THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CG *4494/99*

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

COMMISSIONERS: **KENNETH MACHIN QC**
W M WALKER QC
S J PACEY

ORAL HEARING

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

1. This is an appeal by the claimant against the decision of the Nottingham appeal tribunal dated 20 July 1998 whereby in effect they refused her appeal against the decision of an adjudication officer dated 8 July 1997. That decision had made a finding of overpayment of invalid care allowance [ICA] and that the overpayment was recoverable by the Secretary of State.

2. By direction of the Chief Commissioner this appeal was ordered to be heard together with CG/5631/99, CIS/7182/99 and CG/4657/99 at an oral hearing by a Tribunal of Commissioners. The purpose was to consider whether CIS/2498/97 and CIS/5848/99 had been correctly decided. The hearing proceeded on 14 and 15 November 2000. At it the claimant did not appear but was represented by Mr John Howell QC instructed by the Child Poverty Action Group. The Secretary of State was represented by Mr Richard Drabble QC, instructed by the Solicitor to the Department of Social Security. We have been greatly assisted by their careful submissions.

3. The adjudication officer's decision, page 13 of papers, reviewed an earlier decision awarding invalid care allowance from and including 21 March 1986. The basis for the review was said to have been a relevant change of circumstances. That change was that attendance allowance had ceased on 10 April 1989 to be paid to the person for whom the claimant was caring. It was found that the claimant had failed to disclose that material fact and that as a consequence invalid care allowance amounting to over £ 13,000 had been paid which would not have been paid but for the failure to disclose and so was recoverable by the Secretary of State. Invalid care allowance is only in right of an individual if he is looking after a person in respect of whom either attendance allowance or the highest or middle rate care component of disability allowance on account for the need for attendance is payable.

4. The tribunal came to a slightly different conclusion. Section 71(1) of the Social Security Administration Act 1992 provides for recovery in respect of either misrepresentation or failure to disclose. The tribunal held that there had been a misrepresentation of a material fact in this case rather than a failure to disclose a material fact. Otherwise they upheld the decision of the adjudication officer.

Preliminary

5. Out of respect for his argument we should first record, albeit fairly briefly, the submissions to us made by Mr Howell, together with our conclusions thereon although in the event the determination of this appeal depended upon a branch of the law which only emerged as the submissions progressed from both sides. Mr Howell's first point was that the tribunal had not given any notice that they were considering an alternative ground in law for the basis of recoverability and accordingly their decision was in error. That was accepted by Mr Drabble in his skeleton argument and we are satisfied that upon that point alone the decision has to go.

6. Mr Howell's second point was that the tribunal had not specified what was the material fact that had been misrepresented. At most, according to page 20 of papers, they seem to have founded upon the claimant's signing of her order book for each payment declaring that she was "entitled" to the benefit. If that was what they were founding upon then that was simply a statement of law rather than a statement of fact. That is a further ground for setting aside the tribunal decision.

Facts

7. To set the scene for the major issue in the case it is necessary to quote certain of the tribunal's findings of fact, as follows:

> "6. [The claimant] spoke and read no English. At the tribunal she was represented by Mrs Handa a Welfare Rights Officer from Nottinghamshire County. Council. It was agreed and accepted Mrs Handa could act as interpreter and present the case for [the claimant] as she had full knowledge of the facts and history of the case. Mrs Handa had already explained to [the claimant], prior to the hearing commencing, that the tribunal was independent and had explained the relevant procedure. Mrs Handa was happy to proceed in the absence of a presenting officer. Also present, as observers, were 3 members of [the claimant's] family.
>
> 7. [The claimant] did not speak, read or write English.
>
> 8. The entitlement to ICA was explained to [the claimant] by a hospital social worker, now retired - Audrey Hicks. Mrs Hicks did not speak or write [the claimant's] language. Communication between them was through an interpreter. Mrs Hicks completed the application for ICA on behalf of [the claimant] using the Attendance Allowance book of [N] [her son] as the basis of the information obtained. [The claimant] was asked more basic additional information and signed the form.
>
> 9. We accepted [the claimant] was not told of the link between ICA and Attendance Allowance and that the former depended upon receipt of the latter. We accepted [the claimant] was told by Mrs Hicks that ICA was payable as long as she continued to care for [N].
>
> 10. By letter dated 8.6.89 [the claimant] was informed Attendance Allowance (AA) for [N] was no longer to be paid. Mrs Handa presented us with that letter as evidence and a copy was kept.
>
> 11. [The claimant] contacted Audrey Hicks following this letter. [The claimant] also contacted Marher Mohammed Iqbal and we [were] provided with letters from Mr Iqbal dated 10.6.89 and 10.9.89 - copies were kept for the file - addressed to the Attendance Allowance Board and Department of Social Security, Blackpool respectively. We accepted the letter gave the impression

> of being an appeal against the refusal of AA. We accepted no action was taken by the recipients of the letters."

The sample order book statement, page 7 of papers, read:

> "I declare that I have read and understand all the instructions in this order book. That I have correctly reported any facts which could affect the amount of my payment and that I am entitled to the above sum. [sic]
>
> I acknowledge receipt of the above sum."

and in the order book one of the instructions to be found on pages 2 and 4, pages 9 and 8 of papers, reads:

> **"Important changes you must tell us about**
>
> You must write and tell us straightaway if anything changes about yourself or the disabled person you are looking after.
>
> You must send this order book back to us at the same time without cashing anymore orders. Our address is on page 1. You can get an envelope which does not need a stamp from the Post Office.
>
> .
>
> .
>
> .
>
> In particular you must tell us about any of these changes.
>
> The person you are looking after stops getting attendance allowance or constant attendance allowance or the rate of that constant attendance allowance is reduced.
>
> .
>
> "
>
> .

From the rest of the order book, "us" is clearly the ICA Unit and their address is provided as being at Palatine House in Preston. The arguments in the case thus came to be centred on whether the claimant's signing of the order amounted to either a misrepresentation about the continuance of attendance allowance or a failure to disclose its cessation.

Interpretation/Misrepresentation

8. As a matter of the interpretation of the order book statement Mr Howell first submitted that that meant no more than that the individual had correctly reported any fact known and appreciated as possibly capable of affecting the amount of any payment. If the Secretary of State's response that appreciation of materiality was irrelevant, then it was submitted that it was sufficient to report a material fact to an adjudication officer or the Secretary of State. If the Secretary of State's response that the report must be to a particular office, then it was submitted that the signed receipt which constituted an untrue statement has

consequences in all cases of benefit being paid by the Secretary of State which he would not have paid but for the misrepresentation. The difficulty for the latter position was said to be that the wording had been formulated by the Secretary of State and since as a matter of construction that wording was ambivalent it should be construed against him. If a claimant genuinely believed one meaning of the words of the question and the Secretary of State another there should be no breach. Mr Howell founded upon the Privy *Council* decision *in* Condogianis v Guardian Assurance Co Ltd [1921] 2 AC 125 where a question framed by the insurer and answered upon a fair construction truthfully prevented the insurer *maintaining* that the question had been put in a different sense. However, we are not satisfied that in this case the statement contained any real ambiguity. It rather seems to us that the order book had made quite clear that cessation of attendance allowance could affect the amount of payment and what was being declared was that the claimant had correctly reported any such fact having read and understood the instructions. She did not do so and up to that point, as it seems to us, there was a misrepresentation about what had been reported.

9. To that extent this case seems to us to be on all fours with Jones v Chief Adjudication Officer 1994 WLR 62. In that case a claimant who had sought but not received unemployment benefit claim and received income support had signed a similar declaration to that in this case. He did not then say that he had been awarded unemployment benefit. It was held to be an implicit misrepresentation in the signing to the effect that there were no facts known to him which could affect the payment. That had caused the overpayment. Accordingly entitlement to recovery followed. As is clear from Section 71(1) and emphasised by Staughton LJ in Franklin v Chief Adjudication Officer, Court of Appeal 13 December 1995 misrepresentation may be either fraudulently or innocent. Accordingly motivation for the representation is irrelevant.

Failure to Disclose

10. Mr Howell also presented an argument upon the failure to disclose branch of the section upon the basis that facts can only be disclosed so far as known to the claimant. There is nothing to suggest that this claimant did not know that attendance allowance had been disallowed. On the contrary she appears to have been seeking to appeal that decision. That seems to us to be the end of that argument.

Knowledge I

11. Mr Howell went onto argue that if the Secretary of State already knew the relevant fact then the overpayment would not be causally linked to the misrepresentation. This argument suggested that throughout there had been such knowledge. It depended upon a contention that the appeal of the disallowance decision had brought the matter to the attention of an adjudication officer or the Secretary of State. Mr Howell's argument, put briefly, was that it mattered not to whom or to what office a report was made as long as the correct representation or disclosure was made. One branch of that argument founded upon the decision of the House of Lords in Bushell v Secretary of State for the Environment [1981] AC 75. That was a case dealing with grant schemes for the construction of motorways and connecting roads. The relevant point arose out of a contention that the Secretary of State had

been bound to communicate departmental advice he had received after the close of the enquiry for comment by objectors. The statutory requirement was that the procedure had to be fair to all concerned, including the general public. Lord Diplock at page 94 set out the purpose of such an enquiry and then, at page 95, pointed out that:-

> "What is fair procedure is to be judged not in the light of constitutional fictions as to the relationship between the Minister and the other servants of the Crown who serve in the Government Department of which he is head, but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. Discretion in making administrative decisions is conferred upon a Minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the Department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the Department and their collective expertise is to be treated as the Minister's own knowledge, his own expertise."

Mr Howell sought to persuade us that if anybody of any authority in the Department knew about the cessation of attendance allowance then the Minister had the appropriate knowledge. That, as it seems to us, is to confuse two quite different concepts. In the roads scheme situation the Minister is responsible to Parliament and of course in reaching any decision about a particular scheme he must be held to have had available to him all the knowledge and expertise contained within the Department - or at least that part of it concerned with such schemes. But that is a world away from the situation where the question concerns knowledge of a change in benefit in the multiplicity of benefits and the various units of the Department responsible for administering them. It is then not the Minister's knowledge or responsibility that is at issue but that of that part of the Department administering the relevant benefit scheme. Unless it has been told or is shown to know then there is not knowledge relevant to cut the causal link. Accordingly, in this case since there seems to have been no intimation to the ICA Unit or Division about the cessation of attendance allowance until much later, the knowledge of the Minister acquired as indicated was insufficient.

12. We find support for our approach in the decision in Best and Others v the Secretary of State for the Environment and Others Queens Bench Division 5 March 1997. As the Deputy Judge there observed there was a distinction between delegation of decision-making and availability of information. Having cited the passage quoted above from Lord Diplock he said that it appeared to him that his Lordship was there:-

> "..... confining the doctrine of imputed knowledge to the knowledge of those civil servants who have responsibility for receiving the information, considering it, and advising the Minister thereon. It is, thus, the knowledge of responsible officers which is imputed to the Minister. Accordingly, I would not be prepared to impute the knowledge of the employee in the post room ....to the Secretary of State."

We would not impute knowledge within the attendance allowance section of the Department of Social Security to any other Department such as that dealing with ICA - nor vice versa - without some better foundation than that advanced by Mr Howell.

Knowledge II

13. Mr Howell's other base for contending that knowledge anywhere in the Department was sufficient was based upon the Social Security (Claims and Payments) Regulations 1987. Regulation 20 provided, put short, that benefit was to be paid in accordance with an award as soon as reasonably practicable by means of an instrument of payment or other means felt appropriate by the Secretary of State. Accordingly, there was an obligation on the Secretary of State to pay in respect of the award - and no doubt he had a right to obtain a receipt which was the primary purpose of the statement on the order. Regulation 32(1) provided that in a case such as the present a beneficiary was to:-

> "..... notify the Secretary of State ..... of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence , ... (which does not apply) ..... of any such change to the appropriate office."

And then regulation 2 defined "appropriate office", at the time with which this case is concerned, as:

> "An office of the Department of Health and Social Security or the Department of Employment ....."

The Department of Employment was included because of the possibility of disclosure in the then local unemployment benefit office as envisaged in paragraph 28 of R(SB) 15/87. Mr Howell's point, nonetheless, was that there was nothing in the regulations to require disclosure in any particular place and accordingly the disclosure made obliquely to the adjudication officer by way of appealing the cessation of attendance allowance was sufficient. We reject that submission. The correct view, in our opinion, is that the Department may require the disclosure set out in the regulations but may make such conditions as they think appropriate about the location for such disclosure as evidenced in the quotation above from the order book in this case. We are satisfied that a requirement to make disclosure about the loss of attendance allowance, for example, to the ICA Unit is a good and valid requirement which, if not attended to, may amount to a misrepresentation or a failure to disclose.

14. In short we are satisfied that R(SB) 15/87 and, indeed, R(SB) 21/82 which determined that a failure to disclose could occur only where disclosure was reasonably to be expected, which would have been the case here, were correctly decided. We endorse them. In general, so far as disclosing or representing is concerned, the objective to do so must be either to that unit clearly stated in relevant correspondence or the relevant order book or otherwise to the office, or as it was submitted at one stage the team, so far as that can be clearly identified within the office in an appropriate case.

CIS/2498/97

15. Having said that, however, the question that next arises for decision concerns the particular matter remitted to the tribunal, namely whether or not CIS/2498/97 and CIS/5848/99 were correctly decided. The first of these was a decision by Mr Commissioner Levenson where, in paragraph 12, he came to a conclusion about the knowledge being within the Department somewhat in line with Mr Howell's contention based upon Bushell. We note, however, that there was no oral hearing in that case and the Commissioner did not have the advantage of the full citation of authorities put before us. We further note that neither party founded upon that decision. In our opinion it is a decision which should not be followed.

CIS/5848/99

16. The second of these decisions was a decision by Mr Commissioner Howell QC in which he expressed views as to the extent to which it was to be hoped that the Department might integrate its system of records so as to alleviate the burden upon claimants of knowing when and what and where to make representation or disclosure and, of course, conversely no doubt to cut down the amount of unrecoverable or irrecoverable erroneous payments. These expressions of the Commissioner were obiter and this present decision has depended on facts which established actual knowledge. We cannot endorse the obiter remarks attractive though the sentiments may be.

Non est factum?

17. During the hearing a question began to arise upon the basis of the claimant's lack of English. It is perhaps best focused in paragraph 22 of the tribunal's reasons, at page 36 of papers, thus

> "We decided the explanation of not being able to read, write or speak English for not understanding the declaration on the order book or the accompanying explanatory leaflet was not a relevant factor "

That did seem to raise a question for the tribunal's investigatory jurisdiction as to what, if anything, the claimant knew of what she was signing in respect of the orders and in particular the initial order or, as it might be, what she thought she was signing so far as anything had been communicated to her. We refer further to the passage where it appears that when the claim was being completed even that was done by another with the assistance of an interpreter. Mr Drabble firmly resisted any suggestion that the facts and reasons quoted amounted to a case of non est factum - that is "the deed is not mine". Mr Drabble founded upon the fairly recent decision by the Court of Appeal in Lloyds Bank Plc v. Waterhouse [1993] 2 FLR 97 in which, Purchas LJ, having reviewed earlier authorities including in particular the House of Lords decision in Saunders (otherwise Gallie) v Anglia Building Society [19711 AC 1004, and distilled therefrom at page 111 the three matters necessary to establish the plea thus

"(a) That [the person] was under a disability, [in that case illiteracy] .....

(b) That the document ....in fact signed was "fundamentally different" or "radically different" or "totally different" from the document which [the person] though he was signing; and

(c) That [the person] was not careless or did not fail to take precautions which he ought to have taken in the circumstances to ascertain the contents or significance of the document he was signing."

Purchas LJ then added -

"Before the defence can succeed the defendant must establish strictly each component, particularly the third one."

That these were the three necessary matters to be established was not in dispute between the parties. In the present case Mr Drabble accepted that there was an issue of fact about (a) in the present case. We think he was right so to put the matter because the tribunal have not gone on to consider whether, at least for the purposes of dealing with deeds including the Department of Social Security's Orders, this claimant was under a disability like illiteracy. However, the new tribunal who will be considering the matter may have little difficulty upon the point if they are satisfied, as was the old tribunal, of the extent of the claimant's ignorance of English although that is not, of course, strictly "illiteracy". In context it may yet be a disability.

18. At first Mr Drabble was concerned to argue that there was really little scope for satisfaction of either (b) or (c) being made out. In that regard in part he founded upon the decision of the Court of Appeal in the case of Chief Adjudication Officer v Sherriff, Times Law Report, May 10 1995. That was a case where an income support claimant, mentally incapable of understanding what she was doing was yet capable of making a misrepresentation about the state of her savings to the Secretary of State. The plea of non _est factum appears not to have been taken. What seems to have been established was that the claimant, incapable of understanding her affairs and under the Court of Protection, had signed a form made out on her behalf by someone in the nursing home in which she was residing. The argument for her seems to have centred upon a contention that she had been incapable of making a representation in the sense that such a person had to at least know that a representation was being made. The Court rejected that submission and also one that the misrepresentation had been made by the nursing home upon the basis that if the representator did not need to know the material fact misrepresented, which was established law, it should make no difference if she did not know that she was making a representation. It is at that point that we think it becomes clear that "non _est factum" was not considered. Upon capacity, however, although strictly obiter, Nourse LJ observed that

"If she had the capacity to make the claim, surely she had the capacity to make the representation."

We do not demur from that observation but rather suspect that had the plea been taken the result might have been otherwise. It is enough for us to observe that nothing in that case seems to restrict us from considering the plea in this case.

19. Mr Howell urged us to refer the matter back to the tribunal for further exploration, by use of their investigative jurisdiction, to discover in respect of (b) and (c) first, what if anything the claimant had been told at any stage about the documents involved and, second, and in particular, what she had been given to understand that she would be signing when cashing an order. Equally it would require to be discovered what if anything she asked about what she was signing, or would be signing or had signed, at least on the first few occasions that she was required to sign the order at the post office. It is not for us to give any further guidance to parties or the tribunal, but it is in light of further information on these lines that the tribunal will require to answer Purchase LJ's second and third factual essential. The actual inquiry may need to be quite wide-ranging.

20. Finally, we should record that we were favoured by Mr Drabble with an account of the steps taken and being taken by the Department to relate internally decisions by one benefit team to the work of another. We do not think that it is likely to be helpful to record what those steps are since they are not matters which affect the law or our interpretation of it. We have to elaborate a little on that for the purposes of decision CG/5631/99. All that we would say is that we are heartened to hear that what Mr Commissioner Howell QC hoped might happen has begun to occur.

21. For the foregoing reasons, and in particular those in paragraphs 18 onwards, this case must be reconsidered and it is referred to the tribunal accordingly.

KENNETH MACHIN QC
Chief Commissioner

W M WALKER QC
Commissioner

S J PACEY
Commissioner

Date: 19 December 2000