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CAS(A)
19/01/99

THE SOCIAL SECURITY COMMISSIONERS

(6)

Commissioner's Case No: CIS/2447/1998

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

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: MR J MESHER

[ORAL HEARING]

Claimant:

Social Security Appeal Tribunal:

Tribunal Case No:



DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed as a matter of law, but without any practical advantage to her. The decision of the Leeds social security appeal tribunal dated 3 February 1997 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute a decision on the claimant's appeal against the adjudication officer's decision issued on 29 November 1995 on the facts found by the appeal tribunal (Social Security Administration Act 1992, section 23(7)(a)(i)). My decision is that that appeal is disallowed and the adjudication officer's decision is confirmed, with the result that the amount of £8,532.44 is recoverable from the claimant under section 71 of the Social Security Administration Act 1992.

2. The appeal tribunal decided that the Secretary of State was entitled to recover from the claimant the amount of £8,532.44 overpaid by way of income support during the period from 17 November 1993 to 16 October 1995. It made the following findings of fact in box 2 of form AT2:

"1. [The claimant], who was born on 21 November 1969, lives with her partner, [Mr G], and son Derek in local authority property.

2. On 17 November 1993 she completed claim form A1 to claim Income Support. The form was received by the Benefits Agency on 29 November 1993 but was returned to [the claimant] for further information. The form was re-submitted by her. On the form [the claimant] declared that her partner was not engaged in any work and that there was no money coming in. In fact, [Mr G] was, and has at all times since, been engaged in full-time remunerative work.

3. On 30 November 1993 the Adjudication Officer awarded Income Support from and including 17 November 1993.

4. In a letter received by the Benefits Agency on 18 October 1995 [the claimant] requested help with payment of rent and disclosed that her partner was in full-time work. The Benefits Agency was not aware of [Mr G's] employment prior to the receipt of that letter.

5. On 29 November 1995 the Adjudication Officer reviewed the decision awarding Income Support and decided that a recoverable overpayment had taken place.

6. The amount of Income Support overpaid to [the claimant] during the period from 17 November 1993 to 16 October 1995 is £8,532.44, as correctly shown on Document 1J appended to the appeal papers."

3. There were also some important findings of fact included in the appeal tribunal's reasons for decision in box 3, which I set out nearly in full:

"The decision of the Adjudication Officer dated 30 November 1993 awarding [the claimant] Income Support from 17 November 1993 may be reviewed under Section 25(1)(a) Social Security Administration Act 1992, on the ground that it was given in ignorance of the fact that her partner was in full-time remunerative employment. That fact was material because it meant [the claimant] was not entitled to Income Support.

There is no dispute regarding the fact or amounts of the overpayment. The issue in the appeal is whether the Secretary of State is entitled to recover the overpayment from [the claimant].

The Tribunal finds as a fact that [the claimant] did not notify the Benefits Agency, nor was the Benefits Agency aware of the fact of her partner's employment until her letter (Document 26) was received on 18 October 1995. Mr Ryall, for [the claimant], mentioned the possibility that there had been earlier disclosure in a phone call from [the claimant] to the Benefits Agency shortly after the birth of her son on 20 January 1994, but [the claimant's] recollection of that phone call did not include telling the Benefits Agency of her partner's work. Mr Ryall also invited the Tribunal to take the view from the contents of that letter that [the claimant] was disclosing information, namely her partner's employment, in such an open manner that the inference was that the Benefits Agency were already aware of the fact or, at least, that [the claimant] did not think her partner's job was a bar to her receipt of Income Support. The Tribunal does not find the former inference plausible and the latter inference is not a necessary finding in view of the unequivocal misrepresentation admittedly made by [the claimant] on form A1. There is no suggestion that the misrepresentations were fraudulent. It is not disputed that [the claimant] was aware of her partner's employment, which brought money into the household

The Tribunal determines that the overpayment was made in consequence of the misrepresentation of the material fact made by [the claimant] on form A1.

Mr Ryall argued, however, that from the date of a review of [the claimant's] entitlement to Income Support, which was probably carried out on or about 22 March 1994, following the birth of her son, any overpayment no longer resulted from the initial misrepresentation on the part of [the claimant] but was the consequence of negligence on the part of the reviewing Adjudication Officer. Mr Ryall suggested,

and the Presenting Officer accepted, that the Adjudication Officer carrying out that review had failed to identify that there was no proper basis on which [the claimant] could be considered to qualify for Income Support, because neither she nor her partner were signing on as available for employment and there was no evidence before the Adjudication Officer that would have shown that any of the exemptions in Schedule 1, Income Support (General) Regulations from the requirement of availability for employment, applied in their case. Mr Ryall sought to distinguish the case of Duggan (appended to R(SB) 13/89) on the ground that, in Duggan, the Adjudication Officer did have a solid basis on which to make an award of Income Support, though failed to make enquiries that would have led to the discovery of the claimant's wife's receipt of Unemployment Benefit, which would have had a bearing on the amount of [supplementary benefit] awarded. In the present case, on the other hand, Mr Ryall said that the Adjudication Officer's negligence was of a more fundamental nature in that the Adjudication Officer ought to have realised on the information already before him that the award of Income Support to [the claimant] was flawed.

The Tribunal does not accept that argument. It does not consider that there is a 'higher' degree of negligence on the part of Adjudication Officers that would exonerate a claimant who has clearly made a misrepresentation that has initiated an overpayment. The Tribunal considers itself bound by the decision in Duggan, which is not distinguishable from the present case. The Tribunal had regard to a particular passage in Duggan which is a quotation by Croom-Johnson LJ at page [16G] of the Appendix to R(SB) 13/89,

'... the Commissioner had said 'it does not in any event assist the claimant as it is well established that negligence on the part of the Department does not itself exonerate a claimant from his or her obligation under the relevant legislation. ... Even if the adjudication officer were carrying out his duties negligently [by not making more enquiries] that does not take the matter any further in favour of the claimant as it does not enable the claimant to say that if that be the case then in some way or other the claimant not having disclosed a material fact it exonerates him from so doing and the overpayment was not made in consequence of his failure to disclose.' The Commissioner had clearly addressed his mind to what in my view was the real point that matters in this case, which is whether or no the admitted failure to disclose on the part of Mr Duggan resulted in the overpayment of benefit to Mr Duggan.'

The Tribunal considers that the foregoing remarks are equally applicable in the case of misrepresentation.

Accordingly, the Tribunal is satisfied that the entirety of the overpayment throughout the period from 17 November 1993 to 16 October 1995 was made in consequence of the misrepresentation made by [the claimant] and the Secretary of State is entitled to recover from her the overpaid sum of £8,532.44 by virtue of Section 71 Social Security Administration Act 1992."

4. The claimant now appeals against the appeal tribunal's decision, with leave granted by its chairman. Following the exchange of written submissions, I directed that there was to be an oral hearing of the appeal, in view of the difficulty of determining the scope and effect of the decision in Duggan. At the oral hearing, the claimant was represented by Mr Rod Ryall, of Leeds Citizens Advice Bureau. The adjudication officer was represented by Mr J Hill, of the Office of the Solicitor to the Department of Social Security. I am grateful to both representatives for their carefully prepared and helpful submissions, which nevertheless did not reduce the difficulty of the legal questions before me.

5. The main point made by Mr Ryall was that the appeal tribunal erred in law in treating Duggan as having laid down a rule of law which required it to decide that the claimant's misrepresentation remained a cause of the overpayment throughout the period to 16 October 1995. In essence, he repeated the submission made to the appeal tribunal and recorded in its reasons for decision. He stressed that in Duggan the information before the adjudication officer at the date of the review provided a firm basis for continuing the claimant's entitlement to supplementary benefit when the payment of maternity benefit to his wife ceased. The Court of Appeal held that the adjudication officer did not neglect any duty in failing to enquire whether the claimant's wife had become entitled to unemployment benefit, but that, if he had, that would not have prevented the claimant's failure to disclose the receipt of unemployment benefit from having been one of the causes of the overpayment of supplementary benefit. In contrast, Mr Ryall said that in the present case, once the adjudication officer knew that the claimant's son had been born, the basis for her continued entitlement to income support was removed. She was no longer exempted from the condition of being available for employment on the ground of pregnancy and she was not a lone parent. On review, the adjudication officer should not have continued her entitlement without having investigated whether the claimant satisfied some other ground of exemption from the condition of availability or was available for employment. Mr Ryall submitted that the adjudication officer's failure to do that could only be the result of an error of law, which not only put the case into a different category from Duggan, but had the consequence that any subsequent overpayment of income support was solely the consequence of that error of law and not of the claimant's misrepresentation on the claim form.

6. In reply, Mr Hill submitted that the appeal tribunal's decision was correct. The continuation of the award of income support on review continued to be based on the misrepresentation that the claimant's partner was not in remunerative work. There was no dispute that on review the adjudication officer had been in error in not making further enquiries, but that was an additional cause of the subsequent overpayment. It did not remove the continuing causative effect of the misrepresentation.

7. I accept Mr Ryall's submission to a limited extent, far enough to lead to the conclusion that the appeal tribunal's decision was erroneous in point of law, but not to the extent that the only possible result would have been in favour of the claimant. In my judgment, although the appeal tribunal set out its reasoning particularly clearly and cogently, it misinterpreted the effect of the Court of Appeal's decision in Duggan and in consequence asked itself the wrong question. I need not then consider the other point raised in the appeal, about a possible breach of the principles of natural justice in statements made by a member of the appeal tribunal during the hearing on 3 February 1997.

8. The Court of Appeal's decision in Duggan was closely related to the particular circumstances of the case. Croom-Johnson LJ, in the passage quoted by the appeal tribunal, was referring to the result in the particular circumstances of Duggan. Similarly, May LJ at page 12B, in talking of the wrong assumption by the adjudication officer not being the sole cause of the overpayment, was referring to the particular circumstances. The judgments do not support a rule that, whatever the extent or nature of the error by an adjudication officer, if it can be labelled negligence, it does not remove the causative effect of some earlier failure to disclose or misrepresentation by a claimant. Those passages seem to me not to lay down any general rules of law, but merely require all the circumstances of a case to be looked at.

9. At one point, May LJ appeared to lay down a very strict rule. He said (at page 12C):

"As a matter of common-sense, which questions of causation always are, if one poses the question: did the failure of the claimant to disclose the fact that his wife was in receipt of unemployment benefit have as at least one of its consequences the overpayment of the supplementary benefit?, the only reasonable answer that one can give is 'yes'."

10. If that question were posed, without more, in the present case, it would inevitably produce the answer that the claimant's misrepresentation had as at least one of its consequences the overpayment of income support, even for the period from 22 March 1994 to 16 October 1995. But that question cannot possibly provide the sole test in all cases. Say that an income support claimant initially fails to disclose the receipt of another

source of income, and some time later tells the income support authorities of the receipt, but the adjudication officer mistakenly thinks that the income is irrelevant and does not alter the amount of income support paid until the mistake is realised some months later. May LJ's question would produce the answer that the initial failure to disclose had as at least one of its consequences the overpayment of income support even after the claimant had made disclosure. It plainly is not right that an overpayment for a period after disclosure has been made should be recoverable, and such a result was not in my view contemplated by the Court of Appeal in Duggan.

11. It may well be that the court's emphasis in Duggan on the claimant's continuing obligation to disclose was important, and that it was assumed that one should look week by week at whether there was a breach of the continuing obligation in that week, which had as a consequence the payment of benefit in that week. That link would end once disclosure was made. But it is a different matter where the right to recover is put on the ground of misrepresentation. There the question is whether continuing payments of benefit are a consequence of one or more particular misrepresentations in the past. In my view, if a claimant discloses information which corrects what was wrong in an initial misrepresentation, but that information is disregarded and benefit remains in payment, the continued payment is not a consequence of the initial misrepresentation. In that circumstance also, the answer to May LJ's question cannot be controlling. I think that that would equally be the case if what was disclosed was not information which corrected the misrepresentation, but information which on its own inevitably led to the conclusion that entitlement to benefit should cease. An example would be where a claimant initially says that her partner is not in full-time work when he is, but later tells the income support authorities when she wins £10,000. If the adjudication officer mistakenly determines that that does not affect entitlement to income support, which continues in payment, I do not think that the continued payment of benefit could be said to have even as one of its causes the initial misrepresentation.

12. Mr Ryall submitted that the present case falls into that last category, but I do not accept that. The information that the claimant had had her baby would not on its own inevitably lead to the conclusion that entitlement to income support should cease. Although that information would entail that seven weeks after the birth the claimant would no longer fall within paragraph 9 of Schedule 1 to the Income Support (General) Regulations 1987, as in force at the relevant time, it would not necessarily entail that the claimant was not entitled to income support at all. It would show that the claimant was not exempted from the condition of being available for employment on that ground. An existing award of income support should have been reviewed and revised only after considering whether some other ground in Schedule 1 was satisfied and after giving the claimant

the opportunity to make herself available for work. That is the principle which Commissioners have adopted on many occasions in the context of claimants who are found to have become capable of work, having previously been accepted as incapable. The circumstances of the present case are such that a decision on the question of the causation of a subsequent overpayment of benefit can only be reached after considering all the circumstances.

13. It is for that reason that I have concluded that the appeal tribunal erred in law. It wrongly took the view that there could be only one answer in the light of the decision in Duggan, and that the adjudication officer's negligence could not possibly affect the issue of causation. Therefore, it failed to ask whether in the light of all the circumstances the payment of benefit from 22 March 1994 to 16 October 1995 had as at least one of its causes the claimant's misrepresentation of material fact on the claim form. Because in my judgment there is not a single legally proper answer to that question, this is not a case where I can uphold the appeal tribunal's actual decision as legally correct, although its reasoning might have been faulty. As it is possible that asking the right question might have resulted in a different decision, I must set the appeal tribunal's decision aside.

14. However, I cannot then avoid making the decision on the claimant's appeal against the adjudication officer's decision. The relevant facts have been fully found by the appeal tribunal. Asking the question identified in the previous paragraph, I must look particularly at the adjudication officer's failure when carrying out the review on or about 22 March 1994 to investigate whether there was any other ground apart from the exemption from the condition of being available for employment in paragraph 9 of Schedule 1 to the Income Support Regulations on which the claimant's subsequent entitlement to income support could be based. I must ask whether, in all the circumstances, the nature of that failure was such that the claimant's misrepresentation about her partner's full-time employment was not even one cause of the subsequent overpayment of benefit, all the while bearing in mind that the burden of proving that an overpayment is recoverable lies on the adjudication officer. I have concluded that the adjudication officer's failure, although it was an error of law and considerably more serious than the failure in Duggan, did not have that effect. It is not in dispute that the initial award and payment of income support was a consequence of the misrepresentation. In my judgment, which I do not think that I can expand or unpack any further, the adjudication officer's failure was not such as to break the causative link between the misrepresentation and the subsequent payment of income support. The failure was an additional cause of that overpayment, but not the sole cause. The adjudication officer has proved the existence of all the conditions for the recoverability of an overpayment under section 71 of the Social Security Administration Act 1992. Accordingly, my decision has to be as set out in paragraph 1 above.

15. As I said in paragraph 31 of decision CF/3532/1997, referred to by Mr Hill at the oral hearing, adjudication officers, appeal tribunals and Commissioners have no power to apportion responsibility for overpayments as between a number of causes. The question for those authorities under section 71 of the Social Security Administration Act 1992 is simply whether a misrepresentation of or a failure to disclose a material fact is one of the causes. It is then for the Secretary of State to decide whether or not to enforce recovery of the full amount of the overpayment which is legally recoverable under section 71. The effect of a neglect of duty or an error of law by an adjudication officer, when proper action could have prevented further overpayment, will be relevant to that decision. I do not know what view the Secretary of State has taken in the present case, although Mr Ryall told me that deductions are currently being made from the claimant's benefit. I request the Secretary of State to consider or reconsider his view in the light of my decision, but the claimant must not raise any false hopes about the likely result of that process.

(Signed) J Mesher
Commissioner

Date: 22 December 1998