

Overpayment. ✓

JGM/BC

Commissioner's File: CSB/1186/1985 and
CSB/1187/1985

C A O File: AO 2015/85 and AO 2017/85

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:

Social Security Appeal Tribunal: Lewisham

Case No: 12/21/07 and 12/19/05

[ORAL HEARING]

1. My decisions are:

- (a) that the decision of the appeal tribunal in the case on file CSB/1187/1985 dated 8 July 1985 was erroneous in point of law and it is set aside; and in exercise of the power conferred by regulation 27(a)(i) of the Social Security (Adjudication) Regulations 1984 I give the decision which the tribunal, on the evidence before them, should have given viz that repayment is not required of any amount alleged to have been overpaid for or by reference to the periods in July and October 1980 mentioned in the record of the adjudication officer's decision in the form AT 2.
- (b) That the decision of the appeal tribunal in the case on file CSB/1186/1985 dated 8 July 1985 was erroneous in point of law and is set aside; and that this matter must be referred to another tribunal.

2. I will take first the appeal at (a) above. The claimant appears to have been in receipt of a supplementary allowance for much of the time since the year 1979. During the year 1980, while he was in receipt of an allowance, he obtained some brief employment from different employers for the periods from 11 to 24 July and 6 to 16 October of that year. It is said that he did not disclose this at the time. The Department of Health and Social Security according to the form AT 2 learnt about this in January 1982, but it was not until February 1985 that the adjudication officer issued a decision requiring (pursuant to section 20 of the Supplementary Benefits Act 1976) repayment of supplementary allowance said to have been overpaid as the result of the claimant's failure to disclose computed at £185.60. No explanation has been offered for this delay which does not facilitate the investigation of these old matters. There is however no provision requiring the adjudication officer to establish good cause for late claim.

3. The claimant appealed to the appeal tribunal who affirmed the decision. No evidence was tendered to them about the amount earned by the claimant in either of the two periods; and it seems that the adjudication officer must have based his conclusion on the bare proposition that under section 6 of the 1976 Act, as originally enacted, a person was disentitled to supplementary benefit for any period during which he was engaged in full-time work. But section 6(2) enabled the Secretary of State for Social Services to make provision by regulations for excepting a person from this exclusion from benefit for a period after he takes up employment. In fact by regulation 3 of the Supplementary Benefit (General) Regulations 1977 a person was excepted from this exclusion for the first 15 days. Accordingly there was no question of the claimant's being excluded from supplementary benefit during these periods of employment by reason only of his being in remunerative full-time work. The adjudication officer and the tribunal who must have followed his reasoning, as it seems, erred in law in doing so. The claimant has appealed and the decision of the tribunal must be set aside.

4. This does not mean that the claimant's employment during these periods was necessarily without effect on his title to supplementary benefit during the period or a period shortly thereafter because any remuneration derived from the employment would have fallen to be taken into account as part of his income resources to the extent indicated in Part II of schedule 1 to the 1976 Act and regulations made thereunder. Even so the amount of supplementary benefit could have been adjusted for exceptional circumstances. In order to establish what amount, if any, had been overpaid as the result of the alleged non-disclosure the adjudication officer would have had to adduce evidence as to the amount that the claimant had actually earned during the periods in question; and questions could have been raised as to whether in any case there could have been exceptional circumstances that would have affected the amount of any overpayment. None of this was done and the tribunal ought either to have adjourned the matter for further evidence to be adduced or else have dismissed the adjudication officer's claim to require repayment on the ground that no overpayment was proved. In view of the long delay in bringing the case at all I think that they should have adopted the latter course; and that is the decision that I now give. My decision in paragraph 1(a) follows from this.

5. I turn now to the second appeal. This time it is alleged that the claimant failed to disclose that he had moved from a home which he had rented to his mother's house, and that this again led to the overpayment of benefit during a period from 11 January to 12 April 1983. The reason for this overpayment was that while he was a tenant of his home the rent was included among his requirements whereas, when he went to live with his mother, he became a non-householder entitled only to the small amount under regulation 23 of the Supplementary Benefit (Requirements) Regulations 1980 then in force. The claimant's answer to the adjudication officer on this in his letter of appeal was that he did notify the change of address between 11 January and 12 April 1983, this being his stated ground of appeal. When the matter came before the tribunal he raised another ground viz that he had never been paid the amount said to have been overpaid at all. This appears from the conclusion of the dissenting member of the tribunal. The majority however confirmed the decision of the adjudication officer seemingly without considering the question whether the benefit in question had ever been paid. The point made was a new one, and the adjudication officer would plainly have been entitled to an adjournment in order to look into the question and if so advised to adduce further evidence. But, as it appears

to me, the tribunal were not in a position to adjudicate on the point as matters stood at the hearing. The claimant now appeals to the Commissioner. He was represented at the oral hearing, which I held on this appeal as well as the other one, by Miss Cynthia Gaynor, information/advice officer with the Southwark administration and the adjudication officer was represented by Mr E O F Stocker, barrister.

6. It was the adjudication officer's written submission based on Decision R(SB) 29/84 that the question whether benefit was paid was not for the adjudication authorities but for the Secretary of State. It was held in the decision last mentioned by the majority of a Tribunal of Commissioners that the question whether benefit that had been awarded had actually been paid was not for the adjudication authorities (the adjudication officer, (then the benefit officer), the appeal tribunal and the Commissioner); but they did not hold that it was therefore for the Secretary of State but for the ordinary courts. Further as Mr Stocker pointed out, the majority decision expressly excludes repayment questions under section 20 of the 1976 Act from the scope of their conclusion (see paragraph 8). Mr Stocker therefore intimated that he could not support the written submissions of the adjudication officer and that the majority decision of the appeal tribunal, not having dealt with the contention that no payment had been made of the benefit said to have been overpaid, cannot be supported but is erroneous in point of law and must be set aside. This is not a case, like the other appeal, where it would be expedient for me to give a decision reversing the decision of the tribunal on the ground that the adjudication officer had failed to prove his case. He was confronted by a contention that had not been previously made by the claimant, and the tribunal should, had they considered the point at all, have offered an adjournment to the adjudication officer. It would not be appropriate for me to give a decision based on the limited evidence before the tribunal and I must remit the matter to be reheard by another tribunal.

7. Mr Stocker invited me to give a direction to the tribunal on the meaning of the phrase "fails to disclose" in section 20, submitting that the statement in paragraph 4(2) of decision R(SB) 21/82 to the effect that a failure to disclose necessarily imported the breach of some obligation legal or moral, ie that the non-disclosure must have occurred in circumstances in which disclosure by the person in question was reasonably to be expected. Mr Stocker submitted that this proposition was intended to be limited and should be treated as limited to the case where the "person in question" was not the claimant himself. He referred to the well-known statement by Diplock J (as he then was), in Regina v Medical Appeal Tribunal (North Midland Region), Ex parte Hubble [1958 2 QB 228 at page 242 to the effect that non-disclosure means a failure to disclose a fact known to the person who does not disclose it: and that it is an innocent non-disclosure if the person concerned does not appreciate its materiality and a fraudulent non-disclosure if he does. He was, as I understood it, seeking to establish that where it was the claimant himself who was being required to repay that which had been wrongly paid to him, it did not matter that he did not appreciate the materiality; even if he could not reasonably have been expected to do so. I do not think that the present case is one of not appreciating the materiality of the claimant's move, and in the circumstances I do not think that I should say more than that the passage from Decision R(SB) 21/83 (which relates not to non-disclosure, but to failure to disclose) has been quoted with approval by other Commissioners in R(SB) 28/83 at paragraph 11 and R(SB) 54/83 at

paragraph 13(3) and repeated by its author in Decision R(SB) 40/84 at paragraph 11; and I do not find anything to suggest that its force is limited to cases where the person who failed to disclose was not the claimant himself. The limits of a claimant's duty of disclosure may be marked by regulation 8 of the Supplementary Benefits (Claims and Payments) Regulations 1981, though it must be noted that, as pointed out in the last mentioned decision the requirement of disclosure in writing in that regulation does not apply to section 20.

8. The claimant's appeals succeed.

(Signed) J G Monroe
Commissioner

Date: 17 October 1986