

RFMH/SH/6

Commissioner's File: CSB/310/1990

## SUPPLEMENTARY BENEFITS ACT 1976

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

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal given on 22 January 1990 is erroneous in point of law and accordingly I set it aside. I direct that the case be reheard by a differently constituted tribunal, who will have regard to the matters referred to below.
2. This is the claimant's appeal against the decision of the social security appeal tribunal of 22 January 1990, leave having been granted by the tribunal chairman.
3. At the material time the claimant, then aged 37, lived with her son then aged 11. On 30 July 1985 she claimed supplementary benefit. She stated that she and her husband had separated and that he was not maintaining her. She declared that she worked part-time for a building society and she provided evidence of her weekly earnings. Supplementary benefit taking account of earnings was paid up to 16 November 1986 when the claimant commenced full-time work. On 12 December 1986 in reply to an enquiry made by the local office of the Department, the claimant's employers stated that in addition to weekly earnings the claimant also received monthly payments of commission.
4. In the light of the evidence the adjudication officer reviewed his decision awarding the claimant supplementary benefit because there had been a change of circumstances since the decision was given, in that the claimant was receiving earnings in the form of commission from her employers. His revised decision for the inclusive period from 12 August 1985 was that supplementary benefit was payable at a reduced rate. He further decided that supplementary benefit amounting to £892.72 had been overpaid to the claimant during the inclusive period from 12 August 1985 to 7 September 1986 and that this amount was

recoverable from her because she had failed to disclose the material fact that she was paid commission. The adjudication officer produced a schedule to show how the calculation was done. Thereupon the claimant appealed to the tribunal.

5. The claimant and her representative attended the hearing of the appeal before the tribunal on 22 January 1990. In the event the tribunal dismissed the appeal by a majority decision.

6. Regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986 provides that every tribunal chairman shall record a statement of the reasons for the tribunal's decision and of their findings on material questions of fact. In the present case for the reasons set out below the tribunal chairman failed to comply with the statutory requirements. As a result the decision is erroneous in law.

7. The adjudication officer reviewed his original decision under the provisions of section 104(1)(b) of the Social Security Act 1975. His revised decision was to the effect that supplementary benefit amounting to £892.72 had been overpaid to the claimant during the inclusive period from 12 August 1985 to 7 September 1986 because the claimant had failed to disclose the material fact that she was paid commission. In order to recover expenditure incurred by the Secretary of State under section 53(1) of the Social Security Act 1986, it must be shown that the claimant misrepresented or failed to disclose any material fact. The adjudication officer's written submission to the tribunal relied on the claimant's alleged failure to disclose the material fact that she was in receipt of commission.

8. In order to recover the expenditure incurred by the Secretary of State under section 53(1) on the ground of failure to disclose a material fact, the tribunal must satisfy themselves that:-

- " (i) The Secretary of State seeking to recover the expenditure is the Secretary of State who incurred it;
- (ii) a person from whom it is sought to recover the expenditure knew of material facts;
- (iii) the disclosure by the person in question was reasonably to be expected;
- (iv) there was a failure to disclose;
- (v) the failure related to a material fact; and
- (vi) the expenditure by the relevant Secretary of State was incurred "in consequence of" the failure."

See Decision R(SB) 54/83.

9. In his written submission dated 12 February 1991 the

adjudication officer now concerned supports the appeal for the following reasons:-

" 4. The primary question for the tribunal to determine was whether or not the overpayment had arisen, either in whole or in part, in consequence of a claimant's failure to disclose a material fact. It was put to the tribunal that the claimant had failed to disclose the receipt of her commission payments and the hearing proceeded on that basis. However it is apparent that apart from the payment of commission at approximately monthly intervals her net earnings had also increased from £39.29 to first £39.59 and then £41.33 per week. It seems clear from the schedule of overpayments, together with the supporting calculations on forms A14 that these increases were also material and would have generated a review of the claimant's entitlement independently of the commission of receipt. No reference has been made to this aspect of the overpayment of the tribunal's decision and in my submission this omission renders the decision erroneous in law. Clearly these factors affect the amount of the overpayment which is potentially recoverable so the test as to whether or not that part of the overpayment occurred in consequence of the failure to disclose a material fact was also in issue.

5. However in my submission, the majority decision of the tribunal is erroneous in law for another reason. Where, as here, the recoverability of the overpayment is dependent on whether or not there has been a failure to disclose the tribunal would need to satisfy themselves that such a disclosure was reasonably to be expected (cf R(SB) 54/83 at paragraph 13). Although the tribunal here have asserted that the receipt of commission is a material fact "which she should reasonably be expected to disclose ..." there are no findings of fact which would support such a conclusion and neither do the reasons given by the tribunal for the majority decision.

6. There is a reference in the tribunal's reasons for decision to a pay slip which was apparently produced to the local office of the Department and is said to have revealed an overpayment. Clearly this matter is pertinent to the recoverable amount of the overpayment on the basis that where disclosure has been made the amount of the overpayment embraced by such a disclosure cannot be in consequence of a failure to disclose. Again the tribunal failed to make the requisite findings of fact in regard to the date this disclosure was made and the level of earnings disclosed.

7. Finally where a tribunal, as here, have indicated that the amount of the recoverable overpayment is to be quantified by the adjudication officer I would submit it is incumbent on them to clearly indicate why the existing calculation is considered effective. It can be presumed that the income tax refund referred to in the chairman's note of evidence should have been treated as capital under

regulation 3(2)(d)(ii) of the Supplementary Benefit (Resources) Regulations but, in my submission, the tribunal have again erred in failing to make the necessary findings of fact."

I agree with that submission.

10. The chairman's note of evidence records that the claimant's representative stated "a letter from AT's [the applicant] employers was produced stating part of her salary would be in commission and AT stated she showed this letter to the Dept. Two early pay slips produced, neither showing payment of any commission. The tribunal also erred in law because there is nothing to indicate whether they accepted that the claimant produced the said letter and pay slips, and if she did, what response, if any, did she receive.

11. For the reasons stated above the tribunal's decision was erroneous in law. The claimant's appeal is allowed and I give the decision set out in paragraph 1.

(Signed) R.F.M. Heggs  
Commissioner

(Date) 3 February 1992