JGM/BC

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Region: North Eastern

SOCIAL SECURITY ACTS 1975 TO 1984

CLAIM FOR SICKNESS BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Peter Montgomery Knowles

Appeal Tribunal: Wakefield

Case No: 119/1

[ORAL HEARING]

1. My decision is:-

(a) that the decisions awarding to the claimant sickness benefit for the inclusive period from 17 January to 11 April 1984 are to be reviewed as having been given in ignorance of a material fact;

(b) that on such review the decisions are to be revised in relation only to the period from 24 January to 11 April 1984 so as to provide that during that period sickness benefit was not payable;

(c) that in consequence of such revision there has been an overpayment of benefit amounting in all to £299.20 (11 weeks and 2 days @ £26.40 per week) repayment of which is required.

2. The claimant, a civil servant who had actually worked at one time as an insurance officer, became ill with pneumonia in April 1983 and as a result went sick. It was a severe attack and he did not recover sufficiently to return to his work as a civil servant until the end of June. Then after about four weeks he had to give up the work again for over a month on account of sciatica, which may or may not have been attributable in part to the enforced spell on his back on account of pneumonia. He then worked with only minor breaks until the beginning of December. He was away again on account of sciatica from 2 December until the end of the period before me. For about seven weeks of this period beginning during December he was in a plaster cast that prevented any bending at the hips.

3. Being a civil servant the claimant was subject to the system called "Estains" under which for a certain period salary continues to be paid in full during sickness, but sickness benefit is not claimed. With effect from 17 January 1984 this expired in relation to the claimant, and he was no longer precluded by Estains from claiming and drawing sickness benefit. He did in fact make a claim dated 13 January 1984; and for the period of 12 weeks and 2 days from 17 January to 11 April 1984 personal sickness benefit at the

rate of £26.40 per week was paid. It appears that he completed a form BF 11CW relating to an increase of benefit for wife (and children) but that no such increase was awarded.

4. As well as working as a civil servant the claimant had had for some time a subsidiary spare time occupation running a business to which I shall refer as "Lantern". The business was concerned with the sale, hiring out and installation of stage lighting; but the business included the sale of stage make-up etc. The claimant had worked in this business in the evenings and at week-ends, doing installation work himself. He ran it with the help of his wife. When he became ill he became unable to work in this business as he had done in the past, and had to sub-contract the work. He concluded that he must sell the business; and it was in fact disposed of with effect from 9 December 1983. I understand that in connection with the disposal of this business the purchaser agreed to employ his wife as a consultant paid (at or about that time) in a single sum of £5,000. The purchasers however did not take over the sale of make-up part of the business and a stock of items was left in the hands of the claimant and he continued with this side of the activities (which I shall refer to as the cosmetics side), making use of the connections that he already had through Lantern. I shall consider the extent of the cosmetics side hereafter.

5. The claimant, while running Lantern had had to pay a self-employed stamp quite apart from the employed contributions that were being made on account of his working as a civil servant. The cosmetics side however was not, immediately at least, profitable and he had no wish to go on paying self-employed contributions after the disposal of the main Lantern business. He therefore wrote a letter dated 9 June 1984 to the Department of Health and Social Security asking for exemption from paying self-employed contributions from 10 December 1983. He enclosed with it a rough "Trading Account" of the cosmetics side for the period from 10 December 1983 to 30 April 1984. This account was prepared by himself without the assistance of an accountant; and as an account it is somewhat defective, the defects being fairly obvious. But it purported to show loss of £2,887.31 over the period, and I doubt if with any amount of adjustments, it would have shown a profit.

6. The response of the Department to this letter was to summon him to an interview, which to his surprise turned into an interrogation during which he was questioned about his having claimed sickness benefit while running the cosmetics side and also about not disclosing in his claim for an increase for his wife the fact that she was earning as a consultant. He did, however, disclose other earnings of his wife, which I think must have been sufficient by themselves to exclude any title to an increase for his wife. But I have not seen the document of claim.

7. In the result not only did the adjudication officer review and revise the award of benefit for the entire period requiring repayment of the amount overpaid, but disciplinary proceedings in which the claimant's honesty was called in question were instituted, and at present the claimant is suspended pending the final outcome of those proceedings. I understand that this decision of mine may be taken into account in connection with them. I trust that those concerned with those proceedings will bear in mind that in these proceedings I am not bound by the strict rules of evidence, and that the question of the claimant's honesty is not in issue before me. Indeed I am struck by the fact that, if the claimant had been set on a wilful course of improper concealment of his activities, he would simply have indicated that Lantern had been disposed of and that he was no longer self-employed instead of writing the letter of 9 June 1984, which precipitated the whole process of which this appeal forms a part.

8. The adjudication officer having given the decision reviewing and revising the award of sickness benefit to the claimant for the period in question and requiring repayment of the amount overpaid, the claimant appealed to the appeal tribunal who dismissed his appeal. He now appeals to the Commissioner. I have been furnished with some evidence from the claimant's doctor and evidence extracted by the claimant from his books that was not before the appeal tribunal. This has enabled me to give to the claimant a very slightly better decision from his point of view than that given by the appeal tribunal. But in broad substance I am confirming their decision. The claimant was represented at the hearing before me by Miss L Findlay of the Child Poverty Action Group. The adjudication officer was represented by Mr M N Qureshi of the Solicitor's Office of the Department of Health and Social Security.

9. The claimant was awarded sickness benefit for the period from 17 January to 11 April 1984 on the basis that he was during that period incapable of work that he could reasonably be expected to do. The officers awarding the benefit knew nothing of the claimant's connection with the cosmetics side and gave the decisions awarding benefit in ignorance of that, and, if it was material, they did so in ignorance of a material fact. It was material because it was an indication that the claimant was not during the period or some part of it incapable of work that he could reasonably be expected to do. And the fundamental question that I have to decide is whether it has been shown that the claimant was not during that period incapable of work that he could reasonably be expected to do, not whether that which he was doing constituted work. These two questions though allied are distinct. In particular it seems that, somewhat paradoxically, it does not necessarily follow from the fact that a person is doing some work that he is capable of it (the former regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 was founded on this paradox; see also Decision CSS 61/83, a copy of which is in the case papers).

10. When first taxed with the proposition that he had been working in the cosmetics side the claimant said (and he repeated before me) that he did not see it as work. This of course the time-honoured answer given by every claimant who is being accused of working while drawing unemployment or sickness benefit. It is an answer that anyone who has worked as an insurance officer must have encountered. This does not however mean that the answer is necessarily incorrect. I have to investigate the question whether what the claimant did on the cosmetics side was indeed work or whether it was, as the claimant submits, just a hobby, or possibly something to occupy himself with while unable to work. The difficulty about the idea of its being a hobby is that buying goods and reselling them (and compared with making them and then selling them) is not something that lends itself to being a hobby. Moreover that is not how the claimant looked at it when he wrote a letter of 9 June 1984 asking for exemption from the need to pay self-employed contributions. If he had then looked on it as a hobby he would have considered that there was nothing to exempt. The business, for I take it to be a business, was part of what Lantern had done, and the claimant continued it as such, having fresh letter paper printed and continuing the VAT registration, thereby enabling himself to claim a refund. I understand further that the claimant is presenting accounts to the Inland Revenue.

11. I have to consider therefore whether the work involved can be treated as so trivial that the claimant cannot be regarded as being capable of work that he could reasonably be expected to do by reason of his having done it; or whether the claimant's medical condition was such that he ought not to be regarded as being capable of work even if he did it. If I am against him on this I have to consider the discretion to deem incapable of work a person who is in fact capable of work confirmed by regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983.

12. The local adjudication officer listed in his submission to the local tribunal the number of orders placed for cosmetic supplies during the period (15 orders of which he was invoiced a total of more than £1,800); and the five advertisments placed in journals in that period. The account submitted with the letter of 9 June 1984 showed expenditure of more than £700 on printing and advertising. It also shows £383.65 for carriage, post and petrol. The claimant was questioned about this by the interrogating officer. He indicated that the cost of dispatching parcels was from £3 to £4 and it was put to him that this meant that he sent 100 parcels during the period. He appears to acquiesce in this suggestion. He has however now produced figures derived, he says, from his books showing 33 parcels dispatched during the period before me. This figure is substantially less than that in which he previously acquiesced. At the hearing before me the claimant was asked by Mr Qureshi about the petrol element in the above sum of £383.65. He said that in fact the only petrol used in connection with the cosmetics side was the cost of attending certain conferences connected with the theatre. While he had been concerned in Lantern he had had an arrangement with the VAT authorities that 90 percent of his total expenditure in petrol should be attributed to Lantern. It had subsequently been agreed that this percentage should be reduced to 10 percent after the claimant had disposed of Lantern. But the figure in the account was put in before the change had been arranged. In consequence the figure of £385.63 contained an inflated estimate of the petrol attributable to the cosmetics side. The element of carriage and postage was probably substantially below the figure of £385. In the circumstances I propose to accept the claimant's figure of 33 parcels as correct, more particularly as I have reached the conclusion that even with the lower figure I cannot treat the work done as too trivial to be taken into account.

13. The claimant told the interrogating officer of the Department that he handled the cosmetics side on his own and without the assistance of his wife. I am invited nevertheless to hold that the work that he did in taking over from Lantern the cosmetics side and in ordering goods, advertising, wrapping and dispatching parcels, really the entire business was so negligible that it ought to be disregarded. Although the work was not immediately profitable, it was intended to enable refunds of VAT to be secured, and its effect was to lay the foundations of future business. And I find that at the level at which the business was then running the claimant was able despite his illness to do all that was necessary to keep it going, even if that meant actual physical work for only a relatively small part of the time.

14. Miss Findlay suggested that it was work that the claimant could not reasonably be expected to do. Certainly if he had not done it, he would not have been subject to loss of benefit on the ground that he was capable of it. But once he is found to have been doing work that cannot be ignored as being negligible there is not really any question of ignoring the work because it would not if he had not done it, been reasonable to expect him to do it (see paragraph 6 of Decision CS 427/82, which the claimant's association included among the list of decisions that it was proposed to cite before me).

15. But even if the work was not in general so trivial that I can disregard it I still have to consider whether the claimant was for part of the time incapable of work. On this issue I have some evidence that was not before the tribunal. The claimant's doctor, in a letter dated 21 October 1984 stated that the claimant having continued to make little progress towards recovery was in December 1983 placed in a plaster of Paris cast. I asked the claimant about this. He was unable to give precise dates, but said that he was in it for about 7 to 8 weeks, and that while in it he was unable to bend at the hips at all; and that after he came out of it he had to wear a surgical belt with steel braces. The claimant's final spell of incapacity for his civil service work began on 2 December 1983, and I think it reasonable to infer that it would have been early in that spell that he went into the plaster cast. That would mean that he would have come out of the cast sometime after 20 January 1984. I note from his compilation of the dates on which he dispatched parcels that none were dispatched in the week down to and including 23 January 1984. I am prepared to accept that during the period to that date the work done was relatively trivial and that the claimant was actually incapable of work, and that the decision awarding benefit for that period ought not to be revised on review. I do not consider that I can on the evidence hold the claimant to have been incapable of work beyond that date.

16. I must now turn to regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, which provides as follows:

> "A person who is suffering from some specific disease or bodily or mental disablement but who, by reason only of the fact that he does some work while so suffering, is found not to be incapable of work by reason thereof, may be deemed to be so incapable, if that work is -
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> (i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital or other similar institution; or
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> (ii) work which is not so undertaken and which he has good cause for doing;
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> and from which, in either case, his earnings do not ordinarily exceed £22.50 a week."

The figure of £22.50 has since been increased. But that was the figure at the time in question.

17. This regulation, as was recently held by the Court of Appeal in the combined cases of Merriman v Insurance Officer and Hunt v Department of Health and Social Security (14 June 1985) confers a discretion on the adjudicating authorities to deem certain people incapable of work notwithstanding that they have done some work during the relevant period. It cannot be suggested that the work that the claimant did fell within sub-paragraph (i) above. But it fell within paragraph (ii) if it was work which he had good cause for doing. The only well established instance of good cause under (ii) is, on the analogy of (i), medical good cause but as was acknowledged by Kerr LJ in the above case, non-medical good cause can exist, though instances of it are probably rare. An emergency may be an example. The claimant asked me at the hearing if a bona fide belief that what was being done did not constitute work amounts to good cause. My view is that it does not. For there to be good cause some more objective test has to be satisfied. In the present case Miss Findlay did not suggest that there was anything but medical good cause. She submitted that if one of several objects of doing the work was therapeutic

that was sufficient to establish good cause. The claimant at that point in her submission interjected that it was the only object. I am however unable to accept this last interjection. The claimant has himself indicated other objects in his evidence to the local tribunal and in documents in the case papers, vis. the salvaging of VAT repayments, the maintenance of contact with friends and, maybe, customers in the theatre world whom he had come to know through Lantern. As for medical good cause his doctor says that he knew nothing about the claimant's involvement with the cosmetics side after disposing of Lantern; and while he accepts that any person who had been unfit for work for as long as the claimant had would be helped mentally and physically be some activity, he did not advise what the claimant was doing because he knew nothing about it. It is perfectly possible of course that he would have advised it, had he known. If and so far as the claimant did it for therapeutic reasons it was off his own back.

18. I do not need to decide whether this added up to good cause or not, because, even if it did, I have a discretion to decide whether the claimant is to be deemed to have been incapable of work during the period for which I have found him actually to have been capable of work (24 January to 11 April 1984). In my view a person who works while drawing sickness benefit in circumstances in which he claims to have good cause for so doing will if the earnings are within the limit, ordinarily have the discretion in regulation 3(3) exercised in his favour so long as he discloses the work he is doing to the Department at the time that he is doing it, ie at a time that is to say when the purposes of the work can be readily investigated, eg when the claimant's doctor can be asked if he advises it. If the question of good cause comes up for consideration only at some later time when the fact that the work has been done comes to light (whether because the claimant as here discloses it or otherwise) it is not unlikely, especially in cases where there is no evidence that the work was being actually encouraged by the claimant's doctor (as in Decision R(S) 4/83), that the discretion will not be exercised in favour of the claimant. By that time it will often have become difficult to determine the weight to be attached to the different motives that come to be suggested for having done the work. In the present case I am particularly struck with this difficulty; and I have concluded that it is not a case in which I should exercise the regulation 3(3) discretion in favour of the claimant. I hold accordingly that the decisions awarding benefit should be revised in the manner indicated in paragraph 1 in relation to the period from 24 January to 11 April 1984.

19. This means that the £299.20 paid in respect of that period was overpaid and I have to consider whether repayment is required. I am bound to require repayment under section 119 of the Social Security Act 1975 unless it has been shown to my satisfaction that in the obtaining and receipt of the benefit the claimant used due care and diligence to avoid the overpayment. The claimant, as I have found, received benefit to which he was not entitled. The ordinary rule of common morality that a person who is overpaid should repay is in this case relaxed to the extent that a claimant is not required to repay if he can show that he used such due care and diligence to avoid the overpayment as justifies his retaining that which he ought not to have received. I am entitled to take into account the state of the claimant's health. He was at the time, or at any rate for a substantive part of the time, in considerable pain with his sciatica. But it was not such as to prevent him from giving attention to the business of the cosmetics side, limited though it was at the time. I do not think that I can hold that he could not have been expected to give attention to his claims for benefit. I have held that he was at the time of his initial claim 13 January 1984 in plaster and almost certainly

incapable of work. I do not think that any fault can be found with that claim form. He has been criticised for having failed to put a tick in the box to indicate that he was self-employed as well as in the box to indicate that he was employed. But the form asked him to tick one box, and it is not suprising he selected the box appropriate to his main occupation as opposed to his subsidiary one. Thereafter however he put his name to a statement on three occasions that because of incapacity he had not worked since the date of his last claim. This was, as I have held, incorrect. He claims to have been bona fide of the opinion that what he was doing was not work. In relying on that he made an error, the error of electing to decide for himself what ought to be decided by the adjudicating authorities. If he had not made this error he might have been given the opportunity of going to his doctor for endorsement of what he was doing. But not having done so he does not satisfy me that he used due care and diligence to avoid the overpayment and I require repayment.

20. The claimant's appeal save as to a period of one week fails.

Signed: J G Monroe
Commissioner

Date: 6 December 1985