

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by Wolverhampton City Council ("the Council"), brought with my leave, against a decision of the Wolverhampton Appeal Tribunal made on 20 September 2002. 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, in exercise of the power in para. 8(5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 substitute the following decision for that of the Tribunal:

The Claimant's appeal against the decision made on 15 January 2002, namely that he is liable to repay council tax benefit amounting to £2666.90 which was overpaid in respect of the period from 6 June 1994 to 6 September 1999, is dismissed.

Introduction

2. Stating the matter very broadly for the moment, the position in this case is that the Claimant was wrongly awarded income support because he did not disclose to the Benefits Agency occupational pensions to which he and his wife were entitled. The council tax benefit legislation requires income (other than earnings) of a person who is in receipt of income support to be disregarded in determining entitlement to council tax benefit. The Claimant was therefore awarded council tax benefit, even though he did disclose the occupational pensions on his original council tax benefit claim form. When the Benefits Agency became aware of the occupational pensions his entitlement to income support was removed from the date of the original award, and a similar decision was then made in relation to council tax. The issue in the case is whether the council tax benefit is repayable, and more particularly whether the Council's failure to make any inquiries of the Benefits Agency as to the correctness of the Claimant's income support award constituted an "official error", and if so whether that error caused the overpayment.

The facts

3. The Claimant is a man now aged 68 who owns the house in which he lives. By a claim form signed on 20 June 1994 he applied for council tax benefit. He stated on that form that his wife was in receipt of invalidity benefit of £56.00 per week, and that he was in receipt of an occupational pension of £400 a month and his wife was in receipt of an occupational pension of £156.00 a month.
4. On 14 June 1994 the Council had received notification from the Department of Social Security that the Claimant had been awarded income support from 31 May 1994. Accordingly (see the statutory provisions referred to in paragraph 16 below) by a letter dated 27 June 1994 the Claimant was notified that he had been awarded council tax benefit of £7.07 per week (the maximum). The letter stated that his claim was due to be reassessed on 12 June 1995, and that he would be sent a new form to complete shortly before that date.
5. According to the Council's written submission to the Tribunal, "benefit continued in payment on this basis with yearly reviews confirming that he remained in receipt of income support until October 1998 when the authority received notification [from the

Department of Social Security] that [the Claimant's] entitlement to income support had ceased with effect from 23 October 1998." A copy of that notification was in evidence before the Tribunal.

6. On 12 November 1998 the Council wrote to the Claimant stating that his entitlement to council tax benefit had been terminated from 26 October 1998 because his income support had ended, and enclosing a new claim form in case he wished to claim based on his present income and circumstances.
7. On 27 November 1998 the Claimant signed that further claim form, on which he stated that his wife was and had since May 1998 been working at a wage of £150 per month and was in receipt of state retirement pension of £47.64 per week, but declared no other income of either himself or his wife.
8. On 7 January 1999 the Council wrote to the Claimant stating that his entitlement to council tax benefit had been recalculated because income support had ended, and that based on his and his partner's income he was entitled to benefit of £11.68 per week (the maximum) from 26 October 1998.
9. On 24 August 1999 the Council wrote to the Claimant stating that his entitlement to council tax benefit had been cancelled from 6 September 1999 because the Council required further information. The Claimant appears to have been sent at that time a yet further council tax benefit application form. This was completed and was received by the Council on 8 September 1999. The only income which it declared was state retirement pension of £72.65 per week in respect of the Claimant and £49.46 per week in respect of his wife.
10. There was in evidence before the Tribunal a form of notification by the Benefits Agency to the Council dated 21 January 2000, stating that income support had been awarded from 31 May 1994, and ticking a box marked "no entitlement to income support". The "reason for termination or non-award" is stated to be: "failing to declare his occupational pension – income exceeds."
11. None of the decisions which have been made in respect of income support was in evidence before the Tribunal (or is now in evidence before me), and the history as purportedly set out in the Council's written submission to the Tribunal and in a memorandum (I think of the Council) dated 2 February 2000 (p.26) is far from clear. However, it was not in dispute before the Tribunal that the Claimant's awards of income support were superseded and removed with effect from 31 May 1994 on the ground of failure to declare the occupational pension, and that a decision was made that the overpaid income support was recoverable from the Claimant, and that the Claimant had not appealed against those decisions.
12. On 15 January 2002 the Council made the decision under appeal to the Tribunal, namely (a) (in substance) to revise the awards of council tax benefit, the revised decision being that the Claimant was not entitled to council tax benefit from 6 June 1994 and (b) that the sum of £2666.90 had been overpaid by way of council tax benefit in respect of the period from 6 June 1994 to 6 September 1999 and was recoverable from the Claimant.

13. The Claimant appealed. His notice of appeal stated (among other things):

“In 1994 a form was completed for me giving all the information about my income and my wife’s income. I was not aware at the time that I should not be receiving income support, but a trained officer should have noticed the discrepancy.”

The Tribunal’s decision

14. The Claimant was represented before the Tribunal (as he is before me) by the Wolverhampton Citizens Advice Bureau. It was not contended on his behalf (and is not contended before me) that the part of the decision under appeal which found that he had not been entitled to council tax benefit from the date of his original claim in 1994, and which in effect revised the original awarding decisions accordingly, was wrong. (Like the Tribunal, I therefore proceed on the footing that that part of the decision was correct. An available ground of revision was that, in making the awards of council tax benefit, the Council was unaware of the fact that the Claimant had not made proper disclosure to the Benefits Agency in connection with income support). It was further conceded before the Tribunal that the Claimant was liable to repay the council tax benefit which had been overpaid in respect of the period from 26 October 1998, because that overpayment had clearly not been caused by any official error but by the incorrect information (i.e. the omission of occupational pension) on the further claim form signed on 27 November 1998 (see para. 7 above).

15. However, the Tribunal accepted the submission made on behalf of the Claimant that the overpayments in respect of the period between 6 June 1994 and 25 October 1998 were not recoverable because they had been caused by an official error, namely that the Council should, on receipt of the application form in 1994 showing the occupational pensions totalling £556 per month, have checked with the Benefits Agency whether the Claimant’s income support award was in fact correct. The Tribunal said:

“There is clearly a statutory duty on the authority to check a form and in the normal course of processing a claim the authority would raise queries or ask for supplementary information. The tribunal viewed the extent of the situation here. We were entirely clear that where there is clearly no entitlement to benefit based on disclosed income that must in the tribunal’s view contribute (sic) an official error. We accept there may be some instances where this would not be practicable but in this case the matter is so clear cut that the tribunal find in the appellant’s favour. Some cases may be more marginal.”

Relevant statutory provisions

16. By s.131 of the Social Security Contributions and Benefits Act 1992 one of the conditions of entitlement to council tax benefit is satisfied if the claimant “has no income.” By Reg. 24(2) of and para. 4 of Schedule 4 to the Council Tax Benefit (General) Regulations 1992 (“the 1992 Regulations”) there is to be disregarded, in calculating the amount of a claimant’s income other than earnings, “where a claimant is on income support or an income-based jobseeker’s allowance, the whole of his income.” By Reg. 2(1) of the 1992 Regulations ““person on income support” means a person in receipt of income support.”

17. By Reg. 84 of the 1992 Regulations:

“(1) Any excess benefit, except benefit to which paragraph (2) applies, shall be recoverable.

(2) this paragraph applies to excess benefit allowed in consequence of an official error, where the claimant or a person acting on his behalf or any other person to whom the excess benefit is allowed could not, at the time the benefit was allowed or upon the receipt of any notice relating to the allowance of that benefit, reasonably have been expected to realise that it was excess benefit.

(3) In paragraph (2) “excess benefit allowed in consequence of an 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) an officer of –
 - (i) the Department of Social Security;
 - (ii)

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.”

18. The Council contends on this appeal that there are 2 reasons why the Tribunal was wrong in law to hold that the overpayment in respect of the period between 6 June 1994 and 25 October 1998 was “excess benefit allowed in consequence of an official error” within the meaning of Reg. 84, and so not recoverable.

Official error

19. First, it is contended that the Tribunal was wrong to hold that there was any “mistake” by the Council. The effect of para. 4 of Schedule 4 to the 1992 Regulations was that the Council, having been informed by the Benefits Agency that the Claimant was in receipt of income support, was bound to disregard the entirety of the Claimant’s income other than earnings, which on the face of it rendered it irrelevant to examine the amount of such income. That is, however, subject to at least two possible qualifications.

20. First, if the income support award has been obtained by fraud, the council can go behind it, as “in receipt of income support” has been held to mean “lawfully in receipt of income support”: *R v. South Ribble BC ex parte Hamilton* (2000) 33 HLR 104. However, the Claimant does not of course contend that the income support award was obtained by fraud.

21. Secondly, the Council could of course have asked the Benefits Agency to check, in the light of the information on the 1994 council tax claim form about the occupational pensions, that the Claimant was indeed entitled to income support. Had that been done, the Claimant’s income support award would no doubt have been reviewed fairly swiftly. Even if the Council had, under the legislation applicable in 1994, felt compelled to award and pay council tax benefit pending the income support investigations, it is unlikely that payment would have needed to continue for more than a short time. (There is now a provision, in Reg. 80(2A) of the 1992 Regulations, which was introduced by amendment as from 1 April 1995, which would seem specifically to authorise withholding of payment of council tax benefit in such circumstances).

22. The Tribunal’s reasoning included the statement that “there was clearly no entitlement to benefit [i.e. income support] based on disclosed income”. However, it seems to me that, if the Claimant had had significant mortgage interest payments qualifying as “housing costs”

under Schedule 3 to the Income Support (General) Regulations 1987, he could on the information known to the Council have been entitled to income support notwithstanding the amount of his and his wife's income. The Council nevertheless accepts, in its grounds for this appeal, that "in an ideal world the level of income shown on the 1994 application form is sufficiently high that a check with the Department regarding their income support award would have been prudent." Even if that is so, however, the Council is in my judgment correct in submitting that the fact that it did not do so was not a "mistake". Under the statutory provisions the Claimant, being in receipt of income support, was entitled to council tax benefit, and the information before the Council did not demonstrate that the income support award had been wrongly made. Although the Council could for its own protection have queried the correctness of the income support award with the Benefits Agency, the fact that it did not do so did not in my judgment amount to a "mistake". The Tribunal erred in law in holding that it did.

Causation

23. It is therefore strictly unnecessary for me to consider the Council's second submission. This is that, even if the failure to query the income support award was a "mistake", that mistake did not cause the overpayment, within the meaning of Reg. 84(3), because the overpayment was for these purposes caused by the Claimant's failure to disclose the occupational pensions to the Benefits Agency.
24. I should pause here to say that it was not contended on behalf of the Claimant before the Tribunal (and has not been contended before me) that the Council's decision was wrong because the cause of the overpayment was some sort of mistake (itself qualifying as an "official error") by the Benefits Agency when it made the income support award. However, the Tribunal did record that the Claimant contended that he had made proper disclosure of his income to the Benefits Agency, and that the income support overpayment decision had not been appealed "because it (i.e. presumably an appeal) was out of time". However, the fact that the income support award had been superseded, and an income support overpayment decision made, on the ground that the Claimant had not disclosed the occupational pensions was strong evidence that he had not disclosed them, and the Claimant made no serious attempt to establish his unparticularised assertion that he had made disclosure. In particular, none of the documents relating to the income support award were put before the Tribunal. In those circumstances, the Tribunal could not in my judgment properly have proceeded on any footing other than that the Claimant had not made proper disclosure to the Benefits Agency.
25. In *R (Sier) v. Cambridge CC* [2001] EWCA Civ 1523 the Court of Appeal rejected a submission on behalf of the claimant that in the corresponding provision (Reg. 99(3) of the Housing Benefit (General) Regulations 1992) - which for present purposes is in identical terms - relating to overpayments of housing benefit the overpayment is irrecoverable if the official error is a cause of the overpayment. Latham L.J., having referred to the importance, emphasised by Lord Hoffmann in *Environmental Agency v. Empress Car Co Ltd.* [1999] 2 AC 22, of having regard to the statutory context when determining questions of causation, said:

"In the present case, one has to have regard to the general legislative purpose, which seems to me to be clear. Parliament has laid down in the Regulations that a person is to be relieved of the obligation to repay an overpayment when that has been occasioned by an administrative

mistake and not by any fault on the part of the recipient. That seems to me to be the basic thrust of the Regulation and one should approach the meaning of the word "cause" and its application to the facts on that basis."

Simon Brown L.J. said:

"If one asks the purpose for which the question arises under regulation 99(3) as to whether the overpayment was caused by uninduced official error, the commonsense answer is so as to distinguish that sort of case from a case where the claimant himself is substantially responsible for the overpayment."

26. In my judgment, therefore, it is clear that an overpayment will not be recoverable if it was substantially caused, not by the official error, but by the claimant's own fault. In my judgment, that was the position here. Even if (contrary to my decision on the first point), the fact that the Council did not query the income support award could be described as a "mistake", and even assuming that that mistake cannot be said to have been contributed to by the Claimant, that mistake was not in my judgment the substantial cause of the overpayment. The structure of the legislation meant that the award of income support required the Council to disregard the Claimant's income other than earnings. It could for its own protection have queried the income support award, but that did not in my judgment prevent the Claimant's failure to make proper disclosure to the Benefits Agency, which had led to the income support award, from being also the primary cause of the award of council tax benefit. The Tribunal also erred in law in not expressly dealing with this issue of causation, although in fairness I should say that it was not raised before the Tribunal in the form in which it has been raised before me.

(Signed) Charles Turnbull
Commissioner

22 April 2003