

PLH

Commissioner's File: CTC 0110/04

**SOCIAL SECURITY ACTS 1992-1998****APPEAL FROM DECISION OF APPEAL TRIBUNAL  
ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

*Claim for:* Working families tax credit  
*Tribunal:* Rochdale  
*Tribunal case ref:* U/40/124/2003/01307  
*Tribunal date:* 17 September 2003  
*Reasons issued:* 10 November 2003

1. The decision of the Rochdale appeal tribunal given on 17 September 2003 on this overpayment case was erroneous in law and I set it aside. As is rightly conceded in the very helpful written submission of Mr D Eland on behalf of the Board of Inland Revenue dated 12 March 2004 at pages 205-210, the decision is defective because it failed to address the relevant issues in the case with sufficient clarity, leaving it ambiguous and open to considerable doubt whether it was the claimant, her husband or both that the tribunal was holding legally liable to repay the overpaid benefit involved, and on what basis. Moreover the tribunal failed to take account of the potentially relevant provisions of regulation 14 **Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988** SI No. 664 on the capital calculations for any overpayment claim. The case must be remitted to be reheard and redetermined by a differently constituted tribunal.

2. The claimant is a married woman now aged 45 who was at all material times living with her husband, a taxi driver, in Oldham. She claimed and was awarded working families tax credit continuously from 18 January 2000 until after 19 August 2002. This benefit has to be claimed and awarded for periods of 26 weeks at a time, and the appeal to the tribunal was concerned with the effect of six successive claims and awards made in January and July in each of the years 2000 to 2002 inclusive. Each claim form had been signed by both the claimant and her husband and each contained the material misrepresentation that neither of them, nor any of their children who were included in the claims, had any savings or capital of any kind at all. In fact this was untrue since the claimant's husband had at all material times had over £12,000 in one or more bank or building society accounts in his name, and he and the claimant had had additional bank

or investment fund accounts at the dates at each of the last three claims, taking their total credit balances up to over £21,000 at one point.

3. It is now admitted (and in any case completely beyond argument) that the statements made in the claim forms about the family's capital were untrue, and that neither the claimant nor her husband had disclosed the true facts in connection with her claim before these were brought to light in an Inland Revenue investigation in July and August 2002, after which the claimant's benefit was stopped.

4. The appeal to the tribunal was against a decision, or rather six separate decisions made simultaneously on 13 September 2002, revising and revoking each of the six awards under which benefit had been made for the successive claim periods from 18 January 2000 to 19 August 2002 inclusive. Those decisions had each further determined that the overpaid benefit for the relevant award period had been caused by the misrepresentations on each of the claim forms, and was recoverable: in the case of the first three from the claimant herself, and the last three from the claimant's husband, the difference reflecting a change in the wording of the claim form by which in the last three the claimant's husband had given his own separate confirmation that the details she entered about his capital were correct.

5. Thus the decisions under appeal to the tribunal dealt with a total overpayment for the whole period of £24,337.30, but divided the legal liability to repay this between the claimant and her husband: £14,504.10 being expressed to be recoverable from her for the first three periods and £9,833.20 from him for the remainder. The claimant and her husband submitted and both signed joint forms of appeal to the tribunal, admitting the existence of the accounts previously denied but now averring for the first time that the money standing to the credit of them was held as "family assets" with the beneficial interest divided between various family members so that not more than £3,000 belonged to any one person: pages 1J-1M.

6. When the matter came before the tribunal on 17 September 2003, it appears to have been treated as only one appeal with one appellant, though the tribunal documents and record of proceedings at pages 167 to 180 are very unclear and inconsistent about whether this was the claimant or her husband, sometimes referring to him as the appellant and sometimes to her. Perhaps as a result of this initial lack of clarity, the chairman's decision unfortunately fell into error when after concluding, entirely justifiably, that the evidence given by the claimant's husband was unsatisfactory and failed to establish that the money in his and his wife's accounts belonged beneficially to anyone else, the "decision issued on 13 September 2002" was purportedly confirmed, but

without differentiating between the liability of the claimant herself and her husband under the several decisions of that date. Moreover this confirmation was given on a basis which appeared to relate entirely to the husband alone, since as the tribunal put it in its statement of reasons issued to the parties on 10 November 2003 at page 180:

**“The tribunal found that the overpayment was recoverable in all cases as the Appellant [*sic*] had misrepresented or failed to disclose information in relation to his or his wife’s savings, they had capital in excess of £8,000 at each of the dates of claim for the Working Families Tax Credit.”**

7. The grounds of appeal submitted on behalf of the claimant did not dispute that the overpaid benefit was in principle recoverable for misrepresentation or non-disclosure, but contended that the tribunal had erred in not applying the provisions of regulation 14 of the overpayments regulations referred to above. That regulation, it was suggested, should have been taken into account as potentially relevant in reducing any liability of the claimant for overpaid benefit by the operation of what is known as the “diminishing capital rule”. The material provisions of the regulation are as follows:

**“Quarterly diminution of capital**

**14. – (1) For the purposes of [section 71(1) of the Social Security Administration Act 1992] where...working families tax credit...has been overpaid in consequence of a misrepresentation as to the capital a claimant possesses or a failure to disclose its existence, the adjudicating authority shall treat that capital as having been reduced at the end of each quarter from the start of the overpayment period by the amount overpaid by way of...working families tax credit...within that quarter.**

**(2) Capital shall not be treated as reduced over any period other than a quarter or in circumstances other than those for which paragraph (1) provides.**

**(3) In this regulation –**

**“a quarter” means a period of 13 weeks starting with the first day on which the overpayment period began and ending on the 90<sup>th</sup> consecutive day thereof;**

**“overpayment period” is a period during which...working families tax credit...is overpaid in consequence of a misrepresentation as to capital or a failure to disclose its existence.”**

8. On behalf of the Board of Inland Revenue Mr Eland’s submission draws attention to the divergences between what was said in the tribunal chairman’s statement of reasons about the basis on which the overpayment was being held recoverable and the actual departmental decisions he was purporting to do no more than confirm; and to the lack of any clear findings showing which of the claimant and her husband was being held liable for what amount, and on what basis. On those grounds he concedes that the decision must be held defective and erroneous in law.

9. As to regulation 14 however, his submission is that the “diminishing capital rule”, even if taken into account by the tribunal as he agrees it should have been, would have made no practical difference in this case; since the way in which WFTC is claimed and awarded for separate 26-week periods means that each such half-year must be considered as a separate “overpayment period” for this purpose. Thus, he says, there can never be more than one quarter’s notional reduction from the actual amount of capital possessed by the claimant and her husband, before the calculation has to be started over again with a fresh claim. The result is that on the actual figures in this case (as shown in the tables on pages 1G and 210) the diminishing capital rule never has the effect of taking the couple’s reckonable capital below the threshold figure of £8,000, because one quarter’s reduction is never enough to do this before the actual figure must be brought into the reckoning again at the start of the next claim period.

10. As already indicated, I have to accept the first of Mr Eland’s submissions. The way the tribunal dealt with the case and formulated its decision was defective, and it must be remitted for rehearing of what appear to me actually to have been two separate appeals by the claimant and her husband against the decisions making them each liable for the repayment of a different amount of the total benefit overpaid. I agree with the analysis set out in Mr Eland’s submission, and in particular with his point that while the tests for recoverability on the alternative bases of misrepresentation or failure to disclose material facts under section 71 **Social Security Administration Act 1992** are not mutually exclusive, they are different; and the tribunal erred by failing to keep them separate, as well as by its lack of clarity of who was being made liable and for what amount. Mr Eland’s analysis would in my view be a most useful starting point for the fresh tribunal’s consideration of the case.

11. I am not however persuaded by his second submission that the administrative provisions for claiming and awarding WFTC only in 26-week helpings cause it to have to be treated differently from other benefits under regulation 14. To apply the diminishing capital rule so restrictively in WFTC cases seems to me too artificial and potentially arbitrary in its effects to be right. On this I accept the submissions in reply on behalf of the claimant by Mr Soothill of the Oldham CAB at page 211, that the regulation should be applied quarterly over the whole of what is in reality one continuous overpayment period in this case, from 18 January 2000 to 19 August 2002 inclusive. It seems to me Mr Soothill is right in saying that this is consistent with the natural meaning of an “overpayment period” as defined in regulation 14(3), and that to stop and start the mechanism afresh once every 26 weeks without regard to the continuity of what is really happening before or after that particular segment

of the overall period would be against the principle of the diminishing capital rule as originally applied in such cases as CSB 53/81, R(SB) 6/85 and R(SB)15/85.

12. As is apparent from those cases and indeed inherent in the primary legislation about overpayments in section 71(1) of the 1992 Act, the point of the overpayment provisions is restitutionary, and not penal. They apply even where claimants have acted entirely innocently and benefit turns out to have been overpaid without it being anyone's fault, and their purpose is merely to ensure the recoupment to public funds of whatever, when the truth finally does come to light, turns out to have been actually overpaid in excess of the rightful entitlement: no more. Consistently with this, the diminishing capital principle is that notional reductions in the amount of the claimant's capital need to be made at the rate necessary to offset the reduction or total loss of benefit the claimant would have suffered if all the capital had been disclosed on time: R(SB)15/85, paragraph 14(5).

13. In the present case, if the claimant and her husband had properly disclosed their £12,000-odd of capital at the time of their first claim, they would have not have got WFTC at all for the succeeding 26-week period, and on the figures in this case would then have had £4,440.80 less benefit to live on in that time. The assumption behind the diminishing capital principle is that they would instead have had to have resort to an equivalent amount out of their capital to provide for their needs over the same period. Had they done so, they would then have been in a position to make a claim by at any rate the start of the second quarter in the second period for which they actually did claim, by which time their capital could be expected to have fallen below the £8,000 threshold. Thus had they done what they should have done and spent their own money rather than claiming until they fell below that level, they would have been entitled to at any rate some WFTC from say October 2000 onwards. To ignore this and insist on 100% recoupment of the benefit actually paid for those later periods would amount to imposing a penalty for the misrepresentations, over and above what was needed to restore to public funds the net extra benefit they wrongly overdraw.

14. I do not think it should make a difference for this purpose that a continuous overpayment period for a particular benefit is made up of more than one claim or award period of shorter individual duration. It is apparent from the original cases on the diminishing capital principle that these contemplated it might have to apply over an extended period, even a matter of years, without any suggestion that the way it operated should differ according to the number of intermediate claims and awards made during that time. It seems to me inconsistent with the restitutionary character of section 71 and

the underlying purpose of the diminishing capital rule that it should be interpreted to enable the authorities to recover more than the actual net loss to the public purse, by the mere accident of having the claimant sign successive claim or review forms or making successive short period awards during one overall continuous period of payment.

15. For those reasons I allow the appeal and remit the case to a further tribunal for reconsideration, with the direction that regulation 14 should be applied to the aggregate continuous period of the overpayments in this case as one overpayment period and not separately in relation to each 26-week claim.

16. *(Signed)*

**P L Howell**  
**Commissioner**  
**26 June 2004**

17.