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Commissioner's File: CSB/1272/1989

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal given on 10 May 1989 is erroneous in point of law, and accordingly I set it aside. I direct that the appeal be reheard by a differently constituted tribunal who will have regard to the matters mentioned below.

2. This is an appeal by the claimant, brought with the leave of a Commissioner, against the decision of the social security appeal tribunal of 10 May 1989. In view of the complexity of the case I directed an oral hearing. At that hearing the claimant was not present, nor was he represented, but the adjudication officer appeared by Mr J Heath of the Solicitor's Office of the Departments of Health and Social Security.

3. The question for determination by the tribunal was whether there had been an overpayment of supplementary benefit and income support in the sum of £8,701.91 for the inclusive periods from 16 June 1983 to 18 October 1987 and from 16 August 1988 to 5 September 1988, and, if so, whether the same was recoverable from the claimant pursuant to section 53 of the Social Security Act 1986. In the event, the tribunal by a majority, upholding the decision of the adjudication officer of November 1988, decided these matters adversely to the claimant.

4. The tribunal gave the following reasons for their decision:-

> "The Appellant on 15.6.83, 8.11.84, 17.8.86 and 17.8.88 misrepresented the material fact that he was not receiving any Social Security Benefits when he was in receipt of

Disablement Benefit and Reduced Earnings Allowance.

2. On 17.8.86 and 17.8.88 the Appellant misrepresented the material fact that he had no savings when in fact he did.

3. On 24.8.86 or as soon as reasonably practicable thereafter the appellant failed to disclose a lump sum of £15,000 from his ex-employers.

4. In consequence of 1, 2 and 3 above the Secretary of State incurred expenditure in Supplementary Benefit and Income Support amounting to £8,701.91 which is recoverable from the Appellant (Social Security Act 1986 - section 53(1))."

5. The tribunal made very careful and elaborate findings of fact, on the basis of which they reached the conclusions they did. On these substantive issues I find nothing wrong with the tribunal's decision. They were entitled to make those findings, and on the strength of them to rely on the factors set out in the reasons for their decision. The decision of the tribunal was a majority decision, the dissenting member taking the view that the claimant was "not guilty of misrepresentation" by virtue of his "lack of understanding of the forms which were submitted by him or on his behalf". However, as far as misrepresentation is concerned, it is immaterial whether the misrepresentation was fraudulent or innocent; the forms signed by the claimant still constituted a misrepresentation.

6. However, that is not the end of the matter. The tribunal failed to state how the alleged overpayment of £8,701.91 was arrived at. As was said in paragraph 6 of R(SB) 9/85:-

> ".... I regard it as of the highest importance that .... the appeal tribunal should -
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> (a) expressly state the sum which is recoverable by the Secretary of State; and
>
> (b) indicate clearly the manner in which that sum has been calculated.
>
> Exercise (b) need not be burdensome. Very often the sum will be derived from a schedule which has been furnished by the benefit/adjudication officer. It will then suffice to -
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> (i) identify that schedule; and
>
> (ii) record that it is accepted by the tribunal.
>
> But performed the exercise must be. It was not performed in this case. The tribunal's decision must be set aside and the matter determined by a fresh tribunal ..."

In this instance there was a schedule, and presumably the tribunal had this in mind when they stated the overpayment to be

£8,701.91. But they did not actually endorse it. But far more important, it is impossible to ascertain from scrutiny of that schedule how the overpayment was arrived at. For the answer depends upon knowing what was the correct amount of benefit to which the claimant was entitled. The schedule contains a bare statement of the benefit due against each of the relevant weeks without any explanation as to how it was computed. For example, as the claimant was in receipt of the sum of £15,000 from his ex-employers by way of a terminal payment, this would for a certain period, as it exceeded the statutory maximum, disentitle him to benefit altogether. But the "diminishing capital rule" had to be applied, and it is not clear from the schedule whether it was, and assuming it was intended to operate, exactly how it was thought to work. The claimant was entitled to a full and detailed explanation of what was his correct entitlement, as a prerequisite for determining the extent of the overpayment. The schedule may well represent an accurate statement of the overpayment, but the claimant is entitled to know exactly how it was arrived at. In not giving the necessary explanation, the tribunal erred in point of law. It follows that on this ground I must set aside the tribunal's decision, and direct that the appeal be reheard by a differently constituted tribunal.

7. But there is a further matter which calls for careful consideration, and it is something which has arisen in numerous "recovery" cases. Did the adjudication officer, when he made his decision of November 1988, first review and revise the original award pursuant to sub-section (4) of section 53 of the Social Security Act 1986. For that section provides as follows:-

> " 53. - (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -
>
> (a) ....
>
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
>
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
>
> .....
>
> (4) Except where regulations otherwise prescribe, an amount shall not be recoverable under sub-section (1) above or regulations under sub-section (3) above unless -

(a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review; and

(b) it has been determined on the appeal or review that the amount is so recoverable."

Sub-section (4) constitutes an expansion, taking effect from 6 April 1990, on the original words which read as follows:-

" (4) Except where Regulations otherwise prescribe, an amount shall not be recoverable under subsection (1) above or regulations under subsection (3) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review."

However, I do not think that the change in wording materially affects the matter. Whether one looks at the pre - 6 April 1990 version (the version applicable to the present case) or the current form of wording, the original award must be reviewed and revised, and unless this has been done, recovery under section 53(1) is not permissible. (See in this connection CSSB/105/89, followed in CIS/179/1990 and CIS/360/1990.) Did the adjudication officer in the present instance carry out a review and revision?

8. Unfortunately, the actual decision of November 1988 makes no reference to any review and revision. However, in his submissions to the tribunal the adjudication officer observed, after citing section 53, and in particular sub-section (4), commented as follows:-

"Following receipt of a letter from [the claimant's] solicitor the adjudication officer reviewed the supplementary benefit entitlement and revised the amount payable to him."

Presumably, also if he carried out that revision, he also revised the income support entitlement, although there is no express statement to that effect.

9. However, it is unsatisfactory in the extreme if the adjudication officer does not actually express unequivocally in his decision the fact that he has reviewed and revised the original award. Inferences by reference to other documents contained in the papers are undesirable. But is it open to the appellate authorities whenever it is thought that the adjudication officer did not formally carry out a review and revision, to rectify the position by reliance on section 102(1) of the Social Security Act 1975? That section reads as follows:-

" 102. - (1) Where a question under this Act first arises

> in the course of an appeal to a local tribunal or a Commissioner, the tribunal or Commissioner may, if they think fit, proceed to determine the question notwithstanding that it has not been considered by an [adjudication] officer."

10. It is not altogether easy to see at first sight what was the purpose of sub-section (4) of section 53. It seems on the face of it merely to call for a mechanical incantation on the part of the adjudication officer, and, if that is so, it is highly desirable that an omission should be open to rectification by the tribunal or Commissioner. However, I suspect that there is a purpose underlying the provision. Under the old section 20 of the Supplementary Benefits Act 1976, which section 53 replaced, an overpayment could be recovered without any off-set for benefits not received by the claimant (see in this connection the decision of the Court of Appeal in Lester Commock v. The Chief Adjudication Officer (printed as an Appendix to R(SB) 6/90)). It may be - and Mr Heath was inclined to think that this was the case - that the purpose underlying sub-section (4) was to ensure that in a "recovery" case the position was at large, and any overpayment had to be struck after taking into account any off-set established by the claimant. But be that as it may, the effect of sub-section (4) is to require a review and revision, such a review and revision being incorporated in the decision itself. And if it is omitted, it is highly desirable that such omission should be made good, rather than that the immense expense and delay involved in requiring the whole process to start again should be incurred.

11. Whether or not a review and revision of the award of supplementary benefit/income support were in the present case ever undertaken clearly constitutes "a question under [the Social Security] Act [1975]". The matter was not raised before the tribunal, and is taken for the first time by myself. The decision of November 1988 made by the adjudication officer was undoubtedly an effective decision, albeit, if there was no compliance with sub-section (4), one that could not stand when challenged. As such, it continued to apply unless and until set aside on appeal or review. The decision was appealed to the tribunal, and their decision, upholding the adjudication officer, was in turn appealed to the Commissioner. Accordingly, the question whether the award of benefit was reviewed and revised pursuant to sub-section (4) first arose "in the course of an appeal" when the matter was before the tribunal. It was something which fell within their jurisdiction to determine pursuant to section 102(1). Moreover, it mattered not, in view of the final words of that particular provision, that the requirement in question was never considered by the adjudication officer.

12. I am reinforced in this view by the statement by the then Chief Commissioner in R(I) 4/75 at paragraph 12 that "this useful provision [i.e. section 102(1)] should be liberally construed". In that particular case the question at issue was whether the

claimant suffered an industrial accident in 1965. The insurance officer (now the adjudication officer) had considered the claim on the basis of the claimant's allegation that the accident he suffered took place in 1962. Accordingly, he had never considered a possible industrial accident occurring in 1965. Nevertheless, the then Chief Commissioner was satisfied that he had power under section 102(1) to consider such an accident - the proceedings before him were a complete retrial -, notwithstanding that it had never been adjudicated upon by the insurance officer. Likewise in the present case I take the view that, on the assumption that the adjudication officer failed to review and revise the original award, but proceeded to seek recovery of the overpayment simpliciter, as he was able to do under the old section 20, it was open to the tribunal to rectify the default pursuant to section 102(1). Indeed, their failure to consider whether sub-section (4) had been complied with and to respond accordingly is in itself an error of law, calling for their decision to be set aside on that ground also.

13. As I said earlier, it is not wholly clear whether or not the adjudication officer did actually review and revise the original award. It is certainly not apparent in the decision itself that he did so. Accordingly, I will, for the purposes of this appeal, assume that he did not comply with sub-section 4, and that in consequence his decision is defective. On that basis it was open to the tribunal to remedy the defect in reliance on section 102(1). However, it is not open to me to adopt that course in the present instance. For I do not propose to substitute my own decision for that of the tribunal, and as a result it is not possible for me to revise the original award. Nevertheless, the new tribunal will be at liberty to carry out the necessary review and revision, ensuring that in the course thereof they gave a full and ample explanation of how the overpayment of benefit was arrived at.

14. I allow this appeal.

(Signed) D.G. Rice
Commissioner

(Date) **29 October 1991**