

O/payment - for tribunal?
(goodie record)

JGM/SB

Commissioner's File: CSB/0169/1986

C A O File: AO 2349/86

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: Benjamin Lee

Social Security Appeal Tribunal: Reading

Case No: 16/31-05

1. My decision is that the decision of the social security appeal tribunal dated 16 September 1985 is erroneous in point of law and it is set aside. The matter must be referred to another tribunal.

2. The claimant had been in receipt at the relevant time of supplementary benefit since 30 June 1983. It is said that in a form B1 dated 19 July 1983 he stated that he was in receipt of a retirement pension of £33.33 net per calendar month. This would be presumably £400 per year. The document (though of some importance) is not in the case papers and will I hope be before the new tribunal. It is stated that a letter was received (presumably by the local office) on 30 November 1983 from the Post Office Superannuation Administration Centre (who pay the pension) that the claimant's pension from December was £33.92 net per calendar month (or roughly £407 per annum). In a calculation of the claimant's entitlement of supplementary allowance from 2 January 1984 the figure of £33.63 is used. This figure appears to emanate from information given by the claimant in August 1983 (as appears from a document introduced into the case papers since the tribunal hearing.) On 24 July 1984 the same Post Office Superannuation Administration Centre stated that the claimant's pension had been £49.50 per calendar month since 21 November 1983, without there being any indication in the form AT2 whether this was net or gross. In fact £49.50 less tax at the basic rate 30 per cent is not all that far from £33.92 and the case papers now include a pension slip dated 30 November 1983 showing a gross amount of £48.32, net £33.92.

3. On 29 January 1985 the adjudication officer issued a decision requiring repayment of £234.68 said to have been overpaid in the period of something over six months from 2 January to 29 July 1984. One may perhaps wonder how a difference of about £16 per month in the amount of the pension could in the time have resulted in so large an overpayment; but I infer from the papers that it had something to do with an income tax repayment. But the calculations do not seem to me to be at all clear and I am far from certain that the difference in any case is not one of confusion between gross and net payments; or that taking the tax refund into account has not in fact amounted to treating the same overpayment, if there has been one twice over. I may add that it is stated that there has also been an overpayment of housing benefit, with which however I am not concerned.

4. The claimant appealed to the appeal tribunal against the requirement of repayment, claiming that he had notified the office each time that his pension had gone up. The adjudication officer states that there is no record of his having sent in pay slips. The appeal tribunal dismissed the appeal stating that the tribunal were not satisfied on a balance of probabilities that the claimant had informed the office. They do not appear to have made any attempt to go into the figures.

5. The claimant now appeals to the Commissioner. On his behalf it is urged that the tribunal wrongly placed the burden of proof of his having informed the office on the claimant. I do not propose to base my decision on this point. The tribunal actually made a finding that the claimant had not disclosed the matters in question. And in any case the burden of proving a negative (as that the claimant has not disclosed a matter) is very easily shifted. I do wish to deprecate the tendentious observation in cases of this sort that there is no record of something having happened unless it is accompanied by a statement that in the ordinary course such a record could be expected if the thing in question had happened. A bare statement that there is no record of something carries with it the implication that there would be expected to be a record of that something and, where that would not be expected, is misleading to the tribunal. Incidentally there seems to have been some record of a disclosure in August 1983.

6. The decision is based on section 20(1) of the Supplementary Benefits Act 1976, which so far as material provides as follows:

"If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure -

(a) the Secretary of State [for Social Services] incurs any expenditure under this Act; or

(b)

The Secretary of State shall be entitled to recover the amount from that person."

7. It is therefore necessary to establish that there has been a misrepresentation or failure to disclose on the part of some person not necessarily the payee. In the present case it is argued that the claimant failed to disclose the increases in his pension. This is a question of fact. On the facts as outlined by the adjudication officer in the form AT2 it seems to be much more clear that the Post Office Superannuation Administration Centre made a misrepresentation in their letter received on 30 November 1983, unless of course there has merely been some confusion between net and gross amounts of pension. If it is found that the claimant failed to disclose the increases in his pension, repayment can still not be recovered from him under the section if the overpayment was not the consequence of the failure. The statement of the facts in the form AT2 would suggest to me that the Department did not rely on the claimant at the relevant time but on the statement from the Pensions Administration Centre. This is a matter on which a finding is necessary before a requirement of repayment can be made of the claimant.

8. Then there is a question of the amount. Understatement of pension by about £16 per month could not have led to the overpayment of £234.68 in less than 7 months. There is plainly something else lurking in the background, which seems to be the tax refund. There are no findings whatever about that. And there are no calculations to show how the amount of the overpayment was worked out. Quite apart from any question of failure to disclose it one needs to know the amount of the tax refund, the date of its payment and the period in respect of which the tax refunded was deducted. Only then can one possibly calculate the period to

which the tax refund is referable as a resource under regulation 9 of the Supplementary Benefit (Resources) Regulations 1981 (see decision CSB/879/1985 at paragraph 12, though I do not think that it necessarily is the case here that the tax refund was in respect of a period of one year). At present we do not know whether or when the claimant disclosed it.

9. In my judgment the decision is defective in its failure to go into these matters and I set it aside. The claimant's appeal is allowed.

(Signed): J.G. Monroe
Commissioner

Date: 2 September 1986