CSB 267/87

JGM/II

COMMISSIONERS DECISION
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SUPPLEMENTARY BENEFITS ACT 1976

APPEAL FROM DECISION OF SUPPLEMENTARY BENEFIT APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

Overpayment
'Failure to disclose'

Name:

Supplementary Benefit Appeal Tribunal: Manchester

Case No: 03/136

Only 2 members of tribunal.

[ORAL HEARING]

1. My decision is that the decision of the supplementary benefit appeal tribunal dated 23 February 1981 was erroneous in point of law and it is set aside. The matter must be referred back to a differently constituted tribunal.

2. The claimant was in receipt of a supplementary allowance which, as I understand the matter, included a sum in respect of the rent payable for the house in which he was living. The property was compulsorily acquired by the local authority and the effect of this was that rent ceased to be payable. When the rent ceased to be payable the benefit officer claims that the claimant's supplementary allowance fell to be reduced. The fact of the cessation of liability was not immediately noticed by the benefit officer with the result that there was, it is contended, an overpayment of supplementary benefit. The benefit officer took the view that this overpayment was the result of a failure to disclose the relevant facts on the part of the claimant and he gave a decision pursuant to section 20(1) of the Supplementary Benefits Act 1976 requiring repayment of the amount said to be overpaid computed at £122.90.

3. The claimant appealed to the supplementary benefit appeal tribunal, and in connection with that appeal it was pointed out that there had also been an underpayment of £16.50. The benefit officer conceded that an allowance should be made for this and the appeal tribunal in confirming the decision of the benefit officer noted that an offset of this £16.50 would be allowed by the Department. In my judgment this, which is not the main subject matter of the appeal, was an incorrect approach to the matter. The rate of the claimant's supplementary allowance for the period in question should have been the amount by which his correctly computed resources fell short of his correctly computed requirements. If, as must usually be the case, a variety of different matters have to be taken into account in the computation of the allowance for a period and as the result of error or mistake the figure arrived at is on one account too large and on another account too small, the

overpayment or underpayment of benefit is the difference between the two. There is not a gross overpayment on one account against which it is appropriate to make an allowance for the underpayment. It would be different if the overpayment related to a different period from the underpayment. In my judgment the correct decision for the tribunal to have given on the facts as they found them would have been simply to require repayment of the difference between the overpayment and the underpayment. Had I not concluded that the decision was erroneous in law in another respect which requires that the matter be sent back to another tribunal I should have given a decision in that form in this case.

4. I held an oral hearing of the claimant's appeal at which the claimant presented own case while the benefit officer was represented by Mr E O F Stocker. The appeal was not based on the ground last mentioned which in this case makes no practical difference to the result. The claimant appeals on the ground that, as he contends, he and/or his wife did disclose the matter of the compulsory purchase, albeit not in writing. He mentions also that in connection with a claim in respect of overpayment of child benefit it had been decided that he had used due care and diligence and that he was not required to repay. I may add that in his letter of appeal to the appeal tribunal he maintained that he had several times asked for a breakdown of his assessment to supplementary allowance but had never been given one and that he did not know that he was receiving a rent allowance; by which I take him to mean that he did not know that his requirements were computed by including an item for rent.

5. Section 20(1) of the Supplementary Benefits Act 1976 reads as far as relevant, 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 thereof from that person."

6. It will be noted that the section applies whether the misrepresentation or failure to disclose is fraudulent or not. The common law rule that a person is bound to repay money paid to him by mistake (whoever was at fault) is maintained here if, but only if, the mistake is the result of a misrepresentation or failure to disclose on the part of the person concerned. There is not, as with child benefit, an exception for cases where the person concerned has used due care and diligence to avoid the overpayment (as to which see section 119(2) of the Social Security Act 1975 incorporated into child benefit law by regulation 17 of the Child Benefit (Determination of Claims and Questions) Regulations 1976).

7. The supplementary benefit appeal tribunal who heard the appeal comprised only two persons. The claimant had originally indicated on the form LT 212 (tear-off) that he was not willing to have his case heard unless all three

members were present. When he attended the tribunal hearing he found that there were only two members available and, rather than have the matter deferred he signed a form of consent (on form LT 235) to the case being proceeded with in the absence of a member other than the chairman. He was not informed before signing it that in the event of disagreement on any point the chairman would (under paragraph 9(3) of Schedule 4 to the Supplementary Benefits Act 1976) have a casting vote. Nor does form LT 212 contain any indication of this.

8. In the form LT 205 the benefit officer referred to regulation 8 of the Supplementary Benefit (Claims and Payments) Regulations 1977, which requires a claimant among other things to notify the Secretary of State in writing of any change of circumstances which he might reasonably be expected to know might affect the right to benefit (a comparable obligation is imposed by regulation 8 of the similarly named regulations of 1980 now in force). The chairman, who described himself in the record of the decision as "The majority of the Tribunal", decided that there had been a failure to disclose drawing attention to regulation 8, stating (as was indeed the case) that there was no evidence of any notification in writing and adding that the majority did not consider on the evidence before it that the claimant had disclosed the matter verbally. The other member of the tribunal accepted the evidence of the claimant's wife that she had telephoned the supplementary benefit office and communicated the relevant change of circumstances, and accepted the claimant's evidence of a subsequent communication of the facts to the office. He considered that there was nothing in section 20 to require disclosure in writing.

9. Although the above facts do not in my judgment add up to an error of law such that I could on that ground alone set the decision aside I am not entirely happy about what took place. The dissenting member of the tribunal was absolutely right in his view that written disclosure was not required by section 20(1) (see the decision on Commissioner's file CSB 188/81 a copy of which is included in the case papers). It is true that for the purposes of regulation 8 above mentioned disclosure in writing is required. But there is no power by regulations to make written disclosure necessary to satisfy section 20; I express no opinion on the effect of regulation 8 in cases where oral disclosure only has been made. The position therefore was that one member of the tribunal, who had directed himself correctly on the law, considered that oral disclosure had been made, while the other (with a casting vote), who seems to have thought that oral disclosure was in any case useless, did not consider that it had been made. I cannot help feeling that where a person has (without being warned that in the event of disagreement the matter may be decided on the casting vote of the chairman) agreed to a tribunal of two hearing the case, it would be wiser, when it emerges that there is a difference of opinion on a vital question of fact, to adjourn the matter for re-hearing by a full tribunal. But I do not think that I can hold that what took place was erroneous in law. (cf the decision on Commissioner's file CSB 389/82).

10. I come now to the point on which I am allowing the appeal. The claimant in fact took two points that do not run readily together in harness. He says in effect that he did not know that there was any call for him to disclose the matter and that in any case he did so. Why did he trouble

to do so if he did not realise that there was any need to do so? He might of course by chance have done so, even without appreciating that it was relevant; but if so one would not perhaps expect him to recall the matter clearly. The fact remains however that he made the point and that it is not dealt with in the decision at all. If there were clearly no substance in the point this would not perhaps matter. But I cannot postulate that there was no substance in the point and I consider that the tribunal were bound to deal with it (cf Decision R(I) 18/61 at paragraph 13), the point having been specifically raised.

11. The point made is that the claimant did not and could not have known that there was any need to disclose the matter as he did not know that his rent was an element in the computation of his allowance. Mr Stocker drew my attention to what had been said by Diplock J as he then was in Regina v Medical Appeal Tribunal (North Midland Region) Ex parte Hubble 1958 2 QB 228 at page 242 cited with approval as relevant in the present context by a Tribunal of Commissioners in Decision on file CSB 53/81. The passage in question reads as follows:-

> "Non-disclosure" in the context of the subsection, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term "non-disclosure" is a familiar term in insurance law. It may be innocent if the person failing to disclose does not appreciate its materiality: fraudulent if he does."

On the basis of this Mr Stocker submitted that it made no difference whether the claimant appreciated that it was necessary to disclose the facts about the cessation of rent; since if he did not there was still a non-fraudulent failure to disclose. While that may be so in the present case it is in my judgment not necessarily so and for this reason I consider that another tribunal must examine the facts to see whether it is so. In Decision R(SB) 21/82 approved on this point in the Decision to be reported as Decision R(SB) 28/83 paragraph 11) the Commissioner pointed out that the words "failure to disclose" (as opposed to non-disclosure) imported that there had been a failure in some duty of disclosure and that before there could be a failure to disclose there must at least be a case in which disclosure by the person in question was reasonably to be expected. In the Tribunal of Commissioners' Decision above referred to the person in question (who had died) had failed to disclose that he had some premium bonds, and it had been suggested that he had not appreciated that it was necessary to disclose them. The passage from Diplock J's judgment above cited was treated as showing that this did not assist him inasmuch as it merely made the failure to disclose innocent and not fraudulent. It was not, and indeed could not have plausibly been, suggested that he could not reasonably have been expected to disclose them. In the present case however the claimant contends that he asked repeatedly for particulars of the make-up of his allowance and had failed to obtain them. There is in my judgment room for argument,

when the facts have been ascertained, that it was quite reasonable for him to think that there was no call to disclose the matter of the rent having ceased to be payable and did in fact think so. That is matter which, in addition to the question whether in any case he or his wife did make oral disclosure, that will have to be determined by the tribunal to which the matter is referred back. The appeal is allowed.

Signed J G Monroe
Commissioner

Date: 7 July 1983

Commissioner's File: CSB/267/1981
C SBO File: 309/81
Region: North West (Manchester)