Bulletin 192
Context

CA/2298/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow this appeal. I set aside the decision of the Swansea appeal tribunal dated 11 March 2005 and I refer this case to a differently constituted appeal tribunal for determination. **I direct the Secretary of State** to make, within one month of the date of this decision, a written submission to the appeal tribunal in the light of my decision and to include with it any documentary evidence upon which he wishes to rely for the purpose of showing that the claimant's daughter was under a duty to inform the Disability Benefits Unit that part of the claimant's care home fees were being paid by a local authority from 5 October 2003 or that the overpayment of attendance allowance from 4 November 2003 to 16 February 2004 was made in consequence of any other breach of duty to disclose information to the Unit.

REASONS

2. I have treated this as an appeal brought by both the claimant and her daughter, who is her appointee. I consider that the appeal to the tribunal should also have been treated as an appeal by both of them. That was an appeal against a decision of the Secretary of State to the effect that £858 attendance allowance had been overpaid to the claimant during the period from 4 November 2003 to 16 February 2004 and was recoverable from both the claimant and her daughter on the ground that the daughter, as appointee, had failed to disclose the material fact that part of the claimant's fees in a care home were being met by the local authority from 5 October 2003. The tribunal dismissed the appeal and this appeal against its decision is brought with my leave. The Secretary of State has made a submission apparently opposing the appeal but I agree with the claimant's daughter that the submission appears to have very little relevance to this case. It looks as though it has been made in connection with another case altogether, although it has the claimant's name and details on it.

3. It is not in dispute that the claimant entered a care home in 2002 and initially paid her own fees from her social security benefits and, I presume, other assets or help from relatives. The local authority started paying part of the care home fees from 5 October 2003 (although the change in the legislation that appears to have prompted the arrangement came into effect only on the following day) and it is common ground that consequently attendance allowance ought not to have been paid from 4 November 2003. It is also common ground that attendance allowance did continue being paid for some time and there has never been any dispute that £858 was overpaid in the fifteen weeks up to 16 February 2004. The only question has been whether that overpayment is recoverable.

4. By virtue of section 71 of the Social Security Administration Act 1992, an overpayment of attendance allowance is recoverable only where "any person has misrepresented, or failed to disclose, any material fact" and the overpayment is due to the misrepresentation or failure to disclose. The legislation makes it clear that it does not matter whether or not the misrepresentation or failure to disclose is fraudulent and it has never been suggested that there was any dishonesty in the present case. Indeed, the tribunal made it plain that there had not been. In R(IS) 5/03 it was held that, where an overpayment is made in consequence of a misrepresentation or failure to disclose by an appointee, the overpayment is generally recoverable from both the appointee and the claimant on whose behalf he or she acts. That is why the decision was made in respect of both the claimant and her daughter in the present case. Where that is done and an appointee appeals, the appeal should be taken to have been made on behalf of both the claimant and the appointee, unless it is clear that the liability of only one of them is in issue and, even then, the other will be a "party to the

proceedings" by virtue of the definition of that phrase in regulation 1(3) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (S.I. 1999 No. 991).

5. It was not alleged that there was any misrepresentation on the part of the claimant or her daughter. What was in issue before the tribunal was whether the claimant's daughter had failed to disclose the material fact that the local authority had started to pay part of the care home fees.

6. In her letter of appeal, the claimant's daughter referred to a visit by a Customer Liaison Manager to her home on 4 April 2003, which was specifically for the purpose of discussing the payment of "Nursing Home fees", consequent upon the change of legislation that was to take effect from 6 October 2003. Before the latter date, the claimant was entitled to include a residential allowance within her "applicable amount" for the purposes of calculating her entitlement to income support under paragraph 2A of Schedule 2 to the Income Support (General) Regulations 1987 (S.I. 1987 No. 1967). That was to stop (see the Social Security (Removal of Residential Allowance and Miscellaneous Amendments) Regulations 2003 (S.I. 2003 No. 1121)) and, instead, part of the claimant's fees would be met by the local authority under Part III of the National Assistance Act 1948 (and the income support would be replaced by state pension credit under the State Pension Credit Act 2002). The payment of care home fees by a local authority has the effect that attendance allowance ceases be payable after 28 days have elapsed (by virtue of regulations 7 and 8 of the Social Security (Attendance Allowance) Regulations 1991 (S.I. 1991 No. 2740)). It is not entirely clear to me why no part of the claimant's fees was being paid by the local authority before 5 October 2003, but nothing turns on that in this appeal. The claimant's daughter said that the Customer Liaison Manager "told me that the visit on 4.4.03 would initiate any action required with regard to my mother's benefit changes when council funding started and there was no need for me to take any further action."

7. The tribunal explored this issue at the hearing of the appeal. The claimant's daughter said that she could not remember whether the issue of attendance allowance was specifically discussed or whether she was told that she would not be entitled to attendance allowance from 6 October. The tribunal concluded that "whatever was said by the appointee to the officer who interviewed her on 4/4/03 does not amount to sufficient disclosure since disclosure should properly have been made to an officer of the Disability Benefits Unit which administers the payment of attendance allowance and not to an officer of the Pensions Service."

8. The claimant and her daughter now appeal on the ground that the tribunal erred in law because the duty to disclose had been qualified orally by the Customer Liaison Manager. As I have indicated, the Secretary of State has not addressed this issue but, for reasons I shall explain, I am not convinced that that is the main question arising in this case.

9. In the light of the decision of the Court of Appeal in *B v. Secretary of State for Work and Pensions* [2005] EWCA Civ 929; [2005] 1 W.L.R. 3796, it is now clear that there is a failure to disclose a material fact where there is a breach of any of the duties to give information or notify changes imposed by regulation 32 of the Social Security (Claims and Payments) Regulations 1987 (S.I. 1987 No. 1968). As amended from 5 May 2003, regulation 32(1) and (1A) requires a person to provide information or evidence for which the Secretary of State has specifically asked, whereas regulation 32(1B) provides –

> "Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the

Secretary of State of any change of circumstances which he might reasonably be expected to know might affect –

(a) the continuance of entitlement to benefit;

(b) the payment of benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office –

(i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case he requires written notice (unless he determines in any particular case to accept notice given other wise than in writing)."

10. The Court of Appeal held the oft-cited decision R(SB) 21/82 to have been wrongly decided insofar as it suggested that there might not have been a failure to disclose in a case where there had been a breach of a statutory duty to disclose. The decision in R(SB) 21/82 itself was flawed on the facts of that case (with the consequence that my reasoning in R(A) 1/95 was also flawed) and the gloss put on R(SB) 21/82 in such decisions as CIS/1769/1999, cited by the Sedley LJ at paragraph [31], is untenable in the light of the Court's decision. Nonetheless, it seems to me that the general principle set out in R(SB) 21/82 that there can only be a failure to disclose where "disclosure by the person in question was reasonably to be expected" remains consistent with the Court of Appeal's decision, provided that it is accepted that disclosure is always reasonably to be expected where there is a statutory duty to disclose. I make this point because R(SB) 21/82 has been cited in many subsequent decisions of Commissioners for that general principle and I wish to emphasise that, insofar as the general principle remains valid in the context of those cases, those decisions do not cease to be good law merely because R(SB) 21/82 itself is flawed. Like the Commissioner in R(SB) 21/82, the Court accepted that there had to be a breach of a duty to disclose before there could be a "failure" to disclose. It found that duty in regulation 32.

11. What the Court of Appeal's decision does is place that statutory duty to disclose at the centre of any enquiry as to whether there has been a failure to disclose. However that will seldom result in a different outcome from that which would have been reached on a simple application of the general principle in R(SB) 21/82 without reference to the statutory duty. Thus, where regulation 32(1) or (1A) now applies because the Secretary of State has specifically required a person to furnish information or evidence, it would usually have been held that it was reasonable to expect such disclosure simply applying the general principle in R(SB) 21/82. In cases where regulation 32(1B) applies because there has been a change of circumstances, the test is again not very different in practice from that suggested in R(SB) 21/82 because the word "reasonably" appears twice in that paragraph. Therefore, for instance, it does not appear to me that the erroneous reliance on R(SB) 21/82 in paragraph 38 of R(IS) 5/03 in any way affects the reasoning of that decision and, in particular, the reasoning in paragraphs 39 to 45 in which the Tribunal of Commissioners considered whether there had been a failure to disclose a change of circumstances by reference to the question whether the claimant's appointee had been required by the Secretary of State to provide the relevant information and, if not, whether the claimant's appointee could reasonably have been expected to know that the change of circumstances might affect the claimant's entitlement to income support. That is precisely the test that was then imposed by regulation 32(1) and is now imposed by regulation 32(1), (1A) and (1B) since the redrafting of the regulation. I will return below to the reasoning in R(IS) 5/03.

12. Before then, it is necessary to note that regulation 32(1) and (1A) enables the Secretary of State to specify the "manner" in which information is provided, which will include

specification of the person or place to which the information should be sent, and that regulation 32(1B) requires disclosure to be made to the "appropriate office" but that, so far as is relevant in this case, regulation 2(1) simply defines "appropriate office" as "an office of the Department for Work and Pensions" so that the paragraph itself gives no indication as to which of the Department's offices any disclosure must be made. However, it is apparent from *Secretary of State for Work and Pensions v. Hinchy* [2005] UKHL 16; [2005] 1 W.L.R. 967 (also reported as R(IS) 7/05), that disclosure must ordinarily be made to the office administering the benefit concerned. The claimant's daughter does not dispute that as a general proposition and accepts that, ordinarily, disclosure in relation to payment of attendance allowance should be made to the Disability Benefits Unit which is, of course, what the tribunal said should have been done in the present case.

13. However, what she argues is that the ordinary duty to disclose was modified in this case by the Customer Liaison Manager. This submission needs further analysis. A representation by an officer that there is no need to make further disclosure may have an impact on the duty to disclose imposed by regulation 32(1), (1A) and (1B) in a number of ways. Where regulation 32(1) or (1A) is concerned, the claimant might understand the representation as a modification of written instructions to furnish information because, perhaps, he or she might understand that the information would not be relevant to entitlement to benefit in the particular circumstances of the claimant's case. There is no reason why an officer acting on behalf of the Secretary of State may not modify written instructions because there is nothing in regulation 32(1) or (1A) to suggest that the requirement to furnish information or evidence need itself be in writing. Where regulation 32(1B) is concerned, the claimant might again understand the representation as meaning that the change of circumstances that he or she would otherwise have disclosed would not in fact have any effect on his or her entitlement to benefit so that, after the representation has been made, the change would no longer be one the claimant "might reasonably be expected to know might affect" entitlement to, or payment of, benefit. Alternatively, the claimant might understand that information disclosed to the officer making the representation would be passed on to the relevant office where disclosure should ordinarily be made. That is a modification of the general rule as to where disclosure is to be made. Such a modification was accepted in paragraph 28 of R(SB) 15/87 and was not excepted from the general approval of that decision by the House of Lords in *Hinchy*. In such a case, it was held in R(SB) 15/87, a further duty to disclose would arise if it became apparent to the claimant that the information had not been passed on because an anticipated reduction in his or her entitlement to benefit had not occurred. If the claimant did not know whether or not the information would result in a reduction in benefit, that further duty might not arise.

14. Thus, I accept the premise lying behind the claimant's daughter's argument that the duty to disclose information or a change of circumstances may be modified by an oral representation by an officer of the Department to the effect that further disclosure is unnecessary. However, the argument falls on the undisputed facts of this case. In the absence of any specific discussion between the claimant's daughter and the Customer Liaison Manager about attendance allowance, I do not see how any duty to disclose information relevant to that allowance can have been modified. The discussion must have been about income support and state pension credit and the claimant's daughter presumably knew those benefits were not administered by the Disability Benefits Unit but that attendance allowance was. In those circumstances, there cannot have been any modification of a specific requirement to provide information to the Disability Benefits Unit; nor can the discussion have made the claimant think that a change of circumstances she would previously have thought might affect entitlement to, or payment of, attendance allowance would not have any such effect. Furthermore, if the discussion was about income support and state pension credit and attendance allowance was never mentioned, the circumstances cannot have been such that

it was reasonable for the claimant's daughter to think that the Customer Service Manager would inform the Disability Benefits Unit of the fact that the local authority would start paying part of the care home fees. In my judgment, there was plainly no relevant disclosure by the claimant's daughter and the mere fact of the Customer Liaison Manager's visit cannot have made disclosure unnecessary, if it had previously been required. In other words, the visit might have reinforced a belief that the payment of fees by a local authority was irrelevant to the payment of attendance allowance but it could not have removed any independently-existing duty to disclose such a change of circumstances to the Disability Benefits Unit.

15. However, this raises the question whether there has ever been any duty on the claimant's daughter to inform the Disability Benefits Unit of the fact that part of the care home fees would be, or was being, paid by the local authority. In this case, as in R(IS) 5/03, the Secretary of State failed to provide the tribunal with any evidence that the claimant's daughter had ever been required to furnish such information. If there was no such requirement, no duty to disclose arose under regulation 32(1) or (1A) and the question arises whether the claimant's daughter could reasonably have been expected to know that the fact that part of the claimant's care home fees were being paid by a local authority might affect the payment of attendance allowance, in which case there would have been a duty to disclose the fact by virtue of regulation 32(1B).

16. The facts in R(IS) 5/03 were similar to those in the present case to the extent that the claimant in that case was already living in a nursing home before there was a change in the way that the fees were met. At paragraphs 39 to 45, the Tribunal of Commissioners held, on the particular facts of the case, that the claimant's appointee could not reasonably have been expected to know that the change in the source of funding for the nursing home fees was material to the claimant's entitlement to income support, until she was alerted to its possible relevance by the local authority. Different considerations arise in the present case, which is concerned with a different benefit, in respect of which different information will have been provided to the claimant's daughter, and with a different change of circumstances (because in R(IS) 5/03 the change of circumstances involved the transfer of responsibility for the fees from a local authority to a health authority). In this case, it may be relevant to ask first whether the claimant's daughter was under a duty to inform the Disability Benefits Unit that the claimant had entered a care home in 2002 and, if so, whether she complied with that duty and whether it was then made plain that the subsequent payment of fees by a local authority might affect the payment of attendance allowance. If the Disability Benefits Unit already knew that the claimant was living in a care home, there will arise the questions whether her daughter was instructed to tell the Unit if the local authority started paying part of the fees and, if not, why she should have realised that that might be relevant to the payment of attendance allowance.

17. This once again brings to the fore a point that has frequently been made by Commissioners over the last quarter of a century: in cases where the Secretary of State seeks to recover an overpayment on the ground that there has been a failure to disclose a material fact, it is essential for the Secretary of State to produce evidence showing why the claimant was under a duty to disclose that fact. That usually involves showing why the claimant should have realised that the fact was relevant. Evidence of instructions to report the fact is likely to be the best evidence. It is particularly important that there should be evidence of a duty to report the relevant change in circumstances in cases like the present where the fact in issue may appear obviously relevant to those involved in the administration of benefit but where its possible relevance might reasonably have escaped a member of the public in the absence of any instructions or other information provided to him or her by the Department. Before a person can be shown to have failed to disclose a material fact, it must be shown that,

under regulation 32 (or some other statutory provision or legal principle), there was a duty on that person to make the disclosure.

18. In the present case, the Secretary of State has not produced the evidence necessary to show any duty to disclose the fact that a local authority was paying part of the care home fees, but he has been proceeding upon the implied basis that there was such a duty and that assumption has not hitherto been directly challenged. In my judgment, the tribunal erred in law in proceeding on the same basis without investigating whether it was justified, because the claimant's daughter's case was that she had acted reasonably and that implied a challenge to the Secretary of State's implied claim that she had breached a duty of disclosure, even though the challenge may have been obscured by the extent of the reliance placed on the visit of the Customer Liaison Manager. The tribunal's decision must therefore be set aside. On the material before me, I am unable to determine whether the claimant's daughter was in breach of any duty to provide the Disability Benefits Unit with information or not. Accordingly, this case must be considered afresh by a new tribunal and I direct the Secretary of State to provide the evidence necessary to support his argument. If he cannot provide such evidence he will no doubt consider revising the decision under appeal.

(signed on the original) **MARK ROWLAND**
Commissioner
5 January 2006