

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the Wrexham appeal tribunal did not have jurisdiction to make the decision given on 21 February 2001.
2. The claimant was a part-time worker who was in receipt of working families tax credit, amounting to £78.34 per week. He resigned from his job because his employers sought to impose unilateral alterations in the terms of his employment. As a result of the termination of his employment, he ceased to be entitled to tax credit, but became entitled to jobseeker's allowance. The claimant brought proceedings before an employment tribunal, claiming that he had been constructively dismissed and that his dismissal was unfair, and on 11 October 2000 the tribunal upheld his complaint and awarded compensation amounting in total to £8,963.83.
3. Where a claimant has been dismissed and has been awarded compensation by an employment tribunal, the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the 1996 Regulations") empower the Secretary of State to recover from the employer out of the compensation awarded by the tribunal the amount of any jobseeker's allowance or income support which has been paid to the claimant in the period between the termination of the claimant's employment and the conclusion of the tribunal proceedings. The amount which the dismissed employee receives under the tribunal award is therefore reduced by that amount. Regulation 4 of the 1996 Regulations provides that, in assessing compensation, the tribunal must disregard jobseeker's allowance or income support which has been paid to the claimant and must set out in its decision the amount of any compensation for loss of wages in the period before the conclusion of the employment tribunal proceedings (the "prescribed element"). A copy of the decision containing those particulars must be sent to the Secretary of State. Under regulation 7, the award of compensation, in so far as it relates to the prescribed element, is then treated as stayed in order to allow the Secretary of State to initiate recoupment of benefit by means of a recoupment notice.
4. The claimant does not dispute that the recoupment notice correctly states the amount of jobseeker's allowance which he received in the relevant period. However, he contends that the amount recouped should have been reduced by the amount of tax credit and other benefits which he would have received if he had not been dismissed. The tribunal rejected those arguments, and it is against the tribunal's decision dismissing the appeal that the claimant, with the chairman's leave, now appeals.
5. Regulation 8 of the 1996 Regulations, so far as material, provides:
 - "(1) Recoupment shall be initiated by the Secretary of State serving on the employer a recoupment notice claiming by way of total or partial recoupment of jobseeker's allowance or income support the appropriate amount, computed, as the case may require, under paragraph (2) or (3) below.
 - (2) In the case of monetary awards the appropriate amount shall be whichever is the less of the following two sums-
 - (a) the amount (less any tax or social security contributions which fall to be deducted therefore by the employer); or

(b) the amount paid by way of or paid as on account of jobseeker's allowance or income support to the employee for any period which coincides with any part of the period to which the prescribed element is attributable.

(3) A recoupment notice shall be served on the employer by post or otherwise and copies shall likewise be sent to the employee and, if requested, to the Secretary of the Tribunals.

(8) A recoupment notice served on the employer shall operate as an instruction to the employer to pay, by way of deduction out of the sum due under the award, the recoupable amount to the Secretary of State and it shall be the duty of the employer to comply with the notice. The employer's duty under this paragraph shall not affect his obligation to pay any balance that may be due to the employee under the relevant award."

6. I have come to the conclusion that the Secretary of State is correct in his submission that, in applying the recoupment provisions, there is no power to take into account the benefits to which a claimant would have been entitled if he had not been dismissed. The claimant's representative has submitted that the words "total or partial recoupment" in regulation 8(1) are consistent with a power to recoup less than the full amount of jobseeker's allowance or income support which has actually been paid to a claimant if it is necessary to do so in order to leave the claimant in the same position as if he had not been dismissed. However, I consider that the words in regulation 8(1) that the appropriate amount "shall be" whichever is the lesser of the two sums in paragraphs (a) and (b) indicate a mandatory requirement to determine the amount to be recouped in accordance with the provisions of the regulation. Regulation 8(2)(b) requires that "the amount paid by way of or paid as on account of jobseeker's allowance or income support" is to be taken into account, and I can find nothing to suggest that the paragraph (b) sum may be an amount which is less than the jobseeker's allowance or income support which has actually been paid. In some cases, the amount awarded by an employment tribunal in respect of loss of wages down to the date of hearing will exceed the amount of relevant benefit paid in the period, and in such cases there will be total recoupment of the benefit. In other cases, the amount awarded in respect of loss of wages will be less than the amount of benefit which has been paid, particularly since regulation 4(2) of the 1996 Regulations provides for the tribunal to reduce the prescribed element by the amount of any reduction in compensation for contributory fault, or if the employee's total loss exceeds the maximum amount which the tribunal has power to award. In such cases, there will only be partial recoupment of benefit. In my view it is for that reason that regulation 8(1) refers to "total" or "partial" recoupment.

7. The claimant's representative also contends that the recoupment procedure was defective because there is no evidence of any decision to initiate recoupment, and because neither the employer nor the claimant was informed of any right to challenge the recoupment notice. Regulation 10 of the 1996 Regulations, as amended by Article 3(14) and Schedule 14 of the Social Security Act 1998 (Commencement No. 12 and Consequential and Transitional Provisions Order 1999, provides:

(1) "Without prejudice to the right of the Secretary of State to recover from an employer the recoupable benefit, an employee on whom a copy of a recoupment notice has been served in accordance with Regulation 8 above may, within 21 days of the date on which such notice was served on him or within such further time as the Secretary of State may for special reasons allow, give notice in writing to the

Secretary of State that he does not accept that the amount specified in the recoupment notice in respect of jobseeker's allowance or income support is correct.

- (2) Where an employee has given notice in writing to the Secretary of State under paragraph (1) above that he does not accept that an amount specified in the recoupment notice is correct, the Secretary of State shall make a decision as to the amount of jobseeker's allowance or, as the case may be, income support paid in respect of the period to which the prescribed element is attributable or, as appropriate, in respect of so much the protected period as falls before the date on which the employer complies with Regulation 6 above.

(2A) The Secretary of State may revise either upon application made for the purpose or on his own initiative a decision under paragraph (2) above.

(2B) The employee shall have a right of appeal to an appeal tribunal constituted under Chapter 1 of Part 1 of the 1998 Act against a decision of the Secretary of State whether as originally made under paragraph (2) or as revised under paragraph 2(A) above.

8. Although the submission to the appeal tribunal refers to a decision by the decision maker to recoup benefit, I consider it to be clear from regulation 10 that no decision can be made for recoupment purposes until the claimant has served notice that he does not accept the amount of benefit specified in the recoupment notice. The claimant's solicitor challenged the decision not to take into account notional entitlement to working families tax credit in a letter dated 14 November 2000. That letter was treated as an appeal, which was followed by a purported reconsideration. If the letter of 14 November was properly to be regarded as a notice under regulation 10(1), a decision on the amount of jobseeker's allowance paid in the relevant period should have been taken at that stage. Even on the basis that there was jurisdiction to consider the issue raised by the claimant's solicitor, the appeal was premature. If the correct procedure had been followed, the relevant decision would have been triggered by the claimant's challenge to the recoupment notice, and the claimant's objections to the procedure would not have been arisen.
9. Regulation 10(2) of the 1996 Regulations formerly provided that where an employee had given notice to the Secretary of State that he did not accept that an amount specified in a recoupment notice was correct, the Secretary of State should forthwith submit the question to an adjudication officer and that "any question so submitted shall be for determination by an adjudication officer, a Social Security Appeal Tribunal and a Commissioner...". However, paragraph 2B of regulation 10, as added by the Social Security Act 1998 Commencement No. 12 Order, refers to a right of appeal to an appeal tribunal against a decision made under paragraph (2), but omits any reference to a further right of appeal to a Commissioner. I therefore directed further submissions from the parties on the question of whether the effect of the amendments was to remove the jurisdiction of Commissioners to deal with recoupment questions.
10. I accept the Secretary of State's submission that the amendments did not have that effect. Section 14(1) of the Social Security Act 1998 confers a right of appeal to a Commissioner on a question of law from any decision of an appeal tribunal under section 12 of the Act. Section 12 provides for a right of appeal to an appeal tribunal

in respect of any decision of the Secretary of State under section 8 or 10 of the Act, and section 8(1)(c) provides for the Secretary of State "to make any decision that falls to be made under or by virtue of a relevant enactment". By section 8(4), those enactments include the Social Security Administration Act 1992, under which the provisions of the 1996 Regulations relating to decision making in recoupment cases were originally made. The amendments to the 1996 Regulations were clearly intended to abolish the old free-standing system of appeals in relation to recoupment questions and to assimilate such appeals into the new system of decision making by the Secretary of State. Having provided for such decisions to carry a right of appeal to an appeal tribunal as decisions made under section 8, I agree with the Secretary of State's submission that it was unnecessary to provide expressly for a further right of appeal to a Commissioner. However, for the reasons I have given, the only recoupment question which an appeal tribunal has power to determine is whether a recoupment notice correctly sets out the amount of income support or jobseeker's allowance paid to a claimant in respect of the prescribed period, and, since an appeal to a Commissioner lies only on a question of law, I cannot imagine any circumstances in which a recoupment issue could again properly give rise to a Commissioner's appeal.

11. I therefore consider that the tribunal were right to hold that the recoupment provisions had been correctly applied in this case. However, for the reasons given in paragraph 8, I do not consider that any "decision" had been made under section 8 of the 1998 Act at the time of the appeal, so that the tribunal lacked jurisdiction to deal with the appeal. Since no further action is needed to deal with the case, I propose to dispose of the appeal by deciding accordingly.
12. That is not to say that the claimant's appeal does not raise important issues. As a result of the move towards "in work" benefits, loss of entitlement to such benefits will increasingly often form an element of the loss resulting from an employee's dismissal. However, for the reasons I have given, compensation for such losses cannot be given by adjustment of the amounts recovered from employers under the recoupment provisions. The question of whether compensation can be given for such losses under the employment protection legislation is, of course, a matter for the tribunals concerned with that legislation to decide.

**(Signed) E A L Bano
Commissioner**

17 September 2002