

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the appeal by the Board of Inland Revenue is dismissed.
2. This is an appeal by the Board of Inland Revenue (now Her Majesty's Revenue and Customs) against the decision of the tribunal given on 14 February 2004 allowing the claimant's appeal against a refusal of child tax credit for the period 6 April 2003 to 5 April 2004. The appeal arises out of a dispute between the divorced father and mother of a child as to which of them has the main responsibility for the child for the purposes of entitlement to child tax credit. I held an oral hearing on 13 December 2004 at which the Board was represented by Mr Zaglul Islam, Solicitor, of the Inland Revenue Solicitor's Office. The claimant was not present at the hearing, but he has made written submissions both in response to the original grounds of appeal and in reply to a further submission by the Board which I directed at the oral hearing.
3. Section 8(1) of the Taxes Credits Act 2002 provides that the entitlement of a person by whom a claim is made for child tax credit is dependent on the claimant (or in the case of a joint claim either of the claimants) being responsible for one or more children or qualifying young persons. Regulation 3 of the Child Tax Credit Regulations 2002 sets out rules prescribing the circumstances in which a person is or is not responsible for a child or qualifying young person. The rules to some extent parallel the provisions in section 143 of the Social Security Contributions and Benefits Act 1992 governing entitlement to child benefit, but unlike the former family credit scheme, entitlement to child benefit plays no part in deciding claims for child tax credit.
4. Rule 3 enables two persons with whom a child or qualifying young person normally lives to jointly elect which of them is mainly responsible for the child, but in default of such agreement competing claims are determined in accordance with Rule 2:

**“2.1 This Rule applies where-**

- (a) a child or qualifying young person normally lives with two or more persons in-**
  - (i) different households; or**
  - (ii) the same household, where persons are not limited to the members of a married couple or unmarried couple; or**
  - (iii) a combination of (i) and (ii); and**
- (b) two or more of those persons make separate claims (that is, not a single joint claim made by a married couple or unmarried couple) for child tax credit in respect of the child or qualifying young person.**

**2.2 The child or qualifying young person shall be treated as the responsibility of-**

- (a) only one of those persons making such claims; and**
- (b) whichever of them has (comparing between them) the main responsibility for him (the “main responsibility test”)...**

..

5. The claimant is the father of a child who was born in 1988. The claimant and the mother of the child were divorced about two years before the claim was made and have joint custody of the child, but according to the claimant there is no court order or formal agreement in force relating to the child's care. The claimant stated on the claim form that he was responsible for the child, but because the child had been included on the mother's claim for tax credit, the claimant was asked to provide further information about the arrangements for the child's care. In his reply, the claimant stated that the child normally lived at his address, that he bought the child's school clothes and shoes and food, and that both he and his former wife did the child's laundry and went with her to the doctor and dentist.

7. Under regulation 3 of the 2002 Regulations, in default of agreement as to who satisfies the main responsibility test the Board "may determine that question on the information available to them at the time of their determination". On 31 July 2003 the Board determined that the claimant was not primarily responsible for the child, and on 14 August 2003 the claimant appealed. The basis of the appeal was that a 'split' award of child tax credit should have been made, but it is clear from rule 2 of regulation 3 of the 2002 Regulations that only one carer can be treated as responsible for a child.

8. The Board's submission to the tribunal stated:

**"When (the claimant) made his claim for Tax Credits he did not declare on the form that he was receiving Child Benefit (CB) for his child...and confirmed in his letter of appeal that his wife was in receipt of CB. May I respectfully point out to the Tribunal that (the claimant's) daughter...has already been included in a separate claim for CTC and an award of CTC is in payment. In his letter of appeal (the claimant) states that he has joint custody of his daughter and his daughter lives with him for at least 6 moths of the year. However, in further correspondence (the claimant) states that his daughter only lives with him 2/3 nights per week, which would suggest that the responsibility is not 50/50.**

**As stated above, although (the claimant) states that he has joint responsibility with his wife they have made separate claims and have not elected a person who satisfies the main responsibility test. Therefore, on the information available, the Board has determined that for Tax Credit purposes, the person who is in receipt of CB is primarily responsible and an award of CTC is in payment to that person."**

9. Following a hearing attended only by the claimant, the tribunal allowed his appeal. The claimant gave evidence that following his separation from his wife, his daughter stayed with him continuously at the former matrimonial home for about seven months. After his former wife acquired council house accommodation, their daughter started to stay with her mother on average one or two nights a week, but on those occasions she would have dinner with her father before going on to her mother's house. However, the claimant stated that his daughter found those visits distressing because of the presence of his former wife's boyfriend, and that he undertook all the washing, cleaning, ironing cooking and supervision of school work for his daughter. The tribunal found the claimant to be entirely credible, accepted that he had a genuine concern for the upbringing of his daughter, and found without hesitation that he had the main responsibility for her.

10. In their appeal, the Board did not challenge the tribunal's findings, or submit that the tribunal had misdirected itself in law. The sole ground of appeal was that the tribunal could

..

not decide the question of who had main responsibility for the child without hearing evidence from both the father and the mother:

**“...it was not enough for the tribunal to simply find that the claimant’s evidence was credible in the absence of evidence from his former partner that would have presented a different view...the tribunal should have exercised its inquisitorial jurisdiction and adjourned to enable evidence of responsibility from (the) claimant’s partner to be obtained.”**

In granting leave to appeal, I pointed out that although the Board were well aware of the issues in the case, they did not apply for an adjournment of the hearing to enable the mother to attend or send a presenting officer to the hearing. However, I granted leave to appeal so that consideration could be given to the appropriate procedure in cases where there are competing claims for child tax credit.

11. The difficulty in such cases is that not only there is no provision for a single decision binding both parties on the question of who has the main responsibility for a child, but there is also no provision for the other party to be represented in an appeal brought by a claimant in respect of a refusal of child tax credit. Regulation 4 of the Tax Credits (Appeals) Regulations 2002, made under 63(8) of the Tax Credits Act 2002, applies and modifies section 12 of the Social Security Act 1998 so as to permit an appeal against a tax credit decision both by a claimant and by “such other person as may be prescribed”. However, no such persons have been prescribed in relation to competing claims for child tax credit. There is therefore no provision allowing the claimant’s former wife to be a party to his appeal, even though the decision in the claimant’s favour would entitle the Board to terminate her award of tax credit under section 16(1)(b) of the 2002 Act. Furthermore, if the claimant’s former wife appealed against such a decision, there would be nothing to prevent the tribunal from reaching the opposite conclusion to that reached by the tribunal in this case.

12. It is apparent from their submission to the tribunal that the Board relied on the award of child benefit to the mother as a reason for deciding that the claimant did not have the main responsibility for the child. However, both at the hearing before me and in their supplementary submission the Board argued that their neutral position in the appeal and the risks to the claimant’s former wife if the appeal succeeded imposed a duty on the tribunal to exercise their inquisitorial powers to require the claimant’s former wife to give evidence. In the supplementary observations they submitted:

**“Of course the Board accepts that it failed to provide evidence to the tribunal as to why it had considered that (the claimant’s) partner, rather than (the claimant), met the main responsibility test...Such a failure in a case where the Board have a pecuniary interest would it is accepted, mean that the Board could not normally rely on the tribunal to exercise its inquisitorial powers to obtain relevant information before deciding on the appeal. However in circumstances, as here, where a finding on behalf of a claimant means that a non-party would have her award revoked and, possibly, overpayments clawed back, the Board’s view is that the tribunal ought to have exercised its inquisitorial powers to obtain, or if necessary, to require evidence from the non-party...so as to determine correctly who had main responsibility. Where a tribunal has fully examined the facts of a case and upholds the appeal the original benefit recipient will have the right of appeal to the tribunal, which may have regard to the original hearing in reaching its determination.”**

..

13. I do not accept that the Board had no pecuniary interest in the outcome of the appeal, since it is by no means certain that they would be able to recover any benefit paid to the claimant's former wife if the claimant was successful in his appeal and the award of benefit to his wife was in consequence terminated. On any view, the Board had an interest in preventing inconsistent awards. But even on the basis that the position of the Board in the dispute was neutral, I do not consider that it was the duty of the tribunal, rather than the duty of the Board, to obtain the information which was necessary to resolve the dispute.

14. In *Kerr v Department for Social Development* [2004] 1 WLR 1372 the House of Lords considered the respective roles of the adjudication authorities and a claimant in the determination of claims for benefit under an inquisitorial adjudication system. Baroness Hale of Richmond held (at para. 62):

**“What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.”**

15. It is not clear whether the Board were in possession of any information relating to the claimant's wife other than the fact that she was in receipt of child benefit. However, they were aware from the information provided by the claimant in response to the request for further information that he claimed to be responsible for much of the day to day care of the child. In accordance with the principles laid down in *Kerr*, it was for the Board to decide what questions needed to be asked and what further information was needed in the light of the information provided by the claimant in order to decide whether the conditions of entitlement were met. It may be that the Board were in error in relying on the award of child benefit to the claimant's former wife, but in my view, whatever the reason for their failure to do so, it was the responsibility of the Board, and not the tribunal, to obtain the information which was necessary to determine the claim.

15. The importance of tribunals adopting a fully inquisitorial approach can hardly be overstated. But, as *Kerr* has made clear, the parties in an inquisitorial system of litigation each have duties and responsibilities. The responsibility in this case for obtaining information from the claimant's wife was that of the Board. In my view, the tribunal in this case were fully entitled to assume that the Board were content for the appeal to be decided without information being obtained from the claimant's former wife, and no blame can be attached to the tribunal for dealing with the case on that basis.

16. For those reasons, I dismiss the appeal.

(signed on the original)

**E A L BANO**  
**Commissioner**

**17 June 2005**