

Claim for IS - issue
claimant working "in expectation
of payment"?

CPAG.

★ 42/94

JMe/1/LM

Commissioner's File: CIS/181/93

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. The claimant's appeal is allowed. The decision of the Leicester social security appeal tribunal dated 4 September 1992 is erroneous in point of law, for the reasons given below, and I set it aside. The appeal is referred to a differently constituted social security appeal tribunal for determination in accordance with the directions given in paragraphs 11 and 12 below (Social Security Administration Act 1992, section 23(7)(b)).

The background

2. The claim for income support from which this appeal stems was made on 24 June 1991. On the B1 claim form signed on 20 June 1991 the claimant said that he normally worked unpaid for 30 hours a week. He also said that he had stopped work for an employer, T P Electronics Ltd, on 6 April 1991. In a letter dated 10 July 1991 (which is not copied in the papers before me in the present appeal, but which is at pages T17 to T19 of the papers in the associated appeal on Commissioner's file number CIS/180/1993) the claimant explained that he and his wife had set up T P Electronics Ltd in August 1990. He and his wife were employees of the company, along with a part-time secretary and an accounts person engaged on a self-employed basis. He continued:

"The company has in no way been able to pay salaries to my wife and myself since the end of the financial year 1991, i.e. April 6th, but I have been busily occupied in overseeing, i.e. advising and supervising in the same capacity as previously, now acting as an unpaid Director of the company for as many hours as is necessary, to try to keep the business afloat by completing customer scheduled orders, which some last the rest of the year, quoting for new business hoping it may resurrect, and visiting clients

wherever necessary within England and Wales etc.

The company has no real assets, we just buy and sell, and what bits of office furniture we utilise in the Conservatory, we call the office, now we are back at home ..., are my own possessions, worth practically nothing, and I use my own vehicle for company visits, the petrol being paid for by the company. We try, very successfully, not to keep stock, hoping to sell the components before buying them."

3. On that information, the adjudication officer apparently made a decision that the claimant was not entitled to income support because he was engaged in remunerative work. The claimant appealed. The adjudication officer's submission supported the decision, but noted that income support had been awarded to the claimant on a claim described as made on 31 July 1991. The submission referred to the requirement in section 20(3)(c) of the Social Security Act 1986 for entitlement to income support that neither the claimant nor his wife was engaged in remunerative work and to regulation 5(1) of the Income Support (General) Regulations 1987 ("the Income Support Regulations"). That paragraph provided at the time:

"(1) Subject to the following provisions of this regulation, for the purposes of section 20(3)(c) of the [Social Security Act 1986] (conditions of entitlement to income support), remunerative work is work in which a person is engaged, or, where his hours of work fluctuate, he 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."

The appeal tribunal's decision and subsequent proceedings

4. The claimant attended the hearing before the appeal tribunal and gave evidence. The appeal tribunal's decision was to confirm the adjudication officer's decision that the claimant was not entitled to income support. Its reasons for decision in relation to the issue of remunerative work have to be extracted from the common reasons given for both the present case and the associated appeal. They were:

"In his claim received on the 24th June 1991, in answer to the question as to whether or not he was doing any work at the moment and the number of hours, the Claimant had unambiguously answered that he was and declared that he normally worked 30 hours a week.

He had done so on the basis that he was trying to keep T P Electronics going and even though there had been little or no income due to lack of business around, none the less he had worked in the expectation of receiving income and therefore not entitled to Income Support."

5. The claimant applied for leave to appeal to the

Commissioner, which was refused by the appeal tribunal chairman, but granted by a Commissioner on 26 April 1993. The submission dated 8 June 1993 of the adjudication officer now concerned with the appeal supported the appeal, on the basis that the appeal tribunal failed to record any findings of fact on matters relevant to the question of whether the claimant had a realistic expectation of receiving payment. An oral hearing was directed to be held at the same time as that on the associated appeal CIS/180/1993. The claimant attended the oral hearing. The adjudication officer was represented by Mr L Scoon of the Office of the Solicitor to the Department of Social Security. I am grateful to them both for their assistance.

6. The claimant submitted that in his capacity as a director of the company he was not able to award himself any wages. He explained that trading conditions were so bad that if any money came in from sales it had to be used to pay expenses, but did say that he made some drawings of capital from the company. Mr Scoon submitted that since the company was in effect a one-man operation, the claimant should be treated in the same way as a sole trader. The claimant's evidence was that there was some business around, and if there was a prospect of some income coming in, the claimant was working in expectation of payment, although the company may not have been making a profit. He submitted that if there was a prospect of the company surviving through the bad trading to make money in the future, there was an expectation of payment. However, he agreed that the appeal tribunal had failed to make findings of fact on exactly what the claimant was doing and had failed to deal expressly with the whole of the period from 24 June 1991 until 5 August 1991, immediately before the date from which income support was awarded on the later claim.

Was the appeal tribunal's decision erroneous in point of law?

7. I have concluded that it was. The first reason is that the appeal tribunal failed to deal with the whole of the period in issue before it. It is established by the decisions of the Tribunal of Commissioners in CIS/391/1991 (paragraph 10), CIS/417/1992 (paragraph 5) and CIS/85/1992 (paragraph 35) that in an appeal from an adjudication officer's decision disallowing benefit from the date of claim the period in issue extends down to the date on which the claim is finally determined. I consider that in accordance with paragraph 11 of R(S) 1/83 the allowance of income support from 6 August 1991 on the new claim operated to put a terminal date on the period in issue on the claim of 24 June 1991. Thus the period in issue ran from 24 June 1991 to 5 August 1991. The claimant's circumstances may have changed during that period. For instance, since on the B1 claim form signed on 31 July 1991, he said that he was working for 8/10 hours a week, he may well have been working for less than 24 hours a week in some weeks towards the end of the period in issue. The appeal tribunal should have investigated and made findings on that matter.

8. The second reason is that the appeal tribunal adopted a

wrong legal approach in relation to whether the claimant was working in expectation of payment. It appeared to identify the claimant with the company and consider only whether there was an expectation of income coming in to the company from his work. It seems to me that where a person is in fact and in law an employee of a limited company, which is a separate legal person, and the work which is done is as such an employee, the work is only remunerative within the terms of regulation 5(1) of the Income Support Regulations if payment is expected to be received in the capacity of employee. I have emphasised the capacity in which the work is done, because the claimant in the present case would also have had a capacity as a director of the company and might have had an expectation of remuneration in that capacity. However, as it is put in paragraph 5 of R(U) 1/93,

"the functions of a director qua director of a small private company are comparatively slight. He has to attend board meetings - and there are normally very few of those in the case of a small limited company - and he is responsible for compliance with the relevant legal formalities, such as making the annual return and filing accounts. The amount of remuneration which he would expect to receive for these duties would, in all normal cases, be quite trivial."

It was necessary to consider the expectation of payment for work in whatever capacity it was carried out in each week in the period in issue. I agree with another of Mr Scoon's submissions to some extent, in that I accept that if there is a realistic expectation of receiving payment in the future for work done in a particular week, then that work can come within regulation 5(1). That is obvious in the case of employees who are paid under week-in-hand arrangements or at the end of some set period. But in relation to a particular week, an expectation that payment will resume in the future is not enough if that does not include an expectation that payment will be made for the work done in the week in question. An expectation that payment will be made for work done in future weeks is not an expectation that payment will be made for work done in the current week.

9. That approach - that an expectation of payment for current work at some time in the future will bring work within regulation 5(1) - supplies some limit on the ability of a claimant who is employed by a small private limited company of which he has effective control to manipulate a situation so as to secure that he has no expectation of payment for the duration of an income support claim. A further limit is imposed by regulation 42(6) of the Income Support Regulations, which provides:

"(6) Where--

- (a) a claimant performs a service for another person; and
- (b) that person makes no payment of earnings or pays

less than that paid for a comparable employment in the area,

the adjudication officer shall treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies him that the means of that person are insufficient for him to pay or to pay more for the service; but this paragraph shall not apply to a claimant who is engaged by a charitable or voluntary body or is a volunteer if the adjudication officer is satisfied that it is reasonable for him to provide his services free of charge."

It was pointed out in R(SB) 13/86 that by virtue of the Interpretation Act 1978 a "person" includes a limited company or other corporate employer. Thus if, in the situation described at the beginning of this paragraph, the claimant is not excluded from entitlement to income support as being in remunerative work, the adjudication officer or an appeal tribunal would be bound to treat the claimant as receiving a reasonable amount of earnings for the work which is done, unless the claimant proves, on the balance of probabilities, that the company has insufficient means to pay for the work or unless the claimant is a volunteer. In that latter case, the operation of regulation 42(6) is excluded, but only where the adjudication officer or appeal tribunal is satisfied that it is reasonable for the claimant to provide his services free of charge. The means of the employer are a factor in assessing reasonableness (CIS/93/1991) and all the circumstances must be considered.

10. For those two reasons, the decision of the appeal tribunal must be set aside as erroneous in point of law. Although the claimant did give evidence to me of the circumstances, I am not able to make all the necessary findings of fact in order to determine the claimant's entitlement (if any) to income support for all the period in issue. Therefore, the appeal must be referred to a differently constituted social security appeal tribunal for determination.

Directions to the new appeal tribunal

11. There must be a complete rehearing on the evidence presented and the submissions made to the new appeal tribunal. The new appeal tribunal must consider all the weeks in the period in issue, as explained in paragraph 7 above. If on the rehearing of the associated appeal on Commissioner's file number CIS/181/1993, the new appeal tribunal finds the date of claim is earlier than 6 August 1991, the period in issue on the present appeal must be adjusted accordingly. The claimant should be prepared to provide written or oral evidence as to what activities he undertook for T P Electronics Ltd during the period in issue and in what capacity. The new appeal tribunal must make findings of fact on the extent of his work week by week and whether it was done in expectation of payment, applying the approach set out in paragraph 8 above. The claimant must expect to answer questions about the "drawings of capital" which he said

were made during the period in issue, for it would appear that neither an employee nor a director or shareholder of a limited company has a right to draw capital from the company. If the "drawings" were repayments of loans made to the company by the claimant or his wife, or were payments to cover expenses of the company, the new appeal tribunal must make findings accordingly, and consider whether the payments could be said to be in return for work done. If the claimant can produce the accounts of the company for the year including the period in issue that may help to resolve the matter.

12. The new appeal tribunal must then apply the test in terms of hours of work done in expectation of payment imposed by regulation 5(1) of the Income Support Regulations. If the claimant's entitlement to income support for a particular week is not excluded by the operation of that regulation and section 20(3)(c) of the Social Security Act 1986, then the new appeal tribunal must assess the amount of the claimant's income for that week and the applicable amount in that week, so as to determine whether he is entitled to income support and, if so, of what amount. In assessing the claimant's income (which by virtue of regulation 23(1) of the Income Support Regulations includes the income of his wife) the new appeal tribunal must consider, amongst anything else which is relevant, the effect of regulation 42(6) of the Income Support Regulations, as discussed in paragraph 9 above. In assessing the claimant's applicable amount, the new appeal tribunal must follow the directions given in my decision in the appeal on Commissioner's file number CIS/180/1993 relating to the interest on loans. The rehearing of that appeal and the present appeal should take place before the same appeal tribunal on the same day.

(Signed) J Mesher
Commissioner

Date: 20 April 1994