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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CG/5428/1998

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

MR DEPUTY COMMISSIONER RICHARD SMITHSON

Claimant : Mrs Robina Jamil
Tribunal : Warrington
Tribunal Case No : S/06/078/1998/00582

1. This appeal, brought with the leave of the regional chairman, fails. The decision of the Warrington Social Security Appeal Tribunal dated 25 June 1998 is not erroneous in law.

2. On 20 February 1998 the adjudication officer decided that the appellant had been overpaid invalid care allowance of £718.40 for various weeks between 5 September 1994 and 30 June 1996. It was recoverable from her because she had not disclosed the level of her husband's earnings which in the weeks of overpayment had exceeded the maximum amounts (these increased over the period) above which no invalid care allowance for dependent children could be paid to her.

3. As is not uncommon, when the matter came to appeal the adjudication officer revised the calculation and sought a decision from the tribunal that the recoverable sum should be £551.60 (see paragraph 34 of the submission to the tribunal) the overpayment relating to various weeks between 5 December 1994 and 30 June 1996. In the event the tribunal found £531.80 to be recoverable, the husband's earnings after allowing for expenses not exceeding the maximum for the benefit weeks next after 27 May 1996 and 17 June 1996. The reduction has not been the subject of any comment by the adjudication officer concerned with the submission to the Commissioner and I accept it.

4. The appellant was in receipt of invalid care allowance in respect of caring for her mother-in-law. At the date of the tribunal hearing she and her husband had two dependent children. The elder child was born on 21 December 1992 and the younger on 27 December 1995 that birth being within the overpayment period. The birth of the second child increased both the dependent child addition to invalid care allowance and the level of the father's earnings before that addition would cease to be payable. Since however no increase on account of the second child was actually paid in the overpayment period the £531.80 relates to the first child alone.

5. The language used in the appellant's home is Urdu. Her husband speaks good English. While she has subsequently been learning, her own spoken English during the overpayment period was very limited indeed and she could not read English at all.

6. On the original invalid care allowance claim form completed by a relative but signed by the appellant it had been recorded that her husband was in work with gross earnings of £100 a week. Those earnings however varied. £100 was less than the maximum for a one child family so that on that basis the addition would be payable. The adjudication officer ascertained, from another family member, that the appellant's husband had travel to work costs of £20-£25 per week and, from the employer, that his gross wages did not exceed £125.

Payment of the increase in ICA was made together with the basic allowance with effect from 5 September 1994, an order book being issued for payments from 7 November 1994.

7. The notes in the order book contain the following instruction:-

"Tell us if

Your spouse or partner lives with you and earns £120 or more in a week"

8. A general review form was issued on 23 October 1995. It was not returned but the appellant's husband rang the Invalid Care Allowance Unit to say that there had been no change in circumstances.

9. The level of earnings had for the weeks set out in paragraph 34 of the adjudication officer's submission to the tribunal exceeded the maximum, a state of affairs that was only discovered following further enquiries made in consequence of the birth of the second child.

10. The printed portion of the original claim form had stated the level of earnings net after expenses that could not be exceeded. The adjudication officer however did not in the end seek repayment for any week before the order book came into the appellant's possession.

11. The appellant and her husband attended the hearing on 26 June 1998 with a representative. The husband is recorded as saying:-

"I misled wife. I explained correspondence to wife. I did not explain the payment notes to wife. I did not read them myself. I just gave her the book and left her to it."

and his wife

"I remember lots of printing in order book I did not ask anyone to explain it to me."

12. The tribunal's statement of material facts and reasons reads as follows:-

"This appeal concerns the recoverability from [the appellant] of an overpayment of ICA. Mr W on her behalf agrees the schedule of overpayments but contends further expenses should be set against [the appellant's husband's] earnings for pay days 27.5.96 and 17.6.96. The tribunal accepts fair contention and the overpayment figure is £531.80.

[The appellant] claimed ICA for looking after her mother-in-law on 26.8.94. The form was completed by the [appellant's] sister-in-law. At all material times [the appellant] had very little English. She could not have completed the claim form herself and signed what was put in front of her. When the order book arrived the copious notes were not explained to her, nor did she seek an explanation. She simply presented the order book each week, signed it and collected the money, without understanding the declaration of entitlement she was making.

[The appellant] never knew how much her husband earned. He never told her and she never had sight of his wage slips.

[The appellant] seeks to avoid repayment because she was not aware of the earnings of her husband and because of her poor command of English.

SSAA S71 provides for the recovery of an overpayment where 'any person has misrepresented or failed to disclose, any material fact and in consequence of the misrepresentation or failure' the overpayment has occurred.

[The appellant] failed to disclose the material fact that her husband's earnings exceeded the statutory limits and misrepresented her entitlement by signing the declaration each week, and the overpayment was the direct consequence of this.

It is urged on us by Mr W that she is not bound by the failure and misrepresentation because of her lack of knowledge and her limited misunderstanding of the language. We do not accept this. She had been issued with an order book containing clear instructions. It is reasonable to have expected her to familiarise herself with them, but neither she nor her husband (who has good English) made any attempt to do so. Had she done so she could have made a full disclosure and the overpayment would not have occurred. R(SB) 54/83 applied.

[The appellant] did not qualify the representation in the order book when she signed it. We have considered Jones v CAO where Court of Appeal held the declaration was limited to known facts. In [the appellant's] case there were no known facts - she had taken no steps to understand or ascertain the conditions attaching to the benefit, and we do not accept the Court of Appeal decision embraces circumstances such as these. We prefer to follow the guidance of Commissioner Rice in CIS/359/1990 and Commissioner Mitchell in CSB/329/1990,

and find that [the appellant] is bound by the misrepresentation.

The overpayment of £531.80 is recoverable."

13. The basis on which I uphold the tribunal decision is that I consider that the tribunal did not err in law in holding that disclosure was reasonably to be expected of the appellant because she should have familiarised herself with the order book instructions. That was all that was necessary for the tribunal's decision since the case had been brought on failure to disclose. The excursion in the penultimate paragraph into misrepresentation was not necessary. Misrepresentation is limited to what a claimant knows (Jones v. CAO 1 AER 225). Here the appellant knew that her husband was earning but not how much he was earning. I do not find the tribunal's references to CIS/359/1990 and CSB/329/1990 helpful in relation to the case before it. In CIS/359/1990 it was held that a claimant by signing "I am entitled to the above sum" (the end of the order book declaration) made a misrepresentation if that was not the case. Albeit obiter in the case before the court that approach was not adopted by the Court of Appeal in Jones, Evans L J holding that part of the declaration to be a representation of law and not of fact. Nor was it followed in CIS/102/1993 where the question was in point. CIS/359/1990 is authority for the proposition that a claimant who knows a particular fact and signs an order book declaration without declaring it cannot be relieved of his or her misrepresentation on the basis that the claimant did not know that the fact was material. That however is not the issue in the present case which as I say has not been brought on misrepresentation at all. The same omission will often constitute both a failure to declare and a misrepresentation on account of the declaration but it is necessary to have regard to the terms of the decision in each case. In CSB/329/1990 the Commissioner held that an elderly Asian appellant with very poor English had made a misrepresentation when he signed that he had reported all facts that could affect the amount of his payment when he had not reported the arrival in his home of two non-dependents. Again a misrepresentation rather than failure to disclose case.

14. I regard it as unsettled whether the declaration "I have correctly reported any facts which could affect the amount of my payment" extends to a fact that the claimant did not know but had the means of discovering. Such a distinction has however long obtained in cases of failure to disclose. A claimant will have the necessary knowledge where it relates to something that the claimant either knows or with reasonable diligence ought to have known (R(SB) 28/83).

15. There is a general duty on claimants to acquaint themselves with the conditions concerning benefits which they have claimed. If a particular claimant cannot understand

English then he or she must get an explanation from somebody able to give it (CIS/186/1994). In this case the appellant received an order book with instruction notes. The person who could explain them was immediately to hand namely her husband. I appreciate that as a matter of culture for her all items of business were left to him though I observe, in passing, that in every culture some spouses may not know the level of each other's income. The appellant's duty was to acquaint herself with the conditions for her award. That could have been done by a request that the husband read the book and tell her of anything she might need to know. The tribunal thought that that was reasonably to be expected of the appellant and I see no error of law on its part in that respect.

16. The action taken by the adjudication officer followed the usual course of seeking recovery from the person who received the overpayment. In the circumstances the overpayment has been found to be recoverable from the appellant but I add that in the alternative, a case for recovery from her husband certainly existed under section 71(1) Social Security Administration Act 1992 which reads:-

"Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -"

"Any person" would extend to the appellant's husband. By not reading the notes which, as the family member in charge of money, he should have done he shut his eyes to the conditions for the benefit. That omission on his part had led to his not disclosing either directly or through his wife the material fact that for the weeks in question his earnings were above the maximum.

17. My decision is as at paragraph 1.

(Signed) Richard Smithson
Deputy Commissioner

(Date) 29 December 1999