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SOCIAL SECURITY ADMINISTRATION ACT 1992

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Name: Brian McINARLIN

Social Security Appeal Tribunal: Glasgow

Case No: 553 74360

1. My decision is that the decision of the social security appeal tribunal dated 25 March 1994 is not erroneous in law.

2. This is an appeal by the claimant with leave on a question of law against the above-mentioned tribunal decision.

3. The claimant has been in receipt of income support since 4 June 1990. The decision awarding benefit included an allowance for mortgage interest for which the claimant was liable in connection with the purchase of his home at 27 Cambuslang Road, Glasgow. Prior to the inception of the "mortgage direct" scheme in 1992 information was obtained from the claimant's mortgage lender, the Co-operative Insurance Company, which disclosed that there had been a number of reductions in the rate of interest applicable to the claimant's loan between 6 November 1990 and 5 August 1992. Thereafter on 29 September 1993 an adjudication officer reviewed the decision of 1 June 1990 awarding the claimant income support, on the ground of relevant change of circumstances. His revised decision found the claimant entitled to income support at a reduced rate in the period from 6 November 1990 to 5 August 1992 based upon reductions in the claimant's mortgage interest rates. As a result the adjudication officer found an overpayment of income support to have been made amounting to £637.66. He held that as the claimant had failed to disclose to the Department the material fact of a reduction of his mortgage interest rate as each change occurred an overpayment of income support amounting to £637.66 had been made and was recoverable from the claimant. The decision was supported by a detailed schedule showing the composition of the overpayment. The claimant appealed against that decision to a social security appeal tribunal.

4. At the tribunal hearing on 25 March 1994 the claimant contended that he had advised the Department by telephone each time the interest rate was altered and that he had received reduced benefit. He stated that from his cashed giro cheques for benefit he had paid sufficient to meet his mortgage interest liabilities. The lender had confirmed that decreasing amounts of interest had been paid. The tribunal unanimously refused the claimant's appeal and found that the overpayment of £637.66 was recoverable from him. The tribunal's reasons were stated in the following terms:-

"Tribunal were satisfied on the balance of probabilities that the Appellant had failed to disclose to the Department that his mortgage rate had changed on 8 occasions. Tribunal

could accept that one phone call or even two might have been overlooked by the Department, but they could not accept that 8 phone calls had been ignored. In the circumstances they accepted that the Appellant had failed to disclose the material fact that his mortgage interest rate had been reduced as a result of which he had been overpaid. In terms of Section 71(1) of the Social Security Administration Act 1992 (replacing Section 53 of the 86 Act) the Secretary of State is entitled to recover the overpayment which would not have been made but for the failure to disclose. Tribunal accepted the Department's figures in respect of the overpayment. Appellant admitted that although he disputed the figures, he could not provide a note of what he had actually received."

5. In the claimant's grounds of appeal against the decision of the tribunal it is suggested that the onus of proof was wrongly put upon him. There is no such indication however in the terms of the tribunal decision and I reject that suggestion. It is next complained that there was a lack of evidence to prove that the claimant had received overpayments of benefit and not appropriately reduced amounts as he contended. However the claimant was not prepared to accept computer print-outs which (along with possibly some of the later cashed giro) was what was available by way of written evidence of the amounts received. Given the claimant's inability to speak to any actual reduced amounts of benefit over the relevant period and given the tribunal's approach to the question of the claimant's credibility and reliability as a witness, the tribunal were in my judgment fully entitled to hold established the payments of benefit founded on by the Department in computing the overpayment of benefit. The claimant's further point regarding the probabilities of the destruction of records as perhaps being applicable to the lack of any records of his claimed phone calls does not raise a question of law and is in any event adequately dealt with in paragraph 14 of the written submission of the adjudication officer now concerned with the case (page 25 of the appeal bundle). I am content to adopt that submission of the adjudication officer without repetition. Lastly the claimant has contended that proof on a balance of probability was "not a reasonable conclusion". That however is the appropriate standard of proof as established in many Commissioners' decisions such as R(I) 32/61 cited by the adjudication officer. I am accordingly unable to sustain any of the claimant's grounds of appeal.

6. In paragraph 15 of her submission the adjudication officer now concerned refers to the well known 6 tests applicable in overpayment cases listed in reported decision R(SB) 54/83. She submits that the tribunal erred by failing to show that they had given due regard to all of these 6 tests. The adjudication officer goes on to refer in particular to the second test, viz., the necessity that the person from whom recovery of an overpayment is sought on the basis of a failure to disclose material fact knew the material fact in question, that fact in this case being of course the claimant's reduced liability in mortgage interest payments upon the reduction of the applicable rate.

7. I of course fully accept the relevance of the 6 tests propounded in R(SB) 54/83, but I deprecate any attempt to treat as automatically erroneous any tribunal decision which does not expressly deal with all 6 points. Thus although in case R(SB) 54/83 there was uncertainty at the tribunal stage over whether the overpayment expenditure there in question had been incurred by the Secretary of State for the Department of Social Security or the Secretary of State for the Department of Employment so that an express finding on the first of the 6 points was required, in many cases such as the present there is no doubt whatever which Secretary of State incurred the expenditure. If the point does not arise in a particular case it is otiose to require the tribunal to deal with it.

8. Equally the suggestion that the tribunal erred by failing expressly to find that the present claimant knew the material fact is, in the circumstances of this case, manifestly absurd. The tribunal found that there were 8 reductions in the mortgage rate applicable in the period covered by the overpayment. It was the claimant's case that he had notified the Department each time his mortgage rate changed, that he had paid the appropriate amounts to meet the mortgage liability and that the lender had confirmed the decreasing amounts paid. The tribunal recorded these matters in their findings but decided for the reasons stated by them that they were unable to accept the claimant's evidence on disclosure to the Department. Questions of the credibility and reliability of the claimant's evidence were of course a matter for the tribunal. In the circumstances of this case therefore no question arose as to the claimant's knowledge of the material fact in this case and the absence of an express finding upon that matter cannot vitiate the tribunal's decision. No doubt there are many cases where such a question does arise and in such cases it must be dealt with. The 6 test list in R(SB) 54/83 is extremely valuable in identifying the salient points of a case on recoverable overpayments under what is now section 71(1) of the Social Security Administration Act 1992 but it must be applied intelligently by adjudication officers and tribunals, in identifying and dealing with the issues that arise thereon in the light of the circumstances of each case.

9. For the foregoing reasons I reject the adjudication officer's submission in paragraph 15 of the written submission on this appeal. In my judgment the decision of the tribunal is not shown to be erroneous in law and this appeal is therefore refused.

(signed)

J G Mitchell
Commissioner

Date: 14 November 1994