IEG/MD

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SUPPLEMENTARY BENEFITS ACT 1976

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Celestine Sybil St Rose (Mrs)
Social Security Appeal Tribunal: Euston
Case No: 13/15/12

[ORAL HEARING]

1. (1) This is a claimant's appeal from the decision dated 16 July 1984 of a social security appeal tribunal brought by leave of a duly authorised chairman and upon the contention that the tribunal's decision was given in error of law. By their decision the tribunal upheld, subject to a reduction of the amount of overpayment to £56.14 and changes in the period to which it related (which matters were by the time the matter got before the tribunal not themselves in controversy), the decision of a benefit officer issued on 5 April 1984 to the effect that the claimant had been overpaid supplementary allowance of £72.38 for the period 23 August 1982 to 22 August 1983 and that such amount was recoverable. Though not so expressed in terms, that decision was given pursuant to section 20 of the Supplementary Benefits Act 1976 as amended ("the Act").

(2) My decision follows an oral hearing of the appeal on 25 September 1985 at which the claimant was represented by Mr C. Ward of the Harlesden Advice Centre and the adjudication officer was represented by Mr C.A.M.E. d'Eca of the Solicitor's Office, DHSS. I am indebted to both Mr Ward and Mr d'Eca for their helpful submissions.

(3) The appeal is allowed. I set aside the tribunal's decision as given in error of law in respects undermentioned and direct that the claimant's appeal from the benefit officer's decision be reheard by a differently constituted tribunal. I do not consider it expedient in the circumstances of the case to give myself the decision which the tribunal should have given, as in my judgment a correct determination will involve the ascertainment and finding of additional facts.

2. The claimant, a widow in her early 60's living with her non-dependant son in local authority rented accommodation, was at all material time without capital and in receipt of a supplementary pension. She was in receipt also of a state retirement pension, and the case alleged against her was as to failure to disclose increase in that pension when claiming supplementary benefit, in consequence of which overpayment had ensued. It was not contended on her behalf that she had not received such increases as were relied upon in the case put against her, or that she had made disclosure of those. However, it was contended on her behalf before the tribunal that both her supplementary pension and her retirement pension were payable by order books issued from the same local DHSS office (and that may well have been the case - but the tribunal have made no finding either way) and that she had

on that account thought disclosure by her unnecessary. By the time the matter came before the tribunal it was common ground both that the material period of overpayment was not that specified in the benefit officer's decision of 5 April 1984 but was the period 23 September 1982 to 31 August 1983 and that the correct amount of overpayment was not that indicated in the benefit officer's decision of 5 April 1984, or indeed that specified in an intermediate revised decision which also had altered the dates to those last mentioned, but was £56.14. The tribunal's decision was that the claimant had been overpaid the sum of £56.14 which was recoverable. The only findings of fact made by the tribunal were:-

> "The amount overpaid was amended to £56.14 and the claimant's rep did not challenge the figure. From 23 September 1982 the claimant's retirement pension was increased. She did not directly inform the Department of this change in her income assuming that the pensions and benefit sections in the same building would communicate with each other."

The tribunal's stated reasons for decision were:

> "The Tribunal considered RSB 54/83 and decided that the claimant having continued to receive the same Sup Ben after the increase of her pension had reason to suspect that the benefit department was unaware of the increase. She was, innocently, in breach of her obligation to inform the Department of the increase and thus became liable to the operation of S.20 of the SB Act and to the recovery of the overpayment of £56.14 from 23 September 1982 to 30 June 1983 since the A215 was received on 1 July 1983."

3. It was common ground between Mr Ward and Mr d'Eca before me that the tribunal's stated findings of fact and reasons for decision were inadequate and that the tribunal's decision must be set aside and the claimant's appeal remitted for rehearing. I accept those submissions as well founded, and would go further and indicate that the tribunal's record of decision demonstrates a regrettable lack of grasp of the - admittedly complicated - operation of section 20 of the Act and of the steps required as to "asking themselves the right questions" and stating findings of fact and reasons for decision requisite for a proper determination, notwithstanding their acknowledged referral to decision R (SB)54/83, which provides clear guidelines in point. It had in fact become apparent in advance of the hearing before me that my substantive decision must be in the tenor it now is, and I granted the request made by Mr Ward for an oral hearing only because he indicated that he was hoping to persuade me to give directions for the anticipated rehearing which would involve rulings upon certain points of law and procedure. As foreshadowed to him by me at the oral hearing, I am prepared to respond to his submissions in that behalf only to a limited extent; but I hope usefully.

4. It would appear from the main tenor of the tribunal's record of decision that it founded upon the foundation of "failure to disclose a material fact" - although what was intended to be encompassed by the word "directly " in the tribunal's finding "she did not directly inform the Department" is a matter for conjecture since - prima facie at least - any effective notification - direct or indirect - would suffice to discharge the material obligation. But that "failure to disclose" was the intended foundation is certainly not beyond debate, having regard to the tribunal's reference to R(SB) 54/83 and to the inclusion in their reasons for decision of "she was, innocently, in breach of her obligation to inform the Department" because - tenably - that reference to "innocently" may reflect a confusion on the part of the tribunal between "failure to disclose" a material fact and "misrepresentation" - fraudulent or innocent - of a material fact.

5. Be that as it may, the tribunal have made no finding unequivocally intimating that the claimant knew of the material fact, the disclosure of which was reasonably to be expected of her; that there was a failure to disclose it; or that that the expenditure by the relevant Secretary of State was incurred "in consequence of," such failure. So also my conclusion as to their having failed to master the clear instructions afforded in R(SB) 54/83 is reinforced

by their reference in their stated reasons to "had reason to suspect that the benefit department was unaware of the increase" - for the treatment of "having reason to suspect" which is to be found in R(SB) 54/83 is given not in regard to a claimant who has failed to make a material disclosure at all, but in regard to a claimant who has made a disclosure, has reason to suspect that it has failed to "get through" to the (now) adjudication officer responsible for awarding the claimant's benefit, and who is on that account to have imputed to him an obligation to make a fresh disclosure. But there was before the tribunal, so far as their record of decision goes, nothing to suggest that there had ever been any primary disclosure by the claimant upon which, as the foundation, the guidance so afforded as to further disclosure could fall to be applied. In the circumstances neither the tribunal's stated findings nor their stated reasons attain the standard required for a due discharge of their obligations under regulation 19 (2)(b) of the Social Security (Adjudication) Regulations 1984 and I must set aside the tribunal's decision on that account. But I am in little doubt that those shortcomings in fact stem from significant failure also to "ask themselves the right questions" - though I need not pursue that further.

6. The first point which Mr. Ward raised before me as one upon which he wished me to give guidance to the tribunal for the rehearing concerned the proper interpretation of what is indicated in decision R(SB) 54/83 with regard to claimants who have made the attempt to disclose a material fact to the DHSS being in certain circumstances upon notice that "the message has not got through" and so under obligation to make a further disclosure (para. 18 of R(SB) 54/83 refers). Mr. Ward was concerned lest what had been so indicated should be taken to support the proposition that if following an increase in a claimant's income resources as to which the claimant had made what should have been an effective disclosure there was not a reduction in the amount of supplementary pension or allowance in payment and receipt thenceforward, there was on that account alone, and regardless of other circumstances, a "reason to suspect" giving rise to an obligation to make a further disclosure. I am prepared to indicate that in my view there is no irrebuttable presumption to such effect, for I can conceive of circumstances in which it might not be proper to conclude from those facts alone that an obligation for further notification had arisen. But I can conceive also of many cases in which a continuation of benefit payments without change in amount, following an attempted disclosure of a material change of circumstances, will be a most powerful factor in the evaluation of whether or not a claimant has come under obligation to make a further disclosure. I would stress also that the question whether or not a claimant has "reason to suspect", whilst to be decided in all the circumstances of the particular case, is essentially an issue of fact - though one to be decided, normally, by inference to be drawn from primary facts found. But since I am not convinced that this topic will be of any relevance at the rehearing of the present appeal (certainly there is nothing in the record of the tribunal's decision to suggest that the claimant ever made an attempt at effective disclosure such as to bring the topic into play) I am not disposed to give any express direction with regard to the point.

7. (1) Mr. Ward pressed me to give some guidance also as regards the duty of a tribunal in a section 20 case where, the charge being that the claimant had misrepresented a material fact, the misrepresentation relied upon was the claimant's representation, in the common form declaration habitually required to be declared to by a claimant encashing a payable order for benefit, as to having notified all changes of which notification was required by the instructions in his order book, and where the shortfall in notification allegedly founding the misrepresentation was referable to the instruction to be found in order books requiring notification if the claimant, his or her wife/husband or any other dependant should:-

"(1) Acquire any income, benefit, allowance or pension which you have not already reported to the Issuing Office, or if any change (up or down) takes place in any income you already have....."

[In the order book instructions included in the present case materials there then follows an intimation as to certain limited exceptions from the general rule so expressed - but nothing turns on those for my present purposes].

(2) Mr. Ward pointed to the apparent distinction so made between the requirement in the case of acquiring "any income benefit allowance or pension" and the requirement as to notifying any change which makes reference only to change in any "income", and omits any reference to "benefit, allowance or pension". This, he contended, exonerated a claimant from obligation to notify a change in benefit, allowance or pension" - all of which were, he said, matters as to which the DHSS might reasonably be assumed to have internal knowledge, making notification by a claimant superfluous. So, his contentions ran, omission to notify a change in any of those respects could not make a misrepresentation out of a representation to having notified all that was required to be notified as....or, put at lowest, should not be held against a claimant in view of the scope which the wording afforded for misunderstanding.

(3) The arguments so put forward by Mr. Ward are not without interest or general importance. But there was not the remotest suggestion before the tribunal that the claimant had ever read the instructions in her order book, let alone made declarations on the basis of the instructions to her which might exonerate her from reporting an increase in benefit, or indeed that this was a contention which could be properly founded in her case, the matter of construction apart, upon any rehearing of the claimant's appeal. In the circumstances I am not prepared to give any such ruling as Mr. Ward wished me to do. The point can be decided if and when it arises for practical determination.

(4) I am, however, prepared to indicate both that it would seem to me helpful that the DHSS should, if this has not already been done, reconsider the wording of any instruction issued in the form to which Mr Ward referred me, and to add that had I considered it necessary for me to give a ruling on the point it would have been a ruling which derived no support from the submission which, against the contingency that I might seek to give a ruling, Mr d'Eca put forward - which was to the effect that because such instructions as are to be found in an order book are not of statutory force and do not form any part of even subordinate legislation they should not be expected to have the accuracy of exposition, or be judged by the standards expected of, formal legal instruments.

(5) As to that, there are undoubtedly contexts in which a submission on those general lines is relevant and legitimate - as where, in information leaflets and under an express disclaimer as to being a full exposition of relevant law it is sought to give a "rough popular guide". But I would find myself quite unable to accept that such considerations should bear upon instructions which serve as the basis for formal declarations to be made by claimants when encashing benefit instruments, and to which the DHSS have every intention of holding a claimant, should occasion arise, not only in section 20 proceedings but in criminal proceedings also. Such instructions must, in my judgment, be framed with meticulous avoidance of ambiguity if they are properly to serve their purpose.

8. (1) I am also unwilling to give any direction or ruling on a further point upon which such was sought by Mr. Ward, namely as to whether it is reasonable to expect a claimant even if specifically instructed (or in the alternative "unless specifically instructed") to notify the DHSS of a change of circumstances in his or her income resources represented by a change in the claimant's benefit rate in respect of a social security benefit dealt with by the same local DHSS office as deals with his supplementary benefit. But as regards the first of his alternatives I should have thought an affirmative answer blindingly obvious. And as regards

the second, he should derive helpful assistance from already decided cases, in particular R(SB)54/83 paragraph 6 and at paragraph 16 of the decision on Commissioner's File CSB 61/1982 (unreported), a copy of which has been included in the present case file. It must, however, also be beyond dispute that it is a prudent working rule for a claimant to disclose everything that he appreciates may be of potential relevance, even if in doubt as to whether under obligation to disclose in a particular respect. Moreover (and whilst it is unnecessary for me to give any ruling as to this either) I am not unsympathetic to the counter - submission advanced by Mr. d'Eca that whilst it cannot be expected of every claimant that he or she will have a close and expert knowledge of the intricacies of the supplementary benefits legislation, it will normally be reasonable to attribute to a claimant an awareness that supplementary benefit is a "means tested benefit", and that on that account a claimant should, if and when concerned with determining whether or not instructions as to disclosure require disclosure of any particular increase in his incomings or resources, approach the matter in recognition that all such are of potential relevance unless the subject of authoritative guidance as to exoneration from disclosure.

9. My decision is as indicated in para. 1(3) above.

(Signed) I. Edwards-Jones
Commissioner

Date: 29th October 1985