Social Security Legal Practitioners Association

December 15th 2004

Overpayments and Failure to Disclose

Regulation 32

> **32.**—(1) 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 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 for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.
>
> (1A) Every beneficiary and every person by whom, or on whose behalf, sums 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—
>
> (a) the continuance of entitlement to benefit; or
>
> (b) the payment of the benefit

CIS/4348/2003

This decision of a Tribunal of Commissioners (HHJ Hickinbottom and Commissioners Henty and Jacobs) was handed down on October 12th 2004. The Tribunal of Commissioners had been convened to consider the conflict in Commissioners' decisions[1] on the question of whether, in deciding whether it was reasonable to expect a claimant to disclose a material fact, it was permissible to take the client's mental condition into account.

Instead of resolving this conflict, the Tribunal of Commissioners instead overturned a consistent line of authority of over twenty years' standing, based on the seminal decision in *R(SB) 21/82* where Commissioner Edwards-Jones QC said:[2]

---

1 See, inter alia, *R(SB) 40/84*, *R(A) 1/95*, *CSB/957/1987*, *CIS/12032/1996* and *CIS/1769/1999*.

2 Para 4(2).

> "I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal – ie the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected ...."

The Commissioners' reasoning was that regulations[3] create the obligation to disclose and therefore recovery on the basis of "failure to disclose" is based solely on a breach of that obligation.[4]

It followed that there was nothing in the phrase "failure to disclose" which required consideration of whether a person could reasonably be expected to disclose something with the regulations required him to notify.[5]

The Commissioners decided that all Commissioners' decisions that had predated theirs had not been based on any proper analysis of the interpretation of section 71[6] and could therefore effectively be ignored. Moreover, the fact that when the social security legislation was consolidated in 1992, there was no change in the law could not be taken as Parliamentary approval of the test propounded in *R(SB) 21/82*.[7]

It is understood that CPAG, who represent the claimant, are appealing to the Court of Appeal, which may of course restore the previous position or produce an interpretation of their own. In the meantime, however, advisers need to be aware of a number of points:

- In a failure to disclose case, the critical question is now whether the claimant has breached their obligation to disclose under the regulations.

---

3 Reg 32(1) of the Social Security (Claims and Payments) Regulations 1987.

4 Para 36.

5 Paras 38-43.

6 Paras 47-54.

7 Paras 55-59. However, no consideration appears to have been given as to whether Parliament may be taken to have approved the *R(SB) 21/82* test during the debates on the Social Security (Overpayments) Act 1996. During the debates on that Act, an amendment was proposed which would have relieved certain claimants from liability for misrepresentation. It has not proven possible for the writer to check *Hansard* in the time available, but it is believed that the government minister, in rejecting the amendment, referred to the protections available for a claimant, including the limited circumstances in which a claimant would be found to have failed to disclose.

- Regulation 32 produces two distinct duties of disclosure: an absolute one in the case of information which is specifically requested, and one which is qualified by reasonableness in the case of information which is not specifically requested but which the claimant could "reasonably be expected to know" that it might have an effect on his benefit.[8]

- It remains the case that a claimant who does not know the material fact or does not have the information requested cannot be in breach of regulation 32.[9] Does

- To create the absolute duty, the "Secretary of State had to be clear as to what information he required". The request must be "unambiguous".[10]

- Where information is specifically requested, then mental capacity or other personal characteristics (or even reasonable ignorance) will be no defence to recoverability.[11]

- However, it is suggested that if the Secretary of State's instructions in order books etc are varied by oral advice from his officers, that will negate the specific written request for disclosure.[12]

- It is unclear whether the absolute duty in regulation 32 is breached where there is a general request for information (eg "you must tell us about these changes .... as well as any other changes that may affect your benefit"). It is suggested that only the qualified duty is breached by the latter provision.[13]

- It is also unclear whether, if the Secretary of State is relying on the qualified duty in regulation 32, personal characteristics can be taken

---

8 Para 46(ii).

9 Para 32(i).

10 Para 33.

11 Para 46(iii).

12 cf *CIS/584/1994*, and note para 33 where the Tribunal of Commissioners confirms that the request must be "unambiguous".

13 Since otherwise it is not "unambiguous".

into account there. The discussion of this question[14] is purely directed towards the absolute duty. It is suggested that it remains the case that personal characteristics may be taken into account when considering whether there is a breach of the qualified duty, in considering the question of "reasonableness".

CFC/2766/2003

This is a decision of Commissioner Howell. He states:[15]

> "I further direct the tribunal that, as is well settled law, the principal question is whether disclosure was reasonably to be expected of the claimant in all the circumstances. That long established principle as laid down and confirmed by two Commissioners of unquestionable learning and experience, Mr I Edwards-Jones QC and Mr J S Watson QC, in the (reported) cases *R(SB) 21/82* and *R(SB) 28/83*, has since been followed and applied as good law and practical sense on countless occasions by Commissioners and tribunals over the last 20 years and more, and should at least for the present continue to be applied in the context of facts such as these, notwithstanding the doubts voiced in quite a different context by a recent tribunal of Commissioners in case *CIS 4348/2003*."

This was, however, an example of an overpayment case where, on the *CIS/4348/2003* analysis, the Secretary of State was relying on the qualified duty in regulation 32. This is because it is a deprivation of capital case and no relevant questions were asked on the claim form.[16]

So this decision does not give Tribunals permission to ignore *CIS/4348/2003* on the basis that it is unreported. The principle that Tribunal of Commissioners' decisions are preferred to those of single Commissioners outweighs the distinction between reported and unreported decisions.[17]

Paul Stagg
No 1 Serjeants Inn

---

14 Paras 33-34.

15 Para 13.

16 Para 2.

17 *R(I) 12/75* para 20.