

Remitted

Commissioner's file: CIS/1915/1997

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

APPEAL FROM DECISION OF SOCIAL SECURITY APPEAL TRIBUNAL ON A
QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name :

Social Security Appeal Tribunal:

Case No:

1. The decision of the Social Security Appeal Tribunal of 6th November 1996 dismissing the claimant's appeal from the decision of the adjudication officer issued on 9th August 1996 is erroneous in law for the reasons set out below and I set aside that decision.
2. The appeal relates to income support ('IS'), in particular recovery of amounts overpaid.
3. The claimant is a man then aged 54 who lived alone in rented accommodation. He had been receiving IS since January 1995 and was also receiving incapacity benefit paid by a separate orderbook.
4. The history of the claim is as follows:
 - (1) On 23rd March 1996 a routine examination of the claimant's IS entitlement revealed that his incapacity benefit had increased from £52.50 a week to £58.85 a week from 17th November 1995. The claimant's IS orderbook had been cashed up to and including the payment order dated 25th March 1996.
 - (2) The adjudication officer reviewed the claimant's entitlement to IS and on 9th August 1996 issued a decision that an overpayment of £117.93 had been made from 14th November 1996 to 25th March 1996 as a result of the misrepresentation by the claimant of a material fact which was that he had correctly reported any facts which could affect the amount of his IS. That overpayment was recoverable from the claimant.
 - (3) On 10th September 1996 the claimant appealed to the Social Security Appeal Tribunal against the

adjudication officer's decision. the grounds of the appeal are set out in a letter from the claimant's representative and were that the claimant did not failure to disclose any fact that he could reasonably be expected to disclose. the two benefits the claimant were receiving were administered from the same office. It was therefore reasonable for the claimant to see no need to report to that office a change in the amount of incapacity benefit which he received from that same office. For this reason the signed statements in the payment orderbook (see paragraph 9 below) were not misrepresentations of a material fact.

- (4) On 6th November 1996 the tribunal unanimously dismissed the appeal and confirmed the decision of the adjudication officer. the claimant attended the hearing and was represented.
5. The claimant appeals against the decision of the tribunal of 6th November 1996 with leave of a Commissioner. The grounds for appeal are set out in the application for leave to appeal dated 6th January 1997 and are that the Tribunal :
 - (1) failed to give adequate reasons for its decision;
 - (2) did not explain why it rejected the argument put forward by the claimant's representative and summarised in paragraph 4(3) above.
6. The adjudication officer in her submission to the Commissioner dated 21st September 1997 supports the appeal on the grounds identified by the claimant's representative and also on the additional ground that the Tribunal did not take into account the decision of the Commissioner in CSB/677/1986.
7. Recovery of overpayments of income support are dealt with in section 71 Social Security Administration Act 1992. Sub-section (1) provides that:

'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;. . .

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.'

Sub-section (5) of section 71 provides that for an amount to be recoverable under sub-section (10) the amount in pursuance of which it was paid must have been reversed or varied on appeal or revised on a review and the appeal or review must have determined that the amount is so recoverable. It was clear from form AT2A and the schedule attached to it (pages 5-11 of the tribunal bundle) that the adjudication officer had determined on a review that the sum of £117.93 was recoverable from the claimant.

8. It was established in R(SB) 34/83 that the burden of proof lies on the Department to show that the facts are such that recovery of an overpayment is justified. To do that in this case the Department had to show that:

(1) the claimant had made a misrepresentation of a material fact; and

(2) in consequence of the misrepresentation, a payment was made in respect of IS which would not have been made but for the misrepresentation.

9. The adjudication officer attached to his submission to the Tribunal a specimen of the counterfoils which would have been contained in the Income Support claimant's IS payment orderbook and which he would have signed each week during the period from 14th November 1995 to 25th March 1996 inclusive. The declaration was in the following terms:

'I declare that . . . I have correctly reported any facts which could affect the amount of my payment and that I am entitled to the above sum.'

The adjudication officer in his submission relied on the decision of the majority of the Court of Appeal in Jones v Chief Adjudication Officer [1994] 1 WLR 62 as authority for the proposition that each time he signed the declaration on the orderbook counterfoil when he encashed the payment orderbook the claimant was making a representation that all the facts known to him at the time of signing and which could affect the amount of benefit had been reported. As the claimant did not report the increase in the incapacity benefit paid to him [which was a material fact as it would have been taken into account in determining the amount of IS to which he was entitled] the claimant had misrepresented a material fact. The adjudication officer's analysis of the relevant law was adopted by the tribunal (see box 3 form AT3) and I also agree with it.

10. The essence of the case made to the tribunal on behalf of the claimant was that the claimant did not make a misrepresentation in signing the declaration on the counterfoil without reporting a material fact (the increase in incapacity benefit) when that fact was one which the

Department could be expected to know as the local office which dealt with his claim for IS was the same (although a different section of that office) as had issued the orderbook for payment of the increased incapacity benefit. This argument which is supported by the adjudication officer in her submission to me, relying on the Commissioner's decision in CSB/677/1986.

CSB/677/1986 was a case concerning non-disclosure not misrepresentation, of a material fact. As the Commissioner stated in his decision it was well established that the disclosure required by the provision under consideration, section 20 of the Supplementary Benefits Act 1976, was such disclosure as could reasonably be expected of the person in question. The same qualification does not apply in relation to the obligation to report a material fact in order to avoid misrepresenting it referred to in para 9 above. That obligation is qualified only by the requirement to be aware of the fact he had failed to report (see Franklin v Chief Adjudication Officer The Times 29th December 1995). For this reason I do not agree with the adjudication officer's submission to me however I do agree that the tribunal should have dealt expressly with the argument made on behalf of the claimant. the tribunal did not do this and its decision is therefore wrong in law.

11. The decision of the tribunal is wrong in law for the reasons set out in paragraph 10 above. As I can do so without making further findings of fact pursuant to the provisions of section 23(7) Social Security Administration Act 1992 I give the decision which I consider that the tribunal should have given which is that the claimant has been overpaid the amount of £117.93 in IS for the period from 14th November 1995 to 25th March 1996 inclusive and that sum is recoverable from him as it was paid in consequence of a misrepresentation of a material fact as required by section 71 Social Security Administration Act 1992.

(signed) A L Humphrey
Deputy Commissioner

(Date) 17 June 1998