SUPPLEMENTARY BENEFITS ACT 1976

Overpayments—whether there can be any "set off" against the gross amount of a recoverable overpayment.

The claimant's occupational pension was increased with effect from 1 November 1982. His wife's small social security graduated pension was replaced by a full retirement pension as from 9 May 1983. He informed the local DHSS office of the latter change on 17 May 1983, and asked whether his supplementary benefit was correct; by that date he had already received payment of supplementary benefit for the 2 weeks 9—22 May 1983. Following these changes the claimant was no longer entitled to supplementary pension because the resources of the assessment unit exceeded their requirements, but he qualified for housing benefit supplement payable under regulation 19 of the Supplementary Benefit (Requirements) Regulations 1980. The supplementary benefit officer decided that there had been a recoverable overpayment for the period 8 November 1982 to 22 May 1983. The claimant appealed to the appeal tribunal on the ground that he had disclosed the relevant pension increases to the unemployment benefit office. The tribunal confirmed the overpayment decision and the claimant appealed to the Social Security Commissioners.

Held that:

1. disclosure to an unemployment benefit office may on the facts constitute adequate disclosure under section 20 of the Supplementary Benefits Act 1976. Decision R(SB) 54/83 followed (paragraph 7);

2. there should be "set-off" from the gross amount recoverable any additional benefit which, though not in fact paid, would or could properly have been awarded had the full and correct facts been before the adjudication officer at the outset. But this would not apply where the award of additional benefit depended on obtaining additional facts or on the claimant's making any new claim (paragraphs 9 and 10).

The Commissioners found that the tribunal had erred in law and allowed the appeal.

DECISION OF THE COMMISSIONERS

1. We allow the claimant's appeal. We hold that the decision of the supplementary benefit appeal tribunal ("the tribunal") dated 24 November 1983 is erroneous in law and we set it aside. We remit the case for rehearing and redetermination, in accordance with the directions in this Decision, to a differently constituted social security appeal tribunal: section 2(1) of the Supplementary Benefits Act 1976 as amended ("the Act")—the material section 2(1) being substituted by paragraph 14 of Schedule 8 to the Health and Social Services and Social Security Adjudications Act 1983—and the Social Security (Adjudication) Regulations 1984 [S.I. 1984 No. 451], regulation 27.

2. This appeal by the claimant, a man aged 65 at the material time, was the subject of an oral hearing before us, at which the claimant appeared in person and was represented by his son and the adjudication officer was represented by Mrs. G. M. V. Leslie. The appeal concerns the legal consequences of an assessment of the resources of the assessment unit made in reference to a claim by the claimant for an award of supplementary pension not having included the full amounts of his and his wife's pensions, with the result that an overpayment of supplementary benefit of £62.28 was made to the claimant for the inclusive period for 8 November 1982 to 22 May 1983.

3. The claimant was at all material times in receipt of an occupational pension from his former employers in an amount increased to £5.00 per week as from 1 November 1982. At all material times prior to 9 May 1983 his wife had been in receipt of a small social security graduated pension—13 pence per week at its maximum—but as from 9 May 1983 the claimant's wife had instead received a full retirement pension of £19.83 weekly. On 17 May 1983, the claimant informed the local office of the Department of Health and Social Security that his wife was in receipt of full retirement pension and asked whether the amount of his combined payment of supplementary benefit and retirement pension was correct. By that date the claimant had already received supplementary benefit for the 2 weeks from 9—22 May 1983 inclusive, on the footing that his wife's only income was the small graduated pension, whereas in those 2 weeks she had in fact received the full retirement pension. Moreover, the claimant's occupational pension from his former employers had been under-assessed because, although the claimant asserts that he had informed the unemployment benefit office of periodic increases in that pension, information as to the increase as from 1 November 1982 had not apparently been received by the Department of Health and Social Security.

4. Because the assessment of resources pursuant to which supplementary benefit was awarded and paid for the period 8 November 1982 to 22 May 1983 had not taken into computation either the November 1982 increase in the claimant's occupational pension or the change in his wife's pension in May 1983 it is common ground that a re-computation taking due account of those changes—but otherwise on precisely the same basis as the assessment by reference to which benefit had in fact been paid—would support an award of £68.28 less benefit than had in fact been paid, constituting that amount as benefit overpaid.

5. The first question then arising is, on that footing, whether or not the claimant is liable under section 20(1) of the Act for repayment of benefit overpaid.

However, there is a second question also in play, namely what is the correct computation to make in determining whether any and what overpayment has occurred upon which section 20(1) may bear—and, in particular, whether any set-off falls to be made against the amount arrived at on the basis indicated in paragraph 4 above.

6. The claimant's appeal to the local tribunal was against the local benefit officer's decision requiring repayment of the £68.28, the ground of the claimant's appeal being that he had in fact made full disclosure of the relevant increases of his and his wife's pensions. The tribunal did not in our judgment give adequate consideration to the question whether in the circumstances of the case the claimant came under liability for repayment—if benefit had been overpaid—at all. That question properly turns upon a due application of the detailed terms of section 20(1) of the Supplementary Benefits Act 1976 which, so far as is relevant, provides as follows:—

> "20—(1) 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 incurs any expenditure under this Act; or
>
> (b) [Not relevant]
>
> the Secretary of State shall be entitled to recover the amount thereof from that person."
>
> (The underlining is ours, and is also relevant to the issue of 'set-off').

7. The new tribunal should determine the first question, which is primarily one of fact, with due regard to the relevant law and practice as indicated in the Decision of a Tribunal of Commissioners on Commissioners' files C.S.B. 178/1983 and C.S.B. 397/1983 (to be reported as R(SB) 36/84) and to the Decision on Commissioner's file C.S.B. 347/1983. The new tribunal should have in mind that disclosure to an unemployment benefit office *may* on the facts constitute adequate disclosure under section 20 of the Act (see reported Commissioner's Decision R(SB) 54/83, paragraphs 16 to 18); and should take care to record adequate findings of fact and reasons for decision. The tribunal (though it clearly took pains with the case) did not sufficiently do either, and—other considerations apart—we must set their decision aside on that ground.

8. The important point of principle with which we are now concerned, and have identified in paragraph 5 as the "second question", was not raised

before the tribunal, and has been raised by the adjudication officer now concerned. Re-stated, it is whether—if the claimant should be found to have failed to disclose any material fact, and all other elements of section 20(1) of the 1976 Act are fulfilled—the amount which the Secretary of State is then entitled to recover is the *gross* sum of £68.28 expenditure arrived at in the manner explained in paragraph 4 above ("the gross sum"), or the gross sum *less* the amount of housing benefit supplement (which itself ranks as a supplementary benefit) to which the claimant would have been entitled as from 9 May 1983, in the circumstance that, had there been a fresh assessment of resources when his wife became in receipt of full retirement pension, although the assessment unit's resources would then have exceeded their requirements for the purposes of supplementary pension, the claimant would nevertheless have qualified for award of housing benefit supplement (as to which see regulation 19A of the Supplementary Benefit (Requirements) Regulations 1980 [S.I. 1980 No. 1299], as inserted by regulation 2(12) of [S.I. 1982 No. 1126], now replaced in identical terms by regulation 19 of the Supplementary Benefit (Requirements) Regulations 1983 [S.I. 1983 No. 1399]). Since the tribunal did not consider this question at all, the amount of such entitlement was not found by them, though the local benefit officer's submission mentioned that the claimant had received the supplement as from 23 May 1983. However, the tribunal's failure to consider this aspect of the case in fact constitutes a further error of law and another reason why we set their decision aside. Having regard to our own conclusions on the second question (see below), the new tribunal should ascertain and record the amount of the housing benefit supplement entitlement (if any) for the 2 weeks from 9 to 22 May 1983 inclusive and deduct that amount from the gross sum in arriving at the sum (if any) found to be recoverable.

9. The crux of the "second question" is whether, in reference to the phrases in section 20(1) of the Act "...in consequence of the misrepresentation or failure...the Secretary of State incurs any expenditure", one is to look, as constituting the relevant "expenditure", only to the gross sum, or whether—once the true facts the subject of the misrepresentation or failure are known—there should be some broader re-appraisal of entitlement to supplementary benefit at the material dates, in the light of which the *recoverable* sum (if any) is arrived at by deduction from the gross sum of any additional benefit which has not in fact been paid but would or could properly have been awarded had the full and correct facts been before the adjudication officer at the outset.

10. In our judgment it is correct to give effect to such a "set-off" if and in so far as the claimant would qualify for additional benefit upon a fresh

appraisal of the state of facts so arrived at and without need for ascertainment of additional facts or for the making of any new claim—but not further or otherwise.

11. In the present case it clearly followed on the admissible facts, once it was known that, as from 9 May 1983, the claimant's wife was in receipt of full retirement pension, that the claimant was qualified for award of housing benefit supplement. If, therefore, upon a proper appraisal of his claims for benefit he is to be taken as having claimed that, then the amount of supplement for the 2 weeks preceding 23 May 1983 has to be "set-off" against the gross sum.

12. The recovery procedure under section 20 of the Act constitutes a self-contained code. By section 20(2), the decision of the adjudication officer is confined to the question of whether there was misrepresentation or failure to disclose, and if so, the amount, if any, recoverable. There is no power in section 20 or elsewhere for the review of such a decision nor for the consideration of extraneous matters. The only question for the adjudicating authorities, if there has been misrepresentation or failure to disclose, is what is the amount recoverable that represents expenditure by the Secretary of State "in consequence of the misrepresentation or failure:" (section 20(1)).

13. We have noted that in Decision R(SB) 20/84 (the actual decision was concerned with other matters) the suggestion is made that, in applying section 20(1) of the Act, it might be admissible to deduct from the gross sum an amount referable to a potential claim under the Urgent Cases Regulations [S.I. 1981 No. 1529]. That suggestion does not accord with what we have held in paragraph 10 above, in so far as it appears to envisage set-off of a contingent entitlement for which a separate claim would be one necessary ingredient; but this does not impinge upon the authority of that decision in respect of the matters it decided.

(Signed) J. S. Watson
Commissioner

(Signed) I. Edwards-Jones
Commissioner

(Signed) M. J. Goodman
Commissioner