

MR/SH/2

Commissioner's File: CIS/395/1992

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:

Case No:

1. The claimant's appeal is allowed. The decision of the Wrexham social security appeal tribunal dated 17 October 1991 is erroneous in point of law. I set that decision aside and refer the case to a differently constituted tribunal for determination.

2. It appears to be common ground that the claimant first claimed supplementary benefit on 31 July 1987 when her husband left the matrimonial home. She was awarded supplementary allowance from 31 July 1987 at the rate of £57.54 per week. She then moved to a Women's Aid refuge and from 26 October 1987 she was treated as a boarder, receiving supplementary allowance at the rate of £119.29 per week. Following that change, a girocheque payment was made and then a book of payable orders for 26 weeks from 16 November 1987 was issued. On 24 February 1988, the local social security office rang the Women's Aid refuge who reported that the claimant had left on 11 January 1988, saying that she was going to the former matrimonial home, "as she had been beaten up by another woman". On the same day an officer telephoned the former matrimonial home and recorded the following note:-

"A female answered the phone but denied that she was the claimant. They said that [the claimant] was not there."

There is nothing in the papers to suggest that the claimant has ever been asked to comment on that note. It appears that forms BF136, asking the claimant to return the order book, were issued on 24 February 1988 and 13 April 1988. On 15 April 1988 a "stop notice" was issued. The order book was eventually received by the Department of Health and Social Security on

4 May 1988, orders up to 18 April 1988 having been cashed. On 27 September 1988, the award of income support from 26 October 1987 was reviewed and revised and it was decided that the claimant was not entitled to any supplementary benefit or income support from 11 January 1988. It was also decided, possibly on the same date, that £1,789.35 had been overpaid from 11 January 1988 to 18 April 1988 and that that sum was recoverable from the claimant. The latter decision was issued to the claimant on 5 October 1988. It is not clear when, if at all, the review decision was issued. On 5 February 1991, solicitors acting on behalf of the claimant wrote to appeal against the recoverability decision issued on 5 October 1988. A chairman extended the time for appealing.

3. The claimant accepted that she had left the Women's Aid refuge on 11 January 1988 and returned to the matrimonial home where her husband was living. Her case was that she had returned to the matrimonial home only because she could not stay at the Women's Aid refuge and that she and her husband were not "living together" for the first two weeks after her return. There was then a reconciliation. She admitted that she had cashed orders in those first two weeks and had not informed the Department of Health and Social Security that she had left the Women's Aid refuge but she said that she had then given her husband the order book to return to the local office. She believed that he was making a claim for the whole family and she did not know that anyone was cashing her order book after the first two weeks.

4. The tribunal dismissed the claimant's appeal. They found that there had been an overpayment of £1,789.35 and that it was recoverable because the claimant had failed to disclose the material fact that she had left the Women's Aid refuge and they said that:- "A material fact was involved because no supplementary benefit or income support would have been payable had the Department been aware of the true facts." They referred to section 53 of, and Schedule 7 to, the Social Security Act 1986 and also to R(SB) 54/83.

5. The claimant now appeals out of time against the tribunal's decision with the leave of the Commissioner. An appeal lies to a Commissioner only on a point of law and in my view the claimant's solicitors have failed to identify any point of law whatsoever. Initially the adjudication officer resisted the appeal but, prompted by a direction from a nominated officer, the adjudication officer now concerned with the case submits that the tribunal did err in law in three respects.

6. At the time the adjudication officer made the decision under appeal, section 53 of the Social Security Act 1986 provided, so far as is relevant:-

" (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.

....

(4) Except where regulations otherwise prescribe, an amount shall not be recoverable under sub-section (1) above or regulations under sub-section (3) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review.

...."

From 6 April 1990 there was added (by paragraph 14 of Schedule 3 to the Social Security Act 1989) a new subsection (1A):-

" (1A) Where any such determination as is referred to in subsection (1) above is made on an appeal or review, there shall also be determined in the course of the appeal or review the question whether any, and if so what, amount is recoverable under that subsection by the Secretary of State."

Subsection (4) was also amended but the amendment is not material to this decision.

7. The adjudication officer's first point is that the tribunal failed to record sufficient findings of facts to justify their view that no supplementary benefit or income support would have been payable had the Department been aware of the true facts. I accept that the facts found do not justify the conclusion that the tribunal was not entitled to any benefit. The fact that the claimant had moved from the Women's Aid refuge to the matrimonial home did not necessarily mean that she ceased to be entitled to any supplementary benefit or income support. In view of the provisions of regulation 1A of the Supplementary Benefit (Aggregation) Regulations 1981, it is perhaps unlikely that she would have been entitled to supplementary benefit if she was living with her husband but, if her submission that she was living apart from him (albeit under the same roof) for the first two weeks were accepted, she would have remained entitled to some supplementary benefit for those weeks.

8. However, technically I do not consider that the tribunal erred in law in this respect. Until section 53(1A) was inserted into the 1986 Act, the question of recoverability could be considered separately from the question of review of entitlement to benefit, although section 53(4) made a prior revision on review a prerequisite for consideration of recoverability (unless

there had been a variation on appeal). In this case the claimant had appealed against the decision on the question of recoverability and the question of entitlement was not, strictly speaking, before the tribunal. However, when this case is reconsidered by the tribunal, I suggest that the question of entitlement is put before the tribunal. It would be possible for the tribunal to treat the claimant's appeal as being also an appeal against the review decision on entitlement. Alternatively, the adjudication officer could refer to the tribunal the question whether that review decision should itself be reviewed on the ground that the reviewing adjudication officer was ignorant of, or made a mistake as to, a material fact.

9. The adjudication officer's second point is that there was evidence before the tribunal that from 24 February 1988 the Department knew of the claimant's return to the matrimonial home and therefore, he submits, from that date any overpayment could not be said to have been made in consequence of the claimant's failure to disclose the fact of her return. I reject that submission. In R(SB) 15/87, it was held that information provided by a third party can relieve a claimant of the duty to disclose that information only if the third party provided the information on behalf of the claimant (see paragraph 29). The information provided by the Womens Aid refuge in this case cannot be said to have been provided on behalf of this claimant.

10. However, the third of the adjudication officer's points has far more substance.

"It is my submission that crucial to this case is the question of who had possession of and cashed the order book. The claimant gave evidence that after the first 2 weeks back at the marital home she handed the order book to her husband for posting back to the local office. I would submit that it was incumbent on the tribunal to establish whether the claimant had cashed the order book during the full period of the overpayment."

I agree. If the claimant intended to stop claiming and her order book was then stolen by her husband who cashed the orders without her knowledge, it cannot be said that payments made when the stolen orders were cashed were in consequence of the claimant's failure to disclose a material fact. It might possibly be argued that there would have been no overpayment if there had been disclosure of the material facts because it could be suggested that a "stop notice" would then have been issued. However, the failure to disclose would still not have been an effective cause of the overpayment; it would have been causa sine qua non but not causa causans.

11. Therefore, although the tribunal obviously approached this case with some care, it is my view that they erred in law. They clearly did not appreciate the significance of the claimant's

evidence that her husband had cashed her order book without her knowledge. The case must now be considered by a differently constituted tribunal who must make it clear whether or not they accept that evidence.

(Signed) M. Rowland
Commissioner

(Date) 28 April 1994