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Social Security Legal Practitioners' Group

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Recent Developments in Overpayments

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Decision-Making

Welfare Reform Act 2007 s44

> "44 Recovery of overpaid benefit: Great Britain
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> (1) Section 71 of the Administration Act (overpayments) is amended as follows.
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> (2) Subsection (5) (recovery of overpayments paid into account not recoverable under regulations under subsection (4) unless determination of amount is reversed on appeal etc. and overpayment is determined on the appeal etc. to be so recoverable) ceases to have effect.
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> (3) In subsection (5A) (recovery of overpayments paid in consequence of misrepresentation etc. not recoverable under subsection (1) unless determination of amount is reversed on appeal etc.) for "under subsection (1) above" substitute "under subsection (1) or under regulations under subsection (4)"."

When introduced by the Social Security (Overpayments) Act 1996, s71(5A) reversed the effect of *CIS/451/1995* and permitted decisions revising awards and overpayment decisions to be made at different times. By oversight, that provision did not apply to overpayments made by credit transfer which were recoverable under s71(4).

This provision extends the effect of s71(5A) to overpayments made by credit transfer. The 2007 Act received Royal Assent on May 3rd and s44 comes into force two months later: s70(1)(a). It has therefore been in force since July 3rd. It is doubtful whether it will validate any invalid decisions already taken.

CA/2650/2006, Commissioner Mesher

C was in receipt of attendance allowance and went to live in France without disclosing her change of address. DWP decided that she was not entitled to AA because she was no longer ordinarily resident from the date of her departure. C did not appeal that decision, but did appeal a later decision that she had been overpaid.

Held: (paras 17-19): even though the supersession decision had not been appealed, it was permissible for the Tribunal to hold that the overpayment was not recoverable because she remained ordinarily resident for the overpayment period.

CSG/741/2006, Commissioner May QC

Decision issued that C not entitled to CA because earning too much: not appealed. C appealed against recoverability decision.

Held (para 6): C not entitled to argue that entitled to CA on appeal.

CIS/1216/2005, Commissioner Levenson

Held: for Tribunal to proceed with appeal when criminal proceedings were pending did not amount to breach of (paras 34-36) Art 6 of the Convention or (paras 37-42) C's privilege against self-incrimination.

Note that just because there was no error of approach in this case, it does not follow that a Tribunal is obliged to proceed with an appeal if there are criminal proceedings pending.

Failure to Disclose

Duty to Disclose

Social Security (Claims and Payments) Regulations 1987

Current version of reg 32, as from May 5th 2003:

> "(1A) 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 Secretary of State may determine such

> information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.
>
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect-
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> (a) the continuance of entitlement to benefit; or
>
> (b) the payment of benefit
>
> as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office ...."

CSDLA/140/2006, Commissioner Parker

C in receipt of DLA and did not disclose an improvement in her medical condition which led to her working full-time.

Held (para 12): a succinct explanation was given of the effect of the decisions of the Tribunal of Commissioners and Court of Appeal in *B v SSWP*.

> "12. The Court of Appeal in the case of *B v the Secretary of State for Work and Pensions* [2005] EWCA Civ 929 ("B") upheld the conclusion of a Tribunal of Commissioners (in *CIS/4348/2003*), that the content of the then unamended regulation 32(1) of the claims regulations imposes a duty on a claimant to report facts which the claimant has been unambiguously requested to supply by the Secretary of State, so that if he or she fails to disclose what is so required, this constitutes also a breach of s.71(1); it was therefore irrelevant that the mental capacity of the claimant was limited. However, the Court of Appeal restricted itself to the argument and evidence before it, relating only to the first duty under regulation 32, but did not disapprove the wider approach of the Tribunal of Commissioners. The Tribunal of Commissioners recognised that two distinct duties to disclose arose from regulation 32(1) (and now arise from regulation 31(1), (1A) and (1B)); if the first is not applicable (for example if there has been no request or such request was ambiguous), then the second relevant duty which informs the obligation under s.71(1) is that currently set out under regulation 31(1B) and is the duty to notify the Secretary of State of any change of circumstances which the claimant might reasonably be expected to know might affect the right to benefit."

(paras 15-17): although the Commissioner was doubtful as to whether there was a breach of the duty in reg 32(1A), disclosure was reasonably to be expected and so there was a breach of the duty in reg 32(1B).

Hooper v Secretary of State for Work and Pensions [2007] The Times *June 27th, [2007] EWCA Civ 495, CA*

C was brain-damaged in a road traffic accident while a child. He was in receipt of ICB. New rules about working while in receipt of ICB came into force from April 2002 and a leaflet was sent to the claimant which gave the following instruction:

> "You will no longer need to get a doctor to agree that the work will help your medical condition, but you should tell the office that deals with your benefit before you start work. You should fill in an application form before you do any permitted work."

He commenced work as a school caretaker for 13 hours per week from September 2002 and worked until April 2004. The DWP was not notified. On appeal against a decision that he had failed to disclose his work, it was argued that the leaflet was not sufficiently clear to "require" the information for the purposes of reg 32.

Held: (paras 56-57)

> "56. .... Read in the context of the factsheet as a whole, I do not consider that the words "you should tell the office... before you start work" and "you should fill in an application form before you do any permitted work" are the language of clear and unambiguous mandatory requirement. The consequences for a claimant of not complying with a requirement in accordance with regulation 32(1) can be very serious. That is why in my view, if the Secretary of State wishes to impose a requirement on claimants within the meaning of regulation 32(1), it is incumbent on him to make it absolutely clear that this is what he is doing. There should be no room for doubt in the mind of a sensible layperson as to whether the SSWP is imposing a mandatory requirement or not.
>
> 57. Mr Commissioner Jacobs said that the word "should" in the factsheet was a "polite way of wording an instruction". There may be contexts where the dictates of politeness are such that "should" means "must". Even in a social context, "should" may not mean "must". As Thomas LJ pointed out in argument, "you should go to the doctor" does not mean the same as "you must go to the doctor". The former is more the language of "you would be well advised to go to the doctor". The latter is an instruction. But there is no reason why the Secretary of State should have felt inhibited from using the clear and unambiguous word "must" in the present context. The context is not one which demanded politeness at the expense of clarity."

CIS/203/2002, Commissioner Mesher

C had fixed-period award of DLA which came to an end. The severe disability premium of IS was not discontinued. It was argued that he was not under a duty to disclose because there had not been a change in circumstances.

Held (paras 11-12): the argument failed. Even though the award was a fixed-term award, because that fact had not been made known to the office administering IS, there had been a failure to disclose.

CDLA/3238/2006, Commissioner Jacobs

DLA claimant's mobility improved: question arose as to whether C was in breach of duty under reg 32(1A) by failing to follow instruction in DLA literature to "tell us if things get easier or more difficult for you. And tell us if you need more or less help."

> "23. The interpretation of the duties must reflect their nature and purpose. So the duty to report 'if things get easier for you' is not a duty to report 'if you believe that you are no longer virtually unable to walk'. Nor does this duty necessarily require a comparison between the claimant's abilities and disabilities at the time of the original award and those current at the time when the Secretary of State says a change should have been reported. That comparison does not arise until the later decision-making stage. The notes deal only with the earlier information-gathering stage. It is important not to confuse the issue whether the claimant failed to report a change of circumstances (an information-gathering question) and the issue whether that change was material to his entitlement (a decision-making question).
>
> 24. The duty does not set the focus of comparison on the time of the original award. If it did, it would become increasingly burdensome as time passes. In this case it would require the claimant to remember precisely how disabled he had been 18 years previously. The duty, like all the duties, is continuously speaking. It is to report if at any time things are easier for the claimant. That means easier by reference to the preceding period. Obviously that has to be applied in a reasonable time frame. It would not be necessary to report if a claimant were feeling a bit better today than yesterday. The test has to be applied over a period that is sufficient to show overall a sustained improvement or deterioration, taking account of any usual variation. This is not precise, but that is because it is a matter of judgment for each case.

> 25. I am not going to attempt a more precise definition. Nor am I going to direct the tribunal more precisely how to apply the duty to this case. However, just by way of a possible example based on the circumstances of this case, it might be appropriate to ask whether things were easier for the claimant in August 2000 compared with how he was just before his hip operation. The claimant might say that there had been a significant deterioration leading up to his operation. There was no reason to report that deterioration, at least as far as the claimant's mobility was concerned, given that he already had the higher of the two rates. But once his mobility improved, he was bound by the duty to report it. It was not for him to make a judgment whether he was now better or worse than when he was first awarded mobility allowance. That was for the decision-maker to decide. As I have said, information-gathering and decision-making are separate activities and the duties to report are concerned only with the former."

CIS/1996/2006, Commissioner Howell QC

Recovery of IS overpayment sought from C's partner.

Held (para 16): C's partner was under no statutory duty to disclose and so there could be no recovery from him for failure to disclose. *CIS/674/1994* cannot stand with *B v SSWP*.

CA/2298/2005, Commissioner Rowland

Recovery sought from appointee after C went into care home and DWP not informed.

Held (paras 15, 18): evidence must be adduced to demonstrate that person from whom recovery sought is subject to a duty to disclose.

CF/2311/2006, Commissioner Williams

Held (para 10): reg 23 of the Child Benefit and Guardian's Allowance (Administration) Regulations 2003 has equivalent effect to reg 32 in relation to child benefit.

CIS/1862/2006, Commissioner Rowland

Held: (paras 6-7): evidence of instructions must be put before Tribunal if reg 32(1A) is to be relied upon.

> "6. The principal cause of the tribunal's decision beings erroneous in point of law is that there was no evidence before the tribunal that the Secretary of State had ever asked the claimant to inform him if she came into possession of capital amounting to less than £8,000 and there was no evidence to support a finding that the claimant might reasonably be expected to know that possession of such capital might affect her entitlement. The tribunal might, subject to giving the claimant the opportunity to comment, have made use of its own knowledge of benefit administration to remedy the defect in the Secretary of State's case but it did not do so and the consequence was that there was nothing in the statement of reasons to explain why the claimant was under any duty to inform the Secretary of State that she had come into possession of capital. It was that lack of reasoning that renders the tribunal's decision erroneous in point of law.
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> 7. It is very easy for the Secretary of State to provide to a tribunal a copy of the instructions given to a claimant and it should be done in every case where it is said that an overpayment is recoverable on the ground of a failure disclose. The Secretary of State should be able to point to the instruction that made the relevant disclosure obligatory. If he can do that, the claimant's appeal is likely to be dismissed."

(para 12): if advice is given to claimant over telephone, it might qualify the instructions in the order book, although not in this case.

Disclosure to Whom?

CIS/4422/2002, Commissioner Howell QC

Overpayment of IS minimum income guarantee to pensioner.

Held (para 10): where C is notified of change to other benefit by same office which deals with IS, there must be evidence that he was required to notify a particular part of the office if there is to be a failure to disclose.

CIS/1887/2002, Commissioner Howell QC

ICB awarded to C after IS awarded by same office, resulting in overpayment.

Held (para 18): definition of "appropriate office" may permit disclosure to any office, but certainly does not require identification of particular part of an office.

(paras 19-20): instructions in IS book do not require disclosure to particular part of office.

(para 21): clearly established that overpayment not recoverable where fact known to office.

Recovery

Brown v Secretary of State for Work and Pensions [2007] The Times *April 4th, [2007] EWCA Civ 89, CA*

SB suffers from autism and was in receipt of DLA care and mobility components. In 2001 he started at a boarding college funded by the Learning and Skills Council. This should have meant that he was not entitled to be paid DLA care component except during the vacation periods, but the component continued to be paid until 2003, when SB's attendance at college was disclosed on a renewal claim. DLA was suspended while the position was investigated, which took several months, including the summer of 2003 when SB should have been receiving care component as he was living with his parents.

Eventually, a decision was issued in September 2003 holding that SB had been overpaid. A later decision in January 2004 ruled that the overpayment was irrecoverable because disclosure by him was not

reasonably to be expected (fortunately, before the decision of the Tribunal of Commissioners in *B v SSWP* ruled that to be irrelevant).

The Secretary of State's case, accepted by the Commissioner, was that reg 5 of the Payments on Account etc Regulations 1988 permitted him to withhold the arrears accruing in summer 2003, even though the overpayment was irrecoverable.

Held: (para 25) the arrears did not arise "by virtue of" the subsequent determination for the purposes of reg 5 and so the Secretary of State could not offset them. The arrears had to be paid to SB.

R (Balding) v Secretary of State for Work and Pensions [2007] The Times May 1st, [2007] EWHC 759 (Admin), DC

DWP issued decision in 1994 that overpaid income support recoverable from C. In 1995 C was made bankrupt on his own petition and was discharged in 1998. C argued that discharge from bankruptcy precluded recovery by deductions from ongoing entitlement.

Held: (paras 42-46) the overpayment of IS was a "bankruptcy debt" for the purposes of the insolvency legislation.

(paras 47-50) C was released from liability to repay the overpayment on discharge from bankruptcy, which made further recovery unlawful.

Note that:

- The Secretary of State has leave to appeal to the Court of Appeal. The appeal is currently due to be heard in November 2007.
- This decision will apply equally to recovery of HB and CTB.
- However, where the decision that an overpayment is recoverable is made *after* C becomes bankrupt, liability to repay is not released on

discharge: *R (Steele) v Birmingham CC* [2005] EWCA Civ 1824, [2006] ICR 869.

- In *Balding*, C's appeal against the recoverability decision was not heard until after he was made bankrupt. It was not argued that that affected the situation (see para 32). That concession was correct, since a recoverability decision is enforceable from the date that it is made even if an appeal is made.