



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CTC/3543/2004

APPEAL AGAINST A DECISION OF AN APPEAL TRIBUNAL

CORRECTED DECISION OF MR COMMISSIONER JACOBS

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under section 14(8)(a)(i) of the Social Security Act 1998. It is:

I SET ASIDE the decision of the Fox Court appeal tribunal, held on 2 April 2004 under reference U/42/242/2004/01751, because it is erroneous in point of law.

I give the decision that the appeal tribunal should have given, without making fresh or further findings of fact.

My DECISION is to confirm the decision under appeal except that the overpayment for the first two claim periods (8 August 2000 to 6 August 2001) is recoverable from the wife/claimant only and not from her husband.

The appeal to the Commissioner

2. This case has been referred to me for decision while Mrs Commissioner Jupp is on sick leave.

3. The case concerns a single recoverable overpayment decision given in respect of five different claims for working families' tax credit. The overpayment arose because the husband and wife did not correctly disclose the amount of their capital. Recoverability was based on misrepresentation. The decision was confirmed by the appeal tribunal and comes before the Commissioner with the leave of Mrs Commissioner Jupp.

The grounds of appeal

4. The grounds of appeal were not written by someone who has any knowledge or experience of the relevant law. I intend no respect when I say that they are completely misconceived. A representative of Her Majesty's Revenue and Customs has dealt with each of those grounds and with each of the further comments in the letter of 13 April 2005. I gratefully adopt the representative's comments. I add my own remarks on only two matters. First, there is no truth in the allegation that the chairman spent only four minutes on the case. That is contradicted by the length and contents of the record of proceedings. Second, there is some confusion about the amount of £86,000 that the representative has referred to. This comes from the grounds of appeal. The representative read the amount as £86,000. So did I. However, the reference in the letter of April 2005 to a sum of more than £54,000 makes me wonder if what appears to be an 8 may in fact be a 5, so that the grounds of appeal actually refer to £56,000, not £86,000. Whatever the correct amount, it does not matter, because as the representative has explained it is irrelevant.

Diminishing capital

5. On granting leave, Mrs Jupp asked whether the calculation of the overpayment had correctly taken account of the fact that the couple were reducing the amount of their capital during the overpayment period. The representative of Her Majesty's Revenue and Customs submits that this would not have affected the position. I accept that submission. I am not sure that the representative has applied the correct approach, but a legal officer to the

Commissioners has undertaken a calculation on a more favourable basis to the couple which still confirms the amount of the overpayment as correct.

Reinstated benefit

6. When a doubt first arose about the correctness of the payment of the tax credit, payment was suspended. However, it was later reinstated on the express condition that it must be repaid if it were found not to be properly payable.

7. On granting leave, Mrs Jupp asked whether in those circumstances the overpayment was caused by Her Majesty's Revenue and Customs. I consider that it was not. Causation issues are, as the courts regularly decide, based on common sense. To me, it is common sense that payments made while an issue is investigated are caused by a misrepresentation that is proved by those investigations. That is especially so when the payment only continues to be made on an express condition like that used in this case. The simple test is this: if it had not been for the misrepresentation, would payment have been reinstated? The answer is obviously that payment would not have been made, on condition or at all.

The support for the appeal

8. Her Majesty's Revenue and Customs support the appeal in one respect. The representative draws attention to a feature of the two earliest claim forms. On those forms, the wife signed to confirm the answers she had given, which included the relevant misrepresentations. For the other three forms, the husband signed to confirm the information supplied by him for completion of the form. This was not a feature of the earliest two forms. Accordingly, the representative submits that the overpayment for the first two claim periods was recoverable only from the wife, not the husband, while the overpayment for the other three claim periods was recoverable from both. (It may be that the overpayment for the earliest two periods would be recoverable from the husband on the basis of a failure to disclose, but this has not been sought by the representative.)

9. I accept the representative's submission, but it gives rise to another issue that was raised by Mrs Jupp in her reasons for granting leave.

The parties to the proceedings

10. The decision was that the overpayment was recoverable from both the husband and the wife. The submission to the tribunal showed the wife as the appellant, but the husband wrote the letter of appeal, conducted the case and attended the hearing. The tribunal documentation refers to him as the representative and his wife as the appellant. On the appeal to the Commissioner, the wife is shown as the appellant, but the husband has conducted the case.

11. Who are the parties to the proceedings before the appeal tribunal and before me? This is not just an academic question. It is important for procedural rectitude and because Her Majesty's Revenue and Customs has proposed a decision that distinguishes the liability of the spouses.

12. The parties to the proceedings before an appeal tribunal are defined by regulation 1(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. They include the 'principal parties for the purposes of sections 13 and 14' of the Social Security

Act 1998. Section 14(3)(d) covers 'a person from whom it is determined that any amount is recoverable under or by virtue of section 71 or 74' of the Social Security Administration Act 1992. That suggests that all those from whom an overpayment is recoverable are parties to the proceedings before an appeal tribunal, regardless of who actually appeals. If that is correct, both the husband and the wife were parties before the appeal tribunal. This is my preferred interpretation.

13. The alternative analysis is that the paragraphs of section 14(3) are all governed by the opening wording of that subsection with the effect that each person from whom an overpayment is recoverable is only a party to the proceedings if that person lodges an appeal. If that is correct, only the wife was a party before the appeal tribunal. The tribunal has no power to add anyone else as a party to the proceedings. I do not favour this interpretation because of the difficulties that it can create. They arise if the tribunal needs to distinguish between the responsibility of the parties to an overpayment decision. Suppose that the decision under appeal is that benefit is recoverable from A and B. A appeals, but not B. The tribunal wishes to decide that the overpayment is not recoverable from A for part of the period. The effect is that for that period it is now only recoverable from B, whereas previously B's liability was joint and several. In effect the decision is favourable to A but adverse to B. But how can a decision be made adverse to someone who is not a party to the proceedings? How can such a person's interests be taken into account without being a party? And how can the absence of that person prevent a decision being made favourable to someone who is present as a party?

14. For an appeal to a Commissioner, the definitions of the parties are different. However, any person who is a principal party and who does not lodge an appeal is a respondent to the proceedings: regulation 4(1) of the Social Security Commissioners (Procedure) Regulations 1999. So, both husband and wife are parties to the proceedings before the Commissioner also. The result is that I am able to give a decision that affects both.

15. My interpretation is consistent with the approach taken by Mr Commissioner Mesher in *CTC/4067/2000* at paragraph 8, although he did not spell out his reasoning.

16. I have considered whether to invite the husband to make separate submissions on the case. I have decided not to do so. He has made submissions throughout in the capacity of representative for his wife. He has seen the decision proposed by Her Majesty's Revenue and Customs and had a chance to comment on it. It also appears to me that throughout this case all the dealings have been handled by the husband in a way that shows a unity of interest between him and his wife.

Disposal

17. I allow the appeal and substitute the decision suggested by Her Majesty's Revenue and Customs.

Signed on original on 03 August 2005
Corrected on 04 October 2005

Edward Jacobs
Commissioner