FAMILY INCOME SUPPLEMENT

Normal Gross Earnings—treatment of child-minding expenses

The claimant, a "single parent", made a claim for family income supplement for a family consisting of herself and two children. In order to make herself available for work she placed the children with a child-minder at a cost of £25.00 per week. In assessing the family's gross income the adjudication officer took into account the claimant's normal weekly earnings before deductions or payment of any expenses. No allowance was made for the child-minding expenses incurred by the claimant and the adjudication officer disallowed the claim upon the ground that normal weekly gross income exceeded the prescribed amount. The tribunal upheld the claimant's appeal, deciding that the child-minding expenses were wholly and necessarily incurred by the claimant in the course of her earning her salary.

Held that:

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

2. Directive 79/7/EEC of the Council of the European Economic Community has no application to family income supplement. In this case therefore failure to take into account child-minding costs does not constitute "indirect sex discrimination" (paragraph 5);

3. the words "the gross amount" in regulation 2(3) of the Family Income Supplement (General) Regulations means a person's earnings before the deduction of tax but after the deduction of expenses that are allowable in arriving at the taxable sum *Parsons v Hogg* [*1985*] 2 All ER 897 (paragraph 6);

4. in this context therefore "the gross amount" means the person's "taxable earnings", being the gross figure less any expenses wholly, exclusively and necessarily incurred in order to perform, the employment in question *Halstead v Condon (1970)* 46 TC 289. It does not allow for those matters which depend solely upon a person's personal circumstances and have no connection with his particular occupation (paragraph 7).

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1. Our decision is that:

(a) the decision of the social security appeal tribunal dated 16 December 1986 is erroneous in point of law and accordingly we set it aside;

(b) it is expedient that we should give the decision which the tribunal should have given, namely

(c) family income supplement is not payable to the claimant in respect of her claim dated 11 June 1986.

2. The adjudication officer appeals, with the leave of a Commissioner, against the unanimous decision of the Whittington House West social security appeal tribunal allowing the claimant's appeal against the decision of the adjudication officer, issued on 13 June 1986, that family income supplement was not payable to the claimant "because on the date when the claim was made the resources of the family in respect of whom the supplement is claimed were equal to or exceeded the appropriate prescribed amount".

3. In the light of the submissions and representations made by the parties a Tribunal of Commissioners was appointed to hear this appeal and at the hearing, which took place on 27 October 1987, the adjudication officer was represented by Miss K. Lee of the Solicitor's Office of the Department of Health and Social Security, and the claimant was represented by Mr. A. Evans, of counsel, instructed by Messrs. Baldwin & Co, and by Miss Judith Butt of the organisation Gingerbread, to all of whom we are indebted for the helpful and concise way in which they dealt with the issues in this case.

4. The facts are not in dispute. The claimant, who is now aged 38, is solely responsible for bringing up her twin children, aged just 6, and is accordingly a "single parent". She was in receipt of supplementary benefit but in April 1986 she began to work 25 hours a week for which she was paid £125.00 per week before deductions. In order to make herself available for work the claimant placed her children with a child-minder at a cost to her of £25.00 per week and, although she initially sought to have taken into account other outgoings, including debts incurred by her former husband and travelling expenses, it was realistically conceded, in the joint written submission by Mr. Evans and Miss Butt dated 4 June 1987 on the claimant's behalf, that debts and fares are not allowable deductions from her earnings for the purpose of calculating her entitlement to family income supplement. It is also agreed that if the cost of the child-minder is not deductible, then the adjudication officer's decision was correct and the family's resources would equal or exceed the "prescribed amount". In those circumstances we do not need to set out the relevant legislation save to the limited extent required by the issue as it was presented to us at the hearing.

5. However, before we deal with that it is convenient that we should mention another matter which was raised on the claimant's behalf, namely that unless, in the claimant's case, child-minding costs were taken into account in determining entitlement to a family income supplement, the "inevitable result" would be "indirect sex discrimination" which, it was

submitted, would be contrary to the Directive 79/7/EEC of the Council of the European Economic Community. Having heard argument, we can deal with the matter shortly as, in our judgment, Directive 79/7/EEC has no application to family income supplement. While Article 2 of the Directive clearly applies to the claimant, Mr. Evans conceded that family income supplement is not such a "statutory scheme" as is within the meaning of Article 3(1), does not fall within the specific risks set out in Article 3(1)(a) and consequently cannot "supplement or replace the schemes referred to in (a)" as provided by Article 3(1)(b). While we would not say that family income supplement is not, or could not be, a "family benefit" within the meaning of Article 3(2), that paragraph excepts such benefits save those "granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a)". As family income supplement is not one of those risks *a fortiori* paragraph 2 cannot apply and, in our view, there is nothing else in that Directive, nor in any other EEC Directive of which we are aware, which could apply to family income supplement. We did not therefore need to consider further the authorities and the statistical and other evidence tendered on the claimant's behalf in connection with that contention.

6. We turn now to what was in effect the only live issue in this appeal; the proper construction of regulation 2(3) of the Family Income Supplements (General) Regulations 1980 [SI 1980 No. 1437] which, in so far as it is relevant in the instant case, provides with regard to a claimant's earnings that "...the gross amount thereof shall be taken into account". This phrase was considered by the Court of Appeal in *The Chief Adjudication Officer v Hogg* (printed as an appendix to Commissioner's decision R(FIS) 4/85 and also reported at [1985] 2 All ER 897 *sub. nom. Parsons v Hogg*). Giving the judgment of the Court, Slade LJ concluded that "the gross amount" of a person's earnings meant "before the deduction of tax but after deduction of the expenses that are allowable in arriving at the taxable sum" which, he continued, produced the result that it was "the earner's taxable earnings which are brought into account for family income supplement purposes" (the Court's emphasis). Mr. Evans accepted that the only expenses properly deductible from a person's earnings to arrive at the "gross amount thereof" were those which, in the words of section 189(1) of the Income and Corporation Taxes Act 1970, are "wholly, exclusively and necessarily" incurred in the performance of the duties of the employment. Mr. Evans also accepted that in *Halstead v Condon* (1970) 46 T.C. 289, it had been held that child-minding expenses were not deductible for the purposes of income tax, but he nevertheless contended that different considerations applied or should apply in social security cases from those which applied in the field of fiscal law. The argument is persuasively set out in paragraphs 6 to 9 of the submission of 4 June 1987, but the difficulty he faced in pursuing that line of argument was the use by Slade LJ in the *Hogg* case of the words "taxable earnings". In our judgment that is a crucial point, and we were unable to accept Mr. Evans' submission that they were there used in a "loose sense".

7. On the contrary, we are in no doubt that the phrase was employed by Slade LJ to mean a person's earnings 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 sums necessarily spent to obtain those earnings, and that it would be unusual, indeed extraordinary, if personal tax allowances, mortgage interest and, if eligible, pension contributions were brought into any such assessment.

8. In the light of the Court of Appeal's judgment in the *Hogg* case, which we note has been followed by Commissioners in decisions on files CFIS 14/1986 and CFIS 17/1986, we are left in no doubt that the adjudication officer's decision was correct and accordingly that the tribunal erred in law. The issue in this appeal is essentially a question of law and, having had the matter argued before us, we are satisfied that we properly can, and that it is expedient that we should, give the decision which the tribunal should have given. Our decision is set out in paragraph 1.

9. In conclusion we wish to say that we have the greatest sympathy for the anomalous position in which the claimant finds herself as a result of returning to work. This case is a classic example of the "poverty trap" but, while we are sure that it was never the intention of the legislature to create a situation in which a claimant would be better off financially by refraining from work, the law is in our view clear and our duty is to apply it.

10. The adjudication officer's appeal is allowed.

Commissioner's file No. CFIS 3/87

(Signed) D. G. Rice
Commissioner

(Signed) J. Mitchell
Commissioner

(Signed) M. H. Johnson
Commissioner