Bulletin 191

PLH *Commissioner's File: CFC 2766/03*

SOCIAL SECURITY ACTS 1992-1998
TAX CREDITS ACT 1999

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	*[the claimant]*
Respondent:	Board of Inland Revenue
Claim for:	Family credit/ working families tax credit
Tribunal:	Birmingham
Tribunal case ref:	
Tribunal date:	2 April 2003
Reasons issued:	9 May 2003

1. This appeal by the claimant must be allowed, as in my judgment the Birmingham appeal tribunal consisting of a chairman sitting alone on 2 April 2003 did, as is now conceded, make errors of law in the decision which was issued on 4 April 2003 and confirmed by a full statement of reasons sent to the parties on 9 May 2003. I set the decision aside and, although I am sorry to have to do so in view of the time that has now elapsed since the original proceedings and the events to which they related, remit the case in accordance with section 14(8)(b) **Social Security Act 1998** to a fresh tribunal for rehearing and redetermination of all relevant issues both on entitlement and on whether any overpaid benefit is recoverable from the claimant. That I think is the only fair course I can take, as I am not satisfied it would be right for me to substitute a decision in favour of the claimant on the entitlement issues on the basis of the existing material as her representative invites me to do.

2. This case is concerned with three claims this claimant made for the means-tested benefit under section 128 **Social Security Contributions and Benefits Act 1992,** originally called family credit but from 5 October 1999 renamed as working families tax credit. The claims in question were for successive 26-week periods from 6 April 1999, 5 October 1999 and 4 April 2000 respectively. The respondent to this appeal in respect of all three periods is the Board of Inland Revenue which has taken over responsibility for the administration of this benefit from the Secretary of State. There is no dispute that the claimant claimed, was awarded and paid the benefit for the two periods of six months from 6 April to 4 October 1999 and 5 October 1999 to 3 April 2000 in the sums of £2,163 and £2,446.60 respectively, plus a further £470 for the period 5 April to 8 May 2000 until the benefit was stopped. All those awards and payments were made on the

basis of claim forms, completed and signed by both the claimant and her husband and received respectively on 6 April 1999, 16 September 1999 and 6 March 2000. In each of the forms the claimant and her husband stated expressly that they had no savings of more than £2,500 and that the information given in the form was correct and complete. Nowhere on the form were they required to state, nor did they, whether they had recently had capital but disposed of it before making the claim – a potentially highly relevant question to a correct determination of any entitlement, in view of the provisions for treating **"capital of which he has deprived himself for the purpose of securing entitlement"** as if still possessed: regulation 34 **Family Credit (General) Regulations** 1987 SI No 1973.

3. There is equally no dispute that in fact the couple had deprived themselves of a substantial sum of capital within a relatively short time before making the first claim. A sum of nearly £17,000 belonging to the claimant or her husband had been received into her banking account, and the bulk of it paid out again within a few weeks by lump sum cash withdrawals reducing the balance again to below £2500 at the date of claim. Those drawings, totalling at least £14,000, were later stated by the claimant and her husband to have been used to pay off family obligations and redeem jewellery of hers or theirs that had been pledged to raise money for his business.

4. It was expressly (and correctly) acknowledged by the claimant through her solicitors that for family credit and WFTC purposes both her and her husband's capital and capital transactions properly fell to be treated together as hers, and that by these transactions they had deprived themselves of the capital concerned: see the letter of 18 May 2000 at pages 113-115, setting out the claimant's position very clearly. As that letter also accurately stated, the issue between her and the tax and benefit authorities was whether that deprivation of capital had taken place with the intention of securing entitlement to benefit for the purposes of regulation 34, which the claimant denied. The letter also accurately defined the further potential issue to which the undisputed facts gave rise, namely whether any benefit found to have been overpaid in excess of entitlement was legally recoverable from the claimant under section 71 **Social Security Administration Act 1992** by reason of failure on her part to disclose material information such as the amount of capital she had disposed of before making her claim.

5. The three departmental decisions against which she appealed to the tribunal were given on two separate dates, the first and second on 8 June 2000 relating to the latter two claim periods and the third, rather belatedly, on 17 January 2001 relating to the first period from 6 April 1999. In each case the benefit previously awarded was revised to nil on the ground that the original awards been made in ignorance of the material fact

of the claimant and her husband having capital as assessed under the means-testing rules of over £8,000 at the time of the application, and it was further determined that all the benefit paid out on that mistaken basis was legally recoverable from them, on the ground of alleged "misrepresentation of material fact" as to whether they then had capital over £8000: pages 117, 122, 156. The claimant's appeal against those decisions was on both entitlement and overpayment issues. It came eventually before the tribunal on 2 April 2003 and was dismissed in its entirety, the tribunal confirming in relation to each of the three claim periods that (a) she had no entitlement and (b) the full amount paid was recoverable from her by reason (only) of *misrepresentation* by her in the claim form. Her present appeal, for which I granted leave on 9 March 2004 when the case was referred to me for fresh consideration following earlier judicial review proceedings, is against both aspects of that decision by the tribunal as being erroneous in law.

6. I have been greatly assisted by the helpful and constructive written submissions on both sides: by Mr D P Eland on behalf of the Board, dated 8 June 2004 at pages 335 to 342, and by Mr C Beton of Messrs J M Wilson, the claimant's solicitors, dated 21 September 2004 at pages 356 to 361. It is now common ground between the parties' representatives, and in my judgment rightly so, that the tribunal's treatment of both the entitlement and the overpayment issues unfortunately fell into error in law such that I must set the entire decision aside. It is not necessary to go into the reasons in any great detail beyond recording that I accept Mr Eland's submission, concurred in by Mr Beton, that on entitlement the tribunal's decision leaves it ambiguous whether it was accepting there had been a *deprivation* of capital so that the "notional capital" rules for means-testing purposes had to apply, or holding that the claimant in some way still possessed the *actual* capital despite the evidence from both sides that it had been disposed of. If this was to be regarded as a case of deprivation, then the decision failed to address with sufficient clarity each disposal in question, and make and record sufficient findings about its actual purpose so as to show how it came within the rules requiring "notional capital" to be added into the reckoning along with capital actually possessed by the claimant.

7. I further accept that on the overpayment issue both the original departmental decisions and the tribunal's decision to confirm them were misdirected in holding any overpayments legally recoverable from the claimant on the basis of a *misrepresentation* of fact, when there was a failure to identify any such misrepresentation. The questions in the claim forms were limited to whether the claimant or her husband currently had actual savings of more than £2,500, and to these the answers given were factually correct: there was no evidence of any separate representation about what they might have had or transferred in the recent past, for the simple reason that this was not asked. Mr Eland in

his submission expressly acknowledges it as now common ground that on that basis **"there can have been no misrepresentation of fact in the present case"**: page 340.

8. For those reasons I set the tribunal's decision aside. I have carefully considered the further points made by Mr Beton in favour of disposing of these proceedings at once by a decision in favour of the claimant restoring her entitlement, but am not persuaded that I should. The existing material (even ignoring those relatively few pieces of evidence on which there is continuing factual dispute between the parties) does in my judgment show at the very least a substantial case for the claimant to answer on the purpose of these capital deprivations, made such a relatively short period of time before she made and continued to make claims to this means-tested benefit on a repeating basis for the continuous period of 18 months from 6 April 1999 onwards. Given the evidence of the couple's knowledge and previous experience of the benefit system, and the lack of any clear demonstration of legal necessity to make the lump sum transfers they apparently chose to make in preference to subsisting on their own resources without applying for public assistance, the case must be open to the possible inference that they were organising their affairs with a view to getting the maximum benefit they could, sooner rather than later. But whether such an inference *ought* in fact to be drawn must in my judgment be a matter for a tribunal on a full rehearing of all the relevant evidence on both sides, not something on which I should attempt to draw a conclusion on the necessarily limited material before me without having heard and seen the witnesses.

9. I accordingly remit the case for rehearing to a freshly constituted tribunal and I direct them that there are two principal issues they must determine, (first) whether the claimant's entitlement to the benefit was correctly revised to nil for each of the three periods in dispute from 6 April 1999 to 8 May 2000, and (second) whether any benefit they find to have been paid in excess of the claimant's entitlement is legally recoverable from her under section 71 **Social Security Administration Act 1992**.

10. For the purposes of the first question it may be regarded as an accepted fact (in the absence of any dispute from either side) that the claimant did in fact deprive herself, or is to be treated as having deprived herself, of a sum of not less than £14,000 capital by the three lump sum transfers made out of her account over the period from 21 January to 26 February 1999 before her first claim for family credit, signed the following month on 22 March. Thus the question the tribunal must determine is whether in relation to that claim and the two successive ones for the following six-month periods she is to be treated as having had the intention or significant operative purpose of

depriving herself of those capital amounts with a view to obtaining or maximising benefit under section 128 **Social Security Contributions and Benefits Act 1992**.

11. Since that benefit has to be claimed for fixed 26-week periods and the claimant in fact continued to make such claims over what was in reality one continuous period of claim, I do not think there is anything material in the fact that the name of the benefit changed from 5 October 1999, or that the later forms to maintain the claim were of course further away in date from the original capital transactions than the first one. By the same token, I direct the fresh tribunal that insofar as they find the claimant has to be treated as having "notional capital" so as to reverse the effect of the capital deprivations as at the date of the original claim, they must in relation to the subsequent ones apply the "diminishing notional capital rule" in regulation 34A insofar as it makes any difference to the entitlement figures. I do not understand this to be disputed as a point of principle though the Revenue calculation at page 108 of the appeal papers appears to indicate quite convincingly that it has no actual effect for any of the periods here at issue.

12. As regards the overpayment question the agreed starting point is that the original attempt to impose recovery on the claimant on the ground of misrepresentation was wrong as the answers she gave were factually correct. However I direct the fresh tribunal that they can, and in the circumstances of this case should, consider and determine whether any benefit they find to have been overpaid is legally recoverable from her on the alternative basis of failure to disclose the capital transfers which were material to the question of her entitlement. That issue is within their jurisdiction on appeal against the recoverable overpayment determination under section 71 of the Administration Act, even though the only ground originally cited was misrepresentation: **R(SB) 40/84** paragraph 12. (The claimant and her representative were well aware of material failure of disclosure as a potential issue since as long ago as the letter of 18 May 2000, and in view of that and the express direction I am now giving there is no question of their being disadvantaged at the rehearing by surprise.)

13. For this purpose it is not of course necessary for the Board to prove that the failure of disclosure was other than innocent, and I further direct the tribunal that, as is well settled law, the principal question is whether disclosure was reasonably to be expected of the claimant in all the circumstances. That long established principle as laid down and confirmed by two Commissioners of unquestionable learning and experience, Mr I Edwards-Jones QC and Mr J S Watson QC, in the (reported) cases **R(SB) 21/82** and **R(SB) 28/83,** has since been followed and applied as good law and practical sense

on countless occasions by Commissioners and tribunals over the last 20 years and more, and should at least for the present continue to be applied in the context of facts such as these, notwithstanding the doubts voiced in quite a different context by a recent tribunal of Commissioners in case CIS 4348/03.

14. On the overpayment question the tribunal must also specifically address and determine so far as material the further subsidiary issue raised by Mr Beton in his observations in reply, namely whether the chain of causation between any failure of disclosure and the continuation of the benefit payments may not have been broken at some point before 8 May 2000, by reason of the Inland Revenue becoming aware before that date of the £17,000 having passed through the claimant's bank account. They should also consider any possible relevance of the separate "diminishing notional capital rule" as regards the overpayment calculation, under regulation 14 **Social Security (Payments on Account, Overpayments and Recovery) Regulations** 1988 SI No 664, treating the whole overpayment period as one in the way explained in case **CTC 110/04.**

15. The appeal is allowed and the case remitted for rehearing accordingly.

(Signed)

P L Howell
Commissioner
14 October 2004