

DECISION OF THE SOCIAL SECURITY COMMISSIONER

The decision

1. My decision is that the decision of the appeal tribunal of 2 December 2003 is erroneous in law and I set it aside. Exercising my power under s.14(8)(a)(ii) of the Social Security Act 1998, I consider it expedient to make fresh or further findings of fact, and to give the decision which I consider appropriate in the light of those fresh or further findings. My decision is that (1) an overpayment of housing benefit of £933.37, and (2) an excess payment of council tax benefit of £966.85, both for the period from 3 June 2002 to 7 April 2003, are not recoverable from the appellant.

Background and facts

2. The appellant made a claim for housing benefit and council tax benefit on 30 May 2002. He had not claimed these benefits before. Full details of the income of the appellant and his wife were provided. The local authority computed entitlement to both benefits without taking into account one of the two awards of incapacity benefit. The result was an overpayment of both benefits.
3. On 8 August 2002 the appellant was sent a letter in the following terms:

I am writing to tell you the outcome of your claim for housing benefit. I am pleased to tell you that a rent allowance of £18.20 a week has been awarded from 3 June 2002.

Your awards are as follows:

From 1 Apr 2003 to 7 Apr 2003 an amount of £18.76 per week.

Details of these awards can be found in the accompanying schedules.

Your benefit will be reviewed on the 2 June 2003 and the necessary forms to reapply will be sent to you when appropriate.

However if there is any change in the level of your State benefits or in Government legislation affecting benefits a revised notification will be sent to you.

From your new award, a recovery of £0.00 has been affected against the benefit that was previously overpaid for all or part of the period stated below. This is reflected in the payment detailed below.

Payment will be made by cheque and the first will be sent on 26 August 2002. This will be for £328.94 to cover the period from 3 June 2002 to 26 August 2002. Thereafter you will be paid £75.40 every lunar month.

Please read your rights and duties on the back of this letter.

Housing benefit award for 01 Apr 2003 to 07 Apr 2003

A rent rebate of £18.76 has been awarded.

Weekly eligible rent	£36.10
Long term incapacity	£70.95
DLA (Care—Middle Rate)	£39.30
DLA (Mobility)	£14.90
Occupational Pension	£105.53

(Income tax has been deducted, where applicable, from any private pension)

Capital	£4,788.31
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Your applicable amount (this is the amount set by the Government to cover basic needs) is made up of the following values:

Personal allowance	£84.65
Higher Pensioner Premium	£84.15

4. No copy of the information said to be contained on the back of the letter is included in the bundle before the tribunal or before me.
5. A further letter dated 8 August 2002 was sent to the appellant in the following terms:

I am writing to tell you the outcome of your claim for Council Tax Benefit. I am pleased to inform you that a rebate of £8.85 per week (rounded) has been awarded from the 3 June 2002.

Your awards are as follows:

Details of your new awards can be found in the accompanying schedules.

Your benefit will be reviewed on the 2 June 2003 and the necessary forms to reapply will be sent to you when appropriate.

However if there is any change in the level of your Council Tax, State benefits or Government legislation affecting benefits a revised notification will be sent to you.

Your awards are as follows:

Your benefit has been shown as a rebate on your Council Tax account and a revised demand note will be issued showing your new payments.

Please read your rights and duties on the back of this letter.
6. No schedule is included in the bundle before the tribunal or before me in respect of Council Tax Benefit. No copy of the information said to be contained on the back of the letter is included in the bundle before the tribunal or before me.
7. The foot of all the stationery contains the printed words, 'You should carefully read the notes overleaf. Landlords should note their liability to repay overpayments.'
8. Review letters dated 1 March 2003 were sent to the appellant covering awards of benefit from 1 April to 2 June 2003.
9. On 16 April 2003 overpayment letters were sent to the appellant. Further overpayment letters were sent out on 7 May 2003 and 17 June 2003.
10. On 18 August 2003 the appellant filed an appeal to the tribunal. He pointed out that the local authority had lost their income details and they had to 're-apply' for benefit, and that it was unfair that he should bear the burden of the local authority's mistake in not taking his wife's incapacity benefit into account.

The tribunal decision

11. The appeal came before the tribunal for a paper hearing on 2 December 2003. The outcome was that the decision that there was a recoverable overpayment was confirmed. A full statement of reasons was subsequently provided. In essence, the tribunal concluded that it was reasonable to expect the appellant to have noticed the absence of any mention of his wife's incapacity benefit on letters informing him of the awards of benefit.

The grounds of appeal

12. The appellant appeals against the decision of the tribunal, and the appeal now comes before me by leave of the tribunal chairman.
13. The grounds of appeal are that it was not reasonable for the appellant to have noticed the missing figure. It was argued that Regulation 99(2) had not been fully considered.
14. The appeal is not supported by the local authority. In their observations they state, 'All the Authority's notifications include a paragraph telling claimants that must tell the authority if their income changes from that shown in the assessment letter.' This requirement is not

relevant to the appellant's appeal since this case does not involve any failure to disclose a *change* in social security benefits. It concerns a failure by the local authority to include in the calculation a benefit which has been disclosed to them in the initial claim.

15. In his observations on the local authority's submission to me, the appellant comments,

All the correspondence sent to my by Council was to me ... and I was under the impression that not claiming benefit before that only my earnings were put on the letters. It was not until June 2003 that they the Council started to address letters to (me and my wife jointly). The letters still did not display [my wife's] benefits.

16. None of the letters in the bundle before me is addressed jointly to the appellant and his wife. The latest letter in the bundle is dated 16 September 2003, and is addressed to the appellant alone.

Did the tribunal err in law?

17. The relevant statutory provision dealing with overpayment of housing benefit is section 75 of the Social Security Administration Act 1992, which provides:

(1) Except where regulations otherwise provide, any amount of housing benefit ... paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.

18. The relevant statutory provision dealing with excess council tax benefit is section 76 of the Social Security Administration Act 1992, which provides:

(1) Regulations may make provision as to any case where a billing authority ... has allowed a council tax benefit to a person and the amount allowed exceeds the amount to which he is entitled in respect of the benefit.

(2) The regulations may provide that—

(a) a sum equal to the excess shall be due from the person concerned to the authority (whatever form the benefit takes);

19. The relevant regulation concerning housing benefit is regulation 99 of the Housing Benefit (General) Regulations 1987, which provides (as in force at the material time):

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

(2) ... this paragraph applies to an 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 ... 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 whether in the form of an act or omission by the appropriate authority or by an officer or person acting for that authority or by an officer of the Department of Social Security or the Department of Employment acting as such 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

20. Overpayments of Council Tax Benefit are referred to as excess benefit. The main legal test for their recovery is the same as for the recovery of overpayments of housing benefit (there are some differences in the recovery provisions which are not relevant in this appeal): see reg.84 of the Council Tax Benefit (General) Regulations 1992.

21. The full determination of questions concerning overpayments of housing benefit and excess council tax benefit requires consideration of the following questions:
- (a) Was there an official error?
 - (b) Did that official error cause the overpayment or excess benefit?
 - (c) Did the claimant cause or materially contribute to the mistake, act or omission which constituted the official error?
 - (d) Could the claimant reasonably have been expected to realise that there was an overpayment or excess benefit?
22. It is conceded by the local authority that there was an official error which caused the overpayment and excess benefit. It is not suggested that the appellant caused or materially contributed to the mistake which constituted the official error. Plainly he did not, since he had disclosed all income when he made his claims.
23. The sole issue in this appeal is accordingly whether the appellant could reasonably have been expected to realise that the payments of benefit were, at the time of their receipt, overpayments of the two benefits.
24. In *CH/2554/2002* the Commissioner reduced this issue to three stages:
- (a) Identifying the correct legal test, namely, whether appellants could reasonably have been expected to realise that the amount they were receiving definitely contained some element of overpayment.
 - (b) Determining the information the claimant had about the benefit scheme.
 - (c) Determining what the particular claimant could reasonably have realised from the information available to him or her.
25. I accept that this is the correct approach to the issue before the tribunal when dealing with overpayments of housing benefit and excess council tax benefit.
26. The tribunal in this case refers to part of the test (and I think the most relevant part of the test in the circumstances of this case) set out in *CH/2554/2002* in its reasons. However, the tribunal has not analysed the relevant information with sufficient care. In particular, if reliance is placed on letters from the local authority, it will be vital in every case to examine in greater detail than the tribunal did in this case what those letters actually say and the information that they convey. In particular in this case there is a recovery of both housing benefit and council tax benefit in issue, but the reasons relate solely to the documentation relating to housing tax benefit. On these small points, I have concluded that the tribunal erred in law. Accordingly I set the decision aside.

My substituted decision

27. This is a case in which I consider it right to make further or fresh findings of fact and to make the decision which I consider appropriate in the light of those facts.
28. I adopt the findings set out in paragraphs 2 to 9 above. I also make the following findings:
- (a) The appellant had made no previous claims for housing benefit or council tax benefit.
 - (b) The appellant thought that, since the letters were addressed to him alone, they would include only his income.

29. This appeal seems to me to turn on what the appellant could reasonably be expected to conclude from the information contained in the letters dated 8 August 2002 received from the local authority? It may be that the copies in the papers are incomplete, and it is certainly the case that the 'small print' on the back of the letters was not put before the tribunal, and has not been put before me. It is for the local authority to adduce before the tribunal all the evidence it considers germane to the issue raised in the appeal and its entitlement to recover overpayments of benefit.
30. The letters of 8 August 2002 (which I have reproduced in full earlier in this decision) display all the worst features of standard-form letters drawing upon information in a database.
31. The letter relating to housing benefit tells the appellant of an award from 3 June 2002, with the further reference to an award for one week in April 2003. There is irrelevant information about recovery of an overpayment, and a schedule which appears to relate solely to benefit in the week 1 to 7 April 2003.
32. The letter relating to council tax benefit is even less informative, and no schedule has been adduced in evidence by the local authority.
33. I do not consider that these particular letters give the appellant sufficient information to appreciate how his entitlements to housing benefit and council tax benefit is determined, nor which figures are relevant in that calculation.
34. In response to the appeal process, the appellant now asserts that he was under the impression that, as the letters were addressed only to him, they contained only information about his earnings. That is not unreasonable, although it would seem that the figure used in the schedule on the letter in question is, in fact, the incapacity benefit payable to the wife of the appellant, and that the omitted figure is the incapacity benefit payable to the appellant himself.¹
35. In the particular circumstances of this case (and each case must be decided in the light of its own particular circumstances), and in the light of the evidence before me, I do not consider that the appellant could reasonably have realised from the information in the letters dated 8 August 2002 (nor in any subsequent letter prior to that dated 16 April 2003) that there was an overpayment of housing benefit and an excess payment of council tax benefit. It follows that neither the overpayment of housing benefit nor the excess payment of council tax benefit are recoverable from him.
36. The appeal succeeds, and I substitute for the decision of the tribunal the decision set out in the first paragraph of this decision.

Robin C A White
Deputy Commissioner
22 October 2004

[Signed on the original on the date shown]

¹ In the claim form the appellant's incapacity benefit is declared at the rate of £86.55 per week and that payable to his wife at £141.90 per fortnight. The latter is £70.95 per week.