

SUPPLEMENTARY BENEFIT

Overpayments

In connection with his claim to supplementary allowance in July 1981 the claimant declared that his wife's part-time earnings, after deductions, were £34.46 a week. In October 1983 he was asked to forward details of his wife's wages and it was ascertained that they had increased. The adjudication officer decided that supplementary allowance of £481.63 had been overpaid from 24.4.82 to 29.10.83 and was recoverable. On appeal the tribunal confirmed the decision subject to the sum of £481.63 being reassessed to take account of 5 weeks of underpayment falling within the overpayment period. The claimant appealed to a Social Security Commissioner on the grounds that weeks of underpayment after 29 October 1983 should also be set-off against the amount of the overpayment.

Held that:

1. the tribunal had erred in law because it had not complied with what is said in R(SB) 9/85 paragraph 6 and had failed to:
 - a. state expressly the sum which was recoverable by the Secretary of State; and
 - b. indicate clearly the manner in which that sum had been calculated (paragraph 8);
2. it can be appropriate for an appeal tribunal to pass an issue of assessment or accounting back to the local adjudication officer for such an issue to be resolved between the adjudication officer and the claimant. But it is essential in such a case that the tribunal make it clear that in the event of disagreement the matter must be restored before them (paragraph 8);
3. the phrase "at the material dates" in R(SB) 10/85 paragraph 9 can be properly applied to each and every date upon which benefit fell to be paid within the period of overpayment and extends the concept of "set-off" to underpayments made during that period (paragraphs 11 and 12);

4. those dates continue to be "material" down to the date when the adjudication officer is in possession of the material facts which have been concealed from him by reason of either misrepresentation or failure to disclose. But underpayments made after that date cannot be brought within the phrase "re-appraisal of entitlement to supplementary benefit at the material dates" (paragraphs 13 and 14).

The Commissioner set aside the tribunal's decision and remitted the matter to a differently constituted tribunal solely for the purpose of determining the recoverable sum.

1. This is a claimant's appeal, brought by leave of the chairman of the social security appeal tribunal, against a decision of that tribunal dated 15 March 1985 which confirmed the adjudication officer's review and revision of a decision originally issued on 28 December 1984.

2. The case concerns difficulties of construction and practice which still present themselves in the application of section 20 of the Supplementary Benefits Act 1976:

- "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) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered,
- the Secretary of State shall be entitled to recover the amount thereof from that person.
- (2) If, whether in connection with any legal proceedings or otherwise, any question arises whether any amount paid by way of supplementary benefit is recoverable by the Secretary of State under this section, or as to the amount so recoverable, the question shall be determined by an adjudication officer."

3. The claimant, now aged about 34, was at all material times married and living with his wife. In July 1981 he claimed a supplementary allowance. He declared that his wife's part-time earnings, after deductions, were £34.46 a week. Benefit appears to have been put into payment upon that basis.

4. In October 1983 the claimant was asked to forward his wife's wage slips in respect of what were then the last immediate 4 weeks so that her earnings could be confirmed. There is not in the papers any copy of his response. I cannot, accordingly, be more specific than to quote the following sentence from the submission made by the local adjudication officer to the appeal tribunal:

"When [the claimant] replied on 19 October 1983 it was ascertained that his wife's earnings had increased in the intervening period."

It appears that some considerable effort had to be expended by the Department of Health and Social Security before the precise details of the earnings of the claimant's wife were obtained from the accountants of her employers. However, when those details had been obtained, the local adjudication officer decided that supplementary allowance had been overpaid to the claimant in the sum of £476.84 in the period between 13 May 1982 and 20 October 1983—and that that sum was recoverable by the Secretary of State. As so frequently happens in this type of case, those calculations were subsequently reviewed and revised. The outcome was that

the recoverable overpayment was assessed at £481.63 in respect of the period 24 April 1982 to 29 October 1983. The claimant appealed to the appeal tribunal.

5. In the forefront of the claimant's appeal was his contention that he had telephoned the Department every time that his wife received a wage rise. In his written grounds of appeal to the tribunal he elaborated that as follows:

"I didn't inform the DHSS of every small weekly variation in my wife's wages—even though on occasions when my wife was sick I could have been entitled to more benefit. I do not think that disclosure of every small weekly variation is reasonably to be expected."

Upon that the local adjudication officer, in his written submission, commented thus:

"The Adjudication Officer notes [the claimant's] comments regarding not reporting minor changes in his wife's earnings, all changes in earnings should be reported but if minor changes do occur frequently the Adjudication Officer has the facility of taking an average wage into account with the figure being monitored and reviewed as necessary."

6. The claimant attended the appeal tribunal hearing and was represented thereat by a gentleman from the Chester Unemployed Workers' Centre. Pursuant to the guidance given in paragraph 10 of Decision on Commissioner's File CSB/347/1983, there was deployed on behalf of the adjudication officer evidence directed to the probability or otherwise of the claimant's alleged telephone calls' having been recorded by the local office of the Department. The upshot was that the appeal tribunal found as a fact that—

"The appellant failed to notify the DHSS of each occasion when his wife's earnings varied and such notification was reasonably to be expected."

The claimant appears to accept that that is a finding of fact which cannot successfully be challenged as being erroneous in point of law.

7. The issues—and they are undoubtedly issues of law—with which I am concerned in this appeal arise out of the claimant's contention that there were, during the period which the local adjudication officer subjected to scrutiny, weeks in which, in consequence of the claimant's failure regularly to disclose the exact earnings of his wife, *less* benefit was paid to the claimant than would have been paid had the true situation been known to the Department. That question was canvassed before the appeal tribunal. It was dealt with, however, in a somewhat summary manner. On the relevant Form AT3 the unanimous decision of the tribunal was recorded thus:

"That supplementary allowance has been overpaid between 24.4.82 and 28.10.83, the amount to be re-assessed taking into account those weeks when the supplementary allowance paid was less than the amount due."

The reasons for the decision were set out thus:

"The Tribunal decided that in accordance with S 20 Supplementary Benefit Act 1976 the appellant had failed to disclose a material fact, namely that his wife's earnings had increased and that as a consequence of this failure to disclose the Secretary of State had suffered loss and is entitled to be re-imbursed."

8. I accept the submission of the adjudication officer now concerned that the decision of the appeal tribunal is erroneous in point of law because it

fails to comply with what I myself said in paragraph 6 of Decision R(SB) 9/85:

“I regard it as of the highest importance that in section 20 appeals the appeal tribunal should—

- (a) expressly state the sum which is recoverable by the Secretary of State; and
- (b) indicate clearly the manner in which that sum has been calculated.”

In this case the appeal tribunal left its task uncompleted. There are certainly cases in which it is appropriate for an appeal tribunal to pass an issue of assessment or accounting back to the local adjudication officer in the hope that such issue can be disposed of by agreement between the adjudication officer and the claimant. But, as I have said before, it is essential, when such course is adopted, that the appeal tribunal should make it clear that, in the event that the issue cannot be disposed of by agreement between the parties, the matter must be restored before the appeal tribunal so that it—and it alone—may discharge its duty of finally determining the claimant’s appeal thereto. That was not done in this case. Moreover, it is apparent from the chairman’s note of evidence that the claimant’s representative raised a query as to the correct sum to be deducted from the claimant’s wife’s wages by way of fares—and that issue should have been specifically determined by the appeal tribunal.

9. But it is in respect of the directions which I should give to the appeal tribunal which rehears this matter that the real points of interest in this case arise. As appears from paragraph 4 above, the period scrutinised by the local adjudication officer for the purposes of his revised decision was 24 April 1982 to 29 October 1983. In consequence of the claimant’s failure to disclose, from time to time, fluctuations in his wife’s earnings, there were weeks in that period in respect of which benefit was overpaid and there were weeks (albeit far fewer in number) when benefit was underpaid. Moreover, the claimant contends that, whilst there were not after 29 October 1983 any weeks in which benefit was overpaid, there *were* weeks in which it was underpaid. It was, he submits, inequitable for the local adjudication officer to terminate the period the subject of review and revision without extending it to cover those further weeks of underpayment. In the letter which he wrote requesting (successfully, as it transpired) the chairman’s leave for an appeal to the Commissioner, he states that he raised this issue before the appeal tribunal but that the chairman ruled that the appeal tribunal was confined to consideration of the period embraced by the adjudication officer’s decision. What, then, is the correct approach to—

- (a) the weeks of underpayment falling within the period the subject of the revised decision of the adjudication officer; and
- (b) any weeks of underpayment which fell after that period?

The adjudication officer now concerned takes a stern line. In strict law, he submits, *none* of the weeks referred to in (a) and (b) above can be prayed in aid by the claimant by way of reduction of the sum recoverable by the Secretary of State.

10. The adjudication officer now concerned takes as his starting point a passage from paragraph 9 of Decision of a Tribunal of Commissioners R(SB) 10/85. In the context of this case, however, I think it desirable to cite the whole of paragraphs 9 and 10 of that decision:

“9. The crux of the ‘second question’ is whether, in reference to the phrases in section 20(1) of the Act ‘...in consequence of the misrepresentation or failure... the Secretary of State incurs any

expenditure', one is to look, as constituting the relevant 'expenditure', only to the gross sum, or whether—once the true facts the subject of the misrepresentation or failure are known—there should be some broader re-appraisal of entitlement to supplementary benefit at the material dates, in the light of which the *recoverable* sum (if any) is arrived at by deduction from the gross sum of any additional benefit which has not in fact been paid but would or could properly have been awarded had the full and correct facts been before the adjudication officer at the outset.

10. In our judgment it is correct to give effect to such a 'set-off' if and in so far as the claimant would qualify for additional benefit upon a fresh appraisal of the state of facts so arrived at and without need for ascertainment of additional facts or for the making of any new claim—but not further or otherwise."

11. The adjudication officer now concerned fastens on the words "at the material dates" where they appear in paragraph 9 of the passage which I have just cited. He then develops his submission thus:

"In my submission the 'material dates' are, of course, the dates material to the calculation of the recoverable overpayment and do not relate to the entire span of the claim to benefit; there can be no 'material dates' for periods during which no overpayment arises. On that basis the claimant's contention... that 'the AO could have chosen a different period for his decision' is entirely without merit. I can find no authority to support the claimant's suggestion that underpayments for one period should be off-set against overpayments for another—unrelated—period.

Strictly speaking—having regard to underpayments in the weeks commencing 28.8.82, 9.10.82, 1.1.83, 26.3.83 and 18.6.83—there was not one period of overpayment but 6 separate periods; and the question of a 'set-off' for those weeks would not arise. But the tribunal appear to have adopted a more expedient approach and decided upon a single overpayment span from 24.4.82 to 28.10.83. And having done so it was, I submit, proper for them to consider the question of a 'set-off' in respect of the total of £43.37 underpaid during the 5 weeks in question."

12. The suggestion there is, of course, that the approach adopted by the appeal tribunal was "more expedient" but in no way binding upon it. As to the first limb of that suggestion, many would go further and say that, had any other approach been adopted by the appeal tribunal, it would have worked gross injustice upon the claimant. But it is with the second limb of the suggestion that I join issue. I do not consider that when the Tribunal of Commissioners used the phrase "some broader re-appraisal of entitlement to supplementary benefit at the material dates" it for one moment contemplated the refined dissection urged upon me by the adjudication officer now concerned. Since November 1980, at least, it has been the practice of benefit/adjudication officers, where a misrepresentation or failure to disclose comes to light, to treat as a single period the period falling between the first consequent overpayment and the last consequent overpayment. In my confident view the phrase "at the material dates"—as used by the Tribunal of Commissioners—can be properly applied to each and every date upon which benefit fell to be paid within such period. The "set-off" permitted by paragraph 10 of the decision of the Tribunal of Commissioners (see paragraph 10 above) is confined within narrow limits. It seems to me, however, that, when an adjudication officer has brought into review a period in which overpayments of benefit have been made, the

setting off of underpayments made during that period falls within those limits. The relevant review was embarked upon because the adjudication officer had obtained accurate weekly figures of the earnings of the claimant's wife. In the light thereof, every week in the relevant period could be the subject of "a fresh appraisal . . . without need for ascertainment of additional facts or for the making of any new claim".

13. So far as weeks of underpayment falling after the last week of overpayment are concerned, the position is less clear-cut. I am not, in fact, entirely clear as to how it presents itself in this case. The terminal date taken by the local adjudication officer (in his reviewing decision) and by the appeal tribunal was 28 October 1983. (That was a Friday. I have treated the date as the 29th throughout.) Disclosure of the fluctuations in the wages of the claimant's wife appears to have been made on 19 October 1983 (see paragraph 4 above). It may be, of course, that benefit continued in payment at the existing rate until the precise figures had been obtained from the employers—and that, as it happened, there were underpayments but no overpayments in the meantime. If that was the case, then, in my view, the "accounting" should certainly have been carried down to the date when the local adjudication officer was put in possession of the figures necessary for the taking of the account. Justice demands no less. Certainly, had he carried the "accounting" down to that date, no one could have criticised him. From that it follows (if such were the facts) that the appeal tribunal could have (and, in my opinion, should have) carried the account down to that date. Regulation 71(1) of the Social Security (Adjudication) Regulations 1984 [SI 1984 No. 451] provides for the right of appeal to an appeal tribunal by, *inter alia*, a person "from whom benefit is recoverable under section 20 of the Supplementary Benefits Act". And paragraph (2) of that regulation provides as follows:

- "(2) On an appeal under this regulation or under section 12(4) of the Supplementary Benefits Act the appeal tribunal may—
- (a) confirm the determination appealed against; or
 - (b) substitute for that determination any determination which an adjudication officer could have made."

14. I have not, in what I have said in paragraph 13 above, lost sight of the phrase "at the material dates". It is my view that the dates, week by week, continue to be "material" down to the date when the adjudication officer is in possession of the material facts which have been concealed from him by reason of either misrepresentation or failure to disclose. It is *not* my view that underpayments made after that date can be brought within the phrase "re-appraisal of entitlement to supplementary benefit at the material dates". A claimant may, of course, seek a review in respect of such underpayments or the adjudication officer may, of his own motion, embark upon such a review. But by then the matter is out of the realm of the consequences of the misrepresentation or failure to disclose which rendered "material" the dates in the period down to the adjudication officer's being apprised of the true facts.

15. Those last observations take us, of course, to regulation 87(1)(b) of the Adjudication Regulations:

- "87.—(1) A determination on a claim or question relating to supplementary benefit shall not be revised on review under section 104 of the Act or regulation 89 so as to make supplementary benefit payable or to increase the amount of benefit payable in respect of—
- (a)

- (b) any period which falls more than 52 weeks before the date on which the review was requested or, where no request is made, the date of review. . . .”

That is preemptory—and it often works hardship. It may do so in this case if there were weeks of underpayment falling after the period during which benefit was being erroneously paid in consequence of the claimant’s failure to disclose his wife’s true earnings. But the harshness does not extend to the underpayments made *during* that period. The draftsman of regulation 87(1) has been careful to use the word “payable”: “so as to make supplementary benefit payable or to increase the amount of benefit payable in respect of . . . etc”. Had he chosen, he could very easily have tied regulation 87(1) to *entitlement* to benefit in respect of any period. . . . etc. He has not so chosen. In the type of overall review contemplated in paragraph 12 above, nothing will be payable to a claimant at all. Weeks of underpayment will merely go (very properly, in my view) to reduction of the overpayment and, hence, of the sum to be repaid. In terms of the general law of the land, regulation 87(1) in no way prohibits set-off; it prohibits counterclaim.

16. I have gone into this matter at some length because I was somewhat alarmed by certain aspects of the passage which I have, in paragraph 11 above, quoted from the submission of the adjudication officer now concerned. I doubt, however, whether anything which I have said will come as much of a surprise either to adjudication officers in general or to appeal tribunals. Where weekly wages fluctuate regularly and by relatively small amounts, the system has long been attuned to the notion of periodic overall adjustment as being preferable to minute weekly recalculation. That, indeed, appears from the passage which I have, in paragraph 5 above, quoted from the submission made by the local adjudication officer to the appeal tribunal.

17. For the avoidance of doubt, I wish to make it clear that this matter is being referred solely for the purpose of determining the sum overpaid to the claimant and, consequently, repayable by the claimant. The fresh appeal tribunal will, accordingly, approach the matter on the basis that it has already been established that there was a failure to disclose within the meaning of section 20 of the 1976 Act. It will, however, be for the fresh tribunal to determine the date upon which the material facts came to the knowledge of the adjudication officer.

18. My decision is as follows:

- (1) The claimant’s appeal is allowed.
- (2) The decision of the appeal tribunal dated 15 March 1985 is erroneous in point of law and is set aside.
- (3) The case is referred to a differently constituted appeal tribunal for determination to the extent indicated and according to the principles of law set out in this decision.

(Signed) J. Mitchell
Commissioner