

AWEW/SH/2

Commissioner's File: CIS/457/1990

SOCIAL SECURITY ACT 1986

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This appeal by the claimant does not succeed. For the reasons which follow, the decision of the social security appeal tribunal ("the appeal tribunal") dated 15 May 1990 was not erroneous in law.

2. The decision of the appeal tribunal was a decision, affirming the decision of an adjudication officer on review, that the claimant had been overpaid income support amounting to £2,890.31 from 1 May 1988 to 5 June 1989 and that this sum was recoverable under section 53(1) of the Social Security Act 1986.

3. Section 53(1) reads:-

"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) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,

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

The leading case on the concept of failure to disclose is Commissioner's Decision R(SB) 54/83. That case decided that for

expenditure to be recoverable on this ground it must be shown that -

- (i) the Secretary of State seeking to recover the expenditure is the Secretary of State who incurred it;
- (ii) the person from whom it is sought to recover expenditure knew the material fact;
- (iii) the disclosure by the person in question was reasonably to be expected;
- (iv) there was a failure to disclose;
- (v) the failure related to a material fact;
- (vi) the expenditure by the relevant Secretary of State was incurred "in consequence" of the failure.

4. The facts as found concurrently by the adjudication officer and by the appeal tribunal were that the claimant lived with her two daughters in privately rented property. She had been in receipt of income support since its introduction in April 1988 and prior to that of supplementary benefit. She also received child benefit and one-parent benefit in respect of her children. On 1 May 1988 she started work and, at all times material to this case, continued in work, never working less than 24 hours a week. In November 1988 she also claimed family credit and in due course this was awarded from 6 December 1988. She did not declare in the form that she was receiving income support. A further claim for family credit was received from the claimant on the 25 May 1989. In this claim form she declared that she was in receipt of income support. It was a result of this disclosure that the overpayment of income support came to light.

5. It was also concurrently found that the claimant was interviewed at home on 15 November 1989. During the interview she said that she had telephoned the office when she first started work and had spoken to a young man who had apparently told her that as she was receiving "supplementary benefit" she did not need to claim "family income supplement". She said she was not asked about her hours of work or about her earnings or asked to put anything in writing.

6. Having heard the claimant give evidence, the appeal tribunal made additional findings of fact which included the finding that throughout the relevant period the claimant was in poor health and that her failure to disclose the receipt of income support in making her family credit claim in December 1988 was an oversight on her part. Turning to deal with what they described as a crucial point of fact in the case, namely the alleged telephone call to the Department at Chantry House, the appeal tribunal found that the claimant did in fact make a telephone call of sorts. They went on "she did this when she started working. However, perhaps not surprisingly after this period of

disclosing that she was actually in employment at the time. In my view, they were entitled on the evidence to reach that conclusion. It was entirely a matter for them and, sitting as I am in an appellate capacity with my jurisdiction limited to questions of law, not at all a matter for me. It follows that I regard the claimant's ground of appeal and the submissions thereon to be misconceived and without merit.

10. I cannot leave this matter without touching on the finding by the appeal tribunal that the whole of the overpayment was incurred in consequence of the claimant's failure to disclose that she was in full-time work and not just that part of it relating to the period from 10 May 1988 to 6 December 1989 when family credit was put into payment. As the appeal tribunal put it:-

"This payment of family credit by the Family Credit Centre was notified to the Department and they took no notice of it, even though it is clear that anyone in receipt of family credit by definition cannot be entitled to income support. In spite of this, the Department continued to pay the income support until 6 June 1989. Were the matter not covered by authority, it would therefore be possible to argue that as from 6 December 1988 any other payment was not due primarily to the failure to disclose by the claimant, but rather through failure by the Department to act upon the receipt of the family credit notice. However, the matter is quite simply not free of authority and it is quite clear reading both the Commissioner's decision in R(SB) 15/89 and in particular the judgment of Lord Justice May in the Court of Appeal in that case, that this line of argument is now not open. The facts of that case were similar to the facts of the present case and it is clearly stated by both the Commissioner and the Court of Appeal that the fact that the Department may have neglected to act on advice does not mean that the original failure to disclose cannot still be operative and relied upon by the Department in order to recover the money. We considered this matter at some length and with some care and considered that there was no way in which we could distinguish this Commissioner's decision by which we are bound. We are therefore unable to find that the initial failure to disclose ceased in December 1988 and therefore regretfully have to find that the whole amount for the entire period of 1 May 1988, 5 June 1989 is recoverable from the claimant."

11. I have not had the advantage of any submission on this part of the case by the claimant's representative, but, in my view, the appeal tribunal's decision on this point was correct. They were right in holding that they were bound by the decision of the Court of Appeal in R(SB) 13/89 and that this was a decision in a case on all fours with the present case. If the position had been that the claimant had disclosed in her first family credit application that she was in receipt of income support, different considerations would have applied, but the appeal tribunal found that she did not disclose this fact until she had lodged her

second application for income support in May 1989.

12. In the result my decision is that this appeal fails and is dismissed and the decision of the appeal tribunal is affirmed.

(Signed) A.W.E. Wheeler
Commissioner

(Date) 8 April 1992