

Case Reopened - Failure to

Discard - Knowledge of Claimant

Going to court

DGR/SH/10

Commissioner's File: CIS/145/1994

SOCIAL SECURITY ACT 1986
SOCIAL SECURITY ADMINISTRATION ACT 1992
APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Angela Franklin (Mrs)
Social Security Appeal Tribunal: Sutton
Case No: 7/19/92/69897

1. For the reasons set out below, the decision of the social security appeal tribunal given on 20 December 1993 is not erroneous in point of law, and accordingly this appeal fails.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 20 December 1993.

3. The real issue in this case for determination by the tribunal was whether an overpayment of income support amounting to £304.20 was recoverable from the claimant by virtue of his having been guilty of a misrepresentation of a material fact. In the event, the tribunal decided that the claimant had made a misrepresentation, in that each week, when he signed his order book, he made the standard declaration:-

"I DECLARE that I have read and understand all the instructions in this order book, that I have correctly reported ANY facts which could affect the amount of my payment and that I am entitled to the above sum",

although he had failed to report the reduction in the interest payments payable to his building society. Moreover, the tribunal took the view that it was immaterial that the claimant did not know of the reduction in the interest rates. They considered knowledge immaterial.

4. The adjudication officer now concerned supports the appeal, and relies on the Court of Appeal decision Morris Jones and Mark Wayne Sharples v. The Chief Adjudication Officer. He says

as follows:-

" 5. Although the declaration on the order book in both that case and the present one was the same, in that case the claimant Morris Jones was aware of the material fact.

The majority decision of the Court was that:-

- (a) the declaration on the order book counterfoil is a representation that there are no facts, known at the time of signing, which could affect the amount of benefit and have not been reported, and
- (b) where the declaration is signed, any non-disclosure is equally a misrepresentation."

The adjudication officer now concerned argues that in the present case, the tribunal considered that the effect of the decision of the majority members of the Court of Appeal was to make "knowledge" a pre-requisite of a misrepresentation within section 53 of the Social Security Act 1986, now section 71 of the Social Security Administration Act 1992, and in the case under appeal the claimant lacked the relevant knowledge. Therefore the tribunal erred in point of law. If this interpretation is right, then the tribunal's decision must be set aside. But is it right?

5. This whole matter has been gone into in depth in starred decision CP/034/1993, and the conclusion reached that such interpretation is not correct. The Commissioner in CP/034/1993 first contends that the statements of Stuart-Smith LJ and Dillon LJ relied upon by the adjudication officer now concerned were clearly obiter "as the central issue in the Jones case was whether or not Mr Jones had made a material representation, which they held he had, and that overpayments were recoverable. These statements were not central to the actual decision they, as a majority of the court, reached". (See paragraph 8.)

6. The Commissioner in CP/034/1993 then goes on to deal with the difficulty arising if "knowledge" is to be a prerequisite of misrepresentation. He says as follows:-

" 9. If a person makes a statement knowing it to be untrue or recklessly, he is guilty of a fraudulent misrepresentation: if, on the other hand, he makes a statement in the honest belief it is true, he will be guilty nevertheless of an innocent misrepresentation if it turns out to be untrue. See the well known passage in the opinion of Lord Hershell in Derry v. Peek 1889 14 AC 337 at p374:-

"Secondly fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it is true or false To prevent a false statement being fraudulent, there must, I

think always be an honest belief in its truth.'

See also Halsbury 4th Edition Vol 31, para 1064.

An innocent misrepresentation is therefore one which is made in honest belief, but if it turns out to be untrue it is nevertheless a misrepresentation, albeit innocent. Knowledge is not relevant so far as innocent misrepresentation is concerned.

The difficulty is that in Page v. CAO (reported as an Appendix to R(SB) 2/92) Dillon LJ said of section 53 (now section 71 of the 1992 Act) at pps. 18/19:-

'Applying the general principles I find the wording of section 53(1) plain and unambiguous. It covers innocent as well as fraudulent misrepresentation and non-disclosure, and I would dismiss this appeal.'

That is a pretty plain statement of the law and it is not obiter dictum. Moreover, it was expressly accepted by Evans LJ in Jones at p65 B-D. I need not set out that passage in extenso but will refer only to two sentences:-

'This means that when a person has misrepresented a material fact his knowledge of that fact is irrelevant so far as section 53 is concerned.

It is sufficient that there was misrepresentation whether the fact was known to him or not

I would also refer to a line of decisions of Commissioners to the same effect - see eg. R(SB) 21/82, R(SB) 9/85.

As I see it, the two statements by Lords Justices Stuart-Smith and Dillon can only stand if they are construed on the basis that there is a qualification which is to be implied in the common form declaration in the order book such as, in effect, 'so far as I know or am aware.'

7. The Commissioner in CP/034/1993 then goes on to discuss whether or not such a qualification could be implied having regard to the clear wording of the relevant statutory provision. He points out the limited scope for implications of this nature by referring to the relevant authorities, and concludes as follows:-

" 10. But in my view the truth of the matter is that the words of the declaration were clear and needed no qualification. In Page v. CAO the Court of Appeal, as part of their ratio decidendi, held that these very words were clear and unambiguous and they comprehended innocent as well as fraudulent misrepresentation. So far as innocent misrepresentation was concerned, knowledge was immaterial."

8. This is a difficult matter, and I approach the whole question with considerable hesitation. However, on balance I think that the interpretation of the law as contained in CP/034/1993 correctly represents the position, and I accept the analysis there set out. Accordingly, where, as in the case before me, a claimant signs a declaration in the standard form, he will be guilty of misrepresentation even if he was not aware of the fact or facts he had failed to disclose. He will simply be guilty of an innocent rather than a fraudulent misrepresentation, but he will still be caught by section 71.

9. Accordingly, I consider that the tribunal approached the matter in the correct fashion, and I see no respect in which it could be said that they erred in point of law. It follows that I must dismiss this appeal.

(Signed) D.G. Rice
Commissioner
(Date) 9 February 1995