(L) Overpayment - Knowingly Incorrect For Misrepresentation (Including Wrong Decision)

117/94

JMH/SH/4

Commissioner's File: CP/034/1993

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR RETIREMENT PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal was in part erroneous in point of law though only to the limited extent which appears in this decision. I hold that no overpayments are recoverable for the period 15.4.82 to 8.4.87. As to the period 9.4.87 to 18.5.88 the overpayments are recoverable and must be re-calculated.

2. This is an appeal with the leave of the chairman from the decision of a social security appeal tribunal dated 12.1.93. The claimant received a retirement pension including an increase for his wife from 19.3.81. When he claimed the increase, he disclosed that his wife was in part-time employment but that the amount of her wages was insufficient to cause any reduction in the pension increase payable in respect of her. The adjudication officer had on 25.6.92 held that there had been an overpayment of the increase of retirement pension from 15.4.82 to 23.11.88 amounting to £4,105.95. He held that at various times during that period between those dates, the claimant had, whenever he cashed his order book, misrepresented the material fact that he had reported any fact which could have affected his benefit, whereas he had not reported the fact that his wife was in full-time employment and that her earnings for most of the weeks in question had exceeded £45.

3. However, the tribunal found as a fact that on 16.5.88 the claimant disclosed to the Department that his wife was working full-time, when he was interviewed at the Department's office regarding child benefit. Despite that disclosure, the Department continued payment at the increased rate, and the tribunal held that overpayments during the period from 13.5.88 were not recoverable since they had not been induced by material misrepresentations. There is no appeal from that decision and I accept it. Nevertheless, the tribunal held that the

overpayment in respect of the period 15.4.82 to 13.5.88 (inclusive) were recoverable. The tribunal, however, felt unable to accept that the calculations in the overpayment schedule were necessarily accurate without referral to the statements of earnings submitted by the wife's employers. They referred the appeal back to the adjudication officer for production of the evidence and directed that if the amounts were not agreed the claimant was to have a further right of appeal to the tribunal on that point.

4. There was evidence that, in 1981, the claimant who was receiving supplementary benefit disclosed to the Supplementary Benefits Office that his wife was then in part-time employment. He stated that a visiting officer had called at his home and advised him that his wife's employers would be contacted by the Department as often as was necessary to establish the amount of her earnings. He assumed that, when his supplementary benefit ceased and his retirement pension commenced, all the papers would be passed to the other sector, which was in the same building.

5. On 2.9.94 I raised two directions. I will consider them, and the submissions I received in reverse order.

6. "2. The claim for repayment goes back to 15 April 1982. Does the decision of the House of Lords in Plewa v. Chief Adjudication Officer 1994 3 WLR 317 affect the claim to overpayments before 6 April 1987?"

The reply I received was that, in view of that case, section 71 of the Adjudication Act 1992 (formerly section 52, Social Security Act 1986) could not be used to decide overpayments for periods before 6.4.87 and the appropriate test was the "due care and diligence" test set out in section 119 of the Social Security Act 1975.

Based on the facts I have related in paragraph 4 above, the adjudication officer submitted that the claimant had used all due care and diligence and therefore the overpayment for the period 15.4.82 to 8.4.87 was not recoverable. Predictably, the claimant's representative agreed and expanded the submission on this point. I am not minded to disagree. I hold, therefore, that overpayments between 15.4.82 to 8.4.87 are not recoverable.

7. "1. There is evidence that the claimant's wife was schizophrenic and had not spoken to the claimant for many years. In Box 4 the tribunal went so far as to say, "the tribunal accept that the appellant may well not have realised that his wife was working full-time or known the amounts of her remuneration.

"In the case of misrepresentation the question of knowledge has been held to be irrelevant by Commissioners - R(SB) 21/82 para 24, R(SB) 9/85.

"However, in Jones v. Chief Adjudication Officer 1994 1 WLR 62 (Court of Appeal) the Lords Justices seem to have

stated that knowledge is relevant.

"Dillon LJ says at page 72E-G:-

"The representation must be limited as a matter both of commonsense and law, to a representation he had disclosed or reported all material facts known to him since he could not sensibly be expected to represent that he had disclosed all material facts that were not known to him."

See also per Stuart-Smith LJ at page [what should be 71H to 72B].

"In the light of this judgment, is knowledge now of a material fact to be considered a necessary ingredient if overpayment on the grounds of misrepresentation is to be successfully claimed?."

The reply I received from the adjudication officer was to accept the Lord Justices' dicta and submit that the overpayments from 9.4.87 to 18.8.88 were not recoverable in view of the fact that the claimant lacked the requisite knowledge. Again, predictably, the claimant's representative agreed and expanded the submission on that point as well.

Now, I have myself doubts. I should say that the declaration in this case was the same as the declaration in Jones v. CAO (supra) viz:-

"I DECLARE that I have read and understand all the instructions in this order book, that I have correctly reported ANY facts which could affect the amount of my payment and that I am entitled to the above sum."

The statement in Sharples v. CAO (supra) was:-

"As far as I know the information on this form is true and complete."

The claimant's partner in that case had inherited some insurances of which the claimant was ignorant and it was ruled that the qualification imported by the words "as far as I know" rendered the representation truthful.

8. I now turn to the Jones decision. At p71H to 72B Stuart-Smith LJ said (my underlining indicates the words emphasised by him which appear in italics in the judgment):-

"In my judgment there are two answers to this submission. First, on the facts of this case the declaration can properly be expanded by the inclusion of the words emphasised to read:-

"I have correctly reported any facts known to me which could affect the amount of my payment, including the fact that I have received unemployment benefit ..."."

I do not know what special facts of that case there were which might distinguish that case from this case.

Dillon LJ said at p72 G-H (and it is as well to repeat that statement):-

> "I read that declaration as a representation by Mr Jones each time he signs such a declaration that there were no facts known to him at the time he signed which could affect the amount of his payment but which he had not reported. The representation must be limited, as a matter both of commonsense and law, to a representation that he had disclosed or reported all material facts known to him, since he could not sensibly be expected to represent that he had disclosed all material facts that were not known to him."

It seems to me that what the learned Lords Justices were doing was to imply in the declaration a qualification to all intents and purposes the same as the qualification in Sharples - "as far as I know". Dillon LJ however refused to import the qualification suggested by Mr Commissioner Edwards-Jones in R(SB) 21/82 "in so far as disclosure could reasonably be expected of me" and he said at p73B-C:-

> "But the actual words of the representation "any facts which could affect the amount of my payment" are too wide and clear to be limited even to what a reasonable man would think would affect the amount of the payment."

The statements of both of the learned Lords Justices are clearly obiter, as the central issue in the Jones case was whether or not Mr Jones had made a material misrepresentation, which they held he had, and that overpayments were recoverable. These statements, which I have cited, were not central to the actual decision they, as a majority of the court, reached.

9. But there is a difficulty. If a person makes a statement knowing it to be untrue or recklessly, he is guilty of a fraudulent misrepresentation: if, on the other hand, he makes a statement in the honest belief it is true, he will be guilty nevertheless of an innocent misrepresentation if it turns out to be untrue. See the well known passage in the opinion of Lord Herschell in Derry v. Peek 1889 14 AC 337 at p374:-

> "Secondly fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. ... To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth."

See also Halsbury 4th Edition Vol 31, para 1064.

An innocent misrepresentation is therefore one which is made in honest belief, but if it turns out to be untrue it is

nevertheless a representation, albeit innocent. Knowledge is not relevant so far as innocent misrepresentation is concerned.

The difficulty is that in Page v. CAO (reported as an Appendix to R(SB) 2/92) Dillon LJ said of section 53 (now section 71 of the 1992 Act):-

> "At pps. 18/19:-
>
> > "Applying the general principles ... I find the wording of section 53(1) plain and unambiguous. It covers innocent as well as fraudulent misrepresentation and non-disclosure, and I would dismiss this appeal."

That is a pretty plain statement of the law and it is not obiter dictum. Moreover, it was expressly accepted by Evans LJ in Jones at p65 B-D. I need not set out that passage in extenso but will refer only to two sentences:-

> "This means that when a person has misrepresented a material fact his knowledge of that fact is irrelevant so far as section 53 is concerned.
>
> It is sufficient that there was misrepresentation whether the fact was known to him or not."

[For section 57 now read section 71, Administration Act 1992.]

I would also refer to a line of the decisions of Commissioners to the same effect - see eg. R(SB) 21/82, R(SB)9/85.

As I see it, the two statements by Lords Justices Stuart-Smith and Dillon can only stand if they are construed on the basis that there is a qualification which is to be implied in the common form declaration in the order book such as, in effect, "so far as I know or am aware.".

Now, I know of no case where such an implication has been made, and with the greatest respect I see no compelling reason why one should. Although there is a distinction between, on the one hand, innocent misrepresentation, where knowledge is irrelevant, and on the other hand a representation qualified by the term to be implied as suggested by the Lords Justices (as above), that distinction seems, in my mind, to be more theoretical rather than real in the circumstances with which I am dealing.

But the essence is whether against the background of this case such an implication, limiting the representation to the extent of the claimant's knowledge and no further, is permissible. That argument was not put forward in Page v. CAO (Supra), although it must have been a relevant point. However, it does not appear from the report of that case what the representation relied on precisely was. It is, however, clear from the authorities that the scope of implying terms in statutes is very limited. For

general principles, I refer to Craies on Statute Law, 7th Edition p109:-

> "If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication and to draw inferences or supply obvious omissions. But the general rule is "not to import into statutes words which are not to be found there" ... Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context."

I would also refer to the trenchant judgment of Lord Diplock in Duport Steels Limited v. Sirs 1980 1 AER 529 at page 541 F-J and p542 C-F.

However commonsense the approach of the Lords Justices might be, it seems to me that it leads to the conclusion that although a misrepresentation may be innocent, it is not to be an effective misrepresentation so far as section 71 is concerned if it is qualified by a term such as "so far as the claimant knew or was aware" - and that is tantamount to saying unless the claimant knew what he had represented was wrong. If you get that far, that brings the case perilously close to fraudulent misrepresentation. The essence of innocent misrepresentation is honest belief in the truth of the misrepresentation: if there is no honest belief then the representation may become fraudulent. However blameless a representator may be - and that is evidently what the Lords Justices thought he was in the Jones case - a blameless misrepresentation is nevertheless an innocent representation, and, therefore, if untrue, a misrepresentation for the purposes of section 71 as a result of which, overpayment may be recoverable.

10. But in my view the truth of the matter is that the words of the declaration were clear and needed no qualification. In Page v. CAO the Court of Appeal, as part of their ratio decidendi, held that these very words were clear and unambiguous, and they comprehended innocent as well as fraudulent misrepresentation. So far as innocent misrepresentation was concerned, knowledge was immaterial. Therefore, it seems to me that there was overpayment between the dates 9.4.87 to 18.8.88, even on the basis that the claimant was ignorant of his wife's earnings during that period. The amount is to be recalculated by the adjudication officer. If the amount cannot be agreed then it can be referred back to me or another Commissioner for determination.

11. In fact, it does not appear to me that the tribunal did make any definite finding of fact as to the claimant's knowledge. The most they did was to "accept that [the claimant] may well not have realised his wife was working full-time or knew the amounts of her remuneration.". Furthermore, there is the statement of the claimant dated 10.11.88 (T2/T3) that he was not aware that his wife was working full-time until about 18 months ago i.e. possibly from May 1987. However, since I rule that knowledge is

irrelevant, I need make no further comment about this.

12. Finally, I would say that I am somewhat concerned to note that the relevant notification to the tribunal of the wife's full-time employment was made - according to the tribunal - on 16.5.88, and the statement which I have referred, on 10.11.88. The adjudication officer did not make his decision - a decision of fairly crucial importance to the claimant-until some three to four years afterwards namely on 25.6.92. There may however be some perfectly simple explanation of which I am ignorant, but the lapse of time does seem extraordinary and must have come as a most unpleasant surprise to the claimant.

13. My decision is therefore as set out in paragraph 1 above with the directions as to recalculations set out in para above.

(Signed) J.M. Henty
Commissioner
(Date) 30 November 1994