MR/SH/6

Commissioner's File: CIS/372/1994

SOCIAL SECURITY ACT 1986

SOCIAL SECURITY ADMINISTRATION 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:Central London

Case No: 7/07/93/84680

1. This is an appeal brought by the claimant with the leave of the tribunal chairman against the decision of the Central London social security appeal tribunal dated 8 February 1994. I held an oral hearing of the appeal at which the claimant was represented by Mr Marcus Revell of the National Association of Citizens Advice Bureaux and the adjudication officer was represented by Ms Sarah Ellis of Counsel, instructed by the Solicitor to the Departments of Social Security and Health. The appeal was exceptionally well argued on both sides.

2. It is common ground in this case that income support amounting to £2,747.45 paid to the claimant from 14 January 1992 to 29 October 1992 should not have been paid because during that period the claimant's wife was working on average for more than 24 hours a week. The issue is whether that sum, or any part of it, is recoverable from the claimant under section 71 of the Social Security Administration Act 1992. So far as is material, section 71 provides:-

> " (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) ....,

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

....

(5) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above .... unless -

(a) the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review; and

(b) it has been determined on the appeal or review that the amount is so recoverable."

Therefore, provided there has been the necessary review, section 71(1) has the effect that an overpayment is recoverable from a claimant if the claimant has either made a misrepresentation as to a material fact or has failed to disclose a material fact or both. It is well established that there is no failure to disclose a material fact unless disclosure was reasonably to be expected (R(SB) 21/82).

3. When making his claim for income support in December 1991, the claimant had declared that his wife was working but he had left blank the part of the claim form where he was asked to state the number of hours for which she normally worked. The local adjudication officer initially took the view that that amounted to a failure on the claimant's part to disclose a material fact and so he or she decided that the whole sum of £2,747.45 was recoverable. On appeal to the tribunal, the claimant argued that his wife worked irregular hours and, although he was aware of her coming and going, he did not know whether or not she worked an average of more than 24 hours a week. He also stated that he had left the relevant box on the claim form blank on the advice of an officer of the Department of Social Security. In the written submission on the appeal to the tribunal, the adjudication officer changed tack and argued that the overpayment was recoverable on the ground that there had been a misrepresentation as to a material fact rather than a failure to disclose a material fact. He or she accepted that there was no misrepresentation in the original claim form but argued that the claimant had made a misrepresentation as to a material fact every time he had signed at the unemployment benefit office the declaration on form UB24 which is in the following terms:-

" Each time I sign this form, I declare that:-

1 I have read and understood leaflet UBL 18 'Responsibilities of Claimants' and understand what I must do and what I must report when claiming benefit.

2 On each day since the last date I claimed (other than any day for which I have made a separate declaration)

- I was unemployed and did no work, paid or unpaid;

- I was able, available and willing to do work but was unable to get any;

- The circumstances of myself and my dependant(s) are and have remained as last stated in writing (if there has been any change do not sign this form, tell the clerk, about the change).

3 Each day since the last day I claimed falls in a week in which I have actively sought work.

4 I know that if I am claiming income support I must report in writing anything that could change the amount of income support due to me and/or if I change my address.

5 I understand that if I give information that is incorrect or incomplete, action may be taken against me.

I declare that the information I have given on this form is correct and complete.

I have reported everything I am required to report. This is my claim for unemployment benefit and I claim unemployment benefit for each day."

The tribunal found that the claimant was "aware of his wife's working pattern" and accepted the adjudication officer's new submission that there had been a misrepresentation. The claimant now appeals against the tribunal's decision on the ground that, on a true construction of form UB24, there was no misrepresentation.

4. In a submission dated 19 August 1994 the adjudication officer opposed the appeal. However, a nominated officer raised the question whether there had been a review, as required by section 71(5). The tribunal had found as a fact that there had been such a review but the basis for the finding was unclear. In response, on 21 March 1995, the adjudication

officer submitted that "it cannot be substantiated that a review was carried out in this case" and, in the light of CIS/186/94, argued that the tribunal's decision should be set aside and remitted to another tribunal. However, when the case was passed to me for determination, it seemed to me that the adjudication officer's new approach was unsatisfactory. I suspected, rightly as it transpires, that the submission dated 21 March 1995 was made on the basis of the papers on this appeal and without the adjudication officer having made any enquiries of the local office as to whether or not there had in fact been a review. I therefore asked that further enquiries should be made and they have revealed that there was the necessary review decision.

5. In the light of that new evidence, the adjudication officer then abandoned the submission made on 21 March 1995 and argued, in a new submission dated 19 September 1995, that, on the facts of the case, there had been neither a misrepresentation as to a material fact nor a failure to disclose a material fact and suggested that I should give a decision to the effect that the overpayment was not recoverable. However, I directed the oral hearing because I was not persuaded that there had not been a failure to disclose a material fact. At the hearing, Ms Ellis resiled from the adjudication officer's latest submission and argued that there had been both a misrepresentation as to a material fact and a failure to disclose a material fact. Therefore, at different times, all four permutations possible under section 71(1) have been advanced by or on behalf of adjudication officers, which suggests the legislation is not easy to apply.

6. I shall deal first with the misrepresentation limb of section 71(1). It was common ground that the declaration on form UB24, "I have reported everything I am required to report", is capable of being a representation of a material fact for the purposes of section 71(1). If it is incorrect, it is a relevant misrepresentation. That much is clear from the decision of the Court of Appeal in Jones v. Chief Adjudication Officer [1994] 1 W.L.R. 62, to which the tribunal referred in their decision. However, Mr Revell submitted that, on a proper construction of form UB24, the declaration referred only to matters relevant to the claimant's claim for unemployment benefit. Ms Ellis, on the other hand, submitted that the declaration was not qualified in that way. I have come to the conclusion that Mr Revell's submission on this point is correct. The form is a claim for unemployment benefit. It is true that, in paragraph 4, the claimant acknowledges a duty to report matters relevant to a claim for income support, but it is noteworthy that paragraph 4 does not include the words in parenthesis at the end of paragraph 2, requiring a change of circumstances to be notified before the form is signed. The number of hours for which the claimant's wife worked was not a fact that was relevant to his claim for unemployment benefit

but was a fact that had to be reported to the Department of Social Security for the purposes of his claim for income support. Looking at the form as a whole, it seems to me that the claimant was merely acknowledging a duty to report facts material to his claim for income support and was declaring that he had reported all facts material to his claim for unemployment benefit. I do not think that the form can properly be construed as including a declaration that the claimant had reported to the Department of Social Security all facts material to his claim for income support.

7. I therefore find that the tribunal's decision was erroneous in point of law. Both parties invited me to consider whether or not, on the facts of the case, the alternative limb of section 71(1) were satisfied on the ground that the claimant had failed to disclose a material fact. On the tribunal's approach, it had not been necessary for them to make full findings relevant to that issue and therefore I heard evidence from the claimant.

8. I accept the claimant's evidence. He explained that he had made a claim for income support in September 1991 but that claim had been unsuccessful because the amount of mortgage interest had been incorrectly stated. On that claim form, which was in the papers before me, he had stated that his wife normally worked 22 hours a week, which was an average calculated by looking over a recent past period. From the time of the claim, she did in fact work longer hours but nothing turns on that because the claim has not been pursued. He acknowledged that, when he made another claim in December 1991, he had not stated the number of hours she worked. He also accepted that he had known that, if his wife normally worked for more than 24 hours a week, he would not be entitled to income support.

9. He explained that his wife's hours of work had been irregular. He knew when she was out of the house but did not know precisely what her hours of work were because he did not keep a running record and because his wife frequently had lunch or went shopping before returning to the house. She worked as a secretary on a casual basis. In December her employers were planning to recruit another full-time member of staff, which would have meant that she would have worked fewer hours. She only worked 78¾ hours in that month. When completing his claim form, he asked her about the number of hours she normally worked and she said that she had no idea what they would be in the future. He had telephoned the Office of the Department of Social Security and asked what he should state in the box on the claim form where he had asked for the number of hours she works. He was told to leave it blank and that "they would form their own conclusions". "They" were officers at a benefit centre where his entitlement was calculated, rather than the local office. He thought that, if his claim was not rejected,

the Department of Social Security would contact his wife's employers whom he had named on the claim form. In fact, the new member of staff was not taken on by his wife's employers until October 1992. In January, February, March and April 1992 she worked respectively for 145¾, 104¾ hrs, 128 hrs and 124½ hrs. In cross examination by Ms Ellis, the claimant said that, by April 1992, he would have become aware that his wife was working over 24 hours a week and that that would continue for a little while.

10. In the light of that evidence, I accept that there was no failure on the part of the claimant to disclose a material fact when he completed the claim form in December 1991. Quite apart from the fact that the duty to complete the claim form fully was waived by the official to whom the claimant spoke over the telephone, there was nothing to indicate to him that the hours his wife normally worked would be calculated by taking an average over the three preceding months rather than any other period. In fact, her hours averaged over December by itself were fewer than 24 hours per week and he could reasonably have argued that he did not expect them to rise above that figure in the new year.

11. However, where there has not been disclosure of a material fact, the duty to disclose is continuous and, although it may at first be unreasonable to expect disclosure, it may later become reasonable to expect it. In my view, this was such a case. Even if the claimant had not been sure that his wife's hours of work normally exceed 24 hours a week, there must have come a time when he realised that they might well do so and he should have asked her so that he could inform the Department of Social Security. The level of his wife's earnings would have been one clear indication, quite apart from the amount of time she spent out of the house. As I have said, the claimant accepted as much when cross-examined.

12. Mr Revell argued that the likelihood that the hours would be averaged over a long period would relieve the claimant of the duty to disclose the level of his wife's hours merely because in one or two months they exceeded 24. That may be so, but by the beginning of April 1992, the claimant ought to have realised that an adjudication officer might have thought that the number of hours his wife worked had become relevant, even if he still expected that they would drop again in the future when another full-time employee was taken on by his wife's employers. By then it should also have been fairly obvious to him that the Department of Social Security had not contacted his wife's employers in respect of the hours she had worked since December 1991, because he knew of the 24 hour limit and averaging her hours over any period - other than December by itself - produced a figure in excess of 24.

13. Mr Revell finally argued that, even if there had been a

failure on the claimant's part to disclose the number of hours his wife worked, that was not a direct cause of the overpayment. What seems to have happened is that, faced with no answer to the relevant question on the December claim form, the adjudication officer looked at the September claim form and assumed that the claimant's wife still normally worked for 22 hours a week. Mr Revell argued that the adjudication officer should have sought proper evidence from the claimant or his wife's employer, rather than looking at the out-of-date form. Be that as it may, it is clear from the decision of the Court of Appeal in Duggan v. Chief Adjudication Officer (reported as an Appendix to R(SB) 13/89) that an overpayment is recoverable from a claimant if a failure to disclose a material fact is but one of two or more causes of the overpayment. Thus, even if the adjudication officer failed to take appropriate action and that failure was one cause of the overpayment to the claimant, it does not alter the fact that the failure to disclose the number of hours his wife was working was another cause. Clearly, had the claimant reported that fact in April 1992, the overpayment from that date would have been avoided.

14. For those reasons, the claimant succeeds in respect of the period up to early April 1992 but does not succeed in practical terms in respect of any later period. I must set aside the tribunal's decision. There is no dispute as to the adjudication officer's figures and it is convenient for me to take 10 April 1992 as the date from which the overpayment is recoverable. Therefore, the decision I substitute for that of the tribunal is as follows:-

> The award of income support from 14 January 1992 was properly reviewed on the ground that the adjudication officer awarding benefit was ignorant of the material fact that the claimant's wife normally worked for more than 24 hours a week. The revised decision is that no benefit was payable. Accordingly there has been an overpayment of benefit amounting to £2,747.45 in respect of the period from 14 January 1992 to 29 October 1992. Of that sum, £1,905.81 is recoverable from the claimant because the overpayment in respect of the period from 10 April 1992 to 29 October 1992 was due to his failure to report the material fact that his wife was normally working more than 24 hours a week.

(Signed) M. Rowland
Commissioner

(Date)