

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: Karen Louise Willoughby (Mrs)

Social Security Appeal Tribunal: Oxford

Case No: 2/16/93/07869

1. My decision is that the decision of the social security appeal tribunal was erroneous in point of law. I set it aside and remit the case for re-hearing in front of a differently constituted tribunal.

2. This is an appeal with the leave of the chairman from the decision of an appeal tribunal dated 16.12.93. The claimant was in receipt of housing benefit. The interest on the mortgage on her house was being paid direct by the Department. The original loan was £108,000.00 but, as at 1.7.93, there were arrears of something slightly under £4,000.00. The mortgage rate was 10.99% and housing costs were paid based on these figures. The rate however changed. On 1.7.92 it went down to 10.75%, on 1.11.92 to 9.99%, on 1.12.92 to 9.3% and on 1.1.93 to 8.55%. Nevertheless, during this period housing costs were still being paid on the basis of a mortgage rate of 10.99%. This involved an overpayment of some £579.98 for the period 30.6.92 to 1.2.93. The adjudication officer held that that sum was recoverable under section 71 of the Administration Act 1992 on the grounds that when the interest rates changed the claimant failed to disclose the fact to the Department. That decision was upheld by the appeal tribunal. A schedule showing the calculation of the sum appears at T31. If a sum is recoverable at all, then there is not, as I understand it, any dispute that the figure of £579.98 is correct. If there is, it should be mentioned to the new tribunal.

3. Now I will shortly set out the background situation in which the claimant unfortunately found herself. However, in view of what I say below, viz. that whether disclosure was reasonably to be expected of the claimant was to be judged objectively, much of this will, in fact, be irrelevant, but no case is complete without some mention of its factual background. The claimant had been married. There were three children of the marriage, then ranging in age between about 5 and 10. The claimant was sitting a four year college course with a view to becoming a teacher. She and her husband had run a motorcycle business. On



22.3.92 - not 93 as the tribunal stated - she and her husband separated, and, on 25.3.92, she claimed benefit. The claimant was clearly under a deal of strain. In October 1992, her daughter developed a worrying condition and had to have an operation in November. For three months from the breakup she did not know where her husband lived although he visited to see the children. In November, she was physically attacked by her husband and she said that the attack had been so severe that despite changing the locks she felt very uncomfortable in her home and, at the time of the appeal tribunal hearing, still had not recovered.

4. Now the crux of this case is whether the claimant knew of the changes in the interest rates. She could not recollect ever having seen the relevant notices which would have been sent by post by the building society. She says that her husband often picked up the post but, presumably, not after the attack in November. And it is not disputed that the payments at the original rate continued direct to the building society who used the excess over the interest due in order to reduce the arrears. The claimant says that, in the situation she found herself, she would have reduced the payments if she had learned the interest rate had gone down - but that is not a valid argument, since had she known that the interest rates had gone down, she should have told the Department with the result that the payments made by the Department would be proportionally less.

5. This is a failure to disclose case. Thus it must be shown that the claimant actually knew of the interest changes - see R v Medical Appeal Tribunal ex p. Hubble 1958 2 QB 228, 242 where Diplock J (as he then was) said:

"'Non-disclosure' in the context of the sub-section where it is coupled with misrepresentation means a failure to disclose a fact known to the person who does not disclose it ... it is innocent if the person failing to disclose the fact does not appreciate its materiality, fraudulent if he does."

Then, it must be shown that disclosure by the claimant of the material fact in the changes in the interest rates was reasonably to be expected, and in deciding whether or not it was, the test is objective. As the Commissioner said in paragraph 11 of R(SB) 21/82:

"In this case as to the claimant's near illiteracy and the family's educational difficulties, I consider that in deciding whether or not there is a failure to disclose by the claimant the test must be objective. It must be asked whether, given the claimant's knowledge of the receipt of income support, a reasonable man or woman would have considered that it was material. If so, then there would be a duty to disclose even on the part of the claimant who, considered subjectively, might not have the necessary education or literacy to realise that disclosure should be made."



Or, (as regards the last sentence) as one might say in this case, "Was the claimant under such stress that in the circumstances, judged subjectively, disclosure might not reasonably have been expected?" I would add that this is a case of actual knowledge, not a case where, with due diligence, the claimant ought to have known.

6. The grounds of appeal are set out at pages 49/50. The adjudication officer supports the appeal.

- (i) He submits that the tribunal did not deal with the question of review and cites to me R(SB) 7/91. It is quite clear from T31 that there was a review, and therefore the tribunal had jurisdiction under section 71(5)(a). The fact that the tribunal did not expressly state that is, in my view, a technical error which could be overlooked or possibly remedied by me. I certainly would not have sent the case back on that point alone.
- (ii) The Tribunal made insufficient findings of fact. I agree. In particular, they must make a finding as to the state of knowledge of the claimant and whether, judged objectively, disclosure by her was reasonably to have been expected.
- (iii) The tribunal should have dealt with the 6 tests in R(SB) 54/83. I think I have really dealt with the guts of this in (ii) above. Nevertheless I think it is a useful and proper practice for a tribunal specifically to deal with all 6 tests.
- (iv) The tribunal ought to have made specific findings of fact as to the details of the various changes and how and when those changes were communicated to the claimant by the building society. Again, I have dealt with this above but the tribunal should, in relation to each change of interest, address the question whether the claimant knew of that change and whether disclosure was reasonably to be expected of her in connection with that change. Furthermore, I would add that although an interest change might have taken place on the various dates mentioned, it does not follow that the claimant knew of the change on those dates. It is only from the time that the claimant knew of the change that overpayment can - all else being equal - be recovered under section 71.
- (v) I note that the claimant gave detailed evidence to the tribunal in support of her appeal which is not mentioned. I think much of that is irrelevant for the reasons I have stated above. Nevertheless that evidence can be adduced by the claimant before the new tribunal and if so

adduced it is the duty of the tribunal to make a note of it.

7. My decision is therefore as set out in paragraph 1 above.

(Signed) J M Henty  
Commissioner

Date: 14 March 1995