

overpayment - relationship of UFB0 & DNHJ
- disclosure

JM/SH/7/MD

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Region: London South

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Hazel Teagle

Social Security Appeal Tribunal: Croydon

Case No: 7/07/02

1. This is a claimant's appeal, brought by leave of the Commissioner, against a decision of the social security appeal tribunal dated 7 February 1985 which confirmed a decision issued by the adjudication officer on 22 September 1984 by way of correction of a decision issued on 7 August 1984 which was itself a revision of a revising decision - the original decision of the adjudication officer having been issued on 11 June 1984. The case concerns the Secretary of State's entitlement to make recovery under section 20 of the Supplementary Benefits Act 1976. I need say no more about the series of decisions by the adjudication officer than that -

- (a) the original decision determined that the sum of £590.95 was recoverable in respect of the inclusive period 8 August 1983 to 5 February 1984; and
- (b) the final decision of the adjudication officer was that the sum of £488.40 was recoverable in respect of supplementary benefit overpaid over (but not throughout) the period 8 August 1983 to 15 April 1984.

And it was that final decision which was confirmed by the appeal tribunal.

2. I have come to the conclusion that there was error of law in the appeal tribunal's decision - and that that decision must be set aside. Accordingly, the matter will have to be reheard by a different appeal tribunal. In such circumstances it is, of course, desirable that my rehearsal of the central facts should be as neutral and as objective as I can make it. I must stress that - should I inadvertently stray from that narrow path - nothing which I say by way of rehearsal of the facts is to be taken as in any way inhibiting the fresh appeal tribunal from making its own findings of fact. My rehearsal is designed simply to render intelligible such guidance as I give as to the principles of law which must be applied by the fresh tribunal.

3. At the material time the claimant was a single parent caring for a dependent daughter aged one. She claimed supplementary allowance on 8 August 1983, completing form A11 on that day. She declared thereon that her income consisted of child benefit in the sum of

£9.50 a week (which sum included one parent benefit). Box 4 of form A11 is entitled "Social Security Benefit". In that box the claimant wrote "July 83" under the sub-heading "Date of Claim/Registration". Under "Type of benefit claimed" she wrote "Unemployment". Under "Amount received in last 14 days" she wrote "0". In Box 9 of form A11 ("Any other information relating to this claim.... etc") she wrote, inter alia, "I do not intend to sign on again at the employment exchange".

4. I think that it is the claimant's case that, at that time, the local supplementary benefit office had given her the impression that she could not at one and the same time draw unemployment benefit and supplementary benefit - and that that was the reason why she decided not to pursue her claim for unemployment benefit. Shortly after she had claimed supplementary benefit, however, she received a letter from the local unemployment benefit office asking why she had ceased to sign on. She then paid a visit to that office - and was told that she could, indeed, claim both supplementary benefit and unemployment benefit in respect of identical periods. So she duly claimed unemployment benefit - and it was put into payment. The date unemployment benefit was awarded and the date the supplementary benefit was actually made do not clearly appear from the papers, and certainly were not made the subject of any express finding by the appeal tribunal.

5. It is common ground that the claimant made no immediate attempt to inform the supplementary benefit office of her change of heart in respect of unemployment benefit. The coloured pages in her supplementary benefit order book contained the customary notes. Paragraphs 2 to 6 of those notes fall under the prominently printed heading "Changes which you must report" - and paragraph 6 itself opens:

"6. You must also let the Issuing Office know at once on the blue form A9 or by letter, if you, your partner or any other dependant:

- (1) acquire any income, benefit, allowance or pension which you have not already reported to the Issuing Office....."

Whether the claimant ever read those notes does not clearly appear from the papers. Her case seems to be (and I hope I am not mis-stating it) that, having been told by the unemployment benefit office that she could at one and the same time receive supplementary benefit and unemployment benefit, the one had no bearing upon the other.

6. On 31 January 1984 the claimant called at her local supplementary benefit office in order to report that she had, on 9 January 1984, moved to a new address. On that day she completed a further form A11. Upon that form she declared unemployment benefit in the sum of £27.05 a week. In Box 9 she wrote:

"After my interview at your office on 8.8.83, I received a letter from the Unemployment Benefit Office asking me why I hadn't signed on. I went down to see them and they said I was still entitled to Supplementary Benefit so I continued to sign on. I understand that I must report any change in income or change in circumstances to you. I moved into the flat about 2 weeks ago. The tenancy commenced on 9.1.84."

In consequence of the disclosure of the unemployment benefit, the claimant's supplementary benefit order book was withdrawn - the last date of encashment of an order being 30 January 1984.

7. On 14 February 1984 a visit was made to the claimant to discuss -

- (a) specifically, a claim for single payments in respect of furniture and household effects; and
- (b) generally, the change in the claimant's circumstances consequent upon her

removal to a new address. (She had hitherto been living with her parents.)

There was a discussion as to whether the claimant would continue to sign at the unemployment benefit office. Apparently, the claimant agreed that she would not do so. On that day she completed yet another form A11. In Box 1 she wrote:

"I am no longer receiving unemployment benefit; I did sign on last Thursday, but I received no giro. I was told by the Unemployment Benefit Office last year that it was alright to receive both Unemployment Benefit and cash my supplementary allowance book."

A supplementary benefit order book was issued to the claimant on 15 February 1984. It appears that for a couple of weeks thereafter, her supplementary benefit was calculated upon the assumption that she was in receipt of unemployment benefit. But from 27 February 1984 account was taken only of her child benefit (inclusive of one parent benefit).

8. The next chapter in the narrative is controversial. The claimant contends that on 28 February 1984 she telephoned her local supplementary benefit office in order to seek clarification of the effect of her unemployment benefit upon her supplementary benefit; and that on the following day (29 February 1984) she wrote a follow-up letter with the same purpose in view. It is the adjudication officer's case, on the other hand, that the local office has no record of any such telephone call; nor can that office - although search has been made - find either the letter or any trace thereof. It appears that a copy of the letter was produced to the appeal tribunal - but no copy is in the papers. Be all that as it may; the claimant continued to draw unemployment benefit after her supplementary benefit was increased with effect from 27 February 1984 (cf paragraph 7 above). As to this aspect of the alleged overpayment, the claimant's case seems to be that, by making her telephone call of 28 February and writing the letter of 29 February 1984, she had made all such disclosure as could reasonably be expected of her - and was, in consequence, entitled to draw and to keep all such supplementary benefit as was thereafter paid to her. Be all that as it may, however, the overpayment of supplementary benefit appears to have continued until 15 April 1984. How this second series of overpayments eventually came to the notice of the Department of Health and Social Security does not appear from the papers.

9. As appears from paragraph 1 above, by the time of the appeal tribunal hearing on 7 February 1985 the local adjudication officer was contending that the total amount of overpaid and recoverable benefit was £488.40. The starting date of the relevant period was 8 August 1983 and the terminal date 15 April 1984 - although, of course, there had been a period in February 1984 during which there had been no overpayment. It is recorded on the relevant form A13 that the claimant's representative did not, before the appeal tribunal, seek to challenge the figure of £488.40. That concession was, however, clearly confined to the arithmetic. It is obvious that the claimant's representative did not intend to shut herself out from any line of defence open to her in respect of the wording of section 20 of the 1976 Act or of the construction which Commissioners' decisions have put upon that wording.

10. The appeal tribunal disallowed the claimant's appeal. Its reasons were recorded as follows:

"Supplementary allowance totalling £488.40 was overpaid to [the claimant] between the periods 8 8 83 to 5 2 84 and 27 2 84 to 15 4 84, due to failure to disclose she was in receipt of unemployment benefit covering the whole of these periods, and this sum is recoverable in accordance with the SB Act 1976, Section 20. The tribunal does not regard as credible her contention that she wrote to the DHSS on 29 2 84 to confirm that she could continue to draw unemployment benefit and her supplementary allowance, taking into account that on 8 8 83 she stated that she did not intend to continue to sign on, that she did not declare receipt of unemployment benefit until

31 1 84, and there is no trace of the original of her letter of 29 2 84. Also, her order book made it clear she should report receipt of all income."

11. With characteristic objectivity, the adjudication officer now concerned supports the claimant's contention that the appeal tribunal erred in law in that it failed to make all necessary findings of material fact and to set out adequate reasons for its decision. By way of particularisation, the adjudication officer now concerned stresses the imprecision of the tribunal's approach to the early part of the first period of overpayment. Supplementary allowance was awarded from 8 August 1983 - which date was taken by the local adjudication officer as being the first date in that period of overpayment. But, as I have observed in paragraph 4 above, the papers (including the record of the appeal tribunal's hearing) are silent both as to the date from which unemployment benefit was awarded and the date upon which a payment of unemployment benefit was first made. No one has suggested that when, on 8 August 1983, the claimant completed the first of the forms A11 material to this case, she had actually been paid any unemployment benefit or, indeed, that she had by that date been advised of the outcome of her claim for unemployment benefit. In my view there was no non-disclosure or misrepresentation upon her part at the time when she completed the form. She could not be attached with non-disclosure until such date as she was actually paid unemployment benefit. And from that it follows, in turn, that no "overpayment" of supplementary benefit made prior to that date can be regarded as expenditure incurred by the Secretary of State in consequence of any material misrepresentation or failure to disclose. (As the adjudication officer now concerned points out, section 21(A) of the 1976 Act might well be applied to the consequent situation - but this case is about section 20.) Clearly, therefore, it was crucial to establish the date upon which the claimant first received unemployment benefit. The appeal tribunal did not establish that date. That, in my view, is sufficient of itself to vitiate the tribunal's decision.

12. I consider, too, that the appeal tribunal did not deal adequately with the claimant's contention that - almost at the outset - she was told by the unemployment benefit office that the drawing of unemployment benefit was not inconsistent with the drawing of supplementary benefit. It seems to me to be important to establish, as precisely as possible, what was said on either side at that time. The claimant's own case was particular in the respect that, in August 1983, her requirements and resources were so balanced that -

- (a) if she did not draw unemployment benefit she was entitled to a sum by way of supplementary allowance; but
- (b) if she did draw unemployment benefit her resources exceeded her requirements - and no supplementary benefit was payable at all.

In such circumstances it would have been perfectly proper for the supplementary benefit office to advise the claimant that it would be in her interests to forgo her claim to unemployment benefit. It would have been equally proper for the unemployment benefit office to advise - in a general sense - that the drawing of unemployment benefit was not of itself a bar to entitlement to supplementary benefit. The officer in the unemployment benefit office to whom the claimant spoke may very well not have been aware of the delicacy of the balance between the claimant's requirements and resources. But, of course, the claimant, who presumably was aware of that balance, might reasonably have understood the advice as meaning that the drawing of unemployment benefit would have no effect whatever upon her entitlement to supplementary benefit. It must be borne in mind that the duty to make disclosure is not of unbounded scope. I quote from paragraph 4(2) of Decision R(SB)21/82:

"...but whilst the concept of making or not making a misrepresentation needs no explanation or refinement, I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal - ie the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was

reasonably to be expected...."

Was it reasonable to expect this claimant - in the light of what she had been told by the unemployment benefit office - to disclose to the supplementary benefit office her receipt of unemployment benefit? I cannot - and do not attempt to - say. The answer will depend upon what was actually said in the discussion at the unemployment benefit office.

13. In the context of the later period of overpayment it is contended on behalf of the claimant that the appeal tribunal did not give adequate reasons for its rejection of her evidence that she had made a telephone call on 28 February and written a letter on 29 February 1984 (see paragraph 8 above). I think that that criticism is unfounded. It is true that the issue was not dealt with as comprehensively as is enjoined by some of the precedents - but the shortcomings are not vitiating. I stress, however, that this issue will be at large before the tribunal which rehears this appeal.

The claimant's representative has also expressly raised the effect of Decision of a Tribunal of Commissioners R(SB)36/84. Appendix II to that decision deals at considerable length with the degree to which the unemployment benefit office may be perceived to be or, in fact, actually may be the agent of the supplementary benefit office and with the consequences in law which may flow therefrom. In my opinion it will not do for the adjudication officer now concerned to dismiss all that as "clearly obiter", albeit "interesting". Appendix II, which carries the authority of a Tribunal of Commissioners, identifies matters which may be of the utmost importance in appropriate cases. It cannot simply be dismissed out of hand. Having said that, however, it is inappropriate that I should here go into any detail as to the application of that Appendix to this case. A factual basis has to be laid - and it certainly was not laid before the appeal tribunal whose decision I am considering. In this jurisdiction the Commissioner is confined to points of law. A claimant seeking to avail himself of R(SB)36/84 must establish his facts before an appeal tribunal. Only then can he expect the appeal tribunal - and, if necessary, the Commissioner - to pronounce upon the legal consequences of those facts.

15. The claimant's representative stresses what she refers to as "lack of communication between the DHSS and the Unemployment Benefit Office". Other than in the context of the "agency" argument referred to in paragraph 14 above, that cock will not fight. If -

- (a) there has been a failure to disclose (within the meaning attributed to that term by the precedents); and
- (b) that failure has materially contributed to the incurring of expenditure by the Secretary of State,

It does not avail a claimant to show that there was also contributing fault on the part of the Department.

16. For the rest, it only remains to draw attention to what is said by the adjudication officer now concerned in point 2 of paragraph 6 and in paragraph 7 of his submission; and - with reference to the former - what is said in paragraph 8 of the claimant's representative's comments dated 3 January 1986. Copies of that submission and of those comments must be before the tribunal which rehears this appeal.

17. My decision is as follows:

- (1) The claimant's appeal is allowed.
- (2) The decision of the appeal tribunal dated 7 February 1985 is erroneous in law and is set aside.

(3) The case is referred to a differently constituted appeal tribunal for determination in accordance with the principles of law set out and referred to in this decision.

(Signed) J. Mitchell
Commissioner

Date: 17th July 1986