Bulletin 191

CF/699/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal and allow the appeal; the decision of the Appeal Tribunal was erroneous in law. I set it aside and remit the case to be reheard by a differently constituted Appeal Tribunal.

REASONS

2. The claimant is a woman born in 1964 and is the single mother of a daughter, S, born in June 1986, who lived with the claimant. S reached the age of 16 in June 2002 but the claimant initially continued to be entitled to child benefit in respect of S because S continued to receive full-time education by attending a full-time course at a College of Technology.

3. However, S stopped attending the course in October 2002, with the result that the claimant ceased to be entitled to child benefit in respect of S after the first Monday in January 2003. The claimant nevertheless continued to collect child benefit by order book until October 2003 when, after an anonymous tip-off, the Inland Revenue began to make enquiries.

4. The Inland Revenue sent a form to the claimant in October 2003 (page 1M) saying that S had left College, asking the claimant to return her order book and asking for the date on which S left the College. The form was returned after somebody had partly filled it in and written on it that the claimant did not know the date S left the College and had 'thrown her daughter out due to all this'. A further letter about the possibility of extending child benefit (page 3), asking whether S had registered for work or training, was completed and returned. A form sent by the Inland Revenue to the College (page 5) was completed and returned by the College, giving the date of S's leaving.

5. On 10 March 2004 the Board of Inland Revenue decided to supersede the claimant's award of child benefit with effect from 13 January 2003 on the grounds of a material change of circumstances in that S had left full-time education in October 2002. There was no appeal against this part of the decision.

6. The Board also decided that £622.35 of child benefit had been overpaid to the claimant from 13 January to 12 October 2003 as a consequence of the claimant having failed to disclose that S had left the College in October 2002. The claimant appealed against this part of the decision on the grounds that she had not 'failed to disclose' the fact that S had stopped going to College because she had been unaware of it. She said that S had continued to go out each day as though to go to College and that the claimant, due to her illiteracy and the fact that (she assumed) S had been intercepting the mail, had herself received no notification that S was no longer attending the College.

7. In April 2004 the Inland Revenue wrote to the claimant (page 9) asking questions about how S had been able to hide from the claimant for almost a year the fact that she had stopped attending the College. A reply was asked for by May but not apparently received until August (page 17). It is only partly legible. In the meantime the overpayment decision had been confirmed on reconsideration in June (page 16).

8. Following an abortive hearing in August 2004, the claimant's appeal was heard in December 2004. The appeal was dismissed.

9. The claimant seeks leave to appeal. In March (page 75) a Commissioner directed a submission from the Inland Revenue commenting on the grounds of appeal and saying what evidence there was that the College informed the claimant of S's non-attendance. A submission supporting the appeal was lodged by Her Majesty's Revenue and Customs in May (page 78). HMRC consent to the Commissioner treating the application as an appeal pursuant to regulation 11 of the Commissioners' Procedure Regulations 1999. The claimant, who is represented by a Citizen's Advice Bureau has responded to that submission making 'no further comment' (page 82), which I take to be consent for the purposes of regulation 11.

10. HMRC substantially support the claimant's grounds of appeal. I largely agree with the submissions of HMRC.

Actual and constructive knowledge

11. I agree with Mr Jacobs's decision in CF/14643/1996, in which he analyses the concept of actual knowledge and the more difficult concept of constructive knowledge, which he subdivides into two subcategories of 'means of knowledge' and 'wilful blindness'. As far as actual knowledge is concerned, nothing needs to be added to paragraphs 15 and 16 of that decision. In a case such as the present, it is open to a Tribunal to hold – if so persuaded – that a person in the claimant's situation had actual knowledge of a child's non-attendance at school or college. Deciding the credibility of witnesses is very much a matter for the Appeal Tribunal and the Tribunal would be entitled (if so persuaded) to disbelieve the claimant and to find that she had actual knowledge of the situation.

12. As regards constructive knowledge, I agree with Mr Jacobs that this is not an entirely precise legal concept and that it is important not to allow recourse to such a label to cloud the analysis of any particular case. Constructive knowledge can be described in general terms as a situation in which a person who does not actually know a particular fact is to be treated as if they knew that fact because it would be unfair to allow them to benefit from not having known it. The concept thus rests on there being some form of obligation incumbent on the person to make enquiries about the fact.

13. That obligation may arise if the law specifically requires a person to undertake investigations or enquiries of a specified degree of thoroughness. That is not the position here: the legislation does not specify any obligation of child benefit claimants to undertake any particular investigations. The second situation in which the obligation to make enquiries can arise includes cases where (i) a person is under a legal obligation to act in a particular way if he does know a certain fact, (ii) he has reason to believe that the fact may exist and (iii) it is reasonable for him to make investigations which will reveal the existence or non-existence of the fact.

14. The first of those conditions is fulfilled in a case like the present: if the claimant knew that S had left College, there was an obligation on her to disclose the fact and stop claiming child benefit. The second condition equates to the traditional legal description of a person as being 'put on enquiry'. It is not possible – and probably dangerous – to attempt to define in the abstract the circumstances in which a claimant should be taken to have reason to believe that a fact may exist or the investigations which it is reasonable for him to make; this is a matter for the good sense of Tribunals. But I agree with Mr Jacobs that they will include cases in which the Tribunal concludes that the claimant was 'wilfully blind', in that he avoided confirming suspicions that had been aroused in his mind, and cases of the sort described in paragraph 29 of CF/14643/1996.

15. Though Mr Jacobs analysed the 'wilful blindness' and 'means of knowledge' cases separately, it seems to me that they have a substantial degree of overlap and that both share the three features I have described in paragraph 13. The difference between them is one of degree: wilful blindness comes close to actual knowledge in that it involves a positive suspicion that a fact exists, coupled with a deliberate abstention from confirming the suspicion or finding out the details, whereas the 'means of knowledge' category can cover a case where a person is simply aware of the risk that a fact exists without necessarily having a view on whether it is more probable than not that the fact exists. In that second class of cases, the point at which it becomes reasonable to make enquiries may depend on the degree of likelihood that the fact exists. The purely theoretical risk that any child might be deceiving his or her parent would be unlikely to be enough.

The Tribunal's reasoning

16. The Appeal Tribunal's reasoning contains a mixture of findings to the effect that the claimant must have actually known that S had left the College and of findings that the claimant had constructive knowledge of the fact. The reasoning in the Decision Notice both (a) rejected the claimant's evidence that the claimant was unaware S had left College as well as her evidence that S kept up for a year a strict and convincing routine of going to College and (b) found that a mother should have made enquiries which would have been likely to indicate that something was amiss, so that the claimant had constructive knowledge of the facts.

17. Paragraphs 3(a) to (e) of the statement of reasons appear to contain the tribunal's reasons for not accepting that the claimant was deceived, while subparagraph (f) finds that the onus was on the claimant as a mother to take reasonable steps to be aware of her daughter's situation and to be diligent in seeking information and advice. Subparagraph (g) finds that the claimant did not reply to the Board's enquiries.

18. The problem that I see with paragraphs 3(a) to (e) is that different parts of them could be read as supporting a conclusion either that the claimant had actual knowledge or that she was wilfully blind to indications that S was not attending College. Subparagraph (b) is compatible with a finding of knowledge or wilful blindness, while the first sentence of subparagraph (c), and in particular the use of the word 'realise', suggests a finding of actual knowledge which is contradicted by the remainder of the paragraph and by the conclusion at (f) that the crucial issue was constructive knowledge. I agree with HMRC that this was an error of law in failing to explain clearly in which category the tribunal found that the case fell. The claimant was entitled to know on which of these distinct grounds her appeal failed.

19. It may be that in the first sentence of subparagraph (c) the tribunal meant to say that the claimant must have suspected that S was not attending college, in which case the reasoning as a whole would have been coherent and have supported a conclusion of constructive knowledge; but that is not what the Tribunal wrote in the statement of reasons or the Decision Notice, and plainly I cannot recast its reasoning.

20. It was of course open to the Tribunal to find that the claimant had actual knowledge, or to find that she was wilfully blind. A tribunal could rationally conclude that a claimant was at least wilfully blind (i.e. the tribunal suspected actual knowledge without being sufficiently certain of it, but was sufficiently certain that the claimant had grounds for suspicion). But if the conclusion is that the claimant had grounds for suspicion, that conclusion should be clearly stated.

21. I agree with HMRC that the Tribunal also erred in assuming in paragraph 3(e) that the College would have written to the claimant herself. That seems to have been based on the claimant's own assumption in paragraph 3 of the Appeal Notice, which does not constitute grounds for believing that letters from the College addressed to the claimant in fact arrived; I cannot find anything in the record of proceedings to suggest that letters from the College to the claimant in fact arrived. The information obtained, in response to the Commissioner's direction, by HMRC suggests that the College did not in fact write to the claimant herself.

22. Secondly, I consider that the reasoning discloses an error of law in its approach to the issue of constructive knowledge. In paragraph 3(f) the Tribunal held that the onus was on the claimant as a mother to take reasonable steps to be aware of her daughter's situation. This seems to me to amount to a finding that the claimant should, as a good mother, have asked questions the answers to which would have at least thrown up grounds for suspicion, rather than a finding that the claimant actually *had* grounds for suspicion. In short, the problem is that nothing in the findings suggests that the second of the conditions that I have described in paragraph 13 was satisfied.

23. I do not consider that a tribunal can, as a matter of law, fix a claimant with constructive knowledge on the grounds that the claimant was failing in her maternal duties in not asking enough about a child's educational progress to throw up grounds for suspicion of the child's non-attendance at college. On the other hand, a tribunal, could (if so persuaded) find, in the case of a mother and daughter living together for a period of nearly a year, that conversations must have taken place that must have thrown up grounds for suspicion.

24. I also agree with HMRC that the Tribunal failed in its duty to give adequate reasons when it referred in the decision Notice to paragraph 16 of R(G) 1/75, since that decision does not contain a paragraph 16, but it is clear from the statement of reasons that the Tribunal had in mind paragraph 5. Though R(G) 1/75 is about the duty of claimants to find out the time limits applicable to claims, it is relevant to the extent that it holds that language (or by analogy literacy) difficulties are not in themselves an excuse for failing to make enquiries – assuming that such a duty has arisen.

25. I do not agree that paragraph 2 of the statement of reasons is in breach of the duty to give reasons. A tribunal is not obliged to set out the whole of the evidence that it

accepts; it should set out in sufficient detail the reasons for its decision, but that is not the same thing.

26. The Tribunal appears, however, to have erred in holding in paragraph 3(g) that there had been no reply to enquiries from the child benefit office: it appears there had been a belated reply.

Directions to the new Tribunal

27. The new Tribunal must of course approach the case with a completely open mind and should not regard any of the discussion above – which is intended as a general discussion of legally permissible approaches - as intended to steer the Tribunal towards any particular conclusion. Cases of this sort depend crucially on the Tribunal's assessment of the claimant's evidence, demeanour and answers to questions; the Tribunal will have the advantage of observing the claimant, which I have not. The Tribunal may, on the evidence, conclude that the claimant was completely deceived or that she actually knew or was wilfully blind. It is matter for them.

28. Applying the approach set out in CF/14643/1996 and above, the new Tribunal should first ask itself whether the claimant had actual knowledge of S's non-attendance at college, and if so, by what date. If it does not find that the claimant had actual knowledge, it should consider whether the claimant had grounds for suspicion and if so, whether it was reasonable for her to investigate her suspicions, if necessary by contacting the College. Again it will need to identify the date by which any such grounds for suspicion arose.

(signed on the original) **Nicholas Paines QC**
Deputy Commissioner

8 July 2005