

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: Pauline Lorraine Blanchard

Social Security Appeal Tribunal: Hull

Case No: 1:06:5305

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal dated 4 October 1989 is erroneous in law. I set it aside and direct that the case be reheard by a differently constituted tribunal.

2. The claimant had been in receipt of income support since 11 April 1988. Sometime before then she had apparently worked part-time but during several months of 1988 she was on maternity leave. She arranged to return to work on 5 September 1988 but her first wages were, for reasons I do not know, not to be paid until 26 October 1988. She still had her order book and, she says, she telephoned her local Department of Health and Social Security office to tell them when she was returning to work and that she would not be paid for about 6 weeks and to ask what she should do. She was, she says, told to go on cashing the order book until she received her first wages and then to return the book. She did return it on 26 October 1988 having cashed orders down to 23 October 1988. By a decision issued on 15 December 1988 an adjudication officer decided that -

"Income support of £251.10 has been overpaid for the period 12.9.88 to 17.10.88 and is recoverable by the Secretary of State, as the claimant failed to disclose a material fact to the Department."

According to the claimant she went to the local office on 6 July 1989 and made a statement about the matter. But that statement seems to have been lost because in early April 1989 she received a letter from the Department to the effect that they had had no response to their letter enclosing the adjudication officer's decision. She then wrote referring to the statement she had given on 6 January 1989 and to the telephone conversation to which I have referred. On 19 June 1989 she was given leave to make a late appeal against the adjudication officer's

decision. The tribunal dismissed her appeal. She now appeals to the Commissioner.

3. The failure to disclose issue arises under section 53(1) of the Social Security Act 1986 (now section 71(1) of the Social Security Administration Act 1992) pursuant to which the Secretary of State may recover overpayments which have occurred in consequence of a misrepresentation or failure to disclose. On the facts of this case that is a relatively straightforward issue the outcome of which depends on the view taken of the claimant's evidence concerning the telephone conversation. There is however another issue which has given rise to conflicting decisions of Commissioners. That is the issue of compliance with section 53(4) of the 1986 Act which, in the form then in force, provided that -

"(4) Except where regulations otherwise prescribe, an amount shall not be recoverable under sub-section (1) above or regulations under sub-section (3) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review."

Because of the problems arising from that particular issue the Child Poverty Action Group arranged for representation in relation to a group of cases, including this present case, in which the issue arose. I dealt with the group at an oral hearing when Mr M. Rowland of Counsel represented all the claimants and Mr J. Heath of the Solicitor's Office represented the adjudication officer.

4. Before turning to the section 53(4) point I should deal with the failure to disclose issue. The tribunal accepted that the claimant was a truthful witness who had disclosed her intended return to work in the telephone conversation to which I have referred. But they went on to say that they were not satisfied on the balance of probabilities that in the course of the telephone conversation she had made it clear that she was to start work on 12 September 1988 and I think they were suggesting that she had not asked for or obtained the advice which she said had been given to her. They gave no reasons for that conclusion which, as the current adjudication officer points out, seems inconsistent with the rest of their conclusions. Why, having regarded the claimant as a truthful witness they should accept one part of her evidence and reject another is not made clear and I agree with the current adjudication officer that the tribunal's decision is erroneous in law for insufficiency of reasons. I turn now to the section 53(4) point.

5. Section 53(4) has the effect that benefit overpaid is not recoverable by the Secretary of State pursuant to sub-section (1) unless the original determination whereby the amount overpaid was awarded "has been revised or varied on appeal or revised on a review". There is no mention in the adjudication officer's decision that any of that happened. It is not required to happen where regulations otherwise provide. Regulation 12 of the somewhat tiresomely titled Social Security (Payments on account,

Overpayments and Recovery) Regulations 1988 provides that section 53(4) does not apply "where the facts and circumstances of the misrepresentation or non-disclosure do not provide a basis for reviewing and revising the determination under which payment was made". Whatever effect that is supposed to have the present case is not a case to which it applies.

6. Commissioners have reached different conclusions with regard to cases to which section 53(4) does apply but where there was no evidence before the tribunal of compliance with that provision and where the tribunal did not deal with the point. Mr Rowland identified a number of the relevant decisions of Commissioners. These are some of them. In CSSB/105/89 the tribunal's decision was simply set aside with a suggestion to the effect that an adjudication officer might wish to start again after disposing of the relevant adjudication officer's decision by review under section 104(1A) of the 1975 Act (review for error of law). In R(SB) 7/91 the case was remitted to a new tribunal for consideration of the question whether section 53(4) had been complied with and with a direction to hold that if it had not been the decision was invalid. In CSSB/316/89 the Commissioner treated the question whether there had been compliance with section 53(4) as a question of fact and, having decided there was no evidence of compliance, he gave the decision which he said the tribunal should have given namely that "no valid adjudication officer's decision on the overpayment alleged has been made" from which it followed of course that there could be no recovery. In CSB/1272/89 it was held that where there was no evidence of compliance with section 53(4) the tribunal or indeed the Commissioner could make good the omission by reference to section 102(1) of the 1975 Act as a question first arising in the course of the appeal and then by carrying out the necessary review. In CSB/274/90 the Commissioner carried out the review himself but left open the question whether he did so under section 102(1) or simply because the matter was generally in issue. Mr Rowland took the view that R(SB) 7/91, CSSB/316/89 and CSSB/540/89 were correctly decided and the others were not. Mr Heath agreed that section 102(1) did not empower either a tribunal or the Commissioner to carry out a review. But he referred to the words in section 53(4) "... unless the determination in pursuance of which it was paid has been reversed or varied on an appeal ..." and submitted that those words conferred on a tribunal or the Commissioner jurisdiction to vary the original award in the course of an appeal against the adjudication officer's overpayment decision.

7. The provisions to which I have referred make it quite plain that before the Secretary of State is entitled to recover overpaid benefit there must be two decisions. Which should come first is perhaps a matter for debate but there must be a decision under section 53(1) concerning the misrepresentation etc. and a decision under section 53(4) in relation to the original decision awarding the benefit in question. There has been, in some of the cases to which I have referred, speculation as to the reason for the section 53(4) requirement. The most widely held view, to which both Mr Heath and Mr Rowland subscribed, seems to be that

the purpose was to ensure that two inconsistent decisions, the original decision awarding the benefit and the decision in effect requiring repayment, should not both be left standing. Why that should be so important a consideration has not been made clear to me. Another view is that the provision is there to ensure that, as was said in CSB/1272/1989, on the review of the original decision "any overpayment [is] struck after taking into account any set-off established by the claimant". That was doubted in CSB/274/1990 because of regulation 14 of the Payments Regulations which prescribes the limited circumstances in which under-payments of benefit may be deducted from an overpayment. It seems to me that it is not essential to ascertain, even if it is ascertainable, the reason for the provision as the words "unless the determination ... has been ... revised on a review" are plain in themselves and plainly are a reference to the power to review decisions contained in section 104(1) of the 1975 Act pursuant to which any decision of an adjudication officer, a social security appeal tribunal or a Commissioner may, on the grounds contained in the provision, be reviewed at any time by an adjudication officer or by a tribunal on a reference by an adjudication officer; the grounds include ignorance of or mistake as to a material fact and those no doubt will be the grounds which will be relevant to most section 53 cases.

8. Section 98 of the 1975 Act requires claims and questions arising in connection with claims or awards of benefit to be submitted to an adjudication officer who must, under section 99(2), either decide the claim or question himself or refer it to a social security appeal tribunal. An adjudication officer in an overpayment case has, as I have said, to decide both the section 53(1) and the section 53(4) questions - though theoretically those questions could be decided by different adjudication officers. In the present case, according to the record, the adjudication officer decided that income support " ... has been overpaid and is recoverable by the Secretary of State as the claimant failed to disclose a material fact to the Department". Now both questions were before the adjudication officer for his decision and the terms of his decision suggest that he dealt, as required by section 99(2), with both questions or at least attempted to; by deciding as he did that the amount overpaid was "recoverable" he dealt, as it seems to me, however imperfectly with the recoverability question that arises under section 53(4). The claimant's appeal necessarily related to both questions. The tribunal had, in dealing with the appeal on the section 53(4) question, to determine whether a review had actually been carried out and their decision is erroneous in law because they failed to do so. Now I agree with what was said in CSB/1292/1989 (paragraph 10) that " ... it is highly desirable that such omission should be made good, rather than that the immense expense and delay involved in requiring the whole process to start again should be incurred" and as I have said, the Commissioner in that case relied on section 102(1). In CSB/274/1990 the Deputy Commissioner said (paragraph 18) that he "had some doubt whether the question of review and revision does 'first arise in the course of the appeal' in these circumstances or is rather part

and parcel of the overpayment question which is already the subject of the appeal". And those last words seem to me to be consistent with the approach which I have just indicated; the terms of the adjudication officer's decision show that all questions concerning the overpayment and recoverability of the sum in question were put in issue and remained in issue before the tribunal. They should have dealt with all issues including the recovery question depending as it does on whether a review had in fact been carried out; as the recoverability question was already before them they could as necessary carry out a review themselves not as a matter first arising but because they were already seized of the issue. On further appeal, the Commissioner may of course give the decision himself or remit the case to another tribunal.

9. In view of the conclusion I have reached I propose not to consider Mr Heath's point concerning the effect of the words "reversed or varied on an appeal" though had I needed to do so I would have rejected the argument.

10. With regard to the appeal now before me, the failure to disclose question still remains to be decided and I therefore propose to remit the case for rehearing by another tribunal who must deal both with that issue and with the review question on the basis to which I have referred.

11. I should perhaps mention that as from 6 April 1990 section 53 was amended so as to reformulate sub-section (4) and to add sub-section (1A). The new sub-section was in these terms -

"Where any such determination as is referred to in sub-section (1) above is made on an appeal or review, there shall also be determined in the course of the appeal or review the question whether any, and if so what, amount is recoverable under that section by the Secretary of State."

The precise effect of that provision is not immediately clear but it would seem to be directed at ensuring that all relevant matters are disposed of together. I do not think that the provision alters anything I have said above; it more probably strengthens it. The reformulation of sub-section (4) is I think neutral on the question with which I have been concerned. Section 53 is now, as I have said, consolidated into section 71 of the Social Security Administration Act 1992.

(Signed) R A Sanders
Commissioner

Date: 11 November 1992