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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSTC/724/06

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Appellant: Claire Yates

Respondent: Secretary of State

Tribunal: Inverness

Tribunal Case No: U/05/104/2006/00267

DECISION OF SOCIAL SECURITY COMMISSIONER

Decision

1. My decision is that the decision of the tribunal given at Inverness on 10 August 2006 is erroneous on a point of law. I set it aside. I give the decision that the tribunal ought to have given. It is that the claimant is not entitled to tax credits during the period from 18 April 2003 until 5 April 2005.

2. This appeal came before me for an oral hearing on 20 March 2007. The appellants who are Her Majesty's Revenue and Customs were represented by Mr Mowat Solicitor. The claimant was represented by Mrs Bernard of the Citizens Advice Bureau, Ross & Cromarty.

3. The claimant made a claim for tax credits covering the tax year 2003/04 on 1 May 2003. She made the claim under Section 3 of the Tax Credits Act 2002. Section 3(1) of that Act provides:

“3(1) Entitlement to a tax credit for the whole or part of a tax year is dependent upon the making of a claim for it.”

4. The basis upon which the claimant made the claim was under Section 3(3)(b) of the Act which provides:

“3(3) A claim for a tax credit may be made – ...

(b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another).”

5. A decision under Section 14 of the Act was made awarding her a tax credit for the period 18 April 2003 to 5 April 2004. It is recorded at page 10 of the papers. I was told that at the end of the tax year 2003/04 the tax credit for the next financial year continued without a fresh claim requiring to be made. However, in respect of both the financial years 2003/04 and 2004/05, decisions were made after final notice, under and in terms of Section 18 of the Act. These decisions awarding the claimant tax credits for the respective years on a finalised basis were made and are recorded at pages 11 and 12.

6. Section 19(1) of the Act provides:

“19(1) The Board may enquire into –

(a) the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year, and

(b) the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year,

if they give notice to the person, or each of the persons, during the period allowed for the initiation of the enquiry.”

7. Such notices were given in respect of the tax year 2003/04 in the document at page 27 and 2004/05 in the document at page 84. There was no dispute that these notices were given during the period allowed for the initiation of an enquiry.

8. Following the enquiry the appellants made decisions under Section 19(3) of the Act. That subsection provides:

“19(3) On an enquiry the Board must decide –

- (a) whether the person was entitled, or the persons were jointly entitled, to the tax credit, and
- (c) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,

for the tax year.”

9. I was told such decisions were made in respect of the respective tax years and are recorded at pages 93 and 94 of the bundle. The record of the decisions are in the form of a computer print out and have the description in the print out:

“Award finalised/re-finalised”

10. In one decision, they find the claimant entitled to tax credits of £236.60 in respect of the financial year 2003/04. I was told that this was as a result of a system fault. In relation to the tax year 2004/05, they intimate:

“You do not qualify for this credit”.

11. These computer printouts are the only record of these decisions. The claimant had received a letter on 19 October 2005 in which it was said:

“I have completed my enquiry into your claim for tax credits for 2003/04 and 2004/05.

Using the additional information received, I have concluded that from 18 April 2003 you and [JS] were living together as if you were husband and wife.

You will shortly receive formal notification of my decision against which you will have the right of appeal. Any tax credits overpaid since 18 April 2003 will be repayable. Due to a processing/procedural problem the revised decision will show the date of termination as 1 May 2003, the date your original application was received, and not 18 April 2003 the date entitlement was awarded. When the system error is corrected another decision letter will be issued showing the correct date of termination as 18 April 2003.

I may be able to waive some of the overpayment if you can produce evidence of [JS] income from 6 April 2003 to date. I will accept a copy of his P60 for the year ended 5 April 2004 and 2005 or a payslip for each year, which shows the full income for the

year, or income details supplied by his employer. Please submit these details by 9 November 2005 if you wish me to apply this waiver.”

12. It can be seen from this letter that over the period covered by the tax credit awards the appellants had concluded that the claimant was not someone who was entitled to make a claim under Section 3(3)(b) of the Act. This was because that during the whole period she would have been entitled to make a claim under paragraph (a) of Section 3(3) jointly with another person, namely her cohabitee.

13. The claimant appealed against this decision to a tribunal. The appeal was allowed and the matter was remitted back the appellants with directions, which included the statement that the claimant was entitled to a tax credit for the period from 18 April 2003 to 5 April 2005 on the basis that she was throughout that period living with [JS] as an unmarried couple. The tribunal's findings that the claimant and her cohabitee were during the relevant period, living as an unmarried couple was not challenged in the appeal before me by either party to the appeal. In setting out reasons for their decision, the tribunal said:

“HMRC position is that since the claim was made by [the claimant] as a single person she is not therefore entitled to anything. I do not accept that this is either fair or reflects the terms of the relevant legislation.

I have accordingly had regard to the terms of the Tax Credits Act 2002. Section 3 of that Act deals with the making of claims. It envisages that a claim for a tax credit “may be made” (reading the matter short) either jointly by members of an unmarried couple or by a single person not entitled to make a claim as part of a married or unmarried couple.

Subsection 4 provides circumstances in which entitlement to a claim ceases where certain changes of circumstances occur. The section does not, however, specifically deal with or apparently envisage that a claim could be made on one basis but subsequently be discovered to be appropriate only on another. I have also had regard to the terms of section 16 of the Act. This provides a power which is clearly wide-ranging in its nature where the board subsequently have reasonable grounds for believing that the rate at which tax credit has been awarded differs from the rate at which, in fact, the person is entitled, to amend or terminate the award. This power, it seems to me, is clearly wide enough to cover precisely the set of circumstances in this case. In other words, I am of the view that the board had the power to amend her award and determine that entitlement only exists on the basis that the couple should be treated as an unmarried couple for the purposes of the tax credit claim.”

14. It was Mr Mowat's submission that the tribunal erred in law in deciding that the claimant was entitled to a tax credit for the period 18 April 2003 to 5 April 2005 on the basis of the claim submitted by her as a single person. In doing so, he relied upon by what was said by Deputy Commissioner Green in CTC/3864/2004. There she said:

“15 ...If she was entitled to claim as a single claimant, her award of tax credit should not have been terminated.

16. If the claimant is found to have been part of an unmarried couple, then according to s.3(3)(a) of the 2002 Act, such a claim should have been made

jointly. It appears from s.3(1) that entitlement to a tax credit is dependent on the making of a claim for it. The wording of s.3(3)(b) makes it clear that a claim can only be brought under (b) if that person is not entitled to make a claim under s.3(3)(a). The two claims are mutually exclusive. Thus, if the claimant's claim fails under s.3(3)(b) or is terminated for failing to meet the criteria of a single claim, it appears that there has to be a claim under s.3(3)(a) for the claimant to receive an award. Section 3(2)(b) of the Act provides that where the Board have decided under s.16 of the Act (as here) to terminate an award of a tax credit made on a claim, (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim. In the absence of a new claim, there would then appear to be no entitlement."

15. It was his submission that the same approach should be adopted in respect of decisions under Section 19 as with decisions under Section 16 in this regard. Whilst Mrs Bernard was prepared to concede an error in law on the part of the tribunal by virtue of the fact that on the face of it, they appeared to consider that they were dealing with a decision under Section 16 of the Act as opposed of Section 19 of the Act, it was her submission that there was room for them to make the decision which they did. She submitted that Deputy Commissioner Green had only indicated at the end of paragraph 16, that in the absence of a new claim there would "appear" to be no entitlement. Mrs Barnard also submitted that her interpretation of Section 3 that claims were not mutually exclusive and that a joint claim could be substituted for a single claim, was supported by the letter written to the claimant on 19 October 2005, recorded at page 91, in which the appellants had indicated that they may be able to waive some of the overpayment if evidence could be produced of the claimant's cohabitee's income. Mr Mowat pointed out that the exclusivity between joint claims and single claims in Section 3 was a deliberate one and did have to have the mutual exclusiveness referred to by Deputy Commissioner Green. This was on the basis that, if entitlement was found to be on a joint basis, then both the claimant and her cohabitee would not only have joint entitlement but they also had joint and several liability for any overpayments, notwithstanding that the cohabitee had never been a party to the claim.

16. I find myself in agreement with the position adopted by Deputy Commissioner Green that claims made under Section 3(3)(a) and 3(3)(b) are mutually exclusive. I follow her decision. I am persuaded by Mr Mowat's argument as to why this is the case. In my view a cohabitee who has not been an applicant in a claim cannot acquire the right to a potential tax credit when he was not a party to the claim in the first place and acquire potential liabilities arising therefrom. I also do not consider that the provisions contained in Section 3 in either the form it was in at the time of the claim and in its amended form from 5 December 2005, allow for the course to be adopted by the tribunal. In these circumstances, I am satisfied that the tribunal erred in law in deciding the appeal before them on the basis which they did.

17. I do not consider that Mrs Barnard's submission in relation the letter of 19 October 2005 is sound. That letter concerns the waiving of an overpayment which is due by the claimant. It does not import any joint and several liability upon the claimant's cohabitee.

18. In respect of the disposal of the appeal, I have decided to make the decision I have in paragraph 1 upon the basis that the decisions under appeal, being decisions under Section 19(3), can be decisions in respect of entitlement only. Unlike decisions under Section 16, where awards can be amended or terminated, the scope for a decision under Section 19(3) is

related to an entitlement only. I have decided that the claimant is not entitled to tax credits in respect of the claim that she made on the basis upon which she made it namely under Section 3(3)(b). Whether, following this, the appellants seek an overpayment under Section 28, is a matter for them to pursue. If they do take that course then in relation to any decision they make, the claimant can take advice on whether she can challenge it. I was told by Mr Mowat that the concession referred to in the letter quoted above was still open to the claimant, if such an overpayment was sought.

19. The appeal succeeds.

(signed)
D J MAY QC
Commissioner
Date: 22 March 2007