UNEMPLOYMENT BENEFIT

Earnings from gainful employment: treatment of depreciation in arriving at business profits.
Rehearings: practice to be followed by a freshly constituted tribunal when rehearing a case.

For about 4 years, the claimant had owned a newsagents, which was mainly run by part-time staff. On claiming unemployment benefit from November 1981, claimant made a statement, supported by accounts, that the business was making a loss. Benefit was awarded from 5 November 1981 to 30 October 1982. On receiving more facts about the claimant's earnings, the local insurance officer reviewed the awarding decisions and on revision required repayment of the overpayment.

At the first local tribunal hearing, the claimant's accountant, who represented him produced and explained the relevant accounts. The case was adjourned to the "same tribunal" for more information to be produced, but when eventually the case came for rehearing, the tribunal's membership differed in that the Chairman was the same but the other two members were new. No reference was made to the need for a rehearing and the evidence given at the first tribunal was not read over to the parties. The second tribunal disallowed the claimant's appeal.

The Commissioners gave guidance on the practice to be followed by a social security appeal tribunal, both in advance of and at the hearing, where its composition differs from the earlier tribunal (paragraph 7).

Held that:

1. there had been a breach of regulation 18(3) [now 24(3)] of the Social Security (Adjudication) Regulations (paragraph 3);

2. regulation 18(3) required that a differently constituted tribunal should start again and have a complete rehearing of the case with all issues being at large but, that the tribunal could accept the recorded evidence of witnesses provided the rules of natural justice were not infringed (paragraphs 4 and 5);

3. where a tribunal is differently constituted from an earlier one which part heard the case, it would be prudent for none of the members of the earlier tribunal to be included as part of the second tribunal (paragraph 7);

4. the introduction of regulation 18(3) did not prevent the Commissioners from exercising their discretion to hear the case themselves. R(U) 3/63 reaffirmed (paragraph 8);

5. the tribunal erred in regarding the claimant's drawings from the business as earnings. A man who draws money from a business which he owns is no more earning by so doing than if he draws from his own bank account (paragraph 12);

6. expenditure shown in the profit and loss account, but which was attributable to domestic, rather than business purposes, should be discounted (paragraph 13);

7. capital allowances, allowed by the inspector of taxes, did not represent a true method of allowing for depreciation in arriving at the profits of a business (paragraph 14). The Commissioners considered that there were 3 possible methods for allowing for depreciation. However, whichever method is applied, the Commissioners emphasized the importance of consistently applying the same system in deciding the earnings of a person, and where different methods had been used, of making adjustments in arriving at profit for social security purposes (paragraph 15);

8. there were no profits and therefore no overpayment for the period up to 31 July 1982. Benefit was overpaid and repayment was required for the period from 1 August 1982 (paragraph 17).

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1. Our decision is:
   (a) that the decisions awarding unemployment benefit to the claimant for the inclusive period from 5 November 1981 to 31 July 1982 are not to be revised on review;
   (b) that the decisions awarding unemployment benefit to the claimant for the inclusive period from 1 August to 30 October 1982 are to be reviewed as having been given in ignorance of material facts about the earnings of the claimant's business;
   (c) that on such review such decisions are to be revised so as to provide that unemployment benefit was not payable for the said period from 1 August to 30 October 1982;
   (d) that in consequence of such revision there has been an overpayment of benefit amounting in all to £292.50 repayment of which is required.

2. The Chief Commissioner directed that this appeal be taken by a Tribunal of Commissioners particularly for the reason that it raised the preliminary procedural point dealt with in paragraphs 3 to 8 below. We held an oral hearing of the appeal at which the claimant was represented by Mr. D. Williamson a chartered accountant member of the firm of Burton Oster Williamson & Co of Ashton-under-Lyne Manchester and the adjudication officer was represented by Mr. G. Berry of the Solicitor's Office of the Department of Health and Social Security.

3. The first point is a procedural one and it arises in the following way. After a number of formal adjournments, at which no evidence was led or argument advanced, the tribunal sat on 11 May 1984 (we shall refer to this

as the first tribunal). At this hearing the claimant was represented by his accountant, Mr. Williamson, who dealt with his financial position and both produced and explained the relevant accounts relating to his business. The case was then adjourned to the "same tribunal" on 7 June 1984 in order that the claimant's income tax assessment for the year 1983/84 might be produced as well as his accounts for the year ending 31 July 1983. We think that the intention of the tribunal in adjourning the matter to the "same tribunal" was that the case should continue to be heard by the same chairman and members. On 7 June 1984 the same tribunal sat merely to grant a further adjournment. The case finally came for hearing on 18 September 1984. Unfortunately the membership of the tribunal then differed from that of the first tribunal; the chairman was the same but the other members were new (we shall refer to this as the second tribunal). No reference was made to the need for a rehearing of the case and the evidence given at the first tribunal was not read over to the parties. The case proceeded as though there had been no alteration in the composition of the tribunal. Clearly there was a breach of regulation 18(3) of the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451, as amended] which reads as follows

> "18.—(3) Where an oral hearing is adjourned and at the hearing after the adjournment the tribunal is differently constituted, otherwise than through the operation on that occasion of paragraph (2), the proceedings at that hearing shall be by way of a complete rehearing of the case."

The second tribunal disallowed the claimant's appeal.

4. Up until 15 February 1982, the date upon which what is now regulation 18(3) came into being by virtue of S.I. 1982 No. 38, the procedure to be adopted by a second tribunal, differently composed, in unemployment benefit appeals was not regulated by legislation. But the practice to be followed was laid down in the decisions of Commissioners which were based on the requirements of fairness and natural justice. We need not refer to the early cases because the whole question was dealt with by the Commissioner in the following passages in R(S) 3/64.

> "10. Manifestly it cannot be right for a differently constituted tribunal after an adjournment to decide a case without knowing all the evidence which the claimant has given. The form L.T.70, which is used in such cases, expressly states that all the evidence will be taken afresh if the claimant consents to a hearing by a differently constituted tribunal. Where there are two adjournments two such forms should be used. Decision R(I) 31/57 dealt with such a case.
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> 11. At an adjourned hearing where the tribunal is differently constituted the general rule is that the hearing should be started afresh (see Decision R(I) 3/51 explained in Decision R(I) 40/61, and Decision R(I) 29/59). In a case like this, where the only evidence given at the previous hearings was that of the claimant herself, I think that it would be open to the tribunal, if they thought fit, to deal with the matter with the claimant's consent by reading over to the claimant the record of her evidence at the previous hearings, ask whether she agreed with the record, and then make a note of any further evidence that she wished to give. This would ensure that all the members of the tribunal were aware of all of her evidence and that this was made clear to the claimant without putting her to the trouble of giving her evidence all over again."

Such was the practice to be followed by tribunals prior to the coming into force of what is now regulation 18(3). The position in supplementary

benefit appeals differed to the extent that the procedure to be followed at an adjourned hearing where the tribunal was differently constituted was provided for by regulation. Rule 10(2) of the Supplementary Benefit (Appeal Tribunal) Rules 1971 [S.I. No. 680] stated:

> "(2) Subject to paragraph (1) of this rule, where a hearing before the Appeal Tribunal is adjourned and at the adjourned hearing the Appeal Tribunal is differently constituted, the proceedings at the adjourned hearing shall be by way of a complete rehearing of the appeal, reference or report".

Paragraph (1) governed the matters now dealt with in regulation 18(2). Rule 10(2) was the subject of inquiry by a divisional court in *Regina* v *Supplementary Benefits Appeal Tribunal ex parte Brian James Oliver,* [1973] SB3 page 16. The Lord Chief Justice having referred to the rule went on to observe:

> "That in my opinion means, and can only mean, that if on an adjourned hearing the constitution of the tribunal is different, then it is necessary to start again and have a complete rehearing of the matter, not carrying forward any of the proceedings which occurred on the earlier occasion."

The court, however, had no difficulty in holding that in that case the regulation had been complied with. In our judgment a like meaning is to be put on regulation 18(3). It is, of course, necessary for the tribunal to start again and to have a complete rehearing of the case, and it is not permissible simply to carry forward any of the proceedings which occurred on the earlier occasion. All points must be open to the parties; in particular it would be wrong to restrict a party from advancing or developing any point afresh as a result of what happened at the first tribunal.

5. The extent of regulation 18(3) was considered in a recent decision CS 427/1984. Counsel had submitted to the Commissioner that since the introduction of what is now regulation 18(3) the suggestion made in R(S) 3/64, as to the reading over the claimant's evidence given at the proceeding hearing, was no longer good law. Such submission was in the opinion of the Commissioner correct and he was of the view that what is now regulation 18(3) was intended to effect a real amendment and not merely to confirm an existing practice. He dealt with the procedure which has to be applied in a case of this nature in the following passage

> "9. If there is to be a 'complete rehearing', as the regulation requires, then in my judgment all the evidence must be taken entirely afresh so that all those present including the adjudication officer and of course the new members of the tribunal can have the opportunity of assessing the truthfulness of the evidence and of the person giving it. It may well be of course that notes of evidence taken by a chairman at a previous hearing are not complete or may even contain inaccuracies. The new members of the tribunal or a new adjudication officer appearing at the second hearing (as here) may wish to ask questions about *all* of the evidence. This is particularly important in a case such as the present where a considerable sum of money is involved. Of course, there would be no objection in an appropriate case to the chairman of the tribunal asking questions of a claimant or other witnesses in order to elicit information and using the record of the evidence given at the previous hearing as the basis of such questions (cf. the decision on Commissioner's file No. CS 170/85). But simply to read over the record of the evidence given at the previous hearing and to ask a claimant to confirm whether or not it was correct would not in my view suffice, since the introduction of what is now regulation 18(3). Similarly, if a witness gave evidence to the first hearing, that witness

should normally be present to give that evidence again at the second hearing, the record of that witness's evidence given at the first hearing bearing no more probative value at the second hearing than any other written statement by a person not available to be questioned."

We agree with much of the reasoning in that passage but we think that a requirement to take all the evidence again in every circumstance overstates the obligation imposed by the paragraph. It seems to us to ignore the type of factual material which may be received by a tribunal and to lay undue emphasis on the strict rules of evidence. Manifestly the starting point is that a tribunal rehearing a case can receive any material which might be admitted by a tribunal initially hearing a case. There is a wide discretion as to what will be received. It is for example not uncommon to receive the record of proceedings of an industrial tribunal which dealt with the claimant and to glean facts therefrom. Reports from doctors and experts are freely admitted. In our judgment the use of the words "complete rehearing" in regulation 18(3) do not make it mandatory for all the evidence given at the earlier tribunal to be given again *viva voce*. There must be a rehearing of the case and all issues are at large again but it seems to us that there is no reason why this should prevent the tribunal from accepting the recorded evidence of a witness, provided the rules of natural justice are not infringed.

6. We would emphasise that every effort should be made to avoid a change in the composition of a tribunal. We are aware that there are administrative difficulties, but the need does not arise on every adjournment, it only comes about where the case has been part heard. It should be possible to arrange a hearing date suitable for the original members. If this happens then the difficulty will be avoided.

7. We now turn to the practice to be followed by a tribunal, whose composition differs from the earlier one and to whom the provisions of regulation 18(3) are applicable. The duty of the members is to rehear the case, they are wholly unfettered by what happened at the earlier tribunal relating to the issues before them. The hearing starts afresh. In our view paragraph (3) entails that such hearing has to be a hearing complete in itself; that no evidence and no submission can be rejected because it has been heard at the previous hearing, but that on the contrary everything that requires to be established has to be established again even if it had been established before. It does not in our judgment entail that everything that was proved by oral evidence on the first occasion must necessarily be proved in the same manner on the second occasion. It is, of course, desirable that the witnesses should attend again and give their evidence to the new tribunal, especially this should happen where there has to be an evaluation of testimony on the basis of credibility. The tribunal should freely grant adjournments in order to allow the witnesses to attend before them again. But as we have indicated there are cases where it will be open to a tribunal to dispense with a witness and instead to receive the record of his testimony at the previous proceedings into evidence. If this course is to be adopted there are certain safeguards which should be observed. As the tribunal is differently constituted from the earlier one, which part heard the case, it would be prudent for none of the members of the earlier tribunal to be included as part of the second tribunal. The members are judges of fact at the hearing and it seems to us undesirable for a member to have a residual knowledge of evidence given at the earlier hearing which is not shared by the other members—knowledge of what was said as distinct from what was written down. There is, also, the danger of the member becoming judge and witness if a conflict arises as to what was said at the earlier hearing. The note of the witnesses evidence taken at the earlier tribunal should not only be read over to the parties but they must be supplied with a transcript of

the earlier hearing well in advance of the rehearing; they should be asked whether it is a correct and complete record of what was said at the earlier hearing and whether any further evidence from the witness is required. The probative value of the record will be that of a written statement only. If either party indicates that they wish the witness to be further examined he should be asked to attend and every effort should be made to secure his presence before the tribunal. However if the witness is not available for some reason the record can still be used, but, of course, it must be borne in mind by the tribunal that it is a written statement only and that what was said was not tested by cross examination. It will be for the tribunal to decide what degree of weight is to be attached to it. Nothing we have said precludes in any way the parties from treating the record or part of it as an agreed statement of facts. The safeguards which we have outlined are not exhaustive. We were not addressed on this aspect of the case; there may be others and tribunals will need to bear in mind the requirements of fairness and natural justice.

8. It was submitted by Mr. Berry that the effect of regulation 18(3) is that where it has not been complied with it is not open to us to deal with the case ourselves on the facts as well as the law and that the only course open to us was to direct a rehearing by a differently constituted local tribunal. We are not attracted by this submission. Mr. Berry attempted to find authority for it in CS 427/1984, but it is to be observed that in paragraph 11 of that decision the Commissioner was clear that he had power to deal with the case on the facts and that he only directed a hearing before a differently constituted local tribunal because the claimant asked for it in order that his doctor might give evidence before it. It seems to us that what was said in R(U) 3/63 concerning the discretion of Commissioners in this respect is still good law. In the instant case the claimant urged us to dispose of the case ourselves.

9. We now turn to the substantive issue on the appeal. The claimant worked for many years for the North Western Electricity Board and took voluntary redundancy in the year 1977. He had acquired a news-agency business which he ran with the assistance of his wife and three part-time staff whom he employed. His wife was however working as a full-time teacher and could open up the shop in the morning; the running of the shop in the day time was substantially in the hands of the part-time staff. The claimant was able to take up full-time employment with a large building company in the year 1978, employment which involved him in a considerable amount of travelling, and although he paid the business accounts he had to leave the day to day running to his paid staff with what assistance his wife could give. For various reasons the business far from providing a livelihood in time did little more than break even taking one year with another.

10. In the year 1981 the claimant was made redundant in his new employment and he claimed unemployment benefit from 1 November 1981. In his claim form, dated 29 October 1981, he declared that he was taking part in a business, obviously referring to his news-agency business. He was interviewed in December 1981 and stated that the business was making a loss, a statement which he supported with accounts. He was awarded benefit from 5 November, and this was paid from then until 30 October 1982 when (it would seem as the result of information supplied by the claimant's accountants) payment stopped. After inquiries had been made the insurance officer eventually concluded that the foregoing decisions awarding benefit should be reviewed as having been given in ignorance of facts about the claimant's earnings and that they should be revised so as to provide that such benefit was not payable with the result that there had been

overpayment to the extent of £1,424.39. An appeal against this decision was rejected by an appeal tribunal after the adjournments above described; and this is the substantial appeal that we have, as above mentioned, decided to consider on the merits, rather than remit it to the tribunal. The appeal turns primarily on regulation 7(1)(h) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 [S.I. 1975 No. 1598] then in force which was amended with effect from 8 March 1982 by the Social Security (Unemployment, Sickness and Invalidity Benefit and Credits) Regulations 1982 [S.I. 1982 No. 96]. This before amendment provided, so far as material, as follows:

> ".....a day shall not be treated as a day of unemployment if on that day a person is engaged in any employment unless—
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> (i) the earnings derived from that employment, in respect of that day, do not exceed 75 pence or where the earnings from that employment are earned in respect of a longer period the earnings do not on the daily average exceed that amount; and
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> (ii) he is available on that day to be employed full-time in some employed earner's employment; and
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> (iii) the employment in which he is engaged is consistent with that full-time employment; and
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> (iv) .....[not applicable to the claimant]....."

The amendment of February 1982 increased to £2.00 the daily limit on earnings, abolished condition (iii) and altered condition (iv), which is now numbered (iii).

11. It was held in Decision R(U) 6/77 that this regulation though negative in form was positive in effect and had the effect that a person engaged in employment who showed that he satisfied all the qualifying conditions fell to be treated as unemployed. It does not necessarily follow that because a person is the proprietor of a business he is engaged in employment (cf Decisions R(P) 7/51 and CP 5/75 (not reported)). But in this case it has always been accepted that the claimant participated in the news-agency business to an extent that he fell to be regarded as engaged in employment (defined in schedule 20 of the Social Security Act 1975 as including any trade, business, profession, office or vocation). It follows that no day during the period before us could be treated in relation to the claimant as a day of unemployment unless on that day he satisfied all the relevant conditions in the regulation. Apart from the fact that the claimant admittedly fell outside the final condition, it has not been seriously suggested that he did not satisfy the condition about consistency (the original condition (iii)). He had been able to run the news-agency business while working full-time for the building company and it was plainly consistent with full-time employment that he should do so. As for condition (ii) relating to availability, the claimant was throughout the time that unemployment benefit was paid to him accepted as available for employment. Mr. Berry asked the claimant questions about his availability and the steps that he had taken during the period in question to obtain employment, and after hearing him very properly accepted that the claimant at all times satisfied the availability condition.

12. This leaves the condition about the amount of the earnings. Obviously this is a case where earnings have to be determined by reference to a longer period than a day, and then averaged. With a short-term benefit like unemployment benefit it is not always appropriate to take as long a period as a year. In the present case the claimant's accounts have been worked out on an annual basis by reference to an accounting year ending on 31 July, and it has in this case been accepted that this is the appropriate

period to take. The period before us covers part of the accounting year ended 31 July 1982 and part of the following accounting year and it is thus these two accounting years with which we are concerned. The appeal tribunal rejected the claimant's appeal predominantly on the ground that his drawings from the business exceeded the daily average maximum. This was clearly an error. A man who draws money from a business which he owns is no more earning by so doing than if he draws from his own bank account. Regulation 2 of the Social Security Benefit (Computation of Earnings) Regulations 1978 [S.I. 1978 No. 1698], which applies to short term benefits such as unemployment benefit, provides that the determining authorities shall calculate or estimate such earnings as best they may having regard to the information available to them. In the present case we have the accounts of the business supplemented by the evidence of Mr. Williamson, which enable us to calculate or estimate the profits of the business on a sound basis and we consider it right to rely on those accounts so supplemented.

13. The profit and loss account for the year ending 31 July 1982 shows a loss for the year of £723. On the other hand the figure agreed with, or assessed by, the inspector of taxes for that year (forming the basis of assessment for the next following tax year) was a profit of £1,168 against which he agreed capital allowances of a like amount. Mr. Williamson furnished us with a reconciliation of these two results. He explained that the loss of £723 shown in the accounts was arrived at after deducting depreciation of fixed assets of £1,183 and after deducting in respect of rent, rates, insurance, light, heat and water, telephone and motor expenses amounts which exceed by £708 in the aggregate the amounts spent on them for business, as opposed to domestic, purposes. It is clear that these last amounts should not be allowed as deductions in arriving at the profits for social security purposes and should be added back. But even if they are there remains an overall loss of £15 for the year so long as the depreciation is allowed. It is to this question that we now come.

14. It was argued before the appeal tribunal and before us that the capital allowances allowed by the inspector of taxes for tax purposes should be treated as a deduction from profits for the present purpose. This argument was, in our judgment, rightly rejected by the tribunal. Regulation 5 of the Computation of Earnings Regulations provides broadly in relation to certain long-term benefits that the income tax assessment shall be the measure of the profits of a business; and in cases where that regulation applies it may be that it is right to deduct capital allowances allowed for income tax purposes. But in our judgment capital allowance is a creature of statute and does not represent a true method of allowing for depreciation in arriving at the profits of a business. This does not mean that depreciation is now allowable. It was held in decision R(P) 5/57, a decision given before there was anything corresponding to regulation 5, that it was proper to allow for depreciation in arriving at the profits of a business. And the matter was explored more fully in the unreported decision CU 5/80, a decision followed in the case of file CU 87/1984.

15. What is the right method of allowing for depreciation to be adopted in the present case? One possible method is to wait until a relevant capital item has to be scrapped or disposed of and then charge the net cost of replacing it. For income tax purposes this is, in the absence of any relevant capital allowance, the only allowable method since section 136(d) of the Income and Corporation Taxes Act 1970 precludes deductions beyond any sum actually expended. It is recognised as good accountancy practice to allow for depreciation as it occurs. One method is to estimate the number of years the asset will be in service and the amount of depreciation that will

occur during that period and spread it rateably over that period. Another method is to spread the amount over the same number of years, with each year's depreciation a constant percentage of the figure remaining after allowing for the depreciation allowed to date. This, Mr. Williamson informed us, is the method known as the "reducing balance method", which was commended by the Commissioner in decision CU 5/80, and which he told us had been consistently applied in preparing the accounts of the claimant's business. Mr. Berry rightly in our judgment accepted that on this basis the £1,183 was rightly deducted for depreciation, with the result that a loss is shown for the year ended 31 July 1982. Before leaving the point about depreciation we would emphasise that we attach importance to the point that the same system of allowing for depreciation has been consistently applied (see paragraph 14(B)(ii) of decision CU 5/80). Where there have been changes over the years in the method adopted it may be necessary, in order to avoid distortion, to make adjustments in arriving at the profits for social security purposes.

16. The result is that there were no profits in the accounting year ended 31 July 1982 and the decisions awarding unemployment benefit for the part of the period before us which fell within that accounting year do not fall to be revised. There has been no overpayment and no question of liability to repay arises. In relation to that period the claimant's appeal is allowed.

17. We come now to the balance of the period. The claimant has never contended that his appeal should be allowed in relation to that period or that repayment should not be required. Mr. Williamson produced at the hearing the accounts for the year to 31 July 1983 which show a profit of £627 or rather less than £2.00 per day. But no adjustments have been made for domestic use charged in the accounts and this no doubt put the figure above £2.00 per day. At all events it has not been shown that the earnings condition was satisfied (indeed a comparison with the previous years' adjustments makes it almost certain that it was not) and the awards of unemployment benefit plainly fell to be revised on review, so that benefit was not payable. The total number of days affected by this revision is 78 (the number of weekdays in the period from 1 August to 30 October 1982) and the amount overpaid at £22.50 per week was £292.50. The claimant makes no submission on the question of repayment and we thus cannot be satisfied that he can be relieved under section 119(2) of the Social Security Act 1975. We must therefore require repayment. To that extent the decision of the tribunal is confirmed.

(Signed) J. G. Monroe
Commissioner

(Signed) R. F. M. Heggs
Commissioner

(Signed) J. J. Skinner
Commissioner