

Overpayment - effect of signing declaration - cannot amount to misrepresentation of a material fact.

Decision Nos: C1/89(WB)
C2/89(CB)

SOCIAL SECURITY (NORTHERN IRELAND) ACTS 1975 TO 1988

WIDOWS BENEFIT AND CHILD BENEFIT

Appeal to the Social Security Commissioner
on a question of law from the decision of the
Newry Social Security Appeal Tribunal
dated 16 December 1988

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. These appeals are brought by the claimant against the decision of a Social Security Appeal Tribunal which upheld the decision of an Adjudication Officer that overpayments of £152.95 widows benefit and £108.75 child benefit were recoverable from the claimant on the grounds that she misrepresented a material fact, namely that her child last attended full-time education on 19th June 1987.
2. The facts are that the claimant was entitled to an increase in her widows benefit and to child benefit in respect of her 17 year old son so long as he was receiving full-time education. The Department discovered in January 1988 that the child had left school in June 1987 (but in accordance with the regulations he was deemed not to have left until September 1987) with the result that the overpayments of the above amounts were made. It is not in dispute that claimant was overpaid the amounts detailed above; what is in dispute is whether or not they are recoverable by the Department.
3. The Social Security Appeal Tribunal to which claimant appealed found as a fact that the change in circumstances was not reported and held the amounts were recoverable. It gave reasons for that decision as:-

(1) Child Benefit

"Misrepresentation, which may have been wholly innocent, consists in the claimant signing declaration on each payable order that she had reported any fact affecting payment. Commissioner's decisions R(SB) 9/85 and R(SB) 21/82 applied."

(2) Widows Pension

"Claimant has misrepresented material fact that Thomas last attended full-time education on 19.6.87. This misrepresentation may have been wholly innocent, claimant has continuing obligation."

4. The Law

The Department's right to seek repayment of monies overpaid is found in Article 54 of the Social Security (Northern Ireland) Order 1986, the relevant portions of which read:-

"54.- (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -

(a) a payment has been made in respect of a benefit to which this Article applies; or

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

The Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

(2) An amount recoverable under paragraph (1) is in all cases recoverable from the person who misrepresented the fact or failed to disclose it."

Regulation 32(1) of the Social Security (Claims & Payments) Regulations (Northern Ireland) 1987 reads:-

"Information to be given when obtaining payment of benefit

32.- (1) Every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish, in such manner and at such times as the Department may determine, such certificates and other documents and such information or facts affecting the right to benefit or to its receipt as the Department may require (either as a condition on which any sum or sums shall be receivable or otherwise), and in particular shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing of any such change to the appropriate office."

5. The declaration which was signed by the claimant and referred to by the Tribunal in its decision is the same in respect of both benefits and reads:-

"I declare that I have read and understood all the instructions in this Order Book, that I have correctly reported any facts which would effect the amount of my payment and that I am entitled to the above sum. I acknowledge receipt of the above sum."

The instructions in the Child Order Book which are referred to in the declaration are found at the back of the book and are headed:-

"CHANGES WHICH YOU MUST REPORT

If any of the following changes happen your right to further payment may be affected. You must tell Child Benefit Office and return your order book at once. An envelope for this can be obtained at any post office. When reporting changes always give the full information including your child benefit number which is shown on the front cover of this order book, and begins with the letter C."

Below that there follows 23 changes which must be reported; 13 of these refer to children. The section headed "Changes affecting Children" (as far as is relevant to this case) reads:-

"You must report and return your order book IMMEDIATELY if:-

- (f) there is any other change in circumstances about the education of a child over age 16 which affects the information you may have given to the Department."

The instructions in the Widows Pensions Book run along the same lines and give instructions as to what must happen if there are changes in circumstances. The section headed "Changes affecting Children" instructs the claimant to return the order book "... if any of the following changes affects a child IN RESPECT OF WHOM YOU ARE GETTING AN ADDITION OR PENSION" and there follows 16 changes which would be material and which must be reported.

6. At the hearing before me Mr Brady on behalf of the claimant argued that she was an innocent party in the matter. He said that because of family circumstances she was unaware that the child was not attending school, that she had bought him the uniform to begin in September and that it was only by chance that she discovered that he was not attending school. He said that at no time had she failed to disclose a material fact because she was at all times unaware that he was not at school. As far as misrepresentation was concerned the declaration she signed was merely a declaration that she had reported any change and argued that that did not amount to a misrepresentation of a material fact which was that the child had left school.
7. Mr Kelly on behalf of the Adjudication Officer considered the matter to be beyond dispute. He said once a declaration was signed that she had correctly reported any fact which could affect the amount of payment, she misrepresented the material fact which caused the overpayment. He relied on a comment of Lord Denning in *Curtess -v- Chemical Cleaning and Dying Company Limited* in which he said:-

"Any behaviour by word or conduct is sufficient to be a misrepresentation if it is such to mislead the other party."

He also relied on the decision of a Great Britain Commissioner, R(SB) 9/85 which was referred to in the Tribunal's decision and in which the Commissioner said:-

"It is settled law that one cannot be held to have failed to disclose something of which one had no knowledge. With innocent misrepresentation, however, the case is by very definition quite otherwise. ... Misrepresentation is founded on positive and deliberate action. In this case it was the action of signing declarations that there had been no change in the circumstances of the claimant's wife. If the claimant did not know whether there had or had not been any such changes he should not have signed. "I do not know", or "not to my knowledge" would have put him beyond risk and would at the same time have put the Department upon further enquiry. But he made no such qualification to his declaration. The system could not work if claimants could shelter behind their failure to make adequate enquiries into the accuracy of the facts declared by them."

He also said that the obligation to report was a continuing one and that the signing was a misrepresentation because it created the impression that the facts had not changed. He said a claimant does not have to state something about a material fact eg attending school, to misrepresent; all a claimant has to do is to create a mistaken impression which will mislead and in this case the signing of the declaration was sufficient to mislead the Department.

8. I am indebted to both Mr Kelly and Mr Brady for their arguments in this case. The point is a short one, the Adjudication Officer decided claimant misrepresented the material fact that Thomas last attended full-time education on 19 June 1987 and that this caused the overpayments. The only matter which has to be decided is whether or not the signing of the declaration referred to above constituted such a misrepresentation of that material fact. It is interesting to note that in not one of the Commissioners' decisions relied upon by Mr Kelly or the Tribunal is it alleged that there was misrepresentation by signing the declaration; but only with the allegation of failure to report a change. In Great Britain Commissioner's Decision R(SB) 9/85 the head note reads:-

"The claimant had declared that his wife was working but failed to report an increase in her earnings until 6 months after the event while regularly signing declarations to the effect that his circumstances had not changed."

But there is no indication as to the grounds on which the recovery was sought or as to whether there as an allegation that there had been misrepresentation. In any event in a subsequent case also referred to by Mr Kelly, R(SB) 15/87, where the point turned on whether or not claimant had duly reported a change in the circumstances of his entitlement to supplementary benefit and where during a long period he had been signing the same declaration a Tribunal of Commissioners not only did not refer to R(SB) 9/85 but went further and recorded:-

"There is no suggestion of misrepresentation by the claimant and the adjudication officer accepted that the claimant's "failure to disclose a material fact was wholly innocent", not that that relieves him of his duty to make such disclosure."

I feel justified therefore in following the Tribunal of Commissioners and not following R(SB) 9/85.

9. I now turn to the other case referred to by the Tribunal R(SB) 21/82. This case relates to a couple who signed statements that they had no capital resources, but after their death it was discovered that they had considerable capital resources. Repayment of the overpayment was sought against the estate on the grounds of failure to disclose. The argument was centered upon knowledge and whether or not the person had knowledge of the true facts which were not disclosed. The Commissioner, however, after having referred the matter back to be reheard by a different Social Security Appeal Tribunal went on to comment:-

"I should for completeness mention that whilst the Department have not in their terms of reference in this particular case incorporated any charge of misrepresentation alleging only failure to disclose, it is settled law that knowledge is not a material ingredient in innocent misrepresentation. Thus if knowledge is a material ingredient in failure to disclose the alternative charge may in other cases be an easier ground to establish."

I have considered these comments in relation to the facts of the case in which they were made and the instant case. As far as the case in which they were made is concerned they were both relevant and appropriate because a declaration that persons did not have any capital resources when in fact they had substantial resources was a clear misrepresentation. However, it is difficult to see the relevance to the instant case were there was no positive statement of the relevant fact which caused the overpayment.

10. I am satisfied that the Article 54 quoted above is intended to embrace two separate and distinct elements, the first being a misrepresentation of a material fact which caused the overpayment and the second being a failure to disclose a material fact which causes the overpayment and I am satisfied Regulation 32 of the Claims and Payments Regulations which I have quoted supports this view. Under the misrepresentation aspect there must be a positive and deliberate representation of the material fact which causes the overpayment. However, the 'failure to report' aspect is the one which is related to the declaration signed by the claimant because all the references in the declaration are to the instructions at the back of the book and the instructions in the back of the book all relate to disclosing information. It is quite clear that it was intended to cover a situation where a claimant read the instructions and declared that they had been complied with. I think it is impossible to turn a declaration that a person has reported a change into being a material fact of which there are 23 detailed in one order book. A misrepresentation of a material fact must be just that.

11. I now turn to the definition of Lord Denning relied upon by Mr. Kelly. The case relates to a receipt signed by a Plaintiff which contained a clause that a dress which she had left for cleaning was accepted on condition that the company was not liable for any damage whatsoever arising and it was alleged that the Defendant's agent misrepresented the extent of the non-acceptance of liability. I do not find this case helpful because in it there was a clear misrepresentation of a material fact whereas in the instant case the material fact has been identified by the Adjudication Officer but the declaration merely relates to reporting any change. I also reject Mr Kelly's argument that creating a mistaken impression is enough to amount to misrepresentation of a material fact.

12. One must always bear in mind that what is being discussed here is not a statutory provision but a receipt or declaration which is attached either to the paying order or the book from which the benefit may be collected. However, there is another method of paying the benefit. Regulation 21 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1988 provides:-

"...any benefit may, on the application of the person claiming or entitled to it and with the consent of the Department be paid by way of automated or direct credit transfer into a bank or other account."

When that is done no declaration is signed. The obligation to report still persists; as Mr Kelly rightly said it was a continuing obligation, but any misrepresentation would be in respect of the claim form or specific information given to the Department. The provisions in regulation 11 of the Social Security (Payment on Account, Overpayment and Recovery) Regulations (Northern Ireland) 1988 sets out prescribed conditions under which recovery of overpayment by direct debit may be effected and in regulation 14 the following appears which in my view also supports the contention that the misrepresentation and the failure to disclose are 2 separate and distinct aspects of the right to recovery and should not be linked. Regulation 14 reads:-

"14-(1) For the purposes of Article 54(1) of the Order, where income support or family credit has been overpaid in consequence of a misrepresentation as to the capital a claimant possesses or a failure to disclose its existence, the adjudicating authority shall ..."

So here again there is a distinct line drawn between misrepresentation and failure to disclose.

13. Since the hearing I have had the benefit of reading the as yet unreported decision of Great Britain Commissioner C(SB) 790/88 which concerns supplementary benefit paid in respect of a child and the declaration similar to the one in the instant case was signed over a period of time by the claimant who had failed to report that she was receiving child benefit and supplementary benefit at the same time. The Adjudication Officer sought recovery of the overpayment on the grounds that the signing of the declaration was a misrepresentation and the Social Security Appeal Tribunal upheld that decision and took the view, as in the instant case, that the signing of the Order Book was a

misrepresentation although it may have been an innocent one. The Commissioner, however, rejected that argument and summarised his conclusions as follows:-

"What was the representation made in that declaration? It seems to me that it was no more than that the claimant had reported any fact as he understood should be reported as a result of reading the instructions. .. The point turns on what was actually represented and not whether the representation was innocent or otherwise. The declaration guards against claimants failing to disclose material facts but in my judgment it is of no assistance to the Adjudication Officer on the question of misrepresentation in the circumstances of the present case ... I am satisfied that the Tribunal were wrong in law to treat the statement as representation of the actual material fact relied upon by the Adjudication Officer ..."

14. I am satisfied that the signing of the declaration does not and cannot amount to the misrepresentation of a material fact which has been identified by the Adjudication Officer as "that Thomas last attended full-time education on 19 June 1987". I therefore allow the appeal and set aside the decision of the Tribunal as wrong in law. As the only point in issue was misrepresentation and as the Adjudication Officer and the Social Security Appeal Tribunal based their decision on that point alone, I feel it is a proper case in which to exercise the jurisdiction conferred upon me to give the decision which the Tribunal should have given. As the claimant did not misrepresent a material fact then the amounts claimed are not recoverable.

(Signed):

B. Skelley

COMMISSIONER

(Date):

22ND MARCH 1990