SICKNESS BENEFIT

Incapacity for work—weight to be attached to criminal convictions of working while in receipt of benefit—effect on the onus of proof—meaning of "work".

The claimant received sickness benefit for a period by reason of bronchitis. Information was subsequently obtained that on various dates in the period the claimant and members of his family had done work for a local farmer, all payments by the farmer being made to the claimant. The claimant did not dispute that payment for the work done was made to him but contended that all the work had been done by other members of the family, that he had supervised and advised on work done by his sons, and that he had had no money personally from the work.

The claimant was convicted by a magistrates' court of 2 offences of making false representations to obtain sickness benefit because he had worked as a casual labourer These offences related to periods which were within the period at issue.

Held that:—

1. The fact of the conviction should not be ignored and should have a bearing on the case relating to benefit (para 13).

2. The initial onus in review proceedings must lie on the insurance officer to show that a conviction related to the benefit in issue and the period in issue, or part of that period (para 13).

3. Thereafter the effect of a conviction for an offence relating to that benefit and that period, or part of that period, is to shift the onus on to the claimant to show, on a balance of probability, that he is entitled to that benefit (para 13).

4. "Work" does not necessarily mean manual work or work for which a person is paid: organising, directing and supervising other work constitutes work (para 15).

5. The balance of probability being that the claimant had at least organised his family's work during the period in issue, he was not incapable of work (para 15).

1. My decision is that

(a) the decisions of the insurance officer awarding sickness benefit to the claimant for the inclusive period 9 May 1975 to 21 June 1975 were properly reviewed and revised under section 104(1)(a) of the Social Security Act 1975 as they were given in ignorance of a material fact, namely that the claimant had worked and was not incapable of work, as provided by section 17(1)(a)(ii) of the Social Security Act 1975;

(b) the decisions are revised so that sickness benefit is not payable for the said period;

(c) the claimant is required to repay to the Secretary of State for Social Services benefit overpaid for that period of £157 as I am not satisfied that in the obtaining and receipt of that benefit he throughout used due care and diligence to avoid overpayment as provided by section 119(1) and (2) of the said Act.

2. At the oral hearing before me the claimant appeared in person and the insurance officer was represented. This appeal by the claimant from the decision of a local tribunal on 25 March 1976 has taken a considerable time to be heard. Initially, the insurance officer dealing with the appeal to the Commissioner deferred making a submission until after the hearing of charges against the claimant at the magistrates' court at Spalding. Those proceedings were adjourned twice. On 22 March 1977 the claimant was convicted by a magistrates' court of 2 offences relating to the period in issue in this appeal and a great deal of delay has been occasioned by the claimant's solicitors' request for consideration of the claimant's appeal to

be deferred pending an appeal by way of case stated to the High Court against those convictions. After considerable correspondence, it transpired that the case stated had not been set down. At the hearing the claimant put the case stated in evidence, which included the notes of evidence taken at the hearing before the magistrates' court to which I refer later.

3. The claimant, now aged 55, is a civil engineer. His doctor certified, dated 16 April 1975, that the claimant was incapable of work by reason of bronchitis and he received sickness benefit from 12 April 1975 to 21 June 1975 for that complaint. From 23 June he received unemployment benefit for some intermittent periods to 30 August 1975. The insurance officer reviewed and revised the decisions awarding unemployment benefit on the ground that they were given in ignorance of the fact that the claimant was not unemployed but had been employed by, and had done work for, Mr T, a farmer. The claimant appealed to a local tribunal and, in the summary of facts, it was stated that various jobs were carried out by the claimant and his sons but Mr T could not specify the exact dates on which the jobs were carried out but stated that payments were usually made when a job was completed. The claimant gave evidence before the local tribunal and the chairman's note of evidence records that the insurance officer at the hearing stated "....that in view of the evidence now submitted he considers that although the claimant received cheques, his sons had the money. If this had been known at first he would have supported the claim and now does so." The local tribunal allowed the appeal.

4. Prior to that hearing by the local tribunal on 4 December 1975, the insurance officer had, on 13 November 1975, reviewed and revised decisions awarding sickness benefit to the claimant for the period 9 May 1975 to 21 June 1975 because they were given in ignorance of a material fact, namely the amount of work done by the claimant while receiving sickness benefit. Benefit was held not to be payable for the period and repayment of £157 overpaid was required. The evidence as to work done was for the same Mr T. The claimant appealed to the local tribunal and gave evidence at the hearing of his appeal. The tribunal also heard evidence from the claimant's wife, their 5 sons, a daughter and 2 daughters-in-law. The witness for the insurance officer was Mr P, a special investigator, who also gave evidence before me. In summary, the evidence for the insurance officer was that the claimant had personally worked for Mr T on some of the days during the period in issue and had received cheques from Mr T for the work done. The claimant's case was that he had not done any of the work which had been done by his sons.

5. The report of the proceedings of the local tribunal indicates that they enquired thoroughly into the circumstances and, after a lengthy hearing, they recorded their findings which were to the effect that the claimant had known Mr T for 15 years, that he and his family had worked at Mr T's farm for varying periods, payment being made by cheque handed to the claimant and gratuities to individuals. They found that there was no agreement as to rates of pay or hours, that the claimant was not present on some of the dates and for part of the period and that the claimant arranged for work to be done by his family and received payment but there was no agreement as to how the money was to be split, which appeared basically to have been in the claimant's disposition. The grounds of the tribunal's unanimous decision were as follows—

> "We have found this a very difficult case. But on balance, the evidence shows that claimant organised his family to work for Mr T and to that extent at least he was capable of work. Payments were made by him. The medical certificates are not entirely consistent with the claimant's case as to dates."

6. The claimant was charged with 4 offences. The first 2 were that he made false representations to obtain sickness benefit because he had worked as a casual labourer: he was convicted and fined £75 on each charge and ordered to pay £50 towards legal aid costs. The dates covered by the offences were 13 to 22 May and 21 May to 9 June 1975. Two further offences charged false representations to obtain supplementary benefit in July and August 1975 and those charges were dismissed by the magistrates. Detailed notes of the evidence were recorded and evidence that the claimant had worked was given by Mr T and, in a reply by the claimant, that he had driven a combined harvester for 1½ hours. The latter related to the offences of which the claimant was acquitted and he said before me that it was in August at harvesting time, as might be expected.

7. Mr P, special investigator, gave evidence before me of his interviews with Mr T on 6 and 13 October 1975. Mr T stated that the claimant and his sons had worked for him. He gave the dates of payment of cheques to the claimant which he obtained from the stub counterfoils in his cheque book. Mr P said that Mr T could not give any specific date on which he had seen the claimant work. Mr T also stated that he had not employed the claimant's wife. The claimant's daughter, Mrs K, in a statement for the local tribunal, said that she and her children had done work on Mr T's bulbs for which he paid £20 on 13 May 1975. In evidence before the magistrates, Mr T said that he had employed the claimant for casual work since the 1960s. He said that in May 1975 the claimant repaired or modified a beet harvester, that he built a replacement shed "using his sons", that on 27 June and 4 July he was paid for further work on the shed. His evidence then dealt with the work alleged to have been done in August 1975. Mr T was cross-examined as to detail. He said that he always paid the claimant for work done by the family, that he saw the claimant organising the work, that the "welding job" was done by the claimant and then passed on to his sons, the building of the shed was done mainly by the sons and that the claimant drove the van to pick up the steel for the shed, which he described as a "team effort".

8. The claimant's evidence before me, and indeed before the magistrates and the local tribunal, was that he did not do the work alleged and to all intents and purposes was staying in a caravan and was fishing. He put in evidence before me a letter, dated 10 January 1977, from the warden of the caravan park to the effect that the claimant and his family were camping there from Easter 1975 to some date which is illegible and that they left occasionally for 2 or 3 days and returned. The claimant himself said that he was at Matlock from Easter to September 1975 and that he used to go to Spalding for one day at a time to put in his medical statements. His case was that he did not do the work and indeed could not as he was not there and was not capable of work. The shed, he said, was built and the steel acquired in August and September 1975 and that he supervised and advised on the work done by his sons but that he only told them how to do the work. In evidence before the local tribunal, the claimant's 5 sons all said that they had done work for Mr T and a daughter and 2 daughters-in-law gave evidence that they had pulled bulbs for Mr T early in May 1975. Another son had also worked for Mr T. Before me, the claimant's wife and 2 of his daughters gave evidence and the claimant put in evidence a letter from another daughter, the effect of which was intended to show that the claimant could not have worked during the period in issue because he was away at the caravan site. The claimant's wife said that the work was done as 2 of their sons were to be married and they were told that they would have to get the money for the weddings.

9. The claimant agreed with Mr T's statement that he had done work for him on and off for about 15 years. He said that when Mr T wanted work done he would ask his wife or the girls and that he, the claimant, when the children were young, would not let them do the work without payment and that cheques were always made out to him. This practice had continued and he was always paid for work done by the different members of his family and he would pay them according to the work they had done. The sons had their own jobs. The claimant said that he had had no money personally from the work except a commission of £5 for introducing the buyer of the steel, which was scrap, for the shed. He said that at the time he was incapable of work because he could not have done his job as an engineer when he was suffering from bronchitis.

10. The insurance officer's representative correctly accepted that, as it was sought to review and revise decisions awarding sickness benefit, the onus of proof is on the insurance officer to prove that the claimant was not incapable of work (see Decision R(I) 1/71, paragraphs 9 and 16). Evidence that he worked is probative that he was not so incapable. The claimant was convicted by the magistrates' courts of the 2 offences mentioned above, which include dates in issue in this appeal. In Decision R(U) 24/55 the learned Chief Commissioner stated that, save in exceptional cases, the statutory authorities (the insurance officer, local tribunal and the Commissioner) must treat a conviction by a criminal court as conclusive proof that the act or omission which constituted the offence in question was done or made. That statement was not necessary for the decision as the appeal was allowed and, with respect, I do not think that it can be supported. Prior to 1968, in civil proceedings, evidence that the defendant had earlier been convicted in criminal proceedings for an act for which he was being sued was inadmissible. Proceedings before the statutory authorities are not civil proceedings and the rules of evidence to not apply. The Civil Evidence Act 1968 has altered the position in civil proceedings. Section 18(1) of the Act defines "civil proceedings" as not including civil proceedings in relation to which the strict rules of evidence do not apply. The Act does not, therefore, apply to proceedings before the statutory authorities but regard should, I think, be had to the principle of the legislation. The Court of Appeal considered the effect of the Act in civil proceedings in *Stupple v Royal Insurance Co Ltd* [1971] 1 Q.B. 50, see Buckley LJ. at pages 75 to 76. The Court decided that the effect of section 11(2)(a) was to shift the legal burden of proof so that the person convicted has to prove, on a balance of probability, that he was innocent of the offence.

11. In paragraph 8 of Decision R(S) 10/79 the learned Commissioner expressed the opinion that, when on an appeal to the Commissioner the evidence on which the conviction was based is unknown and the evidence on which the appeal is founded is plainly inconsistent with any grounds upon which the conviction could be justified, the Commissioner should have regard solely to the evidence before him and should ignore the fact of criminal conviction. On the other hand, in Decision C.S. 9/79 (not reported), paragraphs 16 and 17, the learned Commissioner stated that he knew nothing of the evidence on which the conviction was based but must assume that at least evidence was given before the magistrates which satisfied them that the claimant was working during the days in the period covered by the conviction and that he had to accept that the claimant in that case worked during the period.

12. By section 147(1) of the Social Security Act 1975, proceedings in England and Wales for an offence under that Act shall not be instituted except by or with the consent of the Secretary of State or by an inspector or

other officer authorised by the Secretary of State. Section 147(4) provides, amongst other matters, that in Scotland proceedings under the Act may be commenced within specified times on evidence sufficient in the opinion of the Secretary of State to justify a report to the Lord Advocate with a view to consideration of prosecution. It is important that inconsistency of decisions should be avoided, if possible, as they are not understood by the public. That is not to say that a decision at variance with a conviction should not be given provided the evidence supports it. When benefit is denied, or an award is reviewed and revised, in my opinion, the Department should put before the statutory authorities evidence of a conviction concerning the same benefit and copies of such evidence as was available for, and was used in, the criminal proceedings. Not to do so would seem to be inconsistent with steps taken to prosecute. The weight or assistance to be derived from such evidence should, I think, be regarded in a similar manner to that given to proceedings before an industrial tribunal. The statutory authorities are not bound by any conclusion reached by an industrial tribunal; they are not bound by evidence on which a claimant was convicted of an offence. In Decision R(U) 2/74, it was decided that, although findings of fact of an industrial tribunal are not binding on the statutory authorities, such findings reached after inquiry by a judicial authority are cogent evidence on which the statutory authorities can act. It was pointed out that the statutory authorities cannot compel the attendance of witnesses.

13. In my opinion, the fact of a conviction should not be ignored and plainly should have a bearing on the case relating to benefit. A claimant having failed in the criminal proceedings might change his evidence. I prefer the approach in Decision C.S. 9/79 (*supra*). The onus of proof on the prosecution in criminal proceedings is a heavy one and a court sees and hears a defendant on oath, if he gives evidence. A decision inconsistent with the conviction should not, in my opinion, be given without at least hearing the claimant in person. If a claimant does not attend he has no ground for complaint. By analogy with the provisions of the Civil Evidence Act, in my opinion, the effect of a conviction for an offence relating to the same benefit for the same period, or part of the period, in issue in proceedings before the statutory authorities should have the effect of shifting the burden of proof on to a claimant who has been convicted to show, on a balance of probability, that he is entitled to the benefit in issue. The initial onus must lie on the insurance officer to show that a conviction related to the benefit in issue and covered the period in issue, or part of it, before the onus shifts. If the proceedings are on a claim, and not a review and revision, the onus of proof is anyway on a claimant in most claims and appeals. (Compare Decision R(S) 13/52, paragraph 6).

14. In considering the overall effect of the evidence in this appeal, and paying due regard to the decision of the local tribunal, who saw and heard the claimant and a number of witnesses, I bear in mind that the magistrates were the only judicial tribunal who saw and heard Mr T. Proceedings before the statutory authorities are apt to be preponderantly one-sided as witnesses can only be asked to attend and only occasionally do so. I accept that the claimant passed a great deal of the time from Easter to September 1975 at the caravan site but I was not impressed by the evidence that for that reason he could not have participated in the work done for Mr T. In his evidence before the magistrates, Mr T said that the claimant both directed work and actually worked himself, that it was a family effort and that the claimant was acting as gang master. In answer to the Court, he said that repair instructions were given to the claimant only.

15. The claimant contended that "work" meant work for which payment is made and that he personally received no payment. In section

17(1)(a) of the Social Security Act 1975 "work" in that paragraph is defined as meaning "work which the person can reasonably be expected to do". "Work" does not necessarily mean manual work or work for which a person is paid: organising, directing and supervising other work constitutes work. The claimant said that he supervised and advised on the work to be done by his sons. Evidently the magistrates considered that the claimant had also done some of the work himself. Having carefully considered the whole of the evidence and the circumstances, I have reached the conclusion that, on a balance of probability, the conclusion of the local tribunal was right when they stated in their grounds of decision that, on balance, the claimant organised his family to work for Mr T and to that extent at least he was not incapable of work. My own conclusion is that the claimant not only organised, directed and supervised the work but probably went rather further and did some of the work himself or demonstrated to his sons what should be done and how it should be done. I find therefore that the claimant was not incapable of work during the period in issue and I am not satisfied that he used due care and diligence to avoid overpayment of benefit with the consequences set out in paragraph 1 above.

16. The claimant's appeal is dismissed.

(Signed) J. S. Watson
Commissioner

NOTE ISSUED ON THE AUTHORITY OF THE CHIEF COMMISSIONER

See, however, the procedure available to secure the attendance of witnesses described in Decision C.P. 4/74 paragraph 38 (unreported) and *Soul v Inland Revenue Commissioners* [1963] 1 W.L.R. 112 at p.113.