JJ-v-Department for Communities (PC) [2020] NICom 70

Decision No: C1/16-27(PC)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PENSION CREDIT

Appeal by the Department to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 12 September 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Department for Communities (the Department) from the decision of an appeal tribunal with reference CN/3986/16/45/0.

2. I held an oral hearing of the appeal on 12 April 2018. I was subsequently on sick leave for a period of some months. On return I was advised that similar issues were under consideration in a case before the Chief Commissioner, and I stayed the appeal pending the determination of that case. I acknowledge the considerable delay which has resulted in these proceedings and I apologise to the parties for that delay.

3. For the reasons I give below, I disallow the appeal.

REASONS

Background

4. The respondent claimed state pension credit (PC) from the Department from 29 June 2009 on behalf of himself and his wife. He became entitled to retirement pension (RP) from 26 August 2012. A review of his PC entitlement took place in a telephone call from the Department to the respondent on 21 September 2012. The record of the call indicated that the respondent informed the Department that he was due to receive an occupational pension. However, he was still to make a choice between different occupational pension options. The record of the telephone call indicated that a follow up call was to be made by the Department in one month. A subsequent call took place in November 2012 but the content is not recorded.

5. On 20 May 2014 a further telephone call was made to the respondent by the Department, in which he confirmed that he was receiving an occupational pension. On 13 October 2014 the Department suspended payment of PC to the respondent and, on 20 October 2014, superseded the decision awarding him PC. On 20 May 2015 the Department decided that PC amounting to £2,956.54 had been overpaid to the respondent for the period from 4 February 2013 to 7 September 2014, on the basis that he had failed to disclose that he was receiving an occupational pension, and that this was recoverable from him. He appealed.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 12 September 2016. The tribunal allowed the appeal. The Department then requested a statement of reasons for the tribunal's decision and this was issued on 14 November 2016. On 7 December 2016 the Department applied to the LQM for leave to appeal from the decision of the appeal tribunal. The application for leave to appeal was granted by a determination issued on 5 January 2017. The question of law on which leave was granted was:

> "Did the tribunal misapply the law when it determined the appellant had made disclosure of a material fact when he informed the Pensions Service in advance that he would receive an occupational pension?"

Grounds

7. The Department submits that the tribunal has erred in law on the basis that the advance notification of the prospective occupational pension did not discharge the responsibility to disclose the fact that occupational pension payments had started.

8. The respondent was invited to make observations on the Department's grounds. Mr Hatton of Law Centre NI responded on his behalf. He accepted that the tribunal had erred in law on its own reasoning, but that it had reached the right outcome on a different basis. He further submitted that the period of the recoverable overpayment was incorrectly calculated by the Department.

The tribunal's decision

9. The tribunal has prepared a statement of reasons for its decision. From this, I can see that the appeal was listed as an oral hearing but that neither of the parties attended. The tribunal had a Departmental submission setting out the argument of the Department and the evidence in the case, which included a letter from the respondent setting out his version of events. It is evident that the decision on entitlement to PC was not disputed but that the decision on recoverability of the overpayment was in dispute. In his letter of appeal, the respondent made the case that he had notified the Department of all his circumstances.

10. The tribunal adopted the facts as outlined by the Department. It accepted that the Department had issued an INF4(PC) leaflet to the respondent setting out the information that needed to be reported to the Department. It found that the respondent had claimed PC by telephone on 21 September 2012 and in the course of the claim had informed the Department that he was to receive an occupational pension, but had a choice to make about the form of the pension. The tribunal found that the Departmental officer dealing with the claim had made a note to return to the respondent in one month to learn which option he had chosen. However, there was no record of any such action being taken.

11. The tribunal identified the issue before it as whether the respondent had failed to disclose his non-state pension contrary to the obligation on him under section 69(1) of the Social Security Administration (NI) Act 1992 (the 1992 Act). The tribunal reasoned that the respondent had notified the Department on two occasions (based on a written statement from the respondent dated 5 June 2016) that he would receive a pension from a specific date. It found that the Department knew in advance of the advent of the occupational pension, and found that there cannot be a failure to disclose something that is already known. On this basis it allowed the appeal.

Relevant legislation

12. The legislation governing recoverability of overpaid benefit appears principally at section 69(1) of the 1992 Act, which provides:

> **69.**—(1) 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 Department in connection with any such payment has not been recovered,
>
> the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

13. The requirement to disclose is connected to regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

> **32.**—(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the

Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit; or

(b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

Hearing and submissions

14. The Department's appeal noted the tribunal's finding that the respondent had informed the Department on two occasions in advance that he was due to receive an occupational pension. It accepted that the occupational pension had been discussed in two conversations with the Department in September and November 2012. The Department submitted, nevertheless, that the respondent had not made full disclosure. A "generalised matching scan" was carried out on 10 February 2014 that indicated that the respondent was receiving a non-state pension. In a follow up telephone call on 20 May 2014 the respondent confirmed that he was receiving an occupational pension. The precise details of payments to the respondent were received from the pension provider on 30 August 2014. This led to the calculation of an overpayment of PC amounting to £2,956.54, which the Department submitted was recoverable from the respondent in all the circumstances.

15. The Department observed that the tribunal was satisfied that the respondent had not failed to disclose the material fact that he was in

receipt of a non-state pension, relying on three authorities of the Great Britain Social Security Commissioners and the Upper Tribunal, namely *CIS/1887/2002*, *CIS/2447/1997* and *GJ v SSWP* [2010] UKUT 107.

16. While accepting that the respondent had notified the Department that he was due to receive an occupational pension, Mr Smith submitted that his obligations from the INF4(PC) leaflet went further. He submitted that the respondent was required to inform the Department of the date on which his pension would begin, the amount due and the frequency of receiving the pension. Otherwise, the Department was not in a position to supersede the existing award. He sought to distinguish *CIS/1887/2002* on the basis that the information about date, amount and frequency was not already known to the Department. While accepting that *CIS/2447/1997* was relevant to the extent that it held that all the facts had to be considered in determining the cause of an overpayment, on the particular facts of the present case there was still a failure to disclose. He submitted that *GJ v SSWP* should be distinguished on the facts as the evidence required to carry out a supersession was not in the possession of the Department. Relying on my own decision in *BR v Department for Social Development* [2012] NI Com 315, Mr Smith submitted that at best the respondent had made partial disclosure, but that he had a continuing obligation to disclose material facts which he had not met.

17. Mr Hatton of Law Centre NI responded. He acknowledged that the respondent himself had not known the amount, start date and frequency of his occupational pension payments until February 2013 and could not have disclosed that in September or November 2012. He further accepted that in the light of *Duggan v Chief Adjudication Officer* (appendix to *R(SB)13/89*), despite the Department's failure to set a review, the respondent could not establish a break in the chain of causation that would discharge his obligation to disclose. He therefore accepted that the tribunal had erred in law.

18. However, he made further submissions regarding the period of overpayment, which ran from 4 February 2013 to 7 September 2014. Firstly, he submitted that correspondence in the respondent's case was unclear about whether the respondent was in an Assessed Income Period (AIP), which would affect his obligation to make disclosure. Secondly, he submitted that the telephone conversations of September 2012 and November 2012 modified the INF4(PC) instructions and the respondent's resulting obligations, relying on *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495, at paragraph 56. Finally, he observed that the respondent directly informed the Department of the details of his occupational pension in a telephone call of 20 May 2014, and therefore could not be liable for a continuing overpayment to 7 September 2014 on the basis of a failure to disclose.

19. I held an oral hearing of the appeal. The Department was represented by Mr Smith of DMS. The respondent was represented by Mr McGowan of counsel. I am grateful to the representatives for their assistance.

20. Mr Smith reiterated the submission that on 21 September 2012 the Department was made aware by the respondent that he was due to receive an occupational pension, but that he had three options to choose from. He accepted that there was a further discussion that confirmed that an occupational pension was in prospect in a telephone conversation in November 2012. Whereas the respondent subsequently received the occupational pension on 26 January 2013, he did not inform the Department of its details. On 10 February 2014 a "general matching service" scan found that the respondent might be receiving an occupational pension. Mr Smith relied on the instruction in the Department's INF4(PC) leaflet "Tell us if you start to receive an occupational pension".

21. Mr McGowan did not rely further on the submission advanced by Mr Hatton relating to the AIP. He submitted firstly that the obligation to disclose was modified by the communication the respondent had with the Department. He further submitted that the chain of causation between failure to disclose and overpayment was broken. He additionally submitted that the period for which any overpayment was recoverable was incorrectly assessed on the basis that full disclosure was made earlier than 7 September 2014.

22. While accepting that the information communicated in the course of the telephone calls in September and November 2012 may not have constituted sufficient disclosure within the terms of the standard INF4(PC) leaflet, Mr McGowan submitted that the respondent had given the contact details of his pension provider and had formed the impression that the Department would take matters further (as accepted by the tribunal on the basis of the respondent's letter of 5 June 2016). He submitted that the respondent's account was supported by evidence in the form of the Department's note of the telephone call containing the words "check back in one month to see which option was taken". He relied on *Hooper* at paragraph 56 where Dyson LJ said:

> "The consequences for a claimant of not complying with a requirement in accordance with regulation 32(1) can be very serious. That is why in my view, if the Secretary of State wishes to impose a requirement on claimants within the meaning of regulation 32(1), it is incumbent on him to make it absolutely clear that this is what he is doing. There should be no room for doubt in the mind of a sensible layperson as to whether the SSWP is imposing a mandatory requirement or not".

23. He submitted that ambiguity might be introduced through a conversation with a Departmental staff member, even though the wording of an

INF4(PC) form might otherwise be unambiguous. He submitted that the nature of the duty to disclose material facts was altered in the respondent's case, by his belief that the Department was taking things forward and might contact his pension provider.

24. Mr McGowan's second and third points related to the duration of the period for which overpayment might be recoverable. He submitted firstly that the Department conducted a general matching scan on 10 February 2014 and confirmed that the respondent was receiving an occupational pension. He submitted that the information from the general matching scan, combined with the respondent's previous disclosure, was sufficient to take supersession action and avoid further overpayment. He submitted that it was impossible subsequently to disclose that which the Department already knew and that there can be no failure to disclose after 10 February 2014.

25. Alternatively he submitted that – at the very latest - from 20 May 2014 the respondent had disclosed the fact or his occupational pension in the course of a telephone call. Mr Smith accepted that the respondent had told the Department's reviewing officer that he had an occupational pension in payment in the course of this call and therefore agreed with Mr McGowan on this point, which would lead to a reduction of the period of the recoverable overpayment by some 5-6 months.

26. In his replies, Mr Smith pointed out that, despite submitting that he expected the Department to have made enquiries to his pension provider, the respondent was in further contact with the Department on 21 November 2012. As a result he would have known that the Department was not acting as he had anticipated. He nevertheless accepted that there was no record of 21 November 2012 call.

27. At the hearing before me, Mr Smith further sought leave to introduce evidence relating to the respondent's contact with two Departmental officers. Although not produced until the day of the hearing, and not before the tribunal, I admitted the evidence. This took the form of e-mail enquiries from Mr Smith and responses. I do not consider that it assists me as the informant cannot recall specifics and it is of limited probative value. The evidence confirms that the officer who spoke to the respondent on 21 September 2012 most likely intended to revert to the respondent after a month, and did not propose to contact the pension provider directly. However, those acting for the respondent rely on his subjective belief, and his understanding of instructions, rather than the actuality of the case.

28. I held the oral hearing of the appeal on 12 April 2018. I was subsequently on sick leave for a period of some months. On return I was advised that similar issues were under consideration in a case before the Chief Commissioner, and I stayed the appeal pending the determination of that case. The decision in that case was promulgated in the first half of 2020 as *PMcL v Department for Communities* [2020] NI Com 20. The

parties were duly invited to make submissions in the light of that decision. Mr Black of Law Centre NI and Ms O'Connor, now for the Department, each made further written submissions.

29. Mr Black submitted generally that the decision in *PMcL v DfC* supported the respondent's case and the principle that a claimant could not fail to disclose a material fact that was already known to the Department.

30. Ms O'Connor submitted that *PMcL v DfC* should be distinguished from the present case. In particular, whereas in the present case the Department was only aware that a non-state pension was due to come into payment at some future date, *PMcL v DfC* involved the prospective termination of an award of another benefit from a known date.

31. Ms O'Connor made further reference to a case I myself decided, namely *BMcE v Department for Communities* [2017] NI Com 34. There a claimant had notified the Department on two occasions of the prospective receipt of a non-state pension. Ms O'Connor sought to distinguish that case on the basis that the appellant in that case had stated specifically that the pension would commence on his 65th birthday, whereas that was not the case in the present appeal. She further observed that the claimant in that case had been told that a case control had been set in place. She submitted that there had been no such modification of instructions to the respondent in the present case.

Assessment

32. No reliance was placed by either party on the authorities relied upon by the tribunal, namely *CIS/1887/2002*, *CIS/2447/1997* and *GJ v SSWP* [2010] UKUT 107. I do not find them of particular assistance and I will not refer to them further.

33. There are clear similarities between the present case and *BMcE v DfC,* which is raised by Ms O'Connor. That case also involved Mr Smith as the Department's representative. In *BMcE v DfC* a claimant had similarly notified the Department on two occasions that he would be receiving an occupational pension from his 65th birthday with no action being taken by the Department. In that case, as in the present case, Mr Smith relied on my own decision in *BR v DSD* as an authority in support of the Department's case. However, in *BMcE v DfC*, I distinguished *BR v DSD*. It might be useful to set out what I said at paragraphs 19-26 of *BMcE v DfC* to set out the general context and to explain my reasoning:

> "19. In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, Lord Hoffmann and Baroness Hale held that the source of the duty to disclose a material fact (for the purposes of the Great Britain equivalent of section 69 of the 1992 Act) arose from regulation 32 of the Claims and Payments Regulations. At paragraph 54, Baroness Hale said:

> "54. What is the source and content of that duty? One obvious source (although there may be others to which our attention has not been drawn) are the regulations under which claimants and others may be required to furnish information to the Secretary of State. The vires for such regulations are contained in section 5 of the 1992 Act (quoted by my noble and learned friend, Lord Hoffmann, in paragraph 17 earlier). The relevant regulation at the time was regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987 (quoted by Lord Hoffmann, in paragraph 19). The beneficiary "shall furnish in such manner and at such times as the Secretary of State…may determine such certificates and other documents and such information or facts affecting the right to benefit or to its receipt as the Secretary of State…may require…, and in particular shall notify the Secretary of State…of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, . . ."".

20. This principle has been applied in this jurisdiction in relation to the direct equivalent of the GB regulations. Thus, most recently in *TT v DSD* [2016] NI Com 38, I said:

> "17. It is settled law that the question of failure to disclose, for the purpose of section 69 of the 1992 Act, is linked to the obligations placed on a claimant by regulation 32 of the Claims and Payments Regulations. These include an obligation to furnish information or evidence which the Department might require for determining whether a decision should be revised or superseded (arising from regulation 32(1)), an obligation to furnish information or evidence as the Department may require in connection with payment of the benefit claimed or awarded (arising from regulation 32(1A)) and a distinct obligation to notify the Department of any change of circumstances which the claimant might reasonably be expected to know might affect the

continuance of entitlement to benefit (arising from regulation 32(1B)) (see *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16 at paragraphs 32, 40 and 54). In terms of how disclosure should be made, a Tribunal of Great Britain Social Security Commissioners in *R(SB)15/87* at paragraph 28 has said that a claimant's duty is "best fulfilled by disclosure to the local office where his claim is being handled. In *Hinchy*, it was said by Lord Hoffman at paragraph 23:

> "Disclosure, then, must be made to the relevant official and not to the Secretary of State as an abstract entity. What assumptions can be made about what the relevant official already knows? The Commissioners have on the whole resisted arguments that the relevant official must be assumed to know, or that the claimant is entitled to assume that he knows, anything about his other benefit entitlements which cannot be described as common knowledge. It is not for the claimant to form views about what may go on behind the scenes in the Social Security or other benefit offices. His duty is to comply with the instructions in the Order Book. A disclosure which would be thought necessary only by a literal-minded pedant (see, for example, *CSB/1246/1986*) need not be made, but the safest course is to resolve doubts in favour of disclosure".

21. *Hinchy* dealt with the specific problem of whether information known to, or conveyed to, one administrative branch of the Department could be deemed to be known to another completely separate branch administering a different benefit. In *Hinchy*, an award of disability living allowance (DLA) had stopped, and with it an entitlement to certain allowances in income support (IS). The claimant had not notified the Departmental staff administering IS that her DLA had stopped, submitting

that this was a fact already known to the Department. The House of Lords did not accept that it could be assumed by the claimant that information was known to the relevant officials and found that by failing to notify the relevant officials of the change in her circumstances, the claimant had failed to comply with her duty to disclose.

22. *Hinchy* emphasised the link between the duty to disclose and the instructions given to claimants by the Department. Mr Smith relies on that duty in his submissions to me. In *Hinchy*, of course, there had been no disclosure by the claimant of the fact that her DLA had stopped. In the present case, there had been disclosure. However, whereas the tribunal was satisfied that, by this disclosure, the respondent had given the Department advance notice of the advent of his non-state pension, Mr Smith submits that this was insufficient. He emphasised that the instruction to the respondent was to "tell us if you start to receive any personal or work related pensions". As the respondent had not communicated to the Department that payment of his non-state pension had started, he had not complied with the relevant instruction. This is an arguable point and I grant leave to appeal.

23. *Hinchy,* while of course a binding precedent, is an unsatisfactory decision in many ways, leading to the situation where the Department - which has significant investigatory powers to access private information held by third parties - is deemed not to know the information it holds on its own computer systems. The House of Lords in *Hinchy*, with the honourable exception of Lord Scott, turned a blind eye to the consequences of maladministration and deficient operational practices on the part of the Department. As a result, there has been little evident change in the Department's approach to avoiding overpayments of benefit in the intervening years. This has understandably led tribunals to take a sympathetic view of honest claimants who strive to make full disclosure of their circumstances against a background of complex benefit rules which they do not understand.

24. Thus, in the present case, the tribunal observed that the respondent had given advance notice of the start of his pension from his 65th birthday on two separate occasions and had been told that case controls had been set for taking action on this information. The Department's operational system then failed to take the appropriate action between October 2013 and June 2014. In this context the tribunal stated that "it is clear the

Department already knew of the advent of the Appellant's non-State pension, and there can be no question of subsequent failure to disclose to someone something that – plainly – is already known". The latter statement by the tribunal is a reference to the decision of the Tribunal of Great Britain Social Security Commissioners in R(SB)15/87, where it was accepted at paragraph 25 that "it is not possible to "disclose" to a person a fact of which he is, to the knowledge of the person making the statement as to the fact, already aware" (approving the statement of Latham CJ in the Australian case of *Foster v Federal Commissioner of Taxation (1951) 82 CLR 606*).

25. In *BR v DSD*, the appellant made a similar submission. However, in that case at paragraph 44, I said that:

> "the appellant in the present case has not been required to "disclose" a fact which, to his knowledge, the Department already knows. The Department did not know whether he had in fact made a claim for his occupational pension, the Department did not know when payments in fact commenced under the pension and the Department did not know how much he was receiving by way of a pension. The appellant could not reasonably claim that, to his knowledge, the Department was aware of these facts".

26. It seems to me that the position in that case was somewhat different to the present case. In the case of *BR v DSD*, the award of an occupational pension would have been conditional on the appellant making a claim and being found permanently incapable of performing the duties of his employment. In the present case, the letter at Tab 8 shows that the respondent had already retired and received a lump sum element of his pension on 1 March 2000, commuting his initial pension. It appears to me that there was no conditionality to his receiving the pension after his 65th birthday. The tribunal had sufficient basis to say that the applicant had already disclosed the fact that he would receive a pension, and could not fail to disclose it in these circumstances."

34. Ms O'Connor seeks to distinguish *BMcE v DfC* on the basis that the date of the commencement of the non-state pension was identified by the claimant – being linked to his 65th birthday – whereas it was not in the present case. However, the factor that led me to distinguish *BMcE v DfC*

from *BD v DSD* was that the occupational pension in *BD v DSD* was conditional on a claim being made to the relevant scheme and upon a subsequent medical assessment of permanent incapacity for work. The case of *BMcE v DfC*, as in the present case, involved unconditional entitlement to a pension linked to pensionable age.

35. As pointed out above, *Hinchy* involved no attempt at disclosure by the claimant whatsoever. In the present case, the tribunal found sympathy with the claimant because, as is not disputed, he had communicated with the Department on two occasions to disclose his prospective pension. However, Mr Smith points to the duty set out in the INF4(PC) leaflet at page 8 to tell the Department once the payments of the work related pension had started.

36. The respondent places some reliance on the decision in *Hooper v SSWP*. It appears to me that the wording of the INF4(PC) in this case was clear, unlike the instructions in *Hooper*. However, I accept that there is force in the point that – in light of the consequences of failure to disclose - instructions from the Department requiring disclosure must be unambiguous. I also observe that in *R(A)2/06* it was held by the Great Britain Social Security Commissioner that the instructions issued by the Department in written form could be modified by oral instructions. Whereas I accept that proposition in principle, there is a lack of consensus about what was said to the respondent in the two telephone conversations where his occupational pension was discussed, and therefore about whether and how the instructions were modified by oral communication.

37. However, it seems to me that there is a reasonably close analogy between this case and the situation in *RM v Department for Communities* [2017] NI Com 18. There a claimant's wife had obtained a job and he had notified the relevant officer accordingly. Due to relevant divisions of responsibility at that time, no action was taken by the Department on foot of this information and an overpayment of benefit ensued. The Department argued that whereas the claimant had told the Department that his wife had got a job, he had failed to disclose the material fact that she subsequently began to receive wages. In that case I said:

> "49. As stated in *Kerr v Department for Social Development* [2004] UKHL 23, the process of benefits adjudication is inquisitorial rather than adversarial. In determining entitlement to benefit, both the claimant and the Department must play their part. The Department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. I observe that the Department issued B7 forms to the appellant when he notified the DEL adviser that he had commenced part-time self-employment in order to ascertain his level of income. This is to be expected in an

> inquisitorial benefits adjudication system. Once he had reported the fact that his partner was working, it would have been reasonable to expect the Department to issue similar forms to his partner. However, the Department's failure to take action cannot be attributed to the appellant. I consider that, once the Department had been placed on notice that the appellant's partner was working, it was for it to seek the appropriate information about her earnings. The appellant, who had made appropriate disclosure in compliance with his statutory obligations, cannot be blamed for the operational failings of the Department".

38. It appears to me that a similar principle can be applied in the present case. The requirement to make disclosure is a necessary one in the administration of benefits. However, there have to be reasonable limits on that requirement. The respondent had discussed his prospective occupational pension on two occasions with an official of the Department. The official had clearly intended to make further enquiries, having noted on 21 September 2012 "check back in one month to see what option taken". The content of the subsequent telephone call in November 2012 is nowhere recorded. However, the respondent was able to say of those conversations that he had engaged with the Department about his occupational pension not once but twice, and this was not disputed.

39. In such a situation, I consider that the respondent can reasonably conclude that he had met his obligation to disclose. As indicated above, it is the Department that knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met.

40. It is not a situation like *Hinchy* where there was no attempt a disclosure at all. It is not a situation where disclosure was made, but to the wrong section of the Department. The respondent had twice confirmed to the correct section of the Department that he would be getting an occupational pension linked to his having reached the age of 65. The tribunal in this case considered that, having made this disclosure on two occasions, the respondent could no longer fail to disclose to the Department something that he knew that the Department already knew. In the context of inquisitorial decision making, he had played his part, but the Department did not play its part in directing the necessary enquiries that should have flowed from the disclosure.

41. Mr Smith is justified in pointing out the obligation in the INF4(PC) to "tell us if you start to receive an occupational pension", and submitting that the Department did not know when the occupational pension payments actually commenced. However, I consider that this obligation must be viewed in the light of the two instances of prior disclosure of the occupational pension in telephone calls to the Department. It cannot be said that the written instructions in the INF4(PC) were modified by the Department on the basis of what was said in those discussions, as

exactly what was said is not recorded. Nevertheless, the respondent came away with the view that he had met his obligations and that the Department was going to take further steps. In light of the inquisitorial nature of benefit adjudication, I consider that he was justified in that view. It must be expected that the Department would take the next steps in terms of pursuing the information it needed in order to determine the respondent's PC entitlement.

42. In all the circumstances of this case, I am not satisfied that the tribunal has erred in law by holding that the respondent did not fail to disclose a material fact and consequently that the overpayment of PC was not recoverable. I therefore disallow the appeal.\

(signed): O Stockman

Commissioner

16 September 2020