

IEJ/SH

## SUPPLEMENTARY BENEFITS ACT 1976

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

1. (1) This is a claimant's appeal from the decision dated 25 October 1982 of a supplementary benefit appeal tribunal ("the tribunal") upholding the decision dated 14 May 1982 of a benefit officer given pursuant to section 20 of the Supplementary Benefits Act 1976 as amended ("the Act") to the effect that supplementary allowance amounting to £921.75 had been over-paid to the claimant and was recoverable from her. The present appeal is brought by my leave and upon the contention that the tribunal's decision was given in error of law. I can express my decision more briefly than might otherwise be necessary because - very properly, if I may say so - the benefit officer now concerned concedes that the tribunal's decision is erroneous in law in the respect identified below. The claimant has been assisted on her present appeal by the Child Poverty Action Group, to whom I am indebted for helpful submissions.
- (2) The claimant has requested an oral hearing of her appeal, but I am refusing that request because I am satisfied that the appeal can properly be determined without one.
- (3) The appeal succeeds. I set aside the tribunal's decision as erroneous in law and direct that the claimant's appeal from the benefit officer's decision be re-heard by a differently constituted tribunal. I do not consider it expedient to seek to give myself the decision which the tribunal should have given, as a proper determination will require additional findings of fact.

2. The claimant was at all material times living in local authority accommodation with 3 dependant children, and the matters relevant to the appeal have proceeded on the footing that she was married. On the basis that her only income was Child Benefit and following the sentencing of the man regarded as her husband to 6 month's imprisonment the claimant, on 30 March 1981, claimed supplementary allowance as a single parent, and benefit was awarded accordingly.

3. It is not in dispute that for a period following such man's release in July 1981 he did not return to live in the family home. Differing grounds have been stated by the claimant as the reason for that at different times, one being that he was not ready to return to family life and another that she was unwilling to forego the financial security which receiving direct payment of supplementary allowance in her own right conferred on herself and the children by comparison with the situation if he was the head of the household and accordingly the only qualifying claimant. It is unnecessary for me to reach a conclusion on that question; but I should also mention - though, again, it is unnecessary for me to decide - that it has been indicated to me that during this period of living apart the man was also claiming supplementary allowance on his own account.

4. (1) It is also not in dispute that there came a time - it is suggested (but this also is unnecessary to my immediate decision to resolve) that it was in October 1981 - when the man returned to live in the same home as the claimant and her children. That time was certainly before 13 January 1982, for on the occasion of a home visit to the claimant on that date it became apparent to a visiting officer that the claimant and the man had become re-united and that he was again living at her home, and was thus the apparent head of household, and the eligible claimant to the exclusion of the claimant. In the light of that information a benefit officer took what was clearly in the circumstances a Draconian course - but one which may well have been on the facts as known to him the proper course in implementation of his duty in the matter - of giving a decision that the whole of the supplementary allowance, totalling £921.75, which had been paid to the claimant since the date (which the decision put at 12.10.81) at which the man regarded as her husband had returned to the claimant's home constituted over-payment of benefit and was recoverable under section 20 of the Act. And the decision of 14.5.82 was given accordingly. I have used the word "Draconian" because upon the premise that the "husband" was in his own right qualified to receive supplementary allowance and upon the assumption (which I make for the purposes of this observation only) that he did return to the household to live with the claimant as husband and wife on the predicated date, it would appear to follow that

if what, on the same official view, was a proper course had been followed he would have been entitled to supplementary allowance at a rate which reflected the dependency of the claimant and the 3 children and, whether or not so applied, a substantial part of the benefit which would have been awarded to him would have represented the requirements of his dependants and have been intended for application to the like needs as were in fact the subject of payments made to the claimant claiming in her own right.

5. However, assuming there to have been overpayment in the amount so determined (the arithmetical computation of which does not appear to have been contested by the claimant on her appeal from the benefit officer's decision to the tribunal), that is - as I made clear in my decision R(SB)21/82, - the beginning of the matters relevant under section 20 of the Act, not the end. For, in brief summary, a proper determination that an amount of benefit is recoverable pursuant to section 20 of the Act requires, in addition to the mere fact that there has been an overpayment of benefit, discharge by the benefit officer of the burden of proving that the expense incurred by the Secretary of State which that represents has resulted from - ie. is causally consequent upon - either a mis-representation (fraudulent or innocent) on the part of the claimant concerned, or a failure on the part of the claimant concerned to disclose a material fact. Furthermore, as was indicated in the decision on Commissioner's file CSB 688/1982 (unreported) - and as I myself have observed in unreported decisions - the obligation to disclose a material fact, in reliance upon which section 20 proceeds with respect to a "failure to disclose" constituting breach of obligation, does not import any requirement that disclosure must be made in writing. As it was put by the learned Commissioner in the decision last cited "There is nothing in the section to suggest that the disclosure has to be in writing. It is just as effectively made if it is made orally, albeit it may be considerably more difficult for the claimant to establish that he did in fact make an oral disclosure." Thus, if it be held that disclosure was made (whether in writing or orally), but the disclosure has been administratively overlooked and account has not been taken of it in computing a claimant's proper entitlement to benefit subsequent thereto, there can be no question of a liability for recovery being imposed on a claimant under Section 20 by reference to that alleged failure to disclose.

6. (1) The benefit officer's decision does not state in terms in reliance upon what misrepresentation or failure to disclose under section 20 of the Act it was given, and I would pause here to indicate my view that it would be better practice if in all section 20 cases the benefit officer's decision did so indicate, as was substantially the requirement prior to changes in the law in 1980.

(2) However, it would appear that the decision did not proceed on the footing of any misrepresentation, and that the breach relied upon was an alleged failure on the part of the claimant to report the changes in circumstances constituted by a return of the "husband" to live with her as husband and wife in the family home. At all events the matter so proceeded before the tribunal.

7. The error of law into which the tribunal fell was in conceiving that the material disclosure was required to be made in writing, which it was not. The claimant's case before the tribunal was that she had been told and had understood that she was to make disclosure of the "husband's" return if and when it took place, and that, so soon as it did, she reported the fact by telephone to the local office of the DSS.

8. The benefit officer's case before the tribunal was that there had been no such notification, and in particular that there was no official record of any such notification as the claimant asserted. The tribunal clearly felt concern over the claimant's case, for they adjourned the first hearing of the appeal in order that additional enquiries might be made at the DSS end; and, learning on the resumed hearing that none had been found, they confirmed the benefit officer's decision. Whilst the record of their decision does not indicate this in terms - indeed the "Box" in the record of their decision provided for the intimation of their reasons for decision contains only a statement of their decision - it is, upon reading the record of the decision as a whole, in my view readily apparent that they so decided in the (erroneous) belief that there needed to be a written notification. For their findings of fact include the following:-

"An adjournment was made from the first hearing for a further search of documents to be made but the Supplementary Benefit Officer has found nothing. The tribunal thought that the appellant may have notified the Supplementary Benefit Officer of the change of circumstances but did not do so in writing".

9. I should at this point stress once more the need for a supplementary benefit tribunal adjudicating upon a claimant's appeal to pay close regard to the statutory provisions - whether under the Act or under Regulations made pursuant thereto - which bear on the case before them. For, in addition to the error of law above cited it would appear (although it is unnecessary for me so to hold) that the tribunal "failed to ask themselves the right questions" in another respect. They appear to have proceeded on the footing that since the "husband" was referred to as such and since it was not in dispute that he had returned to what had earlier been the family home it followed automatically that, as from the date upon which he had returned to the home, aggregation of his and her requirements and resources applied and that he was, to the exclusion of her, the only eligible claimant - so that the whole benefit paid to her since his return constituted over-payment. But, as I see it, the position is considerably more complex than that. In the first place the tribunal needed to consider whether or not the claimant and the man in question were legally married, and make a finding in that respect. If they were, then various further matters needed to be determined on the footing that they constituted a married couple. And if they were not legally married certain further questions also needed to be posed and answered in

the context of "unmarried couples"; and in both cases findings were needed in regard to what "household" each was to be taken as living in at all material times, for the purposes of the Act. Moreover, even upon the assumption that the claimant and the "husband" were legally married (and I am not to be taken as either inferring or holding that they were not - but the facts before me leave this open) there were further questions of complexity for them to consider. For on that footing, and excluding his time in prison, (over the duration of which he would under the operation of the Aggregation Regulations have been excluded from counting as a member of the same household as the claimant), the claimant would under the ordinary operation of those regulations have been treated as a member of the husband's household even during the time for which they were temporarily absent from each other, and her requirements would, it is true, be included with his. But, contrary to the impression that the claimant appears to have received, there is provision under the Claims and Payments Regulations for a benefit officer to determine that all or part of an award of supplementary allowance may be made to the partner of a claimant who, as it is put in the Supplementary Benefits Handbook "because of improvidence or eccentricity neglects his responsibilities to support his partner or dependant children". I express no opinion as to whether such was or was not the case, or whether there was or was not overpayment - these will all be matters for the tribunal concerned with the re-hearing. But there were in my view clearly matters to be covered in the context of the "first limb" of the necessary ingredients for the application of section 20 of the Act as well as upon the issue as to disclosure or non-disclosure and upon their necessary inter-relationship by causation.

10. (1) Finally I would like to refer to a submission by the benefit officer now concerned as to "burden of proof". It is put in the following terms:-

"Although the burden of proof rests on the benefit officer ... he discharges at least the initial burden by his evidence that he has no record of any disclosure. The claimant must then give his account of what happened and the tribunal then come to a positive finding whether the benefit officer has discharged the burden of proof."

- (2) Though it contains much that is sound, the submission as so stated is in my judgment over-stated. True it is that the burden of proof rests on the benefit officer. True it is (as is implicit though not stated in the submission) that it is a burden of proof upon a simple balance of probabilities. True it is that if the benefit officer lays a proper foundation for establishing that:

- (i) there is no official record of a disclosure by the claimant;
- (ii) there was a material change of circumstances; and

- (iii) had that been disclosed, there would, on the balance of probabilities, be extant a record of that disclosure held by the Department;

it could then properly be said that a prima facie case had been established, and the burden of proof resting upon the benefit officer would stand discharged unless the claimant (or his representative) was - by evidence or submission - to displace the prima facie case.

- (3) But such foundations must be properly laid - and until they are there is nothing for a claimant or his representative to rebut. It may well be - I do not know one way or the other - that there is a standing instruction to officers of the Department who deal by telephone with members of the public that a contemporary record is to be made of each conversation, and sufficient information elicited to enable it to be attached to a claimant's file, and that there are appropriate administrative arrangements for this to be done; so that the absence of a written report of a telephonic communication by a claimant upon a claimant's case file has a certain probative value. Even if there was such a procedure, the weight of such evidence might be affected by how far it could be shown to have been in practice carried out, and to what extent not. But, be that as it may, mere assertion that "there is no record" is plainly insufficient to discharge the requisite burden of proof, nor is its insufficiency cured by assertion also that a search has been made for a written record and none can be found.
- (4) That was, I think, appreciated by the benefit officer who formulated the above cited submission - see his closing phrasing. But let it be supposed that a claimant has died and his personal representatives are contesting the section 20 decision - in which case the claimant cannot be present to give any further account, although he has asserted prior to his death that he made oral disclosure. I would not wish to place any intolerable practical burden upon benefit officers concerned with section 20 cases, but it should, I think, be apparent from what I have above indicated that a much more refined balance will, in the interests of justice, need to be struck than the above cited formulation would suggest. What is required to be shown in order to discharge the burden of proof will of course depend on the facts of the particular case - but whilst the balance of probability must in the case of a deceased claimant be struck with due regard to his inability to give any further account, that does not mean that the other considerations I have above referred to, using the case of a deceased claimant for illustration, are not as well applicable in the cases of living claimants. There is, however, no warrant for personal representatives to exploit the circumstance that the claimant has died: see R(SB)28/83 and R(SB)34/83.

- (5) So also, in my judgment, it is incumbent on the presenting officer seeking to discharge the burden of proof in such a case as the present to put before the tribunal the best evidence he can upon each ingredient in the chain of substantiation, and not just "mere assertions" attributed to some unidentified other DESS officer. I appreciate that there are practical limits to what can in this respect be done to prove that something alleged to have been done by a claimant was not done. But in the sort of situation I have postulated in (3) it would at least be practicable to put forward a copy of any material instruction and a written statement by a responsible officer at the relevant local office at the material times dealing with such points as I have there identified. See also decision R(SB)5/82 as to a tribunal's obligations in regard to "hearsay evidence".
11. (1) I direct that the tribunal re-hearing the claimant's appeal be furnished with a copy of my present decision in order to see some of the pitfalls to be avoided. I further direct that they record in their decision a finding of fact as to disclosure having or not having been made orally by the claimant, and if made as to when to be taken as having been made.
- (2) Whilst I do not so direct, I think it would also be helpful to the tribunal if the benefit officer was equipped to address the tribunal fully on the relevant provisions of law as to aggregation upon which his case is founded.
- (3) Should the tribunal hold that there was no disclosure they should additionally record as findings of fact, and deal in their reasons for decision with, all relevant matters which they consider to arise on the issue of overpayment and as to the causal link between the non-disclosure and the overpayment, if any, they hold to have taken place.
12. My decision is as indicated in paragraph 1(3) above.

(Signed) I Edwards-Jones  
Commissioner

Date: 6 December 1983

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