
CHAPTER 22

Recovery from compensation payments

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CHAPTER 22

Recovery from compensation payments

Part 1: Accidents

1 Cause of injury

i The claimant suffered an accident in 1991. His claim for compensation was settled in 1996 at £50,000. In the meantime the S of S had issued a certificate of recoverable benefits. The claimant appealed on the grounds that his disablement had been caused by a pre-existing condition rather than an accident. The tribunal dismissed this appeal. The question then came before a Commissioner who decided: R(CR) 1/01

1. if benefit is to be recovered for compensation for an accident then that accident must have been an effective cause of the injury giving rise to the payment of benefit throughout the period in which recovery is sought;
2. in this case, whilst it was not in dispute that the accident caused or contributed to the neck injury, there was a question whether it remained the cause or was still contributing to the neck injury still existing in 1996. This question had not been answered by the AT.

Part 2: Payments in consequence of injury

1 Income support

R(CR) 1/95 i When the accident occurred on 24.8.90, the claimant was receiving IS on the basis of unemployment. From the date of the accident onwards, the claimant received IS on the basis of incapacity for work due to sickness. Damages were paid by the compensator after the deduction of benefit in favour of the S of S in accordance with a certificate of total benefit paid. The claimant appealed a SSAT decision to the Commissioner who held that, as the basis upon which the IS was paid had changed, it **was** paid in consequence of the accident and was therefore recoverable. The claimant appealed to the CA on two main grounds:

1. the claimant argued that the same amount of IS would have been paid had the accident not happened so it was not in consequence of the accident. The Court rejected this argument. The IS paid after the accident was founded on medical certificates dealing with injuries caused by the accident and was therefore paid as a direct consequence of the accident;

2. the claimant argued that, in any event, recovery of IS should be limited to that part of the applicable amount relating to the claimant himself. This too was rejected by the Court. The unfairness to the claimant did not stem from the legislation for recovery of benefit from compensation payments but from the failure to claim damages in respect of the benefit recoverable by the S of S.

Note: This decision relates to S. 82 of the SS Act 1992. Since 6.10.97 the SS (Recovery of Benefits) Act 1997 governs the recovery of benefits from compensation payments.

2. Benefits paid for reason other than the accident

R(CR) 1/02 i A Tribunal of Commissioners dealt with 3 cases where the S of S appealed against decisions of appeal tribunals made under S. 12 of the SS (Recovery of Benefits) Act 1997. In each case the tribunal had decided that some of the benefits during the relevant period had been paid otherwise than in respect of the accident (see 11(1)(b)). For example, in one case the claimant had suffered a fall, striking his back. The tribunal found that the claimant had not suffered a fracture during the accident and that a subsequent disc hernia was constitutional and unrelated to the accident. The tribunal concluded that the accident had not been the cause of the physical disability after a year.

The S of S argued that it was irrelevant whether, in relation to industrial injuries benefits, it was shown after the award that the claimant was not in fact suffering disablement as a result of the relevant accident. The Commissioner rejected this argument: Parliament cannot have intended to impose on compensators a liability to recompense the S of S for benefits that ought not to have been paid at all. Tribunals were entitled to reach a conclusion that was inconsistent with the award of benefit. Such a tribunal decision did not actually affect the award of benefit but it was plainly open to the S of S to consider whether the award should be revised or superseded in the light of the tribunal's findings.

ii In July 1999, the compensator's insurers settled a claim for damages in respect of pneumoconiosis contracted through employment. £6,000 was paid on the basis that the disease had not incapacitated the claimant and so had not led to any loss of earnings. The Secretary of State sought to recover benefits amounting to over £32,000 made up of sickness, invalidity and IB together with disablement pension based on an assessment of 10% in respect of pneumoconiosis. A tribunal dismissed an appeal by the compensators who then appealed to the Commissioner. A Tribunal of Commissioners decided that the tribunal erred in holding that it had no jurisdiction to consider whether the benefits had been wrongly awarded. The Commissioners went on to examine the medical evidence and to find that the claimant had not in fact been incapable of work throughout the relevant period. The benefits paid on the basis of incapacity for work were therefore not paid in respect of the disease and so were not recoverable. However the disability pension was clearly recoverable because it was paid in respect of the disease in question, namely pneumoconiosis. R(CR) 2/02

iii Compensation was paid to the claimant in respect of a head injury, which he claimed caused epilepsy. The Secretary of State recovered benefits (SSP, invalidity benefit, IB, disablement benefit and DLA) paid to the claimant within five years of the accident. The compensator appealed arguing that the injury was minor, that the claimant was not suffering from epilepsy and that such symptoms as he had were not caused by, or were not solely caused by, the relevant accident. The tribunal dismissed the appeal. R(CR) 1/03

The Commissioner held that the tribunal erred in failing to take account of R(CR) 1/02 and R(CR) 2/02 which make it clear that a tribunal can decide whether benefits are paid "otherwise than in respect of the accident". The question arose whether it could be argued that **part** of a benefit was paid in respect of some other cause. The Commissioner confirmed the view taken in CCR/5336/95 and R(CR) 1/01, that is to say it is not possible to take a single rate of benefit and apportion it between that part which was in respect of the accident and that part arising from other causes. However if benefit is paid at the wrong rate (for example where the Secretary of State has made a mistake as to the claimant's age) then only that part of the benefit which ought to have been paid will be recoverable.

The Commissioner then examines how awards of disablement benefit should be approached. He notes that the rate at which disablement benefit is payable depends on an assessment of the level of disablement. Disablement from different accidents can be aggregated (S 103 (2) of the SS Contributions and Benefits Act 1992). Plainly where that applies, only the benefit attributable to the assessment made in respect of the relevant accident will be recoverable.

Also reg 11 of the SS (General Benefit) Regs 1982 makes provision for the assessment of disablement where it is due both to the relevant accident and some other cause. If a compensator can show that the assessment made by the Secretary of State was made in ignorance of a material fact then a tribunal would be entitled to give a decision to the effect that part only of the disablement benefit had properly been paid in respect of the accident. However, the Commissioner stresses that the burden of showing that benefit is paid otherwise than in respect of the accident lies with the compensator and he comments that "in the absence of some compelling new evidence, a tribunal will no doubt be slow to substitute their own judgement for that of an assessor who has had the advantage of examining the claimant".

iv The claimant was exposed to asbestos in the course of his employment and compensation was paid on the basis that the claimant had developed asbestos-induced pleural thickening ("the relevant disease"). The Secretary of State sought to recover all benefits paid to the claimant between July 94 and July 99. The benefits were disablement benefit (paid in respect of pneumoconiosis), sickness, invalidity and IB, IS and DLA. The compensators appealed to a tribunal on the basis that benefits had been paid otherwise than in respect of the relevant disease. Medical evidence showed that the claimant had other disabling illnesses, including heart disease and chronic bronchitis. The tribunal accepted that none of the DLA was recoverable but found the other benefits R (CR) 3/03

to be recoverable because the relevant disease had been one cause of the disablement. The tribunal rejected as irrelevant the compensators argument that the claimant would have been incapable of work in any event by reason of his other illnesses.

The Commissioner noted that the evidence accepted by the tribunal showed that, during 1994, the claimant was incapable of work due to the combined effect of all the conditions from which he was suffering while from the beginning of 1995 he would have been incapable of work even if he had never been exposed to asbestos. The Commissioner held that a compensator's liability was confined to benefits the payment of which was caused by the relevant disease. The phrase "in respect of" in S 1(1)(b) of the Recovery of Benefits Act 1997 was to be read in this sense. It was therefore open to the compensators to avoid the recovery of benefits by showing that they would have been paid in respect of a pre-existing condition even if the relevant disease had not developed. Hence, in this case the sickness benefit, invalidity benefit, IB, IS and DLA (care component) paid from 1.1.95 were not recoverable. However the evidence did not show that the relevant disease ceased to affect mobility and so the DLA (mobility component) was recoverable in full.

R (CR) 1/04 v The claimant was awarded compensation in respect of an injury to his right eye in an accident at work. The Secretary of State sought to recover (IB) paid to the claimant in two separate claims. The compensator appealed, producing expert medical evidence which showed that the claimant had pre-existing loss of sight in the right eye and that the accident had no disabling effect beyond a week after the accident. Most of the IB had been awarded on the basis of reg 28 of the Social Security (Incapacity for Work)(General) Regs 1995 which says that a claimant shall be deemed to satisfy the all work test on the production of medical evidence. In this case the medical evidence from the claimant's GP gave a diagnosis of "injury to right eye" combined with depression on the second claim. The question for the Commissioner was whether a payment of IB linked to the accident could be found to have been paid otherwise than in respect of the accident. The Commissioner held that one must look at the substance of the diagnosis given by the GP to ascertain whether it was sufficiently linked to the accident to indicate that the accident was an effective cause of the incapacity. If it is shown that for some or all of the period covered by reg 28 the accident was not an effective cause of the incapacity then that period could not be included in the certificate of recoverable benefits.

3 Appeal against certificate after section 8 deduction

R (CR) 2/03 i The claimant sued her employers in respect of an accident at work that occurred in 1993. In August 1998 the compensator gave notice that they had paid some £37,000 into court but had withheld £32,000 in accordance with S 8 of the SS (Recovery of Benefits) Act 1997. S 8 provides that, where compensation is awarded, for example for loss of earnings, a deduction can be made in respect of certain benefits paid in respect of the accident or injury. The deduction is paid by the compensator to the Secretary of State and the claimant receives any balance. The claimant accepted the net payment of £5,000.

Subsequently the claimant requested a review of the certificate of recoverable benefits: she argued that, even if the accident had not happened, psychological problems would have prevented her from working after the age of 60. In response, the Secretary of State confirmed the original certificate.

Later the compensator appealed on the grounds that benefits had not been paid in respect of the accident beyond a period of six months after it occurred. The tribunal decided that benefits paid in respect of any period after the claimant's 60th birthday were not paid in consequence of the accident. The Secretary of State appealed to a Commissioner.

The Commissioner held:

- (a) As there is no right of appeal to a tribunal against a deduction made under S 8 any dispute as to the deduction or its amount is to be determined by the Court seized of the compensation proceedings. Thus, in this case, the

claimant's remedy was to refuse to accept the payment into court unless the deduction was reduced.

1. If a compensator makes a deduction under S 8 that implies an acceptance that the benefits concerned were paid in respect of the accident.
2. Reg 11 of the SS (Recovery of Benefits) Regs 1997 caters for the situation where a deduction is made under S 8 in accordance with a certificate and a fresh certificate is subsequently issued following a review or appeal.
3. A tribunal hearing an appeal under the Recovery of Benefits Act should generally have regard to the basis on which a case is settled by the parties acting with the benefit of legal advice. It should be slow to accept an argument by a compensator that is inconsistent with a S 8 deduction unless it is supported by the claimant (who is the only person who has an interest in it). Tribunals should also be slow to accept an argument by a claimant which is inconsistent with the basis on which compensation was obtained or upon which benefits were claimed.
4. The tribunal erred in law because the reasons given for their decision were not supported by evidence, being based on a misunderstanding of the grounds for appeal.

The commissioner substituted his own decision confirming the Secretary of State's certificate.

ii On 1 April 1997 the claimant suffered an injury to his chest in the course of his work for a removal firm. Eventually he left that employment as he was no longer able to cope with heavy lifting. In October 1998 he started another job but in early 1999 he suffered a further accident at work which severely affected his buttock and hip. In August 1999, the claimant claimed IB (additional to the disablement benefit which he had previously been awarded following the 1997 accident). An "all work test" assessment took place in October 1999. The total points awarded was sufficient to entitle the claimant to IB but points attributable to each accident alone would not have entitled the claimant to benefit. At a further assessment in December 2000, the highest number of points was awarded in respect of disability arising from the first accident and the claimant would have been entitled to IB on the basis of these points alone. In March 2001, the claimant obtained judgement in his favour in an action for damages against his employers at the time of the first accident. Special damages were assessed on the basis that the claimant had been more or less incapable of work for two years after the accident and that thereafter his earning capacity had been reduced.

R(CR) 2/04

The Secretary of State issued a certificate of recoverable benefits which included all the disablement pension and IB paid since 1.4.97 on the basis that it was paid "in respect of" the accident on 1.4.97. The employers deducted the whole of the benefits listed from the compensation paid to the claimant. The claimant appealed against the certificate on the grounds that four years' worth of benefits had been deducted from a compensation award based on two years of incapacity for work. The tribunal dismissed the appeal and the claimant appealed to the Commissioner.

The Commissioner held that benefit was not payable in respect of a later accident if it would have been payable in respect of an earlier accident even if the later accident had not occurred.

The claimant's incapacity for work in October 1999 was attributable to the second accident but by a date in 2000 (which the Commissioner set as 18.5.00) incapacity became attributable to the first accident. Accordingly IB paid before 18.5.00 was not paid "in respect of the first accident".

The question of whether the compensator was entitled to deduct all the benefits on the certificate from the compensation otherwise payable to the claimant was not a matter within the jurisdiction of the tribunal but, being a matter solely between the claimant and the compensator was a matter within the jurisdiction of the court dealing with the compensation claim. If the matter was not considered by the trial judge at the time the award was made, it could still be brought before the court in proceedings to enforce the judgement of the court.

Albeit that the matter was not within his jurisdiction, the Commissioner felt that, in order to prevent a flow of hopeless appeals to appeal tribunals and Commissioners, he should give an *obiter* judgement. Benefits could properly be deducted from compensation under S 8(3) of the Recovery of Benefits Act 1997 only to the extent that they were paid during the period for which the claimant had received relevant special damages. In other words if the relevant special damages were for a two year period in 1997 and 1998 only recoverable benefits paid for the same period could be deducted under S 8(3).

4 Psychiatric illness

R (CR) 4/03 i The claimant's unborn baby died during pregnancy following complications including the development of severe maternal diabetes. Following the still-birth, the claimant developed severe depression. She claimed damages for negligence against her GP under the Fatal Accidents Act 1976 and for psychiatric injury. The claim was settled and the Secretary of State issued a certificate seeking recovery of IB paid to the claimant. The compensator appealed to a tribunal on the grounds that a) the IB had been paid partly in respect of diabetes b) the claimant's depression was not attributable to the still-birth and c) the claimant would not in any event have been available for work after the still-birth and so only any difference between the IB paid and any benefit that might otherwise have been awarded was recoverable. The tribunal dismissed the appeal.

The Commissioner held that the death of the child in the womb, or the communication of the diagnosis of the child's death and the subsequent still-birth constituted an "accident" or series of accidents, **or** the claimant had suffered a psychiatric "injury" **or** her psychiatric illness was a "disease". All three cases came within S 1 (1)(a) of the Recovery of Benefits Act 1997.

The evidence showed that the main cause of incapacity was the psychiatric illness of the claimant following the loss of the child. There was no evidence that the claimant had been entitled to IB at any time before it was put into payment after the still-birth. Recovery of benefit cannot be avoided on the ground that some other benefit would have been paid on a different basis (e.g. unemployment) if the relevant injury had not occurred. However there were no grounds for recovery if the payment of benefit was caused by a pre-existing illness.

R(CR) 1/07 ii The claimant was dismissed on 15.3.94 following a long period of suspension and disciplinary proceedings. He made a statutory claim for compensation for unfair dismissal and an Industrial Tribunal made an award. The claimant also took civil proceedings against his employers for damages for psychiatric injury. The claimant's case was eventually heard by the HL together with *Eastwood v Magnox Electrical plc* [2004] UKHL 35, where it was held that the principle (established by *Johnson v Unisys Limited* [2001] UKHL 13) that damages cannot be recovered in respect of matters within the scope of the unfair dismissal claim, did not prevent a claim for damages due to injury caused prior to dismissal. Compensation was paid and the Secretary of State recovered benefits for the period 17.3.94 to 16.3.99. The Compensator appealed on the grounds that the injury which led to the payment of benefit had been caused by the dismissal and therefore fell within the *Johnson* exclusion zone. A tribunal upheld the appeal. The Commissioner held that the boundary between the common law and statutory claims was defined by matters which lay within the scope of each. Since an employment tribunal does not have the power to make an award in respect of mental injury, the tribunal therefore erred in law in seeking to find the point at which the injury arose from

the dismissal. The Commissioner also found that, once a compensator makes a payment on the basis that an injury occurred in a particular way, it cannot then argue in the context of CR that it occurred in a different way. In this case the mental injury had begun in May 1993 and that was an effective cause of the claimant's illness throughout the period he was in receipt of relevant benefits.

22 Annex

The decision listed below is not included in Chapter 22.

R(CR) 1/96