

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 23 June 1993 is erroneous in point of law and accordingly I set it aside. However, as I consider it expedient to make further findings of fact and to give such decision as I consider appropriate in the light of them, I further decide subject to the operation of "the principle of diminishing capital rule" contained in regulation 51A of the Income Support (General) Regulations 1987, and amended, that the claimant is not entitled to income support from 21 October 1992 because he is treated as possessing capital which exceeds the prescribed amount of £8,000.

2. This is the adjudication officer's appeal against the decision of the social security appeal tribunal of 23 June 1993, leave having been granted by the tribunal chairman. I held an oral hearing of the appeal. The claimant attended and conducted his own case. The adjudication officer was represented by Mr G Roe from the Central Adjudication Service.

3. At the material time the claimant, then aged 58, lived with his wife in owner occupied property. He claimed income support on 23 September 1992. On his claim form he stated that he had been employed for the last eight years but that his employment had terminated by reason of redundancy on 4 September 1992. He provided particulars of the amounts owed to him in respect of pay in lieu of notice and redundancy payment; the amount of his current savings and the amount outstanding on his mortgage. He

was awarded income support which ceased when he went abroad from 13 October 1992 to 20 October 1992.

4. On 21 October 1992 the claimant submitted a fresh claim for income support. In reply to further enquiries he stated that his savings amounted to £1,900; he had received £14,229 redundancy payment and £6,850 in respect of pay in lieu of notice; he had used the redundancy payment together with £670 from his savings to redeem the mortgage on his property. He provided verification from a building society in support.

5. In the light of the evidence the adjudication officer decided that the claimant should be treated as possessing notional capital amounting to £16,797, consisting of his redundancy payment of £14,227, his declared current savings of £1,900 and his former savings of £670 which he had paid towards the redemption of his mortgage. As a result the adjudication officer decided that the claimant was not entitled to income support from 21 October 1992 because this amount of capital exceeded the prescribed limit of £8,000.

6. In his written observations on the claimant's appeal the adjudication officer submitted that the pay in lieu of notice amounting to £6,850 did not fall to be treated as capital. However, in the event of the tribunal deciding that the claimant possessed capital less than the prescribed amount of £8,000, the adjudication officer requested that the case be referred back to the him to determine whether the claimant should be treated as being in remunerative work for any period, as a consequence of his receiving a payment in lieu of notice.

7. The claimant attended the hearing of the appeal before the tribunal on 23 June 1993. The tribunal decided that the claimant was entitled to income support and "is not treated as possessing capital which exceeds the prescribed amount of £8,000". The reasons for decision read so far as relevant:-

"1. The Appeal succeeds because the Appellant deprived himself of capital to redeem his mortgage but not for the purpose of securing or increasing his benefit. His course of action was considered to be prudent in view of his loss of employment, his age, his slim prospects of re-employment and diminishing capital..."

In my judgement the tribunal applied the wrong test as explained in paragraph 14 below and accordingly erred in law.

8. It is not in dispute that the claim to income support made on 21 October 1992 constituted a fresh claim which was adjudicated upon by the adjudication officer on 26 January 1993. Section 134(1) of the Social Security Contributions and Benefits Act 1992 provides that no person is to be entitled to an income related benefit if his capital or a prescribed part of it exceeds the prescribed amount. Regulation 45 of the Income Support (General) Regulations 1987 provides that the prescribed amount is £8,000.

9 The tribunal were required to consider the question of "deprivation" and "notional capital" for the purposes of regulation 51(1) of the General Regulations, which provides so far as relevant:-

"The claimant shall be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit except... to the extent that the capital which he is treated as possessing is reduced in accordance with regulation 51A (diminishing notional capital rule)."

It will be noted that two elements are necessary - that the person has deprived himself of actual capital and that his purpose was to secure entitlement to or increasing the amount of that benefit. The provisions are mandatory.

10. The word "deprived" is an ordinary English word whose meaning is not a question of law. In decision R(SB) 40/85 a Commissioner considered the meaning of the word in the context of regulation 4(1) of the Supplementary Benefit (Resources) Regulations 1981. In my view the same interpretation applies to regulation 51 of the General Regulations. At paragraph 8 of the said decision the Commissioner stated:-

"...in my judgement it does not change its meaning by reference to the consequences of deprivation. It is in my judgement perfectly proper for the adjudication officer or tribunal to conclude that a person has deprived himself of the resource if as the result of his own act he ceases to possess that resource whether or not he becomes possessed of some other resource in its place. He may thus be held to have deprived himself of the resource if he gives it away, if he uses it up in living frugally or prodigally, or to pay for a holiday or in any other manner that leaves no resource at the end of the day; ..."

11. In the present case it is not in dispute that prior to the date of claim the claimant received £14,229 redundancy payment and that he had savings of approximately £2,570. At the date of claim he no longer had these capital sums and declared his savings to be £1,900. It follows that he had "deprived himself" of a total of £16,797 consisting of the whole of his redundancy payment and the sum of £670 taken from his savings which he had paid towards the redemption of his mortgage.

12. The next question for determination by the tribunal was whether the claimant had deprived himself of £16,797 "for the purpose of securing entitlement to income support or increasing the amount of that benefit". The claimant contended and still contends that he was reasonable and prudent to use the capital to redeem his mortgage. He argued that as his prospects of future employment were poor, the security of the possession of

his home was essential. The chairman's note of evidence records that the claimant "was aware of the capital rule but did not realise that spending money may disentitle him to income support". The claimant reiterated this evidence before me. He considered that the "capital rule" applied to actual capital and he complained that no one had advised him of the "notional" capital provisions although he readily accepted that he had not sought advice from anyone prior to redeeming his mortgage.

13. The tribunal accepted the claimant's evidence and found as fact "that his sole purpose was to use his capital to clear, his mortgage and to secure his home for the future. His evidence did not reveal any intention on his part to obtain or increase his existing benefit". The tribunal allowed the appeal on the basis that the claimant's "course of action was considered to be prudent". The tribunal applied the wrong test and erred in law in consequence. In Decision R(SB) 12/91 the Commissioner held at paragraph 15, albeit for supplementary benefit purposes that: -

"The tribunal are required to consider all the circumstantial evidence, including the claimant's familiarity with the supplementary benefit system. In particular, they must be satisfied .. that the claimant realised that there was a capital limit, which his capital resources could not exceed without depriving him of entitlement to benefit .. if .. the tribunal are satisfied that the claimant did know of the capital limit, then they must determine, making appropriate findings of fact and give adequate reasons, whether a significant operative purpose of his action .. was the securing of supplementary benefit."

14. The intention to secure "entitlement to income support or increasing the amount of that benefit" need not be the predominant motive underlying the relevant transaction (R(SB) g/91). In the present case the predominant motive was doubtless the preservation of the claimant's home. However the claimant was aware of the capital rule. The fact that he believed that the limit applied to actual capital and he was unaware of the notional capital provisions does not assist him. I agree with Mr Roe that by redeeming his mortgage the claimant preserved his capital. In Decision R(SB) 12/91 the Commissioner gave the following guidelines on this issue:-

" 13 a person has to repay his debts. He has no choice in the matter, and if he has no choice, then any divesting of capital resources in pursuance of the reduction or discharge of his indebtedness cannot be for the purpose of securing supplementary benefit or any increase thereof ..

14. of course, the above principle only applies where the relevant debt is immediately payable. If the obligation to repay does not mature for several years, or, as in the case of the usual mortgage of house property, there is no need to repay the sum borrowed, provided the agreed interest and capital repayment are kept up, then any premature repayment

of indebtedness will be a voluntary act constituting a deliberate choice. And if there is a choice, then the question will arise as to whether a sufficient operative purpose, albeit not necessarily the predominantly purpose, was to secure supplementary benefit or any increase thereof (R(SB) 38/85; R(SB) 40/85).”

15. In the present case I am satisfied that a significant operative purpose in redeeming his mortgage was to secure entitlement to income support. The claimant was aware of the "capital rule"; he had made a prior claim and been awarded income support; there was no obligation to redeem his mortgage when he did and the premature repayment was a voluntary act on his part constituting a deliberate choice. I am satisfied that the claimant considered that if he redeemed his mortgage he would have the security of the possession of his home and would be entitled to income support to meet his daily expenses. I should add for completeness that I found the claimant to be a very honest witness and I have no doubt that although a significant operative purpose was to secure entitlement to income support for the purposes of regulation 51(1) of the General Regulations, he believed he was acting within his rights and had no intention to abuse the social security system.

16. For the reasons stated above the claimant is caught by the provisions of regulation 51(1) and is to be treated as possessing notional capital amounting to £16,797. As a result the claimant is not entitled to income support from 21 October 1992. In considering the period of disentitlement the adjudication officer should apply "the diminishing notional capital rule" contained in regulation 51A of the General Regulations. If there is any dispute as to the application of the this rule on the facts of the present case the parties are at liberty to refer the matter, back to me for determination.

17. Finally I turn to the payment of £6,850 which the claimant received in lieu of notice. The claimant told me and I accept that his contract of employment provided for three calendar months notice of termination of employment. The payment he received was income and did not fall to be treated as capital. As stated the adjudication officer requested the tribunal to refer the case back to him for determination of this issue if they decided that the claimant as possessed capital less than the prescribed amount of £8,000. The tribunal erred in law because the decision is silent on this matter and there is nothing to indicate they had regard to the relevant legislation. They failed to refer the matter back to the adjudication officer as requested. In view of my decision I do not propose to comment on this matter further as it is no longer decisive of any issue.

18. For the reasons stated above the tribunals decision was erroneous in law and to that limited extent the claimant's appeal is allowed. As I consider it expedient to give a decision the

tribunal should have given, I give a decision set out in paragraph 1 as I am empowered by section 23(7)(a)(ii) of the Social Security Administration Act 1992.

(Signed) R.F.M. Heggs
Commissioner

(Date) 26 April 1994