

IDENTIFIABLE DECISION
NOT TO BE SENT OUT OF
THE DEPARTMENT

MHJ/1/LM

Commissioner's File: CIS/222/92

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the unanimous decision of the Exeter social security appeal tribunal given on 28 May 1991 is erroneous in point of law. Accordingly I set it aside and remit the matter for rehearing.

2. The claimant, to whom I shall refer as Mr G, appeals with leave of the chairman against the decision of the tribunal confirming the decision of the adjudication officer, issued on 11 June 1990, that Mr G was not entitled to income support because his income exceeded his weekly applicable amount.

3. The facts, which are not in dispute, are as follows. Mr G, who is now in his late 50s, was a police officer until he retired through ill health in about 1983. Mr G and his wife separated in February 1986 and, on 2 February 1987, he executed a document undertaking to pay his wife during his lifetime his net pension from the police authority. On 25 May 1990 Mr G claimed income support when he stated that he was in receipt of invalidity benefit and that his occupational pension was -

" ... paid directly to my wife's bank account by my former employers. I have no control over it."

The adjudication officer considered Mr G's application and held that his occupational pension was income which was to be taken into account together with his invalidity benefit and, having made proper allowance for Mr G's housing and other costs, found that his income exceeded his applicable amount.

4. Mr G appealed and on 28 May 1991 the tribunal confirmed the adjudication officer's decision and, among their reasons for so doing, stated that -

"The claimant's main concern ... was that his occupational pension had been taken into account in assessing his income, whereas as he stated in his appeal, 'I never see the money - it is not mine'. The Tribunal, however, were

unanimously of the opinion that the claimant's occupational pension was indeed his income which he chose to make over to his wife."

5. Not surprisingly, Mr G's appeal against that decision is supported by the adjudication officer now concerned with the case, whose submission is undated but was received in this office on 29 June 1992. Plainly the tribunal failed to consider - or, if they did consider, they failed to make adequate findings of fact - whether Mr G had in fact validly assigned his occupational pension to his wife. This is a question which was dealt with in Commissioner's decision on file number CSB/663/1984, and no doubt the tribunal did not have the advantage of being referred to that decision; nevertheless, and particularly in the light of the document dated 2 February 1987, the tribunal failed to deal with what should have been an obvious and potentially important point of law. Clearly their decision cannot be allowed to stand and accordingly I set it aside.

6. The matter will be remitted for rehearing by an entirely differently constituted tribunal who will hear the case afresh. Plainly their principal concerns will be whether Mr G's occupational pension is assignable and, if so, whether he has in fact made an irrevocable assignment of it to his wife.

7. In relation to assignability the new tribunal may be assisted by the line of cases dealing with service pensions and gratuities: Walker v Walker [1983] Fam 68 and [1983] 3 WLR 421; Roberts v Roberts [1986] 1 WLR 437; Happe v Happe [1990] 1 WLR 1282; and Cotgrave v Cotgrave [1991] 3 WLR 567. In Cotgrave's case Butler-Sloss LJ, giving the judgment of the Court of Appeal, compared the wording of section 4 of the Naval and Marine Pensions Act 1865 with section 203 of the Army Act and the Air Force Act, both of 1955, and held that an important distinction was that, whereas the Army and Air Force Acts specifically dealt with court orders, the 1865 Act did not do so. I mention that as it may be necessary for the new tribunal to construe section 9 of the Police Pensions Act 1926, which would seem to be the statute relevant to the instant case, which provides that -

"9 Assignment etc of pension to be void

Every assignment of or charge on a pension granted under the regulations made under section 1 above, and every agreement to assign or charge such a pension shall, except so far as it is made for the benefit of a dependent of the pensioner, be void, and on the bankruptcy of the pensioner such a pension shall not pass to any trustee or other person acting on behalf of the creditors."

That section would not appear to preclude a valid assignment, but the tribunal will of course decide that issue in the light of the evidence before them, which should include a statement from the police authority as to their perception of the arrangement whereby they apparently pay Mr G's pension direct to his wife.

No doubt Mr G (or the adjudication officer) can obtain the necessary information. It will also be necessary to have documentary proof of the account into which such moneys are paid, and of precisely who has authority to withdraw from it.

8. With regard to whether or not the document of 2 February 1987 constitutes an irrevocable assignment of his pension, the new tribunal will again determine that in view of the evidence before them and such submissions of law as may be directed to them. I would only comment that, as a contract, there was plainly consideration and that prima facie Mrs G would have a right of action in the event of non-performance. However, the document would seem to contemplate a dissolution of the marriage and, in those circumstances, the whole question of financial provision for Mrs G would be at large before the court. The mere fact that Mr G has entered into a legally binding agreement is not of course in itself conclusive evidence of irrevocability. Variation of post-nuptial settlements was very recently considered by Ewbank J in B v B (The Times Law Report 5 May 1993).

9. It also occurs to me with some force that people seeking an income-related benefit are under a duty - a moral duty at the very least and, in certain circumstances, a legal duty - to make the best use of their resources. In the instant case Mr G's occupational pension is clearly taxed at source, but whether on the basis of a coding giving him credit for his personal allowances, or simply at the standard rate, I do not know. In any event the present arrangement, whereby he pays his wife on a voluntary basis out of taxed income, is probably tax-inefficient in that more tax is possibly being deducted than would be the case if the periodical payments were being made pursuant to a formal agreement or order accepted by the Revenue authorities.

10. In my view Mr G should urgently seek professional advice regarding his position and be prepared to provide evidence at the rehearing regarding his tax affairs and, in the event of the new tribunal holding that he has not irrevocably assigned his pension, regarding what would be a reasonable figure for maintenance for his wife, in view of their respective resources and needs. Clearly it will be in Mr G's best interests to attend the hearing.

11. The issues referred to above will be for the new tribunal to determine, but in conclusion I feel bound to comment that, on the information at present before me, I have considerable sympathy for the view taken by the tribunal on 28 May 1991, who plainly considered that it was excessive and unreasonable for Mrs G to have the benefit of the whole of Mr G's pension, and that he was being generous at the expense of the community at large.

12. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 5 May 1993

