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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

Name:

Social Security Appeal Tribunal:

Case No:

1. I allow the adjudication officer's appeal against the decision of the social security appeal tribunal dated 8 September 1994, as that decision is erroneous in law and I set it aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to another social security appeal tribunal which can (but need not) consist of a member or members of the original tribunal; Social Security Administration Act 1992, section 23.

2. This is an appeal by the adjudication officer against the unanimous decision of a social security appeal tribunal, dated 8 September 1994, which allowed the appeal of the claimant (a man born on 4 April 1943) against a decision of the adjudication officer issued on 24 December 1993 as follows,

> "That [the claimant] is not entitled to income support from 25.12.93. This is because he is treated as possessing capital which exceeds the prescribed amount of £8,000."

3. On my direction an oral hearing of this appeal was heard by me on 6 June 1996 at which the adjudication officer was represented by Mrs. S. Rabas of the Office of the Solicitor to the Departments of Health and Social Security. The claimant did not indicate in advance whether he intended to attend. He did not attend the hearing, although the beginning of the hearing was postponed to await him. I understand a telephone message has since been received from the claimant explaining his non-attendance. In the circumstances, I consider that no further

oral hearing should take place (I do not understand it to have been asked for) and that this decision should be issued. The claimant will have an opportunity at the new tribunal hearing that I have directed to ventilate the points that he wishes to make about the substance of his appeal.

4. The facts underlying the adjudication officer's decision that the claimant had capital in excess of the income support limit of £8,000 are complicated. They result from the fact that the claimant had in his bank account(s) the remains of a large sum paid to him by an insurance company as a result of a fire which damaged a number of adjoining properties at "The Green", owned by the claimant. The original tribunal clearly took the utmost care with this case and their record of decision (on form AT3) is completed in exemplary detail. They investigated all the evidence to a considerable extent. Their ultimate findings of fact were as follows,

> "1. Following a serious fire at Nos. 6, 8 and 10 The Green ... in 1990, the appellant received on the 10 September 1990 the sum of £145,356.76 by way of an insurance payment.
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> 2. The Appellant at all material times was the freehold owner of the above properties.
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> 3. A surveyor retained by the Appellant advised that the cost of complete renovation would be in the region of £100,000 more than the insurance payment. This estimate precluded the appellant from employing architects, builders and other experts to proceed with the restoration as he had no other capital than the insurance monies.
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> 4. Delays in the reconstruction were caused primarily by the necessity for the Appellant to carry out most, if not all, of the work himself. In addition, the property was in a Conservation Area and the Appellant having had one application for planning permission refused, was still awaiting the results of another in respect of the frontage of buildings.
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> 5. Up to 31 January 1993, the Appellant had spent all but £31,959.19 partly on restoration work (mainly materials) and partly on his living expenses, he having no other income.
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> 6. The Appellant owed £11,000 to [a London Borough] for Scaffolding in respect of which there was a charge upon his

property and which sum he almost certainly would eventually have to pay, together with interest.

7. By 28 July 1994, the Appellant's capital had dwindled to £22,500 the majority of which after allowing for such living expenses as were not funded by his mother had been spent upon the Appellant's living and business premises.

8. On a balance of probabilities, allowing for the reduction of the sum of £31,959.19 by the £11,000 for the scaffolding bill, sufficient of the balance of £20,959.19 would be spent on the appellant's living and business accommodation as to reduce his capital for less than £8,000."

5. The tribunal's reasons for decision were as follows,

"1. The capital of £31,959.19 belonging to the appellant on 31 January 1993 was part of a larger sum paid to the Appellant by his insurers, in consequence of damage to or loss of his home as provided in paragraph 8 of Schedule 10 to the Income Support (General) Regulations 1987.

2. The Appellant intended to use the vast majority of this sum, certainly sufficient to bring his capital below £8,000, for the repair [or replacement] of his home or for the rehabilitation of his business in respect of which it was an asset within the meaning of paragraph 6 of Schedule 10 to the said Regulations."

6. I am bound to say that it appears to me that this tribunal took the utmost care in ascertaining the facts in this case. They showed a blend of legal acumen and commonsense in the formulation of their findings of fact and reasons for decision. It is only after careful consideration that I have decided to allow the adjudication officer's appeal on the grounds set out in his appeal dated 27 January 1995 and re-iterated by Mrs. Rabas at the hearing. They may be summarised as asserting that the tribunal did not identify to what extent Nos. 6, 8 and 10 The Green could be regarded as the claimant's "home" (see the 1987 Regulations, Schedule 10, paragraph 8 and regulation 2(1) - definition of "dwelling occupied as the home"), nor identify which of those properties were to be regarded as "the assets of any business" within paragraph 6 of Schedule 10 to the 1987 Regulations.

7. The tribunal adopted the view that one way or another, whether under paragraph 6 or paragraph 8 of Schedule 10, the capital would be spent so as to reduce it below £8,000. In view

of the care taken by the tribunal, I am loath to upset their decision but I have ultimately decided that I must do so. The new tribunal will need to try to ascertain more precisely the position with regard to the properties and the destination of the insurance monies. There is also the point of course that under both paragraphs 6 and 8 of Schedule 10, there is a prima facie limitation of the period of disregard of capital, subject to extensions for such longer period as is reasonable in the circumstances (see the various circumstances set out in those paragraphs). The tribunal does not appear actually to have dealt with that matter, or at least not expressly and that also constitutes an error of law.

8. In view of the obvious care that the original tribunal took and the knowledge that they acquired about the matter, I consider that I should vary the normal rule (under section 23 of the 1992 Act) that, where the Commissioner remits a case to a new tribunal that tribunal, that tribunal must be entirely differently constituted, Consequently in paragraph 1 of my decision, I have indicated that the new tribunal that hears this case can (but need not necessarily) consist of a member or members of the original tribunal that heard the case.

9. I now turn to another matter of which the claimant, through his Solicitor, has made a complaint, in my view justifiably. It appears in the tribunal's record of decision that no presenting officer from the Department was at the hearing. Mrs. Rabas gave me an explanation for that, connected with staffing difficulties at the local office. However, as has been said in earlier Commissioner's decisions, it is essential that there should be a presenting officer present, particularly at a hearing of a difficult case such as this. The tribunal is entitled to rely on having the Department's case put to it by the presenting officer and also on the expertise of the presenting officer as to the legislation and as to Departmental practices. It is well established that the presenting officer should act as "amicus curiae" i.e., as literally translated, "friend of the court". If a tribunal has to go ahead in the absence of a presenting officer particularly in a difficult case like this, it is labouring under a considerable handicap.

10. It is hardly surprising therefore that when faced with an appeal by the adjudication officer against the decision that was favourable to him, the claimant himself, in a complaint reiterated by Solicitor (who asked that the matter be dealt with as a preliminary issue), states (letter of 9 March 1995),

".... [the Adjudication officer] did not attend the hearing before the Tribunal. Under those circumstances, should it be

open to the [Adjudication Officer] to appeal? If you or I are charged with an offence, and choose not to appear and are thus convicted in our absence, should we be allowed to appeal, or would we be told that by having failed to appear and make representations in the court of first instance, we have forfeited the right to appeal?"

The matter is again taken up by the claimant's Solicitor in a letter to the Commissioner's Office dated 16 May 1995, as follows,

> "It seems to us to be quite wrong that a party should be able to appeal against a decision and put the other party to considerable anxiety and expenses (and incidentally deny him the benefit to which he would otherwise be entitled), having failed to attend the original tribunal hearing."

11. Those observations by the claimant and by his Solicitor are well founded and justifiable. However, I have to consider whether as a matter of law, the adjudication officer is thereby disabled either wholly or in part from appealing against the decision of the social security appeal tribunal. Under section 23 of the Social Security Administration Act 1992, the adjudication officer (subject to obtaining leave - which he obtained from the chairman in this case) has a right to appeal to the Commissioner on any error(s) of law by a social security appeal tribunal. That being the case, does it make any difference that no presenting officer or adjudication officer appeared before the original tribunal? I bear in mind that if a party failed to appear at a Court hearing and then sought to raise a matter before an appellate Court (assuming any leave had been given) the appellate Court might well refuse to allow a new point to be raised. Alternatively, if it did allow it to be raised, the Court might well make an order for costs against the person so doing to compensate the other party for the extra expense to which he is put. So far as costs are concerned, however, I have no power to award costs, e.g. against the adjudication officer as a condition of admitting his appeal.

I have to bear in mind that it is undoubtedly the position that an appeal from a social security appeal tribunal to a Commissioner means that the Commissioner must look into the whole case on an inquisitorial basis. That is of course different from the adversarial basis on which appeals lie eg. to the Court of Appeal. The Commissioner himself is therefore under a duty to investigate all possible errors of law whether or not drawn to his attention by the parties. Moreover, the Commissioner must give effect to the Social Security Acts and the Regulations made thereunder. The Commissioner has no power

to waive them, even in the case of default by a party relying on them. I must therefore allow the appeal on the grounds above stated. I should explain that my criticisms of the absence of the presenting officer from the tribunal are not of course criticisms either of Mrs.Rabas, who appeared at the hearing before, me and was most helpful, nor of the Central Adjudication Service. The problem arose at a local level and I understand from Mrs. Rabas that it has now been rectified.

(Signed) M.J. Goodman
Commissioner

(Date) 23 July 1996