

WMW/HJD

Commissioner's File: CSU/3/91

SOCIAL SECURITY ACTS 1975 - 1990

APPEAL TO THE COMMISSIONER FROM A DECISION OF A SOCIAL SECURITY APPEAL TRIBUNAL UPON A QUESTION OF LAW

DECISION OF SOCIAL SECURITY COMMISSIONER

[ORAL HEARING]

1. I hold the decision of the Galashiels Social Security Appeal Tribunal held on 12 October 1990 to be erroneous in point of law. Accordingly I set it aside. Because I think it appropriate so to do I proceed to give the decision which I consider the tribunal should have given - section 101(5)(a)(i) of the Social Security Act 1975.

2. That decision is to allow the claimant's appeal from a decision of an adjudication officer issued on 13 July 1990 and to substitute for that decision this -

"Each of the decisions of the adjudication officer awarding unemployment benefit from 10.4.89 to 11.5.89 and 25.5.89 to 29.7.89 (all dates included) are reviewable in terms of section 104 of the Social Security Act 1975. That is because such decisions were either based on a mistake as to a material fact (104(1)(a)) or they were erroneous in law (104(1A)). [This imprecision is explained in paragraphs 11, 12 and 13 below]. The scope for and the result of the review is the same namely that the claimant was entitled to unemployment benefit for the said periods at a reduced rate only, all as detailed in said decision issued on 13 July 1990. But because the conditions set out in section 53(1) of the Social Security Act 1986 are not established the consequential overpayment during said periods, of some £463.25, is not recoverable by the Secretary of State."

3. This case came before me by way of an oral hearing at which the claimant was represented by Mr T W Peel of the Roxburgh District Citizens' Advice Bureau and the adjudication officer by Mr David Cassidy, Solicitor, of the Office of the Solicitor in Scotland to the Department of Social Security. I am indebted to both for their assistance.

4. The relevant facts were not in dispute before me. They were adequately recorded by the tribunal as follows -

"1. The appellant registered for Unemployment Benefit on 6.4.89 and declared that he was in receipt of an Occupational Pension at the rate of £73.00 per week, on the claim form UB461.

2. On 11.4.89, the appellant completed a form UB81 (PEN) giving his pension details as £293.75 per year in answer to Question 2 on that

form. In Answer to Question 3, he indicated that the pension was paid monthly.

3. The Benefit Office calculated the appellant's pension on the basis that he was paid £293.75 per year and was paid Unemployment Benefit on the basis of this calculation.

4. The appellant again registered for unemployment on 2.5.90 when his job ended and he declared that he was receiving an Occupational Pension of £350.00 per month and in subsequent UB81 (PEN) form, appellant showed his Occupational Pension as £4,257.00 per annum. As a result of this the error in the UB81 form completed on 11.4.89 was discovered.

5. When the appellant's wife completed UB81, they had intended to indicate that the appellant was paid £293.75 monthly but had mistakenly entered that figure in answer to the question as to the annual pension."

The majority decision by the tribunal was to refuse the appeal.

5. The adjudication officer's decision had been to review the awarding decisions for the periods set out in paragraph 2 above, to calculate the overpayment that had resulted from the original awards being based upon what was, on any view, then properly found to have been an incorrect assessment of the claimant's rate of occupational pension and to declare the total to be recoverable.

6. No question arose or now arises as to the propriety of the review and so section 53(4) of the Social Security Act 1986 was satisfied. That section, by sub-section (1) confers an entitlement on the Secretary of State to recover any such overpayment if it has been caused by either a misrepresentation of, or a failure to disclose, a material fact. The adjudication officer's decision proceeded upon the basis that the original awarding decisions "... were given in ignorance of a material fact. This was that the rate of occupational pension paid to Mr D H Mulview [sic] by his former employer was understated." But then the executive part of the decision proceeds upon the basis that Mr Mulvie "... misrepresented the material fact that his annual rate of occupational pension was £293.75." At least superficially there appears a contradiction.

7. The tribunal explained their majority decision as based upon -

"... the failure to disclose a material fact, namely the actual pension that the appellant was receiving in relation to his claim made on 6.4.89 following completion of the UB81 form on 11.4.89, the appellant had made a mistake in completing the UB81 form which he had signed indicating that the information on that form was, to the best of his knowledge correct. The Department was entitled to rely on the information in that form, notwithstanding that there was different information in the claim form which was correct."

8. Mr Peel's argument in favour of the claimant was a very simple, but powerful, one. Within the same procedure relating to a claim two related forms had had put on them mutually conflicting information about the occupational pension. The earlier form contained the correct information. Whilst it was accepted that, as explained in R(SB) 3/90, there was no duty upon the Department to look back from one claim to an earlier one to check out the accuracy or reliability of information, this was a different case. The two forms herein were both part of the same initial claim procedure. The

earlier form was properly the claim itself. The subsequent form was designed only to elicit in certain circumstances certain further information. In that regard there had clearly been a disclosure of the material fact - the receipt of an occupational pension and its true amount. That having been done there was no obligation to make further disclosure - R(SB) 15/87 paragraphs 26 and 28. At the very least the Department should have considered both forms when determining the claim. Their apparent reliance on the latter form alone showed that they were determining the claim on partial evidence only. That was an improper approach and so was the true cause of the overpayment.

9. Mr Cassidy accepted that the tribunal decision contained an error of law. There could not, he submitted, be a failure to disclose a material fact given the contents of the claim form. A question was later considered as to whether given full disclosure of a material fact there could then in law be a misrepresentation of that same fact within the same transaction? The question could have arisen sharply in this case. Without further submissions regarding, for example, the position under the law of insurance, I could not have come to a final view. It is enough to say that it does seem at the least a trifle odd if the latter event could properly be called a "misrepresentation". I am aware that, at least for the purposes of section 53, a misrepresentation may be innocent but there is more to that concept in such a situation, I suspect, than merely an inaccurate statement.

MISREP?

10. But Mr Cassidy based his main submission to me upon a broader, and in my view an accurate, basis. It was that the whole evidence in the case had never been considered by the adjudication officer when determining the claim. It appeared that there had been a partial determination on the basis of the first form - limited to entitlement - and a completing partial determination on the basis of the second form - looking solely to amount. But if at either stage - and so if, overall - there has been a determination on partial evidence that is in breach of the rules of natural justice which require any decision to be based on the whole of the relevant evidence. Such a failure flaws the ultimate decision. I agree.

11. As Mr Cassidy pointed out, however, it is not clear from the present case how that partial determination on partial evidence had come about. The evidence before the tribunal indicated not only that the decision had been reached in two separate steps but also that use of a computer had at least given rise to the possibility that when making the final determination the adjudication officer had not had the whole information before him but only the UB81 (PEN) form and the first part of the decision. Whether that was because the Secretary of State had failed, through his officials, to have the whole evidence put before an adjudication officer at any stage, or because the adjudication officer himself had failed to notice that there was other relevant material in the case than what was then before him can not now be determined.

12. But, as Mr Cassidy also pointed out, the history of this case indicated that the total decision awarding benefit could not properly be determined to have been given "in ignorance of a material fact". That may have been so only if it was the Department which had, at the stage of the final determination failed to put before the adjudication officer the information on the original claim form. But equally the cause of the bad decision could have been the adjudication officer not troubling to seek out the earlier submitted material. Either way a proper approach would have at the least revealed the apparent inconsistency and, indeed, a possible inherent unreliability in the later

material because of the amounts involved. Either way clarification would have been required, either at the hand of the Department or by the adjudication officer.

13. It is for these reasons that it was, and now is, impossible to say whether the true ground for review of the original awarding decisions had been ignorance of a material fact or an error of law. If the "fault" had been that of the adjudication officer then it was the latter: if the fault had been that of the Department it was the former. Either way the result is the same. A review was, and is, warranted and its scope remains the same, namely correction of the amount of benefit in light of the true figure of occupational pension. But the same conflict of cause makes it impossible to affirm ignorance as the ground. That ground alone could have been related to any failure by the claimant. In that situation there can be no question of recovery in terms of section 53(1) of the 1986 Act.

14. The appeal succeeds.

(signed) W M Walker
Commissioner
Date: 23 December 1991