

* 9/98

(7)

DGR/SH/ZA/CW/ZA/15

Commissioner's File: CFC/13585/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 October 1995 is erroneous in point of law, and accordingly I set it aside. As it is convenient that I give the decision the tribunal should have given, I further decide that there was an overpayment of family credit for the period from 13 September 1994 to 1 March 1995, and that the same is recoverable from the claimant. I leave the exact amount of that overpayment to be agreed between the parties, but, in the event of a failure to agree, the matter is to be referred to myself or some other Commissioner for final determination.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 10 October 1995. In view of certain difficulties arising in this case, I directed an oral hearing. At that hearing the claimant, who was not present, was represented by Mr Clifford Murphy from the North Somerset Citizens Advice Bureau, whilst the adjudication officer appeared by Mr S Cooper of the Solicitor's Office of the Department of Social Security.

3. On 6 September 1994 the claimant applied for family credit in respect of herself and her dependent daughter. She stated that she was employed as a sales assistant, and normally worked for 48 hours a week. She declared that she had no other income than that disclosed, and in particular

that she did not receive any help with the payment of the mortgage on the property that she occupied as her home, and in which she had a beneficial half share. After she had provided these details, the adjudication officer decided that she was entitled to family credit at the weekly rate of £57.30 for 26 weeks from 13 September 1994. Subsequently, it came to the notice of the Department that it was the claimant's husband who was paying the mortgage on the property, and in the light of that information the adjudication officer decided that the award to the claimant of housing costs should be reviewed. The original award had been made in ignorance of the material fact that her husband was making the mortgage repayments, and that when this was taken into account, family credit had to be reduced to £49.06 per week. He also decided that there had been an overpayment of benefit amounting to £214.24, and that the same was recoverable from the claimant by reason of her failure to disclose the material fact that she was receiving assistance with her mortgage repayments. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer.

4. The claimant contended before the tribunal that, in computing her entitlement to family credit, the mortgage repayments made by her husband should be disregarded in their entirety. She should be treated merely as living rent-free. The mortgage payments did not constitute any part of her income. The tribunal rejected this contention, and rightly so.

5. The facts of this case are not in dispute. Throughout the relevant period, the claimant's husband was paying the entire cost of the mortgage, although he only had a half interest in the property. He was therefore paying the claimant's share of the mortgage obligations. And payment of that share constituted "notional income" of the claimant within regulation 26(3) of the Family Credit (General) Regulations 1987 [S.I. 1987 No 1973]. That provision reads as follows:-

"26. (3) Any payment of income made -

(a) to a third party in respect of a member of the family (but not a member of the third party's family) shall be treated as possessed by that member of the family to the extent that it is used for his food, ordinary clothing or footwear, household fuel or housing costs [my emphasis]"

The claimant was clearly "a member of the family" by reason of the definition of the word "family" contained in section 137

of the Social Security Contributions and Benefits Act 1992.
For that provides as follows:-

" 'Family' means -

- (a) a married or unmarried couple;
- (b) a married or unmarried couple and a member of the same household for whom one of them is or both are responsible and who is a child or a person of a prescribed description;
- (c) except in prescribed circumstances, a person who is not a member of a married or unmarried couple and a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description."

Manifestly, the claimant and her daughter fell within (c).
"Housing costs" are not defined in the Family Credit (General) Regulations 1987, but whatever their extent, they certainly encompass mortgage repayments.

6. The tribunal, following the adjudication officer, decided that the notional income attributable to the claimant pursuant to regulation 26(3) was half the mortgage repayments, reflecting her beneficial share in the property. However, in his written submissions to me the adjudication officer now concerned contended that the entirety of the mortgage repayments were to be attributed to the claimant as notional income. And initially Mr Cooper supported this contention. However, this viewpoint is fallacious. It really arises out of a confusion between the position of the claimant vis-a-vis the lender and her position vis-a-vis her husband and co-owner. In relation to the lender, the claimant and her husband have assumed joint and several liability for all mortgage repayments. But as between themselves, the claimant is responsible for one half, as the owner of a half interest, and her husband is responsible for the other half, as the owner of the other half interest in the property. If, for any reason, either of them pays the entirety of the mortgage repayments, the other is entitled to reimbursement from his co-owner of half the cost. Accordingly, in the present instance, in paying the entirety of the monthly mortgage repayments, the husband paid the claimant's half share of the mortgage obligation, and as a result the claimant, pursuant to regulation 26(3), must be treated as possessing a sum equivalent thereto. But, she cannot be treated as possessed of the totality of the payments. She only has a half share in the property; she does not own it outright. On further reflection Mr Cooper accepted that this was the true position, and that the written submission on this point by the adjudication officer now concerned was misconceived.

7. For completeness, I should mention that there has to be deducted from the notional income attributable to the claimant, pursuant to regulation 26(3), the sum of £15 per week by way of maintenance from her husband. For paragraph 14 of Schedule 2 to the Family Credit (General) Regulations 1987 provides for the disregarding of:-

“£15 of any payment of maintenance, whether under court order or not which is made or due to be made by -

- (a) the claimant's former partner; or
- (b) the parent of a child or young person where the child or young person is a member of the claimant's family except where that parent is the claimant or the claimant's partner.”

As I understand it, both the adjudication officer and the tribunal made the necessary deduction in arriving at the extent of the overpayment.

8. In the present case, I should mention that the tribunal clearly made a typing error when they stated that the overpayment recoverable was £171.60; they clearly meant £214.24. The present appeal was heard in conjunction with CFC/14075/1996 and CFC/14074/1996 where in the one case the sum expressed to be recoverable was £171.60 and in the other £214.24, and clearly in the present instance the wrong figure was typed in as the sum recoverable.

9. The tribunal, in upholding the decision of the adjudication officer, considered that the overpayment was recoverable from the claimant by reason of her failure to disclose the material fact that a mortgage was being paid by her husband. In the course of the hearing before me, the question was considered whether the claimant could reasonably have been expected to make this disclosure. Mr Cooper contended that there could be no doubt on this issue. He properly drew my attention to the question on the claim form which reads:-

“Do you, or your partner, or any of the children you are claiming for have any other money coming in regularly?”

Money coming in includes

help with the mortgage

This may mean that someone pays these things for you.”

To this the claimant answered “no”. The claimant clearly should not have answered in the way she did. She must have known that she was to make proper disclosure, and she failed to do so. Moreover, she was also guilty of a clear

misrepresentation, an alternative ground on which the overpayment was recoverable pursuant to section 71 of the Social Security Administration Act 1992.

10. I cannot, however, simply confirm the decision of the tribunal. For there is a document in the file relating to the appeal CFC/14075/1996, heard concurrently with the present appeal, in which it is clear that by 1 March 1995 the Department were aware, or ought to have been aware, of the true situation in connection with the mortgage repayments. Consequently, after that date, disclosure had effectively been made. It follows that the tribunal should have reduced the amount of the overpayment accordingly. In other words, the tribunal approved too great an overpayment, and on this ground I must set aside their decision as being erroneous in point of law. However, it is unnecessary for me to remit the matter to another tribunal for rehearing. I can conveniently substitute my decision for that of the tribunal, and determine the appeal finally.

12. My decision is as set out in paragraph 1.

(Signed) D G Rice
Commissioner

(Date) 2 February 1998