

Overpayment. Contended that because AO had not taken a
"stopped" point of PSA 7 "stopped" from taking it now.
does not apply to SB. H20; because ultra vires act cannot bind crown.
AO cannot, by anything he fails to do, cause
a relevant statutory provision to be left out of effect.

JBM/SH/8/MD

Commissioner's File: CSB/176/1985

C A O File: AO 2510/85

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: Kurshed Ahmed Ansari
Social Security Appeal Tribunal: Battersea
Case No: 01/17/14

[ORAL HEARING]

1. My decision is that the decision of the Battersea social security appeal tribunal dated 15 November 1984 revising the decision of the benefit (now adjudication) officer is erroneous in point of law. Accordingly I set it aside and remit the case for hearing to a differently constituted appeal tribunal.
2. This is an appeal by the claimant to the Commissioner with the leave of the Commissioner against the unanimous decision of the appeal tribunal revising the decision of the benefit (now adjudication) officer issued on 28 January 1983 and set out in Box 1 of Form LT205. The claimant requested an oral hearing to which request I acceded. Accordingly on 5 March 1986 I held an oral hearing at the conclusion of which I directed a further submission. Following the receipt of that submission and the claimant's comments thereon I held a resumed hearing on 8 January 1987. At the conclusion of that hearing I directed the production of a further schedule together with a summary of the submissions made at the resumed hearing by Miss Kearns on behalf of the adjudication officer directing the claimant's representative to provide written comments thereon. In response to that direction I received a further submission by the adjudication officer now concerned dated 20 March 1986 and comments in respect thereof from the claimant dated 11 April 1986. At the resumed hearing the claimant was not present. He was represented by Mr John Wadham of the Battersea and Wandsworth Law Centre Ltd, legal assistant. The adjudication officer was represented by Miss R Kearns of the Solicitor's Office, Department of Health and Social Security. To both of them I am indebted. At the conclusion of the resumed hearing I made a further direction and I received the following letter dated 10 February 1987 from the solicitor to the Department of Health and Social Security which so far as relevant is set out immediately below:-

"I refer to the oral direction.. of the oral hearing of the above appeal... In accordance with that direction I enclose herewith a further Submission made on behalf of the Adjudication Officer. [The Commissioner] also directed that a copy of the original overpayment calculation should be obtained and placed with the papers and such a copy is enclosed with this further submission. The original decision of the SBO of 28 January 1983 has been found and is also enclosed."

Accordingly I received the helpful further submission dated 10 February 1987 made on behalf of the adjudication officer together with a copy of the overpayment calculation. Comments in respect of the submission dated 10 February 1987 were enclosed in a letter dated 23 February 1987 from the claimant's representative. Thereafter I received a supplementary submission made on behalf of the claimant accompanying a letter dated 12 March 1987 from the claimant's representative.

3. The facts and history of the case are dealt with partly by reference in paragraph 2 of the submission dated 17 June 1985 of the adjudication officer now concerned on which the claimant and his representatives have had the opportunity to comment. No useful purpose would be served by my setting out these matters afresh here.

4. The relevant statutory provisions are referred to in paragraph 3 of the submission dated 17 June 1983 of the adjudication officer now concerned. The relevant provisions of regulation 9(2) of the Supplementary Benefit (Resources) Regulations 1981 [S.I. 1981 No. 1527] are set out at paragraph 5 of the submission dated 17 June 1985 of the adjudication officer now concerned. Nothing is to be gained by my setting out those references or provisions here again.

5. In his able address to me at the resumed hearing Mr Wadham stated that this was an appeal in respect of an overpayment. The relevant law was section 20 of the Supplementary Benefits Act 1976. The correct approach in Mr Wadham's submission is to take each overpayment made on a weekly basis and to look at each week the claimant was paid to see whether there was misrepresentation or failure to disclose, whether disclosure was reasonably to be expected and whether there was an overpayment. In regard to this the appeal tribunal failed in their duty to follow this procedure. Mr Wadham referred me to the record of the appeal tribunal at page 54 of the case papers and in regard to Box 4 thereon he submitted they failed to deal with this case as it was incumbent on them to make a separate decision in respect of each week. In some cases there may be one failure to disclose in respect of a whole series of weeks. However in this case there was a series of payments but as, so submitted by Mr Wadham the DHSS would themselves admit that the circumstances here varied from week to week. He referred me to page 3 in respect of the claimant's statement and stated there was a series of disclosures by the claimant and therefore it was incumbent on the tribunal to look at every week. Mr Wadham submitted that the appeal tribunal have to deal with each week as to the payment in a week, what the misrepresentation was, whether it was reasonably to be expected and finally whether there was an overpayment. The decision had to be set out in terms the claimant could understand. Mr Wadham submitted that the appeal only relates to those weeks covered by the decision of the tribunal when it was said an overpayment was recoverable. He was not seeking to disturb the decision of the appeal tribunal. Mr Wadham submitted that there were a number of decisions before me. He referred me to R(SB)42/83 at paragraph 5 for the proposition that there is a series of payments. He submitted that the present case was not on all fours. Mr Wadham further referred me to decision R(SB)9/85 at paragraph 6 and stated that if what the schedules are is a series of weekly decisions here the claimant did inform the Department at different stages. The tribunal cannot say they rejected the claimant's evidence of disclosure without going through that evidence properly - some evidence in some weeks, so stated Mr Wadham, is weaker than in others. The tribunal must make their decision on every week and must not adopt a broad brush approach. Mr Wadham referred me to the notes of evidence of the record of the appeal tribunal's procedure at page 51 of the case papers and stated there was evidence of letters by the claimant. He submitted that there were no findings on the evidence before the tribunal and the tribunal came up with the statement that overpayment was recoverable. There was a failure to make proper findings and failure to deal with evidence in each week.

Mr Wadham then dealt with the question of what the tribunal decided and why they arrived at their decision. He referred me to page 54 of the case papers in respect of the tribunal's reasons for decision. Mr Wadham referred me to decision R(SB)21/82 at paragraph 4(2) which he submitted was approved in decision R(SB)54/83. He submitted that the tribunal sought to impose a higher standard in that the claimant had a duty to inform the Department; if he had any duty it was his duty to notify the Department when he had a payment - the question was whether it was reasonably to be expected. Mr Wadham further submitted that the tribunal were not sure whether they were talking about misrepresentation or failure to disclose. He referred me to decision R(SB)40/84 at paragraph 12 and submitted that the claimant was not really surprised as the adjudication officer was not clear in his written submission whether it was misrepresentation or failure to disclose. He submitted that the tribunal should have said that this was a case of failure to disclose and given the claimant the opportunity to reconsider his argument. Mr Wadham referred me to decision R(SB)34/84 for the proposition that the burden of proof is on the Department in overpayment cases. He further referred me to decisions R(SB)21/82 and 28/83 for the proposition that when assets are not those of the claimant the Department must prove the claimant knew or could have known of their existence and he submitted that this adds to the burden whether there is failure to disclose or misrepresentation. On the assumption that the instant case is a failure to disclose Mr Wadham submitted that it is necessary to look at when the failure occurred. Mr Wadham referred me to unreported Commissioner's decision CSB/347/83 in regard to the shifting burden of proof. Turning to regulation 9(2) of the Resources Regulations Mr Wadham stated that the claimant's wife received payments for every day on which she worked. He stated that she also seems to have been regularly paid but there were differing amounts. The difference between Mr Wadham and the Department he submitted is that the claimant's wife was paid per day. He referred me to pages 74, 75 and 76 of the case papers. The number of days varied. He submitted that evidence was before the tribunal as to the amount paid in respect of the period. The claimant's wife was employed irregularly and was paid for the days she worked. Administratively the payments were made on a regular basis. Mr Wadham dealt with the contractual basis and dealt with the question whether she was contractually entitled to payments at the end of a day or a five day period or whether she was entitled to be paid when she was in fact paid. He submitted (in the absence of any evidence in respect of a contract of employment) that she was entitled to be paid when the day or days were worked. He submitted that a tribunal needs to look at the case again as there was no contract before the appeal tribunal. He stated that you work five days and get paid for five days "payable" relates to when a person is contractually entitled. The payability and the period relates to the entitlement to the payment by the employer. He submitted that "paid" only has meaning in respect of "payable in respect of a". He referred me to decision R(SB)17/82 at paragraphs 6(2) and (3) as to what the period is. Mr Wadham stated that the tribunal at page 52 of the case papers were confused as to regulation 9(2)(a) and (b). They had not dealt with (a) at all and had not looked at what the period was. What they said was that the sum total of supplementary benefit is the amount paid in the whole period and taken into account against supplementary benefit. This is not what regulation 9(2)(a) or (b) says. You must look at regulation 9(2)(a)(i).

Mr Wadham then turned to the question of the point at which the income shall be taken into account. He submitted that the tribunal did not take into account the method in which the pension is payable. He referred to the mode of payment made by the Department in respect of a giro payment and stated that in looking at "payable" that means "when a person is contractually bound to receive it". He referred me to decisions R(SB)15/82 at paragraph 4, R(SB)23/84, paragraph 19 (which was not dealt with by the Court of Appeal who heard that case on appeal), R(SB)11/85 at paragraph 14 and 16(1). He submitted that the tribunal should have decided on a weekly basis when these amounts were payable. He then

dealt with the question of when it is practicable to take a payment into account. He submitted that neither the claimant nor his wife nor the Department can take it into account at the time when it is payable. Mr Wadham then referred me to page 54 of the case papers in respect of the tribunal's reasons for decision. He stated that the tribunal suggested that failure to disclose also includes failure to disclose expected income. He said that the Department knew the claimant's wife was a supply teacher. He referred me to regulation 8 of the Claims and Payments Regulations and submitted that there was not a change of income until income has been received.

Mr Wadham then returned to the question of an additional requirement for an ulcer condition which should have been paid and taken into account. The claimant was in receipt of this additional requirement at the date of the tribunal and gave evidence in respect of it as shown at page 51 of the case papers. The tribunal Mr Wadham stated said that there was no medical evidence - it was important to have medical evidence - they should have adjourned to get medical evidence. He then referred me to decision R(SB)56/83 at paragraphs 13 in regard to making a claim. He further referred me to R(SB)9/84 and to R(SB)11/86 at paragraph 12.

Mr Wadham then dealt with the question of evidence he submitted the claimant had produced in respect of disclosure. He referred me to pages 3, 4, 5 and 6 of the case papers and he stated that page 84 of the case papers was an example of a letter disclosing the claimant's wife's income. He stated that the tribunal had made no findings of fact in this regard and that the tribunal should have decided whether they rejected that evidence and decided which part of which evidence they accepted. He submitted that the tribunal must look at whether it was reasonably practicable for a disclosure to be made. Mr Wadham then referred me to the schedule at page 40 of the case papers and dealt with particular weeks. He submitted that problems occurred in all the weeks and it was an analytical task initially on a weekly basis for the Department and then for the tribunal. Finally Mr Wadham dealt with the standard expected of a tribunal in relation to setting out their decision and referred me to decisions R(SB)5/82, 6/81, 11/82, 12/82, and 23/82.

It was common ground between Mr Wadham and Miss Kearns that the case had to be remitted in the light of the many errors of law in respect of the tribunal who (as Mr Wadham stated and with this I am in agreement) tried very hard but started from incorrect premises.

6. In my judgment for the reasons referred to hereafter the decision of the appeal tribunal is erroneous in point of law.

So far as relevant the submission dated 10 February 1987 made on behalf of the adjudication officer in response to my direction at the conclusion of the resumed hearing referred to in paragraph 2 above is as follows:-

"2. At the hearing.. it was common ground between the Adjudication Officer's Representative and the Appellant's Representative that the decision of the Appeal Tribunal had contained various errors of law and that the matter should be reconsidered by a differently constituted Appeal Tribunal.

3. What had happened in this case was that the Supplementary Benefit Officer decided on 28 January 1983 that £640.49 supplementary benefit had been overpaid to [the claimant] and that it was recoverable from him. [The claimant].. appealed against the decision to the Appeal Tribunal on 24 February 1983. As can be seen from document 87 in the case papers, a Supplementary Benefit Officer made several subsequent attempts to review and revise the original decision of 28 January 1983. In a written submission made on behalf of the Appellant dated 9 January 1985.. it was submitted that the Supplementary Benefit Officer had no authority to review the original decision. The Appellant's Representative resiled from this submission at the

oral hearing.

4. At all material times before 23 April 1984, the law governing the question of review was contained in Regulation 4 of the Supplementary Benefit (Determination of Questions) Regulations, 1980.. as amended by Regulation 10(3)(c) of the Supplementary Benefit (Miscellaneous Amendments) Regulations, 1981..

These regulations specifically except "Any determination made under section 20 (recovery in cases of misrepresentation or non-disclosure)" from the review provisions. Nevertheless on 16 April 1984 the Supplementary Benefit Officer purported to review and revise the decision. The Social Security (Adjudication) Regulations, 1984.. which gave Adjudication Officers authority to review and revise their own decisions came into operation on 23 April 1984. On 16 July 1984 the Adjudication Officer reviewed his purported review of 16 April 1984. It is submitted that, although on 16 July 1984 the Adjudication Officer had power to review and revise his own decisions including a decision of 28 January 1983, he did not have power to review his "review decision" of 16 April 1984 as that purported review decision was itself a nullity.

5. It is submitted that the most fundamental error in the decision of the appeal tribunal in this case lay in the fact that it treated the decision appealed against as that made by the Adjudication Officer on 16 July 1984. As stated above, that decision was a nullity because although at that date the Adjudication Officer had power to review he could not review a decision which was in itself a nullity. The Appeal Tribunal had before it only one valid decision, that of 28 January 1983 and should have dealt with the case on that basis. A copy of the original calculation of overpayment at £640.49 is attached to this further submission together with a copy of the decision of 28 January 1983.

6. It is submitted that a freshly constituted Appeal Tribunal would have before it for determination whether £640.49 supplementary benefit was overpaid to the Appellant for the period from 12 April 1982 to the benefit week commencing 7 June 1982 and if not, whether any other sum of supplementary benefit was overpaid to the Appellant during that period.

7. At the oral hearing on 8 January 1986 the Appellant's Representative, having resiled from his submission that the Supplementary Benefit Officer had no authority to review earlier decisions before 24 April 1984, submitted that, because the Adjudication Officer's Representative had not taken the point at the hearing before the Appeal Tribunal, the Adjudication Officer is now estopped from making that contention.

It is submitted that it is an unassailed principle of English law that an ultra vires act or statement cannot bind the Crown. Authority for the proposition it to be found in Minister of Agriculture and Fisheries v. Hulkin. [sic] (Unreported but applied by Mr Justice Cassels in Minister of Agriculture and Fisheries v. Mathews [1950] 1 Kings Bench P.148. In that case Lord Greene, Master of the Rolls, said "The power given to an authority under a statute is limited to the four corners of the powers given. It would entirely destroy the whole doctrine of ultra vires if it were possible for the donee of a statutory power to extend his power by creating an estoppel." See also Howell v. Falmouth Boat Constnction Co Ltd [1951] Appeal Cases 837 and Western Fish Products LTD v Penwith District Council [1980] 2 All England Reports 204. It follows that the Adjudication Officer's representative cannot, by anything which he did or failed to do, cause a relevant statutory provision to be left out of account.

8. I adhere to the submissions made in the Submissions of the Adjudication Officer dated 17 June 1985 and 20 March 1986 and respectfully submit that the decision of the Appeal Tribunal in this case was made in error of law and that the matter should be

reheard by a freshly constituted Appeal Tribunal."

I accept the above submission made on behalf of the adjudication officer now concerned. I have given careful consideration to the claimant's representatives comments referred to in paragraph 2 of this decision and to Mr. Wadham's submissions made at the resumed hearing but for the reasons referred to above my decision is as there set out. I would add that all issues of fact are at large before the new tribunal. I would also add that I have read with considerable interest the learning in respect of estoppel contained in paragraphs 11 to 18 inclusive of the claimant's representatives further submission dated 23 February 1987 and the cases there cited. However, the question is not open before me and I am bound to reject the claimant's representatives submission as to estoppel - whether the question is one open for argument before the House of Lords (and I give no opinion either way) is not a matter for me.

7. In accordance with my jurisdiction set out in regulation 27 of the Social Security (Adjudication) Regulations 1984 my decision is as set out in paragraph 1 of this decision. I direct that the tribunal to whom I remit this case in rehearing the case shall pay particular attention to all the aspects to which I have referred above. Further they shall consider carefully the exact wording of the relevant regulations and make and record their findings on all the material facts and give reasons for their decision.

8. Accordingly the claimant's appeal is allowed.

(Signed) J.B. Morcom
Commissioner

Date: 16 April 1987