



MJG/SH/5/MD

Commissioner's File: CSB/1006/1985

C A O File: AO 2731/SB/85

Region: North Eastern

SUPPLEMENTARY BENEFITS ACT 1976**APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW****DECISION OF THE SOCIAL SECURITY COMMISSIONER**

Name: [REDACTED]

Social Security Appeal Tribunal: [REDACTED]

Case No: [REDACTED]

[ORAL HEARING]

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 6 November 1984 as that decision is erroneous in law and is set aside. I remit the case for rehearing and redetermination, in accordance with the directions in this decision, to a differently constituted social security appeal tribunal: Supplementary Benefits Act 1976, section 2 and the Social Security (Adjudication) Regulations 1984 [SI 1984 No. 451 as amended], regulation 27.

2. This is an appeal to the Commissioner by the claimant a man aged 52 years at the relevant time against the unanimous decision of the local tribunal dated 6 November 1984, holding that supplementary benefit of £972.45 had been overpaid to the claimant for the inclusive period from 23 November 1983 to 27 March 1984 and that that sum was recoverable from the claimant under section 20 of the Supplementary Benefits Act 1976 (see below). The appeal was, at the claimant's request, the subject of an oral hearing before me on 4 March 1986 at which the claimant was present and was represented by Mr A J Cox of the Citizens Advice Bureau in the claimant's home city and the adjudication officer was represented by Mrs G Huka of the Solicitor's Office of the Department of Health and Social Security. I am indebted to Mr Cox and to Mrs Huka for their assistance to me at the hearing.

3. The reason why there was said to have been an overpayment of £972.45 for the period in question was because during that period the Department was unaware of the fact that the claimant was the owner of 540 ordinary shares in a well known tailoring company of which he had been an employee and which had been allotted to him under a "group profit sharing scheme" because he was an employee. Unhappily, the claimant was made redundant by the tailoring company in June 1982. The market value of the shares was at all times sufficient to cause the claimant's total capital to exceed the capital limit for entitlement to supplementary benefit (£3,000), prescribed by regulation 7 of the Supplementary Benefit (Resources) Regulations 1981 [SI 1981 No. 1527]. It is not disputed that the market value of the shares has to be taken into account as an actual resource of the claimant's (under

ulation 5 of the Resources Regulations) but what is in issue is whether the claimant should be required to repay the whole or part of the £972.45 overpayment of supplementary benefit under the provisions of section 20 of the Supplementary Benefits Act 1976, which so far as is material provides as follows,

"20. (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -

(a) the Secretary of State incurs any expenditure under this Act; or

(b) [not relevant]

the Secretary of State shall be entitled to recover the amount thereof from that person."

4. I will mention first the question on which both Mr Cox and Mrs Huka concurred in submitting to me that the original tribunal erred in law. That arises from the words "in consequence of" in section 20(1) of the 1976 Act. It is only such overpayment that arises "in consequence of" any misrepresentation or failure to disclose that is recoverable from a claimant in a case such as this. There needs therefore to be taken into account, if relevant, the "diminishing capital" rule as now laid down in reported Commissioner's decision R(SB)15/85, which requires the capital possessed by the claimant to be diminished by the amount of his supplementary benefit requirements, on the footing that until he becomes entitled to supplementary benefit he will have to pay for those requirements out of his own capital. At the point of time at which the capital becomes diminished below the £3,000 limit, then supplementary benefit would once more become payable. Therefore any overpayment of benefit that is recoverable must cease also on that date. The new tribunal will therefore need to call for the relevant evidence from both the adjudication officer and the claimant, to enable it to make a proper calculation of the recoverable repayment which presumably will be considerably less than the £972.45, the full amount of overpayment referable to the entire period from 23 November 1983 to 27 March 1984. For the reasons set out below, I direct the new tribunal that there was a recoverable overpayment and the only question for that tribunal is its amount.

5. A recoverable overpayment under section 20(1) of the 1976 Act occurs only if there was either a misrepresentation or a failure to disclose a material fact. The original local adjudication officer put his decision on the footing of misrepresentation but in my judgment (and I so direct the new tribunal) there is no misrepresentation in the present case. Misrepresentation involves the need for an actual statement which is untrue and the only statement that the claimant made that is relevant is the form of declaration on form B1 (claim for supplementary benefit) dated 24 November 1983 which reads,

"Declaration: as far as I know, the information on this form is true and complete."

In my view the words "as far as I know", which, I believe, are not included on more recent editions of form B1 mean that the claimant represents only that to the best of his knowledge the information that he has given on the form is true and complete. Therefore the fact that there was no specific entry relating to the shares in the tailoring company or the fact that the amount of the total for "savings" given by the claimant in the form was incorrect does not amount to a positive misrepresentation, since I am satisfied from the findings of the original tribunal that the claimant, when he signed the declaration, was giving what he bona fide believed to be a true and complete account of his reckonable resources.

6. The remaining issue therefore is whether the claimant at the material time failed to disclose any material fact. It was argued before me by Mr Cox that the claimant had not failed to disclose any material fact because he did not realise that the shares in the tailoring

company could be sold at any time by him but thought the shares were for 7 years after allotment to him not able to be sold, being held on a trust by the trustees of the profit sharing scheme in a manner which meant that the claimant could not have any access to the capital. That belief arises from the fact as stated before the original tribunal that the claimant did not receive a letter dated 15 July 1982 from the tailoring group which indicated that, even though the claimant had opted to have the shares held in trust for him for 7 years after the date of such allocation, he nevertheless if he became redundant could instruct the trustees to sell the shares on his behalf and remit to him the proceeds of sale. By contrast, a letter (undated-number 11 in the appeal papers) from the tailoring company to the claimant after his redundancy did not refer to the fact that there was accessibility to the capital of the shares on redundancy, even if the claimant had earlier chosen to exercise his option to have the shares held for 7 years in trust.

7. Mr Cox therefore submitted that as the claimant bona fide believed that the shares were unrealisable for 7 years from allotment, he could not have failed to disclose a material fact. However, in my judgment the very existence of the shares was a "material fact", even if the claimant had considered reasonably that they were not realisable or that they were subject to restrictions on transfer or sale. Their very existence was in my view "a material fact" which should have been disclosed on the initial claim for supplementary benefit. The words "material fact" must be construed with a reasonably wide meaning and mean in my judgment any fact which might reasonably be considered to have some effect on the claimant's entitlement to, or the amount of, supplementary benefit. The possession of shares, whether subject to restrictions on transfer etc or not, is in my view well within the meaning of a material fact.

8. There therefore remains the question of whether the claimant failed to disclose that material fact. Mr Cox submitted that he did not and prayed in aid the well known statement in reported Commissioner's decision R(SB)21/82 at paragraph 4(2) which reads as follows,

"4. (2) In my judgment 'any person' is quite clearly to be taken in its ordinary sense and extends to any person whatsoever - provided that it is he or she who has made the material misrepresentation or failed to make the material disclosure; but whilst the concept of making or not making a misrepresentation needs no explanation or refinement, I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal - ie. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see amongst the definitions of 'failure' in the Shorter Oxford English Dictionary:

'1. ...non-performance, default; also a lapse...!'

9. Mr Cox submitted that in the circumstances of this case disclosure by the claimant was not "reasonably to be expected" since he bona fide believed that the shares were not relevant, in that he considered them to be unrealisable and in the hands of trustees until the lapse of the 7 years period. In my view that submission by Mr Cox is erroneous in law. I consider that the learned Commissioner in R(SB)21/82 was making the statement "disclosure by the person in question was reasonably to be expected" in the general context of that decision, which concerned the question of whether husbands and wives should be under a duty to disclose one another's assets. That clearly emerges from the wording of paragraph 4(2) itself in that the question of reasonable expectation of disclosure is "by the person in question". If there is being considered possible repayment by a person other than the claimant himself, eg. a spouse or a receiver of a mentally infirm person's estate (compare R(SB)28/83) or representative of a deceased person, then there may well be some issue of whether disclosure by that person was reasonably to be expected. But in the case of a claimant one would automatically expect disclosure of all material facts which the claimant knew. That is borne out by paragraph 4(3) of R(SB)21/82 where the learned

Commissioner said,

- "4. (3) However the reference to 'fraudulently or otherwise' necessarily extends the scope of the provision beyond fraudulent misrepresentation or failure to disclose to wholly 'innocent' misrepresentation or failure to disclose -for instance, by reason of forgetfulness."

10. Moreover further, passages in R(SB)21/82 show in my view that the phrase "disclosure by the person in question was reasonably to be expected" in paragraph 4(2) is confined to situations where someone other than the claimant is being considered (compare paragraphs 19 and 20(4) of R(SB)21/82). The dictum in paragraph 4(2) of R(SB)21/82 has been cited in subsequent Commissioners decisions, notably in R(SB)28/83 and R(SB)54/83, but in the first case in the context of a person other than the claimant personally being considered in relation to the duty of disclosure and in the second case in the context of the claimant not being the person who received the income to be disclosed (compare paragraph 15 of R(SB)54/83 - "it is not in dispute that the claimant knew that his wife was working, that disclosure by him was reasonably to be expected..." - my underlining - and paragraph 11 of R(SB)28/83).

11. Mr Cox referred me to reported Commissioner's decision R(P)1/79 where the headnote accurately sums up the ruling as follows,

"Failure to make enquiries does not of itself defeat a plea of good cause if the claimant can show that he could not reasonably have been expected to have been aware of his rights or that a mistaken belief reasonably held by the claimant was responsible for his failure to assert those rights."

By analogy Mr Cox contended that in the present case there was "a mistaken belief reasonably held by the claimant" and therefore there was no failure to disclose by him. In my view, that is a non sequitur. R(P)1/79 was dealing with an entirely different statutory provision, namely what is "good cause" for delay in claiming. I do not consider that "a mistaken belief reasonably held by the claimant" can absolve him under section 20 of the Supplementary Benefits Act 1976 from the duty to disclose what is in reality a material fact.

12. I therefore direct the new tribunal that they must find that there was a recoverable overpayment to the claimant and the only question for them is the amount of that repayment as outlined in paragraphs 1-4 above. Were it not for the question of amount, I could myself have used the power in regulation 27 of the above cited Adjudication Regulations to give the decision which the tribunal should have given but the Commissioner is not made a judge of fact in this jurisdiction but only of questions of law. Therefore the new tribunal will need to investigate fully the issue of the repayment that is due from the claimant.

(Signed) M.J. Goodman
Commissioner

Date: 16th May 1986