DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the Appellant's appeals.

The decision of the Colchester First-tier Tribunal dated 18 November 2011 under file references 133/10/00335 and 133/10/00336 involves an error on a point of law and is set aside. The Upper Tribunal re-makes that decision in the following terms:

> "The Appellant's appeals are allowed.
>
> The Secretary of State's overpayment recovery decisions of 19 November 2007 (in respect of the period from 18 May 2007 to 6 November 2007, FTT ref 133/10/00335) and 17 June 2009 (in respect of the period from 12 November 2007 to 11 March 2009, FTT ref 133/10/00336) are of no effect.
>
> This is because there were no relevant entitlement decisions by way of supersession or revision. It follows that at the time the overpayment recovery decisions were made, the requirement in section 71(5A) of the Social Security Administration Act 1992 had not been met.
>
> This is without prejudice to any further action the Secretary of State may decide to take in relation to the alleged overpayment."

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. At the time in question the Appellant was an unemployed local authority councillor. This appeal concerns two main issues. The first is how his local government member's basic allowance was to be treated for the purposes of entitlement to income-related jobseeker's allowance (JSA). The second issue relates to the decision-making process required when the Department for Work and Pensions (DWP) seeks to recover an alleged overpayment of income-related JSA.

A summary of the facts

2. This appeal has a long and complex history. For present purposes this summary will suffice. The Appellant made a claim for income-based JSA as from May 2007 (Claim 1). He then went abroad for a few days in November 2007. On his return, he immediately made a fresh renewal claim (Claim 2). The Appellant states that he told his DWP Advisor about his involvement as a councillor.

3. In March 2009 DWP Fraud Investigators interviewed the Appellant under caution about the payments he received as a councillor and their relevance to his benefit claims. Having read the transcript, it is fair to say that was a rather difficult interview. For example, near the start there was a pedantic argument between the Appellant and the investigators as to whether the audio-tape was brand new and unused (or not). This perhaps set the tone for many of the subsequent communications between the Appellant and the DWP.

4. In the course of 2009 DWP decision-makers made a series of further decisions on the Appellant's two claims (these decisions are considered in more detail below). The upshot, however, was that two overpayment decisions were made.

5. The first, in relation to Claim 1, was that there was a recoverable overpayment of income-related JSA amounting to £1,073.62 (18/05/2007 to 06/11/2007). This was said to be recoverable due to a failure to disclose "earnings from part-time work" as a councillor. This decision, taken by way of a revision decision on 19 November 2009 (revising an earlier decision of 17 June 2009), led to First-tier Tribunal (FTT) appeal ref. 133/10/00335 (and Upper Tribunal appeal CJSA/2691/2012).

6. The second, in relation to Claim 2, was that there was a recoverable overpayment of income-related JSA amounting to £4,171.50 (12/11/2007 to 11/03/2009). This was said to be recoverable due to a misrepresentation as to his receipt of "part-time earnings" as a councillor. This decision, taken on 17 June 2009, led to FTT appeal ref. 133/10/00336 (and Upper Tribunal appeal CJSA/2690/2012).

7. The Appellant sent in various letters and appeal forms challenging these decisions. His letter dated 13 July 2009 and the appeal form dated 26 November 2009 were plainly in-time appeals against the overpayment decisions in respect of Claims 2 and 1 respectively.

The appeals before the First-tier Tribunal

8. The FTT held an initial hearing on 12 July 2010. This got off to a poor start. The presenting officer was delayed due to a traffic accident. The Appellant's representative was absent, possibly for the same reason. The FTT judge adjourned the appeal with directions requiring the DWP to produce the relevant entitlement and overpayment decisions and the Appellant to provide a further submission and any additional evidence at least 14 days before the next hearing.

9. Between the adjourned FTT and the final FTT the Appellant appeared at the Crown Court at a "mention hearing". He had been charged in relation to more than one offence (presumably as to alleged benefit fraud). At the Crown Court hearing, the DWP conceded that it was not in a position to prove the allegations and formally offered no evidence. The Judge duly entered not guilty verdicts on each count.

10. The FTT then held a final hearing, before the same tribunal judge as before, on 18 November 2011. The Appellant attended, again without his representative. The FTT dismissed the appeal, ruling that the two overpayment decisions had been correctly made and that the sums in question were recoverable. The decision notice, issued on the day, stated as follows:

> "[The Appellant] made assertions on new grounds of appeal which were unsupported by existing evidence and by any evidence produced by him in accordance with the directions issued on 12/07/2010. The tribunal was unwilling to consider these arguments as it had no prior notice of them and they were not set out in the submission of the CAB representative, dated 25th October 2011".

11. The FTT judge subsequently issued a statement of reasons. This did not take matters much further forward. It summarised some of the history of the appeal, noting that "the full decisions were provided by the DWP as required but the case for the appellant had been faxed to the venue by the CAB only 2 days before the hearing and not seen by the Judge until the morning of the hearing." Furthermore, the Appellant was said to have "proceeded by making assertions, which could have been

supported by evidence but for which no evidence was produced. He also produced evidence of a new case which had not previously been notified to the Tribunal or DWP and which did not form part of the case put forward on his behalf by the CAB. This is outlined in the Record of Proceedings".

12. The so-called "new case" on behalf of the Appellant, as it appears from the record of proceedings, appeared to have two aspects. The first was the Appellant's argument that he was not "employed" by the local authority. The second was that he had the name of the DWP Advisor he had told about his role as a councillor, but the CAB representative had not named this individual in the submission of 25 October 2011.

13. The FTT District Tribunal Judge gave permission to appeal, posing the question "given the facts of this case, was the Tribunal Judge entitled to take the robust approach that she did or did it constitute an error of law?" Before dealing with that question, I need to address two misconceptions and consider the position of councillors' allowances under the relevant benefits scheme.

Dispelling two misconceptions

14. First, the fact that the DWP formally offered no evidence on the criminal charges and the Appellant's acquittal was directed is not a "get out of jail free" card on these overpayment appeals. The legal tests are completely different, as is the standard of proof. A failure to disclose or a misrepresentation, for the purpose of a recoverable overpayment of benefit, may be entirely innocent.

15. Second, the fact that a councillor is not an employee of the local authority of which he is a member (and indeed is disqualified from holding such office if he or she is an employee of that council: see section 80(1) Local Government Act 1972) is not conclusive as to how monies received (e.g. a member's allowance) are treated for the purposes of entitlement to income-related JSA. The treatment of such allowances is governed by social security law, not local government law (nor indeed tax law).

The treatment of councillors and their allowances

16. Although a councillor is not an employee of that local authority, he or she is generally an "employed earner" for social security purposes. Thus, for the purposes of income-based JSA, an "employed earner" carries the same meaning as in section 2(1)(a) of the Social Security Contributions and Benefits Act (SSCBA) 1992 (see Jobseeker's Allowance Regulations 2006 (SI 2006/213) ("the JSA Regulations"), regulation 3). Section 2(1)(a) of the SSCBA 1992 defines an "employed earner" as a person working under a contract of service (i.e. an employee) "or in an office (including elective office) with general earnings" (this last term in turn refers to the Income Tax (Earnings and Pensions Act 2003, section 7(3)). Similarly, "employment" is defined widely to include any "office" (JSA Regulations 1996, regulation 3); see further reported Social Security Commissioner's decision R(IS) 6/92 at paragraph 5. A councillor, by definition, is a holder of an elective office and thus an "employed earner" for these purposes.

17. However, although regarded as an "employed earner", a person performing his or her duties as a councillor is treated as <u>not</u> being engaged in remunerative work for the purposes of entitlement to income-based JSA (JSA Regulations 1996, regulation 53(e)).

18. The position is less straightforward as regards the status of any allowances received by councillors from the local authority. The starting point is that "any remuneration or profit" derived from an employed earner's employment (in the

extended sense of those terms, as set out in paragraph 16 above) amounts to that person's "earnings" (JSA Regulations 1996, regulation 98(1)). However, there are various exclusions from that definition, one of which is "any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment" (regulation 98(2)(d)). On that basis, travelling expenses while on council duties and subsistence payments will typically be ignored (see unreported Social Security Commissioner's decision CIS/89/1989 and R(IS) 6/92 at paragraph 8).

19. However, in addition to (or in place of) such specific payments, councillors may receive an 'attendance allowance' (not to be confused with the social security benefit of the same name) and/or a 'basic allowance'. A local government attendance allowance, in principle, is clearly a payment of "earnings" under social security law (see R(IS) 6/92 at paragraphs 5 and 6). A basic allowance is not paid to meet itemised individual expenses, but rather in broad terms to compensate the councillor for their time and generally to cover expenses incurred in the execution of their duties. The basic allowance may, or may not, absorb all a councillor's actual expenses. Depending on the particular facts, a basic allowance may be regarded as wholly attributable to the reimbursement of expenses – if the claimant can show that he incurred expenses wholly exclusively and necessarily in the performance of his duties and that these expenses absorbed the whole of the basic allowance (CIS/77/1993, at paragraphs 9 and 10).

20. The full legal position was helpfully set out by Mr Commissioner (now Judge) Turnbull in CJSA/2396/2002 (at paragraph 6):

> '6. In my judgment the law and its application to this case are quite clear. I put the correct position (which is that set out in the Secretary of State's submission in this appeal) to the Claimant at the hearing, and he said that he did not wish to contend to the contrary. The position is as follows.
>
> (1) The basic allowance and the special responsibility allowance are in principle both capable of being "earnings" within the meaning of Reg. 98(1) of the Jobseekers Allowance Regulations 1996.
> (2) However, by Regulation 98(2)(d) "earnings" shall <u>not</u> include "any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment." If either (i) the legislation relevant to council allowances had showed that a basic allowance could only be paid in respect of the expenses likely to be incurred in the course of duties as a councillor or (ii) the evidence had showed that the basic allowance was in fact calculated by reference only to expenses likely to be incurred, the Claimant could have said that the whole of the basic allowance should be disregarded, without inquiry as to the amount of expenses which he actually incurred in performance of his duties. However, (i) the legislation relating to the basic allowance (which is helpfully summarised in para. 6 of CIS/77/1993 (see pages 151-2 of the case papers)) shows that such an allowance is not by law restricted to the amount of likely expenses and (ii) the evidence in this case shows that the basic allowance is in fact given partly in order to compensate for a councillor's time, and not solely to compensate him for his expenses: see especially pages 112 and 113 of the case papers, and also para. 7 of CIS/77/1993. The position is therefore that, in calculating the Claimant's earnings, there should be deducted from the basic allowance expenses wholly, exclusively and necessarily incurred in

> the performance of the Claimant's duties which were not in fact separately reimbursed by the Council. That was also the analysis reached in para. 20 of CIS/5826/1997, helpfully cited by the Secretary of State. If those expenses exceeded the basic allowance, the excess can be deducted from the special responsibilities allowance: see para. 21 of CIS/5826/1997. The end result is therefore simply that there has to be determined the amount of expenses incurred by the Claimant in the performance of his duties which were not (or could not have been had they been claimed) separately reimbursed, and that amount falls to be deducted from the allowances.'

21. In the present case the Appellant appears to have been elected as a councillor in May 2007. He received a member's basic allowance of £3,485 a year, along with a broadband allowance of £220 p.a., which were paid together in monthly instalments.

Did the First-tier Tribunal err in law?

22. The District Tribunal Judge asks whether the FTT judge's robust approach involved an error of law. The short answer is yes. Mr Wayne Spencer has provided a helpful written submission on behalf of the Secretary of State, supporting the appeal. He argues that there are two errors of law in the FTT's decision.

23. The first is that the FTT simply did not explain how the payments received by the Appellant in his capacity as a councillor fell within the statutory definition of "general earnings".

24. The second, and more fundamental, point is that there were no effective decisions dealing with the Appellant's entitlement to income-based JSA for the relevant periods. That being so, the consequential overpayment decisions were, in effect, built on sand, and crumbled with the defective entitlement decisions.

25. I agree with both those points and therefore allow the appeal and set aside the FTT's decision as in error of law.

26. In deference to the further arguments put forward by Mr Richard Aldis, the Appellant's CAB representative, I should add that I also agree with his primary ground of appeal, namely that the FTT erred in its handling of his submission on behalf of the Appellant. Mr Aldis, knowing that the Appellant had asked for an adjournment on that same day, sent in a first detailed written submission on 12 July 2010, which was received by the FTT office the following day. Before the final hearing, Mr Aldis prepared a further submission dated 25 October 2011, developing those points, which was sent to the FTT office on 1 November 2011. He therefore met the 14-day deadline set by the FTT's directions. However, his submission was not date-stamped as received until 9 November 2011 – whether this was due to postal delays or (as seems more likely) processing delays at the Birmingham Administrative Support Centre (ASC) is unclear. The Birmingham FTT office then faxed the submission to the venue on 16 November 2011, two days before the hearing.

27. It is therefore entirely understandable that the FTT judge did not see Mr Aldis's second submission until the day of the hearing (18 November 2011). However, she was mistaken in placing the responsibility for that delay on the CAB – the submission had been faxed by the FTT office to the venue only two days before the hearing and not (as the FTT judge found) by the CAB. I am also satisfied that, properly understood, the Appellant was not seeking to raise novel and very late arguments at the hearing. He had raised the point about the Local Government Act 1972 and not

being an employee in his interview under caution back in March 2009. Both of Mr Aldis's submissions had referred to the Appellant's contention that he had informed the DWP Advisor of his role as a councillor, even if the staff member had not been specifically named.

28. Tribunals are perfectly entitled to be robust in their approach where the circumstances justify it. However, in the present case the FTT judge's robustness unfortunately led to a failure to adopt a sufficiently inquisitorial approach to the appeal. Mr Aldis in both his submissions had developed arguments around the application of the principles set out in CIS/77/1993, but these are simply not addressed in the decision notice or statement of reasons. It is almost as if the FTT judge's finding that the Appellant was seeking to raise a new argument – and certainly the argument about his status was (a) not new and (b) not relevant, given the statutory definitions considered above – in some way absolved her of any need to deal with the substantive issues on the appeal.

29. I have to say that the FTT's failure to address the two grounds for recovery represents a further error of law. There are no findings of fact as to what the Appellant did or did not say on his JSA claim forms and in meetings with his DWP Advisor. There is no analysis as to the nature of the alleged failure to disclose (regarding Claim 1) and supposed misrepresentation (Claim 2). As Mr Spencer notes, there is no consideration of the nature of the Appellant's duty to provide information etc under regulation 24 of the JSA Regulations 1996. Nor did the FTT note that the DWP's case on misrepresentation was confused, being based in part on legally irrelevant arguments about reasonableness.

30. For all these reasons I must allow the appeal and set aside the FTT's decision.

The Upper Tribunal's disposal of the appeal

Introduction

31. Mr Spencer, for the Secretary of State, invites me to allow the appeal and send the case back for re-hearing. However, in my view this would just delay the inevitable, given the poor qualify of DWP decision-making in this case from the outset.

32. The problems turn on the second issue identified by Mr Spencer in his support for the appeal (see paragraph 24 above). As he points out, it is not enough simply to have an overpayment recoverability decision which is valid on its own terms. There must also be an effective revision or supersession decision relating to the claimant's entitlement to benefit. In the absence of such a decision, the overpayment is not recoverable, irrespective of whether there has been a relevant failure to disclose or misrepresentation (see Social Security Administration Act (SSAA) 1992, section 71(5A)).

33. In the present case, whatever the position as regards the overpayment decisions, I am not satisfied that there were valid entitlement decisions in relation to both Claims 1 and 2, for the following reasons.

Claim 1: is there a valid entitlement decision?

34. The DWP submission to the FTT appeared to suggest that the relevant entitlement decision was that dated 26 May 2009. This decision purported to be a supersession of an earlier decision dated 1 August 2007, awarding income-based JSA, and related to the period from 8 May 2007 to 25 October 2007. In fact there was then a refusal to revise that decision on 11 September 2009, followed by a "revision" on 5 November 2009. That revised decision was essentially in the same terms as the

26 May 2009 "supersession" decision, but for a slightly longer period (ending 6 November 2007). Both decisions were made at the Merthyr Tydfil DWP office, rather than the local office that had been handling the Appellant's claim previously.

35. Both the "supersession" decision of 26 May 2009 and the "revision" decision of 19 November 2009 stated that the Appellant was entitled to JSA for the period of Claim 1 and continued to satisfy the conditions of entitlement. Both decisions also stated that "however, earnings are to be taken into account", at specified weekly rates. However, neither decision specified the new weekly rate of benefit for each week or period in question. As Mr Spencer observes, the findings in these decisions "constitute a set of determinations and not an outcome decision". As such, neither decision amounted to an effective supersession (or revision) (see R(IB) 5/04, paragraph 55(1) and e.g. CSH/447/2010 at paragraphs 3 and 4; see also CIS/3228/2003). It followed that section 71(5A) of the SSAA 1992 was not met. As Mr Commissioner (now Judge) Bano put it in CIS/3228/2003 (at paragraph 24):

> "Proof of a supersession or revision decision complying with section 71(5A) of the Administration Act is not a question of 'constructing a narrative', as the Secretary of State has submitted, but of establishing that the necessary decision was actually taken by a decision maker, or by a computer in accordance with the procedure now authorised by section 2(1) of the Social Security Act 1998."

36. Thus Mr Spencer argues that the FTT should have considered whether there was some other decision which completed and perfected the process of supersession. It is presumably for consideration of this issue that he suggests that the matter be sent back for re-hearing. In my view it is highly unlikely that there was any other such decision. Nor is there sufficient material here for the FTT to correct the deficiencies in the DWP's decision-making processes. I bear in mind the following factors.

37. First, it is true that the first overpayment decision (dated 17 June 2009) purports to be made "as a result of the decision(s) dated 01/06/2009". This might suggest that there was in fact an effective entitlement decision made on 1 June 2009, separate from the defective supersession decision of 26 May a week earlier. However, there is no mention of this supposed decision in the later decisions taken on 11 September 2009 (which refers only to the decision of 26 May) and 5 November 2009. Furthermore, the DWP submission to the FTT simply states that "on 1 June 2009 the central reassessment team [at Merthyr Tydfil] calculated the resulting overpayment and referred the debt to Glasgow for a decision on its recoverability". There is no indication that a perfected entitlement decision was made, let alone communicated to the Appellant. His initial letter of 13 July 2009 was in terms plainly a challenge to the overpayment decisions, not to any entitlement decision that he may have (or may not have) received.

38. Second, the onus is on the Secretary of State to demonstrate that the appropriate grounds have been established for a recoverable overpayment. No other such decision, whether dated 1 June 2009 or any other date, has been produced. The Secretary of State's decision maker is required to provide, with the DWP's response to the appeal, copies of any written records of the decision being challenged along with all other relevant documents (Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), rule 24(4)(a) and (b)). In addition, in response to the FTT's directions at the adjourned hearing, the DWP had expressly confirmed that all relevant evidence had already been produced.

39. Third, the Appellant has made a request to the DWP under the Freedom of Information Act 2000 in relation to DWP information held about his prosecution. The 14-page schedule of "unused material" catalogues a total of 77 different documents or groups of documents. There appears to be no mention there of any other supersession or revision decision. Nor does there seem to be any reference, in the various computer screen prints, to any decision dated 1 June 2009.

40. Fourth, there is in any event a lack of coherence between the decisions produced and the DWP's other documentary evidence. The "supersession" decision of 26 May 2009 and the "revision" decision of 5 November 2009 both stated that the Appellant remained entitled to JSA for the period of Claim 1, albeit that his "earnings" (as they were described) had to be taken into account. The supposed supersession decision expressly stated that the effect on benefit was "decreased", not "disallowed" or "disqualified" (the later decision was silent on this matter). Both the initial and later overpayment decisions included schedules indicating that the Appellant was entitled to JSA as from 18 May 2007 (the start of Claim 1) but at a reduced rate. Yet a letter from the local office manager to the Appellant's MP, dated 13 November 2009, stated that the Merthyr Tydfil decision maker decided that the Appellant "was not entitled to payments of JSA from 18 May 2007 ... because his income from his duties exceeded his JSA personal allowance". Either he was entitled (perhaps at a reduced rate), or he was not entitled to JSA. It is simply unclear what the Secretary of State's case was on this crucial point.

Claim 2: is there a valid entitlement decision?

41. The decision making history in respect of Clam 2 is a little less convoluted. There is what purports to be a revision decision dated 26 May 2009, revising a JSA award dated 12 November 2007. There was a subsequent refusal to revise on 11 September 2009. However, both decisions suffer from the same fundamental flaw as the equivalent determinations on Claim 1. They are not proper entitlement decisions. An overpayment decision dated 17 June 2009 again refers to a decision of 1 June 2009 but, as described above, there is no other satisfactory evidence of any such decision having been effectively made or communicated.

Conclusion in re-making the decisions under appeal

42. From the file before me, there is no persuasive evidence that the requirement in section 71(5A) of the SSAA 1992 has been met, i.e. there was no valid entitlement decision (whether by way of an effective supersession or revision) before the respective overpayment decisions for Claims 1 and 2. Nor is there sufficient material on file for the decisions that were made to be perfected into proper entitlement decisions. That being so, the basis for the overpayment decision in each case necessarily falls as well.

43. In those circumstances, the decisions that there were recoverable overpayments are of no effect, there being no valid decisions. This is not the same as saying categorically that the overpayments are not recoverable. There is nothing to stop the DWP going back to square one and making (and notifying) effective entitlement decisions, and then making (and notifying) the relevant consequential overpayment decisions (see R(IS) 13/05 at paragraph 15). Any such new decisions will carry their own fresh appeal rights. The DWP is also subject to no time limits in this respect. However, any such fresh entitlement decisions will have to have due regard to the matters set out in paragraphs 18-20 above.

Conclusion

44. I conclude that the decision of the First-tier Tribunal involves an error of law for the reasons set out above. I therefore allow the appeals and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The decision that the FTT should have made is as set out at the head of these reasons (section 12(2)(b)(ii)).

Signed on the original
on 10 May 2013

Nicholas Wikeley
Judge of the Upper Tribunal