

HOUSING BENEFIT OVERPAYMENTS AND

“OFFICIAL ERROR”

Paper presented to the Social Security Law Practitioners' Association by
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The Legislation

The Social Security Administration Act 1992, s.75 and the following regulations from the Housing Benefit Regulations 2006 (SI 2006/213)¹: -

- Regulation 88(1) on the duty to notify a change of circumstances which might affect entitlement;
- Regulation 99 on the meaning of an overpayment;²
- Regulation 100, which prescribes the circumstances in which an overpayment is recoverable.

Under regulation 100(1), all overpayments are, in principle,³ recoverable, unless the claimant can bring themselves within the following exemption: -

- the overpayment was caused by “official error” *and*
- the claimant did not materially contribute to that error *and*
- s/he could not reasonably realise that s/he was being overpaid.

An “overpayment caused by official error” is defined as an overpayment caused by mistake, whether arising from an act or omission on the part of the various authorities. The exemption will not apply until it is established that there was an official error. The onus is on the claimant to bring themselves within the exemption.⁴

¹ Similar provisions apply to excess council tax benefit; see Council Tax Benefit Regulations 2006 (SI 2006/215) reg. 83.

² Note that a claimant's lack of entitlement to any HB must be determined prior to any decision that there has been an overpayment or that it is recoverable under the scheme.

³ R(H) 2/04 para 7.

⁴ CH/3439/2004 para 22, Mr E Jacobs, January 19, 2005.

The Court of Appeal decision in *Sier*

The issue of overpayments caused by official error was considered by the Court of Appeal in *R (on the application of Sier) v Cambridge City Council Housing Benefit Review Board* [2001] EWCA Civ 1523. The claimant had been overpaid HB by the local authority in Cambridge as it had not been aware that the claimant had taken out a second tenancy in London and had claimed HB on it too. The court rejected the argument on causation and held that the Benefit Agency's failure to send form NHB8 to Cambridge City Council had not "caused" the overpayment even if that failure did amount to an official error. Lord Justice Latham said:

25. ... In the present case, one has to have regard to the general legislative purpose, which seems to me to be clear. Parliament has laid down in the Regulations that a person is to be relieved of the obligation to repay an overpayment when that has been occasioned by an administrative mistake and not by any fault on the part of the recipient. That seems to me to be the basic thrust of the Regulation and one should approach the meaning of the word "cause" and its application to the facts on that basis.

26. Bearing that in mind, I consider that Richards J was correct in concluding that the failure to send form NHB8 to Cambridge City Council had not "caused" the overpayment even if that failure did amount to an official error. The overpayment occurred because the appellant continued to claim Housing Benefit for the Cambridge property and failed, in breach of his duty under Regulation 75 of the 1987 Regulations, to notify the Cambridge City Council of what in my judgment was clearly a relevant change in his circumstances and one which he would have appreciated. The administrative failure, if that is the appropriate way of describing it, to send form NHB8 of the Cambridge City Council did not cause any payments to be made. The most that could be said is that as a result of that failure Cambridge City Council was not alerted to the fact that the appellant was no longer entitled to the relevant payments. But it seems to me that the answer to the question posed by the Regulation is clear: this was not an overpayment caused by official error and accordingly the Regulations do not relieve the appellant of the obligation to repay the overpayment, which is the primary rule in such circumstances.

And Lord Justice Simon Brown said:

30. In my judgment a single composite question falls to be asked under regulation 99(3). One must ask: "was the overpayment the result of a wholly uninduced official error, or was it rather the result of the claimant's own failings, here his failure in breach of duty to report a change of circumstance?" The answer to that question on the facts of this case is, of course, self-evident.

31. ... If one asks the purpose for which the question arises under regulation 99(3) as to whether the overpayment was caused by an uninduced official error, the common-sense answer is so as to distinguish that sort of case from a case where the claimant himself is substantially responsible for the overpayment. It would be remarkable indeed if the claimant was liable to make repayment in a case where he merely contributed to what might be a fundamental error on the part of the department, and yet wholly escapes such liability even when himself primarily responsible for the overpayment.

The case is authority for the principle that decision makers are to approach the issue of causation in a common sense way but the fact that there was an official error which could be said to be a cause of the overpayment does not necessarily mean the overpayment is

not recoverable if the claimant's breach was a more substantive cause of the overpayment.

Local authorities have tended to interpret *Sier* to mean that if there has been *any* failure to act on the part of the claimant to notify the authority of a change of circumstances then overpayment then the overpayment will be recoverable. Subsequent case law indicates where the overpayment may have been due to official error *or* an action or omission on the part of the claimant then *Seir* requires the decision maker to make a common-sense judgment on which is the primary or substantive cause of the overpayment. It follows that the fact that the claimant could have reported the material fact to the local authority is not necessarily fatal if the official error is the more potent of substantive cause of the overpayment.

1. Cases where there the facts did not amount to "official error"

R(H) 1/04⁵ - The claimant disclosed that both he and his wife were entitled to occupational pensions of £556 per month on the CTB claim form. But the claimant had not disclosed the occupational pensions to the Benefits Agency. The Commissioner held the Council's decision not to ask the Benefits Agency to check the IS award in the light of the information about the occupational pensions did not amount to a "mistake" or an official error.

R(H) 2/04⁶ - The claimant made a claim for HB in April 2000 giving the figure for working families' tax credit (WFTC) that she was receiving at the time. However, when the claimant was notified that the amount of WFTC had been increased by the Inland Revenue for the same period she did not inform the authority of the change. The Commissioner rejected the argument that the authority had erred in making any award of HB while the decision on the WFTC renewal claim was pending.

The case was nowhere near the kind of "mistake" envisaged by the regulation, namely a "clear and obvious" error of fact or law made by some officer on the facts disclosed to them, or which the officer had reason to believe were relevant (**R(SB) 2/93**, paragraph 6; **R(SB) 10/91**, paragraph 11).

CH/69/2003⁷ - The claimant was overpaid HB/CTB because his Industrial Disablement Benefit (IDB) had not been taken into account. The claimant had failed to tick the relevant box on the HB/CTB claim form to indicate receipt of the benefit. The claimant

⁵ Mr C Turnbull, April 22, 2003.

⁶ Mr P. L. Howell QC, May 1, 2003.

⁷ Mr M Rowland, September 15, 2003, available on hbinfo

argued that the authority should not have processed his claim without obtaining his bank statements which showed regular credits representing payments of his DLA and IDB. The Commissioner held that the authority was entitled to act on the basis that the bank statement had been produced as evidence of capital rather than income from benefits. There had been no official error as there was no duty on the authority to analysis the payments into the bank account just in case they revealed undisclosed income.

CH/412/2003⁸ - The claimant informed the Council that he had initially moved into a care home on a temporary basis. But he did not notify the Council when he decided to go into permanent care. The Council was not under a duty to conduct enquiries to ascertain whether he was in permanent care.

CH/687/2006⁹ - In April 2003 the claimant completed a form in which she said that she was now living with a partner and gave the figure for his income for short-term IB. The partner's income increased in July 2003 when he became entitled to long-term IB, thereby causing an overpayment. The claimant argued that the information provided in April 2003 should have alerted the council to the fact that the partner would become entitled to long-term IB if he remained incapable of work.

The Commissioner said there was no obligation to make any enquires regarding the IB. The duty to make further inquiries would only arise where the facts were such that it was clear and obvious that further inquiries needed to be made in order to determine entitlement *at the time of the claim*. There is no general duty to make inquiries as to what may affect a claimant's entitlement *in the future* (paras 46-50).

2. Official error exists but the claimant contributed to the error

CH/2899/2006¹⁰ - The claimant's IS ceased in July 2003 but the DWP did not notify the local authority. In April 2004 the DWP did notify the local authority that the claimant had made a claim for IS which had been refused but the Authority took no action. In June 2004 an official helped the claimant complete a review form in which the claimant stated that he received IS. In December 2004 the Authority raised an internal report confirming that the claimant was not receiving IS/JSA but again no action was taken. By August 2005 an overpayment of HB/CTB in excess of £5,000 had occurred.

The Commissioner held that whilst there was official error the claimant was required under the legislation to notify the Authority of change of circumstances. The claimant had contributed to the error as he could reasonably be expected to know he was being overpaid.

⁸ Mr S.J. Pacey, July 20, 2004, available hbinfo

⁹ Deputy Commissioner Whybrow QC, October 16, 2006

¹⁰ Mrs E.A. Jupp, January 18, 2007.

3. Cases in which official error was the cause of overpayment in the initial period but the overpayment was caused by the claimant's action or inaction in the subsequent period

CH/3761/2005¹¹ - When the claimant found employment he told the Jobcentre and his JSA was terminated. His personal adviser told the claimant that he need not inform the council, as the Jobcentre would do so. The DWP failed to notify the council and an overpayment of HB occurred. In May 2004 the claimant received letters from the authority which showed that HB was continuing to be paid based on receipt of JSA. The claimant took this to the Jobcentre but the overpayment continued.

The Commissioner held that what the claimant had been told by the Jobcentre adviser did not absolve him from his statutory duty to notify the council that he had started work. However, up until the receipt of the letters from the authority in May 2004, the substantial cause of the overpayment was the Jobcentre's mistake, because it was the Jobcentre's advice which caused the claimant not to comply with his obligation to notify. *Sier* could be distinguished, as the mistake identified there - DSS not sending a change of address form to the authority – did not cause the claimant not to comply with his obligation of disclosure. The cause of the overpayment after May 2004 was less clear and the case was remitted to a new tribunal

CH/3083/2005¹² - The claimant found full-time employment in February 2004 and her entitlement to JSA ceased. The JobCentre advised her to complete a JSA signing-off card in which she indicated that she wished to claim the one month's extended payment of HB. The council did not receive any notification from the DWP and HB continued to be paid until August 2004. The council argued that as the claimant had not notified the council directly she had contributed to any mistake which had been made.

The Commissioner held that the DWP's failure to notify the local authority about the extended payments was an official error.¹³ For the initial period, the DWP's failure was "substantially more potent" as a cause of the overpayment, than the claimant's failure to notify the council direct.

By the end of April 2004 however, the claimant ought to have made enquires, when she would have discovered that HB payments were continuing. Accordingly, the cause of the overpayment from May 2004 onwards was not the official error by the DWP but the fact that the claimant did not ask the council why she was continuing to be paid.

¹¹ Mr C. Turnbull, 24 April 2006 available on hbinfo.

¹² Mr C Turnbull, November 1, 2006.

¹³ Para. 2 of Sch 7 to the HB Regulations 2006.

4. Cases where official error is the primary cause of the overpayment

CH/602/2004¹⁴ - The claimant omitted to mention receipt of disablement benefit on the claim form but provided bank statements which clearly indicated he was in receipt of industrial injuries benefit and any overpayment was due to the official error of the local authority in not noting those payments as income. The claimant's failure to mention them on his claim form did not mean that he caused or materially contributed to the error. His omission was part of the background but the error arose from the officer's mistake.

The case could be distinguished from *R(H) 2/04* and *CH/69/2003*¹⁵ as the evidence on which a correct amount of HB could have been made was in the hands of the officer acting for the local authority, as the industrial injuries benefit was clearly identified on the statements supplied to the local authority.

CH/1780/2005¹⁶ - The claimant was working and claimed HB in August 2003. In September 2003 he provide his August payslip together with a letter from his employer reporting that he was working occasional overtime, which had begun in July. The local authority failed to take the overtime into account.

The Commissioner held that the LA had been wrong to calculate HB/CTB based on the claimant's average earnings without making inquiries into the new pattern of earnings. It should have obtained more precise information about the claimant's income before making the award.

CH/277/2006¹⁷ - In August 2002 the claimant wrote to the local authority stating that she had a new job and gave details of her hours and net pay. The letter also stated that her 22 year old son had joined the household. The letter asked the local authority to inform her whether they were entitled to any further benefits. The local authority continued to pay HB in error on the basis that she was still in receipt of income support until January 2003.

The Commissioner held that the overpayment had been caused by (i) the DWP's failure to notify the local authority that the claimant was no longer receiving income support and (ii) the local authority's failure to appreciate that the claimant's letter had made it clear that her income support had terminated. The Deputy Commissioner said the highest case that could be put against the claimant was that, in the absence of any reply from the local authority, she might reasonably have been expected to suspect that there might be an overpayment. However, it could not be said that she could have realised that the amount she was receiving definitely contained some element of overpayment.

¹⁴ Mr J Mesher, May 27, 2005.

¹⁵ See above.

¹⁶ Mr E Jacobs, September 9, 2005.

¹⁷ Deputy Commissioner Mark, May 5, 2006.

CH/530/2006¹⁸ - The claimant's CTC should have ended in December 2003, when his son had his 19th birthday. The Deputy Commissioner held that as it was predictable that the claimant's income from an award of tax credit would end when the claimant's son became 19 the award of HB ought to have been calculated to a period ending when the son became 19 (paras 26 and 27).

Comment: Compare to **CH/687/2006**, above, on the transition from short-time IB to long term IB.

5. Cases in which official error not in dispute but the focus is on whether the claimant could be expected to reasonably realise that they were being overpaid

CH/2554/2002¹⁹ gives guidance on how to determine whether a claimant could be expected to realise they were being overpaid. It involved a three-staged process.

Stage 1 – the legal tests – “what matters is whether the claimant could reasonably have been expected to realise that the amount she was receiving definitely contains an element of overpayment”.

Stage 2 - the information available to the claimant – “it is likely that most cases will involve considering what the claimant should have realised from previous experience of the scheme and the documents provided by the local authority”.²⁰

Stage 3 – the significance of the information – “the tribunal must determine what the claimant could reasonably have realised from the information available”.

The Commissioners have emphasised that the test to be applied is not an objective one.²¹ It is a test of whether the claimant could have realised that the HB they were receiving definitely contained some element of overpayment. According to **CH/2554/2002**: -

The issue for the tribunal was what could reasonably be expected of the claimant. There may be exceptional cases in which it is reasonable to expect a claimant to find out more about the housing benefit scheme, probably from the local authority or (possibly) elsewhere. If those cases exist in reality rather than theory, they will involve claimants with a special knowledge of the scheme, such as former housing benefit officers. They will, in any event, be rare. This case is not one of them. In the overwhelming majority of cases, there is no scope for imputing any knowledge to the claimant. The issue will be what could reasonably be deduced from the information

¹⁸ Deputy Commissioner Mark, July 3, 2006

¹⁹ Mr E Jacobs, September 11, 2002.

²⁰ There is no scope for imputing knowledge of the HB/CTB scheme to the claimant (para 13).

²¹ CH/2713/2006, para 11, Mrs E.A. Jupp, February 12, 2007, available on hbinfo.

available to the claimant. What a claimant could reasonably have been expected to realise is a question of fact. It depends on the information available to the person and on an analysis of what that information could have revealed. Identifying and analysing that information are the second and third stages," (para 13).

In *CH/609/2004*²² the Commissioner said that tribunals should take a three-staged approach:

- First, the tribunal must direct itself correctly on the law.
- Second, the tribunal must identify the information that the claimant had about the housing benefit and council tax benefit schemes.
- Third, the tribunal must determine what the claimant could reasonably have been expected to realise from that information.

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According to *CH/609/2004*: -

The issue is what the claimant or other person could have realised, not what a claimant or other person could have realised. That puts the focus on the individual claimant. And what an individual claimant could reasonably have been expected to realise must depend on what information that person had about the schemes," (para 8).

See also Deputy Commissioner Mark's comments in *CH/2935/2005*:²⁴ -

A more fundamental question is the extent to which the test of what the claimant could not reasonably have been expected to realise is a subjective one. It is clear from CH/2554/2002, para.13 and CH/609/2004, para.8 that the question is what this individual claimant could reasonably be expected to realise from the information that he had. That is a question of fact to be decided on the basis of all the relevant evidence. There is no doubt room for disagreement between tribunals as to what is reasonably to be expected of an individual claimant taking all the circumstances into account. Provided a tribunal takes all the relevant circumstances, and only the relevant circumstances, into account, and its decision

²² Mr E Jacobs, June 28, 2004.

²³ CH/2713/2006, para 11, Mrs E.A. Jupp, February 12, 2007, available on hbinfo.

²⁴ March 28, 2006, available on hbinfo

is one that a tribunal could reasonably come to, its findings on this issue cannot be challenged," (para 28).

The Deputy Commissioner also observed that the burden on the claimant to show that s/he did not reasonably realise that they were being overpaid upon receipt of an initial payment could change if there was a subsequent change in circumstance. Whilst accepting the test as explained in **CH/2554/2002**, the Deputy Commissioner added two qualifications: -

First, regulation 99(2) clearly places a burden on the claimant to show that s/he could not reasonably have been expected to realise that it was an overpayment. Second, the times at which this burden has to be satisfied are the times when each payment is received. Although this burden may need to be satisfied where there is an initial error by the council in the calculation of benefit, clear cases where it is likely not to be satisfied are (a) where the claimant knows that s/he is to receive £x per week, but suddenly receives more than this for no apparent reason, and (b) where a significant change of circumstances has been notified by the claimant to the council, which the claimant knows should lead to a reduction of benefit, but the benefit continues to be paid at the old rate.

A change of circumstances may also lead to a situation in which a claimant who may previously have been expected to know that there has been an overpayment can no longer be expected to have that knowledge. A prime example of this is where the claimant has contacted the council to raise the relevant issue, has done so fully and openly, and has been assured that the amount being paid is correct," (paras 24-25).

It is important to keep in mind that the test that needs to be applied is whether the claimant could reasonably have been expected to realise *on the occasion of each overpayment* that it was an overpayment.

CH/1675/2005 concerned a claimant who contacted the authority by phone during the period of the overpayment. The Commissioner said that regulation 100 (99 as it then was) envisages that where an authority is made aware of an overpayment it will take steps to bring it to an end. If the authority reassures the claimant that there has been no overpayment, the claimant must be allowed to argue that it was reasonable to accept what he was told (para 12).

In **CH/2479/2006**²⁵ the claimant retired due to illness. With the assistance of his CAB, he applied for several benefits including CTB although there was no guarantee that he would receive any awards. He declared an occupation pension but only the net figure was taken into account when the gross amount should have been used. When the LA became aware of the error it sought to recover an overpayment of CTB from November 04 to October 05 in respect of benefit that had already been paid and from October 2005 to March 2006 because of payments in advance. The Commissioner held that it was not

²⁵ Mrs E A Jupp, May 30, 2007.

reasonable to expect the claimant to realise he was being overpaid as (i) he had produced everything he had been asked and he was not advised that he should check the position by the CAB and he was unused to the benefits system and was seriously unwell. The overpayment from November 04 to October 05 was not recoverable. The CTB paid in advance from October 05 (when the overpayment decision was made) until to March 2006, was recoverable.

In **CH/361/2004**,²⁶ the claimant completed a form advising the local authority that she would start to work 20 hours a week from 30 October 2000. Although the claimant produced a wage slip showing net pay of £259.02 the local authority failed to take her earnings into account. The claimant could reasonably have been expected to realise that she was being overpaid as the award letters showed earned income as £0.

In **CH/858/2006**,²⁷ the claimant gave the local authority the HMRC letter showing an award of tax credits in March 2005. A HB award made in April failed to take this into account. When the error was discovered in May 2005 the local authority decided that an overpayment was recoverable from the claimant for the period 14 March 2005 to 15 May 2005. The Commissioner said the test for whether the claimant could reasonably realise that she was being overpaid was an objective one but it had to be applied to the individual claimant. The claimant had recently come to the UK from the Netherlands. It was her first HB claim and she did not know that tax credits were taken into account immediately, and not, as in the Netherlands, retrospectively. The Commissioner emphasised that whilst the claimant could have realised that the tax credits *might* affect the amount of her housing benefit, this was not enough for the local authority to recover the overpayment. The test was whether she would reasonably have been expected to realise that it *did*. The Commissioner concluded that the claimant could not have deduced this from a reading of the April letter or the other information available to her.

In **CH/2935/2005**²⁸ the claimant was 68 years of age and was claiming HB for the first time. He needed help from an officer of the council to complete the claim form. The council failed to include his state retirement pension when calculating the award but said the resulting overpayment was recoverable from the claimant as he should have read the award letter more carefully. The Deputy Commissioner said it was unrealistic of the council to expect the claimant, who required help to complete the form, to be able to check the calculations in its letter and allowed the claimant's appeal. The Deputy Commissioner did not follow CH/2554/02 directly *because* "...it was not a case in which the claimant sought help in filling in the form, nor was it a case in which the omitted income was of a kind which almost everybody of the age of the claimant received," (para 36).

²⁶ Mrs E.A. Jupp, June 23, 2004.

²⁷ Mr E. Jacobs, September 11, 2006.

²⁸ Deputy Commissioner Mark, March 28, 2006, available on rightsnet.

This can be contrasted with *CH/2713/2006*²⁹ where the tribunal found that a claimant who started temporary work but did not check her bank for three months could have realised she was being overpaid HB. See also the strict approach adopted in *CH/866/2006*³⁰ where the Commissioner held that the claimant should have realised that the wrong gross figure for maintenance payments was being used. See also *CH/3309/06* where the claimant made repeated attempts to notify the council that her council tax benefit was wrong but it was still recoverable because on her own evidence she must have realised she was being overpaid.

Conclusion

A correct application of the rules for recovery is dependent upon the decision-maker having made clear findings on the factual circumstances in which the overpayment arose; including the information received by the claimant and any notification made to the authority. The case law suggests the following questions need to be considered by the decision-maker when applying the test for recovery:

- Has there been an official error?
- If yes, what was the substantive cause of the overpayment; was it the official error or some act or omission on the part of the claimant?
- Did the cause of the overpayment change during the period of the overpayment?
- Could the claimant reasonably have been expected to realise it was an overpayment on the occasion that a payment was received or notified to him or her?

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²⁹ Mrs E.A Jupp, February 12, 2007, available on hbinfo.

³⁰ Mr M. Rowland, October 3, 2006.