CP/63/1983

MJG/MD

SOCIAL SECURITY ACTS 1975 TO 1984

THE SOCIAL SECURITY (ADJUDICATION) REGULATIONS 1984 REGULATION 9.

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

DECISION OF TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS - CORRECTION

Paragraph 14(2) Lines 2,3 and 4

Delete "were given in reference to original awards (purportedly subsequently reviewed) of retirement pension under Section 28(1) of the Act"

Paragraph 14(2) line 2 add full stop after "in each case)"

(Signed) M.J. Goodman
Commissioner

(Date) 13th January 1986

Commissioner's File: CP/63/1983

IEJ/SH/3/MD

Commissioner's File: CP/63/1983

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR RETIREMENT PENSION

DECISION OF TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

[ORAL HEARING]

1. (1) This is a claimant's appeal against the decision dated 22 December 1982 of a national insurance local tribunal ("the tribunal") brought by leave of a Commissioner. By their decision the tribunal upheld the decision dated 8 June 1982 of an insurance officer to the effect, first, that he had reviewed the decision of the insurance officer awarding increase of retirement pension from and including 3 April 1980 because there had been a relevant change of circumstances since the decision was given; secondly, (and expressing a revised decision) that increase of retirement pension was payable for the claimant's wife at the reduced weekly rate shown in column (6) of an attached schedule on each of the pension paydays shown in column (1) of such schedule, because the wife's weekly earnings were calculated to exceed £45.00; and thirdly, that as a result an overpayment of retirement pension had been made amounting to £809.55 and that repayment of such sum was required because it had not been shown that the claimant had throughout used due care and diligence in the obtaining and receipt of benefit to avoid overpayment.

   (2) Upon representations to the Chief Commissioner that the case provided a forum for a ruling upon an important issue of principle concerning the statutory powers of review of original decisions, he directed that the appeal be the subject of oral hearing and of determination by a Tribunal of Commissioners.

   (3) Our decision follows an oral hearing of the appeal on 22 October 1985 at which the claimant attended and gave evidence, but was represented by Mr S. Cottle, of counsel, instructed by the claimant's local Law Centre, and the adjudication officer was represented by Mr M. N. Qureshi of the Solicitor's Office, DHSS.

2. (1) Our decision is that the decisions of an insurance officer awarding the claimant increase of retirement pension in respect of his wife from and including

3 April 1980 and relating to the period terminating with the pension pay day 5 November 1981 were properly reviewed because given in ignorance of a material fact, namely that the information as to wife's earnings upon which they had been based was incorrect. We are not, however, satisfied that the insurance officer's revised decision of 8 June 1982 correctly reflects the resultant overpayment when correctly computed under the material legislation in reference to the correct figures as to her earnings (although we consider it unlikely in the extreme that a correct computation will not demonstrate some overpayment). We direct that if within 2 months from promulgation of our decision a revised computation as to the overpayment, if any, over the period we have identified is agreed by or on behalf of the adjudication officer and the claimant respectively our present decision is to take effect as holding there to have been overpayment in the so agreed amount and as requiring repayment of that amount if and so far as the overpayment was made on or after 30 April 1982. If such agreement is not reached the adjudication officer concerned is to give a revised decision indicating the amount, if any, determined by him to have been overpaid, and, if and so far as any overpayment was made on or after 30 April 1980, requiring repayment of that amount; and his decision so given is to be open to a fresh operation of the appellate procedures - but on the footing that our decision upon the issue as to due care and diligence is to be followed and any amount held to have been overpaid on or after 30 April 1980 is to be the subject of a requirement for repayment.

(2) Our decision as to review is given pursuant to section 104 of the Social Security Act 1975 ("the Act"); any figure agreed or determined in respect of the claimant's wife's weekly earnings is to be taken as determined in the context of regulation 45(3) of the Social Security Benefit (Computation of Earnings) Regulations and of section 45 of the Act; and any quantified requirement for overpayment on or after 30 April 1980 which ensue is to be taken as made pursuant to section 119(1) and (2) of the Act.

3. We find the following facts:-

(1) The claimant was born on 1 April 1915 and educated in the South of what is now the Republic of Ireland. He left school at 14 and did not receive any further education. Down to his retirement he had spent his working life as a painter and decorator. His retirement took effect, in the context of retirement pension, as from 3 April 1980. In anticipation of it he had been provided with claim forms both for retirement pension in respect of himself and for increase of that pension in respect of his wife. His wife was at all material times employed for domestic duties by the management body administering a large number of flats. However, during the time after the claimant had received the forms and before his retirement took effect his wife was not performing the duties of her employment - she was away in Ireland in connection with what proved to be the terminal illness of her own father, and so remained over the period requisite for the funeral and other arrangements consequent upon his death.

(2) The claimant had a general awareness both that his own earnings, if any, subsequent to his retirement could affect the amount of his retirement pension and that his wife's earnings could affect the amount of increase payable in respect of her.

(3) On 14 February 1980 he took both claim forms to his local DHSS office, only partially completed. The parts which were already then completed had been completed for him by his daughter. He saw an officer of the DHSS, who

completed both forms for him. The claimant then appended his own signature and the date, and left the forms with the office. The form as to increase in respect of his wife had been completed in his daughter's handwriting as to his wife having an employer, but in the DHSS officer's writing as to the employer's name and address, the wife's clock or check number, and the amount indicated in the space provided for indicating her gross weekly earnings before deduction of income tax. The text preceding that space also included an intimation that holiday pay, bonus payments and regular tips should be included. The amount so inserted was £43.

(4) The answer "no" in the space provided for indicating as whether the wife's earnings varied from week to week, and also an entry as to £1.50 per week luncheon vouchers being provided by the employer, are also identifiable as inserted by the DHSS officer.

(5) Expecting that he would be required to indicate the amount of his wife's earnings in the context of his claim for increase in respect of her, and with the time for his retirement close at hand and her still absent in Ireland, the claimant had in the course of a telephone conversation with his wife whilst she was in Ireland asked her what her earnings were. She had told him £43.00 and that was what he told the DHSS officer on 14 February 1980, who had inserted that figure accordingly.

(6) The claimant had been married to his wife since 1940 and she had throughout their married life been the "financial manager" of their domestic finances. Every week he handed over the pay in his pay packet to her and she would let him have a pound or two for his personal expenses as and when he asked for it. He "took life as it came" and never normally inquired of her what her earnings were. He had been provided with various leaflets at the same time as he had received the claim forms but could not himself make much of the contents of those leaflets, which he accepted had included leaflet NP32, or indeed of the forms themselves. In attending the local office with the forms uncompleted he was seeking to put himself in the hands of the DHSS as to how they should properly be completed by him to the extent that they had not already been completed by his daughter on his behalf. He could not remember very much about the interview on 14 February 1980, but one thing he did clearly remember - when it had come to inserting a figure for his wife's earnings the officer dealing with him had said that the DHSS would be in touch with his wife's employer with regard to those.

(7) Both the claimant's claim for his own pension and his claim for increase of it in respect of his wife became the subject of an insurance officer's decision (the same officer in each case) on 24 March 1980. That in respect of his own pension indicated that his retirement was accepted from 3 April 1980 and that retirement pension was allowed from that date at the weekly rate of £25.59. That in respect of increase for his wife indicated that residence was accepted and that increase of retirement pension for his wife was allowed at the weekly rate of £14.00 also from 3 April 1980. There was in neither case any expressed qualification of the award by reference to any "earnings rule" or otherwise.

(8) On a date which cannot be precisely identified but (from the note referred to next below) can be inferred to have been shortly before 28 April 1980 the claimant made a further visit to his local DHSS office. He did that in the circumstance that he had been offered full-time employment to start on 28 April 1980 at remuneration of £60.00 per week as a cleaner for a company with offices near his home and was concerned to ascertain the effect, if any, this

would have upon his retirement pension if he took up the offer.

(9) An official note was made of that interview, the text of which includes "earnings rule was explained to him and he decided to ask his employer to employ him part-time in order to earn no more than £52.00. He was told that he must obtain a signed letter from his employer stating that he will be employed part-time and will earn no more than £52.00 per week". In the light of what he had been told at that interview the claimant in fact arranged with the employer to be engaged on an appropriate part-time basis, and nothing further turns upon that aspect. The intimation as to his having had the earnings rule explained to him was, however, relied upon by Mr Qureshi before us.

(10) Whether entirely on his own initiative or because of what he had been told at one or other of the interviews above referred to (and for our purposes it matters not which), the claimant had prior to 29 April 1980 made it clear to his wife that he was required to report any increase in her earnings, and on or shortly before that date she reported to him that her earnings had gone up from £43 to £50.50 per week. Accordingly he went to the local office again on 29 April 1980 to report this increase. He was asked to make a written statement and did so. It was signed by him and witnessed with a signature which can be inferred to have been that of the officer who dealt with him. The claimant had in his own handwriting indicated "my wife earnings is gon up from £43 a week to £50.50 per week", and after that text is added in that officer's handwriting "from 21 April 1980".

(11) On the same date (and, it is in our judgment to be inferred, on the same occasion) the claimant signed and left with the local office a completed formal declaration upon a form BR356A(LO) as to the earnings of his wife. That was filled in as to the "calendar week ending" to which it was referable, and also as to the amount of the wife's earnings, by the same officer as had witnessed the claimant's written statement of the same date above mentioned. The first of those entries was "25 April 1980" and the second "£50.50". However:-

(i) the entry as to the £50.50 is against the text "your wife's or housekeeper's TOTAL earnings or profits, ie. before deductions of income tax, (enclose her payslip if available)"; and

(ii) there next follows, on the form, a printed text as to expenses to be claimed in connection with the wife's employment, under 10 numbered heads of possible expenditures, and those are in turn followed by a space for inserting the total so arrived at - and that entry has been completed by the claimant, in his own handwriting, "NILT". He also signed and dated the form below a declaration that to the best of his knowledge and belief the information given on that form was a true and correct statement of all his wife's or housekeeper's earnings and record of her employment for the week stated, and inserted in in his own handwriting the name and address of her employer.

(12) Increase of retirement pension in respect of his wife was paid to the claimant at the rate appropriate to the wife's reckonable weekly earnings being £43, without deduction for any expenses, until the week ending 25 April 1980, and thereafter as appropriate to their being £50.50 at all material times, also without any deduction for expenses.

(13) As a result of a conversation he had had with his daughter on or shortly before

3 April 1981 the claimant went again to his local DHSS office on that date to make a further inquiry. He was asked to and did make a written statement in regard to it. That statement is identifiable as wholly in the handwriting of the official who dealt with his inquiry save for the date and his signature, both appended in his own handwriting. As subscribed by him it indicated:-

> "I would like to know if I can claim expenses for my wife for whom I receive an increase of my pension. From 3 April 1980 my increase has been downrated on account of her earnings I did not claim expenses as I did not understand what it meant and it was only when my daughter saw the form and told me what it meant that I claimed then. I would like to have the expenses backdated to 3 April 1980 if possible".

(14) On 29 April 1981 the Department wrote to the claimant indicating that arrears of increase of retirement pension might be paid if he could provide the necessary evidence of his wife's earnings. But the Department in fact pursued their own inquiries with her employer, and in due course received detailed earnings figures from that source.

4. (1) The photocopies of the information so obtained by the Department which have been supplied to us are in substantial part "cut off" or illegible, so that we have been unable to make any close appraisal of the detailed figures ourselves. It was suggested before us that the figures as to the wife's earnings which the claimant had himself provided to the Department had represented what had been his wife's "take home pay" - but we have, for the same reason, been unable to make any effective correlations as to that. What is, however, apparent from the documents before us is that it is improbable in the extreme that either of the figures which the claimant had himself provided to the Department corresponded to his wife's gross earnings at any material time or to her "total earnings", before deductions of income tax (as requested respectively on the claim form BF225 he had submitted on 14 February 1980 and the declaration he had submitted on 29 April 1980).

(2) At a stage in the case before the appeal to us the claimant suggested that the figures he had supplied had represented his wife's basic earnings but omitting bonus payments. But as to that:

(i) both forms had indicated that bonus payments should be included; and

(ii) for the same reasons as we have above indicated in regard to other correlations, we have been unable to resolve the truth or otherwise of such suggestion.

5. (1) In the light of the information derived from the wife's employer there eventually ensued the insurance officer's decision of 8 June 1982, from which the claimant appealed to the tribunal.

(2) Amongst the materials before the tribunal were written grounds of appeal (signed by the claimant but written for him by his daughter) which included an averment that he had acted to the best of his ability when filling in the forms with which he had been provided in advance of his retirement, that he had put in the figure his wife had given him on the telephone from Ireland as to her wages, and:

"After that my wife got [her employer] to fill them in and I am led to believe that you also made enquiries to [the employer] yourselves. All the books and forms I got when I retired, to be honest with you I did not understand a word of them and when I asked for help people were just not interested..."

6. (1) The claimant attended the tribunal's hearing and gave evidence himself, but was not represented at it. The chairman's note of evidence indicates that the claimant explained the position as to the circumstances in which the figure of £43 had come to be indicated in the initial claim for increase in respect of his wife and that "I never asked my wife her actual total earnings. I have never done a dishonest thing in my life".

(2) The findings of the tribunal are expressed as:-

"The claimant has admitted that when he thought he had underclaimed he was of the opinion that he was justified in claiming arrears. Because of enquiries made by the Department of her employers it is admitted that an overpayment of £809.55 occurred. We accept his honesty but that is not the criterion. By not making enquiries he failed to show due care and diligence and the amount overpaid, £809.55 must be repaid."

(3) The stated grounds for the tribunal's decision consist in citations from decisions R(G)1/79 and R(A)179 as to what constitutes and does not constitute the using of due care and diligence to avoid overpayment.

7. (1) We return to the issue of "due care and diligence" at paragraph 15 below. For we must first deal with a point of law raised by Mr Qureshi before us in the hope, he told us, of obtaining clarification by us of what he saw as being conflicting decisions of individual Commissioners and as to which the present case had been put forward by the Department as an appropriate vehicle. The point can be briefly identified as concerning "powers to review inchoate decisions in relation to retirement pension". The term "inchoate decision" is not to be found in the Act or regulations thereunder but is employed in decision R(P)3/84 as descriptive of a decision by one of the determining authorities under the Act which is so framed as not to provide in itself all the ingredients required for a full substantive determination upon the claim for benefit to which it relates. A simple example would be a decision that a claimant was entitled to a retirement pension without indicating from what date, or for how long, or at what rate.

(2) Whilst our present decision is unanimous in its result and not a "majority decision", Commissioner Reith holds views significantly different from those of Commissioners Edwards-Jones and Goodman upon this question. And on that account we set out in the first instance the reasons for decision of the majority and then (starting at para. 19 below) those of Commissioner Reith.

Reasons of Commissioners Edwards-Jones and Goodman

8. (1) It is common ground that the claimant's retirement pension was a Category A retirement pension. In a proper course of events the award of such a pension results from the due institution of a claim for it by the claimant, and a favourable determination by (now) an adjudication officer of that claim pursuant to sections 98 to 104 of the Act by reference, in particular, to section 28(1) of the Act.

(2) Section 28(1) of the Act provides as follows:-

> "28. - (1) A person shall be entitled to a Category A retirement pension at the rate specified in section 6 of the Pensions Act, if -
>
> (a) he is over pensionable age and has retired from regular employment; and
>
> (b) he satisfies the contribution conditions for a Category A retirement pension specified in Schedule 3, Part I, paragraph 5;
>
> and the pension shall commence
>
> from the date of retirement and (subject to section 30(1) of this Act (earnings rule)) be payable for the pensioner's life."

(3) The otherwise operation of section 28 in regard to the rate at which retirement pension is payable, if payable at all, is modified by section 30(1) of the Act. Section 30(1) provides as follows:-

> "30. - (1) Where the earnings of a person entitled to a Category A or Category B retirement pension, being a person who is less than 5 years over pensionable age have exceeded "[a specified amount, currently £70.00]" for the week ending last before any week for which he is entitled to the pension, the weekly rate of pension for the last-mentioned week shall be reduced -
>
> (a) where the excess is less than £4, by 5p for each complete 10p of the excess; and
>
> (b) where the excess is not less than £4, by 5p for each complete 10p of the excess up to £4 and by 5p for each complete 5p for any further excess:
>
> Provided that this sub-section shall not affect the rate of the pension for the first week after the date of the beneficiary's retirement.
>
> In this sub-section "week", where used in the expression "week for which he is entitled to the pension" and in the proviso, means such period of 7 days as may be prescribed by regulations relating to the payment of pensions."

(4) Under section 45 of the Act, which by sub-section (1) of the section is indicated

as applicable to a Category A or Category C retirement pension, and also to an invalidity pension, sub-section (2) provides for increase of the weekly rate of - (materially) Category A retirement pension, when payable to a married man, for (materially) any period during which the pensioner is residing with his wife, and indicates that the amount of such increase is to be that specified in relation to the relevant pension in Schedule 4, Part IV, column (3) of the Act. The otherwise operation of section 45(2) is, however, then modified by section 45(3) in cases where the pensioner is residing with his wife and she has earnings in excess of a stipulated amount. Section 45(3) provides as follows:-

> "(3) Where the pensioner is residing with his wife, and the earnings of his wife for the week ending last before any week for which he is entitled to benefit under this section exceeded" [and the present figure is £45], "the weekly rate of benefit under this section shall for the last-mentioned week be reduced -
>
> (a) where the excess is less than £4, by 5p for each complete 10p of the excess; and
>
> (b) where the excess is not less than £4, by 5p for each complete 10p of the excess up to £4 and by 5p for each complete 5p of any further excess.
>
> In this sub-section 'week', where used in the expression 'week for which he is entitled to benefit', means such period of 7 days as may be prescribed by regulations made for the purposes of this sub-section."

(5) It is convenient to note at this point that both in the case of the retirement pension attributable for the claimant personally and in the case of any increase in the weekly rate of that pension in respect of his wife there are under sections 30 and 45(3) respectively similar though not identical provisions for abatement of the amount of such benefit by reference to the earnings of the claimant himself, in the first case, and of the wife in the second; and to note also that in both cases the abatement, if any, which falls to be made by reference to such earnings operates in respect of a particular week ("week B") by reference to the earnings in a preceding week ("week A"). Where relevant earnings commence, cease, or fluctuate, such provisions are accordingly capable of practical effectuation only in conjunction with some practical arrangements for adjustment of an initial determination as to the amount of benefit payable for a particular week after some predetermined amount of pension has been paid and after the material information as to earnings is known. And, in general terms, this accommodation is provided by the machinery under the Act for "review" of the decision constituting the authority for the initial payment where a relevant change of circumstances has taken place, and the substitution of a revised decision (with or without a requirement for repayment of benefit so rendered benefit overpaid, in pursuance of the provisions of section 119 of the Act). It was, we were told, for long the practice of (now) the DHSS in the case of Category A retirement pensions (and we believe in certain other cases, but we are not here concerned with any others) to economise in the workload constituted by the giving of formal decisions by (now) adjudication officers under the Act by expressing the initial decision upon a successful claim for retirement pension to a determination, that retirement pension is payable "is allowed" (or "is payable") from a stated date (or from the date of retirement or the payday following the date of retirement - but that is for our purposes an immaterial

detail) "subject to reduction for earnings" (or "subject to earnings"), and then to make payment administratively - ie. without the authority of any further formal decision by (now) an adjudication officer - at what was considered to be the appropriate "going rate" in the particular case, with administrative adjustment for any uprating, and also for any material change in earnings upon which section 30 of the Act bears. And, we were given to understand, the like practice was adopted with regard to an increase of retirement pension under section 45 of the Act. Only if and when an issue arose as to a change, or as to a requirement for repayment of benefit overpaid, was any further formal decision procured. And, upon the authority of Commissioners' decisions of long standing, in those cases in which it was considered that a formal "completing" decision was required, it had prior to the decision next mentioned been understood by the Department that when such a "completing" decision was required it could properly be given in exercise of the statutory power to review decisions upon relevant change of circumstances.

9. As regards retirement pension, the soundness or otherwise of reliance upon the statutory power to review in cases where the above described practice had been followed was considered in decision R(P)3/84, where the initial award was expressed to be of a stated weekly rate from a stated date "subject to reduction for earnings where appropriate". In that case, and taking account of a change from antecedent statutory wording given effect by what is now to be found in section 28(1) of the Act, the learned Commissioner materially held first that a formal decision awarding retirement pension subject to earnings, but going no further, was not susceptible of a review in the case of relevant change of circumstance if the change of circumstance relied upon was a change in the claimant's earnings position - because a formal decision so framed was "inchoate"; its effect might be perfected or counteracted by a subsequent decision awarding or refusing pension, but the original decision itself remained unaffected by what in fact was the earnings position (by reason of being expressed to be "subject to earnings"). Thus far the learned Commissioner's decision clearly presented the Department with a substantial problem, because if the decision could not be reviewed no application of section 119(1) of the Act (as to requiring repayment of benefit rendered "overpayment" by a review decision) could be triggered, so that the Department would lose the protection of a simple statutory foundation for recovery and be left to its remedies under the general law as to restitution. However, the learned Commissioner then went on to deduce and indicate what (though in no sense pejoratively) we would call an ingenious alternative solution to the problem. He held that since the original decision was "inchoate" - ie. did not go the full course of indicating what was the specific amount of pension awarded in respect of a specific period - it gave rise to no conflict with the continuing subsistence, unreviewed, of that decision for there to be superadded an ad hoc decision by one or other of the determining authorities "perfecting" the earlier and more general decision by a specific award, and that the "perfecting" decision so given would then serve as the foundation, where required, for a requirement for repayment of benefit which had already been paid but had been "overpaid" in the light of the tenor of the superadded decision. That foundation he found, was provided by section 119(2)(A) of the Act as amended. And, proceeding (as we infer - he does not specifically identify this in his decision) by way of his own jurisdiction in the particular case under section 102 of the Act as to questions under the Act first arising in the course of an appeal to (inter alia) a Commissioner, he then went on to give the superadded decision appropriate in the circumstances of the case before him and embody in it the requirement for repayment which he held to be appropriate in the circumstances of the case.

10. (1) Since we are in the present case concerned with increase of retirement pension in respect of a wife, we are not directly concerned with any "inchoate decision" in the context of section 28(1) or section 30 of the Act, which was the context in which decision R(P)3/84 was decided. We are concerned with a purported review

decision in respect of increase of retirement pension pursuant to section 45 of the Act. However, what was indicated in decision R(P)3/84 is, tenably at least, capable of application by analogy to a section 45 case also, and on that account we must refer further to that decision. But before so doing we should mention a "curiosity", namely that the present case papers include a copy of the decisions awarding the claimant retirement pension (under section 28 of the Act) in respect of himself, and increase in respect of his wife, and both were were quite clearly "complete" decisions embodying nothing in the text to warrant characterising them as "inchoate". And whilst we consider it expedient nevertheless to state our respective views on the "inchoate decision" point since it has been extensively argued, and was the reason why the case was directed to be heard by a Tribunal of Commissioners, it does not strictly fall for determination as an issue upon which the present appeal turns. Faced with that setback in his endeavours to obtain guidance Mr Qureshi specifically invited us to give "obiter" guidance. Had there been no relevance of the point to the present case we would have preferred to leve the subject for treatment in a case in which it directly arose. But there is a peripheral relevance which we regard as contra-indicative, namely that if the whole of what was indicated, in paragraph 16 of decision R(P)3/84, including an obiter dictum to which we will below refer, was to apply a direct application of that dictum would affect the present case; and that aspect at least we must necessarily clarify.

(2) In the course of decision R(P)3/84 the learned Commissioner there indicated (paragraph 16) that as section 28(1) is now framed, embodying as it does an express reference to a retirement pension being payable "(subject to section 30(1), of the Act (earnings rule))" that made it "impossible... to interpret words like 'subject to earnings' in an insurance officer's decision awarding pensioners as mere description. They must now be a substantive part of the decision and would have to be understood if they were omitted". Now, if what the learned Commissioner was there seeking to indicate was that section 30 would still bear upon the decision, however the decision was expressed, we entirely agree as to that. But if he is to be taken as meaning that every decision, however specific and explicit, was to have attributed to it such a mention of it being subject to the earnings rule as to render it an "inchoate decision", and thus unsusceptible to review on grounds of relevant change of circumstance constituted by a change in the claimant's earnings position, we part company. For that is an interpretation which, as we see it, leads to the result that - for the very reasons indicated earlier in R(P)3/84 - there can never be review of a retirement pension upon the foundation of a relevant change of circumstances constituted by a change in the earnings position, even where the original decision is not "on its face" inchoate. And that is, for a reason we will shortly indicate, a conclusion to which we would subscribe only if driven to.

11. (1) In the course of submission to us in regard to "inchoate decisions" in the context of section 45 of the Act Mr Qureshi gave us to understand that it was of no great concern to the Department how we decided on that topic, and that all they were seeking was some clarification of existing decisions. But we see certain difficulties arising, tenably at least, in the context of section 119(2A) which did not fall to be considered and are not dealt with in decision R(P)3/84, since they did not arise in the circumstances of that case; and which, once appreciated, may render the Department less sanguine .

(2) Just as section 30 bears upon an award made under section 28(1) whether or not expressly referred to in the award, so in our judgment section 45(2) bears upon an

award made under section 45(1) whether or not referred to in the award. We have received no evidence as to the Department ever applying to section 45(1) awards the practices which we have above indicated we understand them to have adopted with regard to section 28(1) awards; but we infer from their concern to receive guidance as to the application or otherwise by analogy of decision R(P)3/84 to section 45 cases that they may well have done so (though it may be only that they are concerned about the position which would arise if every 45(1) decision had to be read as by implication inchoate, on that reading of what the learned Commissioner indicated in paragraph 16 of that decision). We are therefore prepared to decide - and not as "obiter" - and do decide, that a decision given under section 45(1) will not constitute an "unreviewable inchoate decision" in the context of the earnings rule constituted by section 45(2) if it is not in terms expressed to be subject to that rule, notwithstanding that section 45(2) will, of course, bear in the case, and may give rise to occasion for review of the decision under which the increase has been in payment. Our reasons for so deciding are first those we have already expressed in the course of assessing what decision R(P)3/84 itself indicates, and secondly that everything which is there indicated with regard to "inchoate decisions" has as its expressed foundation the express reference in section 28(1) to the earnings rule - and there is nothing corresponding to that reference in section 45(1). We leave for future determination, if and when occasion arises, what is the position if a decision given under section 45(1) is in terms expressed to be an award of increase subject to section 45(2), or in words to that effect. But we are not by so indicating being to be taken as impeaching the essential logic by which the learned Commissioner in decision R(P)3/84 arrived at his conclusion that a decision under section 28(1) which in terms referred to it being a decision "subject to earnings" was not susceptible to review on grounds of relevant change of circumstance referable to a change in the earnings position. We should for completeness in this part of our decision indicate that Mr Cottle's position with regard to the "inchoate decision" argument was, on behalf of his client, one of neutrality - though he was so good as to indicate that if and so far as he might adopt the role of amicus he would commend to us deciding in a tenor, if we properly could, which did not lead to any protracted "roll up" of unanticipated and unforeseen overpayment suddenly overtaking a claimant after a long interval and being accompanied by a requirement for repayment.

12. (1) Before leaving the subject of "inchoate decisions" we would, without deciding it, identify the point which has occurred to us in connection with section 119(2A) of the Act and led us to comment as we have in para 11(1) above. It is this: In decision R(P)3/84 the Department were, in a phrase, "saved by the bell", as regards obaining a requirement for repayment, by the learned Commissioner's conclusion as to the availability in the circumstances of the case of section 119(2A) not withstanding the unavailability of section 119(1).

(2) It is prerequisite to imposing a requirement for repayment under section 119(2A) that prior to the decision ("decision B") in which upon the authority of section 119(2)(a) the requirement for overpayment is to be made an amount of benefit has been paid which would not have been paid if the facts established for the purpose of decision B had been known - but also that the amount of benefit originally paid was itself paid "in pursuance of a decision" - decision A.

(3) But has the payment which decision B identifies by its own tenor as having constituted an overpayment been made "pursuant to a decision"? The learned Commissioner who decided R(P)3/84 merely concluded that it had been - but had, so far as we are aware, heard no argument on this point. What the Department may or may not elect to do by way of administrative act is no

concern of ours. But whether or not a decision which indicates that there is entitlement to a retirement pension and that retirement pension is payable "subject to earnings" ie. subject to a due application of the earnings rule under section 30 - enables a payment to be regarded as having been made "in pursuance of a decision" where the payment has been made without the authority of a determination by one of the determining authorities which expressly awards benefit of that amount for a period covering that in respect of which the payment purports to be made is, in our estimation, at large an "arguable question". And whilst prima facie it may be averred that decision R(P)3/84 already stands as authority that "all is well" as to that, we gauge also that since the point does not appear to have been argued in that case, the element of that decision which rests upon an affirmative conclusion as to payment made "in pursuance of a decision" constituted a decision per incuriam, any payment made having, so the argument would run, having stemmed from administrative action taken "in the light of" the inchoate decision, but not, materially, "in pursuance of" that or any decision.

13. Be that as it may, it suffices for the purpose of our present decision that in our judgment, and upon the evidence before us, the decision awarding the claimant increase of retirement pension in respect of his wife was a "complete" decision and not an "inchoate decision", in consequence of which it was susceptible of review in the context of the earnings rule and of section 119(1) of the Act upon relevant change of circumstances referable to the claimant's earnings position, in further consequence of which the material review decision by the insurance officer was properly founded. Whilst we have, for the reasons we have already indicated, been unable to determine for ourselves the detailed position as to any overpayment, the case has proceeded before us in the expectation on both sides that there will prove to have been such, and the case of "due care and diligence" has been fully argued before us. In those circumstances we have considered it appropriate to deal with the determination of the amount, if any, of overpayment in the way indicated in paragraph 2(1) above, but to give, in anticipation of any necessity for it so arising, our own ruling upon the issue of "due care and diligence" so as to avoid unnecessary repetition. Accordingly we will shortly move on to that issue; but before we do so we must for completeness make brief reference to a number of recent unreported decisions given by individual Commissioners which were cited to us by Mr Qureshi, in the context of his "inchoate decisions" submissions, as being in conflict with decision R(P)3/84.

14. (1) The decisions on Commissioner's File Nos. CP/14/1984, CP/48/1984 and CP/62/1984 were all given by the same Commissioner, were all given in reference to original awards (subsequently reviewed) of increase under section 45 of the Act which were in terms "complete decisions", as distinct from "inchoate decisions", and are not in our view in conflict with anything we have indicated in our present decision. They would be in conflict with decision R(P)84 only if it constituted authority as to an implication into every section 45 decision of a term, deriving from section 45(2), which rendered the decision an "inchoate decision" although in terms a "complete decision". It has not constituted such an authority, in our view, and we have expressly ruled against any application of it by analogy as regards any such implication in a section 45 case. Whether or not what it indicated - obiter - as to making such an implication in a section 28 case was correct can be tested afresh if and when occasion arises.

(2) The decisions on Commissioner's File Nos. CP/27/1984 and CP/55/1984 were given by another Commissioner (the same in each case), were given in reference to original awards (purportedly subsequently reviewed) of retirement pension under section 28(1) of the Act. It is not fully apparent from the second decision whether the original decision was "inchoate" or "complete" though from an

observation as to the Department's practice as regards the former it may reasonably be inferred that it was the former. The first clearly concerned a purported review of an original decision expressed in terms rendering it "inchoate". In both those cases the learned Commissioner followed R(P)3/84 and - until and unless the point to which we have drawn attention in paragraph 12 above is established as correct in law - cannot be regarded as having fallen into any error of law in so doing.

(3) No conflict appears to us to arise between the decisions referred to in (1) and (2) respectively above, having regard to the differing infrastructure as regards the decisions under appeal therein.

15.. (1) Since the "inchoate decisions" point affords no assistance to the claimant it follows that if and so far as overpayment is held against the claimant under or pursuant to our decision he must be required to repay the amount overpaid, in accordance with section 119(1) of the Act, unless - the burden of proof resting upon him - he can successfully establish that in the obtaining and receipt of the benefit overpaid he and any person acting for him throughout used due care and diligence to avoid overpayment.

(2) What constitutes "due care and diligence" in that context is the subject of well-established case law which is amply set out in the written submissions of (x) insurance and adjudication officers on the present case file of which the claimant has a copy, and indeed is substantially identified in the tribunal's stated reasons for decision. We therefore see no need to cite the authorities individually.

(3) The required test can for our purposes be sufficiently summarised as requiring that you start from the premise that a claimant is under a duty to tell the Department all circumstances which he should appreciate are relevant to his claim and should seek official advice as to any doubts he may entertain as to what he should disclose or as to official communications or requirements of him which he does not understand. Proceeding upon that foundation you must then look to the circumstances in which the claimant stood, and to all relevant considerations as to the sort of person he was - for example whether he was literate or illiterate - and, having done that, you are to evaluate whether or not he has throughout used due care and diligence in accordance with the standard to be expected of a person having his capacities to deal with matters relevant to his claim. For "due" care and diligence means care and diligence to the degree to be expected in the circumstances of the particular claimant of such a person as was the claimant. And, as is clearly established by the case law, that test cannot be passed by demonstration merely that the claimant has throughout acted without dishonesty or bad faith.

16. Mr Qureshi submitted before us that the claimant had been "less than frank" in giving the information which in fact he gave as to his wife's earnings being £43 and, subsequently, £50.50. That charge fell short of alleging actual dishonesty but went well beyond the scope of carelessness, neglect, inattention or indolence. And we wish to indicate at once, and unequivocally, that we regard it as wholly unjustified and unsubstantiated. We hold that the claimant, whom we found to be a transparently honest witness, emerges from the present appeal with his reputation for honesty and frankness utterly unstained. But that, for the reasons we have above summarised, does not of itself carry the day for the claimant - though it will we trust, be a welcome vindication so far as it goes.

17. (1) Taking account of the circumstance that the claimant had, as we accept, no

prior knowledge of what his wife's earnings were and had obtained the figure of £43 from her in circumstances in which, as we hold, neither he nor she had their minds upon whether what the Department were concerned with as representing her earnings was her gross pay, her total pay, her take-home pay, or what, and taking account also of the circumstance that the £43 was clearly inserted in the claim form by the DHSS officer who assisted him to complete it, we hold that the claimant did at the time the claim for increase was completed show the requisite degree of due care and diligence. Had it occurred to such officer to pursue with the claimant what, in the particular respects with which the question to which the £43 was given as the answer was concerned, the £43 represented it would - for we have already accepted the claimant's honesty and good faith - in our view have quickly emerged that the claimant had not the first idea where the £43 fitted into those contemplations because he had never asked his wife anything in that context nor had she told him, and the £43 either would not have been inserted at all at that stage or would have been identified as a provisional figure to be verified. We do not rule out that some doubt did arise in the mind of the officer concerned, which however has not been recorded, because of the claimant's clear recollection as to such officer having indicated that the matter would be clarified by the Department with the wife's employer. But we need not pursue that.

(2) We have not overlooked that the claimant had received a copy of leaflet NP32 before ever he signed the claim form in respect of increase for his wife, and that had he read and understood its text he would have been under clear notice as to what in the Department's requirement was and was not to be counted as earnings. However, we also accept the claimant's evidence that he did not understand the leaflets or the application forms with which he was supplied, and find no difficulty in making the inference that it was on that account that he took the form uncompleted to the local office in order to have the assistance of the Department in completing it properly. And that, in our judgment, disposes of contention advanced by Mr Qureshi in reliance upon the text of leaflet NP32 to the effect that the claimant knew or should have known what earnings were required to be stated on the claim form.

(3) However, after anxious consideration we are constrained to conclude that as regards his subsequent disclosure of the increase in his wife's earnings to £50.50 different considerations arise, and that upon a proper evaluation of the position as to that we cannot find the requisite standard of due care and diligence attained by the claimant.

(4) Very shortly before the claimant on 29 April 1980 made the disclosure of the increase to £50.50 in his wife's earnings he had attended the local office in the context of the prospective impact upon his retirement pension of the employment at £60 per week which he had been offered. That £60 was clearly the gross or total pay offered. Mr Qureshi, relying in this behalf upon the official note of that interview, submitted that at its conclusion the claimant "knew all about" the earnings rule and was then and thereby seised of the knowledge that it would be his wife's gross or total earnings which would be reckonable and needed to be disclosed in the context of his claims for increase in respect of her. That is, in our judgment, putting it too high. There is certainly nothing in the note to substantiate that at such interview there was any specific direction of his attention to what was required to be returned in respect of earnings of his wife. The interview was in quite a different context and the explanations needed to deal effectively with that context turned upon the earnings limits in respect of his own pension in respect of himself. Nevertheless,

we are satisfied that the £60 about which the claimant was then inquiring was to his knowledge the total or gross pay the subject of the offer of employment to him. Proceeding from there, we are prepared to infer in the claimant's favour that at the time when he went to the local office again on 29 April 1980 in connection with his wife's earnings, and indeed at the time when he signed the short written statement which was written out in the main by him but completed by the interviewing officer, he had not directed his mind to whether the £50.50 to which he was referring was gross, total, or whatever. Indeed, beyond that, we are satisfied also that when he signed the formal declaration on the same date and embodying the insertion by the interviewing officer of the figure of £50.50 he still had not in fact directed his mind in that quarter. But that, in the circumstances we will next indicate, does not in our judgment carry him home either.

(5) In the letter written on his behalf by his daughter and signed by him in the context of his appeal to the tribunal the claimant indicated that he had not until shortly before his claim for backdating of expenses of his wife in the computation of her earnings understood that expenses could be claimed. However, when completing the declaration form on 29 April 1980, it is apparent from that form as it stands that whilst the £50.50 had been inserted by the interviewing officer, and whilst the space for answer in regard to the numbered individual heads of specific expenses to be claimed against the wife's earnings were left unanswered, the claimant had himself inserted the entry "NILT" in the space marked for the total of such expenses. We are prepared to infer in the claimant's favour that he made that insertion without fully understanding about what might be so claimed. But it was clearly an occasion upon which there was no need for him to sign anything he did not understand for want of asking for explanation by the interviewing officer. And, had he done so, it must quickly have come to light not only that he did not know whether his wife had any expenses or not, but that he also had no knowledge as to what in the context of the immediately preceding entry of the £50.50 in the space provided for the declaration of her "total" earnings- ie. before deductions of income tax etc - the £50.50 truly represented it. And it is, in our judgment, not in such circumstances consistent with the exercise of due care and diligence for a claimant to give a specific answer to a question he does not understand without first seeking explanation. Mr Cottle's contention on his behalf was in substance that the claimant was still then "franked" by the intimation which had been given to him in February that the Department would be looking into the matter of his wife's earnings with her employer (though the expression "franked" is our formulation, not his). But we reject that contention as carrying the claimant over the situation in which he was at the time of making the formal declaration of 29 April 1980.

(6) The requirement as to showing due care and diligence "throughout" can as regards an aggregate period spanning changes in relevant circumstances be applied differentially as to different constitutent sub-periods. Consistently with the conclusions we have already expressed the claimant has, we hold, shown due care and diligence throughout as regards such, if any, overpayments as are determined to have been made to him within the overall material period but prior to 30 April 1980, but not as to payments made to him during the balance of the period to 5 November 1981.

18. The extent, if any, and, if any, the manner and timing of recovery of any overpaid benefit of which repayment is required are matters for the Secretary of State, and outside

our jurisdiction to determine. But we have very considerable sympathy for the claimant, who was clearly at all material times trying to do his best to grapple with matters with which he was unfamiliar, as to which he acknowledged he had little understanding, and concerning which he went to considerable lengths to obtain appropriate official advice. Whilst we have been constrained to arrive in the main at conclusions adverse to him upon the issue of due care and diligence, it has not escaped us that (whilst we attach no blame to the interviewing officers concerned) had either of those who saw him in 1980 asked the claimant to obtain, or obtained independently, wage slips in respect of his wife's own earnings, or had the later of those interviewing officers detected how "at sea", in general in the matter the claimant was and thought to check with the claimant or independently what the £50.50 represented, the true situation would have quickly emerged and the claimant would not now be faced with a requirement for repayment of what must for someone in his circumstances of life be a formidable repayment requirement. We therefore express the hope that recovery, if pursued at all, will be effected only upon a basis which does not impose undue hardship.

Reasons of Commissioner Reith

19. The facts and circumstances relating to this case and our decision thereon are very fully and carefully set forth in paragraphs 1 to 6 and 15 to 18 above. It is therefore unnecessary for me to deal with these matters. The position is that the claimant received an overpayment of benefit by way of the increase of retirement pension payable in respect of his wife, but the exact amount of that overpayment has still to be ascertained. I agree that the claimant should be regarded as not having shown the appropriate due care and diligence to avoid the said overpayment.

20. I and the other two Commissioners are agreed that the decisions in the present case awarding retirement pension to the claimant and an increase in respect of his wife were not inchoate. At the hearing, however, considerable discussion took place regarding when and under what circumstances decisons in regard to retirement pensions or increases thereof in respect of wives fell to be regarded as inchoate. I disagree with some of the views expressed by the other two Commissioners in this connection in paragraphs 7 to 14 above and although that is not a material consideration in regard to the decision which we have reached in the present case, I feel that it is right that I should explain the views which I hold regarding this question of inchoate decisions.

My understanding is that prior to about April 1978 the normal form of decision made in regard to a person claiming retirement pension was as follows:-

> "Retirement pension is allowed from (date) at the weekly rate shown below, subject to reduction for earnings where appropriate."

Where an increase of retirement pension was paid in respect of a wife the normal decision was in the following terms:-

> "Increase in respect of wife allowed at (rate) a week from (date) subject to reduction for earnings where appropriate."

In my opinion such decisions were not inchoate. They made awards of pension and, where appropriate, increases in respect of a wife at specified rates and therefore cannot in my opinion be regarded as having been inchoate. The addition of the words "subject to reduction for earnings where appropriate" did not in my view render such decisions inchoate. These additional words merely advised claimants that the specified rate of pension would

fall to be reduced or extinguished if in fact claimants or their wives started to earn more than the approporiate amount of earnings set forth in the relevant statutory provisions relating to earnings. When the earnings of a claimant or his wife warranted an alteration in the rate of pension, that in my view could be done, and was in fact done, by applying the review provisions contained in section 104 of the Social Security Act 1975 and the question of repayment of any overpayment was dealt with under the provisions of section 119(1) and (2) of the said 1975 Act.

22. In decision R(P)3/84 a Commissioner considered that the claimant in that case had had a decision relating to his retirement pension made to him in terms which fell to be regarded as inchoate. I respectfully disagree with that view. The Commissioner in question thereafter proceeded to consider the whole question relating to inchoate decisions. In that case the claimant in question received a decision which stated "Retirement pension is allowed from 10.3.77 at the weekly rate shown below subject to reduction for earnings where appropriate". The weekly rate was set forth as being £15.42½p. A decision was also given in relation to his wife which stated "Increase in respect of wife allowed at £9.20 a week from 10.3.77 subject to reduction for earnings where appropriate." In my opinion these decisions were not inchoate. It was later ascertained that on 20 August 1979 the claimant in question had commenced employment as a self-employed carpenter but had failed to report that fact until 3 January 1980. Investigations were made, and it was discovered that as result of having commenced that employment an overpayment of retiremnt pension had been made. In my view it was thereafter open to review the original decision relating to retirement pension under the provisions of section 104 of the said 1975 Act and to deal with the question of the repayment of the overpayment under section 119(1) and (2) of the said 1975 Act without having recourse to the provisions of section 119(2A) of the said 1975 Act. To the above extent therefore I respectfully disagree with the decision of the Commissioner who decided said decision R(P)3/84.

23. My understanding is that from about April 1978 onwards decisions in relation to retirement pensions were as was the decision in the present case to the effect that retirement pension was allowed from a payable date at the weekly rate shown in the form set with the decision. The increase in respect of a wife was normally given in a decision similar to the one which was given in respect of the claimant's wife in the present case, i.e. to the effect that an increase of retirement pension was allowed at a weekly rate from a specified payable date. Such decisions, albeit they did not contain what might be termed as any additional words explaining that the rate of pension or increase thereof might fall to be extinguished or reduced if the statutory earnings rule came into operation, were in my view not inchoate.

(Signed) D Reith
Commissioner

(Signed) I Edwards-Jones
Commissioner

(Signed) M J Goodman
Commissioner

(Date) 6th December 1985