

SUPPLEMENTARY BENEFIT

Overpayments—failure to disclose.

On informing the Unemployment Benefit Office that his wife had started work, the claimant was asked to complete a form and was told that the form would be sent to the Supplementary Benefit Office and his benefit would be adjusted. The form was not sent. Later, the supplementary benefit officer and, on appeal, the tribunal, decided there had been a recoverable overpayment because the claimant had failed to disclose his wife's earnings in person to the Supplementary Benefit Office. The claimant appealed to a Social Security Commissioner.

Held that: -

1. in order to recover expenditure incurred under section 20 of the Supplementary Benefits Act 1976 on the ground of failure to disclose a material fact, it must be shown that:—

- (1) the Secretary of State seeking to recover the expenditure is the Secretary of State who incurred it;
- (2) the person from whom it is sought to recover the expenditure knew the material fact;
- (3) the disclosure by the person in question was reasonably to be expected;
- (4) there was a failure to disclose;
- (5) the failure related to a material fact;
- (6) the expenditure by the relevant Secretary of State was incurred "in consequence of" the failure (paragraph 13);

2. the determining authority cannot be estopped from performing its statutory duty under section 20 of the Supplementary Benefits Act 1976 by anything said or done by the Secretary of State (whether for Employment or Social Services) (paragraph 15);

3. a claimant is under an obligation to take such steps as might reasonably be expected to ensure that material facts reach the supplementary benefit officer charged with the awarding of benefit. But the local Supplementary Benefit Office need not necessarily be informed by the claimant in person if the communication is made in some other way which might reasonably be expected to reach the relevant local office (paragraph 16);

4. if the Unemployment Benefit Office is the agent of the Supplementary Benefit Office to receive notice of change of circumstances from claimants who are signing on for unemployment benefit, then the Supplementary Benefit Office can be taken to know the material fact, under the doctrine of imputed notice, and there can be no failure to disclose. But, even if the Unemployment Benefit Office is not an agent to receive such notice, the claimant will have discharged his obligation of disclosure if he hands the form to that Office in circumstances in which it can reasonably be expected that it will be transmitted to the Supplementary Benefit Office (paragraph 17);

5. the obligation to disclose is a continuing obligation. If, after disclosure has been made, a claimant continues to receive benefit at the existing rate, so that he has reason to suspect his disclosure was ineffective, he must take further, and more effective, steps to make the necessary disclosure (paragraph 18).

The appeal was allowed.

Decision on this appeal

1. My decision is that the decision of the supplementary benefit appeal tribunal ("the SBAT") dated 7 December 1981 is erroneous in point of law. I set it aside and refer the case to another tribunal for determination in accordance with my directions.

The supplementary benefit officer's decision

2. By a decision issued on 14 September 1981 the supplementary benefit

officer decided that the claimant had been overpaid £470.02 and that this sum was recoverable. The claimant appealed against this decision and in his written submission on the appeal the benefit officer stated the facts to be that the claimant had been receiving supplementary benefit because he was unemployed and had been registering for employment since 1978. He lives with his wife and 3 children, a non-dependent son and his mother, in a house which he owns. His wife had been doing part-time work since March 1981. In a statement made by the claimant on 29 February 1980, which was read over to him, the claimant said that his wife was not working and he had not notified the Department of Health and Social Security, at any time since, of her earnings. The claimant did inform the Unemployment Benefit Office on 2 April 1981 that his wife was working but "the Unemployment Benefit Office regrettably did not then follow normal procedure by notifying the Department and lapsing the order-to-pay in issue". The claimant had been interviewed under caution and admitted that he knew he had to notify both Government Departments of changes in his circumstances. In 1979 he had similarly failed to inform the Department that his wife had been working.

Grounds of appeal to the SBAT

3. The claimant's grounds of appeal to the SBAT were that on going to sign on for unemployment benefit, he asked the man (i.e. the unemployment officer) for a form to declare that his wife had started work on the Monday of that week. When the claimant returned the form to the man, he asked the officer should he go to or telephone Lemna Road (i.e. the Supplementary Benefit Office) and his reply was "No, that will be done, by us. Your money will be stopped and reassessed". He told the supplementary benefit officer this. She went and made a telephone call to the Labour Exchange (i.e. the Unemployment Benefit Office), on this the officer said he was lying and to tell the truth. The officer said that there was no form in his file declaring his wife had started work. On the week following he went to the Labour Exchange to ask to see someone. A Mr. P. dealt with him. He told Mr. P. his problem at which Mr. P. produced his file with the form the claimant had filled in in March 1981 and told him it was the Department's (i.e. of Employment's) fault, that this form was not sent to the Supplementary Benefit Office and his money was not stopped the next week. He said he would send the form to that office right away for proof of what he told the officer for which he was accused of lying.

Evidence before the SBAT

4. The chairman's note of evidence before the SBAT states that the Department's officer (presumably the Presenting Officer) explained that the claimant had not reported that his wife was working to the supplementary benefit officer. She explained that the onus to do this was the claimant's. She said that he had been given form UBL18 and signed UB25 to say that he had read the form and understood his duties and rights. She explained that this was the second time this had happened and that the claimant had been interviewed under caution. It was agreed that the claimant had reported the change to the Unemployment Benefit Office. They had confirmed in a telephone conversation that they held a form completed by the claimant. The claimant's representative submitted that since the claimant had reported to the Department of Employment that his wife was working he thought this should be sufficient. The Department of Employment had told the claimant that they would inform the Supplementary Benefit Office on his behalf. The claimant also said that he had a change in his rates at the same time—although he noticed the amount of his allowance had not substantially altered—he thought it was because of this.

The SBAT decision

5. The SBAT found as facts that the claimant had reported that his wife had commenced work to the Department of Employment, that the Department of Employment had agreed that they would report this to the Supplementary Benefit Office but did not do so and that the claimant did not personally report the fact that his wife had started work to the Supplementary Benefit Office. This was the second occasion that this had happened. The SBAT unanimously decided that an overpayment of £470.02 had occurred and was recoverable from the claimant. They stated their reasons to be that they had considered the submissions of the claimant and his representative and accepted the claimant's statement that having reported that his wife had commenced work to the Department of Employment who had agreed to pass his information to the Supplementary Benefit Office, he felt that he had taken sufficient steps to ensure that the change was reported. However, the tribunal noted that this was the second occasion on which an overpayment had occurred because the supplementary benefit officer was not aware that the claimant's wife had commenced work and the tribunal felt that the claimant should have learned the importance of reporting all changes to the correct body from the last occasion. The SBAT also felt that the claimant should have realised that his allowance had not been reassessed and taken steps to inform the Supplementary Benefit Office of the change himself. The tribunal found that the onus of reporting all changes rested with the claimant.

Representation

6. I held an oral hearing of this appeal. The claimant, who did not appear, was represented by Mr. S. O. Agutu, a barrister of the Free Representation Unit. The benefit officer was represented by Miss L. Shuker of the Solicitor's Office, Department of Health and Social Security. I am indebted to them both for their able and persuasive submissions.

The issue in this appeal

7. It is not in dispute that the claimant was overpaid the sum of £470.02 and that the excess payment was made because the supplementary benefit officer was ignorant of the fact that the claimant's wife was working. The question at issue in this appeal is whether, on the facts as found by the local tribunal, section 20(1) of the Supplementary Benefit Act 1976 (as amended) authorises recovery of the overpayment. Section 20(1) provides:

“20.—(1) If, whether fraudulently or otherwise, any person misrepresents, or fails to disclose, any material fact, and in consequence of the misrepresentation or failure—

(a) the Secretary of State incurs any expenditure under this Act; or

(b)

the Secretary of State shall be entitled to recover the amount thereof from that person”.

It has not been suggested that the claimant misrepresented any material fact. The question is whether he failed to disclose the fact, which is admittedly material, that his wife had started work in March 1981. On 2 April 1981 he disclosed that fact to the Department of Employment.

The claimant's arguments

8. On behalf of the claimant, Mr. Agutu made three submissions:

(1) that the claimant did not fail in his duty to disclose;

(2) if he had failed (which was denied) his failure was not the

immediate cause of the overpayment as required by section 20;

- (3) the Department is estopped from recovering that amount: see *Robertson v Minister of Pensions* [1949] 1 K.B. 227.

9. On the first point, Mr. Agutu said that the form for which the claimant asked was form A9 and this was handed to him. He completed the form and handed the completed form to the unemployment benefit officer. The claimant asked him whether he should get in touch with the Supplementary Benefit Office and was told that this was unnecessary because that would be done by the Unemployment Benefit Office and his money would be stopped and reassessed. Regulation 3(2)(a) of the Supplementary Benefit (Claims and Payments) Regulations 1980 provides that:

“(2) A claim for benefit—

- (a) in the case of a claim for an allowance by a claimant required to register for employment pursuant to section 5, shall be delivered or sent (for forwarding to an office of the Department) to the relevant unemployment benefit office,
.....;

Regulation 8 provides:

“(8) Every.....person by whom.....sums payable by way of benefit are receivable shall.....in particular—

- (a) shall notify the Secretary of State in writing of—
 - (i) any change of circumstances which is specified in the notice of determination issued pursuant to regulation 3(1) of the Supplementary Benefits (Determination of Questions) Regulations 1980 or, where applicable, the book of serial orders,
 - (ii)
 as soon as reasonably practicable after the occurrence of that change.....”

Mr. Agutu produced a copy of the notice of determination (Form B3 (ADP)) of the claimant’s claim for supplementary allowance with the “Instructions to Claimant” which provides:

- “1. You must attend at the Unemployment Benefit Office on the days and times laid down by that Office.....and you must comply with any instructions given by the relevant Office
.....

3. Changes of Circumstances

If your circumstances change, the amount of supplementary allowance may also change. You should inform the local office of the Department of Health and Social Security at once by letter or on form A9, obtainable at the Unemployment Benefit Office, of any change in the circumstances of yourself (or your wife).....”

In Mr. Agutu’s submission, the claimant had done all he could reasonably be expected to do by obtaining a Form A9, handing in the completed form at the Unemployment Benefit Office and being told that it would be sent on.

10. On the second point, Mr. Agutu submitted that the overpayment must have been made, if there was a failure to disclose, *in consequence of* such failure. “In consequence” was an ordinary phrase in the English language and it means, in this context, that the failure to disclose was the immediate cause of the overpayment and the immediate cause was the failure of the Department of Employment to pass on Form A9, which the claimant had completed.

11. On the third point, reliance was placed on *Robertson v Minister of Pensions* (cited above) at page 232. (I cite the passage he refers to, for convenience, in the Law Reports rather than the series to which Mr. Agutu referred)—

“In my opinion, if a government department in its dealings with a subject takes upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know the limits of its authority.”

In Mr. Agutu's submission, the claimant was entitled to rely upon the assurance of the official of the Unemployment Benefit Office that it would pass on Form A9, which it had issued, to the Supplementary Benefit Office.

The supplementary benefit officer's arguments

12. On behalf of the benefit officer, Miss Shuker relied on the wording of section 20 of the Act, and contended that the provisions of regulation 3 of the Claims and Payments Regulations were irrelevant. She contended that the Unemployment Benefit Office was only the agent of the Department of Health and Social Security for the receipt of claims for supplementary benefit by persons required to register for employment and not for the transmission of information as to change of circumstances. Regulation 3 provided for the former but not for the latter and that the claimant was not entitled to rely on the statement of the official in the Unemployment Benefit Office that he would pass on Form A9 (if Form A9 were in fact completed) and that it was not necessary for the claimant to do so. As regards the statement of Mr. Justice Denning (as he then was) in *Robertson's case* which he stated as a principle and purported to follow in *Falmouth Boat Construction Ltd v Howell* [1950] 2 K.B. 16, on appeal, where the case is reported as *Howell v Falmouth Boat Construction Ltd* [1951] A.C. 837, Viscount Simonds expressly stated that there was no such principle (page 845) and the other four Law Lords agreed with him. In Decision R(P) 1/80 the Chief Commissioner stated that the doctrine of promissory estoppel was limited to existing contractual rights and that an estoppel cannot prevent a duty enjoined by statute from being carried out: see *Maritime Electric Company v General Dairies, Limited* [1937] A.C. 610 P.C. In Decision R(SB) 8/83, it was stated by the Commissioner that there was little scope for applying the doctrine of estoppel to the functions of the supplementary benefit officer and the Decision in R(P) 1/80 that an estoppel cannot prevent a duty enjoined by statute from being carried out represented the correct approach. The claimant's argument that an estoppel applied in this case ought, on the basis of these authorities, to be rejected.

Construction of section 20

13. In order to recover expenditure incurred by the Secretary of State under the Supplementary Benefits Act 1976 on the ground of the failure to disclose a material fact, it must be shown:

- (1) that it is the Secretary of State who incurred the expenditure. The expression “Secretary of State” is nowhere defined in the Act; though in sections 22 and 23 there is a reference to the Secretary of State for Social Services and there are similar references in some other sections. There are, according to *Halsbury's Laws of England 4th Edition Volume 8, paragraph 1193*, 14 Secretaries of State. But “Although the secretarial duties are divided among the fourteen persons presiding over their respective departments of government, the office of Secretary of State is one, and in law each secretary of state is capable of performing the duties of all or any

of the departments” and a footnote to this passage explains that powers are occasionally given or transferred to a “Secretary of State” leaving it to be understood from the context or otherwise which Secretary of State is intended, that in practice the administration of each secretary of state is confined to his own department and the term “Secretary of State” in any particular statutory context accordingly refers to the secretary of state whose department normally deals with the subject matter of the provision” of Schedule 1 to the Interpretation Act 1978;

- (2) that the person from whom it is sought to recover the expenditure knew the material fact. In *Regina v Medical Appeal Tribunal (North Midland Region) Ex parte Hubble* [1958] 2 Q.B. 228 (on appeal [1959] 2 Q.B. 408) Diplock J. (as he then was) said (at page 242):

“‘Non-disclosure’ in the context of the sub-section, where it is coupled with misrepresentation, means a failure to disclose a fact known to the person who does not disclose it. The term ‘non-disclosure’ is a familiar term in insurance law. It may be innocent if the person failing to disclose the fact does not appreciate its materiality: fraudulent if he does.’”

This passage related to section 40(1) of the National Insurance (Industrial Injuries) Act 1946 and a Tribunal of Commissioners in Decision C.S.B. 53/1981 had no doubt that the words used were relevant to the consideration of the meaning of the words “fails to disclose” in section 20(1) of the Supplementary Benefits Act 1976, and applied those words in paragraph 7 of their decision;

- (3) the disclosure by the person in question was reasonably to be expected: see Decision R(SB) 21/82, paragraph 4(2); and R(SB) 28/83 paragraph 11;
- (4) that there was a failure to disclose: this is considered in paragraph 16 below;
- (5) that the failure related to a material fact; and
- (6) that the expenditure by the relevant Secretary of State was incurred “in consequence of” the failure.

14. In the present case, I was told at the hearing before me that the girocheques made out to claimants who are required to register for employment are made out by the Accountant General of the Department of Employment but that in so far as any part of the sum for which the girocheque in question is made out relates to supplementary benefit that sum is recoverable by the Department of Employment from the Department of Health and Social Security. If this is correct, and is what happened in the present case, the expenditure was incurred by the Secretary of State for Social Services, not the Secretary of State for Employment, who was merely acting as the agent of the former.

15. It is not in dispute that the claimant knew that his wife was working, that disclosure by him was reasonably to be expected, that the fact that she was working was a material fact and that the Secretary of State for Social Services incurred the expenditure of supplementary benefit now in question amounting to £470.02. The sole question is whether there has been a failure by the claimant to make disclosure. Two of the points raised by Mr. Agutu in this connection must, in my judgment, fail. First, I cannot accept that anything done or said by the Secretary of State (whether of Employment or for Social Services) can operate to estop the determining authority (i.e. the supplementary benefit officer or the SBAT) from performing the statutory duty, imposed by subsections (2) and (3) of section 20 of the

Supplementary Benefits Act 1976, of determining whether or not any sum is recoverable under subsection (1) of the section. The determining authority has made no representation. Even if it had, that would not enable it to escape its statutory duty: see the *Maritime Electric Company* case, to which reference is made in paragraph 12 above. Secondly, if there were in fact a failure by the claimant to disclose that his wife was working, I cannot accept the argument that the expenditure was incurred *in consequence* of the failure by the Department of Employment to pass on this information. It is not in dispute that the excess expenditure was incurred because the supplementary benefit officer who awarded benefit, payable by the Secretary of State, was ignorant of the fact that the claimant's wife was working. What was the cause of his ignorance? Clearly, the failure to disclose that fact. There is a direct causal connection between the failure to disclose and the excessive expenditure.

16. The primary question is accordingly what can be said to amount to a failure to disclose in this context. A "failure to disclose necessarily imports the concept of some breach of obligation, moral or legal. . . .": see Decision R(SB) 21/82 at paragraph 4(2), with which I am in agreement. What was the claimant's obligation as regards the communication of the material fact that his wife was working? In my judgment, it was an obligation to take such steps as might reasonably be expected to ensure that the material fact reached the supplementary benefit officer charged with the awarding of benefit. It is not enough, for example, to inform the Child Benefit Office, or some other branch of the Department of Health and Social Security which is not concerned with the award of supplementary benefit. The material fact must be communicated to the right branch of the Department of Health and Social Security, which in most cases will be the local Supplementary Benefit Office. But that is not to say that the local Supplementary Benefit Office must necessarily be informed by the claimant in person, if the communication is made in some other way which might reasonably be expected to reach the relevant local office.

17. In the present case, the story told by the claimant is that he completed form A9, which is one of the prescribed methods of telling the Supplementary Benefit Office of a change of circumstances laid down in the notice of determination of benefit received by him as required by regulation 8 of the Claims and Payments Regulations. The claimant says that he obtained that form from the Unemployment Benefit Office, which is a place from where, according to the notice of determination, he should obtain it. It is not in dispute that the officer in the Unemployment Benefit Office undertook to pass the information (and if it was on form A9, then form A9) on to the Supplementary Benefit Office. The supplementary benefit officer in his submission to the SBAT has stated in writing that the normal practice was to pass such information on. Miss Shuker has told me that this was a recognised way of doing so. If this is correct, it may well be concluded that, notwithstanding their denials, the Department of Employment was the agent of the Supplementary Benefit Office (a branch of the Department of Health and Social Security) for passing on such information. On that basis, the Supplementary Benefit Office clearly had imputed notice, in the very transaction in question (i.e. the payment of supplementary benefit to the claimant) that his wife was working: see *Halsbury's Laws of England 4th Edition Volume 1 Paragraph 833* and the cases referred to in the notes thereto. This conclusion is reached independently of the "agency agreement" drawn up between the two Departments in 1945 and referred to in paragraph 2.36 of the Report of the Joint DE/DHSS Rayner Scrutiny 1980 relating to "Payments of benefits to unemployed people", which was published in March 1981 by the two Departments, which agreement I have not seen. In my judgment, however, the question whether a claimant has

failed to disclose a material fact does not turn on whether or not the two Departments are independent, which is a point repeatedly urged before the Commissioner. According to the report already quoted: "most [unemployed people] would probably conclude that the same department or 'people' were responsible for them all [i.e. the various offices they visit whilst unemployed]. In this they would be wrong": see paragraph 2.35. If the Unemployment Benefit Office is the agent of the Supplementary Benefit Office to receive notice of change of circumstances from claimants who are signing on for unemployment benefit, then the Supplementary Benefit Office can be taken to know the material fact, under the doctrine of imputed notice, and there has been no failure to disclose. But, even if the Unemployment Benefit Office is *not* an agent to receive such notice, the claimant has nevertheless discharged his obligation of disclosure if he hands the form to that Office in circumstances in which it can reasonably be expected that it will be transmitted to the Supplementary Benefit Office. And where the unemployment benefit officer who receives the form A9 gives an assurance that the form will be passed on and there is no need to tell the Supplementary Benefit Office independently, and the fact is that there is a normal practice to pass such forms on, then it is in my judgment unquestionable that there has been no "failure to disclose".

18. The obligation to disclose is, however, a continuing obligation. If, after disclosure has been made, a claimant continues to receive his benefit at the existing rate, so that he has reason to suspect that his disclosure was ineffective, he cannot sit idly by. He must take further, and more effective, steps to make the necessary disclosure.

Was the decision of the tribunal erroneous in law?

19. The decision of the supplementary benefit appeal tribunal was clearly erroneous in point of law for the following reasons:

- (1) there are insufficient findings in their decision as to the material facts. The claimant had said, in his grounds of appeal, that he filled in a form and returned it to a man in the Unemployment Benefit Office and the supplementary benefit officer in his "statement of facts" on the appeal has stated that it was the normal procedure for the Unemployment Benefit Office to notify the Department. Findings on both these points are essential. What was the form? Did the unemployment benefit officer have authority to receive it back and pass it on to the Supplementary Benefit Office? What was the normal procedure? When should the claimant have realised that his allowance had not been reassessed and taken further steps?
- (2) Insufficient reasons are given in the tribunal decision. Why were the steps taken by the claimant considered to be insufficient? What test were they applying when they decided (as it seems that they did decide) that there had been a *failure* to disclose?

Conclusion

20. Since the material facts have not been found, it is neither expedient, nor possible, for me to give the decision that the tribunal should have given. Accordingly, the case must be referred to another tribunal, which should be differently constituted, for determination in accordance with my directions. The tribunal should:

- (1) find the material facts: see paragraphs 17, 18 and 19(1) above;
- (2) in giving their reasons, state in what respects they consider that section 20 of the Supplementary Benefits Act 1976 is in their view satisfied, and why (see paragraph 13 above);

(3) in considering whether there has been a “failure to disclose” in terms of section 20, apply the test set out in paragraphs 16, 17 and 18 to the material facts as found by them.

21. My decision is set out in paragraph 1.

(Signed) V. G. H. Hallett
Commissioner
