

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal.

2 The claimant and appellant is appealing with my permission against the decision of the Hull appeal tribunal on 8 August 2003 under reference U 01 006 2003 00885.

3 For the reasons below, the decision of the tribunal is set aside. I refer the appeal to a new tribunal to consider in accordance with the directions in this decision (Social Security Act 1998, section 14(8) and (9)).

DIRECTIONS FOR THE REHEARING

4 A The rehearing is to be an oral hearing.

B The Inland Revenue is to prepare a new submission for the tribunal dealing with paragraph 6 of Schedule 3 to the Family Credit (General) Regulations 1987, with the overpayment, and with the recoverability of the overpayment. That submission is to be made within four weeks of the issue of this decision. The Inland Revenue should also consider being represented at the hearing as the burden of proof in establishing the recoverability of the overpayment is on the Inland Revenue.

C The claimant is to ensure that any further documentary evidence that he wishes the tribunal to consider, in addition to the evidence now in the papers, is to be submitted to the appeal tribunal not later than two weeks from the receipt by him of the further submission of the Inland Revenue. The claimant may also add any further written submission he wishes to make about this decision and the further submission.

D The case is not to be listed for rehearing until both the time limits set out in these directions have passed.

E These directions are subject to any further direction by a district chairman.

F The claimant may wish to consider appointing a Citizens Advice Bureau, welfare rights office, solicitor, accountant or other expert adviser to assist him with this appeal. If he does appoint a representative, he should advise the appeals service of this immediately.

REASONS FOR THIS DECISION

5 The decision under appeal is that the claimant was not entitled to working families tax credits (WFTC) from and including 19 June 2002 because he had capital of more than £8000, and that there was an overpayment of WFTC that was recoverable. He had originally been awarded WFTC £83.43 a week from that date, but that decision was revised on 31 October 2002 to a nil award.

6 The claimant appealed because the capital was money held for his business. He accepted that he had over £8,000 but these funds were raised for business purposes, by

remortgaging his main residence, and were used to consolidate credit and purchase a new vehicle for business use. He is self-employed.

7 The letter informing the claimant that his WFTC had stopped was a letter dated 21 October 2002 notifying him of its suspension and warning him that if he did not provide certain information he might be liable to a penalty. This was followed by another letter dated 31 October 2002 stating that he was not entitled to WFTC from 18 June 2002. It added: "This new decision means that you have been overpaid WFTC amounting to £1501.74 and you must pay this back." The letter included a calculation justifying the sum stated.

8 The tribunal held its hearing without the claimant being present or the Inland Revenue being represented. Its decision was "The decision of the Secretary of State issued on 31/10/2002 is confirmed." The decision was, of course, not a decision of the Secretary of State but of the Inland Revenue.

9 The claimant asked for this decision to be set aside, and when that was refused on 10 October 2003 then asked for permission to appeal, because he was not able to present his evidence to the tribunal. I granted permission to appeal not on that ground but to consider whether the tribunal and Inland Revenue properly dealt with the issue of business capital. However, since then I have noted an interlocutory decision of a district chairman on 11 July 2003 that was not in the appeal file although it was mentioned in the tribunal decision. This directed that any further evidence that the claimant wished to rely on must be lodged with the appeal service no later than 7 days before the next hearing. The claimant asked for an oral hearing and this was directed. But I accept the evidence that the claimant did not receive notice of the hearing. That meant that he was not put on notice of the date by which he had to produce his further evidence. That meant he suffered the double prejudice not only of not being present but also of not having evidence that he wanted to be considered in front of the tribunal. That is clear from the tribunal decision itself. In those circumstances, he has been deprived of a fair hearing and the tribunal decision must be set aside.

10 The tribunal also erred on the capital question. The submission for the Inland Revenue supports the appeal on this ground. There has been no focussed thought on whether the capital held by the claimant was within the exemption in paragraph 6 of Schedule 3 to the Family Credit (General) Regulations 1987. No mention of this provision was made at any stage in this case before it came before me. It is, for the ease of reference of the new tribunal to which this must go, in similar – though not identical - terms to paragraph 6 of Schedule 10 to the Income Support (General) Regulations 1987, and any consideration of that issue must have regard to the case law on it. I gratefully adopt the reference by the Inland Revenue representative to Commissioner's decision R(SB) 4/85 in particular as being in point here, and to the case law cited in that decision. At paragraph 11 of that decision Commissioner Monroe, drawing on other decisions, stated:

"In the case of a capital asset it has to be considered whether the asset is part of the fund employed and risked in the business. Findings of fact should be directed to this issue. It emerges from the above decision also that the manner in which the item is treated or not treated in the accounts (if any) of the business is not conclusive."

I add that the title of a bank or similar account in which funds are held is also not conclusive.

11 The Inland Revenue representative raised another point, though one not raised by the claimant or by me. I thank him for that. It was an entirely proper action on his part. The decision under appeal included not only a decision, in technical terms, superseding the

decision awarding WFTC. It also included an overpayment decision and a recovery decision. The claimant's appeal clearly ran to all those issues. But the submission to the tribunal omitted both the overpayment decision and the recovery decision. And, perhaps because of this, the tribunal paid no attention to them. However, its formal decision was, as noted: "The decision of ... 31/10/2002 is confirmed." Whether the tribunal realised it was doing this or not I do not know, but this could reasonably be interpreted as confirming the overpayment decision and the recovery decision. If it did so intend, its decision is in error of law for failing to consider those issues adequately. If it did not so intend, its decision is in error of law for ambiguity and for not dealing fully with the issues before it.

12 This case clearly illustrates why a tribunal should not adopt the lazy technique of confining its decision to "the decision issued on ... is confirmed." It should restate the substance of the decision. In this case we can see that the tribunal did not confirm more than part of the decision - or one of the decisions, if they are regarded as separate. If there had been no statement of reasons, that failure by the tribunal would not be recorded.

13 The case must go to a new tribunal. It must consider the question about business assets identified above. It must then consider if there has been an overpayment and if the overpayment is recoverable. I have given directions to ensure that the failure to provide the claimant with a proper hearing last time is not repeated.

David Williams
Commissioner

19 May 2004

[Signed on the original on the date shown]