

## 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 Colchester appeal tribunal under reference U/42/132/2001/00810, held on 12<sup>th</sup> July 2001, 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 in order to determine whether the overpayment is recoverable from the claimant under regulation 99(1) to (3) of the Housing Benefit (General) Regulations 1987. In particular, the tribunal must determine the factual issue: did the claimant make the telephone call reporting the local authority's mistake, as she alleges she did? The legal burden is on the Secretary of State to show recoverability, although the claimant bears at least the evidential burden of proving the case that she alleges.

### **The appeal to the Commissioner**

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of a district chairman of tribunals. Case management directions were given by Mr Commissioner Powell. The local authority has made observations on the appeal.

### **The issue**

3. The issue in this case is whether an overpayment of housing benefit is recoverable from the claimant.

### **How the overpayment arose**

4. There is no dispute that the overpayment occurred. It occurred because of an incorrect calculation of the income the claimant received as incapacity benefit.

### **The law**

5. The overpayment is recoverable from the claimant unless it was caused by an official error and the claimant could not reasonably have been expected to realise, either when the award was notified or when it was paid, that an overpayment was being made. See regulation 99(1) and (2).
6. The claimant was in receipt of a rent allowance, not a rent rebate. The local authority's submission to the appeal tribunal and the full statement of the tribunal's decision both refer to regulation 99(4) of the Housing Benefit (General) Regulations 1987. That provision only applies to rent rebate cases. It has no application to this case.

### The claimant's argument

7. The claimant's argument on her appeal was this. She had realised that the local authority might have made a mistake in the calculation of her award. She telephoned the local authority to report this. But the officer to whom she spoke was adamant that no mistake had been made. So, she was assured by an officer of the local authority that the award was correct. In those circumstances, she could not reasonably have been expected to realise that there was an overpayment.

### What the tribunal had to decide

8. So, her case turned on a crucial issue of fact: did she make the telephone call as she alleged?

### The evidence

9. The claimant attended the hearing of her appeal and gave evidence of making the call, when it was made and what was said. She accepted that she had no other evidence of the call than her word that it had been made. The local authority reported that there was no record of the call.

10. The tribunal was in a position familiar to tribunals from their social security overpayment jurisdiction. The claimant alleged that a call had been made, but could not produce any corroborating evidence. The local authority denied that there was a record of the call.

11. There was no necessary conflict between the evidence of the claimant and that of the local authority. The evidence could be reconciled if the claimant had made the call, but it had not been recorded.

12. In response to questions posed in my direction at page 52, the local authority replied:

'It is standard procedure for the authority's Customer Services officer to record all telephone calls received, regardless of whether any action is needed or not. The authority is not aware of any instances where the procedure has not been carried out correctly.'

13. I do not doubt that the local authority's standard procedure is as it describes. I also accept that it may not be aware of any instances of non-compliance. However, that leaves open the question of the evidence on which non-compliance could be shown to the satisfaction of the local authority. It is not my experience of life that administrative systems work perfectly in every case.

14. In replying to the same question, the claimant's representative referred to an automatic system that logs all calls to the relevant section, but said that it was not in place at the time. I do not know if the local authority's reply was referring to that system or to the previous manual system. As far as I can tell from the chairman's record of proceedings, this point was not dealt with at the hearing. **It will have to be investigated at the rehearing.**

15. So, the issue turned on the credibility of the claimant's evidence. The lack of a record of the call by the local authority was a relevant factor in assessing that credibility, but that evidence itself had to be assessed taking into account the possibility of a mistake in the operation of the local authority's system.

### **The tribunal's decision**

16. The tribunal dismissed the claimant's appeal. It commented on her argument in both the decision notice and the full statement of the decision.

17. In the decision notice, the chairman wrote:

'The Tribunal recognises the personal difficulties of [the claimant]. She was aware of the mistake and phoned the benefit office in March 2000 but there is no record of this call.'

On the basis of that passage, the tribunal's decision was contradictory. It accepted that the call had been made, but dismissed the appeal. That might be read as just a rather inelegant way of saying that the claimant alleged that she had made a call, but that the tribunal did not accept her evidence in the absence of confirmation that the call had been made. It is appropriate to make allowance for the fact that the decision notice was completed immediately after the hearing without the chairman having much time in which to compose a succinct statement of the grounds for the decision. However, this was the key issue in the case. I cannot overlook the fact that on that issue the decision notice is contradictory.

18. The confusion in the decision notice could have been cleared up in the full statement of the tribunal's decision. It was not. Instead, the tribunal added to the confusion in two ways.

18.1. First, it found that the claimant had contacted the local authority, but only after she had been notified of the error. It did not explain why it had come to that conclusion.

18.2. Second, it asked why, if the claimant had known of the mistake in March 2000, she had not been more persistent in ensuring that it was corrected. The tribunal did not explain how that question related to the claimant's argument, which was that she had done all that she could.

### **Was the tribunal's decision wrong in law?**

19. Yes, it was. The tribunal did not make a clear finding on the key factual issue in dispute. It gave contradictory answers in the decision notice and its statement of reasons. Even if the more charitable reading of the decision notice is correct, the tribunal did not explain why it rejected the claimant's evidence. It is not enough to reject it just because there was no record of the call having been made. That would only be sufficient in itself if the record system was infallible. I doubt whether any manual system can be perfect and the tribunal did not make a finding that it was.

### **A discretion for the tribunal?**

20. The claimant's representative has asked the Commissioner to allow tribunals an element of discretion to accept the statement of a claimant without support.

21. I direct the tribunal on this argument as follows.
- 21.1. The language of discretion is not appropriate in this context. The tribunal does not have a discretion as to what evidence it will accept or reject.
- 21.2. What it has to do is to assess the probative worth of the evidence of the claimant and of the local authority.
- 21.3. Corroboration obviously adds to the probative value of the evidence. But corroboration is not essential.
- 21.4. Equally, the tribunal does not have to accept the bare word of a claimant.
- 21.5. As regards the claimant's evidence the tribunal must investigate the possibilities. One is that she is accurately reporting what happened. Another is that she is accurately reporting her recollection, but that recollection is confused with that of other calls she has made or is inaccurate for some other reason. A third possibility is that she is making up her account in order to avoid repaying money to which she was not entitled.
- 21.6. As regards the local authority's evidence, the tribunal must investigate the nature of the procedures when a call is made and consider the likelihood of the procedure not operating correctly.
- 21.7. It is not for me to tell the tribunal how to set about the task, which it performs in almost every case, of assessing evidence. But my opinion, for what it is worth, is this. Given the fallibility of human systems, the proper concentration should be on the claimant's account. Is it plausible? Does it have the ring of truth? Is it consistent with the claimant's conduct before and after the alleged call? Is there evidence which could support the account, but which the claimant has not produced? If she has had similar problems before (I believe she had), why did she not write a letter and send it recorded delivery? Or put a clear note on the claim form?
- 21.8. Having considered the matters relevant to the worth of the evidence, the tribunal must make a decision on the balance of probabilities whether or not the claimant made the telephone call as she alleges. In doing that, it must evaluate the evidence as a whole, taking account of the strengths and weaknesses as part of that package.
- 21.9. Having made that decision, it must explain why it made it. That does not mean that it has to set out every factor that it took into account or the precise weight that it gave to each. That degree of analysis is not possible. What is possible is a clear statement of the key factors that led to the tribunal's to its conclusion. In a case like this where the options are limited, that is not a difficult task.

### **Summary**

22. I allow the appeal and direct a rehearing so that the key factual issue in dispute can be investigated and determined afresh by a differently constituted tribunal. A rehearing is appropriate, as the case largely turns on the credibility of the claimant's oral evidence.

23. I emphasise, so that the claimant does not misunderstand, that my directions are only concerned with the approach that the tribunal must take at the rehearing. I have not directed the tribunal on what the outcome should be. It is for the tribunal to make the findings of fact on whether or not she did report to the local authority the mistake it had made in calculating her award of housing benefit.

**Signed on original**

**Edward Jacobs  
Commissioner  
12<sup>th</sup> June 2002**