Decision No. C8/00-01(IS)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCOME SUPPORT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 21 September 1999

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal, leave having been granted by myself, by the claimant against a decision dated 21st September 1999 of a Social Security Appeal Tribunal (hereinafter called "the Tribunal") sitting at Belfast. That Tribunal had disallowed the claimant's appeal against a decision of an Adjudication Officer dated 10th January 1999 reviewing and revising an earlier decision relating to the claimant's Income Support entitlement. The Adjudication Officer had decided that the claimant had failed to disclose the material fact that his Incapacity Benefit had increased. As a consequence Income Support amounting to £211.50 from 17th September 1998 to 30th December 1998 (inclusive) had been paid which would not have been paid but for the failure to disclose. Accordingly the Adjudication Officer decided that the overpayment of Income Support of £211.50 was recoverable from the claimant. The Tribunal upheld the decision and the claimant, with my leave, appealed to me. Neither before the Tribunal nor before me has there been any dispute that the said sum was overpaid.

2. The claimant's grounds for appeal were set out in a letter dated 29th February 2000 from the Law Centre (NI). The grounds were as follows:-

   "1. Information technology advances by the Department have increased the accessibility of information to staff of individual benefit branches to decisions on entitlement to a benefit administered by another branch. The information required to be disclosed in this case was already in the possession of the Income Support Branch via the Department's computer system. The claimant could not fail to disclose something already known to the Department and therefore the tribunal erred in law in determining that benefit was recoverable.

   2. In the alternative, the failure to disclose on the part of the claimant was not the cause of the overpayment, which was caused by the failure to transfer the required information between the Incapacity Benefit Branch and the Income Support

Branch or the failure of the Branch to check the Departmental computer system."

3. Observations on the appeal were made by Mrs McAllister of the Decision Making and Appeals Unit of the Department by letter of 17th July 2000 and further comment on these observations was made by Mr Stockman of the Law Centre by letter of 29th August 2000. Additional comments were made by Mrs McAllister by letter of 2nd October 2000 and by Mr Stockman by letter of 2nd November 2000. I also held a hearing of the appeal which was attended by Mr Stockman and by Mrs McAllister. After the hearing I gave 14 days for any further submissions. Mrs McAllister submitted certain information as to dates etc. of benefit changes. These matters had been mentioned by me in the course of the hearing but in the event do not appear to me to assist the claimant and were not before the Tribunal.

4. I am grateful to both representatives for their very able submissions in this case. In addition I am grateful to Mrs McAllister for the considerable work which she has done in obtaining background information as to the working of the Department's computer system and other factual matters regarding Departmental practice etc.

5. At hearing Mr Stockman stated that he was not proceeding on ground 2 set out above. He also conceded that there had been no disclosure by the claimant of the material fact that the Incapacity Benefit he received had changed from the higher short term rate to the long term rate. I consider that this concession was properly made and that Mr Stockman was correct in not proceeding with ground two.

6. As regards ground one Mr Stockman had two main contentions. Firstly, he submitted that it was impossible for a person ("the putative discloser") to disclose information to a person ("the putative disclosee") which that person already knew. He stated that he based this contention on *R(SB)15/87* and on the case of *Foster v Federal Commissioner Of Taxation (1951) 82 CLR 606* mentioned therein and on general insurance law.

7. Secondly he contended that disclosure of the change in his Incapacity Benefit rate was not reasonably to be expected from the claimant who had made the reasonable assumption that the Incapacity Benefit section would inform the Income Support section of the fact that his rate had changed.

8. Mr Stockman also introduced a further ground of appeal. This was that on the evidence the Tribunal had not been entitled to conclude that the Income Support Section had not been informed by the Incapacity Benefit Section of the change in the claimant's benefit. In connection with this ground Mr Stockman submitted that the document headed "Income Support and Incapacity Benefit" handed in by Mrs McAllister was a helpful guide to Departmental procedures and he referred particularly to paragraph 11 thereof. This paragraph explained the procedures in relation to a document entitled "Form C73/S". This form had 3 parts A, B and C.

Mr Stockman stated that he understood that this form was usually completed and sent by the Income Support section of the Department to the Incapacity Benefit section. Part B of the form was to be returned by the Incapacity Benefit section within a week by way of acknowledgement and part C thereof to be sent to the Income Support section by Incapacity Benefit section in the circumstances set out in the form. Those circumstances included Incapacity Benefit increasing. That was the procedure as set down in the form. It was, Mr Stockman conceded, an administrative backup procedure.

9. Mr Stockman stated that there was further evidence available in this case (which had not been before the Tribunal) that in fact part C of the C73/S form had not been sent by Incapacity Benefit section to Income Support section and he accepted that it had not in fact been sent. This part C would if sent have advised Income Support Section of the increase in the claimant's Incapacity Benefit.

10. Mr Stockman submitted that the evidence before the Tribunal had included an addendum which indicated that Andersonstown Social Security Office had no record of this C73/S form being received by them. He submitted that decision *CIS5848/99* (a decision of Commissioner Howell in Great Britain) had relevance to notification between different offices within the Department. Issues relating to the weeding etc of documents were discussed in that case. The onus in that case was on the Department to prove failure to disclose and an issue arose in that case as to whether on the balance of probabilities there had been notification from Child Benefit section to the Income Support office of a change in Child Benefit. The Commissioner found that the absence of a record of the relevant form having been received was not of itself conclusive that no such receipt had taken place. Mr Stockman relied in particular on paragraphs 19 to 21 of the decision.

11. Those paragraphs state:-

> "19. In the present case, as I have already indicated, all the evidence before the tribunal and before me tends to show on the balance of probabilities that there *was* in fact due notification to the local office in accordance with the department's standard practice. Although the paper evidence is incomplete because of the department's practice of destroying its own documents, there has been no evidence whatever produced to show that there was some failure in the department's internal communication systems, or to contradict the express evidence given on behalf of the Secretary of State by the child benefit officer in the memorandum on pages 29-30 that they "*would have notified* the relevant income support office": in other words it was likely and probable that they had done so, though because of the destruction of paper records it was impossible to cross-check against these so as to be absolutely certain.

> 20. In my judgment that evidence, together with the confirmation by the adjudication officer himself on page 31 that the claimant had been recorded by the child benefit centre as an income support claimant, is sufficient to rebut any assertion by the Secretary of State that the proper internal procedures cannot have been followed in the present case if the benefit went on being paid as it did. I do not agree with the Secretary of State's submission in para 11 on page 44 that the evidence of probable notification to the local office is "inconclusive", when the child benefit centre have confirmed that their records "show an income support interest" which would be the normal corollary to such notification having been given in accordance with the department's own standard published practice. The fact that there is no evidence to confirm this *conclusively* at the receiving end, because the department has destroyed whatever evidence there might have been, does not in my judgment destroy the value of whatever evidence still does exist to show what is *likely* to have happened, on the balance of probabilities. It is certainly not sufficient to enable the Secretary of State to establish the converse, that on the balance of probabilities it did *not* in fact happen.
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> 21. For those reasons on the evidence now before me I find as a fact, on the balance of probabilities, that the claimant's child benefit award was duly communicated by the child benefit centre to the officials concerned with calculating her continuing income support entitlement. Accordingly their failure to recalculate it has not been shown to be caused by the lack of a separate notification of the same piece of information from her."

12. Mr Stockman submitted that in the present case a C73/S form was in use. The absence of the form in the claimant's file in the context where procedures existed to have the form sent was not necessarily conclusive that there had been no notification by means of the Income Support section sending the said form to the Incapacity Benefit section. The proper procedure would be that the form would be sent. The Tribunal should have investigated whether or not the form had been sent and was not entitled to assume no document had been sent. He relied on paragraphs 19 to 21 of *CIS5848/99* decision for that statement.

13. He stated that the C73/S form initially completed by the Income Support section and sent to the Incapacity Benefit section would indicate that the Income Support section was aware that the short term rate was in payment. Part A thereof indicated this and the termination date. As the short term rate had a definite termination date and the long term rate would then come into payment, even if part C of the C73/S form was not sent by the Income Support section to the Incapacity Benefit section it would not matter. It would be known to someone with a knowledge of Social Security law that a change would take place. The change was universal in terms of the start date and the change in rate. Even though the specific date for the change in rate was not on the form which Income Support held it was reasonable to expect a knowledge of Social Security law from the

Department and this could amount to the Department having knowledge of the date of change and the fact that the rate had changed. There could have been anticipatory knowledge of the material fact of the change of rate.

14. In support of ground 1 and contention 1 Mr Stockman submitted that he was relying on the premise, indicated in *CIS5848/99*, that a person could not disclose that which the putative disclosee already knew. The putative discloser would not be revealing anything. That putative discloser's state of knowledge as to the putative disclosee's knowledge would not operate to make the imparting of factual information a disclosure or otherwise. I raised the query with him as to whether *R(SB)15/87* and the Foster case (which were quoted as authorities in *CIS5848/99)* were indeed authority for that proposition. He acknowledged that *R(SB)15/87* and the Foster case did rely on the knowledge of the putative discloser of what the putative disclosee already knew.

15. Mr Stockman then submitted that in this case, as the Department had brought about the change it was likely that the claimant thought that the Department's various sections were aware of the change. The requirement in Foster that to the best of the putative discloser's knowledge the putative disclosee already knew the relevant fact would be addressed by that. The putative discloser would have been aware in a broad sense that the various branches of the Department were aware that there had been a change in the benefit rate.

16. Mr Stockman also submitted that with increasing computerisation and the fact that the Common Enquiry System (a system whereby information could be accessed by different sections) was in place at the relevant time the Income Support section of the Department could have accessed the information on the claimant's Incapacity Benefit file. Rates of payment, awards etc could be read off a computer system. He described the information on the computer system as being like information in a filing cabinet there being no restriction on the level of security access to the system. The Income Support section could therefore access this information.

17. In support of his second contention i.e. that disclosure was not reasonably to be expected, Mr Stockman stated that he was not sure if a claimant would receive an explanation of a change in benefit. There were two methods of obtaining information in the Department – the manual method and the Common Enquiry System. In this case the change in rate of benefit had been brought about by the Department. Going back to *CIS5848/99* Mr Stockman submitted that the answer to what was reasonably required of a claimant by way of disclosure must be relevant to present not past conditions. In this case the Department had access to data. Much of the case law in relation to the question of failure to disclose was rooted in the mid 1980's and reflected the situation prior to the technological advances applicable at the time of this case.

18. Mr Stockman further submitted that claimants were also aware of modern technology being aware that the letters they received were computerised. Computerised decisions were valid. In this situation it was necessary to look at present day circumstances.

19. Mr Stockman further submitted that it was not reasonable to expect the claimant to tell the Department something which in essence the Department was telling him and which it was sharing with its other branches. It was reasonable for the claimant to assume that the Department's Incapacity Benefit Branch would itself notify the Income Support section if there was to be any change in the benefit rate.

20. In relation to the order book itself Mr Stockman conceded that the general duty of informing the Department of relevant facts under regulation 32 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 remained. He also conceded that point 9 of the Income Support order book instructed the claimant to advise the Department if any benefit went up or down. Referring to Mr Commissioner Howell's decision he stated that the law and the legal tests remained the same. The question was what was a normal view of what was required in to-day's conditions.

21. Mrs McAllister opposed the appeal. She stated that the Tribunal had not erred in law. Dealing with ground 1, contention 1, Mrs McAllister stated that the Tribunal did not err in holding that the Income Support section of the Department did not know about the increase in Incapacity Benefit. The Tribunal had made a specific finding on this. Mrs McAllister produced evidence that in fact the usual back-up procedures had broken down and that Andersonstown Social Security Office was not informed of the change in the Incapacity Benefit rate. This evidence not having been before the Tribunal, I informed Mrs McAllister and Mr Stockman that I would accept the evidence only if I considered that the Tribunal had erred in law.

22. Mrs McAllister conceded that perhaps the Tribunal could have gone rather further in investigating whether or not Andersonstown Social Security Office had in fact been informed of the change in the Incapacity Benefit rate but submitted that the Tribunal was entitled to its conclusion that the procedures had broken down.

23. As regards Mr Stockman's arguments in relation to the Common Enquiry System Mrs McAllister stated that it had to be asked what exactly the various computer systems were capable of and how the sections linked. In this particular case there was no link between Incapacity Benefit and Income Support. The Common Enquiry System required a prompt. It was not linked to the Income Support system but was used as a means to verify information which was already held on file. In that respect the system was no different than what would formerly have been done by telephone. It was like a filing cabinet but the question had to be asked as to where it was located.

24. Mrs McAllister submitted that it placed too great a burden on the Department to go into the Common Enquiry System all the time. The system required a prompt and there would be no occasion for making the prompt if disclosure was not properly made.

25. Dealing with ground one, contention two, Mrs McAllister referred to Great Britain Commissioner's decision *R(SB)15/87*. She submitted that this decision was authority for the proposition that the onus of disclosure rested on the claimant but that the claimant could be relieved of this if to the claimant's knowledge the relevant office already knew the material fact which was in question. In that connection she referred to paragraph 25 of *R(SB)15/87*. That paragraph states:-

> "The Shorter Oxford English Dictionary (3rd edition) defines the verb to "disclose" as meaning to "open up to the knowledge of others; to reveal". We respectfully agree with Latham C.J's opinion [*in the Foster case*] that disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made. But section 20 leaves to inference the questions to and by whom the relevant disclosure is to be made. Mr Powell submitted that, in the context of the section it could only be to the Secretary of State. While we accept that it is the only practical interpretation that disclosure is required, if not to the Secretary of State personally, then at least to some person or persons having a connection with the Secretary of State such as members of the staff of his Department, we reject the submissions that disclosure to any member of the staff of the Department at large constitutes disclosure to the Secretary of State so as to satisfy section 20; and that further disclosure thereafter is impossible. Such a submission in our view goes far beyond anything said by Latham C.J. in the passage cited and far beyond anything demanded by the express words of section 20 itself."

26. In relation to the present case Mrs McAllister submitted that the claimant assumed the relevant information would be passed from one branch to the other. She referred to decision *C17/98(IS)* (a decision of my own) for the proposition that mere assumption was not sufficient, there had to be a factual basis for it. There was no evidence anywhere in the records nor was it contended that the claimant had ever been told he did not need to inform the Income Support section of the changing rate. Indeed the order book notes instructed the claimant to inform that section of any change in benefit and gave him details of who to inform and how.

27. Referring to *CG/4494/99* (a decision of a Tribunal of Commissioners in Great Britain) she submitted that paragraph 13 thereof was authority for the proposition that the Department could define where and how disclosure of material facts was to be made. She submitted that the claimant was not relieved of his duty to make disclosure to the particular office unless he had reason to believe that that particular office knew of the change of material fact.

28. She submitted that paragraph 11 of that decision had rejected the imputed knowledge argument put forward by Mr Stockman in this present case and stated that unless the Department had been told or was shown to know the material fact there was no knowledge relevant to cut the causal link between failure to disclose that fact and the overpayment as a result of that fact not being known.

29. In this case Mrs McAllister submitted that there was not sufficient knowledge to break the chain of causation. She submitted that at paragraph 14 the Tribunal of Commissioners endorsed *R(SB)15/87*. She stated that in this case there was not even the integral computer link which had existed in *CG/4494/99* and *CG5631/99*.

30. The said paragraph states:-

> "In short we are satisfied that R(SB)15/87 and, indeed, R(SB)21/82 which determined that a failure to disclose could occur only where disclosure was reasonably to be expected, which would have been the case here, were correctly decided. We endorse them. In general so far as disclosing or representing is concerned, the objective to do so must be either to that unit clearly stated in relevant correspondence or the relevant order book or otherwise to the office, or as it was submitted at one stage the team, so far as that can be clearly identified within the office in an appropriate case."

31. In Mrs McAllister's submission unless the computer systems were advanced to such a degree that the relevant office (Income Support) could be said to have knowledge of the material fact of the change in the claimant's Incapacity Benefit rate then *R(SB)15/87* continued to apply. The claimant was under an onus of disclosure and could not be relieved of that duty because the relevant office did not know that the rate had increased.

32. Mrs McAllister also dealt with the ground of appeal (ground two) which Mr Stockman had already stated he did not intend to put forward (the causal link between the failure to disclose and the overpayment). So doing she referred to the case of *Duggan v Chief Adjudication Officer* (reported as an appendix to *R(SB)13/89)* and to page 17 of the judgment which addressed this point. She referred particularly to its endorsement of the view expressed in *R(SB)13/89* that "negligence on the part of the Department does not itself exonerate a claimant from his or her obligation under the relevant legislation."

33. Relying on the decision of Mr Commissioner Rowland in *CIS5131/98* and paragraph 11 she stated that negligence on the part of the Agency, if it existed, made no difference to the causal link. In *CIS/064/98* the causal link was also considered and the Commissioner was satisfied that procedures had broken down but this did not affect the duty on the

claimant. Failure of administrative procedures did not break the chain of causation.

34. In Mrs McAllister's submission the Tribunal had considered the correct principles as set out in *R(SB)15/87*. The instant decision perhaps fell a little short but overall had further investigations been made it would have made no difference. The Tribunal did not err in holding that benefit was recoverable. The claimant had not fulfilled his duty of disclosure and she therefore opposed the appeal.

35. Mr Stockman in response said that he was not arguing that knowledge anywhere would be enough to prevent disclosure being able to be made. He stated that he had conceded on the causal link as he understood that to break the causal link it would have to be shown that even if the claimant had made disclosure the overpayment would still have been made and that could not be shown.

36. He referred to decision *CIS5131/98* (a decision of Mr Commissioner Rowland in Great Britain) which was a decision relating to misrepresentation. He referred in particular to the middle point at paragraph 10 where Mr Commissioner Rowland appeared to agree with paragraph 23 of Mr Commissioner Howell's decision referred to above. The relevant sentence read:-

> "Plainly, increasing use of computers may make it reasonable for a claimant to believe that information is available to, and will be obtained by, those officials in situations where that might not have been a reasonable belief in the past and I therefore agree with what was said in paragraph 23 of CIS/5848/99."

[I set out the said paragraph 23 later in this decision]

37. I gave the parties 14 days to put in further written submissions if they so wished and informed Mr Stockman that if I was in agreement with his contention that there was knowledge by the Income Support section of the fact that the amount of the claimant's Incapacity Benefit had changed I would direct both himself and Mrs McAllister to put in further submissions on whether the state of mind of the discloser (i.e. did he need to know that the disclosee knew?) was relevant.

38. <u>LEGISLATION</u>

(1) Regulation 32 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987 provides as follows:-

> "(1) Except in the case of a Jobseekers Allowance, 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 (unless the Department determines in any particular case to accept notice given otherwise than in writing) of any such change to the appropriate office."

(2) Section 69 of the Social Security Administration (Northern Ireland) Act 1992 provides as follows:-

"**69.**-(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 section 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) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall

(a) determine whether any, and if so what, amount is recoverable under that
subsection by the Department, and

(b) specify the period during which that amount was paid to the person concerned."

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

(4) In relation to cases where payments of a benefit to which this section applies have been credited to a bank account or other account under arrangements made with the agreement of the

beneficiary or a person acting for him, circumstances may be prescribed in which the Department is to be entitled to recover any amount paid in excess of entitlement; but any such regulations shall not apply in relation to any payment unless before he agreed to the arrangements such notice of the effect of the regulations as may be prescribed was given in such manner as may be prescribed to the beneficiary or to a person acting for him.

(5) Except where regulations otherwise provide, an amount shall not be
recoverable under regulations under subsection (4) above unless

(a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review; and

(b) it has been determined on the appeal or review that the amount is so recoverable.

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on review."

39. THE MAIN AUTHORITIES

(1) *R(SB)15/87* is a decision of a Tribunal of Commissioners in Great Britain. The factual background of that case is as follows:-

Between January 1981 and December 1983 the claimant received Supplementary Benefit for himself, his wife and his three children, E, S and K. In November 1983 responding to an enquiry from the Supplementary Benefit section of the office handling his claim, the claimant disclosed that both E and S were no longer dependent on him. It transpired that E had left school in the summer of 1982 and had claimed Supplementary Benefit in her own right in September 1982; and that S had left school in the summer of 1983 and had started a YTS course in July 1983. The Adjudication Officer decided that Supplementary Benefit totalling £980.28 had been overpaid to the claimant in the case between September 1982 and December 1983 and was recoverable from him under section 20 of the Supplementary Benefits Act. The claimant appealed against that decision. Before the matter was put before a Tribunal the Adjudication Officer reviewed his decision and revised the amount he had determined was recoverable from the claimant to £793.38.

The Tribunal found that in making her own claim to Supplementary Benefit in September 1982 E had disclosed to the Supplementary Benefit section that her father was receiving Supplementary Benefit. It held that that constituted due notification made on the claimant's behalf of the change in his circumstances and that consequently there had been no initial failure to disclose. But it further held that once it became clear in October 1982 that that notification had been ineffective the claimant was obliged to make an

effective disclosure. Accordingly it varied the Adjudication Officer's decision, holding that only the benefit overpaid to the claimant after 15th October 1982 was recoverable from him. The computation of the result and recoverable overpayment was left to the Adjudication Officer.

The Tribunal also held that the fact that in August 1983 the claimant's wife had called at another section of the office to exchange a child benefit book relating to S and K for a book relating to K only did not assist the claimant. The claimant appealed to a Social Security Commissioner.

The appeal was heard by a Tribunal of Commissioners.

Amongst other things the Tribunal of Commissioners held that:-

1. Once disclosure had been made to a particular person there could be no question of an obligation to repeat that disclosure to the same person.

2. The duty to disclose imposed by section 20 of the Supplementary Benefits Act (the relevant legislation) was a duty to make disclosure to a member or members of staff of the local DHSS office handling the claimant's claim to Supplementary Benefit.

3. The claimant's duty to disclose was best fulfilled by disclosure to the local DHSS office where his claim was being handled either in the claim form or otherwise in terms that made sufficient reference to his claim to enable the matter disclosed to be referred to the proper person.

4. The claimant's duty could be fairly filled by disclosure elsewhere. If, however, an officer in, for instance another DHSS office or local unemployment benefit office accepted information in circumstances which made it reasonable for the claimant to think the matters disclosed would be passed on to the local office in question and the claimant subsequently became aware or should have become aware, that the information had not been so transmitted the claimant was then under a duty to make a disclosure to the right person in the right place.

5. The onus of disclosure rested with the claimant and disclosure had to be made in connection with the claimant's own benefit by the claimant himself or, on his behalf, by someone else. Disclosure could be made "on behalf" of the claimant if someone else gave information concerning that claimant in the course of some entirely different transaction provided that:-

    (a) The information was given to the relevant benefit office;

    (b) The claimant was aware that the information had been so given; and

(c) In the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself.

6. Casual or incidental disclosure by some other person (such as that made by E when making her own claim to benefit) of information regarding the claimant would not discharge the duty of disclosure.

At paragraph 25 the Tribunal of Commissioners dealt with the concept of disclosure, what disclosure itself meant and to whom it must be made. It stated:-

> "The Shorter Oxford English Dictionary (third addition) defines the verb to "disclose" as meaning to "open up to the knowledge of others; to reveal. We respectfully agree with Latham CJ's opinion [*given in the Foster case*] that disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made."

The opinion of Latham CJ was extracted at paragraph 19 of *R(SB)15/87* as follows:-

> "In my opinion it is not possible, according to the ordinary use of language, to "disclose" to a person a fact of which he is, to the knowledge of the person making a statement as to the fact, already aware. There is a difference between "disclosing" a fact and stating a fact. Disclosure consists in the statement of the fact by way of disclosure so as to reveal or make apparent that which (so far as the "discloser" knows) was previously unknown to the person to whom the statement was made. Thus ... the failure of the [plaintiff] to repeat to the Commissioner what he already knew did not constitute a failure to disclose material facts."

(2) <u>CIS5848/99 (decision of Mr Commissioner Howell)</u>

The ratio decidendi in the case was that the Tribunal had failed to deal with the central issues placed before them. At paragraph 14 the Commissioner stated: -

> "14. It is established by the decision of the tribunal of Commissioners in case R(SB)15/87 that overpaid benefit is only recoverable from the claimant on the basis of a "failure to disclose" under what is now section 71 [*sic*] Social Security Administration Act 1992 if there has been a lack of *disclosure* on the part of the claimant or other person sought to be made liable, in the sense of not revealing to the Secretary of State or other person to whom the statement should be made some fact of which that person is otherwise unaware. If the person already knows the fact, then the claimant cannot "disclose" it to him. Liability to repay under s. 71 is not stated to arise, and does not in fact arise, merely by reason of a failure to make an express statement of what is

known already. Such a statement in those circumstances would serve no useful purpose, and would not amount to "disclosure": see R(SB)15/87 paras 19-25, *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606, 614-615."

At paragraph 15 et seq the Commissioner states: -

"15. Consequently, on the evidence before the tribunal, the claimant's representative invited them to hold on the balance of probabilities that the child benefit centre had indeed duly notified the claimant's local office of the award of child benefit, and the continuing overpayment was the result of that office's failure to act on the information it had, rather than the lack of an additional notification from the claimant herself. As the written submission to the tribunal on pages 26-27 put it, "the notification by the child benefit centre broke the causal link".

16. As is common ground between the claimant's representative and the Secretary of State in the submission dated 13th January 2000 at pages 42-45, the tribunal wholly and inexplicably failed to deal with these clearly presented arguments at all. They recorded in their statement of reasons only that:

> "[The claimant] was aware of the material facts that Child Benefit became payable to her on 20.1.98. Disclosure by her was reasonably to be expected. There was a failure to disclose. The failure related to a material fact. The Secretary of State seeking to recover the expenditure is the Secretary of State who incurred it. The expenditure by the relevant Secretary of State was incurred in consequence of the failure. The amount of income support overpaid for the period 24.12.1997 to 16.6.1998 was £1047.90 and is recoverable from [the claimant]."

17. Those flat, almost mechanistic, statements of conclusion make no apparent reference to the serious issues raised on behalf of the claimant about whether there was a reasonable need for separate notification by her, and whether the lack of it had in fact been the cause of the continuing overpayment. As a statement of "reasons" this passage is of course quite inadequate to show that the tribunal had properly addressed the material issues before them. I have no hesitation in accepting the submissions of both the Secretary of State and the claimant's representative that because of this, and the tribunal's apparent disregard of the evidence tending to show the probability of an actual notification by the child benefit centre to the local office, the decision was so far defective as to be erroneous in law; and on that ground I set it aside."

At paragraphs 22-23 the Commissioner stated:-

22. That is sufficient to dispose of this case in favour of the claimant but in case it should go further, and also with an eye to the treatment of other similar cases of alleged overpayment in the future, I desire to add that it does not seem to me that it should be regarded as a foregone conclusion in favour of the Secretary of State in all such cases nowadays that the responsibility must always be on the claimant to ensure that each one of possibly numerous different sets of officials or agents dealing with his or her social security affairs on behalf of the Secretary of State is made *separately* aware of material information. The normal position under the general law is that actual knowledge on the part of a large organisation such as a business or a government department is established by the due submission of information in written form to *any* relevant arm of that organisation, without there having to be repeated separate act of "disclosure" to each other arm that is or may be concerned with the same piece of knowledge.

23. I do not for my part find it obvious why any different principle should now apply in determining whether multiple or repeated notifications of the same information, to different people all acting in the name and on behalf of the same Secretary of State, should be held to be necessary before the Secretary of State can be said to have knowledge of that information for the purposes of s.71. Particularly now that the operations of the department and indeed government itself are being made increasingly monolithic, and with the enormous advances over the last twenty years in systems for the storage and rapid retrieval and dissemination of information without the need for separate pieces of paper to be carried about between offices, it seems to me that the answers to what is "reasonably to be required of the claimant" in any particular case must reflect current, not past, conditions. That well established, practical and flexible test remains applicable, but what is said in the older cases about separate notification to different offices should I think be read in the context of the system as it then was, widely diffused with many local and other offices each depending on their own paper records and dealing with separate aspects of "insurance" and "welfare" benefit systems which used to be more clearly differentiated from each other, under different primary legislation with different entities responsible. The question remains what is reasonable, but the answers given then may not necessarily hold good now."

(3) CG4494/99 and CG5631/99 (decisions of a Tribunal of Commissioners in Great Britain)

At paragraph 14 of *CG4494/99* the Tribunal of Commissioners stated that they were satisfied that *R(SB)15/87* was correctly decided and endorsed that decision. It commented on *CIS/5848/99* at paragraph 16 and stated:-

> "[*This*] was a decision by Mr Commissioner Howell QC in which he expressed views as to the extent to which it was to be hoped that the Department might integrate its system of records so as to alleviate the burden upon claimants of knowing when and what and where to make

> representation or disclosure and, of course, conversely no doubt to cut down the amount of unrecoverable or irrecoverable erroneous payments. These expressions of the Commissioner were *obiter* and this present decision has depended on facts which established actual knowledge. We cannot endorse the *obiter* remarks attractive though the sentiments may be."

The Tribunal of Commissioners also commented at paragraph 11 of CG4494/99 on an argument addressed to it by the claimant's representative based on the decision of the House of Lords in *Bushell v Secretary of State for the Environment* [1981] AC 75. The Tribunal of Commissioners stated:-

> "Mr Howell sought to persuade us that if anybody of any authority in the Department knew about the cessation of attendance allowance then the Minister had the appropriate knowledge. That, as it seems to us, is to confuse two quite different concepts. In the roads scheme situation [*relevant in Bushell*] the Minister is responsible to Parliament and of course in reaching any decisions about a particular scheme he must be held to have had available to him all the knowledge and expertise contained within the Department – or at least that part of it concerned with such schemes. But that is a world away from the situation where the question concerns knowledge of a change in benefit in the multiplicity of benefits and the various units of the Department responsible for administering them. It is then not the Minister's knowledge or responsibility that is at issue but that of that part of the Department administering the relevant benefit scheme. Unless it has been told or is shown to know then there is not knowledge relevant to cut the causal link."

In *CG5631/99* at paragraph 5 the Tribunal of Commissioners stated:-

> "This case raised on its own account two issues upon each of which we have decided in favour of the claimant. In regard to the first we refer to decision CG/4494/99 which records that we were favoured with certain factual material on behalf of the Department regarding the extent to which it was seeking to provide for some automatic transfer of knowledge to the Invalid Care Allowance Unit team from that dealing with attendance allowance or disability living allowance. A sufficient award of the latter is a prior qualification for invalid care allowance. We have to record more fully in this decision that, whilst there was some evidence about material being made available earlier in a somewhat indigestible form, it appears that on 9 December 1996 there was a manual reconciliation of some such material followed by the establishment of an interface between the computers dealing with these benefits so as after that date there would be an automatic notification of changes sufficient to provide, in our view, knowledge in the Secretary of State for invalid care allowance purposes that, where it mattered, a change in the award of attendance or disability living allowance had occurred. In light of that evidence Counsel for the Secretary of State made a concession that in this case he would not seek recovery for the

period after 6 December 1996. We should explain that loss of the former or reduction to the lowest rate of the care component of the latter were the two factors either of which would disqualify the carer from entitlement to invalid care allowance. In this case, in the result, and essentially by reason of the concession on behalf of the Department, we are satisfied that there can be no question of recovery after 9 December 1996 because from then onwards the Secretary of State had knowledge of a reduction in disability allowance to the lowest rate of the care component. It is well established that there can be no failure to disclose something which is already known to the person to whom disclosure might otherwise be owed. Accordingly, in this case there can be no failure to disclose after the last mentioned date."

40. REASONING

(1) The said regulation 32 imposes certain duties on the claimant and the said section 69 sets out what has to happen when there has been a failure to disclose. The word disclosure is not one which is used in regulation 32. That regulation concerns the furnishing of information and consequently it does not appear to me that there is an exact correlation between regulation 32 and section 69. Regulation 32 imposes the duty but section 69 is triggered only by misrepresentation or failure to disclose. Some analysis of what is meant in context by the word "disclose" is therefore required. I accept the definition in *R(SB)15/87* and in so doing affirm that disclosure consists in the statement of a fact so as to reveal that which so far as the discloser knows was previously unknown to the person to whom the statement was made. It appears to me that this definition which has long been accepted also accords with the imposition of the duty of furnishing information which does lie on the claimant under regulation 32. The claimant has the overall duty of furnishing information but the concept of failure to disclose is narrower than failure to furnish information.

(2) I also refer to my earlier decision in *C17/98(IS)* where I stated in paragraphs 9 and 10 that mere assumption by the putative discloser that a fact was known by the putative disclosee was not enough to render disclosure impossible. There had to be knowledge or factually based belief that the fact was already known to the putative disclosee. Those paragraphs were dismissing an argument that disclosure was not an issue in the case and were dealing with what was meant by "disclosure". I was not in those paragraphs dealing with whether or not there had been a "failure to disclose".

(3) As regards *CIS5848/99* and in particular paragraph 14 thereof I disagree with the learned Commissioner where he states that *R(SB)15/87* and the Foster case are authority for the proposition that if the putative disclosee already knows the relevant fact then there cannot be disclosure to him. That is not what *R(SB)15/87* nor the Foster case say. Neither of those cases focuses on the actual knowledge of the

disclosee in terms of analysing what is meant by disclosure. Their focus is on the knowledge of the discloser. Cf. [illegible]

(4) The knowledge or lack of it by the disclosee might be relevant to whether or not any failure to disclose caused the overpayment. It does appear that the Income Support section was aware of when entitlement to the short term higher rate of Incapacity Benefit was due to end but that is different to knowing that the claimant's benefit had increased. Mrs McAllister is correct that the Common Enquiry System required some form of prompt. In other words there would have to be a reason for the Income Support section to seek information as to the claimant's Incapacity Benefit entitlement. In light of that I do not see that Income Support can be fixed with the knowledge of the Incapacity Benefits section that the long term rate had been paid to the claimant. Mr Stockman is correct in that information nowadays is more easily accessible by different sections of the Department. However, I do not consider that more accessible information means that one section can be stated to have knowledge of information which is not accessed by it. In this case the information in the possession of the Incapacity Benefits section was certainly accessible to the Income Support section but it was not in the possession of the Income Support section until an enquiry was made from the Common Enquiry System. No such enquiry was made. The system had to be accessed and the particular information relevant had to be obtained by the Income Support section before it could be said to have knowledge of it. No such information was obtained. I do not therefore consider that the Income Support section actually had knowledge of the information in the possession of the Incapacity Benefit section by means of the Common Enquiry System. It does not appear that the information that the claimant's benefits rate had changed was conveyed in any other way.

(5) Mr Stockman has argued that the change from the high rate short term Incapacity Benefit to the long term Incapacity Benefit was a standard matter and that knowledge of it should be imputed to staff throughout the Department. While it is undoubtedly correct that persons who remain on the high rate short term Incapacity Benefit will eventually change to the long term rate that is not the material fact in this case. In this case the material fact was that the particular claimant's benefit increased. The Income Support section was aware from part A of the C73/S form that on a certain date the short term benefit rate was due to stop. There is no contention that that information came from the claimant. That is, however, different from knowing that the claimant had begun to receive a higher amount of benefit or been awarded it. Because of the varied nature of benefits and the different conditions attaching to entitlement thereto and the duration of awards and the different rates it appears to me highly unlikely that members of staff in Income Support section would have knowledge of all the different benefits entitlements. I do not agree with Mr Stockman's contention. More importantly the material fact is not that the short term higher rate was due to stop but that the claimant had received a benefit increase. I

can see no grounds for upsetting the conclusion that the Income Support section was not aware of that material fact.

(6) I therefore do not agree with Mr Stockman's contention that the Income Support section had knowledge that the claimant's benefit had gone up. It follows therefore that on any view of the meaning of "disclosure" in the context of "failure to disclose", I consider that disclosure was possible.

(7) In addition, even if I accepted Mr Stockman's view that the Income Support section of the Department had knowledge of the material fact of the claimant's benefit having changed, I am not certain that the statement in *CIS5848/99* at paragraph 14 that "if the person already knows the fact, then the claimant cannot "disclose" it to him" is correct. In both of those cases the state of mind of the putative discloser was considered very relevant. It follows therefore that I have doubts as to the correctness of the last two sentences of paragraph 5 of *CG5631/99* extracted above. The context of "failure to disclose" is relevant. I have difficulty in ascertaining how this concept can be usefully applied if the discloser's state of mind is ignored. I express no concluded view on the matter as I would, if so doing, wish to hear fuller argument. As the matter is not necessary to my decision it is unnecessary to explore it further in this decision.

(8) I come next to the issue of whether or not the Tribunal erred in not further investigating the matter. This appears to me somewhat academic in the circumstances of the case but in any event I do not consider that Mr Stockman is correct in stating that *CIS5848/99* is laying down any general rule as to what is or is not required to prove lack of notification. In that case Mr Commissioner Howell was dealing with a situation where the Tribunal was invited to determine that the Child Benefit section had in fact duly notified the claimant's local office of the award of Child Benefit. There was before the Tribunal a letter from the Child Benefit office which while it did not state that the said notification had been given tended to show this. In any event the Commissioner accepted that it did tend to show this on the balance of probabilities. It was against that background that the Commissioner made the statement in paragraph 20 as follows:-

> "In my judgment that evidence [*the letter from the Child Benefit office*], together with the confirmation by the adjudication officer himself on page 31 that the claimant had been recorded by the child benefit centre as an income support claimant, is insufficient to rebut any assertion by the Secretary of State that the proper internal procedures cannot have been followed in the present case if the benefit went on being paid as it did. I do not agree with the Secretary of State's submission in para 11 on page 44 that the evidence of probable notification to the local office is "inconclusive", when the child benefit centre have confirmed that their records "show an income support interest" which would be

> the normal corollary to such notification having been given in accordance with the department's own standard published practice. The fact that there is no evidence to confirm this *conclusively* at the receiving end, because the department has destroyed whatever evidence there might have been, does not in my judgment destroy the value of whatever evidence still does exist to show what is *likely* to have happened, on the balance of probabilities. It is certainly not sufficient to enable the Secretary of State to establish the converse, that on the balance of probabilities it did *not* in fact happen."

(9) The statement by Mr Commissioner Howell was made against the very particular background of the evidence in the case before him and does not, in my view, lay down any general rule as to the evidence required to discharge the relevant onus in every case. He was essentially making a finding of fact.

(10)There may well be cases where fuller investigation of what took place between
relevant sections of the Department will be needed to ascertain if that onus is discharged. It will all depend on the circumstances of the case. The circumstances here were very different to those before Mr Commissioner Howell and I can see no error in law in the matter not being further investigated. Even if I could the error would not vitiate the decision in this case in light of Mr Stockman's concession that Income Support section was not sent the completed part C of the C73/S form.

(11) As regards the question of whether or not there was a "failure" to disclose. My task is to decide whether the Tribunal erred in law in concluding that there had been such a failure. I consider that the Tribunal in adopting the test of what constituted a failure to disclose set out in *R(SB)21/82* was adopting the correct legal standard. At paragraph 4(2) of that decision the Great Britain Commissioner states:-

> "... I consider that a "failure" to disclose necessarily imports the concept of some breach of obligation, moral or legal – i.e. 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:
>
> "1. ... non-performance, default; also a lapse ...""

(12) In its findings of fact the Tribunal has incorporated certain conclusions of law. Items 5 and 9 of the findings of fact are conclusions of law. However there is no error in these conclusions being incorporated in the findings of fact and I agree with the Tribunal's actual findings of fact.

(13) The claimant had submitted to the Tribunal that he was not aware that he needed to inform the Income Support section of the increase in his Incapacity Benefit. He had also stated that it was not unreasonable for him to have expected the Benefits Agency to be already aware of the increase. In its reasons for decision the Tribunal recorded as follows:-

> "We find that it was reasonable to expect the Appellant to disclose the material fact as he was paid Income Support by order book and notes 11 and 14 in the yellow advice pages of each Orderbook advised him what to do if things change and if any of his benefits increased. Commissioner's decision CS102/1993 held that it is not sufficient that a claimant did not realise that disclosure was necessary if a reasonable person would have done so."

(14) I agree with the Tribunal that the standard of whether or not a reasonable person would have realised that disclosure was necessary is the relevant standard. This is what was laid down in *R(SB)21/82.*

(15) The notes in the order book at paragraph 11 relate to how claimants are to tell about changes and they state amongst other things "You must get in touch with the Social Security office that is named at the front of this book as soon as you can". The office named appears to have been Andersonstown Social Security Office.

(16) Paragraph 14 states:-

> "**Any benefit goes up or down**
>
> You must send us a letter or form A9 if this happens to your money or your partner's money or your dependant's money. If you have already told us that your benefit is going up or down and the amounts on the orders in this book change to take account of this, you do not need to tell us again."

(17) Mr Stockman contends that the Tribunal's conclusion in relation to this was incorrect. He relied on *CIS5848/99* for the contention that the answer to what is reasonably required of a claimant must relate to current and not past conditions and contended that claimant's were aware of modern technology and aware that letters were computerised. He stated further that computerised decisions are valid. Mr Stockman contended that the case law on this matter was rooted in the mid 1980's and reflected the situation prior to present day technological advances. He conceded that the order book was there and that the order book did instruct the claimant to advise the Department if any benefit went up or down but stated that while the law and the legal tests were the same the question of the normal view of what was required had changed. One had to look at the actual circumstances to ascertain what was reasonable. In this case if all that had taken place was a change in the order book rate of payment, in view of the general

awareness of systems etc it was not reasonable to expect the claimant to tell the Department in essence something which it was telling him and which it was sharing with other branches.

(18) It has already been agreed that the Income Support branch was not notified about the increase in the claimant's Incapacity Benefit so that the last part of Mr Stockman's contention is not in my view relevant. I do agree with him that it is necessary to apply the standard of whether disclosure is reasonably to be expected and this must be applied against the background of all the relevant circumstances of the case. The outcome of application of that standard will depend on the facts of a particular case.

(19) The evidence before the Tribunal was that the claimant was not aware that he needed to inform Income Support of the increase in his Incapacity Benefit. The claimant actually said:-

> "I did not notify Income Support as I was not aware that I needed to. I didn't notify anybody."

The Record of Proceedings contains a note of evidence which is stated to be from the presenting officer but which I suspect is actually from the claimant's representative which states: -

> "He just assumed that he didn't have take any further steps. He thought Incapacity Benefit Branch would notify Income Support."

(20) I consider that the Tribunal was correct to take the instructions in the order book into account. In his letter of appeal to the Tribunal the claimant's representative stated:-

"[*The claimant*] was not aware that he needed to inform Income Support of the increase in his Incapacity Benefit. It is also not unreasonable for him to have expected the benefits agency to already be aware of this increase. Thus, we do not believe that [*the claimant*] can be said to have failed to disclose information."

(21) Against that evidential background I am not of the view that the claimant had any awareness of the computer systems within the Department or of form C73/S or that the existence of these played any part whatsoever in his not disclosing the increase in his Incapacity Benefit to the Income Support section. He made an assumption that Incapacity Benefit Branch would notify the Income Support section. Even accepting the assumption was reasonable which it may well be that is not the end of the matter. What the Tribunal had to do in the case was to balance the claimant's evidence that he thought that Incapacity Benefit branch would notify the Income Support section against the instructions in the order book which a reasonable person would read. It then had to decide whether disclosure was reasonably to be expected.

(22) I consider that the Tribunal was entitled to the conclusion which it reached. While the claimant may perhaps be forgiven for believing that one part of the Department would be informed about a benefit rate change coming from another part of that Department nonetheless the instructions in the order book are clear and would tend to negate that general belief. The instructions in the order book were extremely clear and they did tell the claimant to report any benefit going up or down. In this case it was reasonable to expect the claimant to follow them.

(23) The claimant had no factual basis for believing that the Income Support section had been told about his benefit change by Incapacity Benefit Branch. He simply assumed that it had. While that assumption may be understandable it must be balanced against the very specific instruction in the order book to report when any benefit went up or down. I am of the view that the Tribunal was entitled to conclude that a reasonable person would have made disclosure in the circumstances and that consequently failure to disclose had been established.

(24) The order book instructions were obviously important in the Tribunal's view, as they are in mine, in concluding whether disclosure was reasonably to be expected. Had they been less specific the conclusion as to whether disclosure was reasonably to be expected might have been different.

(25) Mr Stockman did not proceed with his argument on ground 2 (the causation question) and I accept Mrs McAllister's arguments thereon. I am of the view that the Tribunal was correct in its conclusion that the overpayments resulted from the failure to disclose.

41. I therefore agree with Mrs McAllister that the Tribunal did not err in law in this case and I dismiss the appeal.

(Signed) M F BROWN

COMMISSIONER

1 MARCH 2001