

MHJ/1/LM

Commissioner's File: CIS/222/91

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

1. My decision is that -

(a) the unanimous decision of the Cleveland social security appeal tribunal given on 21 April 1989 is erroneous in point of law and is set aside;

(b) overpayment of supplementary benefit amounting to £1,005.00 during the inclusive period from 6 August 1985 to 22 February 1988 did not arise in consequence of the claimant's misrepresentation and accordingly is not recoverable from her.

2. The claimant appeals with my leave against the decision of the tribunal confirming the decision of the adjudication officer, issued on 16 December 1988, that a recoverable overpayment of £1,005.00 had been made to the claimant because she had "misrepresented the material fact that she did not [sic] pay ground rent".

3. What happened, which is not in dispute, is that the claimant, a widow now aged 56, when completing form A1 dated 29 July 1985, answered questions in part 10 regarding her home by stating that she paid ground rent of £32.50 a month, but then immediately went on to say that her home was not a leasehold property and was subject to a mortgage from the Newcastle Building Society. The claimant's benefit was calculated on the basis that she paid ground rent and in due course, when her entitlement to income support came to be assessed, it was established that she owned the freehold of the property and that the figure for ground rent was in fact the amount she paid by way of general rates. The adjudication officer recalculated her entitlement and issued the decision of 16 December 1988 holding that, as the claimant had misrepresented a material fact, the sum overpaid was recoverable from her pursuant to section 53(1) of the Social Security Act 1986, which provides that -

"53.-(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to

disclose, any material fact and in consequence of the misrepresentation or failure -

- (a) a payment has been made in respect of a benefit to which this section applies; or
- (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered.

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose."

That this provision operates retrospectively is now beyond doubt in view of the judgment of the Court of Appeal in the case of Tunnickliffe (to be reported as R(A) 4/91), so it is not necessary to consider the former, similar provisions of section 20 of the Supplementary Benefits Act 1976.

4. The claimant appealed and on 21 April 1989 the tribunal found as facts, inter alia, that -

"2. In completing that form she explained in unqualified categorical terms that she pays ground rent at the rate of £32.50 per month.

3. It is common ground between the parties that the reality of the situation is that the Appellant did not and does not pay ground rent. In completing the form of claim she took the obligation to pay rates to relate to the enquiry as to ground rent."

And, having summarised the provisions of section 53 above, they gave as their reasons for their decision -

"In this case the Tribunal is unanimous in finding that the Appellant misrepresented her obligations in showing an obligation to pay ground rent. As a result of that misrepresentation an overpayment of £1.005 occurred."

5. In the submission dated 19 July 1991 by the adjudication officer now concerned with the case it is submitted, in paragraphs 5 and 6, that the tribunal erred in law in failing to deal with the question of review and in failing to make adequate findings of fact or give sufficient reasons. I have no doubt that those criticisms are well founded and would suffice to set the decision aside. However, it also seems to me that the tribunal erred in their application of section 53.

6. Part 10 of form A1 is plainly stated to be "for people who own their own home or have a mortgage or loan". The first question is: "Do you own your home jointly with anyone else?", to which the claimant answered, "No". She then gave the answers referred to in paragraph 3 above and, having said "No" to the

question whether her home was leasehold, she left blank the answer to the next question: "When the lease was first granted was it for more than 21 years?". The significance of that question lies in the fact that under regulation 18(1)(b) of the Supplementary Benefit (Requirements) Regulations 1983 "payments by way of ... ground rent" were only to be included as "miscellaneous outgoings" if they related to "a long tenancy" as defined in regulation 2(1) of the Housing Benefit (General) Regulations 1987 as "a term of years certain exceeding twenty one years".

7. It follows that ground rent could only be brought into the assessment of a claimant's requirements for supplementary benefit purposes if the lease of the property to which it related had been granted for a term exceeding 21 years. Clearly in the instant case that question was never investigated by the adjudication officer who initially awarded benefit. In my judgment the claimant's answers to part 10 of form A1 were so plainly inconsistent and ambiguous as to put the adjudication officer on notice. Quite apart from the inherent improbability of ground rent of £32.50 a month being payable on a long leasehold, the claimant unequivocally said that her home was not leasehold. That the adjudication officer saw fit to make an award without resolving that obvious conflict and, moreover, took into account ground rent without establishing whether the conditions of regulation 18(1)(b) were satisfied, seems to me manifestly an error on the part of the Department rather than a misrepresentation by the claimant.

8. The tribunal failed to address themselves to that aspect of the matter at all and, in those circumstances and for the reasons set out in the preceding paragraphs, I hold that their decision is erroneous in point of law and I set it aside. In my view this is a case in which I can and should exercise my power under section 101(5) to give the decision which the tribunal should have given. In my judgment, for the reasons set out above, the overpayment of supplementary benefit amounting to £1,005.00 to the claimant during the period in issue was not in consequence of her misrepresentation and is accordingly not recoverable from her.

9. The claimant's appeal is allowed and my decision is set out in paragraph 1 above.

(Signed) M H Johnson
Commissioner

Date: 11 February 1992