

Overpayment

LB/RC

Commissioner's File: C.W.S.B.7/85
C.A.O. File:

SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL
ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal: Pontypridd

Case No:

1. My decision is that the decision of the social security appeal tribunal of 4 September 1984 is erroneous in point of law and is set aside.
2. An adjudication officer decided on 7 June 1984 that the claimant, who was in receipt of supplementary benefit, had failed to disclose that his wife was working, that as a result an overpayment of benefit amounting to £697.25 and relating to the period 16 May 1983 to 19 February 1984 had occurred and that this sum was recoverable from the claimant. The claimant's appeal from this decision to the appeal tribunal, which he attended and at which he was represented by his solicitor, was disallowed. He then appealed to the Commissioner, having been granted leave to do so by me.
3. The findings recorded by the chairman of the tribunal were "1) Appellant is married with no children and has received Supplementary Benefit from January 1982 to February 1984 continuously. 2) Appellant's wife worked at T... E... and received wages during periods 6th May to 19th August 1983 and 27th January 1984 to 10th February 1984 and during those said periods the appellant continued to receive Supplementary Benefit. 3) DHSS have no record of a telephone call made or letter written by the appellant stating that his wife commenced employment in May 1983. 4) Appellant continued to receive Supplementary Benefit at same rate after his wife commenced work notwithstanding his telephone call and letter. 5) Appellant did not include on form A9 completed at Unemployment Office G... during his wife's periods of employment the fact that she was working. 6) Appellant's wife's net wages during the periods of her employment mentioned above have varied on a weekly basis between £43.35p and £95.01p. 7) The last entry in the Employer's statement was added to after the statement had been received by DHSS." The decision recorded was "Appeal disallowed as the appellant failed to disclose material facts and has not furnished particulars required under Regulations 4 and 8 (Claims and Payments Regulations). An overpayment has been made to the appellant and must be repaid. The calculation of the overpayment must be referred back to the Department and made after confirmation of the wage paid to the appellant's wife on the 17th February 1984 has been given by her employer." The reasons recorded were "The appellant's appeal is based on the assertion that shortly after his wife commenced work in May 1983 he telephoned the DHSS

with the information. He further asserts that he was told to write to the DHSS with the said information which he claims he did the same day. The DHSS are not able to confirm or deny that the appellant made the telephone call or wrote the letter as there is no record of either at the Dept. After making the disclosure and in view of the amounts paid to the appellant's wife by her employers any reasonable person would expect benefits to be reduced. This was not so in the case of the appellant. He continued to receive and accept payments at the rate of £43.60 per week whilst his wife worked in 1983 and £45.55 per week whilst she worked in January and February 1984. During these periods the appellant's wife received net wages in excess of the benefit payments apart from week ending 6 5 83. In R(SB) 54/83 the Commissioner stated "the obligation to disclose is however, a continuing obligation. If after disclosure has been made a claimant continues to receive benefit at the existing rate, so that he has reason to suspect that his disclosure was ineffective, he cannot sit idly by. He must take further and more effective steps to make the necessary disclosure." [The claimant] did continue to receive benefit at the existing rate and therefore had reason to suspect that his disclosure was ineffective. He sat idly by. He did not take further action although he had the opportunity of doing so when he visited the Unemployment Office in G... every other Thursday during the time that his wife worked. The appellant has therefore failed to disclose a material fact - Section 20 Supplementary Benefits Acts 1976. In view of the additional entry made in the Statement of Employer the calculation of the amount recoverable is referred back to the Department and recalculated on receipt of confirmation of the amount paid to [the claimant's wife] from T.. E.. on the 17th February 1984."

4. In his submission to the Commissioner, the adjudication officer supports the claimant's appeal on the ground that the chairman of the tribunal failed to comply with the requirements of regulation 19(2)(b) of the Adjudication Regulations. In this context he has asserted that the claimant had led evidence to the effect that he had made disclosure of his wife's earnings, that he was entitled to know why his evidence was not accepted and that the record does not disclose why it was rejected. He has also asserted that "the tribunal appear to have decided that the claimant was caught by the requirement laid down in decision R(SB) 54/83 (paragraph 18) that the claimant was under a continuing obligation to disclose. I submit that only if the tribunal had decided that there had been an initial disclosure (which had proved to be ineffective), and it is submitted that they had made no such unequivocal finding, could they have gone on to have held that there was a continuing obligation to disclose. Had they properly determined that a continuing obligation existed, they ought to have gone on to determine whether such disclosure was reasonably to be expected in the light of the evidence led by the claimant that he believed that the reason why his initial disclosure had not affected his benefit was that his wife was only working part-time (page 10, paragraph 13 and paragraphs 22(c)(d), page 23). Further I submit that, if they had properly founded their decision on the continuing obligation to disclose, they ought to have found at what date the claimant ought to have suspected that his disclosure was ineffective and to have made proper findings as to the amount of the overpayment for the reduced period beginning on the date when the claimant ought to have appreciated that his earlier disclosure had been ineffective. I submit that they ought to have computed the overpayment in accordance with the principles of law set out in decision R(SB) 40/84 (paragraph 5(2)). Paragraph 21 of the claimant's submissions on appeals refers."

5. I accept that each of the assertions made by the adjudication officer is well founded for the reasons given by him and am also satisfied that each one of the omissions referred to in these assertions gives rise to a failure to comply with the requirements of regulation 19(2)(b). Accordingly, I hold that the decision of the tribunal of 4 September 1984 is erroneous in point of law and is set aside. Unfortunately, it is not expedient in the circumstances for me to give the decision the tribunal should have given. I therefore refer the case to an appeal tribunal whose constitution is entirely different from that of 4 September 1984 in order that it may be considered afresh. The chairman of this tribunal should ensure that he includes in the record a statement of the reasons for the tribunal's decision and a statement of the tribunal's findings on all material questions of fact. This will involve the making of express findings of fact and of making good the omissions of the earlier tribunal, which are referred to above. The record should be in such a form as to leave the claimant and the adjudication officer in no doubt as to the reasons for the decision and as to why any particular contention has been accepted or rejected.

6. The claimant's appeal is allowed.

(Signed) E. Roderic Bowen
Commissioner

Date: 10 April 1985

APPLICATION FOR LEAVE TO APPEAL TO A
SOCIAL SECURITY COMMISSIONER
AGAINST A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL
SITTING AT PONTYPRIDD ON 4th SEPTEMBER 1984

1. On 4th September 1984, the Social Security Appeal Tribunal sitting at Pontypridd dismissed the appeal of
against a decision of the Supplementary Benefit Officer [now Adjudication Officer] that an amount of £697.25 had been overpaid from 16.5.83 to 19.2.84 and is recoverable from him. It is submitted that the decision of that Tribunal is erroneous in law, and should be set aside.

The Hearing

2. At the hearing on 4th September the Appellant was represented by Mr Robert D. Jones, Solicitor. The Appellant filed Affidavit evidence with the Tribunal beforehand upon which he was cross-examined at the hearing. His solicitor made oral submissions on his behalf.
3. The hearing opened with the Chairman inviting the solicitor to present his case. The solicitor referred the Tribunal to the affidavit evidence and to Commissioner's decisions R(SB) 34/83 and 54/83. He submitted that the onus of proving that there was a recoverable overpayment of benefit under section 20, Supplementary Benefits Act 1976, lay on the Adjudication Officer, that the Adjudication Officer was obliged to prove the six steps set out by the Commissioner in R(SB)54/83, and consequently that it was more appropriate for the Presenting Officer to set out his case first, and the Tribunal then hear the Appellant's reply.
4. The Chairman invited the Presenting Officer to follow this approach.
5. The Presenting Officer asked the solicitor whether the sum overpaid could be agreed between the parties and the issue for the Tribunal to adjudge confined to the question of whether the sum was recoverable by the Secretary of State.
6. In answer to this question the solicitor asked the Presenting Officer to produce the original of Form QB9, the front page of which was included in the bundle of documents accompanying the Adjudication Officer's submission in photocopy form.
7. The Presenting Officer conceded that he could not produce the original. He enquired of the Tribunal Clerk whether she had the original and she stated that she did not.
8. The solicitor asked the Presenting Officer to note that the final entry on the front page of form QB9 appeared to be in different writing to the remaining entries, and asked whether this entry had been added after the time it was alleged to have been received back at the local office. The solicitor also asked whether there was a back page to form QB9, and if so what did the Presenting Officer claim was set out thereon.

9. The Presenting Officer conceded that the front page of form QB9 had been added to by a D.H.S.S. officer after it had been received back from the former employers of the Appellant's wife. He went on to say that there was a back page, which he could not produce to the Tribunal, which set out a signature of a person certifying the details therein, his or her position in the employers' firm, and the date the document was completed.
10. The solicitor informed the Tribunal that in view of the fact that the Presenting Officer could not show who completed form QB9, his or her position or rank, nor the date the certificate was purported to have been made out, and, further, in view of the fact that it was conceded that the front page had been altered by an officer of the D.H.S.S. after being received at the local office without being validated by the person who originally gave the certificate, it would be quite unsafe to admit the photocopy document in evidence, especially when the original existed and was available to be put before the Tribunal. Therefore, the overpayment figure could not be agreed on the Appellant's behalf. The solicitor informed that Presenting Officer that the Adjudication Officer was put to strict proof of all the matters set out under section 20, Supplementary Benefits Act 1976, save that the identity of the Secretary of State was admitted.
11. The Presenting Officer resumed by conceding that the Adjudication Officer no longer disputed the facts set out in the Appellant's Affidavit concerning the making of the telephone call to the D.H.S.S. and the posting of the letter to the D.H.S.S. He referred the Tribunal to paragraphs 17 and 18 of Commissioner's decision R(SB) 54/83, and stated that, accepting the letter was posted to the local office, then the Appellant could not sit idly by and receive benefit without taking further steps to find out whether he was receiving the proper amount. The Presenting Officer referred to paragraph (v) of the grounds of appeal [set out in the solicitor's letter of 15th June 1984] and stated that the Appellant should have taken further steps.
12. The Appellant's solicitor cross-examined the Presenting Officer. The solicitor put it to the Presenting Officer that the Appellant had not taken any further step with the D.H.S.S. to make his disclosure effective because he held a genuine belief that his wife's earnings did not enter into the matter because she was engaged in part-time work. He further put it to the Presenting Officer that this misunderstanding had continued as a direct result of the female officer, first, failing to take down the information, so that the Appellant was never advised in writing of the correct position, and, second, failing to advise on the disregard that applied in such cases of part-time earnings received by a spouse, or arrange for the Appellant to be advised by an officer in a position to give such advice. The Presenting Officer answered that the officer who had taken the telephone call had "rejected the information reported", thereby placing a duty on the Appellant to take further steps. He felt that because of this action by the officer the

telephone call could be discounted. He stated that there was no trace in the local office of any memorandum recording the telephone call or the letter. He refused to either accept or deny that the call consisted of the exchange of remarks set out in the Affidavit. He admitted that if the exchange as described in the Affidavit occurred, then the female officer had not followed Department instructions in that she ought to have taken down details of the call and ensured that this record was placed with the Appellant's case papers, or passed the record to another officer who would ensure this was done. He explained that the action that an officer would take on receipt of such a telephone call might in practice vary; an officer might simply take a note of the information proffered, or take a note of the information and advise the claimant that it would be wise to write in confirming, or simply tell the claimant to write in. The practice which officers were instructed to follow was to note the information and advise the claimant to write in confirming but officers might depart from this under pressure as local offices dealt with a great many claims. Whether an officer followed proper procedure might depend on whether the telephonist put the claimant through to the supplementary benefit section or another section of the local office, for example, the sickness benefit section, or the extent of work pressures at the time.

13. The solicitor put it to the Presenting Officer that there was an insufficient number of staff employed in local Social Security offices on the assessment of supplementary benefit claims, and that it was no secret that officers had taken industrial action at this local office and others, because of what were considered to be intolerable pressures. The Presenting Officer declined to comment except to say "The Secretary of State would not agree with you". The Chairman observed that the Tribunal was aware that industrial action had taken place over this issue.
14. Questioned by the solicitor as to when the Adjudication Officer said a further step should have been taken to make disclosure effective, the Presenting Officer said on the occasion of the Appellant receiving the first giro order after his wife commenced employment.
15. The Appellant gave oral evidence to the Tribunal. He told them that he was telling the truth in his Affidavit, that he did not know that he was receiving more benefit than he was entitled to receive, and he believed himself entitled to the same benefit as when his wife was not working because her earnings were part-time earnings and not taken into account. The Chairman asked him at which Unemployment Benefit Office he signed and how often, to which he replied, "Garden City, Gilfach Goch, every other Thursday". He did not say he signed at "Gelli". The Chairman also asked him why he did not report any change of circumstances to the Unemployment Benefit Office. He replied that he had signed to the effect that he had not worked since he last signed, and that he did not consider that there had been any change of circumstances since the last time he reported his circumstances to the

D.H.S.S., namely, when he wrote in, after the telephone call. No forms which it was alleged that he had signed were produced to the Tribunal nor shown to him. He did not say "I have signed form A9". He had no idea whether the form he signed was A9 or otherwise, and he could not recollect exactly what the form said.

16. No written or other evidence was put before the Tribunal to show that he was aware of how his supplementary allowance was made up. No forms UBL 18 or SB9 were included in the Adjudication Officer's submission bundle, nor adduced in evidence before the Tribunal by the Presenting Officer.
17. His solicitor put before the Tribunal an extract from the Child Poverty Action Group's "WELFARE RIGHTS BULLETIN No 61", August 1984, [a copy of which is annexed hereto] reporting on Commissioner's decisions R(SB)12/84 and CSB 347/1983
18. The Appellant's solicitor drew the Tribunal's attention to the presence of Mrs Lucas, the Appellant's wife, at the hearing and invited the Chairman and members, and also the Presenting Officer, to question her on any matters pertinent to the appeal of which she possessed knowledge, including the Appellant's evidence that she saw him write and post the letter to the D.H.S.S. at Tonypany.
19. The Appellant's solicitor submitted to the Tribunal:-
 - [a] that there was no evidence against the Appellant's claim that he had telephoned and written to the Tonypany local Social Security Office;
 - [b] that there was evidence to show that a written record was not always kept of telephone conversations even though the standing instructions to officers provide that they should keep such a written record;
 - [c] that in the circumstances, the Appellant was entitled to have his evidence on this point accepted, and that it was reasonable for the Tribunal to find as a fact that he did telephone the local office and that the conversation he described in his Affidavit did take place.
 - [d] that as a matter of law, applying R(SB)12/84 and CSB 347/1983, oral notification of change of circumstances over the telephone constitutes "disclosure" under section 20 of the Supplementary Benefits Act 1976.
 - [e] that there was no evidence against the Appellant's claim that he had written and posted a letter to the D.H.S.S. notifying them of his wife's employment; and in the circumstances he was entitled to have his evidence on this point accepted, and that it was reasonable for the Tribunal to find as a fact that he did write a letter to the Tonypany local office as described in his Affidavit, and post it.

[f] that if, which is not admitted, the letter did not reach the Tonypandy local office, that fact is immaterial by reason of the combined effect of Regulations 2[4] and 8[a] of the Supplementary Benefit (Claims & Payments) Regulations 1981 as amended, as interpreted in the light of Commissioner's decision R(SB)55/83 [mentioned in the notice of appeal].

Reg 2[4] says

"Any notice or other document required or authorised to be given or sent to any person under the provisions of these regulations shall be deemed to have been given or sent if it was sent by post to that person at his last known address."

Reg 8 says

"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 certificates and other documents and such information of facts affecting right to benefit, or to its receipt, as the Secretary of State may require (either as a condition on which any sum or sums shall be receivable or otherwise) and in particular

(a) shall notify the Secretary of State in writing of -

(i) any change of circumstances which is specified in the notice of determination or, where applicable, the book of serial orders, and

(ii) any other change which that beneficiary or person might reasonably be expected to know might affect the right to benefit, or to its receipt,

as soon as reasonably practicable after the occurrence of that change.....

(b) in the case of a beneficiary required to be available for employment pursuant to section 5-

(i) shall at such intervals as the Secretary of State may direct sign a form approved by the Secretary of State which includes a declaration as to his unemployment and availability for employment within the meaning of that section, and

(ii) shall in that connection attend at the relevant unemployment benefit office on such occasions and in such manner as he is required or would be required to attend for the purposes of claiming unemployment benefit."

It was submitted that the written notice required of a claimant under Reg 8 [a] [ii] fell within the category of notices prescribed by Reg 2[4] and that accordingly, provided that the notice was posted, receipt thereof by the addressee was deemed to have occurred. In this case it was submitted that the fact that the letter may not have reached the local Social Security office did not place the Appellant in breach of Reg 8 or exclude his argument that he had made disclosure under section 20 of the Supplementary Benefits Act 1976 because the effect of Reg 2[4] was that notice of his change of circumstances was deemed to have been given. Fortification of this view was found in R(SB)55/83 where the Commissioner had interpreted the same words as used in Reg 2[4] (also found in Rule 1(4), Supplementary Benefit & Family Income Supplement Appeals Rules 1980) so as to render it immaterial whether a notice of a hearing was ever received provided it was posted. If the letter did reach the local Social Security office in this case but was not linked to the Appellant's case papers no responsibility could be placed on him for that omission.

- [g] that, accordingly, the Appellant had discharged his duty to make written disclosure under Reg 8(a), Supplementary Benefit (Claims & Payments) Regulations 1981 as amended and could not therefore be said to have failed to have disclosed a material fact under section 20 of the Supplementary Benefits Act 1976 on this account.
- [h] that the Presenting Officer's argument that the female officer had "rejected" the information proffered by the Appellant when he telephoned the Tonypandy local office was misconceived. His solicitor referred the Tribunal to section 27(1) of the Supplementary Benefits Act 1976 as amended.

Section 27(1) says

"It shall be the duty of the Secretary of State to make arrangements with a view to ensuring that adjudication officers and other officers of his concerned with the administration of this Act exercise their functions in such manner as shall best promote the welfare of persons affected by the exercise of those functions."

It was submitted that Parliament has imposed upon the Secretary of State a mandatory obligation to make arrangements for his officers to do their work in a way which will be in the best interests of claimants, and that the arrangements made by the Secretary of State include the standing instructions to officers to note the content of a telephone call and link the memorandum with the appropriate file of papers. It was beyond the authority of an officer to substitute her own procedure for that laid down by or in the name of the Secretary of State. By departing from the arrangement laid down by the Secretary of State she had defeated Parliament's

intention of promoting the Appellant's welfare in the local office's exercise of a function under the Supplementary Benefit Act 1976, as amended, namely, to assess his supplementary benefit entitlement according to law.

- [i] that in judging what was to be reasonably expected of the Appellant after he sent in his letter of disclosure to the Tonypandy local Social Security office the Tribunal should take into account the following matters
- (a) that he had never claimed supplementary benefit before whilst his wife had worked
 - (b) that he did not know how his supplementary benefit was made up and formed a genuine belief that part time earnings of a wife were disregarded
 - (c) that he took reasonable steps to enquire of the Department whether his belief was correct
 - (d) that if the officer who had taken the Appellant's telephone call had acted properly and in accord with standing instructions then he would have been correctly advised of the effect of his wife having commenced work
 - (e) that those in receipt of supplementary allowance are nearly always those at the bottom end of the labour market, who are very often ill informed on their rights, poorly educated and poorly placed to fill gaps in their knowledge, and inarticulate, and that therefore great reliance is placed on the way the D.H.S.S. deal with enquiries, and the advice given, in particular that given over the telephone - which is the most usual medium of communication of claimants - and that therefore it was of great importance that high standards are maintained in officers' telephone dealings with claimants, and that where there is a clear departure from such standards, then this must be taken into account in deciding whether the conduct of the claimant is reasonable.
 - (f) that if the view of the Presenting Officer were correct, namely, that a duty to make further disclosure arose merely because the Appellant received a giro order for the same amount of benefit as hitherto, first, this assumes that he knew how his benefit was made up, which assumption is untrue, and, second, it is inconsistent with the ruling of the Commissioner in R(SB) 54/83 [paragraph 13(3)]

"In order to recover expenditure incurred by the Secretary of State under the Supplementary Benefits Act 1976 on the ground of failure to disclose a material fact, it must be shown:

(1).....

(2).....

(3) the disclosure by the person in question was reasonably to be expected: see Decision R(SB) 21/82, paragraph 4(2); and R(SB)28/83 paragraph 11."

It was submitted that even though the amount of benefit had not altered after the disclosure by telephone and by letter, the Tribunal were still bound to consider whether it was reasonable to expect the Appellant to take further steps in respect of disclosure in the particular circumstances of the case. There may be factors which allay or discount the suspicion which might normally be expected to arise. Here the Appellant did not suspect that his disclosure had been ineffective because he genuinely believed that his wife's earnings were not to be taken into account.

Grounds of Appeal

- 20. The Tribunal failed to make unequivocal and explicit findings of fact on the Appellant's claim that he telephoned the Tonypandy local office, on the content of that telephone conversation, and on the Appellant's claim that he wrote a letter to the D.H.S.S. notifying his changed circumstances.
- 21. The Tribunal failed to deal with the question of the amount of excess expenditure which the Secretary of State claimed to have incurred, failed to make a proper finding of fact on this most important and material point, and unlawfully delegated their function in this respect to the Department of Health and Social Security, contrary to Reg 19, Adjudication Regulations 1984 and to the rules of natural justice.
- 22. The Tribunal have failed to give any or any proper regard to other important questions of law pertinent to this appeal and have accordingly misdirected themselves on the law in the following way:-

[a] in failing to decide whether the telephone call amounted to disclosure and whether the officer of the Department who took the call acted properly;

- [b] in failing to decide whether the letter sent by the Appellant to the Tonypandy local office was deemed to have been received by reason of Reg 2[4], Supplementary Benefit (Claims & Payments) Regulations 1980;
- [c] in failing to examine whether it was reasonable for the Appellant to be suspicious of ineffective disclosure after his letter was sent, having particular regard to his belief that his wife's earnings did not affect his benefit entitlement and the fact that his wife had not been employed before whilst he claimed supplementary benefit.
- [d] in failing to examine whether it was reasonable for the Appellant to hold a belief that his wife's earnings did not affect his benefit entitlement, having particular regard to the enquiries which he had made and the advice given to him over the telephone.
23. The Tribunal acted unfairly and against the principles of natural justice in admitting in evidence part of a copy document, unsigned, undated and known to have been altered by the other party to the appeal, when the original document was available to the Secretary of State for him to produce to the Tribunal.
24. The Tribunal acted unfairly and against the principles of natural justice in finding facts on the content of documents not included in the Adjudication Officer's submission bundle, not adduced in evidence at the hearing, and which the Appellant was not given any opportunity to examine or comment upon.
25. The Appellant cannot tell from the record of the Tribunal's proceedings whether or not they accepted his evidence as to disclosure and the belief he held. The Appellant is entitled to know whether his evidence was accepted or rejected and whether this has affected the Tribunal's view of his conduct after he wrote his letter of notification to the Tonypandy local office.
26. The Tribunal's record of proceedings gives the false impression that the Appellant's solicitor advanced no submissions to the Tribunal at the hearing. None of the legal argument put forward on the Appellant's behalf is recorded, though the legal argument of the Presenting Officer is recorded. None of the decisions of the Commissioner cited to the Tribunal by the solicitor are recorded save R(SB)54/83, also cited by the Presenting Officer. The Appellant is left with the impression that his representative's legal argument have been disregarded. Certainly those arguments, whether they be right or wrong, are not dealt with in the Tribunal's reasoning.

- 27. The Adjudication Officer, upon whom lay the burden of proof on the test of the balance of probability, failed to adduce evidence to satisfy the six points stipulated in R(SB)54/83, and therefore did not discharge his burden proof. Accordingly the Tribunal's decision was against the weight of the evidence.

- 28. For the foregoing reasons the Appellant says the Tribunal has erred in law and that leave should be given to apply to the Social Security Commissioner to set aside the decision.

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3/11/84

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