Overpayment — "Expenditure under To Act" must be in consequence of a decision by AO. If no decision by AO - nothing on which to base appeal against recovery of the overpayment.

JM/SH/7/MD

Commissioner's File: CSB/830/1985

C A O File: AO 2933/85

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: Maria Ferrer

Social Security Appeal Tribunal: Euston

Case No: 5/3

[ORAL HEARING]

1. This is a claimant's appeal, brought by my leave, against a decision of the social security appeal tribunal dated 20 March 1985. I held an oral hearing of the appeal. The claimant did not attend - but she was most ably represented by Mr J Goldsmith, solicitor, of the Citizens Advice Bureau Legal Service. Equally helpful was Mr E O F Stocker who appeared on behalf of the adjudication officer.

2. The facts of the case are a little out of the ordinary. The claimant is single and over pensionable age. She has been in receipt of supplementary benefit for some years. On 24 March 1980 Westminster City Council ("the Council") wrote to the Department of Health and Social Security stating that the claimant was £291.31 in arrears with her housing costs and requesting that deductions in respect of those costs be made from her supplementary benefit and paid direct to the Council. At about the same time a like request was received from the Paddington Law and Advice Centre, then acting on behalf of the claimant. A visit was made to the claimant's home. In consequence, the supplementary benefit officer decided that deductions should be made from her weekly benefit entitlement and paid to the Council's District Housing Office 3, with effect from 31 March 1980. Because the claimant's full housing costs exceeded her benefit entitlement, only part of her housing costs could, in fact, be met in this way. That was explained to the claimant. She was advised that she herself would be responsible for paying - each week - the balance of her housing costs direct to the Council.

3. In pursuance of the aforesaid arrangement, direct payment was made by the Secretary of State to the Council's District Housing Office 3, on a quarterly basis, for the period 31 March 1980 to 20 July 1981. Payment then ceased because the claimant went to Spain for just over three months. Thereafter, in November 1981, the arrangement was reinstated. But it went wrong. There was an administrative blunder. For the period 21 November 1981 to 28 March 1983 the Department, each quarter, not only paid to District Housing Office 3 the sum which had been authorised by the benefit officer but also paid a like sum to District Housing Office 4. It appears that the Council were aware that duplicate payments were being made - but failed to advise the Department. In consequence, both payments were regularly credited to the claimant's housing account. The result was that that account went

substantially into credit at a time when - had there been no duplication of payment - it would have been in debit.

4. The blunder was finally discovered by the Department. Since the oral hearing in this appeal, there has been put before me (with the agreement of Mr Goldsmith) a copy of a letter dated 2 June 1983 and written, apparently, to the Council's District Housing Office 3 by an officer of the Department who signs as the "Rent Direct Officer". It is necessary that I set out that letter in full:

> "Further to my telephone conversation today 25.5.83 with your Mr H.... (ext 33), I hereby request a refund of Rent Direct payments made to DHO4. Those payments cover a period from 26.11.81 - 28.3.83 and amount to £1,935.52. Rent Direct payments for the same period were made to the DHO3, and therefore payments were duplicated.
>
> I look forward to hearing from you at your earliest convenience."

That letter was responded to immediately. The relevant books were adjusted appropriately. In consequence, the claimant's housing account with the Council went back into debit. And those are the essential facts.

5. So how does all that come before the adjudicating authorities? The answer is that the Citizens Advice Bureau, on behalf of the claimant, gave notice that it wished to appeal to the appeal tribunal against the adjustments which had been made to the claimant's account with the Council. The case was put this way:

(i) The effect of those adjustments was that overpaid supplementary benefit had been recovered from the claimant.

(ii) Such recovery is subject to section 20(1) of the Supplementary Benefits Act 1976.

(iii) It is an express provision of that subsection that, for a sum to be recoverable by the Secretary of State, the Secretary of State must have incurred expenditure in consequence of some person's misrepresentation of or failure to disclose some material fact.

(iv) The expenditure represented in this case by the duplication of payments to the Council was <u>not</u> the consequence of any misrepresentation or non-disclosure by anybody.

(v) In consequence, the "recovery" effected by the adjustment of the relevant books of account was wrongful.

It is still not clear to me what relief was sought from the appeal tribunal. Did the claimant hope for something in the form of a declaration which would lay the foundation for an action in the County Court? Did the claimant hope that the appeal tribunal would order the Secretary of State to pay her the sum of £1,935.52? Or did the claimant hope that the appeal tribunal would order the Council to re-adjust its books so as to record the position as it stood before they were adjusted as aforesaid? In the event, the appeal tribunal decided that it had no jurisdiction to deal with the matter.

6. It will by now be apparent that the most formidable obstacle in the claimant's path is the evident absence of any such determination or reference by an adjudication officer as would give the appeal tribunal jurisdiction to entertain the matter. Mr Goldsmith complained that the appeal tribunal made no enquiry into the genesis of the Department's

"decision" to seek from the Council reimbursement of the overpayment; and he strenuously urged that I should send the matter back to another tribunal so that that tribunal might ascertain whether or not such "decision" was made by an adjudication officer. At that stage, of course, the Rent Direct Officer's letter of 2 June 1983 (see paragraph 4 above) was before neither Mr Goldsmith nor me. That letter confirms what I should always have regarded as being the very strong probability, namely that the "decision" to seek reimbursement was made in one of the paying - as opposed to adjudicating - branches of the Department. But, in my view, the case does not hinge upon that factual issue. As I seek to demonstrate below, even if the adjudication officer had made the "decision" referred to, it would have lain quite outside his legitimate jurisdiction - and could only have been brought before the appeal tribunal for the purpose of being declared a nullity.

7. Recovery of overpaid supplementary benefit is, of course, the subject of section 20 of the Supplementary Benefits Act 1976. I quote subsections (1) and (2):

> "(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) any sum recoverable under this Act by or on behalf of the Secretary of State is not recovered,
>
> the Secretary of State shall be entitled to recover the amount thereof from that person.
>
> (2) If, whether in connection with any legal proceedings or otherwise, any question arises whether any amount paid by way of supplementary benefit is recoverable by the Secretary of State under this section, or as to the amount so recoverable, the question shall be determined by an adjudication officer."

It will be noted that section 20(1)(a) expressly refers to "any expenditure under this Act" - and subsection (2) to amounts which are "recoverable by the Secretary of State under this section". I have given this matter careful consideration - and I have reached the firm conclusion that (in the context of benefit) "any expenditure under this Act" refers - and refers only - to sums which have been disbursed by the Secretary of State pursuant to the provisions of the Supplementary Benefits Act 1976 and the mass of legislation subordinate thereto. Putting it in general terms, the Secretary of State is authorised - indeed obliged - by the Act to pay to claimants such sums as are represented by the awards of adjudication officers. Of course, those awards may be founded upon inaccurate or incomplete information - and in such cases there may be overpayment; but such overpayment will, until detected, be "expenditure under this Act". It is towards recovery in such circumstances that section 20 is directed. It is not, in my view, directed to cases where - by reason of departmental blunder - payments have been made over and above anything that an adjudication officer has awarded. Such payments cannot legitimately be regarded as "expenditure under this Act". The Act nowhere authorises them. In normal cases their recovery - if it is to be pursued at all -must be a matter for the civil courts. In the rather particular circumstances of the case now before me, the ready co-operation of the Council enabled the Department to short-circuit the courts. But in any event, the decision whether and by what method to pursue recovery is one for the Secretary of State and not for the adjudicating authorities.

8. I appreciate that since 1980 review and revision have, in the context of section 20 of the Supplementary Benefits Act 1976, had a chequered career. (The present position is that the adjudication officer may - but is not obliged to - review and revise his original decision.) But what I have said in paragraph 7 above can, perhaps, be tested by asking what would have

been the position in this case had the adjudication officer seen fit to conduct a review as a prelude to giving the decision which Mr Goldsmith would like to think was given by him in this case. Neither in respect of the substantive decision pursuant to which the claimant received supplementary benefit nor in respect of the later decision that there should be direct payment to the Council would any revision have been called for. As I see it, that would have exhausted the adjudication officer's legitimate functions in this case. As I have already indicated, I consider that he would have clearly overstepped his jurisdiction had he given a decision to the effect that the Secretary of State was entitled to recover the duplicated payments, either directly from the claimant or via the Council.

9. In the course of the hearing I was referred by both representatives to decision on Commissioner's file CSSB/69/81. That was also a case in which there had been a decision that the claimant's housing costs should be paid direct to the housing department of the local authority. That was also a case where there was - by reason of departmental error - overpayment to that housing department. The difference was that such overpayment arose - not by reason of duplication - but because the Department went on making payments after the claimant had been adjudicated to be no longer entitled to supplementary benefit. In paragraph 7 of his decision, the Commissioner's reasoning is - if I may say so with respect - on the same lines as that set out by me in paragraph 7 above. That was, perhaps, a clearer case than the one presently before me. At the time of the "overpayment" the claimant was not a supplementary benefit beneficiary at all. Mr Goldsmith ably and strenuously urged that that constituted a fundamental distinction. But I am unable to accept that. It seems to me that both in CSSB/69/81 and in this case the essence of the matter is that the Secretary of State disbursed sums in excess of anything that had been the subject of an adjudication officer's award - with the result that such sums cannot be considered as "expenditure under [the Supplementary Benefits] Act".

10. So there is nothing that the adjudicating authorities can do for the claimant. As the appeal tribunal recorded, however, the claimant's case calls for considerable sympathy. The Department's blunder has, apparently, cost her dear. A charity had been making contributions towards her arrears of rent with the Council. Such payments ceased when her housing account was recorded as having moved into credit. Moreover, that illusory credit substantially delayed the claimant's qualification for housing benefit. As Mr Goldsmith submitted, had this "recovery" been the subject of civil proceedings, the claimant might well have been able to avail herself of estoppels. But, of course, it never came to that. And, in any event, the claimant was in no position to embark upon somewhat hazardous litigation. I should like to think, however, that the Secretary of State might consider this an appropriate case for considering whether an extra statutory payment should be made to compensate the claimant for the effects of a departmental blunder for which she was in no way responsible.

(2) 11. I turn now to an entirely different aspect of this case. It is one which, I was told, is of some general importance. It arises this way. The appeal tribunal's decision of 20 March 1985 was - as is proper and quite usual - recorded on the relevant form AT3 in manuscript and signed by the chairman. But what the claimant was sent by way of notification of that decision was an unsigned form AT3 upon which had been typed someone's interpretation of the manuscript entries upon the original form AT3. (Let me say at once that the manuscript - which is in two different hands - seems to me to be reasonably legible.) But the typescript did not accurately reflect the manuscript. For example, where the manuscript had "Rep. 3 points" (whereafter three points made by the claimant's representative are set out), the typescript had "Reg. 3 points". In another place the manuscript recorded:

> "That recovery of statutory office error was not possible under common law."

This was (somewhat incongruously) typed as:

> "That recovery of statutory officer was not possible under common law."

Unsurprisingly, the claimant's representative (when seeking leave to appeal to the Commissioner) stressed that -

(a) "no Regulation 3 was in question or even discussed at the hearing", and

(b) "'That recovery of statutory officer was not possible under common law'.... has no meaning nor was it discussed at the hearing".

12. Of course, on the basis of the typescript, those would have been effective grounds of appeal. Their essential merit dissolved when the claimant's representative was sent a photograph of the original manuscript form AT3. But, urges Mr Goldsmith, that was too late to remedy the matter. The typed copy, as sent by way of original notification, must be regarded as "the decision of the tribunal" within the meaning of regulation 19 of the Social Security (Adjudication) Regulations 1984 [SI - 1984 - No 451]. Whilst the appeal was pending before me, a memorandum (of which a copy is now in the papers) issued from the Office of the Chief Adjudication Officer in which the view was hazarded that the sending to a claimant of an unsigned transcript, on its own, probably did not satisfy the provisions of the aforesaid regulation 19.

13. My own view is that the truth lies somewhere between the submission of Mr Goldsmith and the - albeit tentative - view expressed on behalf of the Office of the Chief Adjudication Officer. Regulation 19(3) of the Adjudication Regulations provides as follows:

"(3) As soon as may be practicable after a case has been decided by an appeal tribunal, a copy of the record of their decision made in accordance with this regulation shall be sent to the claimant, to the adjudication officer and to any other person to whom notice of the hearing was given under regulation 4(2) and the claimant and any such other person shall be informed of the conditions governing appeals to a Commissioner."

It will be noticed that what is to be sent to the interested parties is not "the decision" but "a copy of the record of their decision". The decision itself is what appears from the record in writing for which provision is made in paragraph (2) of regulation 19. In other words, it appears from the form AT3 which is originally completed (whether in manuscript or typescript) and signed by the chairman. It is to a copy of that - and no more - that the parties to the appeal are entitled. In that context "copy" is clearly not restricted to "photocopy". Typed "copies" of manuscript documents were being made and accepted (eg in the law courts) long before photocopying was invented - and where the relevant original bore a signature, it was considered adequate to reproduce that signature in typescript. But, of course, the advent of the photocopying machine makes it possible and convenient to produce replicas, and typescript copies need only be resorted to, by way of convenience, where the relevant manuscript is difficult to read.

14. So much for the principles. I venture to set out the following simple conclusions:

(1) The sending of a photocopy of the original AT3 will in all cases amount to compliance with regulation 19(3) of the Adjudication Regulations.

(2) Where that original form AT3 has been completed in manuscript, and that manuscript is unquestionably legible, there will have been compliance not merely with the letter but with the spirit of regulation 19(3).

(3) A fortiori, there will have been the like compliance where the original form AT3 has been completed (but for the signature) in typescript.

(4) Where the relevant form AT3 has been completed in manuscript of questionable legibility, the claimant should - as a matter of courtesy - be

sent both a photocopy of the original and a typed-up copy of that manuscript. Wherever possible, that typed-up copy should be verified by reference to the relevant chairman before it is sent out.

(5) In no case should the relevant chairman be asked to put his signature to any form of copy which is sent to the claimant.

It is almost too obvious to require saying that none of this would arise if all chairmen were as careful as are the great majority to make their manuscript readily legible.

15. The claimant's appeal is disallowed.

(Signed) J. Mitchell
Commissioner

Date: 5th September 1986