

Overpayment - disclosure on SB claim form that child benefit & OPB applied for put DSS on enquiry. Claimant had not failed to disclose material fact by not reporting actual receipt.

MJG/SH/35

Commissioner's File: CSB/727/1987

Region: London North

**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: Oxford

Case No: 06/09

**[ORAL HEARING]**

1. I allow the claimant's appeal against the decision of the social security appeal tribunal dated 21 November 1986 as that decision is erroneous in law and I set it aside. I give the decision which the tribunal should have given, namely that an overpayment to the claimant of £694.50 supplementary benefit for the inclusive period from 24 December 1984 to 2 March 1986 is not recoverable from the claimant as it has not been shown that that overpayment was the result of any misrepresentation of, or failure to disclose, any material fact by the claimant: Social Security Act 1975, section 101 and the Supplementary Benefits Act 1976, section 20(1).

2. This is an appeal to the Commissioner by the claimant, at the material time a single parent aged 21 living with her one year old son as a member of her father's household. The appeal was the subject of an oral hearing before me on 30 November 1988 at which the claimant was not present but was represented by Mr J Wilkinson and Ms E Knights of the claimant's local Advice Centre and the adjudication officer was represented by Mr J Stacey of the Office of the Chief Adjudication Officer. I am indebted to Mr Wilkinson, Ms Knights and Mr Stacey for their assistance to me at the hearing.

3. The appeal is from the unanimous decision of a social security appeal tribunal dated 21 November 1986 which dismissed the claimant's appeal from a decision of the local adjudication officer issued on 16 May 1986 requiring the claimant to repay an overpayment of supplementary benefit of £682.95 for the inclusive period from 24 December 1984 to 23 February 1986. The circumstances in which the overpayment arose are as follows.

4. The claimant gave birth to a son on 11 September 1984 and nearly two months later on 5 November 1984 she claimed supplementary benefit on an official printed form of claim. She gave the following answers to the questions on the form:-

Question

Answer

"Are you owed any money?"

"Yes. Family allowance."

"Do you get child benefit or one parent benefit?"

The claimant did not tick either the "No" or the "Yes" box but inserted the words "applied for".

"Have you applied for any social security benefits but not yet got any money?"

"Yes. one parent benefit."

5. Those answers related to the fact that although the claimant had at that time claimed child benefit in respect of her son, and the supplement to it which is known as one parent benefit, she did not receive an order book until it was sent to her on 17 December 1984. The first payable order was dated 24 December 1984 (a girocheque in respect of arrears was issued on 21 December 1984 but the arrears period is not in issue in this case). The claimant did not notify the local supplementary benefit office of the receipt of the order book and of the child and one parent benefit until 24 February 1986 when she gave the information in response to an enquiry made on behalf of the Secretary of State.

6. On those facts the social security appeal tribunal held that the claimant should have made disclosure of the actual receipt of the order book and of the payments of child and one parent benefit and by not so doing she had caused the overpayment, recovery being therefore due under the terms of section 20 of the Supplementary Benefits Act 1976. That section provided as follows,

"Recovery in cases of misrepresentation or non-disclosure.

20. (1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure - (a) the Secretary of State incurs any expenditure under this Act; or (b) [not relevant to this case] the Secretary of State shall be entitled to recover the amount thereof from that person."

There was no question of misrepresentation in this case and recovery must depend on whether the claimant failed to disclose any material fact.

7. It has been argued on behalf of the claimant that the Secretary of State must be taken to have known of the payment of child benefit and one parent benefit to the claimant since the Child Benefit Unit of the Department of Health and Social Security is but one part of the same Department that also is responsible for the administration of supplementary benefit. The claimant's representatives prayed in aid the doctrine of "constructive notice" by which one is fixed with notice of something one does not actually know but of the existence of which one ought to know. It is therefore argued that any overpayment by the Secretary of State was not due to failure to disclose by the claimant because the Secretary of State already had constructive notice of the existence of the payment of child benefit and one parent benefit. I consider this argument to be erroneous in law. It has already been rejected in a number of Commissioners' decisions, notably on facts similar to those of the present case by the learned Commissioner in a "starred" (but unreported) decision on file CSB/0064/1986 (see paragraph 8 of that decision). For the same reasons there given, I also

reject the argument. If the office that pays supplementary benefit actually knows of the payment of child benefit, then of course there cannot be a recovery of an overpayment but I do not consider that constructive notice (or for that matter imputed notice) is an appropriate substitute for actual knowledge in this context.

8. It was further argued on behalf of the claimant that as she had already revealed the fact that she had made a claim for child benefit and one parent benefit, the actual receipt of the payments was not "a material fact" within section 20(1) of the Supplementary Benefits Act 1976. I reject this submission also. In my judgment whenever a recipient of supplementary benefit receives a new source of income, whether or not the recipient considers that it might have to be taken into account as a resource, the existence of that new source of income is a material fact and therefore would in the normal course have to be disclosed to the appropriate office of the DHSS.

9. It follows that the only ground on which I have allowed this appeal relates to the question whether it can be shown that in the particular circumstances of this case the claimant failed to disclose the material fact of the receipt of child and one parent benefit. In R(SB) 54/83 at paragraph 13 the learned Commissioner gave a detailed analysis of what must be proved for there to be recovery under section 20(1) of the 1976 Act. In sub-paragraphs (3) and (4) the learned Commissioner indicated that what needed to be shown was that "the disclosure by the person in question was reasonably to be expected: see Decision R(SB) 21/82, paragraph 4(2); and R(SB) 28/83 paragraph 11;" and "that there was a failure to disclose". As to failure to disclose, at paragraph 16 of R(SB) 54/83, the learned Commissioner cited paragraph 4(2) of R(SB) 21/82 where the Commissioner had said that a "failure to disclose necessarily imports the concept of some breach of obligation, moral or legal".

10. The question therefore in this case is whether disclosure by the claimant in the circumstances of this case was reasonably to be expected, coupled with the analogous question of whether she had failed to make a disclosure, since failure imports a breach of a moral or legal obligation to disclose (see above). In my judgment disclosure by this particular claimant of the receipt of child and one parent benefit was not reasonably to be expected of her, nor was she in breach of any moral or legal obligation in not disclosing it. The reason for that is that she had already in the claim form given detailed answers relating to the claim for child and one parent benefit and had made it abundantly clear that she regarded it as being due to her and that it would be received in due course. It would not therefore in my judgment be reasonable to expect her to make a subsequent disclosure of the actual receipt of the child and one parent benefit. She had done all she could and had revealed truthfully the details of the situation as at the date of her application. Mr Stacey urged upon me that when she received the order book and the payments of child and one parent benefit, she should have asked herself why her supplementary benefit continued to be paid at the same rate and was not diminished. But the claimant may well have thought that child and one parent benefit were not a reckonable resource for supplementary benefit purposes but were payable in addition to supplementary benefit, particularly as she had already revealed her claim. Although that would not of course affect the materiality of the receipt of child benefit (see paragraph 8 above), it nevertheless does not prove that there was any failure to disclose.

11. The duty to disclose material facts in supplementary benefit law is in many respects akin to the duty of a person proposing for a policy of insurance to disclose all material facts to the insurance company etc. Summarising the extensive case law on this subject, the learned authors of Chitty on Contracts state (25th Edition - 1983 - paragraph 3685):-

"If [an insurance company] forbears to ask questions after disclosure of facts that put [it] on enquiry, [it] may be taken to have waived the right to disclosure of the facts which such enquiry would have disclosed. Similarly the questions which the [insurance company] may ask the assured (usually in a proposal form) may be so framed as to indicate that [it] does not require further information on the matters in question, thus relieving the assured from doing more than answering the specific question."

12. In my view the circumstances of this present case are similar. The disclosure by the claimant of the fact that she had applied for child and one parent benefit and that she regarded "family allowance" as being due to her put the Department on enquiry. The claimant's subsequent non-disclosure of the actual receipt of child and one parent benefit could not therefore be described as a failure to disclose in the circumstances. Moreover the questions inserted on the supplementary benefit claim form could easily have led the claimant to think that that was all the information that the Department needed on the subject.

13. Moreover, the order book which she actually received does not carry the matter much further, since the notes in the book on this particular matter simply state,

"You must also let the Issuing Office know at once on the blue form A9 or by letter, if you ... acquire any income, benefit, allowance or pension which you have not already reported to the Issuing Office:" (my underlining)

On that wording, the claimant could justifiably think that she had already reported to the Issuing Office the child and one-parent benefit, since she had told that office that it was claimed and was due.

(Signed) M.J. Goodman  
Commissioner

Date: 21 December 1988