

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the social security appeal tribunal in this matter given on 13 March 1990 was not erroneous in law. I accordingly dismiss the claimant's appeal.

2. The claimant is a married man with a family. He had since December 1987 been in receipt of supplementary benefit and then income support. He made a claim for sickness benefit, and on 24 May 1989 received a lump sum of £257.45 for sickness benefit for the period 25 March 1989 - 24 May 1989. Sickness benefit continued to be paid to him. The first reference by the claimant to the Department about his receipt of sickness benefit was in the weekly statement for income support completed by him and received by the Department on 13 June 1989. For some time afterwards the Department continued - erroneously - to pay income support without regard to the sickness benefit, which was money properly to be taken into account in the computation of the claimant's income support entitlement. A further amount of £58.40 of income support was alleged to have been overpaid and to be recoverable by the Secretary of State.

3. Before the social security appeal tribunal the Secretary of State failed to establish his entitlement to recover the £58.40. The tribunal however held that an amount of £257.45 of overpaid income support was recoverable from the claimant under section 27 Social Security Act 1986, and the claimant has appealed to a Commissioner.

4. Section 27(1) is as follows -

"(1) Where

- (a) payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and
- (b) it is determined that an amount which has been paid by way of income support would not have been

paid if the amount had been made on the prescribed date,

the Secretary of State shall be entitled to recover that amount from the person to whom it was paid."

I also set out subsection (2), which is as follows -

"(2) Where -

- (a) a prescribed payment which apart from this subsection falls to be made from public funds in the United Kingdom or under the law of any other member State is not made on or before the date which is the prescribed date in relation to the payment; and
- (b) it is determined that an amount ("the relevant amount") has been paid by way of income support that would not have been paid if the payment mentioned in paragraph (a) above had been made on the prescribed date,

then -

- (i) in the case of a payment from public funds in the United Kingdom, the authority responsible for making it may abate it by the relevant amount; and
- (ii) in the case of any other payment, the Secretary of State shall be entitled to receive the relevant amount out of the payment".

5. The submissions of the claimant's representative are contained in a letter dated 24 April 1990 to the chairman of the tribunal seeking leave to appeal to a Commissioner; leave was granted. The letter pointed out that the claimant was in receipt of both sickness benefit and income support after the declaration he had made. The letter then continued -

"We therefore argued at the tribunal that it could not be determined that Income Support would not have been paid, because in fact it continued to be paid even when Sickness Benefit was paid at the prescribed time.

The tribunal's interpretation of the regulation would make sense if the wording of the regulation stated "that an amount was paid [of] Income Support which should not have been paid". [original underlining]. However the wording of the regulation is not conditional, in plain English it states that if Income Support was paid, which would not have been paid if Sickness Benefit had been paid at the prescribed time, then the Income Support should be abated from further benefit.

The continuing payment of Income Support even when Sickness Benefit was paid at the prescribed time and there had been full disclosure of [the claimant and his wife's] resources is evidence that it can not be determined that Income Support would not have been paid, because it continued to be paid." [original underlining].

6. The purpose of section 27 is the "Prevention of duplication of payments", as the side note to the section indicates. It provides for that in three different ways, in sub sections (1), (2) and (3), depending upon, the factual situation being dealt with. (Section 27(1) itself derives from section 12(1A) of the Supplementary Benefits Act 1976 as inserted by the Social Security Act 1980, considered in by way of example in decision R(SB)28/85). Section 27(1) deals with the situation where the income in question is paid after income support has been paid. Section 27(2) deals with the converse situation, namely where the payment of the income in question "falls to be made" after income support has been paid.

7. The position under subsection (2) is thus that where overpayment of income support is ascertained before the payment of the other income is made then the payment of the other income itself is abated; there is thus in these circumstances no question of the relevance of administrative machinery beyond the payment of the income support, and the trigger for the operation of subsection (2) is the establishing of entitlement to the other income. The provisions of section 27 as a whole must be construed together and if administrative error is irrelevant as to section 27(2) then some clear change of sense will be required to make it relevant in my judgment for section 27(1). I see no such change of sense in the statutory language. The short point is that administrative error is in my judgment irrelevant in relation to section 27(1). The words "would not have been paid" in subsection (1)(b) import in my view both the establishment of entitlement to the amount of income support and also its payment, and are wholly compatible with the words "falls to be made" in subsection (2), which also point to the relevance of the establishment of entitlement.

8. There is I think also a further point, one to which the adjudication officer in his submission to a Commissioner referred. The fact that administrative error led to overpayment after the Department had been informed of the receipt of sickness benefit does not evidentially establish that at some earlier date the same error would have been committed. It may or it may not. No finding on that point could in my judgment sensibly be made. However, the point is as I have said irrelevant.

(Signed) Leonard Bromley
Deputy Commissioner

(Date) 9 March 1992