



## Legal Framework - Commissioner's Decisions

Bulletin 181



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THE SOCIAL SECURITY COMMISSIONERS - Commissioner's Case No: CH/4354/2003

DECISION OF THE SOCIAL SECURITY COMMISSIONER

This is an appeal by the Claimant, brought with the leave of Mr Commissioner Jacobs, against a decision of the Burnley Appeal Tribunal made on 11 June 2003. For the reasons set out below that decision was in my judgment erroneous in law. I allow, the appeal, set aside the Tribunal's decision and remit the matter for redetermination by a differently constituted appeal tribunal.

I held an oral hearing of this appeal at Bury County Court on 10 March 2004, at which the Claimant was not present but was represented by her husband, and the local authority was represented by Mr. Peter Haywood, an assistant benefits manager employed by the local authority.

I propose first to set out the facts, including those emerging from submissions made orally by Mr. Haywood at the hearing before me.

On 28 January 2002 the Claimant signed a form claiming housing and council tax benefit. This stated that she had a child who was born on 23 January 2002, but no partner living with her, and that she was or was about to be in receipt of income support or jobseeker's allowance. At the end was a declaration which stated: "I will let the council know in writing immediately if there are any changes in my circumstances .....so that my benefit can be worked out again."

Mr. Haywood told me that the council has a remote access computer terminal from which it is possible to check whether a housing benefit claimant is in receipt of income support, and that such a check would have been done on receipt of the Claimant's claim form. This check presumably revealed that the Claimant was in receipt of income support. It could, I think, have been deduced from the information on the housing benefit claim form that the reason why the Claimant was in receipt of income support was that she was a lone parent.

On 31 January 2002 a decision was made that the Claimant was entitled to housing benefit of £55 per week from 7 January 2002. On 4 February 2002 it was decided that the Claimant was entitled to council tax benefit of £9.92 per week from 5 January 2002. (On p.11 of the papers there is an illegible photocopy of a form of notice emanating from the council which appears to be a further notification of the necessity to inform the council of changes in circumstances. It may have been sent to the Claimant with the notification of the decisions awarding benefit. I direct that the council send to the Appeals Service a legible copy for inclusion in the papers before the new tribunal, in case it adds anything).

The Claimant was married on 1 April 2002 and went off on honeymoon. On her return she telephoned or spoke in person to someone at the Benefits Agency on 18 April 2002 and informed them of her marriage. I do not know whether she was told then and there that her income support would cease. On 22 April 2002 a decision was made by the Secretary of State terminating her entitlement to income support with effect from 1 April 2002 on the ground that the Claimant had married (and was therefore no longer a lone parent).

On 18 April 2002 the Claimant also telephoned the local authority and informed them of her marriage. According to the Claimant (see page 36)

"When I called, to inform of my change of marital status, I asked whether this would change the amount of my benefit. The representative of your office told me not to worry that she would sort it out and asked me to send in my marriage certificate as soon as possible. I was unable to do this at the time because my marriage certificate was at the Home Office. I assured your representative that I would send it in as soon as possible.

When I heard nothing further, I assumed that your representative had taken care of the situation. I was in no doubt that if my benefit should have changed, the Treasury Service would have informed me of this. ...."

The local authority's call log records this telephone call from the Claimant on 18 April, and records

under "details of change": "caller has got married. Surname now ....." Then under "other information" is stated: "marriage cert to follow." Mr. Haywood told me that the person who took that call has since left the authority. I also interpose here to say that the Claimant's husband told me at the hearing that they did not in fact receive the marriage certificate until some 8 months later.

On 27 August 2002 the Claimant telephoned the local authority and stated that she wished to cancel her benefit claim because her hours of work had increased.

On 28 August 2002 the Claimant was notified that her claim had been "cancelled", the reason being "claimant request."

On 4 September 2002 the council received notification from the Benefits Agency of the result of a data matching search (p.28) performed (as I understand it from Mr. Haywood) by the Benefits Agency. As I understood what Mr. Haywood told me, the Benefits Agency did not automatically inform the council whenever income support was awarded or ceased, but only did so automatically if the Benefits Agency were aware that housing or council tax benefit had been awarded or claimed, which would only be in cases (which did not include this case) where housing benefit was claimed via the Benefits Agency. That would appear to be confirmed by the fact that the Claimant's husband produced at the hearing before me a copy of a letter to the Claimant from the local Social Security Office stating that no forms were issued to the council when the income support award was terminated on 22 April 2002. According to Mr. Haywood the data matching exercise received on 4 September results from the council periodically (at that time every 3 months) downloading their records relating to housing benefit claimants and transmitting them to the Benefits Agency, which then does the match. In this case the match (p.28) was actually done on 13 August 2002. It shows (under "additional information" at the bottom) that income support became "dormant" on 1 April 2002. Mr. Haywood informs me that the match which would have been done 3 months previously (i.e. presumably in the middle of May 2002) did not disclose that income support had ceased. I am not really clear why not, although Mr. Haywood said it was likely to be due to a delay in the income support information being input into the relevant records.

It appears that on 12 September 2002 Ms. Whipp at the local authority requested, by means of the form on p.29, that a check be done on the local authority's computer (see para. 5 above) to see whether the Claimant was in receipt of income support. On 17 September 2002 the check was done, producing the result at p.30, which confirmed that income support had ceased on 31 March 2002, and the form on p.29 was then filled in.

On 20 September 2002 the decisions under appeal to the Tribunal were made, namely that overpaid housing benefit totalling £1316.48 in respect of the period between 1 April and 1 September 2002, and overpaid council tax benefit totalling £234.52 in respect of the same period, was recoverable from the Claimant.

On 23 January 2003 the Claimant was notified that income support overpaid in respect of the period between 1 and 15 April 2002 was recoverable from the Claimant on the ground that she did not inform the Department about her marriage until 18 April 2002.

The Claimant requested a paper determination of the appeal, but the local authority requested an oral hearing, and on 14 May 2003 the Claimant was sent a notice that the appeal would be heard on 11 June 2003. The letter requested her to bring the "submission" with her to the "hearing."

The Claimant did not appear and was not represented at the hearing, but the local authority was represented, and the Tribunal dismissed the appeal. It did so on the ground that the overpayments did not arise from an official error but from the Claimant's failure to notify the local authority that her income support had ceased.

Permission to appeal to a Commissioner was sought on a number of grounds, which included the ground that the Claimant had not appreciated that an oral hearing was in fact going to take place at which she could have appeared. Mr. Commissioner Jacobs gave permission to appeal on that ground on 2 December 2003. His reasons ended by saying "I warn the Claimant that the basis on which I have granted leave does not relate to the merits of her appeal against the overpayment ..... decisions."

In its submission in the appeal the local authority produced a copy of the letter dated 14 May 2003 which I referred to in para. 16 above, which had not previously been in the papers. The Claimant requested an oral hearing of the appeal.

On 22 January 2004 Mr. Commissioner Jacobs directed an oral hearing. He said:

"I would not have directed an oral hearing if I had been prepared to allow the appeal on the ground I identified when granting leave. However, I am persuaded by the local authority's submission that the tribunal did not go wrong in law on that count. That is my opinion only. It is not necessarily the opinion of the Commissioner who will take the oral hearing. The claimant is entitled to argue the point before the Commissioner.

The purpose of the oral hearing is to consider [whether] the tribunal went wrong in law in concluding that the overpayment and excess benefit were recoverable from the claimant."

At the outset of his submissions before me Mr. Haywood contended that the only point open to the Claimant in this appeal was the natural justice point mentioned by Mr. Commissioner Jacobs. Whilst I would accept that, at the time of granting leave, Mr. Commissioner Jacobs was probably intending to limit the grant of leave to the natural justice point, it is very arguable that the last sentence of the passage which I quoted in the previous paragraph indicates that at that time he considered that any of the points of law in the Claimant's grounds of appeal could be argued. In any event, even if Mr. Commissioner Jacobs considered that he had given leave only on the natural justice point, I have no doubt that the Commissioner hearing the appeal has jurisdiction to permit other points to be argued. That may of course require the respondent to be given an adjournment if he reasonably believed that the hearing would be limited, and had not prepared, whether evidentially or otherwise, to deal with other points. I informed Mr. Haywood at the hearing that I would permit the Claimant to argue the other points mentioned in her OSSC 1 Form, and in her written submissions. Mr. Haywood stated that he did not wish an adjournment.

Like Mr. Commissioner Jacobs, I am satisfied on the evidence now available that there is nothing in the natural justice point. Whilst I accept that the Claimant did not in fact realise that there was going to be a hearing at which the local authority would or might appear, in my judgment the letter dated 14 May 2003 made it clear that there would be such a hearing.

The next point raised by the Claimant's husband was that there had been no valid termination of the Claimant's awards, since (i) the notifications of cessation of benefit stated merely that the awards were "cancelled", and did not refer to revision or supersession and (ii) the only reason given was that the claimant had requested cancellation, which does not indicate the reason why she ceased to be entitled to benefit. He referred to CH/1085/2002 and CH/2302/2002. In my judgment it is clear that the purported "cancellation", on 28 August 2002, as from a date (1 September 2002) just after the date of the decision was intended to be a supersession of the awards, since there was no other general power under which the awards could have been so terminated: see the decision of the Tribunal of Commissioners in CIB/4751/2002 at paragraphs 75-6, the reasoning in which applies equally to the equivalent provisions in relation to housing and council tax benefit. Further, the fact that the correct reason for supersession was not stated did not invalidate the decision if there was in fact a valid ground for supersession: see paragraphs 73, 74 and 77 to 80 of that decision. There was in fact a valid ground for supersession, namely the change of circumstances consisting of the termination of income support.

I turn now to the Claimant's contention that the Tribunal erred in law in dealing with the question whether the overpayments had been caused by official error. Reg. 99 of the Housing Benefit (General) Regulations 1987 (Reg. 84 of the Council Tax Benefit (General) Regulations 1992 being in substantially similar form) provides, so far as material, as follows:

(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.

(2) .....this paragraph applies to any overpayment caused by an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment, or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.

(3) In paragraph (2), "overpayment caused by official error" means an overpayment caused by a mistake made whether in the form of an act or omission by –

(a) the relevant authority;

(b) an officer or person acting for that authority

(c)  
.....

where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission."

The Tribunal's decision was in my judgment erroneous in law in that, in deciding that the overpayments were not caused by an official error, the Tribunal did not in my judgment explore in sufficient detail the contents of and implications for the "official error" question of the telephone conversation on 18 April 2002 which I referred to in paras. 8 and 9 above. The letter at p.36 in which the Claimant set out her contention as to the contents of the conversation was before the Tribunal.

Three questions arose as a result of the telephone conversation: (i) whether the council made a "mistake" in not checking the income support position (whether by means of its remote access terminal or otherwise) on or shortly after the date of the conversation (ii) if so, whether that mistake caused the overpayment and (iii) whether the claimant caused or materially contributed to the mistake by not sending in her marriage certificate or not informing the council when she found she could not. Unless the answer to (i) and (ii) is yes, and the answer to (iii) is no, the overpayment would appear to be recoverable. Mr. Haywood said to me in his submissions that he thought it likely that if the marriage certificate had been produced the council would then immediately have done a computer search by the remote access terminal to see what the Claimant's income support position was, because the council would have been aware that marriage (or the additional income which may be available to a partner) may terminate entitlement to income support. The evidence at p.29 would suggest that if the council had done such a search, it would have taken their office about 5 days to do so, so that a search requested on 18 April 2002 would probably have revealed the termination of income support on 22 April. In essence, the main point of fact which seems to me to arise is whether (a) the local authority gave the Claimant the impression in the conversation on 18 April that they would re-assess the Claimant's housing benefit entitlement without waiting for the marriage certificate, or alternatively (b) the tenor of the conversation was that they would only do so when proof of the marriage was produced by means of a certificate. If (a), then it does not seem to me to matter that the Claimant did not in addition disclose the termination of her income support a few days later, because she was in effect have been led to believe that she need do nothing further by way of disclosure. If (b), then the new tribunal may take the view that the council did not make a mistake, or that even if it did the claimant contributed to it by failing either to produce the marriage certificate or to inform the council that she was not going to be able to do so.

Another issue for the new tribunal which perhaps arises out of Mr. Haywood's submissions to me is whether the council did in fact (see the last 2 sentences of para. 12 above) receive information as to the income support position by means of the matching exercise which would apparently have been undertaken some time in May 2002. The local authority may wish to put further evidence as to this before the new tribunal.

My decision is therefore as set out in paragraph 1 above. It would clearly be wrong for me to decide the substantive appeal (rather than remitting it to a new tribunal) on the evidence before me, because the Claimant was not at the hearing to give evidence as to (in particular) the contents of the conversation, and the local authority have not had any opportunity to attempt to contact the recipient of the telephone call of 18 April 2002 and in any event both parties would I think have been taken by surprise if I had made the necessary findings of fact myself. I should make clear that I have made the above comments as to the factual issues which it appears to me are likely to arise before the new tribunal in order to be as helpful as possible. They are not, however, binding on the new tribunal, which must consider the whole matter afresh and make its own findings on the evidence before it.

**(Signed) Charles Turnbull**

**Commissioner**

**17 March 2004**

