R(TC) 1/04

(Taylor v. Commissioners of the Inland Revenue [2004] EWCA Civ 174)

CA (Gibson, Laws and Longmore LJJ) **CTC/1106/2002**
20.2.04

Disabled person's tax credit – remunerative work – whether bank holidays to be disregarded in calculating average hours worked

The claimant's contract of employment required him to work 16 hours per week. His claim for disabled person's tax credit made on 8 June 2001 was refused on the ground that he could not be treated as engaged in remunerative work. This was because under regulation 6(4)(c)(ii) of the Disability Working Allowance (General) Regulations 1991, the average number of hours worked over the 5 and 13 weeks immediately preceding the week of claim was less than 16 hours per week and so for the purposes of regulation 6(1)(a) of those regulations he was not undertaking work for not less than 16 hours per week. The tribunal dismissed the claimant's appeal. The claimant appealed to the Commissioner on the ground that but for the bank holidays that had occurred in the 5 week period immediately preceding the week of claim, he would have satisfied regulation 6(4)(c)(ii). He also argued that it was perverse that whilst absence from work by reason of bank holidays was not disregarded for the purpose of regulation 6(1)(a), under regulation 6(5)(c) such absence was disregarded in determining whether the claimant had worked not less than 16 hours in the week of claim or either of the two weeks immediately preceding the week of claim, for the purpose of the further condition in regulation 6(1)(c) for being treated as engaged in remunerative work. The Commissioner dismissed the appeal, holding that the focus of regulation 6(1)(a) was on the hours actually worked rather than on the contracted hours of work and applying regulation 6(4)(c)(ii) on that basis. The claimant appealed to the Court of Appeal. He argued that as regulation 6(4)(c)(ii) permitted the use of an alternative length of time to enable the average hours of work to be determined more accurately, the Revenue ought to have adopted instead a period of three weeks in May 2001 when the claimant actually did average 16 hours work per week.

Held, dismissing the appeal, that:

1. selecting the suggested three week period in May would distort the weekly average hours rather than enable the average to be determined more accurately and the Revenue could not be said to have reached a perverse decision (paragraph 12);

2. the requirement of section 129(1)(a) of the Social Security Contributions and Benefits Act 1992 that a claimant is "engaged and normally engaged in remunerative work" was not to be taken as looking to both the factual and contractual positions nor was regulation 6(1)(a) to be taken as looking at the contractual position whilst regulation 6(1)(c) and 6(5) looked at the factual position. Regulation 6(1)(a) focuses on the hours actually worked. CTC/3593/2001 was approved (paragraph 13);

3. regulation 6(1)(c) and 6(5) were necessary to ensure that the current position at the date of claim was that the claimant had actually worked 16 hours in the week of claim or just before as well as having worked an average of 16 hours across previous weeks (paragraph 13).

DECISION OF THE COURT OF APPEAL

Mr Adam Fullwood (instructed by Thrasher Walker Partnership) for the appellant

Mr Jason Coppel (instructed by The Solicitor's Office of the Commissioners of Inland Revenue) for the respondent

Judgment (reserved)

LORD JUSTICE LONGMORE:

1. Mr Simon Taylor was born on 6 August 1975 and suffers from learning disabilities. He works as an assistant gardener at the Marple Dale Hall Nursing Home, Dale Road, Stockport and has an oral contract of employment negotiated for him with the Nursing Home by his father. This requires him to work 5½ hours on Mondays and Tuesdays and 5 hours on Wednesdays making 16 hours per week in total.

2. On 8 June 2001 he applied for what used to be known as a disability working allowance pursuant to section 129 of the Social Security Contributions Act 1992 (contained in Part VII of the Act relating to income-related benefits). That allowance was, following the Tax Credits Act 1999, called a disabled person's tax credit. From April 2003, it was subsumed in a new tax credit called working tax credit. Disabled person's tax credit was given to claimants who work no less than 16 hours per week and provided a weekly cash sum to top up the earned income of the claimant. In order to be entitled to such tax credit, Mr Taylor had to show that he qualified under sub-section (1) of section 129 and, in particular, that:

> "he is engaged and normally engaged in remunerative work".

3. Disability working allowance originated in the Disability Living Allowance and Disability Working Allowance Act 1991 to deal with the previous anomaly that in order to qualify for invalidity benefit a person had to be incapable of work. Under that Act, an allowance (or tax credit) could be granted to those disabled persons who were capable of some work, despite the fact that they may not qualify for invalidity benefit. Regulations made under the 1991 Act have been applied to claims under Part VII of the 1992 Act. These Regulations are the Disability Working Allowance (General) Regulations 1991 and it is regulation 6 which (in its relevantly amended form) defines engagement "in remunerative work", for the purposes of section 129 of the 1992 Act, as follows:

> "6. **Remunerative work**
>
> (1) For the purposes of Part VII of the Social Security Contributions and Benefits Act 1992 as it applies to disabled person's tax credit and subject to paragraph (3), a person shall be treated as engaged in remunerative work where –
>
> (a) the work he undertakes is for not less than 16 hours per week;
>
> (b) the work is done for payment or in expectation of payment; and
>
> (c) he is employed at the date of claim and satisfies the requirements of paragraph (5)
>
> (2) A person who does not satisfy all the requirements of sub-paragraphs (a) to (c) of paragraph (1) shall not be treated as engaged … in remunerative work.
>
> ...

(4) … in determining for the purposes of sub-paragraph (a) of paragraph (1) whether a person has undertaken work of not less than 16 hours per week –

(a) there shall be included in the calculation any time allowed

(i) for meals or refreshments; or

(ii) for visits to a hospital, clinic or other establishment for the purpose only of treating or monitoring the person's disability,

but only where the person is, or expects to be, paid earnings in respect of that time; and

(b) where at the date of claim the claimant has within the previous 5 weeks –

(i) started a new job;

(ii) resumed work after a break of at least 13 weeks; or

(iii) changed his hours,

the hours worked shall be calculated by reference to the number of hours, or where these are expected to fluctuate, the average number of hours, which he is expected to work in a week; or

(c) where none of heads (i) to (iii) of sub-paragraph (b) apply, and

(i) a recognised cycle of working has been established at the date of claim, the hours worked shall be calculated by reference to the average number of hours worked in a week over the period of one complete cycle (including where the cycle involves periods in which the person does not work, those periods, but disregarding any other absences); or

(ii) no recognised cycle of working has been established at that date, the hours worked shall be calculated by reference to the average number of hours worked over the 5 weeks immediately preceding the week in which the claim is made, or such other length of time preceding that week as may, in the particular case, enable the person's weekly average hours of work to be determined more accurately;

…

(5) Subject to paragraph (6), the requirements of this paragraph are that the person –

(a) worked not less than 16 hours in either –

(i) the week of claim; or

(ii) either of the two weeks immediately preceding the week of claim; or

(b) is expected by his employer to work or, where he is a self-employed earner he expects to work, not less than 16 hours in the week next following the week of claim; or

(c) cannot satisfy the requirements of sub-paragraph (a) or (b) above at the date of claim because he is or will be absent from work by reason

> of a recognised, customary or other holiday but he is expected by his employer to work or, where he is a self-employed earner he expects to work, not less than 16 hours in the week following his return to work, …
>
> …
>
> (6) For the purposes of paragraph (5) –
>
> (a) work which a person does only qualifies if –
>
> (i) it is the work which he normally does, and
>
> (ii) it is likely to last for a period of 5 weeks or more beginning with the week in which the claim is made; and
>
> (b) a person shall be treated as not on a recognised, customary or other holiday on any day on which the person is on maternity leave or is absent from work because he is ill.
>
> (7) Where a person is treated as engaged in remunerative work in accordance with the above paragraphs, he shall also be treated as normally engaged in remunerative work."

4. It will be seen that the draftsman of the Regulations has not availed himself of the option (which it may be thought that the parliamentary draftsman of the 1992 Act intended him to use) of defining the terms "engaged in remunerative work" and "normally engaged in remunerative work" separately. He has instead decided to define what he means by "engaged in remunerative work" and then declared that a person so treated as engaged in remunerative work shall also be treated as normally engaged in remunerative work. Nevertheless the requirements of regulations 6(1)(a) and 6(1)(c) are different and must be intended, in some way, to reflect the statutory difference between "actual engagement" and "normal engagement" in remunerative work. Confusingly it is regulations 6(1)(a) and (4) which appear to address "normal engagement" (by reference to the work which the disabled person "undertakes") and regulations 6(1)(c) and (6) which appear to address the actual work being done (but by reference to hours which the disabled person has "worked").

5. Be that as it may on 11 July 2001 the Inland Revenue, which administers the tax credit scheme on behalf of the Government, refused Mr Taylor's claim because he had not undertaken work for an average of 16 hours per week within regulation 6(1)(a). Mr Taylor requested the Revenue to look at the matter again but on 26 July 2001 they confirmed their original decision because, after contacting Mr Taylor's employer to check the hours worked in the previous 5 weeks and the previous 13 weeks to the week in which he made his claim, he had not worked an average of 16 hours per week during that time. Mr Taylor appealed that decision, as he was entitled to do, but his appeal was dismissed by the Stockport North appeals tribunal on 15 November 2001 on the basis that he and his father agreed that:

> "there was no question that he had not worked for 16 hours a week on average through the relevant period."

The "relevant period" was not defined but was presumably either or both of the periods of 5 and 13 weeks before the week in which he made his claim.

6. Mr Taylor was entitled to seek leave to appeal to a Social Security Commissioner on a point of law and on 15 April 2002 Mr Commissioner Henty granted leave to appeal because:

> "one of the days in the relevant week was a public holiday"

and, therefore, it was arguable that Mr Taylor would have worked 16 hours in that week but for the Whitsun bank holiday in late May.

7. Mr Birks, a Welfare Rights Officer, acting on Mr Taylor's behalf submitted to the Commissioner *inter alia*:

(1) that if one took the period of 5 weeks before Mr Taylor's claim was submitted there were in fact two bank holidays and (presumably) therefore Mr Taylor, but for the bank holidays, would in fact have worked an average of 16 hours a week for the 5 weeks preceding the submission of his claim;

(2) that it was confusing and, indeed, perverse that for the purposes of regulations (6)(1)(c) and 6(5), bank holidays appeared to be taken into account whereas for the purposes of regulations 6(1)(a) and 6(4) they were not.

8. Mr Commissioner Henty considered these and other arguments and on 11 February 2003 dismissed the appeal. He held that the requirements of regulation 6(1)(b) and (c) had been satisfied and that the only question was whether Mr Taylor came within 6(1)(a). He held further that the focus of regulation 6(1)(a) was on the hours that had actually been worked rather than the hours specified in Mr Taylor's contract. On that basis he applied regulation 6(4)(c)(ii) to calculate the average number of hours worked per week in the preceding 5 weeks which was less than 16 hours. He held that no decisively better result could be achieved by taking any other period of reasonable length. He could produce no answer to the conundrum posed by Mr Birks that bank holidays were taken into account for the purpose of determining the number of hours being currently worked by the claimant but not in calculating the hours he had actually undertaken to work. He said of regulation 6(1)(c):

> "I feel I must leave to others, in front of whom the point may be argued, what precisely it means"

and gave leave to appeal.

9. We were informed that Mr Taylor had begun his employment on 16 October 2000 and was in receipt of disabled person's tax credit for a period up to June 2001 but had to make a new application at the end of the 6 month period for which the tax credit had been first granted. In March 2001 he had been sick suffering from Krohn's disease and had been off work; in April 2001 he had a major operation but returned to work thereafter. The hours worked during the 13 weeks (or quarter of the year) before 8 June were therefore as follows:

Week ending

10 March 2001	sick
17 March 2001	sick
24 March 2001	sick
31 March 2001	sick
7 April 2001	sick

14 April 2001	sick
21 April 2001	sick
28 April 2001	16 hours
5 May 2001	11 hours
12 May 2001	16 hours
19 May 2001	16 hours
26 May 2001	16 hours
2 June 2001	10½ hours

The figures of 11 hours and 10½ hours for the weeks ending 5 May and 2 June 2001 are attributable to the May Day Bank Holiday and the Whitsun Bank Holiday respectively. But for these bank holidays Mr Taylor would have worked an average of 16 hours for the 5 weeks previous to his application. No such problem would, so far as is known, have arisen if he had made an application in mid-July. Since it is not unlikely that employers of disabled persons will arrange to employ them for 16 hours a week so that such persons can then earn the tax credit in addition to the earnings under their contract of employment, the existence of bank holidays which are not hours of work constitutes something of a "trap" for applicants if the Commissioner has reached the correct conclusion.

10. Mr Fullwood appeared for Mr Taylor on this appeal and submitted that, while the Commissioner was correct (1) to proceed under regulation 6(4) in determining whether Mr Taylor had undertaken work of not less than 16 hours per week, (2) to apply regulation 6(4)(c)(ii) because no recognised cycle or working had been established at the date of claim and (3) to conclude that the hours worked by Mr Taylor did not average 16 hours during the 5 weeks immediately preceding the week in which the claim was made, the Commissioner should nevertheless have held that the Inland Revenue ought to have adopted the second alternative given in regulation 6(4)(c)(ii) and calculated the hours worked by Mr Taylor by reference to:

> "such other length of time preceding that week [in which the claim is made] as may, in the particular case, enable the person's weekly average hours of work to be determined more accurately."

That other length of time, Mr Fullwood submitted, was the 3 week period in mid-May when Mr Taylor did, indeed, average 16 hours per week.

11. Mr Fullwood accepted that, since Mr Taylor only had an appeal on a point of law, he had to go so far as to say that the Commissioner ought to have held that the Inland Revenue were perverse in not so calculating the hours worked by Mr Taylor. He submitted that the perversity lay in the fact that it was only by adopting that period that the bank holiday "trap" could be avoided.

12. This is an impossible argument. The "other length of time" contemplated by regulation 6(4)(c)(ii) has to be such other length of time as will enable the weekly average hours to be "determined more accurately". Selecting the 3 mid-May weeks in fact distorts the weekly average hours rather than enables the average to be determined more accurately. The Commissioner was alive to the point saying:

> "even if one took the 13 week period – or indeed any other period of reasonable length – no decisively better figure is produced or, indeed, can ever

> be produced if, in any one week of that period, the claimant works less than 16 hours. The practical solution would be for a working week to be slightly in excess of 16 hours so as to be able to take up any slack, …"

That is the gist of the matter. To select a period of 3 weeks just to avoid the bank holiday "trap" would be artificial especially if (as we were told was the case) a claim could be freshly made at an appropriate later date. I do not consider that it can be said that the Inland Revenue reached a perverse decision or that the Commissioner ought to have held that they did.

13. That leaves the conundrum of the bank holiday being expressly taken into account for the purposes of regulations 6(1)(c) and 6(5)(c) but not for the purpose of regulations 6(1)(a) and 6(4). In an effort to resolve this conundrum, we explored with counsel the possibility that the statutory requirements of section 129(1) of the Act that the claimant be "engaged and normally engaged" in remunerative work looked to both the factual position and the contractual position and that, reflecting this, regulation 6(1)(a) in requiring the work which the claimant undertakes to be "for not less than 16 hours per week" looked to the contractual position and regulations 6(1)(c) and 6(5) looked to the actual hours worked. Mr Fullwood did not support this approach and we were quickly persuaded by Mr Coppel for the Inland Revenue that that was indeed not the statutory approach. Mr Commissioner Henty had said in terms that regulation 6(1)(a) focuses on the hours actually worked and the language of regulations 6(4)(a), (b) and (c) can bear no other interpretation. This was also decided by Mr Commissioner Jacobs in CTC/3593/2001. Regulations 6(1)(c) and 6(5) are necessary so as to ensure that the current position at the date of claim is that the claimant has actually worked 16 hours in the week of claim or just before, as well as (pursuant to regulation 6(1)(a) and (4)) having worked an average of 16 hours across previous weeks. That is understandable and it is in that context that it is necessary to disregard bank holidays.

14. It would, of course, have been preferable if it had been provided that bank holidays should be disregarded for the purpose of calculating the average weekly hours undertaken by Mr Taylor for the purpose of regulation 6(1)(a). Unfortunately for Mr Taylor it was not so provided. We were assured that this problem would be unlikely to arise in the future since the disabled person's tax credit has been replaced by working tax credit in respect of which the Regulations are in different terms. As it is, I would reluctantly dismiss this appeal.

LORD JUSTICE LAWS:

15. I agree.

Lord Justice Peter Gibson:

16. I also agree.

Order: Appeal dismissed; order as per agreed minute submitted to the court.

(Order does not form part of the approved judgment.)