

*Set aside Underpayment of Act 1992*

JGMi/HJD/T/CH

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**SOCIAL SECURITY ADMINISTRATION ACT 1992**

**APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW**

**DECISION OF SOCIAL SECURITY COMMISSIONER**

**Name:**

**Social Security Appeal Tribunal:** Glasgow Central

**Case No:** 555 03464

**[ORAL HEARING]**

1. My decision is that the decision of the social security appeal tribunal dated 17 August 1994 is erroneous in law and is set aside. The claimant's case is referred to another tribunal for reconsideration.

2. The claimant in this case has appealed, with leave, against the decision of a social security appeal tribunal which upheld, with minor modifications, the decision of an adjudication officer issued on 19 February 1994. That decision had reviewed and revised a decision awarding income support to the claimant between 23 September 1988 and 15 April 1993 and found that an overpayment of income support in that period amounting to £7,304.95 was recoverable from the claimant on the ground that he had failed to disclose that his wife was in receipt of part time earnings. The relevant provisions stated to have been taken into consideration by the adjudication officer were sections 25 and 71 of the Social Security Administration Act 1992, section 124 of the Social Security Contributions and Benefits Act 1992 and regulation 32 of the Social Security (Claims and Payments) Regulations 1987.

3. The claimant's appeal was dealt with at an oral hearing held before me at which the claimant, who did not appear, was represented by Mr C Orr, Welfare Rights Officer with Strathclyde Regional Council Social Work Department. The adjudication officer was represented by Mr W Neilson acting as the Solicitor in Scotland for the Department of Social Security. At the same hearing I also dealt with another claimant's appeal (in case CSIS/53/95) against another decision of the same tribunal given in the same form on the same day which raised the same issue. Again the claimant did not appear and Mr Orr and Mr Neilson were the respective representatives. I am obliged to both representatives for their submissions.

4. One of the claimant's grounds of appeal before the tribunal, which in the end was the only ground pursued before me by the claimant's representative, was that there was no evidence that the question of a possible underpayment of benefit to be offset against the overpayment had been addressed by the adjudication officer. In that

connection regulation 13 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988 provides as follows:-

“13. In calculating the amounts recoverable under section 53(1) of the Act or regulation 11, where there has been an overpayment of benefit, the adjudicating authority shall deduct -

- (a) [inapplicable]
- (b) any additional amount of income support which was not payable under the original, or any other, determination, but which should have been determined to be payable -
  - (i) on the basis of the claim as presented to the adjudicating authority, or
  - (ii) on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination;

but no other deduction shall be made in respect of any other entitlement to benefit which may be, or might have been, determined to exist.”

5. The decision of the tribunal as issued after the appeal bore to be unanimous and apparently rejected the claimant's point under regulation 13. The tribunal's reasons for their decision however stated:-

“The majority of the Tribunal consider that decision awarding Income Support was correctly reviewed and that Section 71 of the Social Security Administration Act 1992 is satisfied.

There is no evidence that the AO had regard to Regulation 13 Payments on Account, Overpayments and Recovery Regulations 1988 in this case.

No regard appears to have been paid to possible underpayments of benefit.”

As was pointed out before me at the hearing the typed decision of the tribunal is seriously flawed. The chairman's handwritten text plainly shows that the decision was the decision of the majority of the tribunal, as the opening of the reasons quoted above indicates, and that the second and third sentences of the reasons are in fact the reasons of the dissenting member. As appears below, these dissenting reasons take account of the position under regulation 13 but it is of course very unsatisfactory that such an inaccurate version of the tribunal's decision should have been issued and left uncorrected.

6. It was submitted before me by Mr Orr that the terms of regulation 13 made it mandatory for the adjudication officer making the overpayment decision to consider the question of possible underpayment. It was submitted that the adjudication officer should in every case expressly say that he had done so. It was also submitted, under

reference to reported decision R(IS)5/92, that the scope of any deduction for underpayment of benefit was not limited to the period of the overpayment and it was pointed out that the claim referred to in regulation 13 had been produced in R(IS)5/92 but not in the present case. Mr Orr suggested that the question of a deduction for underpayment of benefit "stood outside" the overpayment review process. He noted that there was no reference to regulation 13 by the adjudication officer in this case and submitted that it was reasonable to conclude that he had omitted to consider that regulation. The question arose whether that failure rendered the whole procedure a nullity. If so the tribunal should have so held. If it did not, the tribunal should have supplied the deficiency and for that purpose they should have called for the necessary information. Mr Orr also noted that in R(IS)5/92 the reference in regulation 13(b) to "income support" was held to include supplementary benefit by virtue of the transitional provisions of regulation 31 of the same regulations and he suggested that the same could apply in the present case in which the claimant had previously enjoyed supplementary benefit, necessitating consideration of the correctness of that benefit also.

7. For the adjudication officer Mr Neilson agreed that the decision of the tribunal was flawed and that the case would have to go back for re-hearing. He accepted that under the terms of regulation 13 directing the deduction of any relevant underpayment to be made by the adjudicating authority "in calculating the amounts recoverable under..[section 71]..." the adjudication officer was obliged in an overpayment case to look at the claim and the decision made upon it in order to satisfy himself that there had not been any underpayment which fell to be deducted. He initially submitted that it was implicit in a decision on review establishing an overpayment that the adjudication officer had so satisfied himself but he modified that stance later to accept that for this to apply the adjudication officer would require at least to include regulation 13 of the Payments on Account Regulations in the list of the provisions of statute and regulation taken into consideration by him. Provided that was done he maintained that it was for the claimant to raise any challenge and to state why or in what respect he maintained that he had been underpaid. In the absence of the claim document and the decision upon it in the present case Mr Neilson accepted that the case must be remitted. His submission was that it was for the new tribunal to reconsider the situation and make good the deficiency in the adjudication officer's decision.

8. In my judgment the terms of regulation 13 do render it obligatory for the adjudication officer in an overpayment case to consider the question of possible underpayment of income support. For that purpose he clearly requires to consider the "basis of the claim as presented" in terms of regulation 13(b)(i) or "the basis of the claim as it would have appeared ..." in terms of regulation 13(b)(ii) and the awarding decision which followed the claim. Depending on the information in the claim he may also have to look at "any other determination". I do not consider it necessary that the adjudication officer should in every case expressly state that he has considered regulation 13 and not found there to have been any underpayment, provided he includes a reference to regulation 13 among the provisions stated to have been taken into consideration. I agree with Mr Neilson that a claimant who has reason to believe he may have been underpaid income support should state the basis of that belief. In

the event of an appeal raising a question of possible underpayment the adjudication officer should produce the claim and the relevant determination so that the tribunal can consider and decide upon any challenge to the adjudication officer's conclusion in the decision under appeal.

9. I adhere to the view expressed in R(IS) 5/92 that the period of possible underpayment is not limited to the period of overpayment. That necessarily follows in cases where the same benefit is involved, as in R(IS)5/92 and the present case from the wording of regulation 13 itself. The overpayment in question may of course relate to an entirely different benefit - see the definition of "benefit" in regulation 1(2) which applies to the use of that word in regulation 13. In such a case there may be no connection between the respective periods, particularly perhaps in a case falling under regulation 13(b)(ii).

10. The mechanics of the deduction to be made, if one is justified, are left obscure by the legislation but I cannot altogether accept Mr Orr's submission that the process "stands outside" the review process required by section 71 of the Administration Act 1992. Section 71(1) and (2) provide materially as follows:-

"71. - (1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure -

(a) a payment has been made in respect of a benefit to which this section applies; or

...

The Secretary of State shall be entitled to recover the amount of any payment which he would not have made ... but for the misrepresentation or failure to disclose.

(2) Where any such determination as is referred to in sub-section (1) above is made on an appeal or review, there shall also be determined in the course of the appeal or review the question whether any, and if so what, amount is recoverable under that sub-section by the Secretary of State." (my emphasis.)

Regulation 13, as already quoted, renders any sum to be deducted part of the calculation of the amount recoverable under section 71. It would therefore appear that if a relevant underpayment of income support is discovered the adjudication officer making the decision on review establishing the "gross" overpayment would require to go on to deduct the amount of benefit underpaid in order to establish the "net" overpayment recoverable by the Secretary of State. Where different benefits are involved, or the underpayment is a continuing one, or the amount of an underpayment exceeds the amount of the overpayment, it would seem necessary to exercise a second statutory review power under the same or, it may be, a different provision of section 25 of the Administration Act 1992 to deal with the decision or decisions containing the underpayment.

11. Turning to the present case I consider that the dissenting member of the tribunal was correct to hold that there was no evidence that the adjudication officer had considered the question of underpayment of income support under regulation 13 in this case. That being so and since the issue had been raised before them the tribunal should have called for production of the relevant claim and determination in order to satisfy themselves and remedy the deficiency in the adjudication officer's decision. Although this claimant was previously on supplementary benefit I do not accept that the exercise required by regulation 13 extended beyond income support. Regulation 31 of the Payments on Account, etc Regulations contains the following material provisions:-

"31. - (1) These Regulations shall apply to any question relating to the repayment or recoverability of family income supplement and supplementary benefit as though the definition of "benefit" in regulation 1(2) included references to both those benefits and as though any reference in Part VIII to income support was a reference to income support and supplementary benefit.

....

(3) Where this regulation applies -

(a) ...[inapplicable]

(b) regulation 13(b) shall have effect as though for the words "income support" there were substituted the words "supplementary benefit".

Unlike the situation in R(IS)5/92 where the overpayment involved supplementary benefit as well as income support, the overpayment in the present case only involved income support. Regulation 13 is in Part VI. Accordingly the transitional provisions of regulation 31(1) and (3) of the Payments on Account Regulations did not in my judgment have any application so as to read the words "supplementary benefit" into regulation 13(b). It was suggested by Mr Orr that the claimant's supplementary benefit might again come into question in connection with a transitional addition under regulation 10 of the Income Support (Transitional) Regulations 1987. However it was stated to the tribunal in the present case that another tribunal had, on 25 June 1993, rejected any grounds for retrospective review of the claimant's supplementary benefit. Accordingly, although for the purposes of applying regulation 13 it might be necessary to take account of a transitional addition, the claimant's final supplementary benefit entitlement would fall to be accepted as having been correctly decided.

12. I set aside the decision of the tribunal as erroneous in law. I am satisfied that the deficiency over the adjudication officer's overpayment decision can be remedied by a new tribunal and I refer the claimant's appeal for reconsideration by another tribunal. For that purpose it will be necessary for the relevant claim and determination upon it to be produced to the tribunal. A further submission should be made to the tribunal by the adjudication officer dealing with the correctness or

otherwise of the income support determination on the claim. In the perhaps unlikely event of the adjudication officer considering that there was some underpayment in respect of some additional amount of benefit which should have been paid not under the original but under some subsequent determination, this should be made clear for the tribunal's assistance. Besides dealing with the foregoing matter the tribunal will require also to consider the correctness or otherwise of the minor modification of the amount of the overpayment made by the previous tribunal in recognition of the absence of a record of the claimant's wife's earnings in one or two weeks during the period of overpayment. Finally I would mention that an argument suggesting that the "wrong" decision had been reviewed by the adjudication officer was departed from before me by Mr Orr and that is no longer a live issue.

13. The appeal of the claimant is allowed.

(signed )

J G Mitchell  
Commissioner

Date: 18 December 1995