

DECISION OF SOCIAL SECURITY COMMISSIONER

1. This claimant's appeal succeeds. I hold the decision of the Dundee social security appeal tribunal dated 19 April 1996 to be erroneous in point of law and accordingly set it aside. In its place I give the decision which I consider that the tribunal should have given in the circumstances - Social Security Administration Act 1992, section 23(7)(a)(i).

2. That decision is that the purported decision of an adjudication officer issued in July 1995 and which appeared to determine that as a result of a review decision dated 3 April 1995 an overpayment of income support had been made to the claimant which overpayment was declared to be recoverable by the Secretary of State, is invalid and of no effect.

3. The claimant sought and obtained a hearing of this appeal. At it she was represented by Mr S Milne, a Welfare Rights Officer in Arbroath. The adjudication officer was represented by Mr W Neilson, of the Office of the Solicitor in Scotland to the Department of Social Security. I am grateful to them.

4. The case as presented to the tribunal consisted of a review decision by an adjudication officer, of which the original was exhibited. That was said to have been followed some three months later by a further decision to the effect that as a result of that review decision there had been the recoverable overpayment. No copy of that last decision was put before the tribunal. Its effect was said to be recorded on form AT2, in the usual way. The only point, or at any rate the principal point, raised before the tribunal was recorded in the notes of evidence thus:-

"Mr Milne....agreed that the amount was the correct amount but he maintained that this was not recoverable. He pointed out that on the front page of the Schedule the date of the decision was given as 7.6.95. This was obviously wrong as the decision was given on 3.4.95. He then referred the tribunal to summary of facts 5.4 stating that the date of the stop notice was 15.3.95 and he queried and asked what Regulation had caused this to be reviewed at that time because the review was on 3.4.95. He then maintained that the Secretary of State could withdraw at any time and he submitted that this was not the Secretary of State's submission. It was not the Secretary of State that had suspended the benefit.

The Chairman at this point stated that he could not appreciate what the representative's submissions were and held them to be irrelevant and/or incompetent."

I myself had some difficulty in following what that was all about. I suspect that the submission rested upon a confusion between the powers of the Secretary of State to suspend payment when and if he has reason to think that a review may be appropriate and the determination upon a review and, if need be, following a revisal, any question of overpayment. However that may be, Mr Milne assured me that the primary point raised before the tribunal concerned the absence of the decision against which the appeal had been lodged. That was a matter certainly clearly raised in the grounds of appeal which grounds led to a grant of leave by the Chairman without comment. It is at the least unfortunate that the actual decision made the subject of appeal was not before the tribunal. I am only too well aware that the narration of the terms of decisions on forms AT2 do not always accurately

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record the true terms of the decisions and much can turn thereon - as, in the event, it does in this case. No doubt it is really for the presenting adjudication officer to determine whether to lodge the original of a decision. I am reluctant to lay down an absolute rule that the challenged decision must in all cases be lodged. But I am clear that it is highly desirable, especially in recoverability cases and essentially so where challenged.

5. The adjudication officer now concerned, at paragraph 9 of her submission dated 26 March 1997, suggests that decision on file CIS/82/92 is authority for the view that the overpayment decision can be taken as that set out on the AT2. The decision by Mr Commissioner Rolland on the other hand, at paragraph 8, indicates the sort of problem that can arise because of what is recorded on form AT2 which there was not the adjudication officer's decision at all nor even an accurate paraphrase thereof. I therefore do not accept CIS/82/92 as authority for the proposition advanced by the adjudication officer. I conclude in this case that, challenge having been taken and nothing better than the AT2 having been put before the tribunal, the original decision under appeal had not been proved as a proper decision by an adjudication officer. That is not an academic conclusion for there is always the need to be satisfied that such a decision complies with the law. For example there is regulation 13(b)(i) of the Social Security (Payments on Account Etc) Regulations 1988 in regard to possible underpayments. Here the AT2 was silent on that and so could on that ground have been upset by the tribunal. That is also another ground for my decision herein.

6. The central issue in this case, common to both sides, rested upon a decision by Mr Commissioner Mesher in CIS/451/95 to the effect that the determination of whether an overpayment is recoverable must be part of the process of review. At the time of the adjudication officer's decision in this case section 71(5) of the Social Security Administration Act 1992 provided that:-

“(5) Accept where regulations otherwise prescribe, an amount shall not be recoverable under sub-section (1) above.....unless -

- (a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review; and
- (b) it has been determined on the appeal or review that the amount is so recoverable.”

In case CIS/451/95 the adjudication officer had argued that the determination of whether an overpayment is recoverable must be part of the process of review. On the contrary, if there were grounds for review but overpayment was not also determined then an appeal tribunal had a duty to give a complete decision and to deal with the overpayment question. The Commissioner accepted that view and explained that it was justified because it would be unfair to a claimant if an adjudication officer could make a review and revision only decision and then later, after it was too late to appeal against the review decision, to decide that a resulting overpayment was recoverable. He felt that requiring the decisions to be made together prevented inconsistent decisions and also that an appeal against recoverability would allow an examination of the propriety of the review decision.

7. For my part, I have to confess that I have always taken a rather different view. I am aware that I am not alone in that. And I have taken the view since well before the date of decision CIS/451/95. As that decision itself indicates, a review decision can be a discrete decision and may be appealed if anything in it is thought to be wrong - such as the amount of reduction or the principle of termination of benefit. I see no reason in principle, therefore, why equally an overpayment and recoverability decision should not be discrete. I can see many reasons why it is preferable for that to be so. Experience indicates that, as in this case, some time may necessarily elapse between the discovery of grounds for review and the ability to recalculate benefit and so any overpayment. The longer the timespan involved no doubt the greater the recalculating time. Where benefit is being reduced or cut off, the result of having to postpone the review until calculation was complete could deprive the individual claimant of benefit to which he was entitled because the Secretary of State's stop order would have to remain in force. I am aware, of course, that section 71, as in force at the adjudication officer's decision in this case, provided at sub-section (2):-

"Where any such determination as referred to in sub-section (1) above [that is any overpayment decision] 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."

I appreciate that "in the course of the review" seems to support Mr Commissioner Mesher's approach. However I am also aware that section 20 of the Administration Act provides at sub-section (1)(b) that any question arising in connection with an award of benefit shall be submitted to an adjudication officer for determination in accordance with the legislation. And then at sub-section (5) it is provided that:-

"Different aspects of the same claim or question may be submitted to different adjudication officers; and for that purpose this section and the other provisions of this Part of this Act with respect to the determination of claims and questions shall apply with any necessary modification."

Of course section 71 is in Part III whereas "this part" is Part II. But the effect of the provision, as it seems to me, is to provide for just the required degree of flexibility in a potential overpayment case, namely that the review and revisal part of the question can be referred to one adjudication officer and the overpayment and recoverability part of the question to another. For all I know that may be how matters operate since different skills may be involved. And if parts of questions can be referred to different adjudication officers I see no reason why the same adjudication officer may not deal on separate cases with the different parts of the question. I note with respect to my brother Commissioner that what I have always taken to be the proper approach was brought into effect immediately after, and no doubt as a result of, his said decision by the Social Security (Overpayments) Act 1996. That seems to endorse what had been my understanding of the law. For these reasons I do not accept the submission that there is a flaw in the procedure here in respect of separation of the review from the overpayment and recoverability question.

8. There then followed consideration of the application, if any, of the said Overpayments Act to this case. The point therein was the extent to which that Act was retrospective. Although favoured with submissions upon the matter I have found it unnecessary to answer

the question in light of my determination above. However I should note that had it been necessary for me to decide the matter I would have held the Act, and in particular the new sub-section 71(2) which it introduced to the Administration Act, can only apply to determinations made after the commencement of the Act. The question that then arose, however, was as to whether, "the *person* making the determination" referred only to an adjudication officer or could include a tribunal dealing with the complete rehearing of the matter on an appeal. My opinion, as at present advised, is that the reference is to a single person decider such as an adjudication officer. It is noticeable that elsewhere in Section 71 the power to make such a decision is qualified by objective rather than subjective words. It is for these reasons that I have felt it necessary to explain at length my reluctant inability to follow CIS/451/95.

9. Nonetheless I agree with, and draw to attention in respect of this case, to the concluding words in that decision. Particularly having regard to the terms of the Overpayments Act, it may still be open to an adjudication officer, if so advised or requested, to make a determination now under section 71(2) of the Social Security Administration Act 1992. In that regard he will require to attend to the terms of regulation 13(b)(i) of the Social Security (Payments on Account &c) Regulations 1988 referred to above.

10. For the foregoing reasons this appeal must be allowed.

(signed)
W M WALKER QC
Commissioner
Date: 12 November 1997