Bullen 19c

CH/1561/2005

(S Hart)

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

   The decision of the Sutton appeal tribunal under reference U/45/176/2004/03257, held on 10 December 2004, is not erroneous in point of law.

The issue

2. On 4 October 2002, the claimant made a claim for housing benefit and council tax benefit. On 8 March 2003, the local authority made an award. Arrears were paid to the claimant on 14 March 2003. The claimant had also claimed working families' tax credit. In April 2003, the claimant was awarded working families' tax credit on his claim and arrears were paid in a lump sum. When it was notified of this payment, the local authority decided that the claimant had been overpaid housing benefit and paid excess council tax benefit for the period to which the arrears related.

3. The issue in this case is how those arrears of working families' tax credit are to be treated for housing benefit and council tax benefit. Specifically the issue is their classification as capital or income. The parties agreed that there was no difference between the relevant housing benefit and council tax benefit provisions. I will just refer to the housing benefit legislation. All references to regulations are to the Housing Benefit (General) Regulations 1987.

The oral hearing

4. A district chairman gave leave to appeal. I gave case management directions requiring the parties to make written observations. When I had received and read those observations, I directed an oral hearing. It was held before me in the Commissioners' court in London on 27 October 2005. The claimant attended and was represented by Ms Finola O'Neill of Wandsworth and Merton Law Centre. The papers also contained advice to the claimant from Mr Paul Stagg, of counsel. The local authority was represented by Ms Rosana Bailey, of counsel, assisted by Mr Peter Forde of the local authority. I am grateful to Mr Stagg and to the representatives at the hearing for their arguments.

The Secretary of State

5. The Secretary of State declined my invitation to become a party to the proceedings.

The claimant's arguments

Income and capital

6. Ms O'Neill began her oral argument with paragraph 8(1)(b) of Schedule 5 to the Regulation. Schedule 5 sets out the capital that is disregarded for housing benefit purposes. Paragraph 8(1)(b) disregards 'any arrears of ... an income-related benefit'. Income-related

benefits are defined by section 123(1) of the Social Security Contributions and Benefits Act 1992 and included working families' tax credit (section 123(1)(b)). That, she argued, showed that the arrears were capital.

7. She then referred to regulation 68(7). The payment of arrears is a change of circumstances and this provision deals with the date from the payment is effective. It provides that if 'arrears of income' are paid 'in respect of a past period' the change of circumstances takes effect 'from the first day on which such income, had it been timeously paid in that period at intervals appropriate to that income, would have fallen to be taken into account'. That, of course, suggests that the arrears are income. Ms O'Neill sought to avoid that interpretation by arguing that this provision was impliedly subject to Schedule 5. She supported this by pointing to the reason why regulation 68(7) was introduced. It reversed the effect of a decision dealing with industrial injuries benefit, which is not listed in Schedule 5.

8. Ms O'Neill also relied on regulation 40(4). This provides that income from capital is treated as capital from the date when it is normally credited to the claimant's account. It is expressly made subject to specified paragraphs of Schedule 5. She argued that that assumed that anything that fell within any other paragraph in Schedule 5 was capital.

9. Ms O'Neill referred to paragraph 8(1)(a) of Schedule 5. This disregards arrears of disability living allowance and attendance allowance. She argued that it would be anomalous if arrears of these benefits were capital while arrears of working families' tax credit were not.

10. In reply to Ms Bailey, Ms O'Neill referred me to the history of the amendments subsequent to this case and consequent on the introduction of working tax credit. She argued that they supported her principal argument. Lastly, she mentioned paragraph 29 of Schedule 4. That Schedule sets out the income that is disregarded. Paragraph 29 provides that income that is treated as capital is disregarded as income. She argued that this prevented double counting under regulation 40.

11. Mr Stagg's argument was different from Ms O'Neill. He argued that the arrears were income in the week when they were actually paid, giving rise to an overpayment for that week, but that thereafter they fell to be treated as capital. I am not sure from his opinion whether the amount of the income was the working families' tax credit for that week or the whole of the arrears.

Recoverability

12. Mr Stagg also dealt with the recoverability of the overpayment. He argued that the tribunal should have considered whether the delay in awarding the tax credit was an official error by the Revenue. If it was, the claimant might not be liable to repay the overpayment if he could not reasonably have been expected to realise that he was being overpaid (regulation 99(2)). He argued that the tribunal was at fault in not investigating this possibility.

13. Ms O'Neill argued that the local authority had been in official error by making an award rather than a payment on account under regulation 91.

The local authority's arguments

Income and capital

14. Ms Bailey argued that regulation 40 provided for income to be treated as capital. Working families' tax credit was not listed in that regulation and therefore could not be capital. Schedule 5 only applied once the arrears became capital. It did not apply so long as they were income. There was no need to imply any qualification into regulation 68(7). If Ms O'Neill's argument was correct, a claimant would benefit by the delay in the payment.

15. Mr Forde emphasised that disability living allowance and attendance allowance were disregarded as income and therefore had also to be disregarded as capital. That explained paragraph 8(1)(a) of Schedule 5.

Recoverability

16. Ms Bailey responded to Ms O'Neill's argument on this issue by pointing out that a payment on account is only permissible if the delay is not attributable to the claimant (regulation 91(1)). In this case, the delay in making the award to the claimant was caused by his failure to provide documents requested. A payment on account could not have been made.

My analysis on income and capital

Income and capital

17. Ms O'Neill's argument contains two flaws. First, it assumes that a sum of money must be classified either as income or capital and retains that classification for all purposes in housing benefit. Second, it assumes that the provisions of the legislation determine by implication the proper classification.

18. On basic principle, there is no reason why a particular sum of money must bear a single classification. Income and capital are separate but related concepts. A sum of money cannot be both at the same time for the same person and purpose. But it can change from one to the other and vary in classification from person to person and purpose to purpose. Take a person's wages. As paid they are income. When part is paid into a savings account, that part becomes capital. As capital it generates interest that can be taken as income. And if sums are regularly paid out from the account to assist a child at university, they may be capital as regards the parent but income in the hands of the child.

19. At first sight, the legislation appears to be contradictory on the appropriate classification. The result seems to depend on which provision is given priority. Ms O'Neill began with Schedule 5 and treated that as having priority. Ms Bailey rejected that starting point and emphasised instead regulation 68. This confusion is only apparent on the assumption that the legislation determines the classification. That assumption is false. The Regulations deal with both income and capital. They provide for the calculation of both, for disregarding both, for treating income as capital and capital as income, for student income and for benefit income. What they do not do is to provide a definition of income or capital. The provisions operate at the stage after the money has been classified. They assume an initial classification without explaining how it is to be made. It is not possible to deduce the

classification from the provisions of the legislation. Even the provisions that treat income as capital or vice versa assume an initial classification that is displaced.

Income or capital?

20. So how are the arrears to be classified? If the tax credit had been paid timeously, it would have been income. There can be no doubt about that. And the fact that they were paid late and in a lump sum does not change the nature of the payment. That was decided by Mr Commissioner Goodman in paragraph 8 of *R(SB) 4/89*. I believe that this is also the approach taken in tax law.

Treatment as income

21. Mr Stagg argued that the arrears (or part of the sum paid) were to be treated as income in the week in which they were actually paid. I reject that argument. It is contrary to the express provision of regulation 68(7), inconsistent with regulation 24(2) and anomalous.

22. I have already referred to regulation 68(7). The receipt of arrears that are classified as income is a change of circumstances. There can be no doubt about that. Regulation 68(7) provides that the change takes effect from the time when the arrears would have been received if paid timeously. This is consistent with regulation 24(2):

> 'The period over which any benefit under the Benefit Acts is to be taken into account shall be the period in respect of which that benefit is payable.'

The 'period' must mean the actual calendar period to which the payment relates and not simply the length of time. Regulation 24(1) expressly refers to 'the length of the period' when dealing with income other than earnings. The contrast must be significant. It would be inconsistent to treat working families' tax credit differently. The 'Benefit Acts' means the Social Security Contributions and Benefits Act 1992 and the Jobseekers Act 1995 (regulation 2(1)). Working families' tax credit was created by the Tax Credits Act 1999. Section 1(1) renamed family credit as working families' tax credit and section 2(1) transferred the administration to the Treasury. One interpretation is that the tax credit continued to be paid under the 1992 Act despite the change of name and administration. If that is correct, regulation 24(2) applied. The other interpretation is that the tax credit was paid under the 1999 Act. If that is correct, regulation 24(2) did not apply but it would be anomalous to apply a different rule.

23. Finally, as Ms Bailey argued, it would be anomalous if money were treated differently according to whether it was paid timeously or in arrears. Mr Stagg's argument would allow a claimant to manipulate the payment of income in a way that was advantageous for housing benefit entitlement. To take an example based on this case, a claimant could delay an award of tax credit by withholding relevant information for as long as possible in order to maximise the period for which the award had to be paid in arrears.

Treatment as capital

24. Ms Bailey was not explicit on the point at which the arrears became capital and she did not have to be. It was sufficient for her purpose that the arrears were income attributed to the

weeks in which they would have been received if paid timeously. There are two analyses of the point at which the arrears became capital. In the circumstances of this case, I do not have to decide between them.

25. One analysis is that each payment became capital at the end of the week to which it related. This is the analysis used in social security law for income that is paid timeously. A payment of income is treated as income when received. It remains income for the period in which it is paid. Any surplus remaining at the end of that period metamorphoses into capital. See paragraph 6 of *R(SB) 2/83* and paragraphs 22 and 24 of *R(IS) 3/93*. On that analysis, each payment of the tax credit was income for the period to which it related. As it was paid in arrears, it was obviously not spent by the end of that week and metamorphosed into capital. It would be harsh to take this into account as capital; that would impose a double impact on a claimant who was paid in arrears. Therefore, paragraph 8(1)(b) of Schedule 5 operated to disregard that part of the arrears which has metamorphosed into capital. Putting Ms Bailey's oral argument together with the local authority's written submission, I believe that this was their analysis.

26. The other analysis is that paragraph 8 of Schedule 5 does not apply retrospectively. It applies to 'arrears' and by definition a sum is not 'arrears' until it is actually received. Therefore, it applies prospectively but not retrospectively.

My analysis on official error

By the Revenue?

27. Mr Stagg argued that the tribunal should have investigated the possibility that there had been an official error by the Revenue. I discussed this with Ms O'Neill. She read to me her written argument that was before the tribunal. She had argued that there had been an official error by the local authority, but she had not raised the issue of official error by the Revenue. This is confirmed by the note in the chairman's record of proceedings. In those circumstances, the tribunal did not go wrong in law by failing to consider the issue.

28. Paragraph 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 provides:

> 'In deciding an appeal under this paragraph, an appeal tribunal-
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> (a) need not consider any issue that is not raised by the appeal'.

That limits the scope of the tribunal's duty to identify and investigate issues, although it leaves it free to consider other issues if it wishes. Two questions arise.

29. Was official error by the Revenue raised by the appeal? The claimant was represented at the hearing by Ms O'Neill, who is an experienced and competent representative. The tribunal was entitled to rely on her to identify the scope of the appeal.

30. If not, should the tribunal nonetheless have considered it? A tribunal has a power to consider other issues. That power must be exercised judicially. In some cases, an issue may be so obvious that the only proper course for a tribunal is to raise it itself. This was not such a

case. The papers before the tribunal showed a delay in awarding the tax credit, but they did not indicate the circumstances. Ms O'Neill was in a position to know those circumstances and whether they raised an issue that was worthy of investigation. She did not refer to any official error by the Revenue and the tribunal was entitled to assume that the issue did not require investigation.

By the local authority?

31. Ms O'Neill argued that the local authority had made an official error in making an award rather than a payment on account. I reject her argument for two reasons.

32. The first reason is that an 'official error' only arises if it causes an overpayment. That is how the term is used in regulation 99(2) and defined in regulation 99(3). The failure to make a payment on account did not cause the overpayment. It would have avoided the need for an appeal about its recovery to the appeal tribunal and to the Commissioner, but that is not the same as causing the overpayment.

33. The second reason is that I do not consider that a failure to make a payment on account can be an *error* by a local authority in the context of recovery. If the local authority had made a payment on account, it could have recovered any overpayment without recourse to the overpayment provisions and the claimant would have had no defence (regulation 91(2) and (3)). By making an award, the local authority could only recover the overpayment through the overpayment provisions. Those provisions allowed the possibility of some defences to the claimant. In other words, if the local authority had made a payment on account, that course would have been detrimental to the claimant compared to making an award. I do not see how the claimant can argue that a local authority made an error by acting to its potential detriment and to his potential advantage.

Disposal

34. I dismiss the appeal.

Signed on original
on 7 November 2005

Edward Jacobs
Commissioner