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SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. My decision is that the decision of the social security appeal tribunal is erroneous in point of law and accordingly I set it aside; I remit the case for determination to a new social security appeal tribunal who should have regard to what I have said in the course of this decision.

2. I held an oral hearing of this appeal. Mr R. English of the Cleveland Welfare Rights Service represented the claimant and Mr J. Heath from the Solicitor's Office in the Department of Social Security was for the adjudication officer.

3. This is a claimant's appeal against the decision of the Cleveland social security appeal tribunal given on 23 May 1990 which decided that an overpayment of supplementary benefit followed by income support had been made to him. There is uncertainty as to whom the Secretary of State can recover from.

4. It is common case before me that the decision of the tribunal is erroneous in law. It is fair to say that the members of the tribunal were led into error by the submission made to them by the adjudication officer.

5. The claimant is a married man and all material times was living with his wife. He was in receipt of supplementary benefit followed by income support for many years. His wife had been working since 1986. Her employers confirmed that she normally worked six nights per week, for two hours each night, and that she was paid fortnightly into a bank account held at Lloyds Bank. Both the claimant and his wife were interviewed. The claimant denied he had any knowledge that his wife was working and she said that she did not tell her husband about her work. The adjudication officer by a review decision made on 22 February 1990 reviewed each of the decisions dated from 31 May 1986 to 15 March 1989 of the earlier adjudication officer awarding supplementary benefit/income support from and including

19 July 1986. His revised decision for that period was that supplementary benefit and income support should be reduced on account of the wife's earnings. And he decided that an overpayment of supplementary benefit/income support had been made amounting to £3,482.49. He further decided that on 18 July 1986 or as soon as practicable thereafter the wife failed to disclose the material fact that she was in receipt of part-time earnings and accordingly supplementary benefit/income support amounting to £3,482.49 was recoverable from the wife. There are three points to be noted about the adjudication officer's decision; first the recovery was based on the wife's failure to disclose as distinct from misrepresentation, second the failure was that of the wife and third the amount overpaid was recoverable from her as distinct from the claimant. On 1 March 1990 a letter was written to the claimant telling him that the adjudication officer had decided supplementary benefit and income support had been overpaid to him and that this sum was recoverable from him. He was sent what purported to be a copy of the adjudication officer's decision. It is the decision which relates to recovery from the wife but the copy was altered to read that she had misrepresented a material fact and not that she had failed to disclose a material fact; it is clear from the original decision that the adjudication officer found she had failed to disclose a material fact. The letter itself was misleading in that it suggests that the adjudication officer decided that the overpayment was recoverable from the claimant. It does not appear from the case papers that the wife had been sent a copy of the decision or advised of her right to appeal against it.

6. The husband appealed to the tribunal and he, of course, had a right of appeal by virtue of section 100(1) of the Social Security Act 1975 as he was the claimant. The wife had a right of appeal by virtue of the provisions of sub-section (7) of the same section. The issues which arose as a result of the adjudication officer's decision, in so far as the claimant was concerned, was whether an overpayment of supplementary benefit/income support had been made to him or whether he was entitled to the amounts which he received. In other words what his entitlement was. That question turned on whether or not the wife had been engaged in paid employment during the relevant period. There was a further question, namely whether the Secretary of State was entitled to recover from the wife under the provisions of section 53 of the Social Security Act 1986 as determined by the adjudication officer. It appears to me that this was an issue in the claimant's appeal. Section 53(8) of the Social Security Act 1986 provides that any paid in respect of a married or unmarried couple is recoverable by deduction from prescribed benefits payable to either of them in such circumstances as may be prescribed. The benefits from which such deduction may be made and the circumstances are prescribed by regulation 17 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations. The regulation reads as follows:

"In the case of an overpayment of income support or family credit to one of a married or unmarried couple, the amount

recoverable by deduction, in accordance with regulation 15, may be recovered by deduction from income support or family credit payable to either of them, provided that the two of them are a married or unmarried couple at the date of the deduction."

Consequently the claimant was in danger of having an overpayment recoverable from his wife deducted from his income support, provided he and she continued to be married and were members of the same household. Section 20 of the Social Security Act 1986 defines a married couple as meaning a man and woman who are married to each other and are members of the same household. In my judgment the claimant was entitled to have the issue as to whether the overpayment was recoverable from his wife determined in his appeal. These were the questions before the tribunal.

7. The adjudication officer in his submission to the tribunal posed another question for their consideration. He submitted that the claimant also misrepresented a material fact. It was alleged that he represented on the forms UB26T/V, when he registered each fortnight at the unemployment office, that there had been no change in the circumstances of his dependants. The tribunal found as fact that there had been an overpayment of supplementary benefit/income support and that on 18 July 1986 or as soon as practicable thereafter the claimant misrepresented a material fact. His appeal was dismissed. In the reasons for their decision the tribunal stated that, although they had not seen the claimant's wife, they considered all that was said of her in the AT2 and associated papers. They found that the claimant was an articulate man and fully aware of his responsibilities and they found it impossible to believe that he did not know that his wife was working. They then went on to consider the question of whether she had kept that fact hidden from her husband and on the balance of probabilities they found that the claimant was aware of what happened. The tribunal held that there had been both misrepresentation and a failure to disclose a material fact but they did not set aside the decision of the adjudication officer. They did not say from whom the overpayment was recoverable. The decision is ambiguous. It would appear that they accepted that the wife failed to disclose the material fact and that the overpayment was recoverable from her and that the husband misrepresented the material fact and that the overpayment was recoverable from him.

8. Initially I formed the view that it was not open to the tribunal to decide the issue of recovery from the claimant because of his misrepresentation as a new question first arising from the appeal before them. However that question does not appear to me now as it did then. It seems to me that in law it was a question which first arose on the appeal and by virtue of section 102 the tribunal were competent to determine it, provided the claimant was given adequate notice of the question and care was taken to explain that it was a new issue. Section 102 is to have effect for the purposes of income support by virtue of section 52(3) of the Social Security Act 1986. However a tribunal should not exercise the discretion to deal with the new

question unless it is fair to the parties to do so and fairness turns on the claimant being given an adequate explanation of the issue. Despite what was said in the adjudication officer's submission to the tribunal, it does not appear to me that, in view of the misleading information which had been given to the claimant in the letter from the Department, it was a proper case in which to exercise the discretion to deal with the new question unless the issues had been analysed and fully explained to the claimant. In the circumstances of this case it would be unlikely that a tribunal would exercise the discretion in order to take on board the new question. The tribunal, whose decision is appealed against, did not address their mind to the exercise of the discretion and simply went on to deal with the new question.

9. There is a further point. The tribunal have not clearly stated whether the overpayment is recoverable from the claimant or his wife. Again it does not appear that the wife was informed of her right of appeal against the adjudication officer's decision. Notice was given to the claimant in the letter dated 1 March 1990 of his right of appeal. It may be that the claimant's wife neither appealed or desired to do so. But the new tribunal should ascertain whether she was given an opportunity to appeal before they determine that any overpayment is recoverable from her by the Secretary of State.

10. The new tribunal will have to determine the matter afresh. It is a question for them as to whether they will take on board the new question, the allegation that the overpayment is recoverable from the claimant by virtue of his misrepresenting a material fact. They should remember that this is within their discretion and, while I do not fetter the exercise of such discretion, I remind them of what I have said about the need for fairness. If they decide the issue of misrepresentation, then I remind them that such misrepresentation can be wholly innocent but it would be important for them to consider what material fact has been misrepresented by the signing of form UB26T/V.

(Signed) J J Skinner
Commissioner

Date: 9 April 1992