VGHH/SH/14

Commissioner's File: CSB/510/1987
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

1. This claimant's appeal succeeds. My decision is that the decision of the social security appeal tribunal dated 21 November 1986 is erroneous in law. I set it aside and refer the case to another social security appeal tribunal for determination in accordance with my directions.

2. By a decision issued on 1 May 1986 an adjudication officer, according to page 1 of form AT2, decided as follows:

> "That supplementary benefit amounting to £587.40 has been overpaid for the period 7.1.85 to 16.3.86 and is recoverable from Mrs Watkins.
>
> The amount of supplementary benefit overpaid has been revised as follows:-
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> That supplementary benefit amounting to £545.20 has been overpaid for the period 7.1.85 to 16.3.86 and is recoverable from Mrs Watkins."

3. In his written submission to the social security appeal tribunal on form AT2 the adjudication officer stated that the facts before him were that the claimant Mrs W, aged 36, lives with her two children aged 13 and 9 in their own home. She is in receipt of a court order for maintenance in respect of her children of £66 a week and also receives child benefit of £14 and one parent benefit of £4.55. On 26 January 1982 on form A11 she declared she received maintenance of £30 a week for her children and on 11 February 1986 on form A2 she declared she was receiving £36 maintenance and on 13 March 1986 she stated her court order had not been increased but she had a verbal agreement with her husband on which she paid an extra £6 a week as from the beginning of February. On 28 January 1986 the Department received information that the claimant's court order for maintenance of her children had been increased to £66 a week. The claimant stated that the increase in her court order was for her childrens holidays and leisure activities. She stated that on both occasions that her court order was increased she was informed she did not need to notify the Department as her supplementary benefit would not be affected. In giving reasons for his decision the adjudication officer stated that paragraph 1 of section 20 of the Supplementary Benefits Act provided that if whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in respect of that

misrepresentation or failure, the Secretary of State incurs any expenditure under the Supplementary Benefit Act, the Secretary of State shall be entitled to recover that expenditure from the persons concerned. The question whether an amount paid by way of supplementary benefit was recoverable from the claimant and if so, the amount recoverable, was referred to an adjudication officer. On the facts before him the adjudication officer decided the claimant had failed to disclose a material fact because she had not declared that the maintenance for her children she received from her ex-husband had increased to £36 a week from 4 July 1985 and to £66 a week from 8 November 1985 as she was advised to do on her order book. He decided this was a material fact because had it been known on the date of claim the claimant's entitlement to supplementary benefit would have been reduced. Accordingly the adjudication officer decided that the amount of benefit paid as a consequence of the claimant's misrepresentation of a material fact was recoverable under section 20 of the Supplementary Benefits Act. The adjudication officer also determined the amount recoverable being the difference between the amount paid and the amount due was £545.20. An explanation of how this figure was arrived at was enclosed.

4. The appeal to the social security appeal tribunal was heard on 21 November 1986. The chairman's note of evidence is in the following terms:

> "The Presenting Officer outlined form AT2 and accompanying papers.
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> The Appellant represented by Mr Hitchins, CAB quoted C(G) 1/50, CS1 10/50, CS 50/50, R(A) 1/79, and said he was pleading due care and diligence about the overpayment. It was pointed out to him that due care and diligence applied to National Insurance law, and not Supplementary Benefit. He said that the Appellant had been wrongly advised by Counsel and Solicitors, because they told her that she did not have to declare the maintenance for her children. He said she would not have applied for a maintenance increase, if she had realised that she was going to be worse off. He asked the Tribunal to waive the overpayment on the grounds of the wrong advice.
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> The Presenting Officer said that if the Appellant had read the front page of her order book, she would have known that she must report all change of circumstances to the Department.
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> Mr Hitchins said that they did not dispute the calculation of overpayment."

5. The decision of the tribunal was "confirm".

The recorded findings of fact by the tribunal were:

> "1. The Tribunal accepts the facts as stated in the Adjudication Officer's submission."

The recorded reasons of the tribunal for their decision were:

> "The Tribunal considered section 20 Supplementary Benefit Act 1976 and held:
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> 1. There had been a failure to disclose a material fact. It was unfortunate that the Appellant was wrongly advised about the Supplementary Law, but as a fact she did not disclose that she was in receipt of maintenance for her children. This failure was purely innocent.
>
> 2. As a result there was an overpayment.
>
> 3. Which has been correctly calculated as £545.20p."

6. (1) It had been argued before the appeal tribunal that, in effect, the claimant had been wrongly advised by counsel and solicitors that she did not have to declare maintenance for her children. Now, as explained in decision CSB/966/85, which is that of a Tribunal of Commissioners and is to be reported as decision R(SB)15/86, at paragraph 26:

> "The section [section 20 Supplementary Benefits Act 1976] uses the phrase "fails to disclose" and not "does not disclose" and one Commissioner said in decision R(SB)21/82 at paragraph 4(2) (in a passage that is frequently, eg. in decision R(SB)28/83 at paragraph 11 and R(SB)54/83 at paragraph 13(3), being cited with approval by other Commissioners) that a failure imported the breach of some obligation such that the relevant non-disclosure occurred in circumstances in which, at the lowest, disclosure by the person in question was reasonably to be expected."

The tribunal in the present appeal never considered this point at all.

(2) I agree with the submission of the adjudication officer now concerned that the parties are left guessing as to whether disclosure was reasonably to be expected having regard to all the circumstances. The failure to deal with this point constitutes an error of law.

7. (1) I set aside the decision of the social security appeal tribunal and refer the case to another tribunal which in accordance with the usual practice should be entirely differently constituted.

(2) The tribunal should satisfy themselves that there has been an overpayment, if so, of how much and why. Leisure or amenity items do not normally count as income resources: see regulation 11(4)(j)(i) of the Supplementary Benefit (Resources) Regulations. But there is an exception if regulation 13 applies. Regulation 13 (relating to liable relatives) is fraught with difficulty. Nor can it be read in isolation: see, for example, Mc Corquodale v Chief Adjudication Officer The Times Law Report 3 May 1988 (Court of Appeal dealing with payment arrears). It will be noticed that the court order of 9 October 1985 (page 10 of the case papers) which is in issue in this case, also refers to arrears. It should also be noticed that if the payments were, by agreement, made to a third party, it is regulation 4(5) of the Resources Regulations which is in point: see decision CSB/1272/86 (to be reported as R(SB)6/88). No facts have been found as to how the leisure or amenity payments were actually made and to whom. There should be a further written submission by the adjudication officer to the appeal tribunal explaining why it is said that there is an overpayment, and which deals with regulations 11(4)(j)(i), regulation 13, regulation 9 (arrears) and regulation 5(3) (in so far as any payments were made by agreement to a third party as in C(SB)1272/86.) The make-up of any alleged overpayment should be clearly explained.

(3) If satisfied that there has been an overpayment, the tribunal should consider whether the overpayment was due to non-disclosure by the claimant of the court order and, if it was, whether disclosure in respect of that order was reasonably to be expected. The cases cited before the present tribunal establish that to act on the advice of a solicitor instructed in the matter can constitute "good cause" for delay in claiming: compare the summary in paragraphs 5(ii) and (iii) of decision R(P)2/85. So also, clear and unequivocal advice from counsel or a solicitor fully apprised of the facts and instructed to advise on this point, that disclosure was not in the circumstances required because there was nothing that required to be disclosed, might lead to the conclusion that disclosure by the claimant was not reasonably to be expected. Against this however it will be necessary for the tribunal to consider the instructions in the order book of the claimant as to those matters which the claimant should report to the DHSS. It

will be a question of fact for the tribunal to decide whether in all the circumstances disclosure was, or was not, reasonably to be expected: compare decision CSB/1272/86 in this respect.

(4) The tribunal should make findings on all other relevant points raised by or on behalf of the adjudication officer or the claimant.

(5) The record of their decision should comply with regulation 25(2)(b) of the Social Security (Adjudication) Regulations 1986.

8. My decision is set out in paragraph 1.

(Signed) V.G.H. Hallett

Commissioner

Date: 27 June 1988