Bundle 196 (Claim)

CTC/1630/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This supported appeal from a decision of the Coventry Appeal Tribunal is allowed. I set aside the decision of the tribunal and the decision of the Inland Revenue dated 30 June 2004 and I remit to HM Revenue and Customs the calculation of the tax credits that the claimant was entitled to in the year from 6 April 2003 to 5 April 2004 on the basis that she was entitled to make a single claim and to receive tax credits on the basis of her single claim from 6 April 2003 to 30 September 2003. If the problems experienced with their computer system, as described in the submissions on this appeal, prevent HM Revenue and Customs from producing a correct calculation using the computer, then the calculations, or part of them, will need to be done without the benefit of the relevant computer programme.

2. The claimant was married with 3 children. It would seem from the tribunal that she and her husband had made a joint claim for tax credits for the year 2002-2003. For the year 2003-2004 the claimant claimed tax credits as a single person. The tribunal found that she and her husband separated "on or about the beginning of April 2003", but that the husband moved back into the matrimonial home at about the beginning of October 2003. This followed a decision, taken by the claimant at some unspecified date after her and her children's summer holiday, to try to achieve a reconciliation. On the basis of the findings of fact set out in the statement of reasons for the decision, the tribunal concluded that her husband's absence from the household was in circumstances in which the separation was not likely to be permanent.

3. The tribunal therefore disallowed the claimant's appeal and confirmed "the decision of the Board issued on 19 April 2004". That reference is to a letter dated 19 April 2004 which stated that on the balance of probabilities for tax credit purposes, the husband's absence should be treated as a temporary absence, so that the claimant should have made a joint claim for tax credits. Her single claim, with effect from 6 April 2003, was therefore not appropriate and she was not entitled to tax credits as a single claimant from that date. The letter went on to state "You will shortly receive a formal notification of my decision against which you will have the right of appeal."

4. In fact there is no indication that any formal notification ever was issued shortly after that letter, but by letter dated 12 May 2004, in a letter dealing principally with factual issues raised by the claimant, the writer stated that her decision that a joint claim should have been made remained unaltered. A booklet on how to appeal was enclosed.

5. The claimant appealed, with permission, out of time, in October 2004. I shall examine her grounds of appeal later in this decision. They related to whether the Inland Revenue could question her making her application as a single person when she had been advised by the tax credit helpline to make the application as a single person without being asked anything about whether the separation from her husband was likely to be permanent. She also contended that in any event when her husband and she separated she honestly believed that the separation was likely to be permanent.

6. It would appear from the submissions made on behalf of the Tax Credit Office to the tribunal that the decision under appeal was said to have been made under section 16(1) of the Tax Credits Act 2002. The tribunal purported to confirm a decision issued on 19 April 2004. Unfortunately, nobody at that stage noticed that a decision to amend or terminate the award under that section can only be taken "during the award period for which an award of a tax credit is made to a person or persons". It is now rightly accepted by the Inland Revenue that, even if there had been a formal decision issued on 19 April 2004, it could not have been validly taken under section 16(1) because it was outside the period for which the award had been made. Accordingly, there was no valid decision at that time which could be appealed, or which could be confirmed by the tribunal.

7. It is plain therefore that the tribunal was in error of law in affirming the non-existent decision and its own decision must be set aside (CTC/2576/2004; CPC/3891/2004). The representative of the Inland Revenue on this appeal originally submitted that the commissioner should remit the case to a new tribunal to determine whether any valid decision had in fact been taken under section 18 of the Tax Credits Act following the service of the appropriate notices under section 17 of that Act.

8. Following a direction of Commissioner Levenson, investigations were carried out, and the claimant has produced what she believes to be the relevant section 18 decision dated 30 June 2004 on form TC602(E). The Inland Revenue has produced a copy of the section 17 notices and the claimant's responses dated 4 June 2004. The decision communicated to the claimant by the statement of 30 June 2004 was that the claimant was entitled, in the year to 5 April 2004, to a child tax credit of £120.06 and a working tax credit of £72.36. This was said to be based on the personal circumstances shown on the form, which included a statement that the claimant had claimed as an individual. The form went on to state at p.4 that there had been an overpayment of £4762.44 by way of child tax credit and £3596.60 working tax credit which would have to be paid back. The Inland Revenue have submitted on this appeal that the notice was in fact wrong in that the claimant was not entitled to any tax credit for the year in question, but that it had not proved possible to record this information accurately on their computer system "due to an unspecified technical problem".

9. It is plain that the appropriate course, as the Inland Revenue agrees, is to treat the appeal as being from the section 18 decision communicated on 30 June 2004. The principal questions which arise on the appeal remain the questions whether (1) the claimant was correct in claiming in April 2003 as a single person rather than as a couple, and (2) if so, at what stage during the following year a change of circumstances ought to have been disclosed.

10. The commissioner who gave leave to appeal observed that the tribunal seemed to have recited the evidence from the claimant without making it clear whether the evidence was accepted (except in one aspect where it made a contrary finding). However, the tribunal specifically describes the facts set out as its findings of fact and in paragraph 17 of the statement of material facts and reasons specifically takes into account all the "above factors". It appears to me clear that the tribunal accepted the account of the

claimant as set out by it except where it stated otherwise. I see no reason not to accept the tribunal's findings of fact and to adopt them.

11. Section 3(3) of the Tax Credits Act 2002, so far as relevant to this case, provides that a claim for a tax credit may be made (a) jointly by the members of a married couple or unmarried couple both of whom are aged at least sixteen; or (b) by a person who is at least sixteen but is not entitled to make a claim under (a) (jointly with another). Section 3(4) provides that entitlement to a tax credit ceases in the case of a joint claim if the persons by whom it is made could no longer make a joint claim, and ceases in the case of a single claim if the person by whom it was made could no longer make a single claim.

12. Section 3(5) goes on to define "married couple" as a man and woman who are mattered to each other and are neither (a) separated under a court order, nor (b) separated in circumstances in which the separation is likely to be permanent.

13. One has only to look at these provisions to realise that they create impossible problems for a couple who are separated in circumstances in which there remains a serious possibility that the separation may not be permanent. One may consider that they are likely to get together again, while the other may consider that very unlikely. A family therapist or counsellor may have a different view from one or both of them, and the Inland Revenue or a tribunal on an appeal after the event may also approach the matter from a different perspective. How, in those circumstances, are the couple, or one of them, to know on what basis to claim? If they misjudge, they may lose the tax credits to which they would undoubtedly have been entitled if they had claimed on the alternative basis.

14. Further the situation requires re-assessment on a weekly and even daily basis. If, at any point a separation becomes likely to be permanent, entitlement to a tax credit based on a joint claim ceases automatically and a new single claim would have to be made. If a reconciliation becomes more likely, in the case of a single claim, then entitlement would cease and a new joint claim would have to be made. Prospects of a reconciliation could fluctuate from day to day and week to week, as could the assessment of the prospects by both the parties and disengaged bystanders, such as the Inland Revenue or a tribunal. A situation could at least theoretically be reached in which, in order to ensure that the claimant(s) get the tax credits to which they were entitled, fresh claims would need to be completed daily on both the joint and single basis, leaving somebody to work out afterwards which, on the same daily basis, was the correct approach.

15. In the course of her submissions on this appeal, the claimant's representative has stated that when the claimant's husband left again on 5 November 2005 the claimant initially continued to claim as a married couple, but after a solicitor was instructed by the claimant to commence divorce proceedings in January 2006 the Inland Revenue decided to treat the separation as permanent from 5 November 2005 and sought to recover the resulting overpayment of £2060, although the claimant was in that case able to mitigate her position by making a fresh claim as a single person which was backdated by 3 months.

16. Perhaps unsurprisingly, there is no clear assistance to be gained from the written guidance offered by the Inland Revenue to would be claimants. The written guidance set out in the extract from the notes to form TC600 (file, p.1h) states only that "You are not separated if one of you is living away from home temporarily, for example, due to work or being in hospital and it is your intention to continue as a couple in the future."

17. I do not consider it likely that either the draftsman or Parliament ever applied their respective minds to the effect of these provisions or as to how they were to apply in the case of a trial separation. Had they done so, however, I consider it clear that they would have been appalled at it applying in the way described above. Serious consideration should be given to amending the legislation to provide clearer guidelines as to what application should be made, and when it should be made, and to safeguard the entitlement of a claimant, who makes a genuine claim or continues to receive benefit on the wrong basis, to receive or retain at least the benefit he or she would have received had the claim been made on the correct basis.

18. While each case must turn on its own facts, it is important to bear in mind that married couples do not separate unless there have been serious problems in their relationship, or other problems, such that continuing to live together becomes unacceptable for at least one member of that couple. Before any conclusion can be drawn other than that the separation is *likely* to be permanent, the tribunal must consider why the separation has occurred, and what indications there are that the couple may be reconciled. Even then, after balancing those indications against any contra-indications, the tribunal must conclude that there is at least a 50 per cent chance of a reconciliation before it can conclude that a single claimant and his or her spouse are to be treated as a married couple. It is unlikely that such a reconciliation will occur before the parties have taken steps to deal with the problems that led to the separation in the first place, and have actually begun the process of arranging to live together again. A tribunal should be slow to differ from the claimant's own genuine assessment of the likelihood of a reconciliation, although, of course, that is a subjective assessment and the tribunal is not bound by it.

19. In the present case, the tribunal relied on a number of factors as showing that from the start the separation was not likely to be permanent. Specifically, it drew attention to the fact that the claim as a single person maximised the claimant's income during a period of financial stringency, the fact that the claimant's husband continued to have his entire salary paid into the claimant's bank account and the fact that she did not know (the word "note" here appears to be a typo) any other address for her husband as going towards establishing the temporary nature of the separation.

20. The tribunal noted that the claimant stated that she had sought advice from the Tax Credit Helpline and that on the basis of the information which she had provided she had been advised to make a single claim. There is no finding as to the information which had been provided, but there was also no evidence from the Inland Revenue that if, as she had stated, she had told the helpline that she and her husband had separated, any enquiry would have been made from her as to the permanence of the separation. The fact that the single claim benefited the claimant during a period of financial stringency might have been a factor which might have led the tribunal to consider

whether the separation was a genuine one at all, but there is no hint in its findings that it in any way doubted that the separation was genuine. Nor have I any reason to doubt that this was the case. Indeed, the fact that the parties have again separated and are now divorcing is a further indication that the initial separation was genuine.

21. Further, given the findings of fact as to the financial problems which had been created by the claimant's husband, I do not find it surprising that, as between a couple who plainly wanted to keep on good terms for the sake of the children, the husband's wages continued to be paid into the claimant's bank account to ensure that the family finances were properly taken care of. Finally, I am wholly unable to see how the fact that the claimant did not know where the husband was living (except that it was in Warwick at a friend's house (p.12b)) could possibly indicate that the separation was likely to be only temporary.

22. I also consider it perfectly understandable that the parties should not wish to give unnecessary publicity to their separation while a reconciliation remained possible, that the husband should keep keys to the house, that he should maintain regular and frequent contact with the children and that the claimant and her husband should on occasions go out together with their children. The fact is, as found by the tribunal, that it was because the children missed their father while they were on holiday in the summer with their mother and her sister that the claimant decided to attempt a reconciliation. It appears that the husband moved back into the matrimonial home in October 2003.

23. I am satisfied that on these facts, the likelihood initially following the separation was that the separation would be permanent.

24. This raises the question when it ceased to be likely that the separation would be permanent. The husband moved back in early October (p.12b) and it is conceded by the claimant that from 1 October 2003 they ought to have put in a fresh joint claim and that her entitlement under the single claim ceased. It is plain that if the claimant had decided to try for a reconciliation during the summer holiday, and it took until early October for her husband to move back in, that the joint decision to re-unite was not a straightforward one. I have considered whether this case ought to be remitted to a fresh tribunal to determine at what point the balance had shifted from the likelihood that the separation would be permanent, but I consider that nearly three years after the event it is unlikely that any clear date would emerge. I am also conscious that that would be the sort of detailed investigation likely to cause the sort of problems to which I have referred earlier in this decision. I therefore conclude that there is no evidence to indicate that the balance had shifted in this way before 1 October 2003 and that for the period from 6 April to 30 September 2003 the claimant was entitled to claim tax credits as a single person.

25. The appeal is therefore allowed and I make the order set out in paragraph 1 above.

(signed on the original) **Michael Mark**
Deputy Commissioner
28 April 2006