

# S.S. LAW P.A.

THE SOCIAL SECURITY LAW PRACTITIONERS' ASSOCIATION

## Social Security Law Practitioners' Association Minutes of meeting held on 7<sup>TH</sup> March 2007

### Present:

Desmond Rutledge	Garden Court Chambers (Chair)
Neil Bateman	Welfare Rights Writer/Trainer (speaker)
Andy Malik	Newcastle Law Centre (speaker)
Joanie Wilkinson	Camden Law Centre
Finola O'Neill	SWLLC (Wandsworth and Merton Law Centre)
Cherry Young	SWLLC
Jill Lorimer	Moss & Co Solicitors
Joanna Newth	Mary Ward Legal Centre
Sophia Barnett	Mary Ward Legal Centre
Helen Sheldon	Mary Ward Legal Centre
Riza Choudhury	Mary Ward Legal Centre
Amer Ahmad	Steel & Shamash
Alban Hawksworth	RNIB
Khalid Rashid	LB of Redbridge (Welfare Rights)
John Rahman	LB of Redbridge (Welfare Rights)
Leroy Pitter	Paddington Law Centre
Dave Johnson	Southwark Law Centre
Solveig Francis	Legal Action for Women
Stefan Kezyczewski	PRNS Consultancy
Arvin Narendra	Duncan Lewis & Co Solicitors
Jayne Okacha	Duncan Lewis & Co Solicitors
Ian Shury	Duncan Lewis & Co Solicitors
Sebastian Lettouche	Duncan Lewis & Co Solicitors
J Valdganla	Duncan Lewis & Co Solicitors
Owen Davis QC	Garden Court Chambers
Tony Vaughan	Garden Court Chambers
Tom Wainwright	Garden Court Chambers
Anne Karithie	Garden Court Chambers
Anya Lewis	Garden Court Chambers

### 1<sup>st</sup> Guest Speaker: Neil Bateman

### Subject: Welfare Rights Aspects of Benefit Fraud

The central theme of Neil Bateman's talk was that knowledge of welfare benefits and the tests for recovery of an overpayment in the civil context can have a significant bearing on criminal prosecutions for benefit fraud. The speaker's PowerPoint presentation and a 'Welfare Rights Checklist' on the criminal and welfare rights' aspects of benefit fraud are attached.

### Background

The speaker drew attention to the gap between the large number of 'fraud investigations' that have been undertaken during the period 2005/06 (440,732) and the small number of prosecutions actually completed (8,218). These

represent less than 2 per cent of the total investigations started. This suggests that many so called 'fraud' investigations were based upon inadequate evidence or the investigator has misunderstood the rules of entitlement. On the other hand, if a case does go to court, the acquittal rate is very low. Of the 8,218 prosecutions, only 115 defendants were found not guilty; an acquittal rate of 1.3 per cent.

### Duty to report changes

A central concept to the criminal offences contained in ss.111A(1A) and s.112 of the Social Security Administration Act 1992 is a deliberate failure to notify the Department or Authority of a change of circumstances which affects entitlement to benefit. For example, the definition of the offence in s.112(1A) depends on the deliberate failure to report a change of circumstance: -

'A person shall be guilty of an offence if -

(a) There has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation:

.....

(c) He knows that the change affects an entitlement of his to such a benefit or other payment or advantage; and ...

The Speaker made the point that the question of whether someone has reported a material change is often a central issue in DWP cases in the civil context, namely whether there was a 'failure' to report or change or post the decision in B,<sup>1</sup> whether there was a duty to do so in the light of the information sent to or available to the claimant. If there is uncertainty whether the claimant breached the duty to report a change of circumstances in the civil context, then surely this is relevant to the allegation that there was an intentional or dishonest intention to not report such a change in the criminal context. The element in subsection (c), for example, must be established to the criminal standard of proof, namely that the defendant knew that the change affected entitlement (King v Kerrier District Council).<sup>2</sup>

Overpayment cases which may be relevant to criminal cases include:

- the principle that there is no duty to disclose a material fact that is already known to the DWP (CIS/1887/2002 para 21);
- the duty to disclose can be modified by advice given by a DWP officer (R(A) 2/06 para 13-14).
- Where the DWP seeks to establish liability based on a breach of duty, the decision maker must include details of the actual advice or leaflets sent to

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<sup>1</sup> B v Secretary of State for Work and Pensions [2005] EWCA Civ 929 (R(IS) 9/06). Also see (e.g.) reg 32(1B) The Social Security (Claims and Payments) Regulations 1987 and reg 88 Housing Benefit (General) Regulations 1987.

<sup>2</sup> King v Kerrier District Council [2006] EWHC 500 (Admin) (27 February 2006)

the claimant. This may be crucial where the material fact which the Department say ought to have been disclosed, would not have been obvious or self-evident to a reasonable person in the claimant's position (R(A) 2/06 para 17).<sup>3</sup>

The test for whether an overpayment of Housing Benefit is recoverable is much harsher<sup>4</sup> compared to the test used in DWP benefits. Under the Regulation 99 of the Housing Benefit Regulations 2006 (SI 2006/213), the general principle is that all HB overpayments are recoverable unless caused by "official error" provided the claimant (i) did not materially contribute to that error *and* (ii) she or he could not reasonably realise that s/he was being overpaid.<sup>5</sup> When the overpayment is not due to official error the claimant will have to pay it back regardless of the lack of any fault on their part. There is no right of appeal against a decision to recover Tax Credits.<sup>6</sup>

### The size of the overpayment and its relevance to mitigation and sentencing

The speaker stressed that the true level of any overpayment should always be ascertained as the amount cited to the court will often determine the sentence given (R v Stewart).<sup>7</sup>

If the overpayment/prosecution is due to undeclared work it is often the case that the earnings from the job are so low that if they had declared the work they would be eligible to claim in-work state benefits. Because of the government's welfare to work reforms, in many cases if the defendant had declared the work, they would have been eligible to *more* state financial support. The speaker mentioned one case where there had been and alleged overpayment of £30,000 Income Support and Housing and Council Tax Benefits but the defendant would have been entitled to £33,000 Tax Credits and Housing Benefit if they had declared the true position.

The DWP view is that they are no longer required to calculate notional in-work benefits for the purposes of overpayment appeals as they cannot be taken into account as an 'offset.'<sup>8</sup> (though they will request HM Revenue and Customs to do so if requested by a court) However, notional entitlement to benefit is highly

<sup>3</sup> See also Northern Ireland decision: R 1/05 (ICA)(T).

<sup>4</sup> HB Regulation 2006 (SI 2006/213) reg 100.

<sup>5</sup> The test is whether the claimant could have realised that the HB they were receiving definitely contained some element of overpayment (CH/2554/2002 para 7). See also CH/1675/2005 in which the claimant had relied on what he was told on the phone findings of fact on what the claimant had been told are crucial (CH/1675/2005 para 12) and CH/277/2006 at para 14.

<sup>6</sup> See CTC/2662/2006 for a summary of tax credit adjudication and how it differs to social security adjudication (paras. 7-17). For details of the complaints procedure see 'Tax Credit Complaints by Helen McAlpine' – Adviser 108, March & April 2005 and Code of Practice on overpayments in COP26 available at <http://www.hmrc.gov.uk/leaflets/cop26.pdf>

<sup>7</sup> R v Stewart (1987) 85 Cr App R 60, updated in R v Graham and Whatley [2004] EWCA Crim 2755, [2005] 1 Cr App R(S) 110.

<sup>8</sup> R(Larusai) v Secretary of State for Department of Work and Pensions [2003] EWHC 371 (Admin). The DWP's practice of reducing overpayments by the notional Family Credit the claimant would have been entitled to has ceased following its replacement by Tax Credits, which is administered by the Inland Revenue.

relevant to mitigation in criminal cases (R v Parmer).<sup>9</sup> It is also relevant when applications are being made to the DWP or the Local Authority to waive recovery of an overpayment. For example, the HB/CTB Overpayments Guide contains the following entry on this topic: -

“Net loss to public funds

12.16 The net loss would be the difference between the amount awarded and paid during the period of the overpayment; and any notional amount of the other benefit that would have been paid during the period of the overpayment.

12.17 It should only be applied where the customer or their representative has asked about the possible entitlement to another implied benefit, for all or part of the period of the overpayment.

12.18 If the notional entitlement exceeds the overpayment amount then the overpayment should be cleared by means of abatement. However the excess should not be paid to the customer as they have no entitlement to that money.

Example:

- Single parent continues to receive IS after child is no longer a dependant under IS rules
- Benefit overpayment £345.87, customer no longer has an entitlement under IS rules
- Customer states that if they had known the rules they would have registered as unemployed
- a decision is made that there would probably have been a notional entitlement to JSA, there being no evidence to the contrary
- the amount of the overpayment £345.87 is abated by the amount of notional entitlement to JSA, calculated during the overpayment period at £243.89, leaving a balance for recovery of £101.98.”<sup>10</sup>

The speaker also explained how overpayments would often continue to mount up *after* the fraud investigation unit had become involved and were therefore aware that an overpayment was occurring. It was arguable that any overpayment incurred after the investigation was underway should not be included in the amount cited to the court as the Secretary of State had actual knowledge of the claimant's entitlement to benefit but failed to act on that information thereby removed the causative effect of the failure to disclose under s.71 of the SSAA 1992.<sup>11</sup> In many cases of working while claiming, the defendant's work comes to the attention of the DWP as a result of data-matching exercises. Even the DWP's internal Fraud Investigator's Manual states that any overpayment after the date of the scan is not recoverable on this basis.

The speaker suggested that the following welfare rights issues were highly relevant to criminal proceedings for benefit fraud:

<sup>9</sup> R v Parmer [2006] All ER (D) 366 (Mar), March 24, 2006.

<sup>10</sup> HB/CTB Overpayments Guide: Amendment 1 December 2004. This is downloadable at <http://www.dwp.gov.uk/housingbenefit/manuals/overpay/common/01about.asp>

<sup>11</sup> R(SB) 15/81, CIS/159/1990, and CIS/2447/1998. The same argument would not necessarily apply to HB if the claimant's failure to report a change of circumstances materially contributed to the official error: R(H) 1/04; cf CH/3083/2005 para 38.

- Did the decision maker fail to revise or supersede the decision on entitlement thereby rendering any decision to recover the alleged overpayment legally ineffective?<sup>12</sup>
- Has the prosecution in HB/CTB cases relied on the *gross* overpayment because the local authority has failed to calculate the claimant's *net* entitlement to HB/CTB based on their actual income?<sup>13</sup>
- Has the prosecution considered any underclaimed benefits which might reduce the total overpayment? (see net loss to public funds above).

**2<sup>nd</sup> Guest Speaker: Andy Malik**  
**Subject: Benefit Fraud Interviews**

Andy Malik's talk addressed the question of what advice can be given to clients who have been 'invited' to attend an interview by the Fraud Investigation Team. The speaker's notes are attached.

The first issue is the lack of information available when the claimant is asked to come in for such an interview. The speaker explained that if the DWP/LA refuses to give any reason for the interview then the adviser will not be in a position to take proper instructions from the client. In those circumstances, the speaker suggests that he would inform the DWP/LA that the client would not be attending any interview until some indicate of the reason for the interview was forthcoming; this normally produces a response from the investigator – even if it is in the form of a short telephone call.

Once the Advisor has been told the purpose of the interview under caution the question arises whether the claimant should attend the interview at all. The speaker said that as a rule of thumb, where the claimant is not in a position to forward any positive case to explain why a material fact had not been reported then the disadvantages of attending the interview tend to outweigh those of attending. On the other hand, if the claimant's instructions indicated that they do have a defence, then attending the interview and reading out a prepared statement will often be the best option. The speaker went on to address the thorny issue of when can adverse inferences can be drawn from a defendant's 'failure' to answer questions put to them under caution (R v Argent).<sup>14</sup>

The speaker made the general point that the onus is upon the Department to prove an allegation of fraud or that an alleged overpayment was recoverable

<sup>12</sup> In relation to the requirement in s.71(5A) of the Social Security Administration Act 1992 see CIS/0170/2003 paras 9 & 16 and CIS/3228/2003 12, 18-21. In relation to the requirement in reg 99 of the HB Regulations 2006 (SI 2006/123) see CH /3439/2004 para 9 and CH/1395/2006 para 38.

<sup>13</sup> HB Regulations 2006, reg 104. *Adan v. London Borough of Hounslow (R(H) 5/04)* which held that local authority must apply this provision. See CH/360/2006 para 11(1) to (9) on the claimant's right to appeal a decision made under reg 104 and the HB/CTB Overpayments Guide para 3.51.

<sup>14</sup> *R v Argent (1997) 2 Cr App R 27.*

from the claimant. Until the DWP/LA has established a factual foundation for its allegation there is nothing for the claimant or his representative to rebut.<sup>15</sup> In practice the DWP/LA often rely on admissions made during the interview under caution as the basis any prosecution or the decision to recover an overpayment.<sup>16</sup> Hence the importance of giving very serious consideration to how to deal with a fraud interview under caution. When the client has mental health or learning issues the speaker suggests that the interview should be deferred so that evidence can be obtained from a relevant profession on whether the claimant would understand the caution.

Minutes prepared by  
Desmond Rutledge  
SSLPA Chair  
Thursday, 24 May 2007

Next Meeting: 'Overpayments Update' by Paul Stagg – 9 July 2007 – to be confirmed.

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<sup>15</sup> CSB/347/1983 copy attached to speakers notes.

<sup>16</sup> The deduction from benefit to recover an overpayment is higher if fraud has been 'admitted' – £12 a week instead of £9.