Bulkeley 107

[Sitting]

CIS 170 2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. The claimant and appellant (Mrs S) is appealing with my permission against the decision of the Sutton appeal tribunal on 15 April 2002 under reference U 45 176 2001 02274

2 For the reasons below, the decision of the tribunal is wrong in law. I set it aside. The decision of the Secretary of State is also wrong in law, but I refer that to a new tribunal to reconsider.

3 There was an oral hearing of this appeal on 8 June 2004 in London. Mr P Stagg of counsel, instructed by Flack and Co, solicitors, represented Mrs S. The Secretary of State was represented by Mr J Auburn of counsel, instructed by the Office of the Solicitor to the Department for Work and Pensions.

4 DIRECTIONS FOR REHEARING

A The appeal is referred to a new appeal tribunal for a full rehearing in accordance with this decision.

B The rehearing is to be by a tribunal not including any member of the previous tribunal.

C The tribunal will conduct an oral hearing.

D The Secretary of State should be represented at the oral hearing.

E I direct the Secretary of State to produce to the tribunal all available evidence about the income support decision in 1991 and any subsequent decision affected by this appeal, including all available claim forms, notes of interviews or other indications of communications between the claimant and the Department and its officers. The tribunal is also to be provided with a corrected statement of facts and a new submission about the decisions under appeal. That submission and evidence is to be supplied to the tribunal, with copies to the claimant and representative, within one month of issue of this decision.

F Subject to a direction by a district chairman, this case is not to be listed until the claimant has received and has had an adequate period of notice of the new submission and evidence from the Secretary of State.

REASONS FOR THIS DECISION

The decisions under appeal

5 The purpose of the decision under appeal is that Mrs S, now 70, pay back £3809.71 overpaid income support received between 7 April 1997 and 24 December 2000. This was said to be because she had not told the local social security office that she was receiving an occupational pension from the National Health Service. Her daughter protested strongly on her behalf that her mother had not been well for a long time, that the local social security office had sent someone to see her each time she needed to claim, and that she had told them of the pension.

6 The decision on 19 April 2001 was that the award of income support on 18 June 1991 was superseded because there had been an unidentified change of circumstances, that as a result she had been overpaid the amount noted above, and that the overpayment was recoverable because of a failure to disclose the occupational pension.

7 When the case came before the appeal tribunal, the tribunal noted that the decision could not properly be a supersession decision based on a change of circumstances because the occupational pension was in payment from October 1980. It also decided that the period of overpayment was wrong. This was because the Department became aware of the overpayment in September 2000, not December 2000, so could not require an overpayment for the end of the period claimed. However, it dealt with the matter by a decision that states:

> "Appeal is disallowed – *but amount of overpayment is to be recalculated – see below.* The decision of the Secretary of state issued on 19/4/2001 is confirmed *(as revised – see below).*"

The words in italics are handwritten, the rest being typed. A brief statement on the decision notice fails to indicate how or why the decision was revised but explains how and why the overpayment is to be reduced.

8 Both parties at the oral hearing agreed that the decision of the tribunal was inadequate. They also agreed that it should be set aside without further argument or full reasons on my part. Even if the tribunal had been correct in replacing the supersession with a revision, it had not identified how or why it had done so. It also revised the wrong decision. It should have revised the 1991 decision not the 2001 decision. The parties disagreed on just about every other aspect of the case. Three disputed issues were identified by Mr Stagg before the hearing:

- did the claimant in fact disclose her pension to the Benefits Agency?
- was her capacity to disclose limited?
- what was the right approach to take over the question of revision and supersession?

Two other issues emerged during the hearing. How is a tribunal to approach changing the basis of a decision of the Secretary of State in an overpayment case? This is linked to the first issue. Was the tribunal right to reduce the overpayment? This is linked to the third issue. During the hearing it became clear that the issue of capacity did not need to be taken further. It had not previously been raised by Mrs S or those representing her and the tribunal was not in error in not dealing with the matter. But the new tribunal may need to consider it if raised at the rehearing.

The proper form of decision

9 In an overpayment case a full decision must include or identify:
(a) a decision to meet the requirements of section 71(5A) of the Social Security Administration Act 1992,
(b) a decision identifying the period and amount of overpayment, and
(c) a decision whether the overpayment or any part of it is recoverable.
These separate issues have been conflated in this case and it is necessary to unpick them.

10 There must first be the decision required by section 71(5A) of the Social Security Administration Act 1992. Section 71(5A), read with sections 8 to 10 of the Social Security Act 1998, requires that:

> "an amount shall not be recoverable under subsection (1) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10. "

11 In this case there cannot be a supersession of the 1991 decision based on the change of circumstances that the claimant was now receiving an occupational pension. The decision maker in 2001 has confused the grounds for altering the original award with the grounds for claiming recovery of the overpayment. The failure to disclose in 1997 may be a basis for a decision on recoverability but it cannot also be a basis for a decision on entitlement. The pension was in payment in 1980 and the failure to disclose (if there was one) does not alter that.

12 On these facts, the only ground for altering the 1991 decision is ignorance of, or a mistake as to, the fact of the payment of the pension when the award was made. This presents the Secretary of State with two, and only two, possible approaches under the decision making structure introduced by the Social Security Act 1998. First, there can be a *revision* of the original decision(s) awarding income support. This is made under section 9 of the Act and regulation 3(5)(b) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999. That decision takes effect from the date of the decision revised: section 9(3). In this case that is in 1991. Alternatively, there can be a *supersession* of the decision(s) awarding income support. This is made under section 10 of the Act and regulation 6(2)(b)(i) of the Regulations 1999. That decision takes effect from the date of the superseding decision: section 10(5). In this case that is in 2001. There is no middle ground. In particular, there is no legal basis for a decision taking effect only from 1997. The effect in this case is that the Secretary of State must be able to revise entitlement from 1991 if the overpayment in 1997 is to be recovered. A supersession decision in 2001 cannot be used as a basis for recoverability of overpayments before 2001. It is too late.

13 It is clear since the Tribunal of Commissioners decision in CIB 4751 2002 that the tribunal has power to replace the faulty supersession decision of the Secretary of State with a revision decision or a corrected supersession decision. That is what it tried to do. Mr Stagg argued strongly that it had failed to do this properly because of section 71(5A). Mr Auburn argued that the error was technical, and that I should replace the decision of the tribunal with a decision in the following terms:

The decision of 18 June 1991 awarding income support, and any and all subsequent decisions pursuant to that by which payments were made, to 24 December 2004, were given in ignorance of the material fact of the claimant's receipt of an occupational pension. As a result these decisions were more advantageous than they would otherwise have been and are therefore revised to take account of that occupational pension, and in particular as shown in the schedule in respect of the period 7 April 1997 to 24 December 2000.

14 Since the hearing in this case Commissioner Bano has issued decision CIS 3228 2003. In that case an income support claimant failed to disclose a fostering allowance. However, that appeal concerned only the overpayment decision, as the decision reducing entitlement was taken at a separate time and not appealed. It was established, in a conclusive certificate the use of which was strongly criticised by the Commissioner but the content of which was accepted for the purposes of the appeal, that the original award decision had been revised, although the revision was termed a supersession. The Commissioner nonetheless concluded that the decision could not be used as the basis for an overpayment decision for two reasons.

15 His first reason (in paragraph 19) was that "for the purposes of section 71(5A) of the Administration Act, a revision decision, or decisions, must relate to each decision under which benefit was paid during the overpayment period. " The Commissioner cited Commissioner Mesher in CIS 764 2002 (a case to which I was also referred), himself citing *Chief Adjudication Officer v Eggleton*, R(IS) 23/95. The Commissioner records that the secretary of state's representative in that case accepted that there must have been more than one award. That being so, the Commissioner concluded that the supersession/revision decision had not satisfied the conditions of section 71(5A), as those other awards had not been identified.

16 I fully agree with and follow that analysis and those decisions. They are directly relevant here. It was accepted that there must have been at least one further award of income support when Mrs S was 60 (which occurred in 1993). It was suggested that there would have been another one when a disability premium became payable. There is no mention of such decisions anywhere in the submissions to the tribunal. The general wording offered by counsel for the Secretary of State effectively admits that the detail is as yet unknown. It is not even known if the decision of 1991 had any continuing effect in 1997 or 2000. I reject the attempt to avoid the statutory requirement by the vague wording of counsel's suggested decision. Section 71(5A) cannot be whitewashed out in that way.

17 The Commissioner also criticised the decision under appeal in CIS 3228 2003 because:

> "it did not set out the revised amounts of benefit to which the claimant is entitled for each benefit period. I consider that a decision awarding a claimant benefit of a stated amount can only be effectively revised if it is replaced by a new decision which also specifies the amount of benefit (if any) to which the claimant is entitled, in the light of the fact which was not taken into account when the original decision was made. A revision decision to the effect that an earlier decision awarding benefit of a specified amount has been "revised", but which does not state the amount of the revised entitlement is in my judgment inchoate. If a revision (or supersession) decision resulting in an overpayment is made separately from a recovery decision, it will therefore be

necessary for the claimant's revised benefit entitlement to be calculated as part of the revision decision before a valid overpayment recoverability decision can be made under section 71(1)."

18 This was the central thrust of the argument put for Mrs S in this case. Mr Stagg submitted that it would be necessary to identify the relevant dates of decision, the benefit and the levels of amounts of payment, and the period or periods of payment. I agree with that and adopt the reasoning from CIS 3228 2003 as the basis for accepting that submission. In this case the Secretary of State and the tribunal fell far short of providing the necessary level of detail in both variants of the decisions taken. That is problematic if a revision from 1991 is to be achieved. There is nothing in the papers to indicate Mrs S's award or entitlement between 1991 and 1997. It is likely on the few facts that there are that she would have some entitlement between 1991 and 1993 because it was then that her retirement pension probably started (although that is also not known), but she may of course have been receiving some relevant benefit other than income support. We do not know.

19 There is a third reason for the tribunal (and Secretary of State) to take the decision required by section 71(5A) carefully. It is clear from the papers that Mrs S was claiming housing benefit and council tax benefit. As Mr Stagg submitted, a change to her entitlement to income support is more than likely to change her entitlement to those benefits because of regulation 67 of the Housing Benefit (General) Regulations 1987 (and the council tax benefit equivalent). It is therefore additionally important that the tribunal does not use loose language as it may place Mrs S and the local authority in difficulties. That is a further reason for rejecting the general approach suggested by Mr Auburn.

20 It must follow that, even assuming that it accepted that Mrs S did not disclose her pension, the tribunal was wrong to take a revision decision as it did. It did not have the necessary evidence before it to do so. Neither party was present, so it could only rely on the papers. The 1991 decision was not in the papers. It knew nothing about it apart from the date and the fact that income support was awarded. It is entirely possible, if Mrs S's family are right, that at that stage the Department was not ignorant of her pension. And the tribunal had no evidence that they were wrong. It knew nothing of what happened when Mrs S became 60 and (whether then or later) her retirement pension became payable. The only thing the tribunal did know was that in April 1997 Mrs S did not mention her occupational pension as a regular payment, and the income support level she was paid did not take it into account from that date. That might justify a supersession decision. It does not justify a revision decision from 1991.

21 What should the tribunal have done? It could do one of only two things. It could decide the matter on the information in front of it, or it could adjourn for further information. In the light of CIB 4751 2002 this is not the sort of case that should have been thrown out by the tribunal without further consideration.

22 If the tribunal decided the matter on the information in front of it, it had a problem. It could not revise the matter because the Secretary of State failed to provide it with the evidence before it on which to do so. There was no presenting officer or claimant present. And it should not guess which, with due respect to the tribunal, is what it did. This is not simply a matter of looking at the evidence of a

decision or decisions that had gone missing and then acting as best it could. In this case it did not know, or ask, what evidence was available. It should have done so if it was minded to revise. While the tribunal had the power to replace a supersession with a revision, it needed the evidence on which to do so and it needed to put the parties on notice if they are adversely affected by a change. Neither happened here. The only decision that the tribunal could properly take was to correct the supersession decision. That would, however, operate only from 2001. If it acted on that basis it should then have discharged the overpayment and recoverability decisions as the conditions in section 71(5A) were not met.

23 If the tribunal wanted to make a revision decision rather than a supersession decision, then it had to adjourn to ask for the available details. The tribunal does not need the actual decisions, but it does need to be aware of the available evidence. And it is for the Secretary of State to produce that evidence. That has not been affected by the 1998 Act's complexities. Both parties accepted before me that it is clear law that a decision maker must act on the evidence available. When the decision is taken by the Secretary of State that should present a limited problem. The decision maker has access to the computers and files. A tribunal does not have that access. Before it takes a decision that involves knowing about earlier decisions it needs to ensure that it has the available evidence from the Secretary of State, or at least it must ask the parties about it.

24 In this case the tribunal did not have that information and could not therefore take a revision decision at that hearing. It should either have taken a supersession decision, discharging the overpayment and recoverability decisions, or adjourned, directing production of the available evidence and putting the parties on notice.

25 It may be that when the files are checked properly it is found that there is an operative decision since 1991 and that the decision necessary to meet the requirements of section 71(5A) can be based on that later decision. That is for the Secretary of State to establish and, if raised, for the new tribunal to consider.

Other issues

26 Several other issues were raised during the hearing. This case has to go back to a new tribunal and it will need to consider each of the points put in issue including, if it is raised, any issues of capacity. I comment on two matters only because of an error in the statement of facts that led the last tribunal also to make an error, and because of the lack of evidence.

The Generalised Matching Service result sheet

27 There is a poor photocopy in the papers of a "Generalised Matching Service Result Sheet" (GMS for short), the only intelligible parts of which show that on a match date of 12 September 2000 the claimant was receiving income support, housing benefit and council tax benefit, reduced by an income support overpayment deduction. The rest of the form is, to me, meaningless code. This is the only information available to the tribunal and to me about Mrs S's claims, awards and disclosures other than the claim form of 1997 and subsequent information. There is no evidence indicating whether her pension had or had not been disclosed to the

Benefits Agency before 1997, but clear evidence that it was not disclosed in the form in April 1997.

27 What did the GMS sheet tell the Department? According to the submission to the tribunal (Facts of the Case: 2 on document 3):

> "On 12.9.00 information was received from the GMS which indicated that Mrs S was in receipt of an occupational pension".

I asked counsel for the Secretary of State to show me how that was derived from the GMS sheet. After consulting his client he told me that the statement "Result MUA10 Reason 8" translates into English as an indication that at some time in the past Mrs S paid contracted out National Insurance contributions. That suggested that she was probably also paying contributions to an occupational or private pension. I asked him for the evidence to support the specific statement of fact made to the tribunal on the basis of that information. He eventually accepted that there was no evidence of that fact. It had been a guess. But it was a guess that misled the tribunal. The tribunal (correctly on the "facts") took the view that the Secretary of State knew of the pension on the match date. That is why it reduced the overpayment. We now know that he did not, and that this is not a reason to reduce the overpayment.

28 The only deduction that can properly be made from the fact that Mrs S had at some time paid those contributions is that she might be able at some time (past or, given her age, future) to claim an occupational pension because of those contributions. While that obviously justified Departmental enquiry, it did not justify the statement of fact made to the tribunal. I record my strong criticism that the tribunal was misled in this way. But perhaps it came about for the same reason that the tribunal was misled - because no one involved in the decision making understood the GMS sheet.

29 It is clear from this and other cases that the Department's Generalised Matching Service is now a powerful tool for ensuring that there is cross-checking not just within the Department for Work and Pensions but between it and several other government departments and also with local authorities (in the guise of the Housing Benefit Matching Service). Evidence obtained from the GMS or HBMS is obviously important in a case such as this. But the evidence must be explained properly to the claimant and to the tribunal. At present the problems are the same as those commented on in CDLA 2115 2003. I adopt the criticism of the Commissioner in that case of the use of unexplained codes "that there is a real risk of unfairness if matters which are relevant to an appeal are recorded and communicated to a claimant by means of internal Departmental codes without any explanation of what the codes mean." The new tribunal should note the limited information actually derived from the GMS in this case. It might also consider why the GMS shows that there was an overpayment being collected from the claimant on the match date. There is nothing in the papers about that, but it might be relevant, as it suggests that other entitlement and overpayment decisions have been made of which it also knows nothing.

What evidence is necessary for the new hearing?

30 The Secretary of State has based the original decision on a failure to disclose the occupational pension. The only evidence about that is the claim form from 1997. For Mrs S it has been contended that she had disclosed the pension on the various visits that visiting officers made to her. No attempt has yet been made by the

Secretary of State to answer that case by production of any evidence about Mrs S's income support claims and awards before the 1997 claim form was completed. The burden of proof is on the Secretary of State to establish the failure, and that must be done in the light of the *Hinchy* decision. The tribunal will want to see the 1991 and any other claim forms, any evidence from the decisions in 1991 and later and any reports from visiting officers. It may wish to check whether the information was made available in connection with other benefits.

31 At the rehearing the new tribunal will need to decide if it is to revise or supersede the 1991 decision and any other decision of which it is given notice. The tribunal will need at least some of the evidence just mentioned if it is properly to revise the 1991 decision. That is also for the Secretary of State to produce.

32 In the light of the above, it is clearly necessary for the Secretary of State to produce considerably more evidence and probably also a new submission if the new tribunal is asked to revise the 1991 decision and also to deal with the answer given for Mrs S to the overpayment and recoverability decisions. It is for the Secretary of State to make that case. I make a direction to the Secretary of State above to deal with that issue. If the Secretary of State fails to provide the relevant details, then the tribunal may be unable to make a revision decision. If so, it should make a supersession decision from 2001 and discharge the overpayment and recoverability decisions.

David Williams
Commissioner

22 June 2004

[Signed on the original on the date shown]