

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my leave, against a decision of the Worcester Appeal Tribunal made on 14 October 2002. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal and set aside the Tribunal's decision. In exercise of the power in s.14(8)(a)(i) of the Social Security Act 1998 I make the decision which the Tribunal should on its findings of fact have made, namely to allow the Claimant's appeal against the decision of the Secretary of State made on 3 April 2002 and to substitute a decision that the amount of incapacity benefit payable to the Claimant was not reduced from 30 March 2002 by reason of his entitlement to occupational pension.
2. I held an oral hearing of this appeal at which the Claimant appeared in person and the Secretary of State was represented by Mr. Jeremy Heath of the Officer of the Solicitor to the Department of Work and Pensions.
3. Part of the Claimant's occupational pension is paid by the pension scheme trustees direct to the Claimant's former wife pursuant to a court order made in 1997. The issue in this appeal is whether that part of the pension is "payable to him", within the meaning of s.30DD(1) of the Social Security Contributions and Benefits Act 1992 (incapacity benefit: reduction for pension payments).
4. The Tribunal's decision was to dismiss the Claimant's appeal against a decision, made on 3 April 2002, that the incapacity benefit payable to the Claimant was to be reduced by £29.26 per week from 30 March 2002 owing to his receipt of a weekly pension payment of £143.53. That reduction was calculated on the footing that the pension payable to the Claimant included the amount payable directly to his former wife under the court order. According to my calculations, if the amount payable to his former wife is excluded, the pension payable to the Claimant does not exceed the threshold of £85 per week below which receipt of pension payments does not operate to reduce entitlement to incapacity benefit.
5. S.30DD of the 1992 Act (which was introduced by amendments made by s.63 of the Welfare Reform and Pensions Act 1999, and which by transitional provisions contained in regulations applies only to periods of incapacity beginning on or after 6 April 2001) provides, so far as directly material, as follows:

"(1) Where –

- (a) a person is entitled to incapacity benefit in respect of any period of a week or part of a week,
- (b) a pension payment is payable to him in respect of that period (or a period which forms part of that period or includes that period or part of it), and
- (c) the amount of the payment (or, as the case may be, the amount which in accordance with regulations is to be taken as payable to him by way of pension payments in respect of that period) exceeds the threshold,

the amount of that benefit shall be reduced by an amount equal to 50 per cent of that excess.

.....
(4) Regulations may provide –

- (a) for sums of any specified description to be disregarded for the purposes of this section;
- (b) for sums of any specified description to be treated for those purposes as payable to persons as pension payments (including, in particular, sums in relation to which there is a deferred right of receipt);
- (c)

(5) In this section “pension payment” means –

- (a) a periodical payment made in relation to a person under a personal pension scheme or, in connection with the coming to an end of an employment of his, under an occupational pension scheme or a public service pension scheme;
- (b)

6. The court order, made on 18 June 1997, had provided (so far as material) as follows:

“.....

AND UPON the Respondent [i.e. the Claimant] undertaking to forthwith give irrevocable instructions to the Trustees of his Pension Scheme that they are to pay to the Petitioner [i.e. the Claimant’s former wife] one half of the pension income received less any tax due and to provide within 14 days of the date of this Order written confirmation that such instructions have been given

.....

IT IS HEREBY ORDERED BY CONSENT

.....

- 3. As from the date of the Respondent’s retirement, under the terms of his pension with [name of company] the Trustees or Managers of the said Pension do cause to be paid to the Petitioner on behalf of the Respondent periodical payments of such sum as after deduction of tax equals 50% of the Retirement Pension payable under the said Pension to the Respondent during their joint lives until the Petitioner shall remarry or further Order.
- 4. Upon compliance by the Respondent with his undertakings referred to above, each party’s claims for financial provision and property adjustment orders do stand dismissed and neither shall be entitled to make any further application in relation to the marriage under the Matrimonial Causes Act 1973 Section 23(1)(a) or (b) or as amended.”

7. Para. 3 of that order must have been made under s.25B of the Matrimonial Causes Act, 1973 (“the 1973 Act”), a provision introduced by amendments to the 1973 Act made by the Pensions Act 1995. Before those amendments, which enable the court to order

pension scheme trustees to make payments of pension direct to the other party to the marriage (and which are commonly referred to as the “earmarking” provisions), the court’s powers were in practice normally limited to taking the amount of a pension or prospective pension into account in determining what financial provision or property adjustment orders to make.

8. So, in the case of a husband (H) entitled to an occupational pension of, say, £5,000 a year, the court might have ordered him to make periodical payments of, say, £2,000 a year to his former wife (W). There can be no doubt that, in that simple situation, the whole of the £5,000 would remain pension “payable to him” within the meaning of s.30DD(1) of the 1992 Act. H would not be able to say that, in determining the amount of pension payable to him, the £2,000 payable by him to W should be deducted, any more than he would be able to deduct any other expenses which he might have. That would in my judgment normally remain the position even if H were to give, and the pension scheme trustees were to accept, instructions to pay the £2,000 direct to W. Tax approved occupational pension schemes must contain a provision prohibiting a member from charging or assigning his pension benefits (whether actual or contingent). H’s instruction to the scheme trustees could not, therefore, effect an assignment by H of part of his pension entitlement, or amount to a charge of his entitlement, and would not therefore prevent him being beneficially entitled to the whole of each instalment of pension as it arose. He would in principle be entitled at any time to rescind the instruction to the trustees and have the entirety of the pension paid to him. The fact that, as a mere matter of mechanics, he had chosen to have part of the payments made direct to his wife would not in my judgment mean that that part was not “payable to” him.
9. I now turn to the terms of s.25B of the 1973 Act (as in force at the date of the court order in 1997). They refer back to s.23, under which “financial provision orders” can include an order that either party to the marriage make to the other periodical payments or pay to the other a lump sum. By s.25B(1), the matters to which the court is to have regard under s.25(2) in exercising its powers to make financial provision orders include any benefits under a pension scheme which a party to the marriage has or is likely to have. By s.25B(3) “the following provisions apply where, having regard to any benefits under a pension scheme, the court determines to make an order under section 23 above.”
 - “(4) To the extent to which the order is made having regard to any benefits under a pension scheme, the order may require the trustees or managers of the pension scheme in question, if at any time any payment in respect of any benefits under the scheme becomes due to the party with pension rights, to make a payment for the benefit of the other party.
 - (5) The amount of any payment which, by virtue of subsection (4) above, the trustees or managers are required to make under the order at any time shall not exceed the amount of the payment which is due at that time to the party with pension rights.
 - (6) Any such payment by the trustees or managers –
 - (a) shall discharge so much of the trustees’ or managers’ liability to the party with pension rights as corresponds to the amount of the payment, and
 - (b) shall be treated for all purposes as a payment made by the party with the pension rights in or towards the discharge of his liability under the order.

(7)

10. It is to be noted that, under s.25B(3), the earmarking provisions apply only where the court determines to make a financial provision order under s.23. In other words, the section requires the making of an order for (usually) periodical payments by H to W, which is satisfied by means of the payment by the pension trustees direct to W. (Throughout this decision I assume, for convenience of expression only, that it is the wife in whose favour the order is made). S.25B(6) makes express provision as to the effect of the payment by the pension scheme trustees to W. Taking s.25B(6) into account, the analysis is that:

- (a) There is a financial provision order requiring the making of periodical payments by H to W;
- (b) The trustees of H's pension scheme are required to make payments of the necessary amounts direct to W, which (i) discharge the trustees' liability under the scheme to H and (ii) are treated *for all purposes* as payments made by H to W in discharge of his liability to make periodical payments to W.

Although, therefore, H ceases to be entitled to actual payment of the sums ordered to be paid to W, (i) he, rather than W, remains the person who under the trusts of the pension scheme has the underlying beneficial entitlement to the whole of the monies and (ii) that beneficial entitlement may remain of real value and concern to him, because the payments to W discharge his liability to make periodical payments under the court order.

11. In the present case para. 3 of the court order in fact provided simply that the trustees "do cause to be paid to [the Claimant's wife] on behalf of [the Claimant] periodical payments of such sum as after deduction of tax equals 50% of the Retirement Pension payable under the said Pension to [the Claimant]". That telescoped the analysis which I set out in para. 10 above. The actual terms of the order could not of course have taken effect in any way other than that provided for by s.25B, under which it must have been made. The periodical payments payable by the Claimant to his former wife are in effect defined in the order as a percentage of the pension payable under the pension scheme. In practical terms, therefore, so long as the order remains in force the Claimant ceases to be interested in that percentage of the pension. If the amount of the pension increases or decreases, so does the amount of the Claimant's underlying liability for periodical payments, which is discharged by the payment made by the trustees to his former wife.

12. The Secretary of State submits that, taking into account in particular the terms of s.25B(6)(b), under which the payment by the trustees direct to the Claimant's former wife is treated "for all purposes" as a payment *by* the Claimant in discharge of *his* liability for periodical payments, the correct analysis is that the whole of the pension payments remain "payable to" the Claimant within the meaning of s.30DD(1).

13. But for the particular way in which s.25B(6)(b) is framed, I would have been strongly of the view that the effect of the order is that the sums paid direct to the Claimant's wife are not "payable to" the Claimant. The reality of the situation is that the Claimant

neither receives them nor is entitled to receive them. They can be said still to benefit him in that they discharge his underlying liability for periodical payments under the court order, but it does not seem to me that are "payable to" him within the ordinary meaning of those words. There is in my judgment no reason for thinking that those words have in s.30DD(1) anything other than their ordinary meaning. I do not think that in ordinary parlance a sum which is by force of a court order and statute required to be paid to W is "payable to" H, even if H remains the beneficiary under the pension scheme and benefits from the payment in that it discharges his liability under the order to make periodical payments to W. This is the short point which the Claimant makes to me, and there is in my judgment great force in it.

14. Do the particular terms of s.25B(6)(b) require a different conclusion? It is there expressly provided that the payment to W shall be treated "for all purposes" as a *payment by H* in discharge of his liability under the order. I would accept the Secretary of State's submission that the words "for all purposes" mean what they say, and therefore must include social security purposes, and in particular the purposes of determining whether the sums are "payable to" H within the meaning of s.30DD. Does the fact that the payment to W by the pension scheme trustees must be treated as having been made *by H* mean that it must also be treated as having initially been paid or payable *to* him? It does not seem to me that it does. It seems to me that, in the context of statutory provisions such as this one, a sum can be treated as having been paid *by* a person in discharge of liability without it necessarily also being treated as having been paid or payable *to* him. S.25B(6)(b) does not in terms state (although it could have done) that the sums paid to W shall for all purposes be treated as paid or payable *to* H and then by him to W. I do not therefore think that s.25B(6)(b) alters the conclusion to which I would otherwise come.
15. Those are my main reasons for deciding this appeal in favour of the Claimant. I think that my conclusion is also to some extent supported by the following consideration. By the time of the introduction, by the Welfare Reform and Pensions Act 1999, of s.30DD, the earmarking provisions had been in force for some 4 years. I would assume that a substantial number of earmarking orders must have been made. The 1999 Act focused specifically on the position of pensions on divorce by introducing (among other provisions) provision for the making of pension sharing orders. I think it reasonable to infer that it would have been apparent to the framers of s.30DD that one of the common situations in which it would fall to be applied was that where an earmarking order had been made. I think that there is some argument for saying that, if it had been intended that sums which by such an order are required to be paid to W should be treated for the purposes of s.30DD(1) as nevertheless payable to H, the opportunity would have been taken expressly so to provide.
16. I was helpfully referred by Mr. Heath, in his comprehensive written submission, to some authorities decided under the former unemployment benefit legislation, which also contained a provision for abatement on account of payments of occupational pension. I was referred to R(U) 4/83 and R(U) 8/83, both decided under the abatement provisions. I do not, however, think that those cases are of any assistance. The background facts which fell to be considered were not sufficiently similar, and further the abatement provision in that legislation applied to pension payments which "fall to be made to him", and not to pension payments "payable to" him. I was also referred to R(U) 4/82, which concerned the question whether a sum awarded by an industrial

tribunal was "payable to" the Claimant, for the purpose of a different provision of the unemployment benefit legislation, where the employer company had gone into liquidation. Again, I do not think that the facts were sufficiently similar to render the decision of any assistance.

17. I was also referred, at my original suggestion, to a number of decisions under the income support legislation, but again I have not in the end found them to be of any real assistance. In particular, in R(IS) 4/01 an attachment of earnings order was made under which a monthly sum was deducted from the claimant's pension by the trustees and paid to the collecting officer of the court and then by him to the claimant's wife in satisfaction of a judgment which his wife had obtained against him. Mr. Commissioner Angus held that the sums so deducted and paid were not the "income" of the claimant. The background facts obviously bear some similarity to those in the present appeal, but the legislation which fell to be applied was different. It concerned the meaning of the word "income", and not the meaning of the words "payable to", and in addition there are specific provisions in the income support legislation relating to notional income and to income paid to third parties which were considered to be relevant, and which have no equivalents in the legislation with which I am concerned. In that case and in a number of other income support cases reference has been made to the decision of the Court of Appeal in *Leeves v. Chief Adjudication Officer*, reported as R(IS) 5/99. There a sum was paid to a student by way of grant at the beginning of a term in respect of that term, but he abandoned the course a few days after the beginning of the term. It was held that the amount of the grant which related to the period after the local authority had demanded repayment of a quantified sum from him was not his "income" for income support purposes, even though he had received and spent it, because he was under an immediate obligation to repay it. I do not find either the background facts or the legislation to be sufficiently similar to render anything said in that decision of any assistance in this case.

(Signed) Charles Turnbull
Commissioner

19 August 2003