

## SUPPLEMENTARY BENEFIT

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### Overpayments.

The claimant had declared that his wife was working but failed to report an increase in her earnings until 6 months after the event while regularly signing declarations to the effect that his circumstances had not changed. The supplementary benefit officer determined that there had been a recoverable overpayment but, before the matter reached the tribunal, recalculated the sum that was recoverable. On appeal the tribunal confirmed "the decision". The claimant appealed to a Social Security Commissioner on the ground that he had not known of the increase in his wife's earnings.

*Held* that:

1. the tribunal had erred in law because it had failed—
  - (a) to state the sum recoverable by the Secretary of State; and
  - (b) to indicate clearly the manner in which that sum had been calculated (paragraph 6);
2. although a person could not "fail to disclose" something of which he had no knowledge, "misrepresentation" was founded on positive and deliberate action, as in this particular case signing declarations that circumstances had not changed when in fact they had (paragraph 7);
3. a determination under Section 20 made before 23 April 1984 could not be reviewed and revised by the supplementary benefit officer. He should lay his recalculations before the appeal tribunal and invite the tribunal to make them the subject of its decision (paragraph 6).

The Commissioner set aside the tribunal's decision and remitted the matter to a differently constituted tribunal.

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1. This is a claimant's appeal, brought by my leave, against a decision of the supplementary benefit appeal tribunal dated 14 September 1983 which confirmed a decision of the benefit officer (now the adjudication officer) issued on 6 January 1983, alternatively a purported revising decision of the benefit officer issued on or about 14 January 1983. The claimant's representative requested an oral hearing of the appeal. That request I refused. With characteristic objectivity the adjudication officer now concerned supports the claimant's appeal. No useful purpose would have been served by an oral hearing.

2. The questions in issue are—

- (a) has an overpayment of supplementary benefit been made to the claimant;
- (b) if so, in what sum; and
- (c) is that sum recoverable by the Secretary of State pursuant to section 20 of the Supplementary Benefits Act 1976?

3. The facts are by no means uncommon. The claimant's supplementary allowance was calculated upon the basis of (*inter alia*) a declaration which he had made in respect of his wife's earnings. At a later date his wife received a pay rise. The Department of Health and Social Security was not, however, informed of that rise until some 6 months later. In the meantime, of course, the claimant regularly signed declarations that the circumstances of his dependants were and had remained as last stated in writing. The claimant's explanation was that he did not know of the increase in his wife's earnings. He was not on good terms with her. Since 1975 he had been contemplating divorce.

4. The quantification of overpaid supplementary benefit is frequently a complex exercise. It is by no means unusual for the local benefit/adjudication officer to re-calculate the relevant sum between the date of his

original decision and the date upon which the matter comes before the appeal tribunal. (I have myself seen a case in which there were no less than four such re-calculations.) By virtue of regulation 4(7) of the Supplementary Benefit (Determination of Questions) Regulations 1980 [S.I. 1980 No 1643] there could be no review of any determination made under section 20 of the Supplementary Benefits Act 1976 (the section which provides for the recovery of overpaid sums). The local benefit officer sometimes overlooked that regulation and purported to review and revise. (That was what happened in this case.) In at least one case which I have seen he invoked the Social Security (Correction and Setting Aside of Decisions) Regulations 1975 [S.I. 1975 No 572]. The approved procedure, however, was for him to lay his re-calculations before the appeal tribunal and to invite that tribunal to make them the subject of its decision.

5. I myself never understood the thinking behind the aforesaid regulation 4(7). It must have been the product of positive thinking by someone—for it was inserted into the Regulations in 1981. There has clearly been further thinking, however, for there is no equivalent provision in the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No 451]. Accordingly, since 23 April 1984 determinations under section 20 are susceptible of review and revision.

6. That welcome change in the law will not, however, prevent appeal tribunals from falling into the error which was made in this case and has, to my own knowledge, been made in many other recovery cases. On the relevant form LT 235 the decision of the tribunal is recorded simply as:

“To confirm the Benefit Officer’s decision.”

Manifestly that will not do in a case where the benefit/adjudication officer has given, or has purported to give, more than one decision. Moreover, although it is recorded (under the findings of fact) that “The amount of the overpayment was not disputed”, nowhere on the form LT 235 is there any express indication either of the sum overpaid or of the sum the subject of the recovery order. Many appeals of this nature come before the Commissioners. 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.

Exercise (b) need not be burdensome. Very often the sum will be derived from a schedule which has been furnished by the benefit/adjudication officer. It will then suffice to—

- (i) identify that schedule; and
- (ii) record that it is accepted by the tribunal.

But performed the exercise must be. It was not performed in this case. The tribunal’s decision must be set aside and the matter determined by a fresh tribunal. It is a vexing waste of time and money. And such waste is so easy to avoid. I hope that there will be no more of it.

7. I granted leave to appeal by reason of the matters which I have discussed above. They were not canvassed on behalf of the claimant. The grounds which were so canvassed are devoid of merit. They are directed to the claimant’s ignorance of the change in his wife’s earnings. That cock will not fight. Ignorance is crucial to the “fails to disclose” limb of section 20. It is settled law that one cannot be held to have failed to disclose something of which one had no knowledge. With innocent misrepresentation, however, the case is—by very definition—quite otherwise. In the grounds of appeal to the Commissioner the claimant’s representative wrote:

“Further, the distinction between ‘misrepresentation’ and ‘failure to disclose’ is an artificial distinction, leading to arbitrary and inconsistent interpretations of the section.”

I beg to differ. Misrepresentation is founded on positive and deliberate action. In this case it was the action of signing declarations that there had been no change in the circumstances of the claimant’s wife. If the claimant did not know whether there had or had not been any such change, he should not have signed. “I do not know” or “Not to my knowledge” would have put him beyond risk—and would, at the same time, have put the Department upon further enquiry. But he made no such qualification to his declaration. The system could not work if claimants could shelter behind their failure to make adequate enquiry into the accuracy of the facts declared by them.

8.. My decision is as follows:

- (1) The claimant’s appeal to the Commissioner is allowed.
- (2) The appeal tribunal’s decision dated 14 September 1983 is erroneous in law and is set aside.
- (3) The case is referred to the social security appeal tribunal, which must be constituted differently from the tribunal which gave the decision hereby set aside, for rehearing and determination in accordance with the principles of law set out in this decision.

(Signed) J. Mitchell  
Commissioner

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