Commissioner's File **CF/14643/1996**

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992 ,SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

Claimant's name:
Tribunal venue:
Tribunal number:.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows:

1.1 The decision of the Wakefield Social Security Appeal Tribunal held on 18th January 1996 is enoneous in point of law: see paragraphs 20 and 31 below.

1.2 Accordingly I set it aside and, as it is not expedient for me to give a decision on the claimant's appeal from the adjudication officer's decision, I refer the case to a differently constituted Social Security Appeal Tribunal for determination.

1.3 1 direct the Social Security Appeal Tribunal which rehears this case to conduct a complete rehearing and in particular to consider the following questions:

Did the claimant have actual knowledge that his son was not attending college?
If not, was he wilfully blind (as defined in paragraph 17 below) to that fact?
If not, did he have the means of knowledge of that fact under the principles set out in paragraph 29 below?

2. This is an appeal to the Commissioner against the decision of the tribunal brought by ,he claimant with the leave of the tribunal's chairman. The adjudication officer supports the appeal, but not the ground;. put forward on behalf of the claimant.

3. The known facts of plus case are that the claimant was in receipt of Child Benefit in respect of his son. His son was born on 19th August 1977. He last attended full-time education on 4th October 1993, but continued to attend on a part-time basis for 6 hours a week until 1 1th January 1994. From and including 27th April 1994, he was awarded Income Supports in his own right. Hc :.eased to live with the claimant on 5th June 1994. The claimant did not report the fact that his son was no longer attending college until 10th July 1994, Child Benefit having remained in payment up to and including 5th June 1994.

4. The adjudication officer reviewed the decision awarding Child Benefit to the claimant and issued a revised decision that the claimant was not entitled to Child Benefit in respect of

his son for the period from and including 13th September 1993. The officer further decided that for the inclusive period from 13th September 1993 to 5th June 1994 Child Benefit had been overpaid to the claimant in the amount of £309 and that the whole of that overpayment was recoverable from the claimant on the basis of the claimant's failure to report that his son had ceased full-time education.

5. The claimant appealed against that decision to a tribunal. In the light of further investigations, the adjudication officer submitted to the tribunal that the decision under appeal was incorrect. The error lay in the assumption that the claimant's son had ceased to be in full-time education by his 16th birthday (19th August 1993). In fact he had attended full-time education until 4th October 1993. Therefore, his father was entitled to Child Benefit in respect of him up to and including 9th January 1994. The overpayment thereby reduced to £171.30.

6. The ground of the claimant's appeal to the tribunal was that his son

> "was attending college to my knowledge. He was going from home to the college. And he has not been working. And also I have signed the admission form to the college. "

The tribunal's decision

7. The tribunal substituted the decision suggested in the adjudication officer's submission. Although the tribunal accepted that the claimant did not actually know that his son was not attending college,

> "we find it difficult to believe that he did not know that everything was not as it should be. The Appellant says that he did not discuss things with his son. We think this is abnormal and something that would not be expected in a relationship between father and son.
>
> "The Appellant must also have noticed at some times from the behaviour of his son that he was not attending college. He says that he was working a lot and did not see much of his son but there must have been times when he did see him and it would be the normal and expected things that he found out from his son how he was managing his college course. "

The tribunal concluded that he had "constructive knowledge" that his son was not attending college

> "by observing the signs and his son's behaviour and by having normal conversations with his son about his college course he should have known his son was not attending. From the Appellant's answers today he appears not to have been particularly bothered what his son was doing."

8. The findings of fact are a matter for the tribunal, provided that there was evidence on which the finding could be based and the tribunal did not step outside the bounds of common sense in analysing the evidence. I have only a duplicate file before me and it does not contain a copy of the chairman's notes of evidence and proceedings. I can, however, obtain some idea

of the evidence from the way in which the tribunal's findings of fact and reasons for decision are worded, and I take it as significant that the grounds of appeal to the Commissioner do not challenge the tribunal's findings. It appears that there was evidence to support the tribunal's findings and there is nothing to suggest that in reaching its conclusions it stepped outside the bounds of common sense. I conclude that there is no basis upon which the tribunal was erroneous in law in making the findings referred to in paragraph 7 above.

The ground of appeal

9. The claimant's ground of appeal to the Commissioner is that "the Tribunal misinterpreted the law in applying the 'constructive knowledge' principle to an ordinary claimant, when this is intended to apply to professional people in the context of knowledge of assets. I could not disclose what I did not know. "

10. The adjudication officer does not support this ground of appeal. The officer submits that the decision of the Commissioner in CSB/296/1985 and the cases cited therein are authority for the proposition that there can be a failure to disclose "constructive knowledge". However, the officer supports the appeal on the basis that the tribunal failed to make adequate findings to justify the reduction of the overpayment.

The requirement for, and meaning of, knowledge

11. The adjudication officer sought to establish grounds for recovery of the overpayment under section 71 of the Social Security Administration Act 1992 on the basis of failure to disclose a material fact. It is a well-established and oft-repeated requirement for recovery on this basis that non-disclosure presupposes knowledge: see the judgment of Mr Justice Diplock the Court of Appeal in R. v. Medical Appeal Tribunal (North Midland Region), ex parte Hubble [1958] 2 Queen's Bench 228 at page 242 on a predecessor of section 71, and the decision of the Tribunal of Commissioners in CSB/53/1981.

12. However, in law, knowledge may mean a number of different things: see the judgment of Mr Justice Walton in Re Clore (Deceased) (No 3) [1985] 2 All England Reports 819 at page 829. The meaning of knowledge varies from context to context. The question which arises on this appeal is: what does knowledge mean for the purposes of the recoverability of an overpayment on the basis of failure to disclose?

13. In the context of the case before me, I need consider only three of the types of knowledge. For convenience of reference only, I will refer to them as (i) actual knowledge; (ii) wilful blindness; (iii) means of knowledge. Before defining these types of knowledge, I will say something about the phrase "constructive knowledge".

14. The use of a label may be a convenient way within a judgment or a Commissioner's decision to refer to a concept as therein defined. Within an area of law, a label may come to have a common signification. However, all too often the use of, and argument by reference to, labels does more to cloud the issue than to clarify the analysis. "Constructive knowledge" is a term that is used in law, but it is not used with sufficient precision to have become a term of art. In particular, there is no consistency in whether or not the phrase embraces wilful blindness as well as the means of knowledge. In the context of this case, I do not find reference to "constructive knowledge" of any assistance.

Actual knowledge

15. Actual knowledge consists of actual awareness of a fact. This is probably the everyday meaning of the word. It is beyond argument that this type of knowledge is sufficient to found a recoverability decision on the basis of non-disclosure. If the law were otherwise, the words "failed to disclose" in section 71(1) would have no content.

16. In the case before me, the tribunal found as a fact that the claimant did not know that his son was no longer in full-time education. As explained above, the tribunal was not erroneous in law in making that finding.

Wilful blindness

17. Wilful blindness of a fact covers the case where, despite a suspicion in a party's mind, that party wilfully refuses to take a simple step that would readily lead to the fact being discovered. For example: if a wife said to her husband, "Look how much I've won on the lottery", but her husband replied, "I don't want to know; I'll only have to tell the Social if I do", the husband in law would nonetheless be taken to know how much his wife had won.

18. This type of knowledge has a long pedigree in law generally. It is of such general application that, quite apart from any authority directly relevant to social security law, I hold that knowledge of this type is sufficient to found a failure to disclose for the purposes of section 71. The suggestion that this type of knowledge is only applicable in cases involving professional people and knowledge of assets is at variance with its range of application dating back over at least 150 years and is unarguable. It does not depend for its existence upon decisions of Commissioners, and the circumstances in which it applies are not limited by the facts of any such decisions in which it may have been relevant.

19. There is no definitive statement of the sort of "step to knowledge" which is contemplated. It is, though, clear from the many statements and applications of the rule, that what is envisaged is a simple step that is readily available and will be guaranteed to lead to the knowledge which the party seeks to avoid. Elaborate or time-consuming investigations are not what is contemplated.

20. In the case before me, it is possible that the tribunal's findings referred to in paragraph 7 above were intended to convey that the claimant must have had, and did in fact have, suspicions about how his son was spending his days, and that his failure to ask his son anything about his studies and his apparent indifference to what his son was doing were so unusual in a father-son relationship that the claimant must have been, and was, deliberately refraining from asking his son to confirm the fact that was staring the claimant in the face. However, the tribunal's conclusions and its reasons for reaching those conclusions are intermingled in so compressed a way that it is not possible to be sure whether the tribunal has concluded that the claimant was suspicious or merely that he should have been suspicious. There is also no finding that the claimant could readily have discovered the truth. The obvious thing for the claimant to have done, if he had suspicions, would have been to ask his son if he was still attending college, but there is nothing in the tribunal's decision to indicate whether the relationship between father and son was such that the son would have admitted to his father how he was spending his time. The father could have made enquiries of the college,

but that would involve more than the simple step that the rule envisages and falls within the third type of knowledge which I need to consider.

Means of knowledge

21. The means of knowledge covers knowledge which a person has the means of acquiring by making reasonable enquiries. For example: a claimant who is expecting to receive an inheritance on completion of the administration of a deceased's estate may not know whether the money has yet been paid into a bank account, but could readily find out by asking the bank.

22. There is authority that for the purposes of section 71 a failure to disclose may be founded on the means of knowledge: see the decisions of the Commissioners in R(SB) 21/82, paragraphs 20(4) and 22(2), R(SB) 28/83, paragraph 10 and R(SB) 40/84, paragraph 9. However, these decisions give little guidance on two important matters: (i) the circumstances which will put a person on enquiry; and (ii) the standard of enquiries which a person is expected to undertake.

23. The only reported decision of a Commissioner which gives guidance on these matters is R(FIS) 3/85, paragraphs 18 and 20. The claimant was the beneficiary of an award of Family Income Supplement as a member of a household comprising himself, a lady and a child. The couple separated and he went to live with a second lady and four children. He received a second award of the Supplement in respect of this family. He knew that it was not permissible to have two overlapping awards of Family Income Supplement, but had been told by the first lady that she would be handing in her order book. The Commissioner held that, as the claimant was aware of the rule prohibiting overlapping awards, he was expected to use reasonable diligence in order to avoid this. In particular, as he and the first lady were barely on speaking terms, he was not entitled to rely on her statement that she would be surrendering her order book but was expected to check with the Department whether or not she had done so.

24. In the decision of the Commissioner in CSB/296/1985, the material fact was the receipt by the claimant's solicitor, without the claimant's actual knowledge, of a sum of £12,000 which the claimant knew he would receive at some stage as settlement of a claim for damages. The Commissioner held that "constructive knowledge" could found a recoverability decision based on non-disclosure. At paragraph 11, he defined constructive knowledge as "facts which one does not actually know but which one ought to know because reasonable enquiries would have revealed them". The Commissioner directed the tribunal that the burden of enquiry on the claimant was not great in view of the following factors: the claimant had left matters in the hands of his solicitors; the solicitor had taken advice from the local office of the Department; the claimant was not skilled in business. He concluded at paragraph 12:

> "it is only if the new tribunal finds that the claimant had turned a blind eye to whether his solicitor had received this money or not or had neglected to take fairly obvious precautions or make fairly obvious enquiries, that I consider he ought to be fixed with 'constructive knowledge' of the existence of the £12,000 in his solicitors hands. "

25. The Commissioner further held that whether or not a claimant is to be taken as having this type of knowledge of a material fact which could have been discovered by reasonable

enquiry is a question of fact for the tribunal: see CSB/296/1985, paragraph 12. This is supported by the approach of the Commissioner in R(SB) 21/82, paragraph 22(2), where he treated the matter as one for the tribunal which reheard the case.

26. In the decision of the Commissioner in CIS/120/1993, the claimant failed to disclose that his wife had started remunerative work. The flavour of the case can be seen from the tribunal's finding that

> "it seems to the Tribunal almost intrinsically improbable that [the claimant] could remain unaware of that fact and that if he did actually remain unaware of it, then it was only as a result of applying considerable more diligence to preserving his ignorance than would have been required to obtain actual knowledge. He ought to have known of the material facts. "

The Commissioner held, at paragraph 6:

> "Manifestly, knowledge, both actual and constructive, is to be attributed to a claimant. He cannot escape his responsibilities by turning a blind eye to facts. If he ought reasonably to have known of the material change in circumstances, then the requisite knowledge is attributable to him. "

27. This passage was repeated by the same Commissioner in CIS/13507/1996, paragraph 4. The facts do not appear from the report except to the extent that the case concerned non disclosure by a claimant that his partner was in remunerative employment.

28. There are a number of similarities in the cases considered in paragraphs 23 to 26 above. (i) In R(FIS) 3/85, the claimant knew of the risk that he was running by making a second claim for the Supplement without checking to see if the first order book had been surrendered and in all of the other cases there were clear facts to put the claimant on notice of the need to make enquiries. (ii) In all of the cases, the enquiries that should have been undertaken were obvious and readily accomplished. (iii) In the detailed statements of the law in CSB/296/1985 and CIS/120/1993, the Commissioners run together wilful blindness and means of knowledge. No doubt this reflects the closeness of the facts in those cases to wilful blindness, but I also take it as indicating that the Commissioners were not intending to give a wide scope to a "means of knowledge" type case.

29. The further one moves from actual knowledge of a material fact the stronger the justification necessary to found a recoverability decision. This is not an area of law where general statements of law in Commissioners' decisions should be isolated from the facts of the cases in which they appear. The circumstances in which a person is to be fixed with this type of knowledge should be found by progress from precedent to precedent rather than by the statement and application of a broad principle. Like the cases considered above, the case before me is on the borders of wilful blindness and means of knowledge. This is not a case in which any redrawing of the boundaries of this type of knowledge is appropriate. I conclude that, on the present state of the authorities, the law is as follows.

(a) There must be something to put a person on notice that enquiries should be made before a person is fixed with knowledge of this type.

(b) A person will be on notice that enquiries should be undertaken only where (i) there is a risk that there are specific facts to be discovered and (ii) the person is either aware of that risk or the facts and circumstances of the case, as known to that person, are such that the risk was plain to any sensible person.

(c) The enquiries which a person is expected to make must be clear and obvious and be capable of being easily undertaken.

(d) Within the limits set by the above propositions, it is a question of fact whether or not a person is to be fixed with this type of knowledge.

30. I reject the claimant's argument that "constructive knowledge" only applies to professional men and to knowledge of assets. The argument is not based on any discernible principle. It is also inconsistent with the authorities considered above.

31. So far as the case before me is concerned, it is not clear from the tribunal's reasons whether the tribunal saw this as a means of knowledge type of case and, if so, what criteria were applied in reaching the tribunal's decision. In particular the tribunal appears to have considered that any enquiries the father made of the son would have revealed the truth. I have explained in paragraph 20 above why the tribunal's findings on that ground are inadequate.

Proof of knowledge

32. It is necessary to distinguish between the type of knowledge on which a failure to disclose may be founded and the evidence by which existence of that knowledge may be shown. For example, wilful blindness or the existence of the means of knowledge may be used as a basis from which a tribunal may infer in an appropriate case that the claimant had actual knowledge of a material fact: see the speech of Lord Bridge in the House of Lords' case of Westminster City Council v. Croyalgrange Ltd [1986] 2 All England Reports 353 at page 359.

The adjudication officer's submission to the Commissioner

33. The adjudication officer supports the appeal on the basis that the tribunal failed to give adequate reasons for the reduction in the amount of the overpayment. I reject that submission. A tribunal only has to make findings of fact on matters which are in dispute. As explained above, I have only a duplicate file before me and it does not contain a copy of the chairman's notes of evidence and proceedings. However, from the claimant's letter of appeal to the tribunal, the tribunal's record of decision, and the claimant's grounds of appeal to the Commissioner, it appears that by the hearing the only issue in dispute was whether the material facts which he had not disclosed were within his "knowledge" so that he had failed to disclose them.

34. In these circumstances, the tribunal was only required to make findings of fact on the issue in dispute before it. It was not required to deal with all the other matters relevant to the decision which was substituted by the tribunal, the basis for which was adequately explained in the adjudication officer's submission to the tribunal.

Conclusion

35. Nothing in this decision is intended to be a criticism of the tribunal which heard this case. The arguments before the tribunal gave little guidance on the principles to be applied and it is not surprising that findings made and reasons given in those circumstances should fail to reflect some of the distinctions which the law draws.

36. The tribunal's decision is erroneous in law and must be set aside. I cannot give the decision which the tribunal should have given on its findings of fact and it is not expedient for me to make further findings of facts. There must, therefore, be a complete rehearing of this case before a differently constituted tribunal. The tribunal will decide afresh all issues of fact and law on the basis of the evidence available at the rehearing in accordance with my directions in paragraph 1.3 above. As my jurisdiction is limited to issues of law, my decision is no indication of the likely outcome of the rehearing, except in so far as I have directed the tribunal on the law to apply.

Signed: **Edward Jacobs**
Deputy Commissioner

Date: 27th January 1998