MR/SH/1

Commissioner's File:CS/130/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR INVALIDITY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal is allowed. The decision of the Cardiff social security appeal tribunal dated 21 January 1992 is erroneous in point of law. I set that decision aside and refer the case for determination by a differently constituted tribunal.

2. The claimant attended an oral hearing of this appeal at which he was represented by Mr R Kember of Counsel instructed by Mrs A Williams of Central Cardiff Citizens Advice Bureau. The adjudication officer was represented by Mr L Varley of the Office of the Solicitor to the Departments of Social Security and Health. I am grateful to both Mr Kember and Mr Varley for the assistance they gave me.

3. The claimant, who was born on 25 January 1950, suffered for many years from Pickwickian syndrome and he received sickness benefit and then invalidity benefit from 5 June 1979 with only short interruptions. He eventually had a stomach by-pass operation which made a considerable difference to his state of health but before then, on 9 January 1989, he commenced employment as a cleaner. He generally worked for 31/2 hours a night on five nights a week but on occasions he worked for longer. He left that employment on 12 October 1990 and then started work as a counter assistant on a cooked meat stall in Cardiff central market for 20 hours a week earning £54 a week.

4. The tribunal found as a fact that, before the claimant started work as a cleaner, he had telephoned his local social security office, asked to speak to the invalidity benefit section, and asked the person to whom he was put through whether he could do the work he had been offered. However, it is clear that, when the claimant actually started work, the relevant part of the Department were not aware of that fact and invalidity benefit continued in payment until 4 April 1990 when it was stopped following an anonymous telephone call. During the time that the claimant had been working £6,175.13 had been paid to him. After some investigation of the circumstances of the case, an adjudication officer decided on 20 May 1991 to review the award of invalidity benefit on the ground that there had been a relevant change of circumstances. He or she

decided that the claimant was not incapable of work from 9 January 1989 and that the £6,175.13 invalidity benefit paid since then was recoverable under section 53 of the Social Security Act 1986 both on the ground that the claimant had failed to disclose the material fact and on the ground of misrepresentation. The tribunal dismissed the appeal save that they found no failure to disclose a material fact and found that the period of the overpayment attributable to misrepresentation began only on 24 January 1989. The claimant now appeals with the leave of the chairman of the tribunal. The case raises a number of issues.

Deemed incapacity for work

5. The first ground of appeal is concerned with the tribunal's approach to regulation 3(3) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983 which provided:-

> "A person, who is suffering from some specific disease or bodily or mental disablement but who, by reason only of the fact that he has done some work while so suffering, is found not to be incapable of work by reason thereof, may be deemed to be so incapable if that work is -
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> (i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital of a similar institution, or
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> (ii) work which is not so undertaken and which he has good cause for doing
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> and from which, in either case, his earnings do not exceed £27 [increased to £28.50 from April 1989] in the week in which that work was performed."

After his benefit had been stopped, the claimant obtained from his general practitioner, a letter which included the following passage:

> "[The claimant] is at present unfit for full-time employment. In my opinion 'therapeutic work' would be beneficial, both psychologically and physically. I became aware that he was working on 19.4.90, but his condition since 9.1.89 has been similar to his present situation and it is unlikely that my opinion on 9.1.89 would have been different from that which I hold today."

The tribunal gave the following reasons for deciding that regulation 3(3)(ii) of the 1983 Regulations did not assist the claimant.

> "It is for [the claimant] to satisfy the tribunal that he had good cause for undertaking the work on which he was employed at OCS and if we find on the balance of probabilities that he had good cause then the issue will be as to whether his earnings exceeded the permitted amount.
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> It is clear from the evidence that the claimant did not consult his General Practitioner before taking up this work or at any time until after the issue had been raised by the Department. The doctor in his report says that he became aware that the claimant was working on 19 4 90 whereas he had commenced working at OCS on 9 1 89. The Tribunal appreciate that written approval of the General Practitioner is not required before the claimant commences work but it is clear from the doctor's letter that whereas he says that in his opinion therapeutic work would be beneficial both psychologically and physically, he makes no mention of approving the work done by the claimant for OCS, although the claimant does tell us that he told his doctor on 19 4 90 the nature of the work.
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> We have considered whether the work undertaken by the claimant was done so to assist the condition from which the claimant is suffering or whether this is the ordinary case of work done by the

claimant negativing the medical evidence of his incapacity.

The claimant in his letter (document 49) sets out the reasons why he left OCS Wales Ltd and refers to the work that he was doing for them with Husband Brothers was cancelled which meant that his income would have been reduced to £20 per week and then to pay his own petrol costs would have left him with £15 per week to live on. This in the view of the Tribunal is evidence of the importance of than emphasis on the therapeutic effect of the employment.

The claimant then took a job of an entirely different nature with M N Griffiths. It is appreciated that when he took this job his Invalidity benefit had been stopped but it is still evidence of his ability to work and not merely for therapeutic reasons. In this employment he worked for 20 hours a week as a counter assistant on a cooked meat stall in Cardiff Central Market earning £54 per week, working 4 days of 5 hours with a 20 minute break after 21/2 hours work. He found it very hard work and suffered a lot of leg and back pain and the fact that he was unable to eat during the day because of his stomach complaint caused difficulties.

It is significant that when the claimant says he rang the Invalidity Benefit Office at Heron House, Cardiff he made no mention of working for therapeutic reasons but only to enquire as to whether the work hours that he had undertaken would involve affecting his benefit and thereafter relied upon information which he says he was given, that provided he didn't exceed 22 hours a week he would not need to declare his work.

We have not been satisfied on the balance of probabilities that the claimant had good cause under Regulation 3(3)(ii) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983."

6. Mr Kember submitted that the tribunal had failed properly to take account of all the evidence, including in particular the length of time for which the claimant had been suffering from his medical condition and the doctor's evidence. He submitted that that evidence showed that the main purpose of the claimant's working was to assist him to get over the effects of his illness. He referred to CS/270/89 in which it was held (following CSS/5/87) that prior approval by a doctor is not a prerequisite for the operation of regulation 3(3)(ii) and he suggested that the tribunal had misconstrued the doctor's letter. He also referred to R(S) 4/83 and Merriman v Insurance Officer, Hunt v. Insurance Officer (reported as R(S) 3/86) for the proposition that regulation 3(3)(ii) conferred a very broad discretion and to CS/270/89 for the proposition that a claimant could be deemed to be incapable of work even though the work he was doing was not minimal. He accepted that an appeal lay only on a point of law but he submitted that the tribunal had reached a decision that no tribunal, properly instructed as to the law, could properly have reached.

7. I do not accept those submissions. The tribunal's findings of fact show that they were well aware that the claimant's incapacity dated from 1979 and I do not consider that they misconstrued the doctor's letter. Mr Kember argued that the letter should be construed as clear evidence that work as a cleaner was of therapeutic value because the letter had been written in the knowledge that that was the work that was being done. In my view the tribunal were entitled to take account of the letter's comparative vagueness and, in any event, they were not bound to accept the doctor's opinion even if it had been a lot more precisely expressed. The tribunal do not appear to have misdirected themselves as to the law. It was not necessary for them to refer to particular authorities. They do not appear to have taken any irrelevant matters into consideration or to have failed to consider any relevant matters and in my view they have reached a decision that they were perfectly entitled to reach and to have given perfectly adequate reasons for it.

8. However, although the last tribunal did not err in their approach to regulation 3(3)(ii), that issue must be considered afresh by another tribunal because I am setting aside the decision of the last tribunal on other grounds. I draw *attention* to what the Commissioner said in CS/42/1987.

> " .... regulation 3(3) operates as an exception so as to allow benefit where a person is found not to be incapable of work because he has in fact done some work. It seems to me to follow that while sub-paragraph (ii) is expressed broadly it should be applied narrowly. In my judgment good cause in (ii) is seldom likely to be established in circumstances other than those where the work is done for therapeutic reasons. But there may be cases say of emergency where work has to be done or other cases where the claimant is the only person who can do a particular thing which needs to be done which will also come within good cause. It would be wrong if not impossible to try and delimit all the cases which are or are not within good cause. The principle however seems to me to be this. If the motive or predominant motive for doing the work is that of earning or making a profit there would not be good cause. That would just be the ordinary case where work done by the claimant negatives the medical evidence of his incapacity. But if the motive is other than that, and I have instanced therapy and necessity, the circumstances may amount to good cause. Applying that approach to the facts of this case I necessarily come to the conclusion that the claimant did not have good cause for doing the work in question. While at the hearing before me the claimant's father stressed the therapeutic value of the work to his son, I do not doubt and the son more or less confirmed that his real purpose was to turn his enterprise into a profitable business."

I would add that not only must the claimant have good cause for doing the work but it must also be reasonable to exercise the general discretionary power to deem him or her to be incapable of work notwithstanding that he or she is in fact capable of work. There are two hurdles that must be cleared.

Travel expenses

9. The second ground of appeal is concerned with the calculation of the claimant's travelling expenses for the purpose of computing the amount of his earnings. As the tribunal pointed out, it was not really necessary for them to deal with that point in view of their decision on the applicability of regulation 3(3)(ii). However, as this matter is to be referred to another tribunal I am bound to give some guidance and so must consider this ground of appeal.

10. The tribunal had before them documents setting out the claimant's earnings. The "gross amount paid" was the appropriate sum reached by multiplying the number of hours worked in each fortnight by the appropriate hourly rate. The "net amount paid" was the gross sum less National Insurance contributions (in the few weeks when the claimant's earnings were high enough to warrant such deductions) plus a weekly travelling allowance of £11. It is not clear that the travelling allowance was in payment from the very beginning of the employment but doubtless that will be the subject of further thought if it is relevant. There was before the tribunal evidence, which was apparently uncontested, obtained from the Automobile Association to the effect that the average cost of running a 1500 cc car was about 37 pence per mile and the average cost of running a 1000 cc car was about 25 pence per mile. The claimant needed a car to get to work because of the hours he worked. He also transported colleagues. He said that his average weekly mileage was approximately 150 to 160 miles. He had used a Talbot Alpine with a 1500 cc engine at the beginning of the relevant period and had then replaced that with an Austin Metro with a 1000 cc engine. The tribunal said:

"We ... are satisfied, that documents 25 and 26 set out accurately the earnings of [the claimant] at OCS Wales Ltd but that it is the gross amount earned which should be taken into account and not the net amount paid since the net amount paid includes £11 per week car allowance. It is the £11 per week car allowance which we find is the appropriate amount by way of deduction and not any calculation made by the AA for running expenses of a car. This being so, there would be not more than approximately 8 weeks when [the claimant's] earnings came within the limits."

11. Mr Kember argued that the tribunal had erred because they should have had regard to the actual travel costs rather than the notional sum paid by the employer. He referred to regulation 4(b)(i) of the Social Security (Computation of Earnings) Regulations 1978 which provides:

" .... in calculating or estimating for the purposes of any provision of the Act and of any regulations made under the Act which relates to benefit the amount of a person's earnings for any period, there shall be deducted from the earnings which he derives from employment in that period -

(a) .....

(b) expenses reasonably incurred by him without reimbursement in respect of

(i) travel between his place of residence and his place of work and travel which he undertakes in connection with and for the purposes of that employment; ...."

In principle, I agree with Mr Kember that actual costs are relevant but his submission does not lead to the conclusion that the figures supplied by the Automobile Association should be used. Those figures are also *notional, being* based on general assumptions about the annual costs of running a car. Some estimation is likely to be necessary in most cases where motor expenses are incurred. Expenses agreed by the Revenue are a good starting point in many cases (see R(FC) 1/91 at paragraph 35). Apportionment of actual servicing costs between domestic and business use may be appropriate. In principle, depreciation can also be taken into account under regulation 4(b)(i) (see R(P) 3/57) but I am not sure that there are many cases under regulation 3(3) of the 1983 Regulations where that will apply. It does not follow from the fact that a car is used in connection with employment that its purchase (or depreciation) is a cost incurred "in respect of" travel to work.

12. In the present case, the tribunal's reasoning is not very clear. They may have taken the view that the employer's travel allowance of £11 per week was sufficiently proximate to the actual expenditure to justify its acceptance in the absence of clearer evidence. Such an approach would be acceptable. The allowance (which was not a straightforward reimbursement) would form part of the "earnings which he derives from employment" and the deduction would merely cancel the allowance. It is not necessary for me to consider whether the last tribunal erred in law in their approach to the computation of the claimant's earnings when they were dealing briefly with a matter not relevant to their decision. The tribunal to whom the case is now referred must consider the issue in the light of my guidance if they decide that the claimant may be deemed to have been incapable of work in those weeks when his earnings were below the earnings limit. I draw attention to the fact that National Insurance contributions are also deductible (see regulation 4(a) of the 1978 Regulations).

Misrepresentation

13. The third ground of appeal is concerned with the finding that there had been a misrepresentation so that almost all the overpayment was recoverable. The declaration on the back of the medical certificates was in the following terms:

> "I declare that because of incapacity I have not worked since the date of my last claim.
>
> I also declare that my circumstances and those of my dependants are and have been as last stated. (If there has been a change cross out this declaration and attach a signed
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> The information given by me is true and complete.
>
> I claim benefit.
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> I agree to my doctor giving medical information relevant to my claim to a doctor in the Regional Medical Service."

If that declaration is taken in isolation, there was clearly a misrepresentation by the claimant on each occasion when he signed it after he had worked since his last claim. However, Mr Kember submitted that the declaration should be regarded as qualified because the claimant had already disclosed to the office that he was working. That point had been raised at the hearing but the tribunal relied on R(SB) 3/90 for the proposition that "there can still be a misrepresentation of a material fact even though there has been an earlier disclosure of that fact".

14. I think that there is force in Mr Kember's submission that R(SB) 3/90 is distinguishable from the present case. The disclosure in R(SB) 3/90 had been made in respect of an earlier claim. In paragraph 8 of that decision the Commissioner stressed the passage in R(SB) 15/87 where a Tribunal of Commissioners said that disclosure need not be made in the relevant claim form if it was "in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person". At paragraph 11, the Commissioner said that "the Department was entitled to rely on the statements in the claim form of 28 November 1986 and had no 'duty' to check their veracity against earlier documents". In the present case the relevant form Med 3s were not, despite their wording, submitted for the purpose of making new claims but for the purpose of having continued an existing award.

15. In R(SB) 18/85 it was held that a written representation might be qualified by a contemporaneous disclosure. I take the view that contemporaneity may not be essential in all circumstances. It seems to me to be relevant that the representation as to not having worked was accompanied by one to the effect that there had been no change of circumstances and it is also relevant that the form, which must be signed as a matter of routine procedure if an existing award of invalidity benefit is to be continued, makes no provision for a person to sign it after working. It is specifically indicated that the declaration of the change of circumstances may be crossed out if appropriate; there is no such indication in respect of the declaration as to not having worked. Therefore, I would accept that in some circumstances a representation on form Med 3 can be read as having been qualified by an earlier disclosure. The circumstances in which that is so must in my view be limited because one purpose of requiring a person to sign a declaration when claiming benefit or seeking its continuation is to provide an opportunity for the Department to check the accuracy of information held on file.

16. In particular, it seems to me that a claimant can only rely on a prior qualification of a misrepresentation if the earlier disclosure was in sufficiently clear terms that the claimant could reasonably

have believed that it had not been overlooked. A disclosure made in the course of a general enquiry by telephone is unlikely to fall into that category unless, perhaps, the claimant knew that the officer answering the telephone had already had dealings with his or her case and so could be expected to be familiar with it and to act on the disclosure.

17. It follows that it is necessary for there to be detailed findings of fact concerning any disclosure relied upon as a qualification of a representation. In this case, the tribunal's findings are contained in the following passages from their decision:

> "Claimant rang Heron House and understood that he was speaking to somebody in the IVB section."
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> "We have heard from [the claimant] that he rang up Heron House, the appropriate Department of Employment, asked to speak to the IVB section and made an enquiry as to whether he could work the limited hours he had been offered by OCS Wales Ltd to work and says that he was told that provided he did not work more than 22 hours he would not need to disclose this work since it would not affect his invalidity benefit. Whilst the tribunal find it very difficult to accept that anyone in the Invalidity Benefit Office would have made such a mistake as to this, we have however heard from [the claimant] that he did notify the IVB Office of his intention to work these hours so that on a balance of probabilities we accept that he did make such a phone call. We have been satisfied, therefore, that [the claimant] did make a sufficient disclosure to the correct office of his intention to start work and that in any event having made such a call and received such information, however misunderstood, it was not reasonable to expect him to make any further disclosure."

Heron House was the local office of the Department of Social Security rather than of the Department of Employment and it is common ground that "22" should be read as "24" which was, of course, the number of hours which would have caused income support (not invalidity benefit) to cease to be payable, although earnings and the fact of capacity of work would still have affected the amount of benefit payable even if fewer hours were worked.

18. It is clear that the tribunal found that it was only an intention to start work that was disclosed rather than the actual start of work. It was the actual start of work that was the material fact that had to be disclosed and that was inconsistent with the declaration which the claimant signed. Where an intention is sufficiently settled so that an adjudication officer could reasonably review an award under section 104(1)(bb) of the Social Security Act 1975 (now section 25(1)(c) of the Social may be as good as disclosure of the actual start of work. In the present case, the findings do not make it clear how vague or settled was the intention that was disclosed to the Department. In those circumstances, the tribunal's decision is erroneous in point of law because their reasons do not show that they have considered whether the representation on the order book had been qualified by an earlier disclosure and their findings are not such as to enable one to determine whether the earlier disclosure was sufficient for the purpose of qualifying the representation. The record of the tribunal's decision therefore does not comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986.

Failure to disclose

19. In the last paragraph, I have considered the adequacy of reasons with respect to a disclosure claimed to be capable of qualifying a representation for the purpose of the misrepresentation limb of section 53 of the Social Security Act 1986 (now section 71 of the Social Security Administration Act 1992). However, exactly the same point can be made in respect of the failure to disclose limb of section 53. It was the actual start of work that was the material fact that had to be disclosed although a disclosure of a settled intention could make it unreasonable to expect further disclosure. The tribunal found that the claimant had disclosed an intention to start work but their findings do not show that they considered how settled the intention was.

20. Furthermore, the more one looks at the tribunal's findings in respect of the failure to disclose limb of section 53, the more it appears that they did not properly deal with that issue. Apart from deciding that there had been disclosure of the claimant's intention to start work, the tribunal decided that further disclosure was not reasonably to be expected because the claimant had received information from the Department "however misunderstood". If the information was presented so that a reasonable man would have misunderstood it then further disclosure was not reasonably to be expected (Joel v. Law Union and Crown Insurance Co [1908] 2 KB 863). However, if the information was sufficiently clear to enable a reasonable man to understand it, any misunderstanding by this particular claimant leading to him not disclosing a material fact would in my view mean that the non-disclosure was a failure to disclose, albeit an innocent one. The tribunal's record of decision shows that they did not appreciate that fine distinction. It is now, of course, impossible to determine with absolute certainty what information the claimant had received but the tribunal to whom the case is now referred must hear the claimant's evidence and draw such conclusions as they think fit in the light of their experience and such evidence that there may be about advice given by the Department generally.

21. It will be clear that I take the view that, if there was an overpayment, the claimant faces considerable difficulties with section 53. Nevertheless, Mr Kember has persuaded me that the claimant does have an arguable case which must be considered by another tribunal. They must consider afresh both whether there was a misrepresentation and whether there was a failure to disclose. In this particular case those two issues are inextricably linked.

Actual incapacity for work

22. There is one further issue which I raised at the hearing. The very first question *which had* to be considered in this case was whether the claimant was in fact (as opposed to being deemed to be) incapable of work. On this issue, the tribunal said:-

> "The tribunal agree with the adjudication officer that these 2 forms of employment undertaken by [the claimant] cannot be regarded as negligible. It was work which [the claimant] as shown he could reasonably be expected to do and that by undertaking these 2 different types of employment he has demonstrated that he was not incapable of work."

The conclusion may well be right but the mere fact that a person performs some work does not necessarily lead to the conclusion that that was work which he could "reasonably be expected to do" (section 17(1)(a) of the Social Security Act 1975 - now section 57(1)(a) of the Social Security Contributions and Benefits Act 1992) which implies an objective test. A person may work beyond the call of duty. Until 1978, regulation 7(1)(g) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1975 provided that, for the purposes of unemployment, sickness and invalidity benefit

> "A day shall not be treated as a day of incapacity for work if a person does any work on that day, other than
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> (i) work which is undertaken under medical supervision as part of his treatment while he is a patient in or of a hospital or similar institution, or
>
> (ii) work which is not so undertaken and which he has good cause for doing and from which in the case of work of either description his earnings, if any, are ordinarily not more than £13 a week."

That provision would have been unnecessary if the performance of any work necessarily led to the conclusion that the person was not incapable of work. Its revocation without any replacement (since

regulation 3(3)(ii) comes into play only where the claimant is not incapable of work - see R(S) 4/83) leaves a curious lacuna in the legislation.

23. There is authority for the proposition that the performance by a claimant of some work, the extent of which is not negligible, does not necessarily lead to the conclusion that the claimant is not incapable of work. In R(S) 13/52, to which the tribunal were referred in the adjudication officer's submission the Commissioner said:

> "A person who is capable of part-time work is not incapable of work within the meaning of the provision cited above. It may be that the claimant suffered financial loss by the restrictions which his disablement placed upon his exertions; sickness benefit, however, is not payable in respect of a diminution in earning power by sickness but only [in] the event of its total destruction or reduction to an extent so trifling that it can be treated as negligible."

The Commissioner used the word "negligible" in respect of the extent of earning power rather than the extent of the work itself. There is plainly a correlation between those two matters but the distinction may be important in some cases. In R(S) 8/55 the Commissioner was concerned with the extent of the work itself but his decision was made under regulation 6(1)(g) of the Social Security (Unemployment and Sickness Benefit) Regulations 1948 (the predecessor of regulation 7(1)(g) of the 1975 Regulations). He said:

> "If it be proved in any given case that a person certified as incapable of work has in fact performed work on the day to which the certification relates, that fact may establish that the certification was erroneous. It does not, however, necessarily convict the certifying doctor of error. As was explained in decision R(S) 5/53, the words 'incapable of work' occurring in a medical certificate presumably mean 'incapable of work' in the sense explained in the preceding paragraph; that is to say incapable of work such as the patient could reasonably be expected to do. It may be that a person who, owing to the state of his health, could not reasonably be expected to work, nevertheless because of his circumstances does work. An insured person who is furnished with a medical certificate of incapacity may reasonably abstain from working; and if he so abstains prima facie he is entitled to sickness benefit. But the policy which manifestly underlines regulation 6(1)(g) is that if such a person chooses, or feels impelled, to work notwithstanding his certification, any day on which he works is not to be reckoned as a day of incapacity and no sickness benefit will be payable in respect of it. It will be observed also, that in terms of regulation 6(1)(g) a day is not to be treated as a day of incapacity if the insured person does any work on that day. In decision R(S) 24/52 it was explained that 'ate work' means work which is not 'so negligible that it can properly be disregarded.'."

In R(S) 2/61 and R(S) 2/74 the Commissioners focused on the extent of the claimant's work rather than earning power when considering the test of incapacity (rather than the predecessors of regulation 7(1)(g) of the 1975 Regulations) and held that only "trivial" or "trifling" amounts of work could be ignored. On their facts, the decision of those two cases may be right but, in as much as there is a difference between the approach adopted by the Commissioners in those two cases and the approach adopted in the earlier cases, I prefer to follow the earlier cases. It seems to me to be relevant that the purpose of sickness and invalidity benefit is to replace income. Of course evidence of a capacity to carry out a low paid job for a number of hours may be evidence of a capacity to carry out a better paid job for the same number of hours but a person should not be found to be capable of work when he or she is not capable of earning enough on which to live or, if it be lower, to replace the amount of benefit in payment.

24. In R(S) 4/83, it does not seem to have been argued on behalf of the claimant that he might not have been actually incapable of work at all. The case revolved around the application of regulation 3(3) of the 1975 Regulations as then in force, the precursor of regulation 3(3) of the 1983 Regulations. Nor was

there any argument on this point in Merriman v. Insurance Officer, Hunt v. Chief Adjudication Officer (reported as R(S) 3/86) where the Court of Appeal was also considering regulation 3(3) of the 1975 Regulations. It seems to me that the difficulty that the Court of Appeal (and the Commissioners from whom the appeals were brought) had with the construction of regulation 3 stems from the fact that the regulation is based on the fallacious idea that the mere fact of employment is of itself a reason for finding that a person is incapable of work. In my view that approach is simply inconsistent with the clear definition of "work" in the primary legislation. I agree with Mr John Mesher's analysis of the decision of the Court of Appeal given in his note at [1986] JSWL 53-54 and in particular with his paraphrase of the strained construction given by the Court to what is now regulation 3(3) of the 1983 Regulations. He says that it must be construed in terms such as "if a person does some work which falls within sub-paragraph (i) or (ii) and would be found incapable of work if his capacity to do that work was ignored, then, subject to the earnings rule, there is a discretion to treat that person as incapable of work". It seems to be that the Court was driven to that strained construction by the false premise upon which the regulation was drafted. It also seems to me that regulation 3(3) must have limited application in practice unless the claimant is earning less than he or she is capable of earning.

Conclusion

25. In the present case, the tribunal to whom this case is now referred must therefore, before considering anything else, decide whether the adjudication officer has proved that the claimant was not incapable of work during the relevant period, having regard to the amount of money that the claimant was capable of earning and also having regard to the discomfort the claimant suffered, or would have suffered, while working. If the tribunal do not find that the claimant was actually incapable of work, they must consider whether he might be deemed to be incapable of work. If he was not, or could not be deemed to be, incapable of work for all or any of the relevant period, there will have been an overpayment and the tribunal must consider whether or not it is recoverable on the ground that there has been either a failure to disclose or a misrepresentation.

(Signed) **M. Rowland**
Commissioner

(Date) **3 February 1994**