Bulletin 166 [Start]

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CG/2888/00

Starred Decision No: 130/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Ms Kimberli Jones,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 11th January 2002

Comments on Northern Ireland Commissioners' decisions will be forwarded to the Northern Ireland Chief Commissioner.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal in part.

2 The Secretary of State is appealing with permission f the chairman against the decision of the Exeter appeal tribunal on 12 January 2000. The tribunal upheld the respondent's appeal against the decision of the Secretary of State that she had been overpaid a total of £2868.10 widowed mother's allowance and that amount was recoverable from her by the Secretary of State. It decided that no sum was repayable.

3 For the reasons below, the decision of the tribunal is wrong in law. I set aside the decision of the tribunal. It is expedient that I take the decision that the tribunal should have taken. This is:

> **The appellant's appeal is allowed in part. The decision that there was no entitlement to widowed mother's allowance from and including 15 September 1998 is confirmed. There was an overpayment of allowance of £2,868.10 from that date. The overpayment is recoverable from the appellant for the period from 15 September 1998 until 19 October 1998 or, if other, the day on which the Child Benefit Centre was notified by the appellant that she was no longer entitled to child benefit for her son. The overpayment in respect of any later period is not recoverable.**

[In that decision the "appellant" is the appellant to the tribunal and the respondent in this case. The "Secretary of State" is now the Secretary of State for Work and Pensions, the successor in title to any overpayment from the Secretary of State of Social Security. "The Department" covers both Departments.]. The case is referred to the Secretary of State to calculate, and agree with the respondent, the amount of overpayment to be repaid. As this is a decision on the facts, either party is at liberty to refer the matter to me (or if I am not available to another Commissioner) if there is disagreement about this sum or if there is some other difficulty in implementing this decision.

The facts

4 In 1993, three days after her late husband died, the respondent applied for widowed mothers allowance for herself and their two children, and it was paid to her. She was receiving child benefit for their daughter and son. The respondent stopped receiving child benefit for her younger child (and son) with effect from 14 September 1998. She was at that date 44. She therefore stopped being entitled to widowed mother's allowance without becoming entitled to widow's pension. She did not know that. She told the tribunal that she thought she was entitled to the allowance until her son was 19 in March 2000. Her widowed mother's allowance was automatically reduced when her daughter was 19. She had handed back her child benefit book when her son decided not to go back to college from September 1998. The Department stopped her benefit. But it did not stop her allowance.

5 Once child benefit stopped, the respondent was no longer entitled to receive widowed mother's allowance. But she continued cashing her allowance. On 12 April

1999, a computer sent a notification from the Department's Child Benefit Computer System to its Pensions Strategy Computer System. On receiving a printout of this information, an officer of the Department asked the respondent to return her allowance book. She did. The following month, an adjudication officer decided that the respondent had not been entitled to widowed mother's allowance once child benefit had stopped. Another adjudication officer decided that there was a recoverable overpayment of £2868.10 allowance for the period from 15 September 1998 to 12 April 1999. The fact and amount of overpayment are not in dispute.

The appeal to the tribunal

6 The respondent appealed. She stated that when she stopped getting child benefit for her daughter, her allowance was automatically reduced. She assumed that the same would happen for her son. She also assumed that this would be when he was 19. She honestly did not remember what she had been told when she applied for the allowance. The tribunal held an oral hearing. The respondent was represented, but not the Department. The respondent's representative persuaded the tribunal that the overpayment was not recoverable. The tribunal found that there can be no failure to inform the Secretary of State of a situation of which he already knows. Commissioner's decision CIS 2498 1997 was prayed in aid.

The appeal to the Commissioner

7 The Secretary of State appealed on the grounds that CIS 2498 1997 was wrong in law, and that other decisions should be preferred. Further, even if there had been no failure to disclose, there were misrepresentations by the respondent in signing order book foils. The Secretary of State also commented that CIS 2498 1997 was being challenged. This case was postponed while a series of cases was considered by a Tribunal of Commissioners. The decisions are CG 4494 1999, CG 4657 1999, CG 5631 1999, and CIS 7182 1999. The importance of these decisions is that they are binding on me and on tribunals in the same way as a decision of a court of appeal. Copies of the decisions are in the papers.

The duty to disclose: CG 4494 1999

8 The Tribunal of Commissioners confirmed in CG 43944 1999 that CIS 2498 1997 was not to be followed. It confirmed that the traditional approach to the duty to inform still applied, despite advances in technology. The rule is that a claimant is under a duty not just to inform the Department of new facts, but to inform the specific part of the Department responsible for the particular benefit being received by the claimant. In this case, it was submitted, it was not enough to tell the Child Benefit Centre. The local office paying the allowance had to be told as well.

An exception to the duty : CG 5631 1999

9 CG 5631 1999, decided at the same time as CG 4944 1999 by the Tribunal, establishes an important exception to that rule. The rule does not apply where an automatic computer interface exists between two parts of the Department. The Tribunal

of Commissioners distinguished that case from the general rule in CG 4494 1999. This was because, as between the parts of the Department dealing separately with disability living allowance and invalid care allowance, there was after 9 December 1996:

> "the establishment of an interface between the computers dealing with these benefits so as after that date there would be an automatic notification of changes sufficient to provide, in our view, knowledge in the Secretary of State for invalid care allowance purposes that, where it mattered, a change in the award of attendance or disability living allowance had occurred. In the light of that Counsel for the Secretary of State made a concession that in this case that he would not seek recovery for the period after 6 December 1996 ... in the result, and essentially by reason of the concession on behalf of the Department, we are satisfied that there can be no question of recovery after 9 December 1996 because from then onwards the Secretary of State had knowledge of a reduction in disability allowance to the lowest rate of the care component. It is well established that there can be no failure to disclose something which is already known to the person to whom disclosure might be owed. Accordingly, there can be no failure to disclose something after the last mentioned date." (CG 5631 1999, paragraph 5).

10 Although the guidance issued to decision makers (copied to me by the secretary of state's representative) might suggest otherwise, CG 5631 1999 cannot be specific only to disability living allowance (or attendance allowance) and invalid care allowance. It must apply between any two parts of the Department if the two conditions behind that decision are met. First, the need to link the information about the two benefits or allowances arises where the receipt of one benefit or of a specific amount of that benefit is conditional in law upon the receipt (or non-receipt) of another benefit (or of a specific amount of the second benefit). Second, the two parts of the Department dealing with the two benefits have in place an automatic computer interface between their systems so that a change in one benefit by one part of the Department is notified in ordinary course of events by the computer interface to the other part of the Department.

11 The first of these two conditions is met as between child benefit and widowed mother's allowance. The one is a precondition for receiving the other (Social Security Contributions and Benefits Act 1992 section 37). This applies also for the new widowed parent's allowance that has now replaced widowed mother's allowance.

12 There is in the appeal papers a computer print out that suggested to me that the second condition was also met here. It is document 14, a photocopy of a computer generated report headed:

> "RRP00088
> Department of Social Security
> Pensions Strategy Computer System
> Change of circumstances notification from Child Benefit Branch".

No mention of the nature or derivation of this document was made in the submission to the tribunal. I asked the secretary of state's representative to explain it. In reply to my enquiry, the secretary of state's representative informed me:

"Notification arrangements - this case

The process is "owned" by the Child Benefit Centre, who advise me as follows:

How long has the system been in place?

At the time of my enquiry, the Child Benefit Centre officer was unable to precisely identify how long the system has been in place. However, she assured it was in place throughout the relevant period.

How is document 14 produced?

When the Child Benefit Centre officer decides a child is excluded, the decision is recorded on the Child Benefit Computer System [CBCS].

Overnight, the CBCS and Pensions Strategy Computer System [PSCS] compare accounts, [and the CBCS] if appropriate, downloads the child exclusion date to PSCS.

The following night the PSCS downloads the information to the computer system of the office it identifies as being responsible for administering the claimant's widows benefit.

Next work day morning, the downloaded information is printed off by a nominated officer and the reports are passed that day to the various officers who administer the particular cases ['the pensions section'].

The RRP00088 production occurs only once per exclusion input to the CBCS. It follows the only RRP00088 generated in this case is that copied at document 14, generated as a result of the exclusion being input to the CBCS on Friday 9.4.99 and so available for printing on Monday 12. 4. 99".

My conclusion is that the second condition that invokes the exception in CG 5631 1999 is also in place in this case, in that there is an automatic computer interface in place. As that is so, I must follow CG 5631 1999, not CG 4944 1999, in deciding this appeal.

C8/00-01 (IS)

13 In C8-00-01 (IS) a Northern Ireland Commissioner recorded a note of dissent to the passage quoted from CG 5631 1999 (at paragraph 40(7)):

> "In both of these cases, the state of mind of the putative discloser was considered very relevant. It follows therefore that I have doubts about the correctness of the last two sentences of paragraph 5 of CG 5631 1999 extracted above. The context of "failure to disclose" is relevant. I have difficulty in ascertaining how this concept can be usefully applied if the discloser's state of mind is ignored. I express no concluded view on the matter as I would, if so doing, wish to hear fuller argument. As the matter is not necessary to my decision it is unnecessary to explore it further in this decision."

On the facts of C8/00-01 (IS) there was no relevant automatic link in place either in the law or in the computer systems between the two parts of the Northern Ireland

Department. CG 5631 1999 is not in my view relevant to that case. The Commissioner added that there was in that case nothing to suggest that the claimant in that case knew about the computer system that did link the two parts. While I note the reservation, I do not consider it to be part of that decision, while the links were directly in issue in CG 5631 1999. Further, the reason behind CG 5631 1999 is that the existence of the link means that the "chain of causation", as it is usually termed, is already in existence between the two parts of the Department before a claimant makes a disclosure. Telling one linked part is also telling the other linked part. What must be shown, to recover an overpayment under the standard test from R (SB) 54/83, is that the overpayment was "in consequence of" the failure to disclose. That is not so once an automatic link is in place, any more than it is if an officer in the right part of the Department fails to pass to another officer in that part a letter (or e-mail) sent in by a claimant. I do not consider that knowledge on the part of the claimant is necessary to that reasoning.

Application to this case

14 I must uphold the appeal on the ground that the Tribunal of Commissioners stated that CIS 2498 1999 is not to be followed. But it is expedient that I take the decision that the tribunal should have taken.

15 There are two problems in applying CG 5631 1999 in this case. The Child Benefit Centre officer did not input the decision stopping child benefit into the computer until some months after the date from which the child benefit was stopped. I asked the secretary of state's representative why. I was advised that the Child Benefit Centre was unable to give a definitive answer, as the relevant papers had been destroyed. However, records suggested two reasons. The respondent returned her order book only after the order payable on 19 October 1998 had been encashed, and only then informed the Department that her son had decided not to go back to college. The Child Benefit Centre then stopped the child benefit retrospectively to 14 September 1998. This led to an overpayment of child benefit. The respondent has since repaid the overpaid child benefit. The suggestion of the Department was that the computer link had not been activated until the overpayment had been refunded.

16 If the respondent delayed in telling the Child Benefit Centre that her son had decided not to return to college, then it must follow that she cannot be regarded on any analysis as having told those responsible for widowed mother's allowance either. She accepted that there was an overpayment of child benefit and has repaid it. If that is so, she must accept that there was also an overpayment of widowed mother's allowance for the same period, as the one is linked to the other. The tribunal was not informed of the delay in notifying the Child Benefit Centre. It should have been informed. My decision is that the overpayment of widowed mother's allowance is recoverable from 14 September 1998 to 19 October 1998 (or the relevant date if later on which she told the Child Benefit Centre of the change of circumstances about her son).

17 But the further unexplained delay in activating what should have been an automatic computer link does not revive any liability on the part of the respondent to repay the subsequent overpayment. I am told that, separately from the automatic computer link, there is also a manual check by way of an interim notification ahead of a

delayed input of an exclusion, but that there is no information now on file to show if an interim notification was issued, and if it was not why not. The secretary of state's representative could not produce an explanation for the Departmental delay, asking me instead, in effect, to make a guess that the Department was not at fault either in failing to activate the computer link or in failing to activate the back-up link. I am not prepared to do that. The burden is on the secretary of state's representative to establish a failure to disclose or misrepresentation by the respondent and the linkage between that failure or misrepresentation and the overpayment. In this case there was or should have been an automatic computer linkage, with back-up system, between the decision to exclude the respondent from child benefit for her son and the effect on her widowed mother's allowance. Both failed to operate. I can see no failure to disclose by the respondent that contributes to that failure. That being so, I do not think I should make assumptions against the respondent about the failure. The delay does not stop the test in CG 5631 1999 being satisfied. The overpayment is not recoverable from the respondent for any period after she had notified the Child Benefit Centre.

18 Although it is perhaps not necessary for this decision, I add that in any event the tribunal would have been applying the law correctly if it had discharged the liability to recover overpayment once the respondent had told the Child Benefit Centre if it had found that she knew that there was an automatic link between the two parts of the Department. Her widowed mother's allowance for her daughter "was automatically stopped" (her words, without prompting). That is relevant to the standard tests for non-disclosure in R (SB) 54/83. I am not satisfied that it was reasonable to expect the respondent to disclose to the section dealing with widowed mother's allowance, in addition to the Child Benefit Centre, that she was no longer entitled to child benefit, given the links that existed, and which she knew existed, between the two parts of the Department. She had a reasonable basis for considering that both parts of the Department knew once she had told one of them.

19 Can the recovery of the overpayment be based instead on misrepresentation? In principle this is relevant. It was put to the tribunal in the submission, but the tribunal did not consider it. But it is for the Secretary of State to establish it. The papers do not do so, and there was no presenting officer at the tribunal. The alleged failure was by reference to the standard forms in the benefit books. As I pointed out to the secretary of state's representative, none of the usual evidence was put into the submission to the tribunal. Even if it had been, I am not satisfied that a case of misrepresentation is made out. It is not clear in this case whether there were two separate order books. Even if there were two books, the Secretary of State has not established that the respondent had not "correctly reported any fact which could affect the amount of my payment" in claiming allowance on the basis set out above once she had told the Child Benefit Centre, and all the more so once she had accepted there was an overpayment.

David Williams
Commissioner

08 November 2001