MJG/SH/10/MD

Commissioner's File: CSB/831/1985
C A O File: AO 2839/85
Region: London North

SUPPLEMENTARY BENEFITS ACT 1976
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:
Social Security Appeal Tribunal: Finchley
Case No: 09/28/15

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 8 March 1985, as that decision is erroneous in law and is set aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Supplementary Benefits Act 1976, section 2 and the Social Security (Adjudication) Regulations 1984, regulation 27.

2. This appeal by the claimant, a married man, was at his request the subject of an oral hearing before me on 19 August 1986 at which the claimant was present and was represented by Mr C Hobbs. The adjudication officer was represented by Mr E O F Stocker. I am indebted to Mr Hobbs and to Mr Stocker for their assistance to me at the hearing.

3. The claimant's appeal is against the unanimous decision of the local tribunal confirming the local adjudication officer's decision that under section 20 of the Supplementary Benefits Act 1976 an overpayment of £365.55 was recoverable from the claimant as overpaid supplementary benefit. The relevant facts are as follows. The claimant had been in receipt of supplementary allowance since 1980. On 26 June 1981 he claimed an increase of benefit for his wife who had returned from Jamaica to live with him on 28 June 1981. On 18 August 1981 a giro cheque for £119.70 was sent to the claimant in respect of nine weeks arrears of 'addition' of supplementary benefit for his wife. On a visit by an officer of the Department to the claimant at his home on 28 March 1984 it came to light that the claimant's wife had returned to Jamaica "some time in September 1983" (statement of facts by the local adjudication officer to the local tribunal). The result was that the claimant had been in receipt of an 'addition' of supplementary benefit for his wife from September 1983 onwards, to which he was not entitled, with the result that the local adjudication officer decided that the sum of £365.55 was recoverable from the claimant as an overpayment of benefit (this was a net sum after there had been set off against it additional requirements for heating and laundry).

4. In a letter dated 28 November 1984 to the "appeals officer" from the claimant's representative, he stated,

"In my case I did not know that I was receiving benefit for my wife. In fact when I first wrote and stated that I wished to claim benefit for my wife, I received a written reply stating that I was not eligible to receive benefit for her as she was only a temporary resident. I therefore assumed that was the end of the matter. However I now know that my benefit was subsequently increased to include my wife, but I was not informed of this. Had I been informed that I was receiving benefit for my wife, I would of course have informed your office when she went abroad. I hold that it was not reasonably to be expected that I should disclose the return of my wife to Jamaica, when I had been notified in writing that I was not receiving benefit for her."

5. The local tribunal made the following findings of fact,

"The tribunal accept the facts in paragraphs 1 to 9 as submitted by the adjudication officer with paragraph 3 amended referring to paragraphs 2 and 3. The claim for increased benefit for [the claimant's wife] took nine weeks to process and then the regular payments were increased. The next increases were the November uprating and the payment of the long term scale rate in April 1982."

Pausing there, it is not usually satisfactory for a tribunal to adopt an adjudication officer's submission or statement of facts before the local adjudication officer as its own findings of fact, as that is bound to give the impression to an appellant that the tribunal is 'rubber-stamping' the adjudication officer's submission. It is better if tribunals make independent findings of fact even if in fact they accept the local adjudication officer's submission in its totality.

6. The tribunal gave as its reasons for decision,

"[The claimant] requested an increase for his wife and the payment of a giro cheque nine weeks later for 'arrears' could reasonably be expected to be in response to the request, especially as the weekly allowance was increased. There was no further alteration to the amounts, with the exception of the November uprating, until the following April. There was no reason for confusion and a disclosure of his change of circumstances, in accordance with the instructions on the yellow pages of the order book could reasonably be expected. The tribunal accept the reasons set out in paragraphs 10 to 15 of the submission having taken careful note of the Commissioner's decisions 21/82 and 54/83."

7. Although I appreciate that the tribunal took considerable trouble with this case, I accept the combined submissions of the adjudication officer now concerned (in a written submission dated 11 September 1985 and, with variations, reiterated by Mr Stocker at the hearing) and the claimant's representative that those findings of fact and reasons for decision are deficient and do not comply with the requirements of regulation 19(2)(b) of the above cited Adjudication Regulations. In particular they do not deal with the claimant's allegation that he had received a letter from the Department stating that he could not receive an increase of supplementary benefit for his wife because she was only temporarily resident in this country. That required a finding of fact and the mere statement by a departmental officer (if such was the case) that no such letter could be traced would not prevent the tribunal from making its own estimation of whether such a letter had in fact been sent to the claimant (see Commissioner's decision on file CSB/347/83). Moreover, the reasons of the local tribunal, though carefully phrased, do not really relate to the requirements of section 20 of the Supplementary Benefits Act 1976 and below I have given some directions to the new tribunal on those points in a difficult case like this.

8. The proper course therefore is for me to set the tribunal's decision aside and remit the case, in accordance with regulation 27 of the Adjudication Regulations, to a differently constituted tribunal for rehearing. That tribunal will, if it concludes that a recoverable overpayment has occurred (as to which see below), need to investigate the precise date on

which the claimant's wife returned to Jamaica since the onus is upon the adjudication officer to show the amount of the recoverable sum and it would not be right therefore just to accept that there was an overpayment from as early as 5 September 1983 unless there was some evidence on the point, otherwise it might well be that the tribunal would have to find in the absence of evidence, other than that the claimant's wife left in September 1983, that it was at the end of that month rather than at the beginning.

9. On the main question of whether or not there was a recoverable overpayment, the tribunal should of course have careful regard to each and every word of the provisions of section 20(1) of the Supplementary Benefits Act 1976 as follows,

> "20. (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -
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> (a) the Secretary of State incurs any expenditure under this Act; or
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> (b) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered;
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> the Secretary of State shall be entitled to recover the amount thereof from that person."

10. Firstly, I should emphasise that the innocence of the claimant does not of itself prevent recovery of an overpayment of benefit because of the words "fraudulently or otherwise" in section 20(1) (see R(SB)21/82 at paragraph 4(3)), though of course the onus is upon the adjudication officer to show misrepresentation or failure to disclose any material fact (see R(SB)34/83). Subject to this, the new tribunal will wish to evaluate the claimant's contention that no recovery is due from him. The claimant contends that he reasonably thought, having received a letter from the Department to the effect that no increase could be paid for his wife as she was a temporary resident and because the actual payment of arrears did not specify to what circumstances it was attributable that the departure of his wife to Jamaica was not a "material fact" within section 20(1) of the 1976 Act. In order to evaluate this, the tribunal will need to take evidence and make precise findings of fact on the question of whether or not the claimant did receive such a letter from the Department and whether the girocheque for the nine weeks arrears did contain any indication of whether or not the increase was for his wife. The tribunal will also need to make findings as to the claimant's own state of mind in the matter ie. whether he knew or reasonably ought to have known that he was receiving an increase of supplementary benefit for his wife or whether he attributed the increase to other factors eg. annual uprating or grant for long term rate. Those are issues of fact on which the local tribunal's jurisidiction is absolute, the Commissioner's power in this jurisdiction being only to decide questions of law and not questions of fact.

11. If the tribunal should find as a fact that the claimant neither knew or reasonably ought to have known that he was receiving an increase of supplementary benefit for his wife, the question is then whether within the wording of section 20(1) of the Supplementary Benefits Act 1976, recovery is still to be required. Mr Hobbs and Mr Stocker both concurred at this point in submitting that in those circumstances the departure of the claimant's wife to Jamaica could not be "any material fact". In my judgment, if a reasonable man given the knowledge which the claimant had at the relevant time, would reasonably have thought that the departure of his wife to Jamaica was not "any material fact", then there would not have been a failure to disclose a material fact by the claimant. But the test is objective not subjective and the claimant's own beliefs in the matter are irrelevant, though his state of

knowledge and information is relevant. I adopt in this context the words as to disclosure of material facts (in insurance law) of Fletcher Moulton L.J. in Joel v. Law Union and Crown Insurance Company [1908] 2 KB 863 at 883-884 as follows,

> "The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in Brownlie v. Campbell (5 App. CAS. 925 at 954): 'In policies of insurance... there is an understanding... that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not avoids the policy'. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realised to be material, not of that only which you did in fact realise to be so."

12. In my view, those statements apply equally to what is meant by "failure to disclose any material fact" in section 20(1) of the 1976 Act and the new tribunal in this case should apply that ruling if it becomes relevant to do so. I take it that this was what was meant by the learned Commissioner in the oft-cited dictum in R(SB)21/82 at paragraph 4(2),

> "4. (2) ...I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal - ie. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see amongst the definitions of 'failure' in the Shorter Oxford English dictionary;
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> '1. ...non-performance, default; also a lapse...'"

though there the Commissioner based his reasoning on the use of the word "fails" in section 20(1) of the 1976 Act.

13. In a decision on Commissioner's file CSB/1006/1985, after citing that dictum, I expressed the opinion that it was confined to cases "where someone other than the claimant is being considered" in relation to the duty of disclosure (paragraph 10 of the decision on file CSB/1006/1985 - see also paragraph 4 of a decision on file CSB/178/1985 cited by the adjudication officer in the present appeal). I have come to the conclusion that that view may be too narrowly stated but that nevertheless the phrase in R(SB)21/82 "disclosure by the person in question was reasonably to be expected" is subject to the views expressed in Joel v. Law Union Insurance Company and cited in paragraph 11 above.

14. In the present case the tribunal must, if it becomes relevant, themselves decide whether a reasonable man would have regarded the departure of his wife as being a material fact which the claimant should have disclosed or alternatively whether, by not disclosing it, the claimant had failed to disclose, in view of his state of mind. In my judgment in both matters, the test is objective and is the test of the reasonable man. I will say no more than

that, except that in my view the new tribunal should require cogent evidence before it comes to the conclusion that a reasonable man would not have regarded departure of the claimant's wife as being a material fact in the circumstances.

(Signed) M.J. Goodman

Commissioner

Date: 6th October 1986

Ruth,

Thought you might be interested. The decision is a lot worse than I had heard for since the hearing appeared to go very well. Where do they dig up these obscure old judgments?