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## Fraud and error--understanding benefit fraud

### Abstract

**Crime analysis: Will the Department of Work and Pensions (DWP) succeed in its campaign to tackle benefit fraud and error? Rodney Hylton-Potts of Hylton-Potts Legal Consultants, which specialises in benefit fraud, looks at how benefits claimants have a legal duty to report any change of circumstances.**

### Analysis

#### Original news

Press Release: New benefit fraud and error campaign, LNB News 14/01/2014 81

*A pilot on benefit fraud and errors has been launched by the government. The campaign, involving six pilot areas across the country, aims to reduce fraud, change people's attitudes towards fraud and have claimants report changes that could affect the amount of benefits they receive and reduce overpayments. The message will be communicated through posters, newspaper adverts, Facebook adverts and letters to claimants.*

#### **What sanctions can an individual face if they fail properly to inform the DWP about changes that could affect their benefit claim?**

Individuals who are seeking to claim or are in receipt of state benefits are under a duty of candour--ie to provide accurate and truthful information in any application for benefits and to update that information should it change in any material way. There is a duty of ongoing disclosure. Should it transpire that, as to a material fact, a claimant has misrepresented their circumstances or their circumstances change and they fail to notify the relevant department of that change, they are liable to a range of sanctions.

In the first instance, benefits wrongly paid are likely to be liable to be recovered (Social Security Administration Act 1992, Pt 3 (SSAA 1992) as amended by the Welfare Reform Act 2012 (WRA 2012)).

If the individual can be shown to have acted dishonestly, either in the making of their claim or in failing promptly to notify of a change of circumstances that they knew would affect their entitlement, they may be guilty of an either-way offence under SSAA 1992, s 111A. A guilty finding would make them liable to imprisonment for a term of up to seven years and a fine, or to the maximum sentence applicable in the magistrates' court depending on the venue. If dishonesty cannot be shown, but a false representation or failure to notify has occurred, the individual may still be liable to a fine or imprisonment up to a maximum of three months (SSAA 1992, s 112).

There is an alternative to prosecution that can be utilised by the Secretary of State where an overpayment has been made owing to an act or omission of the claimant and where there are grounds for instituting proceedings--a penalty equal to 50% of any overpayment can be levied (between £350 and £2,000), provided that the claimant agrees to this course of action. The minimum penalty can be applied even if no overpayment has in fact been made ( SSAA 1992, s 115A, as amended by WRA 2012, ss 113-115).

Further, a civil penalty of £50 can be imposed as punishment for merely negligent misstatements as to benefit entitlement (SSAA 1992, s 115C) and for failure to disclose information (SSAA 1992, s 115D as amended by the WRA 2012).

Finally, there are 'loss of benefit' provisions that disqualify individuals from receiving certain benefits for varying periods where:

- o they are convicted of a relevant offence
- o they accept a penalty as an alternative to prosecution, or
- o they are cautioned for such an offence (Social Security Fraud Act 2001, s 6B)

The disqualification periods range from four weeks to three years.

### **Are employers under any obligation to inform new staff about the potential impact of employment on benefit claims?**

There is no duty imposed upon an employer to inform an employee about the potential impact of their employment on any entitlement to benefit that the employee might have or any claim to benefit that the employee might then be making. Those are not matters about which an employer will necessarily have any knowledge, and there is no duty for them to enquire as to their employee's personal circumstances. The entitlement to benefit and the claim for such benefit is a matter for the employee and it is their duty to ensure that the relevant department is notified promptly of their change of circumstances--ie that they have commenced employment.

There is an offence under SSAA 1992, s 111A(1B) that is committed where a person, knowing that a change of circumstances has occurred that affects an entitlement of another person to any benefit, dishonestly causes or allows that other person to fail to give a prompt notification of that change. That provision extends liability for non-disclosure to third parties and so, conceivably, could impose a criminal liability on an employer. The provision requires the third party to have been in a position where he could have taken some action that would have resulted in the recipient of the benefit discharging their obligation to notify (see *R v Tilley* [2009] EWCA Crim 1426, [2009] All ER (D) 200 (Jul)). Hypothetically, this provision could catch an employer who knows his employee's circumstances as to benefits and knows that her employment is a material change in circumstances, and further knows that the employee does not believe that they need to report their employment. Conceivably the employer could be said to have 'allowed' the failure to notify by his failure to inform her of her duty and, if he acted dishonestly, would be guilty of an offence.

There is a distinct regime of penalties under SSAA 1992, s 115B for employers who have colluded in the commission of a benefit offence with an employee.

In the circumstances it is perhaps preferable for an employer to notify all new staff that their employment might affect their entitlement to benefits and to advise them, if they are in receipt of any benefits, to notify the relevant department of a change of circumstances. However, there is no positive duty imposed upon them by statute.

### **What are the most frequent issues with reporting changes?**

The duty imposed on a benefits claimant is to report any change of circumstances that affects any entitlement to benefit. They will be liable to prosecution if they have failed promptly to notify the prescribed person of a change in circumstances, knowing that the change affects an entitlement to such benefit. This raises three common issues in reporting cases:

- o What needs to be reported?
- o How quickly does it need to be reported?
- o To whom should it be reported?

The answers to those questions depend upon the benefit in question.

The most common changes in circumstances are:

- o changes in living arrangements

- o changes in employment status
- o an increase in the number of hours worked
- o an increase in remuneration
- o changes in the composition of one's family
- o being sent to prison
- o improvements in the symptoms of a disability or illness

Claimants should be guided as to what is material by the questions that were posed on the application form completed in respect of a particular benefit. If in doubt, they should inform of the change in circumstances.

The requirement is to report any change in circumstances promptly, which means without delay. As soon as a claimant is aware of a change it should be reported. There is no excuse for delay.

The change of circumstances should be reported to the relevant authority to whom the application for the benefit was made. This may require a report to be made to more than one body. Claimants should not assume that one government body will communicate with another and should ensure all are notified of the change.

**Is ignorance of the need to inform any excuse?**

Ignorance of the duty imposed on a claimant to inform the relevant department of a change of circumstances that affects entitlement is no excuse for failing to notify of a change.

The civil penalty can be applied where a person fails, without reasonable excuse, to notify the appropriate authority of a relevant change of circumstances which results in an overpayment. Ignorance of the need to inform could not be considered a reasonable excuse.

However, to establish criminal liability under either SSAA 1992, ss 111A or 112, it would have to be shown by the prosecution that the individual concerned knew that the change of circumstances affects his entitlement to benefit.

So, to that extent, 'ignorance of the need to inform' is an excuse, but only in the sense of 'ignorance of the need to inform' because of not knowing whether the change affected entitlement rather than ignorance of the need to inform of a change that you knew affected entitlement.

**Often lawyers are asked their advice in relation to benefits while dealing with other legal issues, what should lawyers do in this situation?**

This question raises practical issues for lawyers relating to their professional duties arising from their respective codes of conduct. Plainly a lawyer should only advise a lay client in relation to an area of law in which they are competent, and in respect of issues that they feel able properly to address. So long as the lawyer feels able to do so, there is nothing to preclude them from advising regarding benefits issues at the same time as advising on criminal or civil proceedings wholly unrelated to those issues. Obviously it is important, if advice is to be given, that full information is obtained and proper consideration given to the issue before advice is imparted. There are of course funding issues which may affect a lawyer's decision as to how to proceed but those are for the individual concerned. If the decision is made to advise on benefit entitlement as a 'side issue' to the main proceedings, whether on a pro bono or fee basis, the same care and skill should be applied to that advice as to the main case.

*Interviewed by Anne Bruce.*

*The views expressed by our legal analysis interviewees are not necessarily those of the proprietor.*