

VGHH/LS

Commissioner's File: CSB/615/1985

C A O File: AO 2624/85

Region: North Western

COMMISSIONER'S DECISION
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SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A QUESTION OF LAW
DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name:

Social Security Appeal Tribunal:

Case No:

[ORAL HEARING]

Decision

1. This appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 19 December 1984 is erroneous in point of law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

Representation

2. I held an oral hearing of this appeal. The claimant, who appeared, was represented by Mrs Helen Green, Solicitor, of Merseyside Welfare Rights Advice Centre. The adjudication officer was represented by Mr E.O.F. Stocker.

The supplementary benefit officer's decision

3. By a decision issued on 31 January 1984 a supplementary benefit officer decided that the claimant had been overpaid supplementary allowance between 16 April 1982 and 13 October 1983 amounting to £1,338.22 and that this amount was recoverable. The claimant appealed against this decision.

4. The supplementary benefit officer stated, on form LT 205, that the facts before him were as follows. The claimant was a married man aged 28 with two dependent children. His wife was aged 26 and his dependent children were aged 4 and 5 respectively. He had been in receipt of a supplementary allowance since 30 January 1982. In a statement of his circumstances made on form A235 on 26 January 1982 he stated that his wife was not employed. He was visited at home on 9 September 1982 and his wife was seen and his last statement was read over to her and she stated her only income was child benefit at £10.50 weekly. On 20 January 1983 the claimant declared on form A11 that neither he nor his wife did any work. On 23 November 1983 he declared that his wife had been working part-time for the G... Hotel, W.... That hotel who employed the claimant's wife submitted a statement of earnings and also stated that she had commenced work the week beginning 5 April 1982 and ceased employment on 1 October 1983.

5. The supplementary benefit officer's reasons for decision were that the claimant had failed to disclose the material fact that his wife had commenced part-time work which had it been known would have reduced the amount of benefit by £1338.22 and that this amount was recoverable under section 20 of the Supplementary Benefits Act 1976.

6. The claimant's grounds of appeal against this decision were that the figures supplied by the employers were not accurate and that for various periods of time his wife received no wages at all because of holiday, illness, visiting in-laws and other reasons.

7. On 5 November 1984 the claimant wrote a letter to the Appeals Officer asking for the wages record of the employers. A copy of this letter was produced at the hearing before me. It is not mentioned in the chairman's note of evidence.

8. On 7 December 1984, according to the adjudication officer now concerned, an adjudication officer gave a revised decision giving effect to calculations which are, (unlike the revised decision itself), set out in the case papers. The effect of this decision was to decide that £1019.02 was overpaid and was recoverable.

The tribunal's decision

9. After one adjournment, the tribunal heard the appeal and gave their decision on 19 December 1984. They decided that:

"Overpayment of £1019.02 is recoverable subject to a review credit of £51.22 for laundry costs making a total amount recoverable of £967.80."

The chairman's recorded note of evidence, the tribunal's recorded findings of fact and their reasons for decision are set out in the Appendix to this decision.

Was the decision of the tribunal erroneous in law?

10. The tribunal were in error as to the law in at least four respects:

- (1) it is clear from their findings of fact that they considered that it was for the claimant to satisfy them that the overpayments claimed were wrong. This is to misunderstand the onus of proof. It is for the supplementary benefit (now adjudication) officer to satisfy the tribunal that the claimant has been overpaid: see for example, R(SB) 34/83.
- (2) the tribunal failed to consider and make findings on the claimant's grounds of appeal and the oral evidence to the effect that as they were away about 6 weekends a year and in addition the wife was away and not working at other weekends about once every two months the evidence on behalf of the Department was wrong. Did the tribunal disbelieve the claimant and/or his wife? There are no findings to that effect. Or did they reject it out of hand because it was not documentary? If they considered that documentary evidence was the only admissible evidence they were in error as to the law. (In any event, it could not be expected that a claimant should be able to prove, by documentary evidence, the negative that

his wife was not working?) If they considered that corroboration of oral evidence was required, they were likewise in error.

- (3) there is nothing to show how the overpayment has been calculated. This was another error of law: see Decision R(SB) 9/85 at paragraph 6. The decision refers to an exhibit which states the wages alleged to have been paid to the claimant. Another document, to which the tribunal do not refer, and which in any event is unintelligible without further explanation, contains the relevant calculation. This is not a minor or trivial point. On the contrary, it is of considerable importance because the claimant's entire appeal rests on the amount of the recoverable overpayment. (The actual failure to disclose, the claimant's representative told me, is admitted).
- (4) if, as the chairman's note of evidence states, the deduction allowed by them for laundry expenses (£51.22) had not been raised before, the tribunal were in error in law in allowing it.

In calculating the Secretary of State's "expenditure" in terms of section 20, additional facts cannot be produced and taken into account at this stage: see Decision R(SB) 10/85 at paragraphs 9 and 10.

11. It is neither expedient nor possible for me to give the decision that the tribunal should have given, because the material facts, as explained in paragraph 10 above have not been found. The case must accordingly be referred to another social security appeal tribunal which should, in accordance with the usual practice, be entirely differently constituted.

Directions to the fresh tribunal

12. The first point raised on behalf of the claimant, and raised by the claimant himself from the very beginning, is that the employer's statement as to wages paid to his wife is incorrect. That statement, which is signed by the employer and dated 19 October 1983, is stated in paragraph 11 to be supported by wage records which can be produced. The claimant has asked for the production of such wage records. The tribunal should ensure that they are produced and that the claimant or his representatives have the opportunity of commenting on them. If they are not produced, after proper request has been made, in the absence of some thoroughly convincing explanation, the weight to be attached to the employer's statement as to wages will be reduced to little or nothing because it will raise a strong suspicion that there are no such records.

13. The claimant and his wife should have the opportunity of giving oral evidence and the tribunal should, where this evidence is in conflict with other evidence, state which they prefer and accept and which they reject and why.

14. The expenses of the claimant's wife which are properly allowable require to be considered. The claimant claims that all his wife's expenses have not been allowed. The Schedule relating to the overpayment now in existence, or any revised Schedule, should be examined and findings made on this point.

- 15.
- (1) As to the question of set-off for laundry expenses due to bed wetting, the first question is whether the facts relating to this were disclosed for the first time at the tribunal's hearing of 19 December 1984. If so, the allowance cannot be granted: see paragraph 10(4) above.
 - (2) It is now settled by Decision R(SB) 10/85 in reference to the phrases in section 20(1) of the Supplementary Benefits Act 1976 "... in consequence of the misrepresentation or failure.... the Secretary of State incurs any expenditure", that one not is to look, as constituting the relevant "expenditure" to the gross sum only. Instead, once the true facts the subject of the misrepresentation or failure to disclose are known, one should make a broader re-appraisal of the 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". Decision CSB/477/82, which is a decision of mine and was relied by the adjudication officer in his written submission to me, states that one should look to the gross sum only. It is, at least in this respect, inconsistent with Decision R(SB) 10/85 and should not now be followed.
 - (3) The "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 must be made "without need for ascertainment of additional facts or for the making of any new claim - but not further or otherwise": see paragraphs 9 and 10 of the above mentioned decision.
 - (4) The overpayment must now be calculated by working out the expenditure which the adjudication officer should have awarded had the true facts the subject of the non-disclosure been known at the outset and comparing that with the actual expenditure by the Secretary of State. If, on this basis, the laundry expenses would have been allowed, these should be taken into account in working out the expenditure which the adjudication officer should have awarded in the first place, had the true facts been known. But if additional facts required to be ascertained before the laundry expenses should be taken into account, they must be disregarded. It follows that the tribunal must make specific findings, after hearing evidence from the claimant if practicable, as to when the question of laundry expenses should first have been apparent to the adjudication (or supplementary benefit officer).
 - (5) Before me, it was said on behalf of the claimant that the facts as to the claimant's extra laundry costs had been made known to the Department before the tribunal hearing and that the Chairman's note of evidence (set out in the Appendix to this decision) was inaccurate in this respect. Mr Stocker suggested that paragraph 9 of R(SB) 10/85, quoted in paragraph 15(2) is ambiguous. The statement that there should be deducted from the gross sum any additional benefit which had not been paid but would or could properly have been awarded "had the full and correct facts been before the adjudication officer at the outset" might be a reference to the time when the adjudication officer gave his decision that an

overpayment had been made, and specified the amount, or alternatively it might mean the time when the adjudication officer awarded benefit (which is, of course) earlier. There is no logical reason to choose the time when the adjudication officer makes the overpayment decision. I have no doubt, on consideration of paragraphs 9 and 10 of Decision R(SB) 10/85 that the reference to "the adjudication officer at the outset" was to the adjudication officer (or officers) who gave the decision (or decisions) awarding benefit during the period to which the overpayment relates. If he, or they in full knowledge of the facts entitling the claimant to an additional laundry allowance, failed to take this into account, in awarding benefit, the deduction ought to be allowed in working out the overpayment. Otherwise, the claimant would be required to repay an excessive sum, and to compound and pay for the adjudication officer's error. It is only overpayments made in consequence of misrepresentation or non-disclosure which are recoverable under section 20. No deduction for extra laundry costs should, it follows be allowed unless the mistaken failure to take them into account was that of the adjudication officer (or officers) who made the award of benefit.

16. My decision is set out in paragraph 1.

(Signed): V G H Hallett
Commissioner

Date: 4 June 1986