

Overpayment prior to April 1987, review after April 1987. D/P of
Widow's mothers allowance: ~~should~~ S119 of '75 Act should apply
not S53 '86 Act: see ~~S119~~ S16 Interpretation Act



MHJ/13/LM

Commissioner's File: CG/053/1988

Region: London North

SOCIAL SECURITY ACTS 1975 TO 1986

CLAIM FOR WIDOW'S PENSION

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Case No: 2/18/1187

[ORAL HEARING]

1. My decision is that the unanimous decision of the social security appeal tribunal given on 15 December 1987 is erroneous in point of law. Accordingly I set it aside and remit the matter for rehearing by an entirely differently constituted tribunal.
2. On 22 June 1989 I held an oral hearing of this appeal by the claimant, who was represented by Mr Mark Rowland, of Counsel, instructed by the Child Poverty Action Group as agents for Tower Hamlets Law Centre. The adjudication officer was represented by Mr N. Butt, of the Solicitor's Office of the Departments of Health and Social Security.
3. The claimant appeals with leave of the chairman of the tribunal against the decision of the tribunal which substantially upheld the decision of the adjudication officer, issued on 13 August 1987, reviewing the award of widowed mother's allowance to the claimant and revising it with the effect that benefit for the inclusive period from 22 July 1986 to 30 March 1987 was withdrawn and the sum accordingly overpaid to her during that period was recoverable. The tribunal revised that decision by finding that overpayment had been made and repayment was required for the inclusive period from 29 July 1986 to 30 March 1987.
4. Section 25(1) of the Social Security Act 1975 provides that a person is entitled to a widowed mother's allowance if her late husband satisfied the relevant contribution conditions and she is "entitled to child benefit in respect of a child falling within subsection (2)". Subsection (2) requires that, subject to one of the conditions of section 43(1) being satisfied, the child should be, inter alia, "a son or daughter of the woman and her late husband". Section 43(1), in so far as it is relevant to the instant case, provides that, in order to qualify for an increase for a dependent child under section 41, the claimant must be a person who "would be treated for the purposes of the Child Benefit Act as having the child living with her". The effect of those statutory provisions is modified by regulation 16 of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 [SI 1979 No. 642], which provides that "any person under the age of 19 residing with the widow shall be deemed to be a child falling within section 25(2) of the [1975] Act". At the material time, therefore, the effect of the relevant legislation was that a widowed mother was entitled to a widowed mother's allowance provided a child under the age of 19 was residing with her and, further, if she was entitled to child benefit for that child, then she was also entitled to an increase in her allowance, but such increase would cease when child benefit ceased to be payable.
5. The background to this matter is, briefly, as follows. The claimant's husband died in

1982; she was then aged 32 and had two children, J and D, born respectively on 28 March 1969 and 28 August 1971, for both of whom she received child benefit. For reasons I do not know, and which do not affect this decision, the claimant made a late claim for widowed mother's allowance; that was awarded with effect from 14 February 1984 with the appropriate additions for J and D. J attained the age of 16 on 28 March 1985 and, in accordance with the relevant provisions of the relevant regulations, which I do not need to set out here, child benefit for her ceased on 4 June 1985. The increase of widowed mother's allowance for J also then ceased but, by virtue of regulation 16 of the Widow's Benefit Regulations 1979, referred to in the preceding paragraph, the claimant's entitlement to widowed mother's allowance was unaffected. On a date which has not been precisely established, but which was prior to 11 November 1985, J left home and claimed supplementary benefit in her own right. The claimant says - and the tribunal accepted - that she telephoned the Department and advised them of J's departure, but was told that would not affect her benefit. That advice was plainly correct; the appropriate adjustment to the claimant's benefit had been made when J's child benefit ceased and, at that time, she still qualified as a "widowed mother" because D was living with her.

6. The next event of any significance occurred on 11 April 1986 when D was received into the care of the local authority. However, as from 9 June 1986 he lived with the claimant for two nights and the intervening day each week, and she accordingly remained entitled to child benefit for him as long as that arrangement continued. On 29 July 1986 the claimant made a statement on form MF47 that -

"My son, [D], has left my address as from 28.7.86 as a permanent move."

The claimant did not receive child benefit for D after that date, and it is common ground that she made full and prompt disclosure of that change in her domestic circumstances.

7. The claimant continued to receive widowed mother's allowance although, as she no longer had a child under the age of 19 residing with her, her entitlement thereto had ceased. On 5 March 1987 the Central Pension Branch of the Department asked for confirmation that J was still living with the claimant and, on 23 March 1987, the claimant replied -

"With reference to our telephone conversation I can again only state that you will have to check your records for the information asked for. I informed your office at the time [J] stopped living with me but did not keep a record of this."

8. It was in those circumstances that the adjudication officer reviewed the original decision and decided that widowed mother's allowance was not payable to the claimant from 22 July 1986 to 30 March 1987, that there had been an overpayment of the allowance to the claimant during that period, which was recoverable from her because each time she had signed a girocheque or an order in her allowance book she had "misrepresented the material fact that she was entitled to that benefit".

9. The claimant appealed to the tribunal, to whom she is recorded as giving evidence of the information she had given to the local office about both J & D leaving home. The presenting officer is noted as stating that she had checked the records and had found no record of the telephone call regarding J, but that "there would have been no need for a record ... the impact on entitlement being non-existent". The tribunal found as facts material to their decision that -

1. The Appellant informed the Department by telephone that [J] had left home.
2. No record was made of that information.
3. The Appellant informed the local office that [D] had left home.

4. The Appellant failed to tell the Department that no children under 19 were living with her.
5. The Appellant qualifies for the benefit in the week 22.07.86 - 28.07.86."

Accordingly they revised the decision of the adjudication officer as to the sum repayable by the claimant, and gave as their reasons for their decision that a lesser amount was recoverable -

"The Tribunal directed itself to consider a single issue: 'Was there a duty to state on 29.7.86 that no children under the age of 19 were residing with her, ie the Appellant?' The Tribunal concluded that there was a duty to make full disclosure."

And they went on to state their reasons for that decision, including their view that "The very title [denotes] the nature of the benefit", that on 29 July 1986 the claimant had a duty to disclose that the basis of her entitlement had ceased and that failure to so disclose "constituted an omission ... which by its very nature constituted a misrepresentation".

10. It is common ground that, in their assessment of the sum overpaid to and recoverable from the claimant, the tribunal wrongfully included (as had the adjudication officer's calculation) the £10 "Christmas Bonus" paid in December 1986. There is and, at the material time, was no provision for the recovery of such a sum and consequently the tribunal erred in law in so directing. That error of law suffices to set aside the tribunal's decision but, in the submission dated 12 January 1989 by the adjudication officer now concerned with the case, it is submitted that the tribunal's decision contains other errors of law. However that may be, they seem to me to be subsumed by the point taken on behalf of the claimant, initially by the Tower Hamlets Law Centre, and elaborated at the oral hearing by Mr Rowland. This is that the tribunal erred in law in applying section 53 of the Social Security Act 1986, rather than section 119 of the 1975 Act, to the question of whether or not repayment was to be required of the claimant of whatever amount had in fact been overpaid to her.

11. The basis of that submission is that section 53 was brought into force on 6 April 1987 by virtue of article 4 of the Schedule to the Social Security Act 1986 (Commencement No 4) Order 1986 [SI 1986 No. 1959]. Article 4 provides as follows -

"4.(1) The bringing into operation of subsections (1), (2), (4) and (5) of section 53 (overpayments) and the repeal, in whole or in part, of the enactments specified in paragraph (2) of this article (overpayments and set-off) and the provisions by which those enactments have been amended shall not have effect in relation to any review of, or appeal from, any determination, first made before 6th April 1987, of any questions of repayment or recoverability under those enactments." (my emphasis).

Mr Rowland submitted that the effect of that article was that the review of or appeal against a decision made before 6 April 1987 regarding recovery, to which the provisions of section 119 of the 1975 Act applied, would not be affected by the repeal of that section. He further submitted that as the Order was silent as to what should happen in circumstances such as those in the instant case, where the overpayment occurred before 6 April 1987 but the adjudication officer's decision regarding recovery was after that date, it was necessary, in the absence of any specific provisions, to have regard to the common law rules and to section 16 of the Interpretation Act 1978.

12. The common law has always leaned against retrospective legislation. Section 16(1) of the Interpretation Act 1978 provides that -

"16.-(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, -

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
- (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

(Section 15 deals with a repeal which is itself repealed and is not in point in this case).

In Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553, Lord Brightman says at page 558F -

"A statute is retrospective if it takes away or impairs a vested right required under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past", or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

13. In the instant case the overpayment of widowed mother's allowance occurred entirely before the relevant provisions of the 1986 Act (section 53) came into force on 6 April 1987 (see paragraph 11 above). At the time, therefore, that the claimant received the overpayments section 119(2) of the 1975 Act provided that -

"(2) A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment." (my emphasis),

thereby adopting almost verbatim what is said at page 387 of Craies on Statute Law (7th edition) which then goes on to quote the words of Lindley LJ in Lauri v Renad [1892] 3Ch 402 -

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such construction",

and the principle is emphasised at page 389 thus -

"... perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

Section 119(2) of the 1975 Act provided that -

"(2) A decision given on appeal or review shall not require repayment of benefit paid in pursuance of the original decision in any case where it is shown to the satisfaction of the person or tribunal determining the appeal or review that in the obtaining and receipt of the benefit the beneficiary, and any person acting for him, has throughout used due care and diligence to avoid overpayment."

Until 6 April 1987, when that subsection was replaced by virtue of section 86(2) of the 1986 Act and Schedule 11 thereto, overpayment and repayment of benefit (apart from supplementary benefit) accordingly depended on the question of due care and diligence, whereas after that date the question of overpayment was dealt with by section 53(1) of the 1986 Act as follows -

"53.-(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
- (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

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

The tribunal clearly proceeded to consider the matter on the same basis as the adjudication officer, namely that the claimant had misrepresented a material fact by failing to disclose that she had no child aged less than 19 living with her. In my judgment they thereby cast upon her a duty which did not exist at the relevant period; when the claimant received the overpayment the law told her she must use due care and diligence to avoid overpayment. If the tribunal applied the law as it stood after 6 April 1987 then plainly the effect would be to create a new obligation or impose a new duty on the claimant, which would prima facie be contrary to the clear intention of section 16 of the Interpretation Act.

14. Mr Butt contended that the section did not apply because the change in the law was purely procedural and therefore not objectionable for having a retrospective effect. I accept that if the alteration in the law was procedural then that would be correct, but I do not accept that was the case. In my judgment the change of the criteria governing repayment from "due care and diligence" to disclosure is a substantive and not merely procedural. The position in my view distinguishable from that considered by the Divisional Court in R v Secretary of State for Social Services Ex parte Britnell, in which judgment was given on 24 January 1989, and to which I was helpfully referred; in that case it was held that regulation 20(2) of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1987 [SI. 1987 No. 491] (and, it would presumably follow, regulation 15(1) of the identically named 1988 regulations [SI. 1988 No. 664]), were not retrospective, but were a new means of recovering liabilities which existed before the 1986 Act came into force. The issue in the present case is what, if any, liability the claimant had under the 1975 Act. If she should have any such liability then it is not disputed that it would be recoverable.

15. In these circumstances, in my judgment the claimant's liability, if any, to repay the amount overpaid to her, or any part thereof, should have been considered under section 119 of the 1975 Act. Consequently the tribunal erred in law in that respect also.

16. I would have wished to give the decision which the tribunal should have given and, on

the basis of their findings of fact regarding disclosure, I might well have been able to find that the claimant had adequately discharged the onus upon her. However, I have come to the conclusion that there are insufficient findings of fact to enable me to decide the question of whether the claimant used due care and diligence to avoid overpayment. It may be that the learned editors of *Non-Means Tested Benefits: The Legislation* (1989 edition, Sweet & Maxwell), are correct in their comment on section 53 of the 1986 Act, that it applies "a much tougher test" than section 119 of the 1975 Act; what is certain is that it is a quite different test and it would be wrong to assume that because, in my opinion, this claimant made adequate disclosure, she necessarily used due care and diligence. As the matter proceeded throughout on the basis of misrepresentation and/or disclosure the claimant has never been asked about her state of mind during the period in issue and, although a certain amount can be inferred from her answers to enquiries, I have, with some regret, come to the conclusion that the proper course would be for this matter to be considered by another tribunal, who will decide whether or not the claimant throughout the period in issue used due care and diligence to avoid overpayment, in accordance with the provisions of section 119 of the 1975 Act.

17. I do not think it necessary for me to give elaborate directions to the new tribunal about a matter with which they will be only too familiar. However, I would mention the previous tribunal's reasoning, that the title of the benefit denoted its nature, is in my view fallacious. A widowed mother, as a matter of English, remains a widowed mother whatever the age of her children, but it will be a question of fact for the tribunal whether there was anything which should have put the claimant on notice. In that connection the new tribunal will bear in mind the words of the Commissioner in paragraph 16 of R(U) 1/73, where he said that the expectation that the claimant should, in the particular circumstances of that case, have made further enquiries, seemed to him "... to go too far and to require the claimant to exercise something more than due care and diligence" (the Commissioner's emphasis). Whether the same can be said in the instant case will be one of the issues the new tribunal will have to determine.

18. The claimant's appeal is allowed.

(Signed) M H Johnson
Commissioner

Date: 24 August 1989