R(SB) 2/91

1.3.90

CSB/854/1988

Recovery of overpayment - statement that a course was part-time - whether a misrepresentation of fact

The claimant was a student on a four year sandwich course. The third year 1985/86 was spent working in industry. On 5 September 1986 he claimed unemployment benefit on form UB461 and stated that he intended to return to full-time education on 15 September 1986. At the same time he completed a claim form for supplementary benefit and was subsequently awarded supplementary benefit from 6 September 1986. On 15 September 1986 he told the DHSS that he was starting a course that day and supplementary benefit was suspended. The claimant wrote to the DHSS on 14 October 1986 stating that as his course was part-time he should still be entitled to supplementary benefit. Supplementary benefit was reinstated from 15 September 1986 and paid until 2 January 1987 by which time the Department had become aware that the claimant was in the final year of a full-time course. The adjudication officer determined that supplementary benefit had been overpaid to the claimant in consequence of his misrepresentation and that it was recoverable from him. On appeal, the tribunal confirmed the decision of the adjudication officer that the claimant misrepresented when he stated he was starting a course when he knew he was already engaged on a four year course and was simply returning to commence the fourth year. The tribunal also decided that there was a failure to disclose the material fact that the course was full-time. The claimant appealed to a social security Commissioner.

Held that:

1. whether a claimant is a full-time student or a part-time student is for determination by the adjudication officer after acquiring the necessary information from the college. It is immaterial what the claimant thinks about the nature of the course. Accordingly, in the present case, no disclosure by the claimant was reasonably to be expected (para. 8);

2. the Department of Employment were the agents of the Department of Health and Social Security for the purpose of payment of supplementary benefit and provided there was currently a claim for supplementary benefit, information given to the unemployment benefit office constituted information given to the supplementary benefit section of the Department of Health and Social Security. Information given on form UB461 should therefore be deemed to be in the possession of the Department of Health and Social Security. R(SB) 54/83 reaffirmed (para. 11);

3. a tribunal should look at all the relevant documentation. Thus in the present case if the letter of 14 October 1986 is read in conjunction with the form UB461 the misrepresentation contained in the letter is significantly modified (para. 12).

The Commissioner in allowing the appeal set aside the decision of the appeal tribunal and gave his own decision that the sum overpaid by way of supplementary benefit is not recoverable from the claimant.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. For the reasons hereinafter appearing, the decision of the social security appeal tribunal given on 9 November 1987 is erroneous in point of law and accordingly I set it aside. However, as it is expedient that I give the decision the tribunal should have given, I further decide that the sum overpaid by way of supplementary benefit for the inclusive period from 15 September 1986 to 2 January 1987 is not recoverable from the claimant.

2. This is an appeal by the claimant, brought with the leave of the tribunal chairman, against the decision of the social security appeal tribunal of 9 November 1987. The adjudication officer now concerned, in his written submissions, supported this appeal, but I found his reasoning unpersuasive. Accordingly, I directed an oral hearing. At that hearing the claimant was present, but unrepresented, whilst the adjudication officer appeared by Mr. R. Buckley of the Chief Adjudication Officer's Office. I am particularly indebted to Mr. Buckley for his assistance.

3. In 1983 the claimant enrolled at Teeside Polytechnic for a four year "sandwich" course leading to the degree of Bachelor of Engineering Computer Technology. The third year 1985/86 he spent working in industry for BSC Teeside Laboratories. On 5 September 1986 he completed form UB461 claiming unemployment benefit, and stating that he intended to return to full-time education of 15 September 1986. At the same time he was given a form for claiming supplementary benefit. On 11 September 1986 he returned this form duly completed, and on it he stated that he had ceased employment with BSC Teeside Laboratories on 31 July 1986, On the strength of that form, he was awarded supplementary benefit for the period from 6 September 1986 to 14 September 1986. On 15 September 1986 the claimant completed a form for the unemployment benefit office entitled "To be completed by claimants attending courses". On this he stated that training was given "day time Monday to Friday between 9.00am - 5.00pm hours vary 17½ hours per week". He also stated on that form that he was prepared to interrupt his studies, if offered employment. In consequence, he was allowed to continue to sign unemployed "for credits only". On 15 September 1986 the claimant also completed and signed a form A9 for the Department of Health and Social Security, on which he stated:

> " ... and start a course at Teeside Polytechnic on 15 September 1986."

In the light of this information, the supplementary benefit office suspended all further payments of benefit.

4. On 14 October 1986 the claimant wrote a letter to the supplementary benefit office, which *inter alia,* contained the following:

> "On 12 September my mother, who works at Eston Office, was asked the date on which I was due to start at Teeside Polytechnic. She correctly stated that the date was 15 September but was unaware of the fact that the course was of a part-time nature, occupying only 17 hours per week.
>
> I completed a form A9 on 15 September, stating that the course started on that date and informed the Unemployment Benefit Office at the same time. I have signed continuously since 6 September and feel that I should therefore have continued to receive payment.
>
> I have started a course, entailing 17 hours per week, in Computer Technology in the Electrical Engineering department at Teeside Polytechnic and will obtain a letter to this effect."

I am told that on 15 October 1986 the Department of Health and Social Security wrote to the claimant (the letter is not in the file) inviting him to forward verification from the Polytechnic that he was "only at the Polytechnic 17 hours per week", but that the claimant did not reply. On 11 December 1986 the Department wrote direct to the Teeside Polytechnic requesting details of the course, and in its reply the

Polytechnic stated that the claimant was on a final year of a full-time course. It would appear that sometime after 14 October 1986 the adjudication officer awarded supplementary benefit with effect from 15 September 1986 (the decision is not in the file and Mr. Buckley was unable to locate it) and this award continued until 2 January 1987. During this period the claimant was paid £436.07.

5. It is not in dispute in this case that the claimant, who was over the age of 19 throughout the relevant period, was a student within the definition contained in regulation 2 of the Supplementary Benefit (Conditions of Entitlement) Regulations 1981. He was attending a course of full-time education, and accordingly was not entitled to supplementary benefit for the period in question. The real question for determination by the tribunal was whether the overpayment was recoverable. The relevant statutory provision was section 20 of the Supplementary Benefit Act 1976 (now in essence re-enacted as section 53 of the Social Security Act 1986) which read as follows:

> "20. (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material facts, and in consequence of the misrepresentation or failure -
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> (a) the Secretary of State incurs any expenditure under this Act; or
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> (b) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered;
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> 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."

On 27 March 1981 the adjudication officer decided that overpayment for the period from 15 September 1986 to 2 January 1987 amounting to £436.07 was recoverable from the claimant by reason of the claimant's misrepresentation of a material fact. In due course, the claimant appealed to the tribunal, who in the event upheld the adjudication officer, but decided that there was both a misrepresentation and a failure to disclose.

6. In the course of the reasons for their decision the tribunal stated as follows:

> "After hearing the appellant at length and after considering his evidence in detail the tribunal were forced to the conclusion that the appellant had been guilty of a misrepresentation of a material fact (within section 20(1) Supplementary Benefit Act) in that he had incorrectly stated that he was starting a course when he was in fact, as he well knew, already engaged on a four year course and was simply returning to the Polytechnic to commence the fourth year of that course having (as part of his course) been working in industry for a year. The tribunal were also forced to conclude that the appellant had failed to disclose a material fact (within the said section) in that he had failed to inform the DHSS that the course on which he was engaged was in fact a full-time course. The tribunal noted that the appellant had said that he believed that he was on a part-time course, because he was only

> required to attend lectures for 17 hours per week, but were satisfied that this was not a view that he could reasonably have held. The tribunal were satisfied that the appellant was fully aware that the course that he had commenced in 1983 and on which he was continuing in September 1986 was in fact a full-time course."

Now, it is clear that the tribunal based their conclusion on (i) the fact that the claimant had made a misrepresentation and (ii) the fact that he had failed to disclose a material fact. I will deal with the second ground first.

7. It is clear from decision R(SB) 41/83 that it is immaterial whether a claimant considers himself to be a full-time student or a part-time student. At paragraph 11 the Commissioner said as follows:

> "11. Mr. James argued that it was not material whether the claimant considered himself to be a full-time student or a part-time student. He was caught by regulation 8(1)(a) if he was a "student" within the terms of regulation 2(1). In the present case the operative words for consideration in the definition are "a person . . . attending a course of full-time education . ." I agree with Mr. James' submission. It is a well known fact that the required hours of attendance for lectures and tutorial purposes in a full-time course of higher education are limited and that the student is expected to devote the greater part of his time to research projects and private study. Once a student has been accepted for enrolment upon a course and has paid the fees, which in this instance were substantial, he is expected to devote such time to his studies as the University or College of Higher Education considers necessary for successful completion of the course. How he in fact spends his time and whether or not he intends to complete the course and what use he proposes to make of the knowledge or qualification upon completion of the course is a matter for him. He is no less attending a course of full-time education whether or not he devotes to it the number of hours considered necessary for successful completion of the course. The express purpose of the regulations is not to be circumvented by reliance upon the required hours of attendance or those which the student says that he in practice devotes to the course or by what he says are his intentions in regard to the course and his availability for other forms of employment; otherwise many full-time students in higher education would look to supplementary benefit for financial and educational support when that is the province of the local education authority."

The Commissioner then went on to explain how it was to be determined whether or not the course was a full-time one. She said at paragraph 12 as follows:

> "12. Whether or not a person is a student attending a course of full-time education is a question of fact for determination by the tribunal having regard to the circumstances in each particular case. In so doing, the tribunal ought to take into account the description of the course given by the education authorities i.e. the University or College and the examining bodies. Such evidence is not conclusive (see para. 8 of the unreported decision CSB/15/1982) but in my view any other evidence adduced in rebuttal should be weighty in content. All education authorities or examining bodies prescribe the period within which the course of education is to be completed. Their assessment is based upon the amount of time (whether compulsory or

voluntary) required to achieve the standard demanded. Part-time students are accordingly given such extensions as are deemed to be appropriate. Therefore, the normal period prescribed for completion of a course is a clear indication as to whether or not the student is attending a course of full-time education."

8. Now, in the present instance, it was immaterial what the claimant thought about the nature of his course. It was a matter for determination by the college. Accordingly, no disclosure by the claimant was reasonably to be expected (see para. 13 of R(SB) 54/83); nothing he could say would be of any assistance to the adjudication officer. The latter had to acquire the necessary information from the college. Accordingly, in so far as the tribunal decided that the overpayment was recoverable by reason of the claimant's failure to disclose a material fact, they erred in point of law.

9. The tribunal were on somewhat stronger ground in taking the view that in stating "that he was starting a course when he was in fact, as he well knew, already engaged on a four year course and, was simply returning to the Polytechnic to commence the fourth year of that course", he was guilty of a misrepresentation. Clearly, the tribunal had in contemplation the letter of 14 October 1986. The claimant explained to me that, when he wrote that letter, he had it in mind that in the second year he had a timetable involving 28 hours of formal instruction, whereas in the fourth year it had been reduced to 17 hours per week. That was the point that he was trying to make, he was not trying to suggest that he was starting a completely new course. Moreover, this same submission he would appear to have made to the tribunal.

10. However, the letter must be looked at from the standpoint of the recipient. In my judgment, the tribunal were fully entitled to reach the conclusion that, to a recipient without any knowledge of the background of the case, it would appear that a **new** course was being started at the Polytechnic, and that it only involved 17 hours per week. Had there been a full and frank statement, explaining that the claimant was on a degree course, that he had started his fourth year, and that the period of formal instruction had been reduced from that which he had undergone in the first two years of the course, the local office would have been alerted to the strong possibility, not to say certainty, that the claimant was a student within regulation 2(1) of the Conditions of Entitlement Regulations, and was not entitled to supplementary benefit. The tribunal were fully entitled on the basis of the letter to conclude that the claimant was guilty of a misrepresentation, which resulted in his being paid money to which he was never entitled. However, all this proceeds on the basis that the only relevant evidence before the tribunal was the letter of 14 October 1986. But, in my judgment, this was not the case. For the claimant had completed other documents, which were, or ought to have been, before the adjudication officer.

11. The claimant had on 5 September 1986 completed form UB461 and had, in answer to the question "What type of work do you normally do?", replied "Student", and had explained why he had left his last job by stating "returning to college (end of contract)". Moreover, apart from referring to the British Steel Corporation, Teeside Labs as being the name of his employer, he had explained that his job was "student". Now, I am aware, of course, that this information was communicated to the unemployment benefit office, and not directly to the Department of Health and Social Security. However, as accepted by Mr. Buckley, the Department of Employment were the agents of the Department of Health and Social Security for the purposes of

payment of supplementary benefit and provided there was currently a claim for supplementary benefit, information given to the unemployment benefit office constituted information given to the supplementary benefit section of the Department of Health and Social Security. Mr. Buckley accepted that, although the claim form for supplementary benefit was not actually returned until 11 September 1986, it was properly to be regarded as a current claim with that for unemployment benefit, and in consequence the information given on form UB461 should be deemed to be in the possession of the Department of Health and Social Security (see paras. 16 and 17 of R(SB) 54/83).

12. Now if the letter of 14 October 1986 is read in conjunction with the statements set out on form UB461, then the misrepresentations contained in the letter is significantly modified. In my judgement, the divorce of the letter of 14 October 1986 from the other documentation gave rise to an error on the part of the tribunal. They should have looked at all the relevant documentation. Seemingly they did not do so, or if they did, they reached a conclusion which they could not on the evidence, reasonably have arrived at. Either way, they erred in point of law.

13. It follows from what has been said above that I must set aside the tribunal's decision. However, I do not think it is necessary for me to remit the matter to a new tribunal for a rehearing. This is a case where I can conveniently substitute my own decision. I am satisfied that, if form UB461 is read in conjunction with the claimant's letter of 14 October 1986, the claimant was not guilty of misrepresentation. Sufficient information was given to alert the DHSS to the possibility that the claimant was a student within regulation 2(1), and that the course starting on 15 September 1986 was the resumption of an existing course rather than the start of a new one. Accordingly, there was no real misrepresentation. Moreover, for the reasons given earlier, there was no obligation on the part of the claimant to make disclosure of the circumstances surrounding the commencement of the fourth year of his degree course. The claimant is, therefore, not caught by section 20 and the overpayment is in consequence not recoverable.

14. Accordingly, my decision is as set out in paragraph 1.

Date: 1 March 1990 (signed) Mr. D. G. Rice

Commissioner