



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's File No: CTC 4025/03

SOCIAL SECURITY ACTS 1992-1998

**APPEAL FROM DECISION OF APPEAL TRIBUNAL
ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: P L Howell QC

17 May 2004

<i>Claim for:</i>	Working families tax credit
<i>Tribunal:</i>	York
<i>Tribunal case ref:</i>	U/01/009/2001/00886
<i>Tribunal date:</i>	12 August 2003
<i>Reasons issued:</i>	22 September 2003

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1. This claimant's appeal succeeds. The decision of the tribunal chairman sitting alone at York on 12 August 2003 was in my judgment erroneous in law in holding that the claimant had made material misrepresentations of fact, which was not a conclusion open to the tribunal on the evidence put before it. I set the decision aside and substitute the decision I am satisfied the tribunal ought to have given on the material before it and the primary findings it made about the facts, which were largely undisputed. My substituted decision under section 14(8)(a) **Social Security Act 1998** is that:

- (1) the evidence established, and the tribunal correctly found, that the claimant and her husband John had to be treated under the regulations as 'members of the same household' for the purposes of working families tax credit (WFTC) at the dates of each of the claims she made in October 1999 and March 2000 even though they were not actually living together in the same house at either of those two dates;
- (2) it follows that as he was in paid employment she did not qualify for the WFTC she received under the awards originally made on those claims, and the later decisions issued by the Inland Revenue on 8 March 2001 were correct in revising her entitlement downwards for the claim periods 5 October 1999 to 3 April 2000 and 4 April to 2 October 2000 (all dates inclusive); but
- (3) the evidence did not establish that she had made any misrepresentation of fact to the Revenue in either of those claim forms in stating that she and her husband were not then normally living together; and accordingly
- (4) the Revenue are not entitled to recover the benefit mistakenly overpaid under those two claims (amounting to £3,737.50 and £3,665.22) from her under section 71

Social Security Administration Act 1992 as further claimed in the decisions of 8 March 2001.

2. The claimant is a lady now aged 46 who had been divorced from her previous husband in about 1997, leaving her with five young children to look after. In early 1999 she and the five children moved in with her present partner John and they began living together as a single household, continuing to do so for some four or five months before she and John were married on 5 July 1999 and for another couple of months after that. However the arrangement then broke down because of difficulties between the two of them about money and in September 1999 he left the house, though they kept in contact and he continued to pay the mortgage. For the next year he came back sporadically in the intervals of living elsewhere. At the date of each of her WFTC claims he had been away for some weeks and she did not know when or if he was coming back, though they had taken no legal advice about separation. The tribunal found on the claimant's evidence that the couple did intend to resume living together and had managed to do so later in 2000 when they bought another house and things became better between them.

3. On those facts, which I do not understand to be really in dispute at all, the tribunal chairman determined that for the purposes of deciding any entitlement to WFTC under her two claims the claimant fell within regulation 9(1) **Family Credit (General) Regulations** 1987 SI No. 1973, and I have no doubt that decision was correct. In her very clear statement of reasons (pages 93-95) the chairman said:

"9. Undoubtedly, the Appellant was married and accordingly had a partner as at the date of each of the two claims for Working Families Tax Credit. Regulation 9(1) of the Family Credit (General) Regulations 1987 provides that where the claimant and any partner of hers are living apart from each other they shall be treated as members of the same household unless they do not intend to resume living together.

10. I was satisfied that there was evidence that the Appellant and her husband did intend to resume living together. In her own words she said they loved each other. They had only just married. They had taken no legal advice on separation. Her husband owned the house in which and her children were living and he continued to pay the bills ...

12. Accordingly, I was satisfied that the Appellant and her husband John ... were to be treated as members of the same household for the purposes of each of the two claims for Working Families Tax Credit.

13. Accordingly, there has been an overpayment because entitlement should have taken into account the income of the Appellant's husband John. The overpayments have been calculated correctly and indeed this is not apparently disputed by the Appellant."

4. It is clearly implicit in those findings that the tribunal chairman was satisfied that the claimant and her husband had been living together in the same household for several months during 1999 until he left the house in September of that year, but that at the date

of each of her claims they were in fact living apart from one another; and on the evidence I am sure she was correct on those two points as well.

5. It must follow in my judgment that the chairman's decision was right so far as the claimant's true entitlement was concerned, since by regulation 9(1) she and her husband had to be *treated* for this purpose as living together in the same household at the dates of the two claims even though in fact they were not. That in turn has the effect of making them count as a "family" consisting of a married couple living in the same household within section 137(1) **Social Security Contributions and Benefits Act 1992**, so that his income has to be brought into the reckoning under sections 128 and 136 for the purposes of her claim for WFTC, which is an income related benefit.

6. The first part of the chairman's decision dealing with the recalculation of the claimant's entitlement so as to take account of her husband's income for the relevant periods was therefore in my judgment correct both in fact and in law, and that part of the Inland Revenue decisions issued on 8 March 2001 can be confirmed, there being no dispute about the actual figures.

7. The second part of the chairman's decision dealing with the claim to recover the overpayments was however clearly wrong in my judgment, as conceded in the very helpful written submission by Mr D P Eland on behalf of Board of Inland Revenue dated 12 January 2004 at pages 100 to 102. As he rightly comments, the conclusion that *because* this was a case within regulation 9(1) so the claimant and her husband had to be treated as living together at the date of the claims, she must have misrepresented the *facts* by saying they were not actually doing so, involves "quite a leap": in my judgment an impermissible one. Although the actual forms signed by the claimant were no longer available, it seems to have been accepted on all sides that all she was asked was the question "Do you have a partner with whom you normally live?" and that her negative answer to this, signed to as true to the best of her knowledge and belief, was given in good faith as a statement of how matters actually stood at the dates of the claim forms. In those circumstances, as Mr Eland's submission at paragraph 7 puts it:

"The tribunal decision on the question of living together relies on regulation 9 of the General Regulations, and the tribunal regarded that as a provision that deemed the claimant and her partner to be living together in the circumstances of the case. But if the claimant and her partner are treated as living together because that is the effect of the law, it is difficult to see how the overpayment could be recoverable on the basis that the claimant misrepresented a material fact."

8. I agree, and would go slightly further: it does not seem to me that the facts outlined above, which were all that the tribunal relied on, were capable of supporting the

conclusion of a “positive and deliberate misrepresentation” in answering No to the only question she was asked, which referred to the *current* normal living arrangements at the date of completion of the form. It is unrealistic to expect claimants to know the effect of every deeming provision in the regulations for themselves, and there was no suggestion this particular one had been explained to her when she gave her answer. In the absence of that or some supplemental question about whether she and her husband intended to resume living together though currently separated, there was in my judgment no adequate ground for a finding of misrepresentation of the kind made against her.

9. In those circumstances, there being no other evidence before the tribunal which could have founded a claim for recovery on the basis of misrepresentation (which was the only ground alleged against her), it seems to me that rather than do as Mr Eland suggests and remit the case for another tribunal to reconsider, the right course is for me to substitute my own decision in the terms set out above. The practical effect is that although the claimant was mistakenly paid more benefit than she was entitled to, this was not the fault of the answers she gave and the money is not recoverable from her.

10.

11. (Signed)

P L Howell
Commissioner
17 May 2004

12.