

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. For the reasons below, the decision of the tribunal is wrong in law. I set aside the decision of the tribunal. The appeal is to be reheard in accordance with the directions in this decision.

2 The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") are appealing with the permission of a chairman from the decision of the Oxford social security tribunal on 27 09 2004 under reference U 04 048 2004 00208. There are two respondents. The first respondent is the father ("F") of the children for whom the child tax credits were claimed. He is first respondent because he was the appellant before the tribunal. The second respondent is the mother ("M") of the children. Unfortunately they are now divorced. When they separated, they agreed who should look after the children and who should claim child benefit. Child tax credits did not then exist. Both have now claimed child tax credits for the children. This appeal is about who is entitled to those tax credits.

3 I heard the appeal at an oral hearing on 30 January 2006. The Commissioners were represented by Tim Eicke of counsel, instructed by the Office of the solicitor to Her Majesty's Revenue and Customs. Both F and M were present and represented themselves. I issued a further direction to the Commissioners after the hearing, and have since received a response from the Commissioners, and the comments of both F and M on that response.

4 DIRECTIONS FOR THE REHEARING

- A The appeal is to be heard as a three-party appeal.
- B The tribunal is to be constituted of members who were not members of any previous tribunal involved in this appeal.
- C The hearing is to be an oral hearing.

These directions are subject to any further directions by a district chairman.

REASONS

The facts

5 The facts of this case are simple. The resolution of the dispute that has arisen and the procedural handling of that dispute are not. F and M are the parents of a number of young children, all of whom were at primary school together at the time of the claims for child tax credit for them. (I refer to them together as "the children".) It is common ground that the children are looked after together. Whoever was, at any particular time, responsible for one of them has been, as an agreed matter of fact, responsible for all of them at that time. There is no question, on the facts, that one child was treated differently to the others in respect of responsibility. This is an anonymised decision, and I say no more about the children for this reason.

6 When they separated, F and M agreed that they would each look after the children for half the time, no more, no less. The court consent order confirming this agreement divided responsibility between them as equally as possible. The tribunal found on the facts that it was virtually impossible to say whether one of the parents looked after the children to a greater extent than the other. Child tax credit became payable on 6 April 2003 under the Tax Credits Act 2002 ("2002 Act"). It is common ground that, but for any claim by the other, both F and M were separately entitled to claim tax credits for the children from that date. F claimed first. He was awarded child tax credits for the children on 28 April 2003 from 6 April. M claimed on 8 July 2003. The Commissioners promptly awarded the tax credits to M and stopped F's tax credits, by a decision or decisions (the papers do not show precisely how it was done) on 10 July. F appealed.

The tribunal decision

7 The appeal came before the Oxford appeal tribunal. The tribunal, in a robust direction to which all parties commendably agreed, directed that the appeal should be heard with both F and M as parties, in addition to the Commissioners. It did so because, as it pointed out, whichever parent did not receive child tax credit could appeal and all were agreed that it might as well hear the appeals together. At the hearing, the tribunal decided that the Commissioners were wrong in stopping F's child tax credits, and it allowed his appeal. The Commissioners appealed.

8 The tribunal allowed F's appeal for the following reasons:

- 1 F and M had equal responsibility for the children.
- 2 It was virtually impossible to say who had the main responsibility.
- 3 F's appeal should therefore succeed because there had been no change of circumstances such as to warrant a decision terminating F's award under section 16 of the 2002 Act.

The grounds of appeal

9 The Commissioners appealed to seek clarification about how to apply the relevant regulations in marginal cases such as this, and also about how relevant decisions under the 2002 Act, and in particular section 16, are to be taken. The Commissioners considered that the tribunal erred in law both in failing to decide who had the main responsibility and in its decision about section 16.

10 Although this case is before me as a three party dispute, there are procedural problems about this that must be noted. In particular, does a decision of the tribunal allowing F's appeal mean, as a matter of law, that M loses her entitlement to child tax credits?

Who is entitled to the child tax credit?

11 Entitlement to child tax credit for a child or children depends on a claim being made for it: 2002 Act, section 3(1). It is agreed that both F and M made valid claims.

12 Entitlement also depends on the person claiming "being responsible for" the children: 2002 Act, section 8(1). That test is identical to that for child benefit in section 141 of the Social Security Contributions and Benefits Act 1992 ("1992 Act"). Section 8(2) provides for regulations to be made to determine when a claimant is or is not responsible for a child. It is agreed that both F and M were in this sense each responsible for all the children at all relevant times.

13 Section 9(7) of the 2002 Act provides that if more than one person claims child tax credit for a child, then provision may be made to reduce the amount of child tax credit payable to a claimant. That subsection reflects a policy discussion during enactment of the 2002 Act about allowing an award of child tax credits to be divided between conflicting claims. But that policy has not been implemented. No provision has been made under section 9(7).

Who is responsible for a child?

14 The only relevant regulation about conflicting entitlements is regulation 3 of the Child Tax Credit Regulations 2002 ("Regulation 3"). The regulation sets out four rules ("the Rules") and requires that the decision about who is, and who is not, responsible for a child is to be determined by the application of the Rules. The clear policy behind the Rules, if not the 2002 Act, is that only one person can receive child tax credit for a child at any one time.

15 Rule 1 is the main rule. It provides:

"A person shall be treated as responsible for a child ... who is normally living with him (the "normally living with" test)."

It is common ground that the children, as a matter of fact, normally live with both F and M.

16 Rules 2 and 3 deal with competing claims. Rule 1 is made expressly subject to these Rules. The Rules are:

Rule 2 (competing claims)

2.1 This Rule applies where -

(a) a child ... normally lives with two or more persons in -

(i) different households; or

(ii) the same household, where those persons are not limited to the members of a married couple or unmarried couple; or

(iii) a combination of (i) and (ii); and

(b) two or more of those persons make separate claims (that is, not a single joint claim made by a married couple or an unmarried couple) for child tax credit in respect of the child ...

2.2 The child ... shall be treated as the responsibility of -

(a) only one of those persons making such claims; and

(b) whichever of them has (comparing between them) the main responsibility for him (the "main responsibility test");

subject to Rules 3 and 4.

Rule 3

3.1 The persons mentioned in Rule 2.2 (other than the child) may jointly elect as to which of them satisfies the main responsibility test for the child, and in default of agreement the [Commissioners] may determine that question on the information available to them at the time of the determination.

17 Rule 4 is not relevant to this appeal. Regulation 3 therefore requires that only one of F and M can be regarded as having the main responsibility for any one of the children at any one time. Had F and M agreed who should claim for the children, or each child, then the Commissioners would have been required to follow that agreement. They did not agree. So the Commissioners must decide who has the main responsibility.

Can the conflicting claimants agree?

18 The Commissioners were content that F and M could make that election, at least for the future, even at the oral hearing before me. I had urged them to reach agreement before the hearing, and attempts to reach agreement had been made but had failed. That is a pity. It must be in the public interest, and also the interests of the children, that agreement is reached where possible so that disputes like this one are avoided. Agreement may also be to the mutual advantage of the claimants as well as their individual advantage because that may maximise total potential entitlement to the credits.

19 This is because agreement can, as the Commissioners accepted, result in shared entitlements in ways that the Commissioners cannot award, and can result in the two claimants receiving more child tax credit than would either on her or his own. For example, two separated parents make competing claims for their two children and jointly elect that each has the main responsibility for one of the children. This may result in a higher total level of tax credit being paid than if only one parent claimed. This is because (a) both parents separately receive the family element of child tax credit in addition to the element for one child, and (b) both may be entitled to claim childcare credit with any working tax credit claim made. In other cases it will be better for one of the two parents to claim, rather than the other (or both

together by agreement), because that provides for the largest payment of child tax credit and any childcare credit. The optimal way of claiming can only be determined in individual cases. But it should not be assumed that failure to agree is always in the best interests of those refusing to agree.

20 On the facts of this case, the Commissioners could award either all the child tax credits to F, or all to M. There was no factual basis for the Commissioners finding that each parent has the main responsibility for one or some, but not all, of the children. So the Commissioners may not be able, in the absence of agreement, to make an optimal award. That is why, not knowing the relevant facts, I urged both F and M to obtain representation and actively consider an agreement in this case.

21 I also emphasise that there is nothing in law to stop F and M, or any other competing claimants, informally agreeing to share the tax credit paid to one of them. The election procedure permits competing claimants to agree that one receives the credits even though an application of the “main responsibility test” on the facts would result, in the absence of agreement, in the other receiving them. And, of course, that can also be achieved by one of them not claiming. But the Commissioners cannot take decisions such as that. They must follow the Rules on the claims actually made.

22 Following the hearing, and with the agreement of both F and M, the Commissioners reviewed the entitlements of both to credits. The Commissioners produced figures to show that in this case, and for the year in question, the optimal claim that could be made by F and M was for M to claim for all the children. The parties have accepted that.

Applying the main responsibility test

23 As the F and M have not agreed, how are the Commissioners to apply the main responsibility test in this marginal case? Rule 2.2 provides that the decision must be made by comparing between the claims. Rule 3 provides that the decision *may* (italics mine) be made on the information available at the time that the decision is made. There is a clear tension between the Rules, as a decision maker may not be able to make a full and fair comparison between the two claimants on information available at a particular date. For example, it may be that neither of the two competing claimants is aware that the other is claiming and therefore neither addresses all the issues relevant to the conflict, or that there are aggressive or exaggerated claims such that both claims cannot be correct on their own facts. And there will be cases where, as here, the Commissioners’ decision is precipitated by the second claim, so possibly giving the later claimant a tactical advantage simply because he or she claims later.

24 There is a further, less obvious, tension between Rules 2 and 3 that the drafter of the Rules does not appear to have had in mind. Regulation 3 is based in part on the similar provisions in Schedule 10 to the Social Security Contributions and Benefits Act 1992, “Priority between persons entitled to child benefit”. Schedule 10, paragraph 5, gives the Commissioners [in place of the Secretary of State] a

discretionary power to decide between claimants as the Commissioners think fit (subject to judicial review). The child benefit decision is a single decision that operates, as Schedule 10 paragraph 1 ensures, only for the future. The decision-making process for child tax credit is a two stage process. The decision under appeal is the decision to terminate the award of child tax credit to F following the award to M. The decision affecting F was made under section 16 of the 2002 Act (other revised decisions). The decision affecting M was made under section 14 (initial decisions). Both are decisions about awards. Sections 14(2) and 16(3) give the Commissioners power to seek information before making a decision, and I have been shown how those powers were exercised. But those decisions are first-stage decisions, or in-year decisions about awards. They must be followed by second-stage, or after-year, decisions about entitlement.

25 Decisions on entitlement are made under sections 17 and 18 of the 2002 Act. I was not told how the decisions on entitlement have been, or will be, made after the end of the year. (I heard no argument on this, and it may be that no section 18 decision has yet been made.) If section 18 is to be read with Rule 2 in the same way as sections 14 and 16, then the Commissioners must again compare the conflicting claims after the year has ended. How is that to be done? In this case, the Commissioners must issue section 17 notices to both F, about his earlier entitlement, and M, about her later entitlement. Rule 2 requires a comparison between what they say in reply. In the particular and unusual circumstances of this appeal, where the tribunal was able to make a comparison of the claims in place of the Commissioners after the end of the relevant tax year, nothing would seem to turn on this. I therefore do not need to consider how section 18 applies in this decision. But one practical answer to a near deadlock between other competing claims at the time of an award decision may be for the Commissioners to indicate that they will be required to look at the whole issue again under sections 17 and 18 with full information from both claimants so that all relevant evidence is available. However, that is not problem free. As the Commissioner in CTC 2090 2004 recognises, there may be a problem of recovering any resulting overpayment.

Who has the main responsibility in this case?

26 This case is a powerful illustration of a problem every drafter knows. How do you draft a bright line rule that deals clearly with conflicting entitlements? The main responsibility rule is the answer to that problem in this context. But there will always be a marginal case. The tribunal's very experienced chairman decided that the facts of this case are about as close to the margin as one can get, and the Commissioners are of the same opinion. The consent order of the court sharing care between F and M was made as equal as it could be. The accepted facts are that the children are all treated the same, so no division can fairly be drawn between them as to the responsibility for them. The tribunal found nothing to convince it that there was any difference in responsibility of the two parents on the submissions made by F and M to it. Finally, no priority can be given to the mother's claim as against that of the father for child tax credit claims (as it still is in some cases for child benefit claims). So the immediate merits of the claim of the father of these school-age children must, in status terms, be exactly equal to the immediate merits of the claim of the mother. As

the Commissioners freely admitted on the appeal, that put them and the tribunal in an unenviable position. There is no obvious answer.

27 The Commissioners' first answer to the problem was as follows. Where it is impossible to determine that one claimant has main responsibility by reference to the available evidence relating to the contact with, and care and responsibility for, a child there are two possible conclusions:

- i) neither claimant has the main responsibility , or
- ii) the Commissioners can consider any other factors.

28 There is logic but, as the Commissioners themselves freely agreed, little merit in conclusion i). If the ruthless logic of the decision of Solomon were to be applied, perhaps i) is the best answer. If the conflicting claimants cannot agree, then neither gets anything. That would force any rational claimant into an agreement. But it is against the whole policy of the 2002 Act. The Commissioners submit that this is not a valid answer in the light of the terms of the 2002 Act. I agree that the aim of the Act is to pay tax credits rather than refuse them, but note that this problem arises because the provision that could deal with it in the 2002 Act by dividing entitlement has not been used. On the basis on which the Act has been implemented, I agree that it is not appropriate not to award the credits when it is clear that there are claimants with responsibility for the children. The only other logically possible answer, that both parents have main responsibility is, as we have seen, excluded by regulations. So conclusion ii) - that the Commissioners consider all relevant issues - is the only available answer from these possibilities.

29 The Commissioners also advanced an alternative approach to an answer based on procedure rather than substance. The first decision made should be assumed, rebuttably, to be made by the person with main responsibility. I agree with the Commissioners that that is no more an answer than the reverse approach, namely that the latest claim should prevail. The difference is that the former would prevent, while the latter would allow, the perpetual series of claims and counterclaims, appeals and counter-appeals, that could otherwise occur. But both approaches rely, in my view, on extraneous and irrelevant factors, namely the chronology of the claims rather than the merits of the claims. I agree with the Commissioners that this approach does not provide an answer.

30 The answer must therefore be derived from the relevant Rules and the powers and process of the 2002 Act.

"Main responsibility"

31 "Main" is obviously an ordinary word of the English language. The temptation to define it further should be resisted. It is for the Commissioners to evaluate it (or for the tribunal to do so on appeal) and no one else. It requires the decision maker, in any case of conflicting claims, to identify the claim that is stronger, but stronger by reference to what? The answer must come from reading the Rules with the sections under which the decisions are to be taken. It is a broad answer. The

Commissioners have power to ask for "any information or evidence that the Board consider they may need" (see sections 14(2) and 16(3)). In other words, it is for the Commissioners to consider on what information or evidence the issue is to be decided. That is subject to two points: (1) Rule 2 requires that the Commissioners compare the conflicting claims. Fairness must require that the same information or evidence is sought from the conflicting claimants when that comparison is made, or at least equal opportunities are given to the conflicting claimants to present anything considered to be relevant. (2) The decision of the Commissioners is subject to an open appeal to the tribunal. The tribunal must decide for itself what information it considers it may need, and it is not bound to follow the choices of the Commissioners. So a tribunal is free to decide what it considers relevant, and may come to a different view to the Commissioners. This is subject to the practical problem that the tribunal does not have the same powers to demand information as the Commissioners. Perhaps it should have, but it can only use the powers available to it under its own Regulations or, indirectly, the Commissioners' powers. The tribunal's choice of factors is open to further challenge only if it can be shown that it is ignoring relevant factors or relying on irrelevant ones so that it is wrong *in law* in the way it makes its decision.

32 It is therefore not appropriate to lay down any general list of what is or is not relevant. I am also asked in this case about one specific factor. Can the Commissioners take into account the fact that if the award of tax credits is made to one of the conflicting claimants rather than the other then the amount paid is greater?

33 As mentioned above, the Commissioners after the oral hearing and at my request and with the agreement of both F and M, calculated in detail what was best for F and M in this particular appeal. All now accept that the best outcome in terms of the maximum payment of child tax credit for the year in question is that M receives the child tax credit for the children. In the particular circumstances that is a better award for the children than if F received the child tax credit or each receiving some of it. That must be subject to a proviso. The result might be different in later years.

34 The Commissioners argue that they should take the view that in this case it is therefore appropriate to regard M as having the main responsibility because in that way the greater advantage is given to the children, and that assisting the children is the main purpose of the 2002 Act.

35 I have stressed that it is for the Commissioners, and the tribunal, to decide what they should do. I can only decide what they could do. As a matter of law, I see no reason why the Commissioners should not take this approach. It is, after all, the approach that would be taken by properly-advised conflicting claimants reaching the best overall agreement between themselves. So it is the nearest the Commissioners can come to what the claimants might have agreed in their own best interests. I would certainly regard the converse approach - that the Commissioners award credits to the person who would cost the public purse least - as both outside the spirit and intent of the 2002 Act and against any decision that rational conflicting claimants would agree, and therefore irrelevant in law. Any decision that preferred

the mother to the father simply because she was the mother could be discriminatory. But the Commissioners and tribunal must decide for themselves what factors should be used.

36 Does the approach taken for child benefit assist? I drew the attention of the parties to the recent decision of Richards J in the child benefit case of R (*Graham Ford v Board of Inland Revenue* [2005] EWHC 1109 (Admin)). Mr Ford challenged, by judicial review, the decision of the Inland Revenue to pay child benefit for one of their two children to his former wife (and their mother). Nothing is said about child tax credits in the case, although they should have been in payment at the time. The case is a judicial review case because the discretion of the (then) Inland Revenue to award child benefit between competing claimants is not subject to appeal. Mr Ford's lawyers could not challenge the decision itself, but only the way it was taken. The decision of Richards J sets out at length the internal guidance to officers about the way they should take decisions about conflicting claims for child benefit, and the terms of the subsequent letter of decision. Counsel for Mr Ford relied on a multi-faceted attack on the Inland Revenue based on a close analysis of those documents. Richards J rejected this.

37 That decision is not of assistance here for two reasons. First, unlike that case, this is a case where there was no *factual* basis for awarding child tax credit to one parent for one or more children but not all of them. Second, my decision is not about how the Commissioners should decide the case but how the tribunal should decide it. The tribunal may find the guidance of the Commissioners helpful in making its own decision. But it is not required to follow it, or even to take it into account at all.

38 In this case the tribunal declined to decide whether F or M had the main responsibility because it was satisfied that it did not need to do so. In my view, for the reasons to which I now turn, the tribunal was wrong in not taking that decision, however hard it might be. It was required to decide on the decision to end F's claim by reference to M's claim. It did not do so. That is an error of law.

The section 16 decision

39 The decision before the tribunal was a decision under section 16 of the 2002 Act. Section 16 provides:

(1) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the [Commissioners] have reasonable grounds for believing -

(a) that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the credit for the period,

(b) that he or they may have ceased to be, or never been, entitled to the tax credit for the period

the [Commissioners] may decide to amend or terminate the award

(2) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the [Commissioners] believe -

(a) that the rate at which a tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to it for the period, or

(b) that he or they may have ceased to be, or never been, entitled to the tax credit for the period,

the [Commissioners] may give a notice under subsection (3).

(3) A notice under this subsection may -

(a) require the person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which the [Commissioners] consider they may need for considering whether to amend or terminate the award under subsection (1); or

(b) require any person of a prescribed description to provide any information or evidence of a prescribed description which the [Commissioners] consider they may need for the purpose,

by the date specified by the notice.

40 The prescribed descriptions under subsection (3) are in the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002 No 2014) regulations 30 - 32. They deal with employers and childcare providers. There is no prescription covering the position where there are conflicting claims for a tax credit. However, the Commissioners have similar powers to gather information under section 14 in respect of a new claim.

41 Section 16 is in permissive, not mandatory, terms, as is the information power. The decision-making power is triggered by a broad test, unlike the equivalent triggers applying to enable a decision to be superseded for most social security benefits under section 10 of the Social Security Act 1998. The Commissioners (and the tribunal) had the power, not the duty, to terminate F's award if they considered it to be reasonable to do so. The operation of that power must, however, be regulated by the Rules in Regulation 3.

42 The Commissioners considered it to be reasonable to stop F's award because of the claim by, and award to, M. The tribunal thought otherwise. It has, of course, on appeal, the same powers as the Secretary of State. Had the tribunal in this case concluded, in the terms of section 16, that it had considered the matter in accordance with the Rules and concluded that it was not reasonable to terminate F's award, then that may have been a decision that, if taken properly, would not be susceptible to challenge as in error of law.

43 The tribunal's approach was that there had been no change of circumstances to justify invoking section 16. That is not the test. It should have considered whether there were reasonable grounds to end F's entitlement. It did not do so, and was therefore wrong in law in its decision.

The relationship between the section 16 decision and the section 14 decision

44 The Commissioners took a different approach. They submit that the decision awarding the child tax credits to M under section 14 must also apply to the award of child tax credits to F under section 16. If, as here, the Commissioners have awarded the child tax credits to M then in the view of the Commissioners the tribunal cannot take the decision that it took to award them to F. I do not agree.

45 In my view, the Commissioners initially approached this aspect of their decision making in the wrong order. The proper route is to consider the existing award in the light of the new claim but before deciding the new claim. In other words the proper approach is to consider taking any section 16 decision followed by the resulting section 14 decision. I take that view for both procedural and substantive reasons. First, this avoids the Commissioners, even for a short while, awarding the tax credits to two people at the same time. Second, it leaves the powers to enquire further of both parties under both sections 14 and 16, and so the ability to make the required comparisons, open while the section 16 decision is being considered. Third, the section 16 provision is a power not a duty. The Commissioners' existing practice may fetter the exercise of the power to make a decision under section 16 with regard to one claimant by reference to a decision (the section 14 decision) previously made with regard to another claimant.

46 The proper course of action here is to review the existing award of tax credits to F in the light of the fact that M has now claimed. If the Commissioners decide - after all necessary enquiries - that, comparing the claim made by F with that made by M, then F does not have the main responsibility, the consequence under section 16 is that they have reasonable grounds to terminate the award to F. They should then consider the section 14 decision to be made on F's claim. As they have undertaken the necessary comparison, the section 14 award can be made without further enquiry. If they decide not to end F's award, then on the same basis they can refuse M's claim.

47 While that solves the initial problems, it does not resolve the concerns of the Commissioners where there are appeals. What happens when the Commissioners take the view (as they did) that M has the main responsibility but the tribunal, without making the errors made by this tribunal, decides that F has the main responsibility?

48 Unfortunately, the straightforward answer to that question is that the legislation (both the 2002 Act and regulations that set out the tax credit entitlement and the Commissioners' procedures and the 1998 Act and regulations (that deal with the jurisdiction and procedures) is silent on this issue. It is simply not provided for.

The reason, I suspect, is that the situation that has arisen in this case could not arise before the 2002 Act was introduced, and no one saw the problem coming.

49 There are two separate procedural problems. First, the Commissioners have no power under the 2002 Act to make a decision that awards child tax credits to one person binding on any other person. They must choose between them and then make the relevant decisions about the entitlement of each individual separately. Second, an appeal tribunal has no power to consider anything other than the decision or decisions under appeal before it.

Joint or separate decisions and appeals

50 What is missing in the existing procedural framework is a method or procedure by which the Commissioners, or the tribunal, having made the comparison mandated by Rules 2 and 3, can make a single composite decision dealing with the conflicting claims it has compared. The procedure to be applied is that in the 2002 Act and the Social Security Act 1998 as applied by the Tax Credits (Appeals) Regulations 2002 (SI 2002 No 2926) and the Tax Credits (Appeals) (No 2) Regulations 2002 (SI 2002 No 3196). There must be a decision dealing with F, which F may appeal, and a decision dealing with M, which M may appeal. But those are separate decisions and appeals.

51 The Commissioner in CTC 2090 2004 considered this problem as it related to appeals to the appeal tribunal. That was also a case where there was a dispute about who had the main responsibility, as between the father and the mother, for a child and so who could claim the child tax credit for the child. The father had claimed a tax credit for his daughter, but they were already in payment to the mother. The Inland Revenue declined to award the tax credit to the father, and he appealed. The tribunal, having only heard the father's side of the story, allowed his appeal and awarded the tax credits to him. The appeal came before the Commissioner on an appeal by the Inland Revenue.

52 Commissioner Bano, in his decision, commented:

"11 The difficulty in such cases is that not only there is no provision for a single decision binding both parties on the question who has main responsibility in an appeal, but there is also no provision for the other party to be represented in an appeal brought by a claimant in respect of a refusal of child tax credit. Regulation 4 of the Tax Credits (Appeals) Regulations 2002, made under section 63(8) of the Tax Credits Act 2002, applies and modifies section 12 of the Social Security Act 1998 so as to permit an appeal against a tax credit decision both by a claimant and by "such other person as may be prescribed". However, no such persons have been prescribed in relation to competing claims for child tax credit. There is therefore no provision allowing the claimant's former wife to be a party to his appeal, even though the decision in the claimant's favour would entitle the Board to terminate her award of tax credit under section 16(1)(b) of the 2002 Act. Furthermore, if the claimant's former wife appealed against such a decision, there would be

nothing to prevent the tribunal from reaching the opposite conclusion to that reached by the tribunal in this case.”

53 Other issues may arise as between joint claimants who come to be in conflict with each other (for example about repayment of an overpayment made on a joint claim). But I can see no answer to the points made by the Commissioner in this passage to deal with the situation of conflicting single claimants. The powers of decision in sections 14, 16, 17 and 18 are specific to “single claims” and claimants. Sections 8 and 9 deal with the conflicts only by section 8(2) and 9(7). There is nothing in the primary legislation to make a decision apply to anyone other than the claimant about whom it is made. And I do not for myself see that prescription under section 12 of the Social Security Act 1998 could cure this defect at appeal level. Section 23 does not give power to serve notice of a decision under sections 14 or 16 on someone who is not party to that decision. And while section 4(2) may enable the Commissioners to disclose the income and other details of one claimant to the other, the process would raise the problems about confidentiality and disputes about the incomes of others with which Child Support Commissioners and child support tribunals are only too familiar.

54 The statutory position is therefore that a tribunal may award, or maintain an award, of the tax credits for a child to one claimant while the Commissioners (or another tribunal) award, or maintain an award, of the tax credits for the same child to another claimant. Neither decision precludes the other authority from taking an inconsistent decision. However, the point does not arise in this case. F and M are, with their agreement and that of the Commissioners, both parties to the appeal (perhaps more properly joined appeals), and have both taken an active part in the hearings before the tribunal and before me. I invited any party who wished to do so to take any point on this, and none did. It follows that in this case F and M must both now be bound by my decision and the decision of the tribunal made on my directions about who has the main responsibility.

55 That leaves one procedural problem outstanding: the status in this appeal of the section 14 decision in M’s favour. It is clear that the Commissioners’ decision under section 14 does not apply to, and cannot be binding on, F as he was not a party to it. Nor is it in any way binding on the tribunal as it does not have that decision before it. Nor, indeed, can it bind the Commissioners themselves as that would fetter the discretion under section 16. Any other approach to this issue would be to deny F his undoubted rights of appeal. The proper approach for the new tribunal is to put on one side any decision made on M’s claim on the basis that that decision can only be properly made once the section 16 issue is decided. If necessary, that can be done by further use of section 16 or of the entitlement sections in the 2002 Act.

Summary

56 The decision of the tribunal under appeal was wrong on two grounds. First, it was wrong in the way it considered the application of section 16. Its second error, that it did not need to decide - as between F’s claim and M’s claim - whether F did or did not have the main responsibility for the children, followed from its first error.

The tribunal decision must therefore be set aside. The matter is to be reheard by a new tribunal.

57 I direct the new tribunal as follows. First, this is a case that is to be heard as a three party appeal. The tribunal may assume that in this case its decision applies to F, M and the Commissioners. Second, the tribunal must decide as between F and M who had the main responsibility for the children at the relevant time (the time when the decision was taken to stop F's child tax credit award). It should do so under Rules 2 and 3 set out above by comparing the claims as required by Rule 2.2. It may consider any relevant issue in so deciding. Third, it should then consider if, in the light of its decision as to main responsibility, there are reasonable grounds for considering whether the award of child tax credit to F should be amended or terminated under section 16 of the 2002 Act, and if so what decision it makes under that section. Any further decision is to be made following that decision and not before it.

David Williams
Commissioner
24.04.2006