

CPA2

RFMH/SH/6

Commissioner's File: CSB/1316/1989

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 31 March 1989 is erroneous in point of law and accordingly I set it aside. I direct that the case be reheard by a differently constituted tribunal, who will have regard to the matters referred to below.

2. This is the claimant's appeal against the decision of the social security appeal tribunal of 31 March 1989, leave having been granted by the tribunal chairman.

3. The facts before the adjudication officer recorded on form AT2 were that the claimant was in receipt of supplementary benefit from November 1985. He stated that he was living with friends, the householder being Mrs F. The claimant was paid as a non-householder at all times.

4. On 22 February 1988 Mrs F claimed supplementary benefit and it came to light that she and the claimant were married on 16 June 1987. Subsequent enquiries revealed that Mrs F had been employed from May 1983 to 11 October 1985 and from 24 February 1986 to 29 January 1988 when she left her employment. On 27 July 1988 the claimant was interviewed under caution by an officer of the Department. He admitted that he had been living with Mrs F as husband and wife for two or three years prior to their marriage.

5. In the light of the evidence the adjudication officer decided that their requirements and resources should be aggregated and that as a result supplementary benefit amounting to £1,683.45 had been overpaid to the claimant during the inclusive period from 10 November 1986 to 3 January 1988. He further decided that this amount was recoverable from the

claimant because he had failed to disclose the material fact that he had married and had lived with Mrs F as husband and wife prior to that date. Thereupon the claimant appealed to the tribunal. In his grounds of appeal he stated that he had not understood the meaning of "living together" within the terms of the relevant statutory provisions.

6. The claimant and his representative attended the hearing of the appeal before the tribunal on 31 March 1989. In the event the tribunal dismissed the appeal. The findings of fact read:-

" 1. Tribunal accept appellant's evidence in record of interview dated 27 July 1988 that he had been living together with his wife before marriage for two or three years.

2. The overpayment schedule has been correctly calculated."

The reasons for decision read:-

"The appellant failed to disclose his marriage which was a material fact because less supplementary benefit would have been payable if his changed circumstances had been known. Section 53(1) of the Social Security 1986 applied and the overpayment is recoverable thereunder."

7. Regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 provides that every tribunal chairman shall record a statement of the reasons for the tribunal's decision and of their findings on material questions of fact. In the present case for the reasons set out below the decision failed to comply with the statutory requirements and was erroneous in law in consequence.

8. Paragraph 3(1) of Schedule 1 to the Supplementary Benefits Act 1976, as amended, provides that where two persons are a married or unmarried couple their requirements and resources shall be aggregated for the purposes of assessing entitlement to supplementary benefit. The term "unmarried couple" is defined in section 34(1) as a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances. In Decision R(SB) 17/81 the Commissioner approved the criteria given in the Supplementary Benefits Handbook in determining whether or not a man and a woman were living together as husband and wife. Accordingly the tribunal were required to consider and record findings of fact as to the position prior to the claimant's date of marriage on the following - whether the claimant and Mrs F were members of the same household; whether they had a stable relationship; whether there was financial support of one party by the other, or sharing of household expenses; whether there was a sexual relationship and whether they were publicly acknowledged as husband and wife. The tribunal failed to record any findings on this issue and their reasons for a decision indicate that they

merely had regard to the period after the date of a claimant's marriage although the period in issue commenced prior to this date. The tribunal that rehears this case should record findings of fact on the issues referred to above and determine whether the claimant and Mrs F were living together as husband and wife within the meaning of the relevant statutory provisions for the whole or any part of the period prior to the date of their marriage.

9. If the new tribunal conclude that the claimant and Mrs F were an "unmarried couple" in terms of section 34(1) of the said Act during the whole or any part of the period in issue so that their requirements and resources fell to be aggregated for supplementary benefit purposes, they should proceed to consider the correct weekly requirements and resources of the couple in order to arrive at the claimant's proper supplementary benefit entitlement during the period in issue. Their requirements and resources fell to be aggregated for supplementary purposes of course, after the date of their marriage.

10. Once the new tribunal had determined from what date there was an overpayment of benefit they should proceed to determine whether or not the amount of overpayment is recoverable. In order to recover expenditure incurred by the Secretary of State under section 53(1) of the Social Security Act 1986 it must be shown that the claimant misrepresented or failed to disclose any material fact. The adjudication officer's written submission to the tribunal relied on the claimant's alleged failure to disclose the material fact that he and Mrs F had married on 16 June 1987 and had lived together as husband and wife prior to that date. The tribunal decided that "the appellant failed to disclose his marriage which was a material fact" and concluded that this sum was recoverable under section 53(1) of the Social Security Act 1986. Those reasons are manifestly insufficient and give no indication that the tribunal had considered the period prior to the claimant's marriage by reference to the criteria set out in Decision R(SB) 54/83.

11. However, there is a further matter which calls for consideration. Did the adjudication officer, when he made his decision on 24 October 1988, first review and revise the original awards pursuant to subsection (4) of section 53 of the Social Security Act 1986. For that subsection provides as follows:-

" 53. - (4) Except where regulations otherwise prescribe, an amount shall not be recoverable under subsection (1) above or regulations under subsection (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;
- (b) it has been determined on the appeal or review that the amount

is so recoverable."

Subsection (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 (version applicable in 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). In the present case did the adjudication officer carry out a review and revision?

12. Unfortunately, the actual decision of 24 October 1988 and the written submission of the adjudication officer to the tribunal make no reference to any such review and revision. 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 his original decision. In Decision CSB/1272/1989 the Commissioner explained the relevant law on this issue as follows:-

" 9. ... but is it open to the appellate authorities whenever it is thought that the adjudication officer did not form or 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 the [adjudication] officer."

13. Whether or not a review and revision of the award of supplementary benefit 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 ... made by the adjudication officer was undoubtedly an effective decision, albeit, if there was no compliance with subsection (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's, was in turn appealed to the Commissioner. Accordingly, the question of whether the award of benefit was reviewed and revised pursuant to subsection (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 matters not, in view of the final words of that particular provision, that the requirement in question was never considered by the adjudication officer.

14. In the present case 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 section 53(1) of the Social Security Act 1986, it was open to the tribunal to rectify the default pursuant to section 102(1). Their failure to consider whether subsection (4) had been complied with or to respond accordingly is in itself an error of law calling for their decision to be set aside on that ground also. The new tribunal will be at liberty to carry out the necessary review and revision, ensuring that in the course thereof they provide a full and ample explanation of how the overpayment of benefit was arrived at.

15. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs
Commissioner

(Date) 14 February 1992