

overpayment - relationship of UBO & DfHS - two aspects - subjective & objective of this relationship.

JM/SH/5/MD

Commissioner's File: CSB/903/1985

C A O File: AO 3058/SB/85

Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Maurice Francis Lill

Social Security Appeal Tribunal: Brighton and Hove

Case No: 04/222

IDENTIFIABLE DECISION:
NOT TO BE SENT OUT OF
THE DEPARTMENT

[ORAL HEARING]

1. This is a claimant's appeal, brought by my leave, against a decision of the supplementary benefit appeal tribunal dated 28 March 1983 which confirmed a decision issued by the benefit officer (now the adjudication officer) on 31 January 1983.

2. I held an oral hearing of the appeal. The claimant was most ably represented by Mr Martin Rodger of the Free Representation Unit. I am indebted to him for the tenacity and lucidity of his submissions. I am also indebted to the adjudication officer's representative for a characteristically objective approach to the case. Indeed, as appears below, the concessions made (and, in my view, properly made) by the adjudication officer's representative enable me to deal relatively briefly with the sustained and interesting submissions which Mr Rodger made to me.

3. The case is of a type which is by no means unfamiliar in this jurisdiction. In October 1981 the claimant and his wife decided to move to Brighton. They lost their respective jobs in consequence. On 26 October 1981 they went together to their local unemployment benefit office ("UBO") where they each claimed unemployment benefit. But, inevitably in the circumstances, the respective decisions on those claims were delayed whilst enquiries were made into the reasons for their having lost their previous employment. (In the event, each was disqualified from unemployment benefit for 6 weeks on the grounds that the respective employment had been voluntarily left.)

4. On 3 November 1981 the claimant claimed supplementary benefit. He did that on Form A11. On that form he declared that neither he nor his wife had any source of income. (The form makes it clear that the phrase "source of income" includes all benefits and allowances apart from supplementary benefit.) At that date the claims for unemployment benefit were still being considered - and the claimant's said declaration was perfectly true. Since the claimant was, pursuant to section 5 of the Supplementary Benefits Act 1976, required to be available for employment, his claim for supplementary benefit was made at the UBO (see regulation 3(2)(a) of the Supplementary Benefit (Claims and Payments) Regulations 1981). At the time when he completed and submitted Form A11 he told the

relevant officer at the UBO that his wife had claimed unemployment benefit. At a very late stage in these proceedings (long after the appeal tribunal hearing), he alleged that that information was received with a comment to the effect that it did not matter. If that comment was indeed made, it has, of course, an important bearing upon the case. But since in this jurisdiction I have no power to find facts, I say no more on that issue. Manifestly it will be one of the matters to be considered by the appeal tribunal which rehears the case.

5. Unemployment benefit came into payment to the claimant's wife with effect from 11 December 1981. At no relevant time did the claimant inform the supplementary benefit office ("SBO") of that fact. The first that the SBO knew of it was on 25 November 1982 when the claimant telephoned to say that payment of unemployment benefit to his wife had ceased (presumably by reason of exhaustion of entitlement). In the meantime supplementary benefit had been paid to the claimant upon the basis that his wife had no income whatsoever - the resultant overpayment amounting to £1,291.91. The benefit officer decided that that sum was recoverable by the Secretary of State - and that is what this case is about.

6. Since the claimant is so ably advised and represented, it will suffice if I summarise the issues without going into details of the relevant law. The local adjudication officer took the view that there had been a failure to disclose within the meaning of section 20 of the Supplementary Benefits Act 1976; and that the overpayment of benefit was a consequence of such failure. The claimant's case has throughout been that by telling the officer at the UBO of his wife's claim for unemployment benefit he disclosed everything that it was necessary to disclose. It was to the UBO that he made his claim for supplementary benefit. He told the UBO of his wife's pending claim for unemployment benefit. It was that very same UBO which -

- (a) made the award of unemployment benefit to his wife;
- (b) put that award into payment; and
- (c) paid to the claimant his combined unemployment benefit and supplementary benefit.

What more, asks the claimant, ought he to have done? It was not a question of his assuming that the left hand would know what the right hand was doing. So far as he was concerned it was a question of the right hand knowing what the right hand was doing.

7. The appeal tribunal did not accept the claimant's contentions. I need not quote from its recorded findings of fact. They merely recite the bare bones of the narrative without touching upon the contentious issues. Treatment of the latter is reserved to the recorded reasons, from which I quote:

"The Tribunal was satisfied that [the claimant] signed a statement on 3.11.81 that his wife had no income and that he did not notify the Benefit Officer when she was awarded Unemployment Benefit or when it was increased by Earnings Related Supplement. As a result of this non-disclosure supplementary benefit totalling £1,291.91 was paid that would otherwise have not been paid and is recoverable from [the claimant]. He may have informed the interviewing officer that his wife had claimed Unemployment Benefit but that did not relieve him of responsibility to report its subsequent receipt, observing that such information would not tell the Benefit Officer when or how much benefit would be paid. The Tribunal could not accept [the claimant's] apparent belief that the Unemployment and Supplementary Benefit Offices were one and the same constituted good cause for failing to notify the latter."

(The phrase "good cause" features more than once in the papers in this case. It is best known in the social security field in the context of late claims. In my view it is as well to

eschew it altogether in the context of repayment cases.)

8. I have to say at once that, at the time when the appeal tribunal gave its decision, the received wisdom on this topic was much as is reflected by the tribunal's reasons. But even so, I consider that in this case a closer examination of the relationship between the UBO and the SBO was called for. In paragraph 17 of Decision R(SB)54/83 the Commissioner said:

"If the Unemployment Benefit Office is the agent of the Supplementary Benefit Office to receive notice of change of circumstances from claimants who are signing on for unemployment benefit, then the Supplementary Benefit Office can be taken to know the material fact, under the doctrine of imputed notice and there has been no failure to disclose. But, even if the Unemployment Benefit Office is not an agent to receive such notice, the claimant has nevertheless discharged his obligation of disclosure if he hands the form to that Office in circumstances in which it can reasonably be expected that it will be transmitted to the Supplementary Benefit Office. And where the unemployment benefit officer who receives the form A9 gives an assurance that the form will be passed on and there is no need to tell the Supplementary Benefit Office independently, and the fact is that there is a normal practice to pass such forms on, then it is in my judgment unquestionable that there has been no 'failure to disclose'." (The Commissioner's emphasis in each case.)

The second sentence of that quotation does not, of course, exactly bear upon the facts in the appeal before me. But it can, I think, legitimately be projected to apply to a case where a claimant reasonably expects that information coming to the knowledge of the UBO (in this case the putting into payment of unemployment benefit to the claimant's wife) will come to the knowledge of the authority dealing with the quantification of his own supplementary benefit. The adjudication officer's representative very fairly associated himself with Mr Rodger's submission that that aspect of this case was not adequately investigated - and I take the same view.

9. On that basis alone the appeal tribunal's decision is erroneous in law and must be set aside. I need not, accordingly, deal with any of the other respects in which it was contended before me that the appeal tribunal had erred in law. It is more profitable that I should turn to the manner in which the fresh appeal tribunal should approach the case.

10. For convenience, I can refer to the issue canvassed in paragraph 8 above as the "subjective" aspect of the case. It involves consideration, not of the actual relationship of the UBO to the SBO, but of how the reasonable man in the claimant's position would have viewed that relationship. Many facts are relevant thereto - but I can confidently leave those facts to be deployed by the claimant's representative before the fresh appeal tribunal. I need only here remind that appeal tribunal that it is under this aspect of the case that it must consider what, if anything, was said to the claimant when he disclosed the fact that his wife was claiming unemployment benefit (see paragraph 4 above).

11. But - and this may be an even more onerous task - the appeal tribunal must consider the actuality of the relationship between the UBO and the SBO - the "objective" aspect. Its relevance clearly appears from the first sentence which I have quoted from R(SB)54/83 (in paragraph 8 above). Mr Rodger referred to a substantial volume of evidence material thereto. It will have to be carefully considered - and the appropriate conclusions in law drawn therefrom. I need hardly say that the appeal tribunal will, inevitably, be invited to give close consideration to Appendix II to decision of a Tribunal of Commissioners R(SB)36/84. And the appeal tribunal will not overlook the claimant's contention that he told an interviewing officer of the Department of Health and Social Security of his wife's pending claim for unemployment benefit. In the light of standard procedures to which I was directed - and to which, no doubt, the appeal tribunal will be directed - that may raise issues as to the true causation of the overpayment of supplementary benefit.

12. Lastly, the appeal tribunal must not overlook the continuing duty of disclosure which lies on a claimant. Conclusions as to the discharge of that duty and/or the consequences in law of any failure to discharge it will, of course, hinge upon such findings as are made and such conclusions as are drawn in respect of what I have called the subjective and the objective aspects of the case.

13. The appeal tribunal whose decision I am setting aside may well feel aggrieved that it has been overtaken by decisions made by Commissioners since it gave its decision in this case. That is undoubtedly true. It is a fate from which the Commissioner is not himself immune!

14. My decision is as follows:

- (1) The claimant's appeal is allowed.
- (2) The decision of the appeal tribunal dated 28 March 1983 is erroneous in law and is set aside.
- (3) The case is referred to a differently constituted appeal tribunal for determination in accordance with the principles of law set out and referred to in this decision.

(Signed) J Mitchell
Commissioner

Date: 21st May 1986