

*Failure to Disclose - Mervin Carville Davis
Return to Knowledge of A Fact,
Not to be Disclosed*



CPAC

16/94

MR/SH/1

Commissioner's File: CA/303/1992

SOCIAL SECURITY ACTS 1975 TO 1990

SOCIAL SECURITY ADMINISTRATION ACT 1992

CLAIM FOR

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal is dismissed.

2. The claimant was being paid attendance allowance in respect of his disabled son. His son was received into care and placed in a residential home and it is common ground that regulation 7 of the Social Security (Attendance Allowance) (No. 2) Regulations 1975 operated so that after 28 days the claimant was no longer entitled to attendance allowance. The claimant did not tell the attendance allowance unit that his son was no longer living with him and when the adjudication officer discovered that fact he or she not only reviewed the award of attendance allowance so as to determine that no attendance allowance was payable from 25 June 1990 but also decided that £450.60 had been overpaid from 25 June 1990 to 16 September 1990 and was recoverable from the claimant. The claimant appealed. The Bridgend social security appeal tribunal dismissed the appeal subject to an offset in respect of attendance allowance to which the claimant was entitled during short periods when his son was at home. The tribunal left the claimant and the adjudication officer to calculate the amount of the recoverable overpayment in the light of that offset and it is now agreed that, if any overpayment is recoverable at all, the relevant sum is £396.96.

3. The claimant now appeals against the tribunal's decision with the leave of a Commissioner. He was ably represented at an oral hearing of the appeal by Ms Lorraine Harris. The adjudication officer was represented by Mr L Loveday of Central Adjudication Services. I am grateful to both of them.

4. Section 53(1) of the Social Security Act 1986 (now section 71(1) of the Social Security Administration Act 1992)

provided:-

"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

(b)

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."

In this case it was held by the tribunal that the overpayment was recoverable on the ground that the claimant had failed to disclose the material fact that his son was living in residential accommodation.

5. Ms Harris' argument was that, in considering whether the overpayment was recoverable, the tribunal had failed to take account of the claimant's "mental state" at the time when the overpayment occurred. In the letter of appeal, Ms Harris had referred also to the claimant's severe literacy problems but at the oral hearing she put her argument on a narrower footing. This argument is clearly put in the letter of appeal:-

"The circumstances under which the children were removed from the home was extremely traumatic and stressful, the result of which was that [the claimant] spent 15 days in a psychiatric hospital and is still taking medication and visits the hospital as an outpatient. I submit that R(SB) 21/82 is relevant and believe that [the claimant's] mental state, at that time, was such that he would not have reasonably have been expected to know that he should report that his son was under local authority care."

At the oral hearing, Ms Harris referred to R(SB) 54/83 and R(SB) 28/83 but accepted that neither of those cases really advanced her argument. She relied principally on paragraph 4(2) of the decision of the Commissioner in R(SB) 21/82. I set out the relevant part of that sub-paragraph and also the next sub-paragraph.

" (2) I consider that a 'failure' to disclose necessarily imports the concept of some breach of obligation, moral or legal - i.e. the non-disclosure must have occurred in circumstances in which, at lowest, disclosure by the person in question was reasonably to be expected: see amongst the definitions of 'failure' in the Shorter Oxford English Dictionary:

'1. ... non-performance, default; also a lapse

- (3) However, the reference to 'fraudulently or otherwise' necessarily extends the scope of the provision beyond fraudulent misrepresentation or failure to disclose to wholly 'innocent' misrepresentation or failure to disclose - for instance, by reason of forgetfulness."

Ms Harris argued that disclosure was not "reasonably to be expected" from the claimant because of his mental state at the relevant time and, therefore, although there was non-disclosure, there was not, in her submission, a failure to disclose.

6. Ms Harris said everything that could possibly be said on behalf of the claimant but I consider that her argument was ill-founded. In paragraph 4(2) of his decision, the Commissioner was concerned with what it was reasonable for the Department to expect of the claimant and he was not suggesting that personal characteristics of the claimant were relevant. It is true that at paragraph 19(2) of his decision the Commissioner said that the tribunal should have considered whether:-

"If and so far as there was any non-disclosure by the Mother, could it be held a 'failure' to disclose having regard to the medical evidence as to her mental capacity?"

However, it seems to me that the explanation for the reference to mental capacity is that a claimant's mental capacity may not only be relevant to his or her ability to understand whether a fact is material but may also be relevant to the question whether he or she ever knew that fact. In Joel v. Law Union and Crown Insurance Company [1908] 2 KB 863, which was a case arising in the field of general insurance law where a failure to disclose a material fact may make an insurance contract voidable, Fletcher Moulton LJ said at page 884:-

"The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognised that it was material to disclose the knowledge in question, it is no excuse that you did not recognise it to be so. But the question always is, Was the knowledge you possessed such that you ought to have disclosed it?"

→ That is the approach that I have always understood to have been adopted in social security law. Thus mental capacity of a claimant must be considered by a tribunal if it is relevant to the question whether or not the claimant knew the material fact; however, once knowledge has been established, the claimant's mental capacity ceases to be relevant. Unless there is a question as to the claimant's knowledge of the material fact, an adjudication officer or tribunal considering whether disclosure by the claimant was reasonably to be expected will usually focus on the clarity and circumstances surrounding the

instructions or requests for information which the adjudication officer claims gave rise to the claimant's obligation to disclose. Those matters are relevant to the question whether "a reasonable man would have recognised that it was material to disclose the knowledge in question".

7. In the present case, the tribunal found as a fact that the claimant knew that his son had been taken into care and placed in residential accommodation and that he knew that he was receiving attendance allowance because of the difficulty of looking after him. I do not think that those matters were in dispute. The notes in the order book required the claimant to report "any admission or entry to a residential home or school provided by or with the help of a public or local authority". In those circumstances, the tribunal's decision was, in my view, not erroneous in point of law on the grounds suggested by Ms Harris. Nor do I consider that there was any other error of law in what was a very full record of decision. This may possibly be a case where the Secretary of State might be persuaded not to enforce his right of recovery but that is a matter which Ms Harris must take up with the local office of the Department of Social Security and I express no opinion on it.

(Signed) M. Rowland
Commissioner

(Date) 24 January 1994