

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed. The decision of the child tax credit appeal tribunal held on 17 May 2004 is wrong in law and is set aside. The claimant's case is referred to a differently constituted appeal tribunal for rehearing.

2. The claimant made a single parent claim for tax credits on 4 December 2002 on behalf of herself and her two dependent children. She was awarded tax credits of £1,769.78 for the period 6 April 2003 to 5 April 2004. It came to light that the father of the claimant's children was also living in her home. Following an investigation and interview between the claimant and the Claimant Compliance Officer ("CCO"), the CCO wrote to her on 23 October 2003 stating that he had decided that she was not entitled to tax credits relating to this single claim. The reason for that decision was that she was found to be one of an unmarried couple living together as husband and wife. She was advised that she could make a joint application, but no such application was received. On 24 October 2003 the Board of the Inland Revenue issued a decision terminating her award, though this decision does not appear to be in the papers before me.

3. The claimant appealed to the appeal tribunal. On 17 May 2004 the tribunal dismissed the appeal. They decided that she was not entitled to claim tax credits as a single applicant as she was living with a partner at the date of the application as husband and wife.

4. The claimant appealed against the tribunal's decision with the leave of the Commissioner granted on 22 November 2004. The claimant's grounds of appeal are set out in a letter, dated 3 August 2004, attached to her Application for leave to appeal. Her grounds are that the tribunal ignored or did not take into account certain evidence that she gave, that they reached erroneous conclusions on the facts and that they failed to take full account of guidelines on "living in the same household" and wrongly concluded that she was living with another as husband and wife.

5. The Board of Inland Revenue support this appeal. In submissions, dated 14 January 2005, it is submitted, on the Board's behalf, that:

(1) the appeal tribunal erred in failing to give adequate reasons for their decision;

(2) the appeal tribunal erred in law by failing to provide any explanation as to why they did not find all of the claimant's evidence reliable;

(3) the Board's original submission was flawed as (i) it did not address the claimant's family life and subsequently the tribunal did not investigate this aspect of the claimant's relationship; and (ii) it asked the tribunal to uphold the decision of 24/10/03 to revise the award to

nil, which might have misled the tribunal if they had looked at the aspect of revising the award to nil.

It is submitted, on the Board's behalf, that the decision should be set aside and remitted to a fresh tribunal. On 26 January 2005 Observations were submitted on the claimant's behalf, which asked that the Commissioner either make his own ruling or remit the case to a new tribunal.

Relevant statutory provisions relating to Tax Credits

6. The Tax Credits Act 2002 ("the 2002 Act") applies to the tax credits sought by the claimant. Section 3(1) of the 2002 Act stipulates that entitlement to a tax credit is dependent on the making of a claim for it. Section 3(3) provides that:

"A claim for a tax credit may be made –

(a) jointly by the members of a married couple or unmarried couple both of whom are aged at least sixteen and are in the United Kingdom...;

(b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) jointly with another."

The claimant made a single claim under s.3(3)(b).

7. The Board's decision was that the claimant was not entitled to claim as a single claimant on the basis that she was part of an unmarried couple. According to Section 3(6) of the 2002 Act an "*unmarried couple*" means "*a man and a woman who are not a married couple but are living together as husband and wife*".

8. Section 16(1) of the 2002 Act provides that:

"Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board have reasonable grounds for believing –

"(a) that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period; or

(b) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period, the Board may decide to amend or terminate the award."

The Board appear to have terminated the award to the claimant under s.16(1) on the basis that she was not entitled to claim tax credit as a single claimant.

9. The appeal tribunal had to consider whether the claimant was entitled to claim tax credit as a single claimant. In doing this they had to consider whether she was living with a man as husband and wife. The Tax Credits legislation does not give any further guidance as to when a couple should be treated as living as husband and wife. This is essentially a question of fact looking at the totality of the evidence. I hold that in considering this issue, the tribunal erred in giving an inadequate explanation for reaching their conclusion on the facts.

10. The appeal tribunal failed to give adequate reasons for concluding that the claimant was living as husband and wife and had to make a joint claim for tax credit. The main reason given by the tribunal for reaching this conclusion was that they had been living in the same household since 1993, they had two children and both helped to run the household and look after the children. The tribunal have erred in seeming to equate living in the same household as living as husband and wife. Living in the same household is obviously a significant factor, but there were other matters that the tribunal should have considered. It seems that they did consider the sort of criteria that the tribunal identified in the Supplementary Benefits Handbook, which although not of legal force, have been found helpful when considering whether people are living as man and wife in the social security field (see, for example, **Decision R(SB) 17/81**). They may provide a useful starting point when considering this issue in the tax credits field. They start with the criteria the tribunal considered, namely whether they are members of the same household, they then go on to list stability of the relationship, financial support, sexual relationship, children and whether they have represented themselves to others as husband and wife. The tribunal's reasoning that "*clearly they have a stable and longstanding relationship*" was flawed in that they seemed to place undue weight on the length of time they had shared a house, but failed to give adequate weight to the evidence that the relationship had changed from about six years earlier when they ceased having a sexual relationship and started sleeping in separate rooms. Although the lack of a sexual relationship would not be not decisive, it along with other factors (see paragraph 11 below), pointed to a different relationship.

11. The tribunal considered financial support. The tribunal stated that they both used to contribute to the household expenses. They noted that "*He only receives jobseekers allowance and cannot contribute as he used to.*" There was no evidence that he contributed financially at all in recent times. It seems that he bought his own food and did not contribute to any other household expenses. The claimant met all the other outgoings. They led separate lives even though, as father of the children, he had a relationship with them. There was evidence to support their leading separate lives, e.g. the claimant stated that he washed his own clothes, bought and cooked his own food (save for the occasional Sunday roast). There was no evidence that they represented themselves to other people as husband and wife, or that they socialized together, or had a family life together. The tribunal stated that they both helped to run the household and look after the children. However, the claimant's evidence was that, despite the fact that he was unemployed, she paid a child minder to look after the children after school. On her account, he did not help run the household and did very little; they did not socialize or have a family life together. Looking at all the evidence, the tribunal erred in failing to give adequate reasons for finding that they lived together as husband and wife.

12. The tribunal added as a final line to the reasons for their decision that
"The Tribunal did not find all of the appellant's evidence reliable."

Of course, it is a matter for the tribunal to decide upon the credibility of the witness before them and they were entitled to find that the claimant's evidence was not reliable. However, they did not give any indication or any example of the part of her evidence that they regarded as unreliable. To give one example, the tribunal stated that "they sometimes eat their food together, not always, although the appellant prepares the food for them", whilst the claimant's evidence was that they ate separately and that he cooked for himself (save he might occasionally have some of the Sunday roast). The tribunal's finding of fact does not reflect the claimant's evidence, which was the only evidence on this point which was before them. They failed to explain why they did not accept or ignored what she said. They did not state that they thought what she said about this was unreliable, if that was their view. In the circumstances I hold that the tribunal gave inadequate reasons for not finding her evidence reliable. The tribunal should have given their reasons in such a way that the claimant could appreciate why they had decided to reject some of the evidence that she gave (see paragraph 8 of Decision R(A)1/72).

13. For the reasons given in paragraphs 9 to 12 above the tribunal erred in law. I set aside the tribunal's decision under s.14(8) of the Social Security Act 1998, which applies in the case of appeals concerning the Board's decisions (see the Tax Credits (Appeals) Regulations 2002). It is not appropriate for me to give the decision that the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of fact on whether the claimant was living as part of an unmarried couple.

14. In the submissions of 14 January 2005, the Board submitted that the tribunal was required to find whether the decision originally awarding tax credits ought to be amended or terminated and not whether the award should be revised to nil. I will deal with these submissions as this may assist the new tribunal when it considers the case afresh. I agree that the original submission of the Board should not have asked the tribunal to revise the award to nil if the tribunal were minded to uphold the Board's decision. It seems that when making an initial decision on a claim for tax credit under s.14 of the 2002 Act, the Board have to decide whether to make an award and, if so, the rate at which to award it. S.14(3) of the 2002 Act gives the Board the power to decide to award it at a nil rate. However, in this case the claimant had already been awarded tax credit and the Board were exercising their power pursuant to s.16 of the 2002 Act.

15. Under s.16(1) of the 2002 Act the Board have power to amend or terminate the award provided that they have reasonable grounds for believing that the claimant has ceased to be or has never been entitled to the tax credit. The burden is on the Board to show, on a balance of probabilities, that she was not entitled to the tax credit as a single claimant. If she was entitled to claim as a single claimant, her award of tax credit should not have been terminated.

16. If the claimant is found to have been part of an unmarried couple, then according to s.3(3)(a) of the 2002 Act, such a claim should have been made jointly. It appears from s.3(1) that entitlement to a tax credit is dependent on

the making of a claim for it. The wording of s.3(3)(b) makes it clear that a claim can only be brought under (b) if that person is not entitled to make a claim under s.3(3)(a). The two claims are mutually exclusive. Thus, if the claimant's claim fails under s.3(3)(b) or is terminated for failing to meet the criteria of a single claim, it appears that there has to be a claim under s.3(3)(a) for the claimant to receive an award. Section 3(2)(b) of the Act provides that where the Board have decided under s.16 of the Act (as here) to terminate an award of a tax credit made on a claim, (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim. In the absence of a new claim, there would then appear to be no entitlement.

17. The new appeal tribunal should rehear and determine the case in the light of the guidance given in this decision and in accordance with the following directions:

- (1) There must be a complete rehearing on the evidence presented and submissions made to the new tribunal; the decision terminating the award should be amongst the papers before the new tribunal.
- (2) The Board submitted that the new tribunal should direct a revised submission be presented from the Board in view of the original submission being flawed; this would seem desirable and should be done;
- (3) The new tribunal must decide whether the claimant was living as husband and wife at the time of her claim for tax credit as a single claimant;
- (4) If the new tribunal find that the claimant was not living as husband and wife, then her award should not have been terminated by the Board as she was entitled to make a single claim and her award should be recalculated in view of her making repayment;
- (5) If the new tribunal find that she was living as husband and wife, then the decision to terminate her award should be upheld.

(Signed) **A.A. Green**
 Deputy Commissioner

(Date) **17 February 2005**

