

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the Incapacity Benefit Appeal Tribunal dated 8 September 2005 is erroneous in law. I set that decision aside and, as empowered by section 14(8)(a)(ii) of the Social Security Act 1998, I give my own decision which is:-

1. The Secretary of State's decision of 12 May 1995 awarding the claimant Incapacity Benefit does not fall for revision on the grounds that the claimant has worked on any day in any week from and including 12 May 1995.

2. Accordingly incapacity benefit paid to the claimant for the period from 12 May 1995 to 3 October 2001 has not been rendered overpaid by the Secretary of State's revision decision of 14 September 2001 and is not recoverable from the claimant in terms of section 71 of the Social Security Administration Act 1992.

2. The claimant appeals, with my leave, against the tribunal's decision that incapacity benefit amounting to £20,845.70 paid to the claimant for the period from 12 May 1995 to 3 October 2001 was overpaid and is recoverable from the claimant in terms of section 71 of the Social Security Administration Act 1992 on account of the claimant's misrepresentation of work done by him in that period.

3. The claimant worked as a general medical practitioner until May 1995. He was also a director of a family company in which his wife, son and daughter were his co-directors. The company's enterprises include, or have from time to time, included a care home, rented housing accommodation and a restaurant. The claimant ceased his work as a general practitioner on 8 May 1995 by reason of his ill-health. He claimed incapacity benefit from and including 9 May 1995. When he was medically examined for the purposes of the All Work Test the illnesses recorded by the examining doctor as having been previously diagnosed or found during the examination were bronchial asthma, hypertension and raised cholesterol level, possible angina on effort, deafness, tinnitus, vertigo, dyspepsia from a hiatus hernia and depression. On his application for benefit the claimant said that he had ceased work as a general medical practitioner but confirmed, in answer to a question on the form, that he was a director of the family firm and said that he did an average of 2 hours per week consisting of occasional meetings with the other directors to decide upon company matters. Incapacity benefit was awarded from and including 12 May 1995.

4. After the claim had been running for some time, how long is not apparent from the papers, the Department for Work and Pensions received an allegation that the claimant was working while receiving benefit. The claimant was interviewed, in the presence of his solicitor, by a departmental investigating officer. The evidence put to the claimant in that interview included evidence that the expenses in connection with his directorship attributed to the claimant were £9,471 in the tax year ended 5 April 1996 and from £6,645 to £10,299 in the years from 1997 to £2,000, evidence of director's fees of £12,000 per annum, evidence of the claimant's attendance at site meetings in connection with alterations to the building containing the restaurant and the rented accommodation, of his involvement in a dispute with an architect about the care home, and of his involvement in an application for a conversion of a building to a guest house. There was also evidence obtained from the Inland Revenue that

the claimant's business mileage in his car had been between 2,500 and 17,999 miles per year, that his annual business expenditure on telephone use was £315 in 1996 and £3,330 in 2001 and that £4,002 was paid to him in respect of business entertainment in 1996. On the basis of that evidence and the claimant's answers to the questions put to him by the investigating officer during the interview the Secretary of State's decision-maker decided that the claimant had been working in the relevant period and was to be treated as not incapable of work by virtue of regulation 16 of the Social Security (Incapacity for Work) (General) Regulations 1995. He revised the awarding decision of 19 May 1995 on the grounds that the decision-maker had been ignorant of the material fact that the claimant was "still gainfully employed", the decision on revision being that from and including 12 May 1995 the claimant was not entitled to incapacity benefit.

5. A decision-maker then decided, on 12 October 2001, that incapacity benefit paid to the claimant from 12 May 1995 to 3 October 2001 had been overpaid and was recoverable from the claimant by reason of his non-disclosure of the fact that he was gainfully employed. The claimant appealed that decision and the revision decision to an appeal tribunal. The claimant asked for an adjournment of the tribunal hearing because he was too ill to attend. The tribunal heard and dismissed the appeal in the claimant's absence. A Social Security Commissioner, accepting the arguments of both the Secretary of State's representative and the claimant, decided that the tribunal's refusal to accede to the claimant's request that the hearing be adjourned on account of his inability to attend due to ill-health was a breach of the rules of natural justice and set the tribunal's decision aside.

6. When the case came before the tribunal of 8 September 2005 to be reheard the Secretary of State's representative, as he had foreshadowed in his submission to the Social Security Commissioner, changed the ground for recovery under section 71 of the 1992 Act from the claimant's non-disclosure of the fact of his working to the claimant's misrepresentation on the Forms Med 4 which he has submitted subsequent to making his initial claim for benefit on which he had disclosed the fact that he was a director of the family company. The misrepresentation alleged was that on each of the Forms Med 4 the claimant had declared, incorrectly, that he had not worked since the date of his last claim.

7. The reasons for the tribunal's dismissal of the claimant's appeal are stated thus:-

" 1. The Tribunal took into account all the scheduled evidence and the evidence at the hearing.

2. The appellant attended the hearing and gave evidence. He attended with his representative and 3 witnesses. It was particularly regretted that there was no Presenting Officer and no one present on behalf of the Secretary of State or from the Department. At the very least, a Presenting Officer would have been able to help in the calculation of the overpayment. This would have avoided the need to include a provision for liberty to apply within the decision.

3. The appellant did work which was not exempt and which was not to be disregarded under the principle of *de minimis non curat lex*. The work was carried out during the period 12 May 1995 to 3 October 2001. During this period the appellant received Incapacity Benefit.

4. The work involved was acting as a director of the family company [] Ltd. It involved writing letters, attending meetings and occasional phone calls. On average the appellant spent 2 hours per week on this work. The appellant was a credible and trustworthy witness. His evidence on this point was accepted. The evidence had initially been given in a claim form. It had later been stated in an interview. It was repeated at the Tribunal hearing. The appellant only did this work while he was in this country. During the periods in question, 12 May 1995 to 3 October 2001, he had 34 trips abroad or other periods when he was not working. These are recorded in the schedule attached to the decision. The trips abroad were not business trips. While he was abroad the appellant may have done some work. However, this work was to be disregarded as being negligible and came within the principle of *de minimis non curat lex*.

5. With the exception of the periods of time referred to on the schedule attached to the decision, the appellant did work. It is provided in regulations that if a person does work then they are to be treated as capable of work on each day of the week during which they do work. During those weeks the appellant was not entitled to Incapacity Benefit. For the avoidance of any doubt, the appellant did work for the whole of the period between 12 May 1995 and 3 October 2001, excluding out of that period the 34 individual periods referred to on the schedule attached to the decision. In those 34 periods, the appellant did not work.

6. The Tribunal relied on all the evidence of the various parts of the documentation. However, in particular the Tribunal relied on the consistent evidence from the appellant that when he was in this country he had worked 2 hours per week on average. The decision of the Tribunal was not inconsistent with the evidence from witnesses who had put in written statements. Reference is not made to all those witnesses here. However, in particular, the appellant's wife had stated that her husband was not able to participate actively in the running of the business. However, she did refer to rubber-stamping issues, offering advice and signing documents. She also referred to the period of 2 hours per week. There was within the documents copies of estimated times which the appellant had spent on various activities for the company between 1995 and 2001. The figures on those documents did not agree with the evidence that [the claimant] had worked 2 hours per week. However, those documents did not include all the work which he had done for the company. They were put to the appellant in particular and the evidence relating to 2 hours per week on average was still confirmed.

7. In reaching the initial decision, great reliance appears to have been placed on the fact that the appellant received director's fees of £12,000 per annum from the company from 1995 to 2001. He did receive fees in that amount. The fact that he did so was not the principle or determining factor in the decision that he had worked. The relevant question was whether or not the appellant did work. It appears that several matters had not been taken into account. The appellant had been a founder director of the company and his name was still closely associated with it. It was understandable that the other directors would wish to maintain this association. It was understandable that the family would wish to recognise the part which the appellant had played in building up the company. Further, it was understandable from a cultural point of view that they would wish to accord the appellant the respect which they considered due to

him. These factors were taken into account by the Tribunal. They did not affect the principal fact that the appellant had worked.

8. The Tribunal further took into account the appellant's health and that he was not able to be as active in the running of the company as he would have wished. There was a letter from [the claimant's consultant ENT surgeon] dated 12 July 1995. In addition to the points in that letter, the appellant had also suffered problems with his heart and angina.

9. Also, in respect of the work carried out, the relevant test was not the contribution which the appellant made to the running of the company and whether or not that work could have been done by someone else and the extent to which it was necessary that the appellant did do work. The relevant test was did the appellant work.

10. In reaching the decision of 8 October 2001 great reliance was also placed on the fact that there had apparently been business expenses in the name of [the claimant]. That reliance was misplaced. When business expenses are incurred, this may be an indication of the extent of work carried out. However, in this case, the amount of any business expenses which the appellant incurred personally were negligible. The appellant's evidence was to this effect. It was also confirmed by the accountant. The appellant rarely drove the car. He did not use the telephone. He did not entertain customers or others, unless other directors were present.

11. The decision awarding Incapacity Benefit was superseded. The ground for the supersession was ignorance of a material fact. The material fact was that the appellant was working.

12. It fell to be decided whether the overpayment was in consequence of a misrepresentation. The Secretary of State had earlier relied on the ground of failure to disclose. That was an incorrect ground. Reliance was placed on 3 medical certificates dated 6 June 1995, 3 July 1995 and 2 October 1995. Each of those certificates included the words 'I declare that because of incapacity I have not worked since the date of my last claim'.

13. For there to be a recoverable overpayment, it is not necessary for it to be shown that any misrepresentation was fraudulent. The law specifically provides that where there has been a misrepresentation, the overpayment is recoverable whether or not the misrepresentation was fraudulent. If it had been so, the overpayment would not be recoverable. The Tribunal makes a specific finding that there has been no fraudulent misrepresentation.

14. Reference must now be made to the claim form for Incapacity Benefit form SC1 completed on 15 May 1995. The claim form is copied in the documents and the relevant pages are pages 9 and 10. It is acknowledged on behalf of the Secretary of State that on receipt of that claim form correct procedures were not followed. There appeared to be contradiction. The correct procedure would have been for the form to be sent back for clarification. It was not done. There is no excuse put forward for this. This is accepted on behalf of the Secretary of State in the submission to the Commissioner and at page 348. Reference having been made to page 348, there is

also a further mistake on that page on behalf of the Secretary of State. It is stated that the material fact was that the claimant was working self-employed. That is not the fact at all. The material fact was that the appellant did work as a company director. As a company director the appellant was not self-employed. He was employed by the company. The appellant signed the 3 medical certificates including the sentence quoted above. When he signed those certificates and signed to the effect that he had not worked he was referring to his job as a GP. His evidence to the Tribunal was that he himself did not consider that what he did for the company was work. This might be understandable at the relevant time which was immediately after he had to give up work as a GP. However, the statement said that he had not worked. That information was incorrect.

15. There must be a clear causal connection between the misrepresentation and the overpayment. In this case there was a clear connection. The certificates and the statements in them were read as freestanding documents. They did not have to be related back to the form SC1 and read taking into account the information on that form. There was no inconsistency or ambiguity in the medical certificates themselves.

16. This was not a situation where a number of forms had been submitted by a claimant containing conflicting information. The point has already been made in this statement that the correct procedure was not followed on receipt of form SC1. However, the medical certificates dated 6 June 1995, 5 July 1995 and 2 October 1995 were on subsequent dates. Whatever the position at the time of the form SC1, the later certificates stated that the appellant had not worked. Further, it is still possible for there to be a misrepresentation of a material fact even in a situation where there has been an earlier disclosure of that fact. The Department is entitled to rely on statements in current forms. There is no duty to check back and see whether those statements are consistent with earlier disclosures.

17. There was a clear causal connection shown between the misrepresentation and the overpayment. Consequently, the overpayment was recoverable.

18. Based on the above facts and for the above reasons the Tribunal reached its decision. The appeal was allowed. The decision of 8 October 2001 was revised. There has been an overpayment. This now has to be calculated. The overpayment is recoverable because of the misrepresentation of a material fact.

19. This statement includes the information requested in the letter from [the relevant local office of the Department for Work and Pensions] dated 27 September 2005.

20. The Tribunal found as a fact that the appellant was absent from Great Britain for the periods referred to on the schedule attached to the Decision Notice excluding the period at No. 23.

21. The tribunal did not make any finding where the appellant was when he was outside Great Britain. He did no work when he was outside Great Britain.

22. The Tribunal made no findings in relation to the periods when he was abroad, as to whether he was or was not to be disqualified for receiving Incapacity Benefit. The submission documents had not raised this point. The appellant had not been put on notice that this might be considered.

23. For the period at No. 23 from 24 June 1999 to 31 August 1999 the appellant did not work and he was medically incapable of work.

24. It has not been possible for the Secretary of State to comply with the direction and the decision to prepare a further schedule of overpayment, within the period stated. The Secretary of State first required sight of this statement. A further schedule has still to be prepared, the appellant is to have sight of it, and a liberty to apply provision still applies.”.

8. The grounds for appealing the tribunal’s decision to a Commissioner stated for the claimant are that despite the claimant’s submissions to the tribunal having included the citation of Commissioners’ decisions to the effect that work for as little as 2 hours per week is de minimis and does not amount to work within the meaning of regulation 16 of the Social Security (Incapacity for Work) (General) Regulations 1995 there is no explanation in the statement of the tribunal’s reasons for its decision as to why the tribunal concluded that the work which it accepted the claimant had done for only 2 hours per week on average was not de minimis. The tribunal had erred in law in treating the statements by the claimant on the Forms Med 3 as freestanding statements, not to be read together with the original application form. Also, there had been a breach of the rules of natural justice in that after the notice of the tribunal’s decision had been issued the Secretary of State’s representative had written the letter referred to in paragraph 19 of the statement of reasons to intimate to the tribunal chairman the points which the statement of reasons should cover.

9. In granting leave to appeal I observed that the claimant’s grounds for appeal may be arguable and that it was also arguable that as the statements made by the claimant on the Forms Med 3 related to past periods they did not amount to a misrepresentation in respect of the whole of the period of overpayment of benefit.

10. The Secretary of State’s representative does not support the appeal. In a written submission of 8 February 2006 she states that it appears that the claimant’s assertion that the Secretary of State’s post-hearing communication with the tribunal was a breach of the rules of natural justice had been made without the claimant or his representative being aware of the contents of the letter in question. She produces a copy of the letter and explains that it was written to indicate that the Secretary of State’s representative could not comply with the direction to provide a corrected calculation of the amount of the overpayment without an explanation of the factual basis of the tribunal’s conclusion that the current calculation is incorrect. In the event there had been no breach of the rules of natural justice. The Secretary of State’s representative argues also that the tribunal has not erred in law by failing to explain why the work which it accepted the claimant had done was not de minimis because the issue before the tribunal was undisclosed work not the de minimis principle. As to the question of whether or not the claimant’s misrepresentations on the Forms Med 3 were freestanding misrepresentations which brought about the overpayment, the Secretary of State’s representative refers to Morrell v. Secretary of State for Work and Pensions [2003] EWCA Civ 526 and Duggan v. Chief Adjudication Officer, reported in the appendix to R(SB) 13/89,

as establishing the principle that when an overpayment has initially been brought about by an official error the causal connection between that official error and the overpayment can be broken by a claimant's failure to disclose or misrepresentation of a material fact. In that case the claimant remains liable for his non-disclosure or misrepresentation even although the official error is a parallel cause of the overpayment.

Misrepresentation on the Forms Med 3

11. Despite the observation which I made when I granted leave to appeal I think that, had the claimant's statements on the Forms Med 3 been incorrect, the misrepresentation involved would have been, for the purposes of section 71 of the 1992 Act, a relevant cause of the overpayment of benefit. I say that because the test for whether or not there is any causal connection between an overpayment and a misrepresentation is whether or not benefit would have been paid had there been no such misrepresentation. In this case it is true that the misrepresentations, if any, on the medical forms would have related to a past period but had the claimant declared that he had done work during the past period the most likely reaction of the departmental officer seeing that declaration would have been to ask what work had been done since the date of the last claim and what work, if any, is the claimant doing during the period of the current claim. Had those enquiries revealed any past or present work which the departmental officials regarded as being work for the purposes of regulation 16 of the Incapacity for Work (General) Regulations an overpayment claim in respect of the past periods would have been raised and the future overpayments would have been prevented. Contrary to what the claimant's representative argues in his observations of 24 February 2006, I do not think that the fact that the Forms Med 3 relate to specific closed periods makes them any less effective as the cause of an overpayment in a period beyond their expiry date if they are not modified by the claimant to alert the Secretary of State to the need to inquire into the work which the claimant has done and, therefore, might do in the future. To that extent I agree with the submission for the Secretary of State and, to that extent, the tribunal's decision is not erroneous in law.

Breach of the rules of natural justice

12. The notice of the tribunal's decision is as follows:-

"Appeal is Allowed.

The decision of the Secretary of State issued on 08/10/01 is Revised.

There has been an overpayment of Incapacity Benefit between 12/05/95 to 03/10/01. The schedule attached to the decision is incorrect.

From the schedule there are to be deducted 34 periods of time and the relevant amounts of the Incapacity Benefit in accordance with the attached schedule. The Secretary of State is to prepare a further schedule of overpayment and send copies to both the Appellant and his Representative and TAS within 14 days.

The Appellant then has 7 days from receipt of the further schedule to agree or disagree with the schedule. If the appellant does not agree he has liberty to apply to TAS for part of the appeal to be reconsidered by the Tribunal. The application is to be made within the 7 day period.

[The claimant] has misrepresented a material fact. As a consequence the amount (yet to be calculated) is recoverable from the appellant.”

The schedule to which that notice refers is a manuscript schedule headed “periods away from the U.K. and listing 33 distinct periods within a global period from 26 May 1995 to 9 March 2001 when the claimant was, according to the statement of the tribunal’s reasons for decision, out of the United Kingdom and one period from 24 June 1999 to August 1999 when he was “off sick with a neck problem”.

13. The letter of 27 September 2005 to which paragraph 19 of the statement of the tribunal’s reasons refers is a letter from an appeals officer of the Department for Work and Pensions. The Secretary of State’s representative has provided a copy of that letter with her submission. In the letter the appeals officer explains that it had taken the notice of the tribunal’s decision 16 days to reach him by a circuitous route and that was one of the reasons for his inability to comply with the tribunal’s direction that he provide a corrected calculation of the amount of the overpayment within 14 days. However, says the appeals officer, that correction could not be made without a statement of the tribunal’s reasons for decision including findings as to:-

the claimant’s absence from Great Britain for the periods quoted in the manuscript schedule,

where the claimant was when he was abroad,

whether or not the claimant did any work during those periods abroad,

whether or not the claimant was disqualified for receiving incapacity benefit in terms of section 113 of the Social Security Contributions and Benefits Act 1992 and the Social Security (Persons Abroad) Regulations 1975 and

whether or not the claimant did no work and was medically incapable of work during the period from 24 June 1999 to August 1999 in which, according to the manuscript schedule, he was ‘off sick with a neck problem

The letter goes on to say that when it was known what had been accepted by the tribunal as to the claimant’s absences from Great Britain there might be questions as to new unlinked periods of incapacity for work, waiting days, different benefit years and the satisfaction of contribution conditions.

14. Strictly speaking, there has been a breach of the rules of natural justice. Neither the tribunal nor the appeals officer furnished the claimant with a copy of the appeals officer’s letter and that should have been done, with the claimant being given an opportunity to comment, before a statement of reasons in dealing with the points in the letter was issued. As it happens no harm has been done because the tribunal chairman declined to deal with the question of whether or not the claimant was disqualified from receiving benefit while he was abroad. It may be that if the claimant had been given notice of that point before the statement of reasons was produced he would have been able to make a representation which refuted the point completely but that is an academic matter now because the claimant appealed the tribunal’s decision before there could be the exchanges of submissions which the decision notice and the statement of reasons anticipated. Because my reasons for setting aside the

tribunal's decision relate to the issue which was fundamental to both the tribunal's decision and the decision under appeal to the tribunal, I do not set the tribunal's decision aside on account of a procedural error which, in all the circumstances, I do not regard as a vitiating error.

The substantive errors in law

15. As I have noted above, the Secretary of State's representative rejects the argument for the claimant that the tribunal's statement of reasons is defective because it lacks an explanation as to why the tribunal rejected the claimant's case that any work which he had done was de minimis and argues that the issue before the tribunal was non-disclosure (which I think is a slip of the pen for "misrepresentation") of work done, not the question of whether or not that work was de minimis. I cannot agree with the Secretary of State's representative on that point. The Secretary of State had proceeded by way of revision of an awarding decision. The stated grounds for revision were that the Secretary of State had been unaware of the fact that the claimant had been working and the revised decision under appeal to the tribunal was to the effect that because the claimant had been working he was not entitled to incapacity benefit from and including the commencement of the original award. That decision and the overpayment decision were the subject of the appeal to the tribunal. The grounds of appeal were, in effect, that the work done was de minimis and had been disclosed. By the time the matter came before the tribunal of 8 September 2005 the question of non-disclosure had changed to one of misrepresentation. As I read the statement of the tribunal's reasons for decision it gives no explanation as to why work of an average of 2 hours per week, which the tribunal found to be the amount of work done by the claimant, was not de minimis and gives no explanation for the rejection of the argument to that effect for the claimant. Given that in a 5 day week an average of 2 hours per week would be an average of 24 minutes per day and given the case law as to what would be de minimis cited by the claimant's representative, some explanation as to why such a small amount of work would not be de minimis was required in the statement of the tribunal's reasons. If that had been the only error in the tribunal's decision I would have set the decision aside on that account. However, the fundamental error referred to in paragraph 14 which vitiates the tribunal's decision is explained below.

16. Regulation 16 of the Social Security (Incapacity for Work) (General) Regulations 1995 is in the following terms:-

- “(1) Subject to paragraph (3) and (4) and regulation 13(3) (persons receiving certain regular treatment) a person shall be treated as capable of work on each day of any week commencing on Sunday during which he does work to which this regulation applies (notwithstanding that it has been determined that he is, or is to be treated under any of regulations 10 to 15 or 27 as, incapable of work or that he meets the condition set out in regulation 28(2) for treating a person as incapable of work in accordance with the personal capability assessment until a determination has been made in accordance with that assessment unless that work –
- (a) falls into any of the categories of exempt work set out in regulation 17(1); and

- (b) is done within the limits set out in regulation 17(2).
- (2) Work to which this regulation applies is any work which a person does (not being work as a councillor that is to be disregarded under section 171F of the Contributions and Benefits Act or approved work under regulation 10A), whether or not he undertakes it in expectation of payment, apart from care of a relative or domestic tasks carried out in his own home.
- (3) A person who does work to which this regulation applies in a week which is –
 - (a) the week in which she first becomes entitled to a benefit, allowance or advantage on account of his incapacity for work in any period; or
 - (b) the last week in any period in which he is incapable of work, shall be treated as capable of work by virtue of paragraph (1) only on the actual day or days in that week on which he does that work.
- (4) A person shall not be treated as capable of work under this regulation by reason only of the fact that, during an emergency, he undertakes any activity to prevent another person or to prevent serious damage to property or live stock."

17. The wording of paragraph (1) of that provision precludes averaging of the time spent by a claimant on the activities which are alleged to be work as a method of arriving at a conclusion as to whether or not he has in fact done work within the meaning of that paragraph. The paragraph provides that the claimant is to be treated as capable of work on each day of any week in which he does work as defined in paragraph (2). Therefore to apply paragraph (1) to a claimant the Secretary of State's decision-maker must identify a week or weeks in which, or in each of which, there is a day on which the claimant has pursued activities which amount to work. That has not been done in this case. The Secretary of State's revision decision was based on the overall impression gained from the evidence of the director's fees paid to the claimant, his known involvement in certain meetings concerning the development of the family company's properties and the business expenses and car mileage attributed to him. There seems to me to have been no attempt on the part of the decision-maker to identify the weeks in which the claimant did work for the company. Therefore, there has not been, and there could not be, any specification on the decision-maker's part of the weeks in which the claimant is to be treated as not being incapable of work.

18. The tribunal has done slightly better in this respect than has the decision maker in that it has identified weeks in which it considered the claimant did not do any work. Those were the weeks in which the tribunal accepted that the claimant was out of the country. However, that still left the tribunal with the task, if it was going to confirm the Secretary of State's decision to any extent, of identifying the weeks in which the claimant did work. To say that he worked for an average of 2 hours per week when he was in the country is not good enough. Even if one takes "average" to mean, what is typical rather than a simple arithmetical mean the use of the word average implies that in some weeks the claimant could have done more work, in terms of time committed, than what was typical for him and in some weeks less. If there is identified a week in which the claimant is known to have been active in the company's interests for a total of 2 hours there has to be identified a day in that week in which

his activities amounted to work. As I say above, 2 hours per week could be 24 minutes per day which would mean that there was no day in which the work was not de minimis. Even if a week is identified in which there is a day on which the claimant devoted a typical 2 hours to the company there is then the question of whether or not what he did in those 2 hours amounted to work or was negligible. I would suggest that 2 hours spent as the dignified presence at a business lunch at which the other directors were trying to advance matters with business contacts probably did not amount to work. Similarly, attendance at site meetings is not necessarily an indication of anything more than a negligible amount of work by a claimant. In this case the statement of one of the witnesses to the claimant's presence on site was to the effect that the claimant did not even get out of his car.

19. The decision-maker had proceeded by way of revision in this case. The onus was, therefore, on him to satisfy the tribunal that in particular weeks there was at least one day on which the claimant's activities amounted to work. As he has not done so there is no evidential basis for the Secretary of State's revision of the awarding decision and no basis for the tribunal's confirmation of it. That being so, there is no basis for the overpayment decision or the tribunal's confirmation of it. I have, therefore, set aside the tribunal's decision and substituted my own decision to the effect that the awarding decision made in May 1995 is not to be revised on the grounds that the claimant has done work.

20. It is now open to the Secretary of State, if he thinks that he should do so, to consider the application of the Persons Abroad Regulations and the questions consequential upon that which the appeals officer identified in his letter to the tribunal clerk but that should be done as a separate exercise by way of a revision or supersession decision which the claimant can, if so advised, appeal to a tribunal. That may give rise to an overpayment decision. It is also open to the Secretary of State, if he thinks he should do so and if he has the necessary evidence, to supersede my decision on the grounds that there are circumstances not known to me which establish that in certain specific weeks the claimant's activities on a particular day or days amounted to work within the meaning of regulation 16.

21. For the foregoing reasons the claimant's appeal succeeds and my decision is in paragraph 1 above.

(Signed) R J C Angus
Commissioner
(Date) 27 April 2006