

Overpayment of UB - "due care & diligence" ✓

JJS/RO

Commissioner's File: CU/101/1986

C A O File: AO 4105/UB/86

Region: North East

SOCIAL SECURITY ACTS 1975 TO 1985

CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Appeal Tribunal: Sunderland

Case No: 21/01

1. My decision is that:

- (a) the decision of the adjudication officer awarding unemployment benefit from 17 September to 22 September 1984 (both dates included) was properly reviewed because it was given in ignorance of a material fact;
- (b) the decision was properly revised on review because the claimant was not entitled to unemployment benefit from 17 September to 22 September 1984 (both dates included) because for that period he was a serving member of the Forces;
- (c) an overpayment of unemployment benefit was made amounting to £27.05;
- (d) repayment of this sum is not required because the claimant has shown that he has throughout used due care and diligence in the obtaining and receipt of benefit to avoid overpayment.

2. This is an appeal by the claimant against the decision of the Sunderland Social Security Appeal Tribunal, given on 30 January 1986, upholding the adjudication officer's decision issued, by way of revision on a review, on 21 November 1985 in which he decided that an overpayment of unemployment benefit had been made to the claimant amounting to £27.05 and that repayment of this sum was required. The decision was a majority one.

3. The issue in the appeal is whether the claimant has throughout used due care and diligence to avoid overpayment in obtaining and receiving the unemployment benefit. Section 119(2) of the Social Security Act 1975 is relevant and is as follows:

- (2) "A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case

where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment."

It is not a question of honesty or dishonesty, the test is whether the claimant was careful to avoid overpayment. It hardly seems necessary for me to restate this principle, but I do so because the claimant's representative throughout appears to have been under a misapprehension that the claimant's honesty was in issue.

4. The claimant left the Army in the month of April 1983. He had served for 13 years and attained the rank of Sergeant. He was to serve on the Army Reserve for a further two years. He was unable to obtain employment and he signed on for unemployment benefit in April 1983. At that time he was asked whether he intended to join the Territorial Army and he said he did not and pointed out to the official concerned that he was obliged to serve for two years on the Reserve. He was told nothing about declaring any payment which he might receive as a result of his service. During his first year on the Reserve he underwent training for one day only, and at that time he was told by the army authorities that the payment which he received was not liable to be taken into account in respect of his unemployment benefit. No doubt he was told this because of the provisions of regulation 2(a) of the Social Security (Benefit) (Members of the Forces) Regulations 1975 under which a member of any Territorial or Reserve Force, who undergoes training or instruction for a period not exceeding 72 consecutive hours, is not disqualified from receiving unemployment benefit. He was not told of the time factor. In August 1984 he was instructed to report as a member of the Army Reserve on Saturday the 15 September 1984. He did so and took part in an exercise, Operation Lionheart, and subsequently received payment of £119.54 for his service which included the period 17 September to 22 September 1984. While attending the exercise he was told by members of the Territorial Army that their employers were obliged by law to give them at least one week a year off with full pay in respect of their duties. The payment which he received came to the notice of the unemployment benefit officer and enquiries were made. The claimant was sent a form UB596, which is before me in evidence, and in answer to the question why he did not inform the box clerk, when he signed on, that he would be going on Operation Lionheart he answered as follows:

"My plea is one of total ignorance. I was not informed that I must tell the box clerk; in fact I was led to believe that if I went on exercise Lionheart, all the pay for that week would be a perk, except that is for the tax.

As this was my first and last exercise since leaving the Army I must say I was misinformed.

"After serving 13 years in the Army one becomes slightly institutionalised and not very conversant with the many rules and regulations in civvy Street. I am now employed on an MSC, community programme job. As you will no doubt understand the money is not a great deal but I manage. I'm sorry for any inconvenience I may have caused".

When the claimant first claimed unemployment benefit in 1983 he received a copy of a leaflet UBL18. It is to be noted that the leaflet does not specifically deal with payments to a member of the Territorial or Reserve Force.

5. The adjudication officer issued a decision on the 21 November 1985 revising the decision awarding unemployment benefit from the 17 September to the 22 September 1984 (both dates included), and decided that the claimant was not entitled to unemployment benefit for these dates because he was a serving member of the Forces, and that as a result an overpayment of unemployment benefit had been made amounting £27.05, and repayment was required because it had not been shown that the claimant had throughout used due care and diligence in the obtaining and receipt of benefit to avoid overpayment.

6. The members of the tribunal stated their view that there was no suggestion of dishonesty or any slur on the character of the claimant. They further found that when the claimant claimed unemployment benefit initially, he was clearly informed on the form UBL18 of his responsibilities to inform the Department of any work which he expected to do or had done during the period for which he was claiming unemployment benefit. He did not inform the Department that he had received instructions to attend Operation Lionheart and he subsequently received payment of £119.54. The majority of the tribunal were satisfied that the appellant had failed to notify the Department on the 12 September 1984 that he was going on Operation Lionheart, secondly that he had cashed the giro cheques for unemployment benefit without using due care and diligence to avoid overpayment during the period when he received payment as a serving member of Her Majesty's Forces; this had resulted in an overpayment of unemployment benefit to the amount of £27.05, which the claimant was required to repay. In their findings of fact the tribunal found that the appellant was aware of his responsibilities to inform the Department of any work, which he was expected to do or had in fact done, and he had not used due care and diligence in the carrying out of those responsibilities. The dissenting member gave as the reason for dissent that he considered that the claimant was bound by the Official Secrets Act not to disclose his movements, and leaflet UBL18 gave him no indication that he was protected. The question of the Official Secrets Act was relied upon by the claimant's representative and indeed is a point which he is still pursuing in the grounds of appeal to the Commissioner.

7. It is clear from the evidence that the claimant was a serving member of the Forces on the relevant days, and would not be entitled to unemployment benefit; such is provided in regulation 2 of the Social Security (Benefit) (Members of the Forces) Regulations 1975, and it is clear from the evidence that he served as a member of the Reserve Force for a continuous period exceeding 72 consecutive hours and consequently he would not be entitled to the concession provided for in sub-paragraph (a). There is no dispute about the claimant being overpaid £27.05. I now turn to the kernel of the case which is whether the claimant used due care and diligence to avoid such overpayment. The duty imposed on the claimant is to tell the Department all the facts which he should appreciate are relevant. The duty was succinctly explained by the Commissioner in R(G) 1/79 paragraph 11 when he said

"The statutory language does not necessarily import considerations of

honesty or good faith but a standard of care and diligence which it is expected will be exercised. It involves not merely refraining from carelessness, neglect, inattention or idleness in regard to the conditions and circumstances of entitlement to benefit. It signifies also positive action such as furnishing full information to enable entitlement to benefits to be correctly ascertained and finding out by enquiry the conditions and circumstances of such entitlement".

I accept that a leaflet UBL18 brought to the notice of the claimant that he had to disclose whether he had done or expected to do any work, but the leaflet is drafted in the most general terms, and does not specifically deal with payments to which he is entitled as a member of a Territorial or Reserve Force. When he was called up for one day he was told by the army authorities that the payment which was made to him did not disqualify him for benefit purposes. He had no reason to doubt this. Such information was based on regulation 2 but the regulation in its entirety was not explained to the claimant, and one can understand why it was not. I am satisfied that prior to being called up for Operation Lionheart the claimant was under the impression that payments, which he would receive from the Army Authorities, in respect of a training period did not disqualify him from receiving unemployment benefit, and that there was no need to disclose such payments. He had received information from the Army which gave rise to this belief and he was told nothing by the unemployment officer which would disabuse him of it. I do not think that it was a careless thing for him to refrain from enquiring from the unemployment benefit officer whether the information which he had received was correct. I have asked myself whether he should have made further enquiries but in the circumstances I do not think that he should. He had an honest belief reasonably held, even though it was mistaken, and arising from information which by his training he could be expected to rely upon. I have asked myself whether the claimant would have become aware of the true position or would have reason to doubt what he had been told, I do not think he would. There was nothing on his call up papers, which are explicit, dealing with this. I am satisfied that the claimant throughout used due care and diligence in the obtaining and receipt of benefit to avoid overpayment and that repayment of the sum of £27.05 is not required from him.

8. The claimant's representative has taken a further point, namely that the claimant was subject to the Official Secrets Act and consequently he was unable to inform the unemployment office that he would be undergoing training. In my judgment there is no merit in this point, but in any event it is unnecessary for me to enter upon consideration of it as I have held in favour of the claimant on an earlier ground of appeal upon which I decided to reverse the decision of the tribunal.

(Signed) J J Skinner  
Commissioner

Date: 28 October 1986

Name of Appellant (Surname) (Other names)		Case List No. 07 / 01 (1)
Local office CROWN HOUSE SUNDERLAND U B O		Tribunal Reg No. 21 / 10
Constitution of tribunal		Names of others present (write "None" where appropriate)
*Full/Chairman and one member		Appellant's representative (state organisation if any)
Names of Tribunal Chairman and Members		MR W MARSHALL
Mrs B Doberman JP BL Mrs A Stratton Mr A Wilkinson		H.A.R.C.
Appellant notified of hearing on 20 / 1 / 1986		Witness(es)
Appellant Present*/ <del>not present</del>		Others (state capacity)
		MISS S SPEIGHT MR I BROWN (MEMBER)
		Adjudication officer MRS WITHERSPOON

Consent to hearing by less than full Tribunal

\*Appellant's consent given on tear-off portion of form AT6.  
 I consent to this case being proceeded with in the absence of a member of the Tribunal other than the Chairman.  
 I understand the Chairman will have a casting vote if required.  
 Appellant's signature

1 Chairman's note of evidence (ie concise details of all oral and written evidence put before the Tribunal)

The Adjudication Officer outlined the facts of the case and stated there were no new facts.

The Appellant's Representative made the following principal submission in writing:-

The Appellant has carried out his side of the claim and any attempt to say to the contrary is a slur on his character;

he spent 13 years in the army and was victim of institutionalisation and did not understand the complex rules of claiming benefit;

he received no help from the Department's Counter Clerk who advised him on a previous occasion when he was paid for a day on a Reservist exercise that he did not need to declare this amount and it would not affect his benefit;

and finally he was subject to the Official Secrets Act which prevented him from informing the Department.

APPELLANT

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**2 Findings of Tribunal on questions of fact material to decision (ie the relevant facts accepted from the evidence available)**

The members of the Tribunal made it clear that in their view there was no suggestion of dishonesty or any slur on the character.

1. The facts are as set forth on form AT2 para 5 under the heading "Summary of Facts" para 1 and 2 thereof.
2. When the Appellant claimed Unemployment Benefit, he was clearly informed on form 18 of his responsibilities to inform the Dept of any work which he expected to do or had done during the period when he was claiming Unemployment Benefit.
3. The Appellant did not inform the Dept. that in August 1984 he received an instruction to report on Saturday 15th September 1984 to attend Operation Lionheart and that subsequently received payment of £119.54 for his attendance which included the period from 17.9.84 - 22.9.84

/4...

**Full text of \*unanimous/\*majority decision on the \*Appeal/\*Reference (including amounts and effective date(s) as appropriate)**

The revised decision of the Adjudication Officer is confirmed and the Appellant is not entitled to Unemployment Benefit for the period from 17th - 22nd September 1984 those dates inclusive;

further there has been an over-payment of Unemployment Benefit for this period amounting to £27.05 and repayment of this sum is properly required from the Appellant.

**\*Reasons for dissent if Tribunal not unanimous**

~~Mr Wilkinson dissented because he considered that the Appellant was bound by the Official Secrets Act not to disclose his movements and the UB40 form gave him no indication that he was protected.~~

**4 Reasons for decision (ie an explanation of why, when applying the facts to the statutory provisions and case-law, a particular conclusion has been reached. And why, if it is not clear from box 2, certain evidence has been accepted or rejected).**

The Tribunal considered the Appeal under the relevant provisions of the following:-

1. The Social Security Act 1975 with particular reference to Sections 104 (1) (d) and 119 (1) and (2) thereof and
2. The Social Security (Benefit) (Members of Forces Regulations) with particular reference to Reg. 2 thereof.

On the basis of the evidence both written and oral, the majority of the Tribunal were satisfied that the Appellant had (first) failed to notify the Dept on 12.9.84 (or as soon as reasonably practicable thereafter) that he was going on Operation Lionheart on 17.9.84 and was not therefore entitled to Unemployment Benefit while was serving in H.M. Forces and (second) had cashed Giro cheques for Unemployment Benefit sent to him on 13.9.84 and 27.9.84 without using due care and diligence to avoid overpayment of Unemployment Benefit during the period when he received pay as a serving member of H.M. Forces;

this had resulted in an overpayment of Unemployment Benefit amounting to £27.05 and the Appellant is required to repay as he had not used due care and diligence to avoid such overpayment.

In reaching their decision the Tribunal gave consideration to the guidance in

"Commissioner's Decision" R (G) 1779.

Date 30.1.86 Chairman's Signature B. DOBERMAN *see below*

For Clerk's use only

Form AT 22 notes

SSAT decision notified to

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(2)

SUNDERLAND CP

SOCIAL SECURITY APPEAL TRIBUNAL HELD ON 30.1.86

TRIBUNAL REG. NO. 21/10

ANNEXURE TO BOX 2.

The Appellant was aware of his responsibilities to inform the Dept. of any work which he expected to do or had in fact done and he had not used due care and diligence in the carrying out of these responsibilities .....

SD

30.1.84

B DOBERMAN