

ATH/SH/6

Commissioner's File: CSB/086/1991

SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow this appeal by the claimant. The decision of the social security appeal tribunal dated 22 November 1989 was erroneous in law and I set it aside. The case must be reheard and redetermined by a differently constituted tribunal.

2. The claimant was born in July 1920. On 17 September 1987 he signed claim form SP1 for supplementary benefit. He was living with his wife, his non-dependent grandson aged 18 years, and dependent grand-daughter aged 17 years. He had a weekly income of £63.52 invalidity benefit, £25.28 industrial disablement pension, and an occupational pension of £13.02; and his wife had a weekly income of £0.37 occupational pension and £7.25 child benefit in respect of the grand-daughter. He left blank in the form the answer to the question whether he or his partner or any dependent children living with him had any other money coming in. The claimant was awarded supplementary benefit by way of housing benefit from 24 September 1987 to 27 March 1988 at the weekly rate of £4.55. On 29 June 1988 the Department was advised by the District Council by telephone that the claimant's wife was in receipt of a fostering allowance in respect of the grand-daughter and it was discovered that that allowance had been paid since at least March 1985 and that throughout the period 24 September 1987 to 27 March 1988 the rate of benefit was £39.55. By a decision dated 7 April 1989 the adjudication officer reviewed the decision dated 5 November 1987 of the adjudication officer awarding supplementary benefit and his revised decision for the period from and including 24 September 1987 was that the claimant made a misrepresentation, namely that the claimant "misrepresented the material fact he was in receipt of a fostering allowance", and that as a result an overpayment of supplementary benefit had been made amounting to £118.30 and that that sum was recoverable from the claimant. The claimant appealed. By a decision issued on

17 April 1989 the adjudication officer decided that:-

"The claimant failed to disclose a material fact and as a result an overpayment of supplementary benefit has been made amounting to £118.30 for the period from 24.9.87 to 27.3.88. The Secretary of State is entitled to recover this amount."

The claimant appealed. On 4 September 1989 a social security appeal tribunal adjourned the hearing so that the claimant could be represented. On 22 November 1989 the social security appeal tribunal disallowed the appeal. The claimant appeals with leave of the tribunal chairman.

3. Section 53 of the Social Security Act 1986 provides:-

"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) a payment has been made in respect of a benefit to which this section applies; or

(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.

(2) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it."

Section 53(1), therefore, deals with misrepresentation or failure to disclose. In the adjudication officer's original decision dated 7 April 1989 it was stated that the claimant had made a misrepresentation, whereas in his decision issued on 17 April 1989 the adjudication officer stated that the claimant had failed to disclose a material fact. It has been pointed out in a number of decisions that there is a difference between misrepresentation and failure to disclose: see, for example, R(SB) 21/82 at paragraph 4(2), R(SB) 40/84 at paragraph 12 and R(SB)9/85 at paragraph 7, In R(SB) 40/84 at paragraph 12 the Commissioner stated:-

" 12. ... whilst material misrepresentation is an eligible ground for a determination under section 20 of the Act [section 20 of the Supplementary Benefits Act 1976 now section 53 of the Social Security Act 1986] it was not the ground upon which the benefit officer had elected to base his decision; and in my judgment it was not open to the tribunal simply to uphold it by reference to misrepresentation, where originally given by reference to

non-disclosure. It will in my view be nevertheless open to a tribunal in such circumstances to substitute a decision of their own founding upon misrepresentation, if the facts so justify. But it is in my judgment properly pre-requisite to so proceeding that the tribunal have:-

- (i) indicated to the claimant that they have such a course under consideration;
- (ii) identified the misrepresentation/s to be relied upon; and
- (iii) afforded the claimant adequate opportunity to meet the altered case without being disadvantaged by surprise."

In the present case the original decision of 7 April 1989 was not before the social security appeal tribunal and they had no indication that the original decision was based upon misrepresentation, while the decision issued on 17 April 1989 was based upon a failure to disclose. Nevertheless at the hearing before the appeal tribunal the case for the adjudication officer was based upon the written submission in Form AT2 and the claimant was not "disadvantaged by surprise". Be that as it may, as I am setting the decision aside on other grounds it will be clear to the claimant at any rehearing that the case of the adjudication officer is based upon the failure to disclose.

4. Section 53(4) of the Social Security Act 1986 provides:-

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

Section 104(1) of the Social Security Act 1975 provides that any decision of an adjudication officer may be reviewed at any time by an adjudication officer if -

- " (a) the officer ... is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact; or
- (b) there has been any relevant change of circumstances since the decision was given;
- (c) [not relevant]"

but regulations may provide that a decision may not be reviewed on the ground mentioned in paragraph (a) above unless the officer ... is satisfied as mentioned in that paragraph by fresh evidence."

The first question for the appeal tribunal, therefore, was to determine whether or not there were grounds for review of the

decision of the adjudication officer dated 5 November 1987. Clearly the appeal tribunal did not consider that question and their decision was, therefore, erroneous in law. I should add that there is no copy of the decision of the adjudication officer dated 5 November 1987 in the case papers.

5. The decision of the appeal tribunal was also erroneous for other reasons. In R(SB) 54/83 the Commissioner decided that in order to recover expenditure incurred under section 20 of the Supplementary Benefit Act 1976 (now section 53 of the Social Security Act 1986) on the ground of failure to disclose a material fact it must be shown that (as summarised in the headnote):

- "(1) the Secretary of State seeking to recover the expenditure is the Secretary of State who incurred it;
- (2) the person from whom it is sought to recover the expenditure knew the material fact;
- (3) the disclosure by the person in question was reasonably to be expected;
- (4) there was a failure to disclose;
- (5) the failure related to a material fact;
- (6) the expenditure by the relevant Secretary of State was incurred in consequence of the failure."

The appeal tribunal in their findings of fact stated in Form AT3, box 2 that the claimant and/or his wife "informed ... District Council, the DSS and Social Services at various times of the fostering arrangement they had with their grand-daughter". In their reasons for their decision in Form AT3, box 4 they stated:-

"The tribunal take the view that although oral information may have been given to the DSS at some point, and although the presence of [the grand-daughter] was disclosed to the DSS at box 7 on the application form, there was such a material omission in box 9 when he failed to answer the question, "Do you or your partner or any dependent children who live with you have any other money coming in?" that there clearly was a failure to disclose a material fact, namely that a foster child was living with the [claimant]."

It had been the claimant's case before the appeal tribunal that the District Council "confirmed that they had been aware for several years of the fostering allowance". It is clear from their findings of fact that the appeal tribunal found that there had been a disclosure of the fostering arrangement but they have not indicated whether or not they found that the information included the fostering allowance. In their reasons they have stated that they "take the view" that all information "may have been given to the DSS at some point" but, again, they do not

indicate what information was or may have been given. One of the crucial issues before the appeal tribunal was whether or not there had been a failure to disclose a material fact. It was obviously of the utmost importance, therefore, for the appeal tribunal to make the relevant findings of fact and reach a decision as to what information was given to whom and on what date. It is quite clear, in my judgment, that the decision of the appeal tribunal fails to comply with the requirements of regulation 25(2)(b) of the Adjudication Regulations and is, therefore, erroneous in law. In this connection I would refer to R(SB) 54/83 at paragraph 16 where the Commissioner said:-

" 16. The primary question is accordingly what can be said to amount to a failure to disclose in this context ... What was the claimant's obligation as regards the communication of the material fact that his wife was working? In my judgment, it was an obligation to take such steps as might reasonably be expected to ensure that the material fact reached the supplementary benefit officer charged with the awarding of benefit. It is not enough, for example, to inform the Child Benefit Office, or some other branch of the Department of Health and Social Security which is not concerned with the award of supplementary benefit. The material fact must be communicated to the right branch of the Department of Health and Social Security, which in most cases will be the local supplementary benefit office. But that is not to say that the local supplementary benefit office must necessarily be informed by the claimant in person, if the communication is made in some other way which might reasonably be expected to reach the relevant local office."

That passage was referred to by a Tribunal of Commissioners in R(SB) 15/87 at paragraph 28 where the Tribunal of Commissioners stated:-

" 28. We accept that a claimant cannot be expected to identify the precise person or persons who have the handling of his claim. His duty is best fulfilled by disclosure to the local office where his claim is being handled either in the claim form or otherwise in terms that make sufficient reference to his claim to enable the matter disclosed to be referred to the proper person ... but, as was pointed out in R(SB) 54/83, there can be other occasions when the duty can be fulfilled by disclosure elsewhere. This can happen, for instance, if an officer in another office of the Department of Health and Social Security or local unemployment benefit office accepts information in circumstances which make it reasonable for the claimant to think the matters disclosed will be passed on to the local office in question. It was in reference to this sort of case that the Commissioner included in paragraph 18 of Decision R(SB) 54/83 a statement about a continuing duty. A claimant who has made such disclosure has not in fact made disclosure to the right person or in the right place, but he has done something which has the effect that, for the

time being at least, further disclosure is not reasonably to be expected of him. We consider that paragraph 18 of R(SB) 54/83 is concerned with the case of a claimant who subsequently becomes aware, or should have become aware, that the information has not been transported to the proper person or place and who is then under a duty to make disclosure to that person or place. We desire to observe for consideration when it arises the question whether the means of knowledge that the information has not been transmitted has the same effect as actual knowledge."

6. There was another error of law. In R(SB) 9/85 the Commissioner stated in paragraph 6:-

" 6. ... I regard it as of the highest importance that in section 20 appeals [now section 53 appeals] the appeal tribunal should -

- (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 a sum will be derived from a schedule which has been furnished by the benefit/adjudication officer. It will then suffice to -

- (i) identify that schedule; and
- (ii) record that it was accepted by the tribunal."

It is clear that the appeal tribunal did not state the sum which was recoverable by the Secretary of State nor indicate the manner in which that sum had been calculated. Their decision was also, for that reason, erroneous in law. The present adjudication officer submits in his written submission dated 2 July 1991 in paragraph 7 that details of the calculation of housing benefit supplement "may be helpful to both the claimant and the tribunal, hearing the appeal". I agree. As there is no copy of the decision of the adjudication officer dated 15 November 1987 in the case papers, it is clearly important to ascertain how the amount of the housing benefit supplement, as shown in the schedule at T14, was calculated.

7. For those reasons, I must set aside the decision of the appeal tribunal.

8. The new tribunal to whom this case is remitted must make the relevant findings of fact and reach a decision as to -

- (1) Whether there were grounds for review.
- (2) Whether the six elements set out in R(SB) 54/83 at paragraph 5 above have been established; and in particular whether or not there has been a failure to

disclose for the whole of the period in question, namely from 24 September 1987 to 27 March 1988.

- (3) If during that time there had been a disclosure by or on behalf of the claimant, whether that disclosure related to a material fact and if it did, the date of the disclosure.
- (4) Finally, if the new tribunal decide that there has been an overpayment and that it is recoverable, they must indicate the sum recoverable by the Secretary of State and indicate the manner in which that sum has been calculated.

9. For those reasons I allow this appeal.

(Signed) A.T. Hoolahan
Commissioner

(Date) 25 March 1992