[2016] AACR 42

(VT v Secretary of State for Work and Pensions (IS)
[2016] UKUT 178 (AAC))

Judge Rowland **CIS/30/2015**
11 April 2016

Recovery of overpayments – civil penalty – whether discretionary

Tribunal procedure and practice – whether right of appeal against the imposition of a civil penalty

The claimant went abroad for two separate periods in order to receive medical treatment but failed to disclose either absence to the Department for Work and Pensions. The Secretary of State decided that she had received two recoverable overpayments of income support totalling over £2,000 for both periods and also decided to impose a civil penalty of £50 under section 115D of the Social Security Administration Act 1992 (the 1992 Act) in respect of the second overpayment on the ground that the claimant had no reasonable excuse for failing to notify the Department of her absence abroad. The First-tier Tribunal (F-tT) dismissed the claimant's appeal in her absence despite her request for a postponement due to ill-health. The Upper Tribunal gave permission to appeal in relation to the imposition of a civil penalty.

Held, dismissing the appeal, that:

1. the F-tT's findings were sufficient to show that the claimant did not have a reasonable excuse for not disclosing her absences abroad (paragraph 12);

2. the use of the word "may" in section 115D of the 1992 Act conferred a broad discretion as to whether a civil penalty should be imposed, even if the claimant did not have a reasonable excuse for the non-disclosure, but not as to the amount of any penalty (paragraphs 13 and 14);

3. there was a right of appeal to the F-tT against the imposition of a civil penalty under section 115D of the 1992 Act because such a decision was made on an award for the purposes of section 12 of the Social Security Act 1998 (paragraph 19);

4. there was no injustice as a result of the refusal to adjourn because the claimant did not have an arguable case that she had a reasonable excuse for not disclosing her absences abroad or that the imposition of the penalty was inappropriate (paragraph 22).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The appellant appeared in person.

The respondent was represented by Mr Stephen Cooper, solicitor.

Decision: The claimant's appeal is dismissed

REASONS FOR DECISION

1. The claimant appeals, with my permission, against a decision of the First-tier Tribunal dated 10 October 2014 whereby it dismissed her appeals against a decision of the Secretary of State dated 13 May 2014 superseding an award of income support and determining that the claimant was not entitled to income support in respect of the periods from 30 April 2012 to 5 July 2012 and from 8 January 2013 to 9 April 2013 and a further decision dated 28 January 2014 to the effect that £970.06 had been overpaid in respect of the first period and £1,332.22 had been

overpaid in respect of the second period, that those sums were recoverable from her and that a civil penalty of £50 was applicable in respect of the second overpayment and was also recoverable from her.

2. The facts of the case are very straightforward. The claimant had been entitled to income support since 1998 and, at least latterly, her entitlement was on the ground that she was incapable of work and had no other income. She has been involved in a long dispute with the National Health Service as to the treatment that is appropriate for her, which arises out of a complicated dispute as to whether she has been suffering from Lyme disease rather than from chronic fatigue syndrome. She is a British national but originally came from Ukraine and she went there from 1 April 2012 to 6 July 2012 and from 10 January 2013 until 10 April 2013 for the purpose of obtaining medical treatment that the National Health Service had refused to fund in England. She did not disclose those absences to Jobcentre Plus, the relevant agency of the Department for Work and Pensions, until some time after she had returned from the second period of absence. When the Secretary of State became aware of the claimant's absences from Great Britain, he made the decisions summarised above. The claimant appealed. After an earlier abortive hearing, the case came before the First-tier Tribunal on 10 October 2014. The claimant did not attend but asked for a postponement on the ground of ill health. That request was refused on the ground that her case was hopeless and her appeals were dismissed in her absence.

3. The effect of section 124(1) of the Social Security Contributions and Benefits Act 1992 and regulation 4 of the Income Support (General) Regulations 1987 (SI 1987/1967) is that, generally, a person cannot be entitled to income support for longer than the first four weeks of a period of temporary absence from Great Britain. However, there are exceptions and, in particular, regulation 4(3A) provides:

> "(3A) A claimant's entitlement to income support shall continue during a period of temporary absence from Great Britain if –
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> (a) he satisfied the conditions of entitlement to income support immediately before the beginning of that period of temporary absence; and
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> (b) that period of temporary absence is for the purpose of the claimant receiving treatment at a hospital or other institution outside Great Britain where the treatment is being provided –
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> (i) under section 6(2) of the Health Service Act (performance of functions outside England) or section 6(2) of the Health Service (Wales) Act (performance of functions outside Wales);
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> (ii) pursuant to arrangements made under section 12(1) of the Health Service Act (Secretary of State's arrangements with other bodies), section 10(1) of the Health Service (Wales) Act (Welsh Minister's arrangements with other bodies), paragraph 18 of Schedule 4 to the Health Service Act (joint exercise of functions) or paragraph 18 of Schedule 3 to the Health Service (Wales) Act (joint exercise of functions); or

(iii) under any equivalent provision in Scotland or pursuant to arrangements made under such provision."

(I think there may be a drafting error in paragraph (3A)(b)(i) and that the references to section 6(2) of each Act should be either to the whole of section 6 or just to section 6(1), since it appears to be section 6(1) of each of the National Health Service Act 2006 and the National Health Service (Wales) Act 2006 that confers a power to make provision for treatment outside England or Wales whereas section 6(2) of each Act appears to be concerned only with holidays for patients, the transfer of patients within the British Islands and the return of patients from outside the British Islands.)

4. Much of the claimant's case, both in her written submissions to the First-tier Tribunal and before me, has been argument that the National Health Service in England should have provided the treatment she sought. It is unnecessary for me to consider her arguments on that issue because it is quite clear that regulation 4(3A) can apply only if the National Health Service has provided, or made arrangements for the provision of, services overseas and the claimant accepts that that has not been done in this case. The First-tier Tribunal was therefore right to find that the claimant was not entitled to income support during the periods in issue. As I said when I granted permission to appeal, if, as she claims, her absence abroad was caused by negligence or breach of statutory duty by the National Health Service, her remedy was to sue the National Health Service and to include in her claim a claim in respect of the loss of benefits due to her having to go abroad in consequence of the negligence or breach of statutory duty. She told me at the hearing of the appeal that she had been advised that she was out of time for making such a claim.

5. The claimant has also argued that she was not aware that she might not be entitled to income support while she was abroad and that, anyway, she did not know, at least on the first occasion, how long she would be away and she was also unable to use the telephone number provided for the giving of information while she was abroad. However, section 71 of the Social Security Administration Act 1992 (the Administration Act) provides that where, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact, any overpayments of social security benefits due to the misrepresentation or failure to disclose are recoverable from the person who misrepresented the fact or failed to disclose it. The claimant was under a duty to disclose the fact that she had left Great Britain because she had received leaflet INF4(IS) telling her to inform Jobcentre Plus if she was "going away from home for any reason" or if "you or someone you are claiming for goes abroad whatever the reason". In those circumstances, even if the claimant acted entirely innocently, she "failed to disclose [a] material fact" each time she went abroad and the resulting overpayments were clearly recoverable, as the First-tier Tribunal found. There was no reasonable justification for any belief that she was entitled to income support during the periods in issue and any difficulty with using from abroad the telephone number given to her was plainly not insuperable and was equally plainly not the only reason for the non-disclosure because she did not disclose either absence immediately after she had returned to the United Kingdom.

6. In these circumstances, the First-tier Tribunal was right to find that the claimant's appeals against the entitlement and recoverability decisions were hopeless and so there was no injustice in the First-tier Tribunal refusing to adjourn the hearing and proceeding in her absence. However, the civil penalty raises different issues and it was in relation to this that I granted permission to appeal.

7. Section 115D of the Administration Act provides:

"**115D.–**(1) A penalty of a prescribed amount may be imposed on a person by the appropriate authority where –

(a) the person, without reasonable excuse, fails to provide information or evidence in accordance with requirements imposed on the person by the appropriate authority in connection with a claim for, or an award of, a relevant social security benefit,

(b) the failure results in the making of an overpayment, and

(c) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment.

(2) A penalty of a prescribed amount may be imposed on a person by the appropriate authority where –

(a) the person, without reasonable excuse, fails to notify the appropriate authority of a relevant change of circumstances in accordance with requirements imposed on the person under relevant social security legislation,

(b) the failure results in the making of an overpayment, and

(c) the person has not been charged with an offence or cautioned, or been given a notice under section 115A, in respect of the overpayment.

(3) Where a person is making, or has made, a claim for a benefit for a period jointly with another, and both of them fail as mentioned in subsection (1) or (2), only one penalty may be imposed in respect of the same overpayment.

(4) A penalty imposed under subsection (1) or (2) is recoverable by the appropriate authority from the person on whom it is imposed.

(5) Sections 71ZC, 71ZD and 71ZE apply in relation to amounts recoverable by the appropriate authority under subsection (4) as to amounts recoverable by the Secretary of State under section 71ZB (and, where the appropriate authority is not the Secretary of State, those sections so apply as if references to the Secretary of State were to that authority).

(6) In this section 'relevant change of circumstances', in relation to a person, means a change of circumstances which affects any entitlement of the person to any benefit or other payment or advantage under any provision of the relevant social security legislation."

8. In its statement of reasons, the First-tier Tribunal referred to subsection (2) and then simply said:

"23. There is no evidence of a charge, caution or section 115A notice in this case. It therefore follows from what I have said above that the appeal against the imposition of the civil penalty must fail."

In referring to "what I have said above" the judge clearly had in mind what he had said in respect of there having been a failure to disclose the material fact that the claimant had been abroad. This included a finding that the claimant had received a copy of leaflet INF4(IS) and that, having done so, "the Appellant ought reasonably have known that going away from her home (let alone going abroad) might affect her entitlement to benefit. At the very least, she needed to contact the jobcentre and ask whether her temporary absences would affect her entitlement."

9. In his submission to the First-tier Tribunal, the Secretary of State had relied on subsection (1), rather than subsection (2). However, nothing turns on this. There is a degree of overlap between subsections (1) and (2) and the imposition of a penalty in the present case could have been considered under either of them.

10. I granted permission to appeal on the ground that it was arguable that the First-tier Tribunal erred in law in refusing an adjournment because the effect of doing so was to deprive the claimant of an opportunity to argue in person that a penalty should not be imposed. I also suggested that the First-tier Tribunal might have erred in considering the imposition of a civil penalty to be inevitable.

11. The Secretary of State submits that the First-tier Tribunal did err in law because it overlooked the words "without reasonable excuse", which appear in both subsection (1)(a) and subsection (2)(a). He further submits, and I agree, that whether a person has a reasonable excuse raises the question whether what he or she did (or did not do) was a reasonable thing for a responsible person, conscious of, and intending to comply with, his or her obligations regarding benefit but having the experience and other relevant attributes of the person in question and placed in the situation in which that person found himself or herself at the relevant time, to do (or not to do). This submission is based on an adaptation of a passage from the judgment of His Honour Judge Medd OBE QC, President of the Value Added Tax Tribunal, in *The Clean Car Company Ltd v The Commissioners of Customs and Excise* VATTR 234; VTD 5695, where he was considering the meaning of "reasonable excuse" in relation to penalties under Value Added Tax legislation. However, the approach also has a respectable social security pedigree in the cases on "good cause" for late claims for benefits under legislation in force until 1996. The issue was the same, because a person obviously has a reasonable excuse for having done (or not having done) something if he or she had a good cause for doing (or not doing) it. In CS 371/49, it was held that "good cause" meant "some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did" and that passage was approved by a Tribunal of Social Security Commissioners in R(S) 2/63.

12. In the light of that test, I am not satisfied that the First-tier Tribunal did in fact materially err in law in not mentioning that a penalty could be imposed only if the claimant did not have a "reasonable excuse" for her non-disclosure, given its reference to what had been said in respect of the failure to disclose. The findings on that issue were sufficient, in this particular case, to show that the claimant did not have a reasonable excuse for not disclosing her absences abroad. (In other cases, that might not be so because, for instance, a claimant's health is not usually relevant to the question whether he or she has failed to disclose a material fact but it can be highly relevant to whether he or she has a reasonable excuse for the failure.) However, that the First-tier Tribunal's findings were sufficient to show that the claimant had no reasonable excuse in this case

does not entirely answer the question whether there was a breach of the rules of natural justice in not adjourning the hearing.

13. There is also a further question as to whether the use of the word "may" in both subsection (1) and subsection (2) of section 115D of the Administration Act confers a broad discretion as to whether a penalty should be imposed even if the claimant does not have a reasonable excuse for the non-disclosure. The Secretary of State initially argued that it does not and that, if it is found that the conditions of either subsection are satisfied, a penalty has to be imposed. The authority cited for that submission was *The Commissioners for Her Majesty's Revenue and Customs v Hok Ltd* [2012] UKUT 363 (TCC), decided under the Taxes Management Act 1970, section 100 of which provides that an officer "may make a determination imposing a penalty". However, the Secretary of State now concedes that in section 115D of the Administration Act the word "may" should be given its ordinary meaning connoting the existence of a discretion. I agree. Section 100 of the 1970 Act has to be read in the context of specific provisions providing for an automatic liability and limiting the powers of the First-tier Tribunal on an appeal (see sections 98(2) and 100B(2)(a)). However, in section 115D of the Administration Act, it is quite reasonable that there should be a discretion as to whether to impose a penalty. Social security claimants often have low incomes and find it difficult enough to repay an overpayment without a penalty being added and there are cases where, although a claimant is partly to blame for an overpayment and does not have a reasonable excuse for failing to provide information or notifying a change of circumstances, nonetheless the Department has also acted (or failed to act) in a way that has contributed to the overpayment being made. In such a case it might be considered that to impose a penalty on the claimant when none is imposed on the Department is both unfair and also unlikely to encourage the Department to avoid overpayments. The First-tier Tribunal did not consider this issue but it was arguably not raised on the documents before it. Again, though, there is the question whether the refusal of an adjournment breached the rules of natural justice.

14. On the other hand, I accept that section 115D provides for fixed penalties and that there is no discretion as to the amount of a penalty. That is the literal effect of the opening words of subsections (1) and (2) if, as is the case, a single rate of penalty is prescribed (see regulations 3 and 4 of the Social Security (Civil Penalties) Regulations 2012 (SI 2012/1990), which prescribe £50 as the rate in respect of each subsection). Where the legislature has conferred a discretion as to whether any penalty is to be imposed, it may perhaps sometimes be implied from the context of the provision that it intended there to be also a discretion as to the amount of the penalty. However, there is no reason to depart from the literal meaning of the legislation here. It does not give rise to any obvious unfairness as matters stand. The prescribed amount of the penalty is modest and, with only £50 at stake, it can in my view reasonably be considered disproportionate to require decision-makers to weigh relevant considerations in the detail that would be necessary to decide at what rate a variable penalty should be imposed.

15. What is more debateable is whether, as appears hitherto to have been assumed, there is a right of appeal to the First-tier Tribunal against a decision to impose a penalty under section 115D. No express provision has been made for a right of appeal, but the Secretary of State submits that there is such a right under section 12 of the Social Security Act 1998.

16. Insofar as is material, section 12 provides:

> "**12.–**(1) This section applies to any decision of the Secretary of State under section 8 … above … which –

(a) is made on a claim for, or an award of, a relevant benefit, and does not fall within Schedule 2 to this Act; or

(b) is made otherwise on such a claim or award, and falls within Schedule 3 to this Act.

(2) In the case of a decision to which this section applies, the claimant and such other person as may be prescribed shall have a right to appeal to the First-tier Tribunal, …

…

(4) Where the Secretary of State has determined that any amount is recoverable under or by virtue of section 71, 71ZB, 71ZG, 71ZH or 74 of the Administration Act, any person from whom he has determined that it is recoverable shall have the same right of appeal to the First-tier Tribunal as a claimant.

…"

Schedule 3 (headed "Decisions against which an appeal lies") includes the following paragraphs, under the heading "Recovery of benefits":

"5. A decision whether payment is recoverable under section 71 or 71A of the Administration Act.

6. If so, a decision as to the amount of payment recoverable.

6A. [*Not yet in force.*]

6B. A decision as to the amount of payment recoverable under section 71ZB, 71ZG or 71ZH of the Administration Act."

17. The Secretary of State argues correctly that a decision to impose a civil penalty is a decision made under section 8(1)(c) and that therefore there is a right of appeal under section 12 if the decision falls within the scope of either paragraph (a) or paragraph (b) of subsection (1). The difficulty, as Mr Cooper acknowledged, lies in fitting the decision into either of those paragraphs.

18. The Secretary of State first argued that a decision to impose a civil penalty fell within paragraph (b) because it was not a decision made on a claim or award of benefit but fell within the scope of any of paragraphs 5, 6 or 6B of Schedule 3. As regards paragraphs 5 or 6, the argument was that the penalty was simply added to the overpayment recoverable under section 71 of the Administration Act with the result that one or other of those paragraphs applied. In relation to paragraph 6B, reliance was placed on section 115D(5) which, the Secretary of State submitted, has the effect that a civil penalty is recoverable under section 71ZB. I do not accept either argument. A civil penalty is not recoverable under, or by virtue of, either section 71 or section 71ZB; it is recoverable under section 115D(4). This is clearly acknowledged in section 115D(5), which merely provides that sections 71ZC, 71ZD and 71ZE apply to civil penalties recoverable under section 115D(4) in the same way that they apply to overpayments recoverable under section 71ZB.

19. Mr Cooper, however, adopted at the hearing before me an argument that the Secretary of State had initially declined to advance. Contrary to the Secretary of State's first submission, he

argued that the imposition of a civil penalty *is* a decision on an award and so falls within the scope of paragraph (a) of section 12(1). The obvious counter-argument is that paragraphs 5 to 6B of Schedule 3 carry the implication that the draftsman considered that decisions as to the recoverability of overpayments and the amount of overpayments are not decisions made on either a claim or an award and clearly a decision to impose a civil penalty is, if anything, a step even further removed from an award although it is closely connected to the recovery of the relevant overpayment. However, in R(IS) 14/04, there arose the question whether there was a right of appeal against a decision that an overpayment was recoverable under section 74 of the Administration Act. There is no reference to section 74 in Schedule 3 to the 1998 Act but there *is* a reference to it in section 12(4). In the light of that reference, Mr Commissioner Howell QC accepted the Secretary of State's concession that there was a right of appeal because a decision that an overpayment was recoverable under section 74 of the Administration Act was a decision on an award within the scope of section 12(1)(a) of the 1998 Act. (Strictly speaking, section 12(4) does not imply a right of appeal, because the "same" right might be no right, but there had in fact been a right of appeal under Part II of the Administration Act against decisions under section 74 before Part II was replaced by the 1998 Act and there was no indication that it had been intended to remove that right.) The implication of R(IS) 14/04 may be that paragraphs 5 to 6B of Schedule 3 to the 1998 Act are otiose but, in any event, it seems to me to be preferable to find that to be so than to find that there is no right of appeal where the Secretary of State considers there to be one and, as Mr Commissioner Howell noted in the context of the case before him, there might be a breach of the European Convention on Human Rights if there were not. The present state of the legislation is unsatisfactory and it is perhaps an unfortunate side-effect of Mr Commissioner Howell's decision that amending the legislation so as to remove the ambiguity as to what falls within the scope of a decision "made on … an award" ceased to be necessary and has perhaps become more difficult. Nonetheless, I accept Mr Cooper's argument that there is a right of appeal to the First-tier Tribunal against the imposition of a civil penalty under section 115D of the Administration Act because such a decision is made on an award for the purposes of section 12 of the 1998 Act.

20. There being a right of appeal to the First-tier Tribunal but the First-tier Tribunal having arguably breached the rules of natural justice in not enabling the claimant to advance in person arguments as to whether a penalty should be imposed as a matter of discretion, I gave the claimant an opportunity to argue the point before me at the hearing.

21. However, she made it plain that she was primarily concerned with the questions whether she was entitled to the income support throughout her two relevant periods abroad and whether, if not, the overpayments are recoverable and she did not advance any separate argument as to whether a penalty should be imposed. Mr Cooper, on the other hand, submitted that a penalty was appropriate.

22. I accept Mr Cooper's submission. Nothing that the claimant has said has persuaded me that any injustice was caused to her by the First-tier Tribunal not having adjourned the hearing. The facts are as it understood them to be. The claimant had clearly received the information leaflet and indeed it would be surprising if she had not received at least one copy over the years when she has been entitled to income support. She had not received any information contradicting the leaflet and, in particular, had not received information from an authoritative source suggesting that she would be entitled to income support while abroad for more than four weeks in connection with medical treatment that was not being funded by the National Health Service. The leaflet clearly told her to inform Jobcentre Plus if she went abroad and she did not do so. She is an

intelligent woman and was not precluded from understanding the leaflet by any lack of mental capacity. She may not have read it fully but that is not material; she had no reason to assume that income support would remain payable indefinitely while she was abroad. It seems that the Secretary of State did not impose a penalty in respect of the first overpayment because he thought there might be something in the claimant not having been sure for how long she would be abroad and not being able to contact the relevant number while away, but that could not be a reasonable excuse on the second occasion when she could reasonably have been expected to inform Jobcentre Plus that she would be away before she went if she considered that she would not be able to do so later. Moreover, not being able to telephone the relevant number could not be the whole explanation for her not having disclosed her first absence because she did disclose that absence when she returned. I am satisfied that she did not have an arguable case that she had a reasonable excuse for failing to disclose her absences abroad and or that it would be inappropriate for there to be a civil penalty. The overpayment was caused by her fault and no-one else's.