

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CS/17203/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MR COMMISSIONER J M HENTY

1. My decision is that the decision of the SSAT was erroneous in point of law. I set it aside and remit the case for rehearing in front of a differently constituted tribunal.

2. This is an appeal with leave granted by me from the decision of a SSAT dated 14.6.91.

3. The appellant, to whom I shall refer as "Mrs T", was formerly married to the claimant, to whom I shall refer instead as "Mr B". Mr B had made a claim for invalidity benefit, on 19.1.90 which was awarded from 24.1.90. On the instructions of Mr B, and under duress from him, Mrs T made a claim for extra benefit in respect of herself and their three children and, on 22.1.93, completed the necessary form BF225(1F/4). This claim was, as of course it had to be, made in the name of Mr B, and was plainly signed by Mrs T expressly "on behalf of" Mr B. In part D of the form the question is asked:

"1. Has your spouse or partner an employer?"

To that, Mrs T unequivocally answered "No". In fact, Mr B was then out of work, but Mrs T was completing the form as his agent and the spouse referred to in that question was not of course Mr B, but Mrs T herself. Throughout the relevant period Mrs T was herself in fact in full-time employment. Anyhow, as a result, extra benefit was paid to Mr B - and Mrs T never saw a penny of it herself - which would not otherwise have been paid, and, in the appeal in this case, the tribunal held that there had been an overpayment of £4,643.18 which was recoverable from Mrs T, less offset of any family credit to which she would have been entitled for the same period i.e. from 6.5.91 to 17.10.92.

4. Unquestionably, the reply to the question in the form BF225 was (a) a misrepresentation, (b) of a material fact, and (c) in consequence whereof an overpayment was made, which would not otherwise have been made. Therefore, in accordance with section 71(3) of the Administration Act the overpayment was "recoverable from the person who misrepresented the fact or failed to disclose it", whoever that person, for the purposes of this legislation, might have been.

5. very understandably, the AO decided to proceed against me B as principal, for whatever merits Mrs T might have, it is clear that Mr B had none. However, the AO proceeded only on the grounds of failure to disclose and not on the grounds of misrepresentation. Once it was accepted that Mr B was totally ignorant of the fact of Mrs T's employment, as the Tribunal who sat on 9.8.94 found he was, that claim was bound to fail. I suspect that a claim based on misrepresentation may, in the event, have a better chance of success, but that is not before me

on this appeal. Whether the claim can be re-opened now is not a matter on which I express any view.

6. The A0, however, now accepts that the case is on all fours with CIS/710/94. The misrepresentation was made by Mrs T for and on behalf of Mr B and was, therefore, in the ordinary course of agency law, the act of Mr B and not of Mrs T. The approach adopted in CIS/710/94 is an approach which I intend to adopt, rather than the approach which some Commissioners have adopted in the past, including I think myself on one occasion, based on the literal construction of subsection (3) of section 71 i.e. that the overpayment is recoverable from the person who actually made the misrepresentation, regardless of the capacity in which he made it. That person could, therefore, literally be the agent who made the misrepresentation, but the agency line of reasoning now seems to have been largely accepted and I therefore follow it.

7. However, in law, an agent may have a separate liability for misrepresentation in circumstances where fraud is involved. In Spencer Bower and Turner on Actionable Misrepresentation 3rd Edition at p1172, the point is put thus:

"No difficulty arises in general where the person who makes the misrepresentation has himself the mens rea i.e. has himself no honest belief in its truth. In such a case, he himself will be personally liable in fraud whether he be principal or agent: and if he be an agent, his principal will also be liable if he has made the representation within the scope of his authority express or implied."

See also Bowstead on Agency 16th Edition 9-109 et seq.

8. For the purpose of defining what fraud means in this context I refer to para 357 in Vol 31 of Halsbury 4th Edition:-

"Not only is a misrepresentation fraudulent if it was known or believed by the representor to be false when made, but mere non-belief in the truth is also indicative of fraud. Thus, whenever a person makes a false statement which he does not actually honestly believe to be true, for the purpose of civil liability, that statement is as fraudulent as if he had stated that which he did not know to be true, or knew to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately; indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief.

"A representor will not, however, be fraudulent if he believed the statement to be true in the sense in which he understood it, provided that was a meaning which might reasonably be attached to it, even though the court later holds that the statement objectively bears another meaning, which the representor did not believe."

9. In my judgment, the tribunal erred in law in holding that necessarily the representation was that of Mrs T and not of the principal, Mr B. The new tribunal should consider the circumstances in which the misrepresentation was made and what instructions Mr B actually gave to Mrs T for the completion of the claim form. If the misrepresentation was made fraudulently within the test from the passage in Halsbury I have cited above, then there is no reason why Mrs T should not be liable, and, if authorised, Mr B also: if the misrepresentation was made innocently, then the principle in CIS/710/94 will apply and the misrepresentation will be that of Mr B and not Mrs T.

10. I think I should now deal quite shortly with the question of duress. Mrs T claimed she made the application and signed the BF225 under the duress of Mr B, a claim which was accepted as fact by the tribunal, and, of course, is accepted by me. I cannot, however, see how in this context that can affect the issue, unless of course the party deceived - in this case the DSS - had some form of notice of the duress, which plainly they had not. Duress does not avoid a transaction - it only makes it voidable. If anything, the opposite might be the case, for, if a person makes a misrepresentation under duress, it may be a natural inference that he knew the representation he was making was untrue and thus he would be tainted with fraud. It may, however, be that there is a perfectly innocent explanation in this case. Perhaps, when completing the form, Mrs T did not understand precisely what she was doing and the reference in the form to "spouse" she may have thought was a reference to her spouse, i.e. Mr B, and not to herself. I do not know the answer to this question and the new tribunal will have to endeavour to find it out.

11. Since the decision of the tribunal, Mrs T has at pps 70/73 opened up a wholly new line of approach, which will have to be considered by the new tribunal. In that statement Mrs T casts doubt on whether the "No" in the claim form was in her handwriting. She says:

"In the Schedule of Documents numbered 1-37 in this case there is a claim form for an increase of benefit for spouse and children. I confirm that the claim form is in my handwriting save for the answer no to a question in Part D which is not my handwriting. I cannot recall precisely the reason why I completed this form. I have signed it on behalf

of my ex-husband. I seem to recall that he made me fill it in because he thought it would be more convincing that he was unfit for work if I completed it for him ... I was not aware what this form of 22 January 1990 was for except it was something to do with my husband's claim for benefit. I do not recall reading it and may have been simply told by my husband to complete it in the way in which he stated."

There are, however, in Part D of the claim form (3) two occasions on which "No" appears as an answer. One is in answer to the question which gave rise to the misrepresentation, "Has your spouse or partner an employer?", and the other in reply to a question whether the latest pay slip was being enclosed. They seem to be in different handwriting and the new tribunal will have to decide who wrote the "No" in answer to the question giving rise to the misrepresentation and, if it was in Mrs T's handwriting, when it was written i.e. whether before or after Mrs T signed the form. If it was written in by Mr B before Mrs T signed on his behalf, Mrs T cannot shelter behind the fact that it has been written in by Mr B and, in any event, a plea of non est factum - i.e. the form was not that of Mrs T - will not lie - see Gallie v. Lee 1971 AC 1004. If Mrs T signed the form, in effect in blank, and left it to Mr B to complete, it would certainly be arguable that Mrs T was then and, for that purpose acting as principal, and Mr B as her agent. I am not therefore, at all sure, how far this new point will in fact assist Mrs T, but the new tribunal will have to consider the matter and find all necessary facts in order to reach a conclusion in accordance with the considerations I have indicated above. If however the "No" given in answer to the question which gave rise to the misrepresentation was in fact in Mrs T's hand - and I suspect that it may have been - see 5A the direction of 14.6.99 - then the new point raised by Mrs T in her statement above will not arise, and the matter can be determined accordingly in accordance with the general principles I have earlier addressed above.

12. My decision is therefore as set out in para 1 above.

(Signed) J M Henty
Commissioner

(Date) 3 August 1999