

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.
- 1.1. The decision of the Worcester appeal tribunal under reference U/04/055/2001/00523, held on 14 October 2002, is erroneous in point of law.
- 1.2. I set it aside and remit the case to a differently constituted appeal tribunal.
- 1.3. I direct that appeal tribunal to conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 to the 2000 Act, any other issues that merit consideration, in accordance with my interpretation of regulation 99(2) of the Housing Benefit (General) Regulations 1987.

### The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by a housing benefit claimant with the leave of the district chairman of tribunals who tried the case. The other party to the appeal is the claimant's local authority.

### Regulation 99(2)

3. The issue in this case is whether an overpayment of housing benefit, made by the local authority to the claimant, is recoverable from her. The case depends on the interpretation and application of regulation 99(2) of the Housing Benefit (General) Regulations 1987. In so far as relevant to this appeal, it provides that an overpayment is not recoverable

'where the claimant or a person acting on his behalf ... could not, at the time of receipt of the payment or of any notice relating to the payment, reasonably have been expected to realise that it was an overpayment.'

4. The rationale of regulation 99(2) is relevant to its interpretation. In order to identify that rationale, the provision has to be set in the context of regulation 99 as a whole.

5. Regulation 99(1) provides that all overpayments are recoverable, except for those to which regulation 99(2) applies.

6. Regulation 99(2) applies if the overpayment was caused by official error. That is defined by regulation 99(3). In short, it means that the overpayment was caused exclusively by a mistake made by a public official. If the claimant caused or contributed to the mistake, it is not caused by official error and so is recoverable under regulation 99(1).

7. Regulation 99(2) applies only to overpayments for which the claimant was in no way responsible. Nonetheless, it allows recovery in limited circumstances. Those circumstances are that the claimant could reasonably have been expected to realise that an overpayment was

being made at a specified time. The specified time is either when the payment is received or when notice relating to the payment is received.

8. The context in which regulation 99(2) will operate is relevant. It only applies to cases in which the claimant was on low income at the time of the payment. And the payment involved will have been made to help the claimant pay rent on a dwelling. In those circumstances, it is likely that the money will be spent fairly quickly. That, I believe, accounts for the emphasis on the time of payment or notice relating to payment. If the claimant could not reasonably have been expected to realise that an overpayment had been made, it is likely that the money will have been spent and spent in reliance on the claimant being properly entitled to it. In other words, regulation 99(2) contains an element of protection for a claimant who has relied on being entitled to the payment. The provision is not worded in those terms or limited to cases where there has been reliance. But that rationale provides a context in which the terms of the legislation must be interpreted.

9. The reference to the time of receipt of any notice relating to the payment was inserted into regulation 99(2) by amendment in 1991. Circular HB/CCB 90/23 states that its purpose was to cover cases of rent rebate in which no money is actually transferred to a claimant. But the wording is not limited to cases of rent rebate. The wording is general and there is no reason to limit it to those cases. It is equally relevant to cases in which money is actually paid to the claimant, because the notice may explain the basis on which it is being paid.

10. In short, regulation 99(2) protects the public purse by allowing for the recovery of an overpayment for which a public official was wholly responsible, subject to protection for a claimant in circumstances in which there could reasonably have been reliance on entitlement to the payment.

11. In this case, there is no dispute that an overpayment was made. Nor is there any dispute that the overpayment was caused by an official error by the local authority. The issue is how regulation 99(2) applies.

### **The circumstances surrounding the overpayment**

12. The claimant had been claiming housing benefit since 1999. The amount of benefit to which she was entitled had varied from time to time on account of changes in her family's circumstances.

13. On 13 February 2001, the local authority wrote a letter to the claimant, notifying her of her housing benefit entitlement. There are two copies or versions of the letter. One is at pages 14 and 15; the other is at page 68. On the latter, someone has written 'Received 17/4/01'. The copy at pages 14 and 15 refers to a payment of £1373.41 for the inclusive period from 31 July 2000 to 28 January 2001. That was a mistake, which arose from the fault of an officer in the local authority's housing benefit section. The reason for it is not relevant. It is sufficient to record that it arose as a result of not understanding the new computer system that was being introduced at the time. The same words are visible in the copy at page 68, but they may have been partially obliterated by masking fluid.

14. On 18 February 2001, the cheque for £1373.41 was sent by the local authority to the claimant's bank. The cheque appears to the credit of the claimant on 19 February 2001: see her bank statement at page 85.

15. On 19 February 2001, the local authority realised that the cheque was a mistake. A message was left asking the claimant to ring the local authority. The contemporaneous record of the conversation is at page 41. It records the mistake and the request that the claimant ring urgently. However, it is not clear whether the message left for the claimant (a) explained what had happened and asked her to call or (b) merely asked her to ring without explanation.

16. The claimant was away from home. Her husband was at home, but he denies picking up the message. However, he admits receiving an admittance advice relating to the cheque. I assume this is the document at page 39. He must have realised that a mistake might have occurred, because he asked a member of his Housing Association, who is said to have replied that a local authority would not make a mistake over so large an amount.

17. On 23 February 2001, the claimant began to make a series of cash withdrawals from her account. See her bank statement on pages 85 and 87.

18. On 26 February 2001, the claimant rang the local authority. When she was told that the payment had been made by mistake, she said that she had used the money to pay off the arrears on her rent account. That statement was not true.

19. A payment of £921.17 appears to the credit of the claimant in her rent account on 5 March 2001: see page 28. That amount cleared the arrears on her account.

**Could the claimant reasonably have been expected to know that she was being overpaid at the time of the receipt of the overpayment?**

*Receipt*

20. This raises the issue: when does a claimant receive a payment that is made by cheque?

21. The cheque was posted to the claimant's bank on 18 February and received on 19 February. It was shown to the claimant's credit on 19 February. She drew on it almost immediately. There is no indication on her bank statement that she has an overdraft facility. Nor is there any indication of whether she was authorised to draw against uncleared funds in the account. Finally, there is no evidence of when the cheque was cleared.

22. At the risk of stating the obvious, a payment cannot be received before it is received. So, the payment was not received by the claimant before the cheque reached her bank. At the earliest, it was received when it arrived at her bank. At the latest, it was received when the cheque was cleared.

23. Most claimants would, I suspect, consider that they had received payment when they received a cheque for the benefit. This is close to the legal approach, which is that payment by cheque is treated as a conditional payment. In other words, it satisfies the debt, provided that it is honoured. It is realistic and appropriate in the context of regulation 99(2) to take the same approach. So, the claimant received payment when the cheque was received by her bank and shown to the credit of her account. That occurred on 19 February 2001.

*Time*

24. This leads to another issue: how precisely must the 'time' of receipt be identified?

25. In its everyday use, time may refer to a moment or a period. The moment may be infinitesimally short – a nanosecond – or unimaginably long – the time since the universe began.

26. In the context of regulation 99(2), it is appropriate to define ‘time’ relatively narrowly, but not too precisely. In the context of protection for the public purse, it is not appropriate to require the finding of facts with a precision that could never be achieved. For example, at precisely what time did a claimant receive a cheque by post? And at exactly what time did information come to the claimant’s attention? And in the context of reliance by a claimant, precision of time is also inappropriate. A claimant is likely to spend the money promptly, but probably not immediately on receipt. Both those contexts suggest that ‘time’ in regulation 99(2) refers to a period, not to a precise moment. That begs the question of how long that period should be. The inevitable lawyer’s answer is that it all depends on the facts of the case. That can be seen as a cop out by a Commissioner. I prefer to see it as a recognition of an issue that is properly one for the judgment of the tribunal in the context of a particular case. I refrain from giving a definition of the word. It is a word that is in everyday use. Tribunals are capable of applying it sensibly within the parameters that I have set out.

27. The tribunal at the rehearing will have to decide how to apply the word. Just by way of example, in the context of this case, a possible approach would be to take the time of receipt as the day of receipt. The effect of that approach would be that the claimant knew at the time of receipt that the cheque was an overpayment if she learnt of that on 19 February.

28. The approach taken by the tribunal will dictate the issues of fact that it needs to investigate and determine. If it takes the approach suggested in my example, it will need to investigate and determine what was in the message left by the local authority, and whether the claimant’s husband listened to the message and passed it on to the claimant.

**Could the claimant reasonably have been expected to know that she was being overpaid at the time of the receipt of any notice relating to the payment?**

29. Usually, the notice concerned will be the decision notice relating to the payment, which will be in writing in compliance with regulation 77. The issue will be whether a claimant should be able to work out from the notice that the amount of entitlement has been incorrectly determined.

30. In this case, the issue arises differently. There is some uncertainty about the formal notices of the payment: see paragraph 13 above. I leave those to be resolved by the tribunal at the rehearing. I will deal with the issue of the form of the notice to which regulation 99(2) refers.

31. Regulation 99(2) refers to ‘any notice relating to payment’. That is wider than a notice *of* payment. So, it covers more than the actual decision notice informing the claimant of the payment or a remittance advice like the one sent in this case to the claimant. But the notice must relate to the *payment*. It is not sufficient that the notice relates to an overpayment. If it did, the local authority could always recover an overpayment from a claimant by the simple expedient of sending a notice saying that money previously paid had been paid in error. Regulation 99(2) cannot authorise recovery from a claimant on that basis. It is clearly designed to limit the circumstances in which money paid by an official error can be

recovered. If it could be used as a means of recovering any overpayment, it would render itself redundant.

32. But that does not mean that a local authority cannot correct an incorrect notice. I suggest this test. Was the withdrawal or correction of the notice essentially part of the same transaction as the sending of the notice? This preserves the protective force of regulation 99(2) for claimants, while allowing a measure of protection for a local authority that is able to draw a mistake to a claimant's attention promptly.

33. Regulation 99(2) is not limited to notice in writing. A notice will usually be in writing for reasons of proof. But there is nothing that requires it to be so. And when correcting a mistake, speed may dictate that a telephone call is the most appropriate means of communication, perhaps with a letter as a back up. A local authority is entitled to use a telephone message to correct a written notice that has been received or even to overtake one that has not yet arrived. Communication in that form can be effective for the purposes of regulation 99(2). That leaves for the tribunal the question of what the telephone message in this case said, whether it was picked up and whether its contents were sufficient to alert the claimant to the fact that she *was* being overpaid.

#### **What the tribunal did**

34. I come at last to the tribunal's decision. It dismissed the claimant's appeal. Although the interpretation and application of regulation 99(2) was the only issue in dispute before the tribunal, the chairman's statement of the reasons for her tribunal's decision devotes only one paragraph to it. That paragraph contains no analysis of the issues I have identified. It records that the notice for the purposes of regulation 99(2) could be oral as well as written. It then finds that the telephone conversation of 26 February was sufficient notice. Given the nature and the complexity of the issues of interpretation that I have identified, the tribunal's treatment of regulation 99(2) was too brief to be adequate. The tribunal thereby went wrong in law. I set aside its decision and direct a rehearing. I have considered whether to substitute my own decision for that of the appeal tribunal. I have decided to direct a rehearing, as the outcome of the case depends on issues of fact that in turn depend on the credibility of the evidence given by the claimant and her husband.

**Signed on original**

**Edward Jacobs  
Commissioner  
28 January 2004**