Recoupment Farm Reserve Income Averaging
- See Also CCR/001/93
*55/93

Commissioner's File: CSS/36/92
*45/93

WMW/HJD

SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Edinburgh

Case No: SO5 33855

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1. This claimant's appeal fails. I find no error of law in the appeal tribunal decision dated 18 June 1992 such as to warrant my interference. This appeal is accordingly dismissed.

2. The claimant was injured in a motor accident in May 1989. He obtained damages, the payer being an insurance company. In connection with that settlement that company sought a certificate of total benefit under section 22 of the Social Security Act 1989 as then in force, and in terms of paragraph 3 of Part II of Schedule 4 to that Act. The Secretary of State in due course gave such a certificate and the insurance company deducted the amount stated therein and on 19 December 1991 paid it to the Secretary of State in accordance with section 22(1)(b). In February 1992 the claimant appealed as was his right under regulation 1 of the Social Security (Recoupment) Regulations 1990.

It is clear from the claimant's grounds of appeal that his sole point was that his damages had contained no element in respect of loss of earnings and therefore he felt it to be inappropriate that the sickness and invalidity benefits which he had received consequent upon the accident should be recovered from what was an amount purely of solatium. That argument was repeated before the tribunal and it is clear that they sympathised with the claimant's position. He accepted that the sums paid by the Department were correctly as set out in the papers put before the tribunal. Having made appropriate findings of fact, they unanimously refused the appeal upon the basis that -

"The adjudication officer correctly applied the regulations."

It falls to be noted, however, that the decision was not one by an adjudication officer. One represented the Department before the tribunal. But the decision had been by the Secretary of State. The jurisdiction was novel in that for the first time such a Secretary of State's decision was appealable to a tribunal. I am not prepared to set aside the tribunal decision upon such a narrow point but technically their decision should have read -

"The Secretary of State correctly applied the regulations."

The tribunal may wish to consider making an appropriate correction in terms of regulation 10 of the Social Security (Adjudication) Regulations 1986.

4. The tribunal reasons were these -

> "The tribunal was of the opinion that the legislation did not envisage a total clawback of benefits in cases such as this when there has been no element in the award of damages for loss of earnings. It is unfortunately the case that the Regulations do not permit any kind of discretion, the clawback was correctly made. The claimant agreed that the Benefits had been paid. This case seems to indicate a lacuna in the law. Perhaps attention should be given to plugging this particular gap."

The claimant, who now appeals with leave of the chairman, has set out as his ground of appeal that -

> "The law has prejudiced me. Since even though there was no allowance for loss of earnings in my compensation payment I was forced to repay sickness benefit covering the full time of my claim."

5. The starting point for considering this appeal is the now in force Part IV of the Social Security Administration Act 1992, which consolidated into the general body of Social Security Law the relevant provisions of the 1989 Act. Section 82 replaced the relevant parts of section 22 of the 1989 Act. Thereby Parliament determined that once an insurance company, a "compensator" for the purposes of this legislation, has agreed to settle a claim of damages with an individual that company is required, by what is now section 84 of the 1992 Act, first to apply for a certificate of total benefit. Once the company has got that they are obliged to deduct from "the compensation payment", as it is called in the legislation, the amount stated in the certificate and pay it to the Secretary of State. There is no discretion involved and there is no distinction provided according to the different heads of damages known to the law. A compensation payment is defined by what is now section 81(1) of the 1992 Act as -

> ".. any payment falling to be made (whether voluntarily, or in pursuance of a court order or an agreement, or otherwise) -
>
> (a) to or in respect of the victim in consequence of the accident, injury or disease in question and
>
> (b) [not applicable]

That applied to this case. There is thus, as matter of law, no doubt, as the claimant has really accepted throughout, that the insurance company were obliged to pay the sum which they did pay to the Secretary of State. The Commissioner's jurisdiction is limited to questions of law and he has no power to vary or interfere with the terms thereof as laid down by Parliament. If, as I quite understand, the claimant has a grievance that is a matter to be taken up with the legislators and not with those who have the task of applying and interpreting the law.

6. The tribunal drew to attention the claimant's concern. That has been answered by the Solicitor to the Department of Social Security in a helpful submission upon the whole matter. He has pointed out that the legislation does not provide for recoupment only where the award includes an element for loss of past or future earnings. He went on -

This was a deliberate omission. If recoupment were only to here would be permitted should the pursuer so receive the Sec. State considered that it cease to be massive scope for avoidance of recoupment. Claims for such elements of brought and recoupment would become impossible. It is important to note that the benefit received does not have to be repaid by the pursuer. A sum equivalent to the benefit is indeed recovered from the compensator but one of the principles of the legislation was that double compensation should not be permitted so the award is reduced by a sum equivalent to the amount of benefit received."

He then contrasts the present legislation with the former Law Reform (Personal Injuries Act) Act 1948 whereby one half of certain benefits fell to be deducted from loss of earnings. I quite accept that the contrast makes it clear that the scope of the present legislation is different, and deliberately so, in the way set out. The general purpose of the benefit legislation, as I understand it, is to provide those without income, or without what is thought to be adequate income, with a replacement thereof during that lack. I am bound then to observe that there is something slightly illogical in seeking to recover such a benefit from an award which is designed to offer only some mark for the pain and inconvenience which the claimant has suffered. And I find it surprising, if it be the case, that it should be thought that if recoupment was to be directed only against awards replacing lost income there should be massive collusion between pursuers, defenders, their insurers and their legal advisers on all sides in order to seek to provide what would amount to false information to the Department. And that is the more so in light of the extent to which the present regulations rely upon parties, and in particular the compensators, to provide the information upon which alone the Department can effect recoupment.

7. But what particularly troubles me is what was said by the Solicitor about the desire to avoid double compensation. Such a desire is of course entirely understandable and commendable. But there would only be double compensation if a claimant, having lost a source of income through the accident, received damages in respect of it and received state benefits designed to tide him over that period. The result, as it seems to me, of allowing the recoupment to operate against solatium only awards is that such a claimant as the present, unemployed at the time of his accident, then not only effectively repays the benefit he has received because of the accident from that which has been provided to mollify his pain and inconvenience but he also loses any money which the social security scheme would have had to provide for him whilst without income through unemployment - whether by unemployment benefit or income support. The state saves the last and recoups the former. That then seems to be a double deprivation against an already disadvantaged class. Whether or not that may be more reprehensible than risking any double compensation in favour of such persons must be a matter of opinion. I can do no more than draw to the attention of the Secretary of State what appears to be an anomaly in the scheme.

(signed) W M Walker
Commissioner
Date: 10 June 1993

Commissioner's File: CSS/36/92
*45/93

WMW/GM

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Name:

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Case No: 505 33855

Correction Slip

Page 3 - (Emboldened type omitted from original) the indent at the top of the page should read -

"This was a deliberate omission. If recoupment were only to be permitted should the pursuer so recover the Secretary of State considered that there would be massive scope for avoidance of recoupment. Claims for such elements in awards might cease to be brought and recoupment would become impossible. It is important to note that the benefit received does not have to be repaid from the pursuer. A sum equivalent to the benefit is indeed recovered from the compensator but one of the principles of the legislation was that double compensation should not be permitted so the award is reduced by a sum equivalent to the amount of benefit received."

Page 3, paragraph 7, line 10 -

"... he also looses..." should read "... he also loses...".

(signed) W M Walker
Commissioner
Date: 17 June 1993