WMW/HJD **Co@ssioner's File:** CG/19/94 **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

[ORAL HEARING]

1. This adjudication officer's appeal succeeds. I hold the appeal tribunal decision dated 10 December 1993 to be erroneous in point of law and accordingly I set it aside. Because I think it appropriate so to do I give the decision which I consider **that** the tribunal should have aiverr.

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2. That decision is to refuse the appeal from the decision of an adjudication officer dated 5 April 1993. The practical result is that that decision remains the effective one in the case reviewing, as it did, an earlier decision by an adjudication officer awarding invalid care allowance [ICAI to the claimant and revising it for the period from and including 8 July 1990 by termination of the award and then holding that there had been a consequent overpayment of ICA which was recoverable from the claimant. At this point I should record that I have considered the relevant factors other than those argued before me and I am satisfied that but for the failure to disclose in question the Secretary of State for Social Security would not have paid the allowance to the claimant for the period 8 July 1990 to 14 February 1993 (both dates included) and that it follows inevitably therefore that the total so paid is recoverable from the claimant and that that total is £4,189.55. That is, however, in effect a declaration of a right. Whether and to what extent the Secretary of State may choose to exercise that right is for him and not for me nor the adjudication authorities.

3. This case came before me by way of an oral hearing at which the adjudication officer was represented by Mr William Neilson, Advocate, of the **Office** of the Solicitor in Scotland to the Department of Social Security and the claimant was represented by Mr Scott Mclnally, a welfare ria,hts officer with Durham County Council. I am indebted to both for their submissions and assistance.

4. The tribunal decision reversed that of the adjudication officer because they held that the claimant had not been in gainful employment during the period for which the adjudication officer had determined that she had been so engaged. Their findings of fact are not in controversy. It is the conclusion from the findings and in particular the reasoning that was the subject of criticism - essentially a matter of almost pure law.

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5. The findings of fact made by the tribunal, and which I accept - albeit to some extent elaborated as appears below - were these -

111. Mrs Walton has been in receipt of invalid care allowance from 21 April 1988.
2. On I July 1990 Mrs Walton was placed on her husband's business accounts as a partner in that business.
3. Mrs Walton had never played any part in her husband's business and this continued to be the case.
4. There were not two separate incomes from the business before or after 1990. There continued to be one income derived from the business the only difference was that for tax purposes the Waltons were able to claim two sets of tax allowances because Mrs Walton was named as a separate partner from July 1990 onwards.

6. The factual elaboration that I must make is to note that in November 1992 an enquiry from the Contributions Agency had been received within the ICA Unit in respect of an apparent excess payment of contributions in the two tax years 1990-1 and 1991-2. It was probably in response to a query then directed to the claimant that a letter from the firm's accountants to the Department dated in November 1992 said this -

> "We have been informed by Mrs Walton that she is paying Class I NIC on her Invalid Care Allowance, and as she is also paying Class 2 NIC she will be due to a refund.

And then ended with this -

> "We confirm that Mrs Walton has been self employed since I July 1990.

Whilst it is not for me, I can not understand why, if she really had been, the claimant had been paying Class 1 national insurance contributions on her ICA: there are papers in the bundle which tend to indicate that she was getting the necessary credits in that regard. That was a different matter. So too, questions as to whether the accountants' response had been instructed and if so whether by the claimant. However all that may be, in response to a request from the Department the firm's accounts were produced for the year ended 31 May 1992, which also bore figures in respect for **the** previous year. The accounts recorded the names of the only partners as the claimant's husband and herself. The profit and loss appropriation section showed how in each of the years ended 31 May, in 1991 and 1992 respectively, the divisible profit had been split between her husband and the claimant. It was then apparent that the claimant's income, at least according to the accounts, was far greater than that which allowed qualification for invalid care allowance. I understand that in light of that in February 1993 the Secretary of State suspended payment in exercise of the power conferred by regulation 37(1)(a) and possibly (b) of the Social Security (Claims and Payments) Regulations, 1986 [where conditions for an award may no longer be fulfilled or a revisal may be required.] On 17 February 1993 the claimant was asked to return her ICA order book and to provide the firm's projected profit and loss for the year from 1 June 1992. Her reply, dated 24 February 1993, was that the profit would be 15% lower than the previous year. For reasons that are not fully clear, it was not until 5 April 1993 that an adjudication officer considered the matter and decided to review, revise and terminate the award finding the overpayment already mentioned.

7. Mr Neilson's submission, broadly in line with the adjudication officer's written submission upon **the** case, was that the claimant had to accept that she had become a partner in

her hijsband's business and had held herself out in that capacity to the Inland Revenue for the purpose of obtaining a tax advantage, I would presume earned income relief in her own right, and had undertaken the liabilities and acquired any benefits conferred by law upon the relationship. She had been declared by her accountants to be self employed. The accounts bore to attribute an income to her out of the firm's profits. There thus inevitably arose a question as to whether she was thereby in "gainful employment". Mr Neilson pointed to the former provisions about "gainful occupation", the 1994 Edition of "Non-Means Tested Benefits: The Lep-islation" by Bonner *et al.* and the cases there cited such as R(P) 7/51 and in contrast, where the work done was minimal, R(S) 17/52. That text-book refers also to such decisions as R(P) 8/56 and R(U) 11/57 in which it had been suggested that only trivial amounts of work or work to keep a business ticking over temporarily would not count as being in a gainful occupation, always assuming payment of some sort involved. In this case, on the other hand, more than two years had passed with the claimant being a partner in the firm. Mr Ncilson also referred me to other cases such as R(P) 1/65 and R(P) 9/56 where at least some work, even if it was only attendance at court in the former case, had been involved. He referred to what was being represented, ostensibly at least on behalf of the claimant, to the Inland Revenue about her being self employed and so liable to Class 2 contributions. Whilst R(P) 1/65 and 4/67 indicated that the Inland Revenue's views were not binding on the adjudication authorities, those views fell to be taken into account. In R(P) 4/67 a Commissioner had held that it was against public policy for a person to represent to one branch of treasury interest that a sum was earned income and to another that it was not earnings. Upon that basis he submitted that even although the claimarrt might have done no work, as had been common ground throughout, that mattered not, contrary to the view of the tribunal, since she had to be taken as a partner in the business with any potential or actual benefits and risks therefrom. She had been assigned a share of the profits whether or not she drew any of them. That shewed that she was in gainful employmentjust as much as if she had done work for the business. He concluded that it might be that the case should go back to another tribunal to examine what, if anything, the claimant had done for the partnership. I was disinclined to accept that last point since the tribunal had found that the claimant had done nothing whatever in or for the business or in respect of the assignation to her in the accounts of a share of the profits.

8. Mr Mclnally sought to distinguish R(P) 4/67 by pointing to paragraphs 10 and I I thereof. In paragraph I 1, before the observations about representing differently to different authorities, there was said to have been a need for enquiry as to whether the claimant in that case had claimed relief from tax under the then in force section 525(1) of the Income Tax Act 1952 in respect of the money paid to him. But it was pointed out at the same place that even if he had claimed and been awarded earned income relief that would not itself help to determine the question because that would merely reflect the view of an inspector of taxes. What the Commissioner then said was that if that claimant had got earned income relief that would be the result of making representations to the Inland Revenue inconsistent with the representations which that claimant was making to the National Insurance Authorities. I can say at once that I reject that ingenious attempt at distinguishment because the evidence in this case itself demonstrates what was represented to the Inland Revenue by the firm's accountant. As a partner, however nominally, she can hardly be heard to say that she was not aware of what was going on and there is no suggestion that she had ever objected to the arrangement or repudiated the accountants' representations of her position. Indeed it seems fairly clear that she was so aware - cf. her explanation of her position in document 23 of the bundle.

9. Mr Mclnally, I think, appreciated that pressing too far the question of no gainful employment for the claimant in this case might lead to a conflict disadvantageous to the family

even if only arising subsequently between the Inland Revenue and the claimant's husband. That did not daunt him from pressing the matter however and I understood him to accept that if the matter was referred back to another tribunal that might arise a question which would have to be considered. He also submitted that in respect of the final year, that is the year up until 1993 itself, only a forward projection had been used. He submitted that there should have been findings as to whether that was accurate or not. That had been a question of fact for the appeal tribunal. I accept that they do not appear to have looked at that issue. However I am not surprised and I would not regard that failure in the circumstances as an error in law. There was no dispute before them on the matter. Indeed the estimate for the year to 1993 was entirely based upon the claimant's own representation. Had there had been anything to merit a departure therefrom it was for her and her representative to have brought to the attention of the tribunal. I have no reason to suppose that they would not have done so. The accounts would have been long closed before the tribunal hearing in December 1993. Perhaps the real reason why the matter was never mentioned, however, was because of the statutory provisions which the claimant had been held to have failed to satisfy.

10. Turning to these provisions, then, Section 70(1)(b) of the Social Security Contributions and Benefits Act 1992, which contains the current form of the law, provides that one of the conditions for entitlement to ICA is that on any day in question a claimant be not gainfully employed. And regulation 8(1) of the Social Security (Invalid Care Allowance) Regulations 1976 provides, as applied via section 2(1) and (4) of the Social Security (Consequential Provisions) Act 1992, that for the purposes of that section of the Act a person is not to be treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week exceeded a certain figure, which was £20 prior to April 1991, £40 until April 1993 and only £50 thereafter. It is quite clear from the figures involved in the accounts that even if for 1993 the profit shortfall had been 60% instead of 15% the weekly income averaged through the year in question would have been more than twice the highest figure just mentioned. Accordingly I can not accept that there is any potential issue of fact sufficient to require a further hearing by a tribunal.

11. Mr Mclnally also queried whether there had been a proper review and revisal in respect that benefit had been stopped in February 1993 and the repayment period as determined had ended 10 days before the stoppage whereas the Department had been aware of the position from November 1992. That led him to query whether the adjudication officer might not have utilised regulation 17(4) of the Social Security (Claims and Payments) Regulations 1987. His submission was directed to a contention that after November 1992, when the Department first became aware of the matter, any overpayment was because of the Departrnent's failure timeously to act. From the history set out above, it seems to me that whilst the whole case may have started about November 1992 it was as late as mid January 1993 - documents 14 and' 15 of the bundle - that there that the accounts were sent to the Department. That delay was properly excused. Just over 4 weeks later the Department wrote to the claimant - documents 25 and 26 - indicating that the adjudication officer felt that the conditions for the benefit were no longer satisfied. It was at about that same time that payment was suspended by the Secretary of State. The matter then went before an adjudication officer. Although there was delay at that stage it did not inure to the disadvantage of the claimant because payment of the benefit, as noted, had been suspended and so any further possible liability to repay had been avoided.

12. Mr Mclnally's final point concerned reasonable disclosure. That stemmed from the basis of this case having been based upon an alleged failure to disclose. It is axiomatic that any such information which is said was not disclosed was such as "ought reasonably to have been

disclosed". Since the claimant was doing no work and getting nothing from the business other than she had got before - referring to the family income or drawings never having changed - he contended that there was really nothing which she could have disclosed since there was nothing which she knew she was doing or getting different from before: all that she knew was that she had been made a partner on paper. He pointed to what is said by way of the standard warnings to claimants on the cover of payment books. Thus - at T33 of the bundle - is this nodflable change -

> " You start work as an employed or self-employed person, either full or part-time whatever your earnings."

It is not said acquiring earnings is enough: the emphasis Mr Mclnally pointed out, is on starting 11 work". This claimant had never started or done any work. The general warning, however, on page 2, reproduced at document T34 of the bundle, is -

> "You must write and tell us straight away and at the same time return your order book without cashing any more orders, *if anything changes about yourself* or the disabled person you are looking after." [My emphasis. I

And again from page 3, at T33, it is said that the Department must be informed if -

> "You start to receive director's fees or earned income relief on your husband/wife's self employment. "

It seems to me that there is enough in the general and the last particular warning to indicate to any intelligent person a requirement to intimate if they became a partner in a business, especially if to receive, however notionally, some interest in the profits of the business. I therefore reject this point too.

13. Coming, now, to the central question of "gainful employment", I have first to say that the statutory definitions are not very helpful. I am must start with section 70(1) of the Social Security (Contributions and Benefits) Act 1992 which provides that a person shall be entitled to an invalid care allowance for any day on which he, or she, is engaged in caring for a severely disabled person if -

> (b) he is not gainfully employed;

The Social Security Benefit (Computation of Earnings) Regulations 1978 at regulation 1(2), as applicable under the provisions about continuity of the law earlier cited from the Social Security (Consequential Provisions) Act 1992, provides that references within them to "the Act" means to the Contributions and Benefits Act and "gainful employment" -

> 11... means employment as an employed earner or a self-employed earner

More specifically regulation 8 of the Social Security (Invalid Care Allowance) Regulations 1976 provides that -

a person shall not be treated as gainfully employed on any day on a week unless his earnings in the immediately preceding week exceed £x .. - "

The relevant figures matter not for the reasons expressed in paragraph 10 above.

14. The central issue then comes to be whether the claimant was " Painfully employed" within the scope of these provisions. Certainly for the purposes of the Claims and Payments Regulations the claimant was at least "employed" insofar as she was "self-employed". That she was self employed has all along been expressly conceded. Whether her self-employment was gainful" seems to me to lie at the heart of the matter. 0

15. 1 entirely appreciate what has been said and submitted about "facing both ways" on the one hand and on the other that the claimant's partnership made no difference to her actual financial position or income nor, as I understood it, to the monies which she was able to use. Nonetheless, as it seems to me, "gainful" does not necessarily mean to the gain of the individual concerned. An individual may assign or even forego earnings. Depending on the extent of any assignation another person may become liable for the relevant tax. Here, at least, there was a gain to the claimant and her family in the form of extra earned income relief and it was that Grain that had been the reason for her having been made a partner, however little she may have directly obtained any actual pecuniary benefit. At the least she had a leaal right to the profit share recorded in the accounts. That she did not use it and probably would never have enforced her right to it do not alter the fact that thereby she had *gained* a fiscal *and* a pecuniary advantage. That being so I have found myself unable to hold that she fell outwith the category of being Painfully employed. Accordingly I have felt equally obliged to hold that upon the commencement of her gainful employment she ceased to qualify for an invalid care allowance by reason of non-satisfaction of section 70(1)(b) of the Contributions and Benefits Act. therefore hold the tribunal decision to be erroneous in point of law by reason of misconstruction of the statute and that **the** original adjudication officer had reached the proper decision the whole matter. I have therefore sought to restore that decision as the ruling decision upon the case.

16. 1 feel somewhat fortified in the decision at which I have arrived by the consequence that it has not proved possible to take advantage of Inland Revenue legislation without civing up a means tested benefit paid for out of public funds at least in part provided by the Revenue's operations. Whether or not it was question of "facing both ways", I have a strong feeling that a different result would have been against "the public interest" in its broadest sense.

(signed) W M Walker
Commissioner
Date: 19 December 1994