of computation confers a discretion properly classed as a quasi-judicial discretion; and as such a discretion falling to be exercised, or not exercised, in accordance with the principles of natural justice.

15. (1) We consider it unwise to attempt to define exhaustively the particular circumstances in which the general rule may be departed from, or the paths to be followed when it is. Parliament has conferred a discretion the exercise or non-exercise of which is to be governed by clear principles and in the light of clear criteria, and it is in our judgment essentially a matter for the supplement officer's judgment in the circumstances of the case, arrived at on a basis of commonsense and natural justice.

(2) We will, however, indicate that in our view the adoption of any "rule of practice" as to a particular period of short-time working being needed in order for the level of earnings then obtained to be accepted for the purposes of regulation 2(2) is wholly inapt, and constitutes the placing of an unwarranted "gloss" on the statutory provisions, which quite clearly contemplate and require an individual appraisal in the circumstances of each individual case.

(3) There may well be cases in which the "13 weeks" rule suggested by Mr Roberts would, if applied, be entirely appropriate. But there will clearly be others in which it would be quite inappropriate—for example:

(A) where the short-time working has continued for more than 13 weeks but has—as, e.g. with a shipyard worker whose yard has just won and commenced work on a new order which will clearly provide "full-time" working for a year or more to come—just ended; and

(B) where although "short-time" working has been only very recently commenced, it has commenced in conjunction with an authoritative announcement that it must be expected to continue for a specified substantial period at least.

16. We would, however, say something also as to regulation 3(1), which can in our judgment properly and considerably ease the task of supplement officers in a range of circumstances in which regulation 2(2) might, standing in isolation, present them with practical difficulties.

17. (1) For the reasons we have already indicated, the proper application of regulation 2(2) must in every case lead to a definite figure which is to stand as the weekly amount of normal gross income, thus enabling decision as to a claimant qualifying or not qualifying for family income supplement and—at first sight at least—to qualification, if at all, at a particular rate of benefit.

It does not, however, follow from that circumstance that the supplement officer will in all cases then be wholly satisfied that the result so obtained is a fair one—there may be circumstances in which he entertains doubt as to that, notwithstanding a wholly

correct application of regulation 2(2) upon the evidence before him.

(2) Regulation 3(1) by necessary implication recognises that this may occur, and—to a limited extent only—affords ameliorative scope in the particular circumstance that under section 6(3) of the Act an award must ordinarily be made for a 52 week period during which it cannot be altered by reason of change of circumstances.

(3) If on the available evidence the determining authority is left "in doubt as to the rate at which benefit should be payable", but satisfied that benefit should be payable at not less than a certain rate, it can award at that rate for a period of less than 52 weeks, though for a minimum of four weeks.

(4) Here again, we will not attempt any exhaustive prescription of the cases in which that provision will bear. But it will be readily apparent that it is apt to cover a case where short-time working has recently commenced, where the claimant's earnings at the level of "whole-time" earnings are taken in part or in whole as the basis of the regulation 2(2) computation and the computation still leads to an award of benefit, but where if the "short-time" level of earnings had been fully taken into account a higher rate of award would have ensued.

This, it seems to us, should be of particular assistance in cases where the degree of permanence of "short-time working" recently commenced is uncertain, but will become more amenable to proper evaluation with the effluxion of further time.

18. (1) Turning finally to the tribunal decision the subject of this appeal, we should indicate at once that we accept from the evidence afforded by their stated reasons for decision that the tribunal did misdirect themselves in one respect, in that they regarded themselves as able to take account of the continuance of the claimant on "short-time" working down to the date of the hearing before them—and in so doing failed, in our judgment, to pay correct regard to the requirement under section 6(2) of the Act that the question of entitlement be determined "as at the date when the claim to the family income supplement is made"—a requirement which overrides any otherwise freedom of tribunals to consider the facts as known at their hearing date.

(2) However, that slip does not in our judgment vitiate their decision. For it is also clear to us that the true foundation on which they based their decision was independent of that, and holds good.

19. (1) What in effect the tribunal decided was that there was no occasion for departure from the "general rule" under regulation 2(2) because at the date of claim short-time working had already been operative for almost 3 months, with a consistent earnings level, and "the economic situation in the mid-Glamorgan area would have justified an inference that the situation was likely to continue."

(2) That, in our judgment, was—on the facts of the case, and in the light of the tribunal's own general knowledge of the local economic circumstances as they had stood (a knowledge which they were in our judgment fully entitled to bring to bear)—a conclusion which they were clearly entitled to reach; and which, accordingly, we do not see fit to disturb.

20. We would in the same connection add that whilst clearly the claim fell to be decided, pursuant to section 6(2) of the Act, "as at" the date of claim, we expressly reject the suggestion, ventilated before us, that on that account the tribunal were precluded from taking into contemplation whether or not short-time working should at that time have been regarded as likely to continue.

It is in our judgment a necessary ingredient in the proper application of regulation 2(2) to approach the aptness or otherwise of applying the "general rule" thereunder with a due regard to whether, in all the circumstances of the case—including the probability or otherwise of further continuance—the level of earnings shown for the "five weeks" period is that appropriate to be taken for the purposes of that regulation.

And we base this conclusion upon the reasoning already set out in paragraphs 11 to 15 above.

21. Our decision is as indicated in paragraph 1(2) above.

(Signed) I. O. Griffiths
Chief Commissioner

(Signed) E. R. Bowen
Commissioner

(Signed) I. Edwards-Jones
Commissioner