Bullock 175

Dismiss

CH/687/2006

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision

1. The decision of the tribunal made on 7 July 2005 is erroneous in law. I therefore allow the appeal and set aside its decision. In the exercise of my powers under paragraph 8 (5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act") I consider it expedient to make fresh findings of fact and give an appropriate decision. My decision is that the overpayments of housing benefit ("HB") of £244.79 in respect of the period from 21 July 2003 to 21 June 2004 and of council tax benefit ("CTB") in respect of the period from 21 July 2003 to 1 April 2005 are recoverable from the respondent.

The nature of the appeal

2. This is an appeal brought with the leave of the tribunal chairman by the appellant Council against the decision of the tribunal that that the overpayments were not recoverable from the respondent (to whom I shall refer to hereafter as "the claimant"). The tribunal chairman in granting leave raised the following question: what is the extent of the doctrine in Kerr to housing benefit cases? The appeal is opposed by the claimant.

3. At the request of the claimant's representative, a commissioner directed an oral hearing of this appeal. On 11 October 2006 I held the oral hearing at which the Council was represented by Mrs Wendy Cambridge, who is a principal contract officer within that part of the Council's finance department which is responsible for HB and CTB. The claimant and her partner were present and represented by Mr. Derek Stainsby who is a welfare rights officer for the Gallions Housing Association. I am very grateful to both for their submissions and assistance.

The factual background

4. The basic facts are no longer in dispute. Since 1999 the claimant had been in receipt of HB and CTB 1999. In April 2003 she completed a renewal application form indicating that her circumstances had changed in that she was now living with a partner. In answer to the questions in the form as to her income, she declared that both she and her partner were in receipt of incapacity benefit ("IB"): in her case she stated that her IB amounted to £159.50 every two weeks, and in the case of her partner £128.70. The amounts of these payments indicated that she was in receipt of long term IB and that her partner was in receipt of the higher rate of short term IB.

5. The Council by letters dated 25 April 2006 informed the claimant that she was entitled to HB and CTB from 21 April 2003 in the sums specified in the letters, and of the bases of the calculations. In relation to income it stated expressly that her partner's income had been assessed on the basis of his "SHORT TERM HIGHER INCAPACITY £64.74" The letters also stated that :-

" Your claim is next due for renewal on 21 April 2004 and the necessary forms for you to reapply will be sent to you 8 weeks before then. In the meantime if there is a change in your income or circumstances you must write and tell this office at once.

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

6. On 15 July 2003 the claimant's partner became entitled to long term IB which was then paid at the rate of £72.15. The tribunal found as a fact, and there is no challenge to this finding, that the Council did not know at any point in the period to which the overpayments related that the partner had became entitled to long term IB and that his income had increased as a result. Further, although much of the argument in this appeal has been focussed on whether the Council ought to have known that the claimant's partner would have become entitled to long term IB, it is not suggested that the Council actually knew that the partner's IB had increased until 29 June 2004 when it received from the Department of Work and Pensions ("DWP") a matching referral which alerted it to a discrepancy which in turn led it on the same date to establish that the partner had been in receipt of long term IB since 15 July 2003

7. On 6 March 2004 the Council wrote two similar letters to the claimant informing her that her HB and CTB had been reviewed from 1 April 2004 and setting out the amounts of her entitlements from that date and the bases for the calculations. The first two sentences of each of the letters sent stated:-

" This letter explains the Council's determination of your benefit following the Government's increase in applicable amounts/premiums/ state pension, increases in private pensions and other related income

Your [HB/CTB] claim has been reviewed from 1 April 2004 "

8. The only differences in the figures used in these calculations, compared with the calculations of April 2003, reflected the annual statutory up-rating of the amounts of IB benefits, personal allowance and disability premium. The letters also stated that as a result of legislative changes it would no longer be necessary for her at this stage to renew her applications for HB and CTB., but at a subsequent stage there would be a review and renewal forms would then be sent out. The letters made it clear that the income calculations were based on the claimant's partner still being in receipt of short term higher rate IB.

9. The letters indicate that the Council's review was limited to taking account of changes resulting from the annual statutory up-rating. At the hearing Mrs Cambridge confirmed this, explaining that this review process was computerised and did not involve any individual re-consideration of existing awards other than to reflect the up-rating.

10. On 29 June 2006 the Council on discovering that the claimant's partner had been on long term IB since 17 July 2003, superseded the earlier decisions with effect from 17 July 2003, calculated the overpayments in the sums identified in paragraph 1 above (which are not disputed), determined that the overpayments were recoverable from the

respondent and notified her accordingly. On 27 October 2004 the claimant appealed out of time against the overpayment decisions on the ground, in summary, that the overpayments were irrecoverable. On 5 January 2005 the Council re-considered the decisions of 29 June 2005, but did not change them. The appeal was subsequently treated as valid.

The principal relevant statutory provisions

11. As the principal relevant provisions of the Housing Benefit (General) Regulations 1987 ("the 1987 Regulations") are for the purposes of this appeal the same as the relevant provisions in the Council Tax Benefit (General Regulations) 1992 ("the 1992 Regulations") I shall refer only to the former.

12. Regulation 66 (2) of the 1987 Regulations which was in force when the appellant made the April 2003 awards of benefit, but which was revoked with effect from 5 April 2004, provided:-

> " The benefit period shall be such number of weeks as the relevant authority shall determine having particular regard to any relevant circumstances which the authority reasonably expects may affect entitlement in the future"

13. Regulation 75 (1) of the 1987 Regulations imposed a duty on claimants to notify a change of circumstances in these terms:-

> " Subject to paragraph (2), (4) and (6) [which are not material in this appeal] if at any time between the making of a claim and a decision being made on it or during the award of housing benefit, there is a change of circumstances which the claimant .....might reasonably be expected to know might affect the claimant's right to, the amount of or receipt of housing benefit, that person is under a duty to notify that change of circumstances by giving notice to the designated office"

14. Regulation 99 lays down the general rule that overpayments of benefit are recoverable and specifies the limited exception to that rule as follows:-

> "(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.
>
> (2) Subject to paragraph 4 [which is not material], 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 payment is made could not, at the time of receipt of the payment, or any notice relating to 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 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 work and Pensions;
> (ii) The Commissioners of the Inland Revenue, acting as such;or

(d) a person providing services to the department or to the Commissioners referred to in (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 proceedings before the tribunal, its decision and reasons

15. The issues before the tribunal were whether

(1) the fact that Council did not in April 2003 to inquire into the date when the claimant's partner had become entitled to IB and act on that further information and/or its failure in March 2004 to act on the information it then had was an official error;

(2) whether the claimant knew that the amount of her partner's IB had increased and was in breach of her obligation to report a change in circumstances;

(3) whether in the light of (1) and (2) the overpayment was the result of a wholly un-induced official error or the result of the claimant's failure to report a change in circumstances;

(4) whether the claimant could not reasonably have been expected to know at the relevant times that the sums paid were overpayments.

16. The claimant attended the appeal and was represented by Mr Stainsby. She gave oral evidence to the effect that she did not know that the amount of her partner's IB had increased. In relation to issue (1), Mr Stainsby submitted in writing and orally that, in summary, the decision in CIS 222/91 (to which I refer below) was authority for the proposition that if the information before the decision maker suggested further inquiries should be made it would be an official error if those inquiries were not made. On this basis he submitted that the information in the renewal form should have alerted the Council to the fact that the partner would become entitled to long term IB if he remained incapable of work, required them to ascertain from the Department when he had become entitled to IB, and its failure to do so was the cause of the overpayments. He also submitted that there was an additional official error in March 2004 when the Council superseded the April 2003 awards on the basis of the erroneous and unsupported assumption that the partner was still on higher rate short term IB.

17. The Council was not represented at the appeal as a consequence, it was later said, of the impact on travelling arrangements of the terrorist explosions in central London on the day of the hearing. There were before the tribunal short submissions from the Council to the effect that the overpayments were caused by the claimant's failure to report the change in circumstances.

18. As I have already indicated, the tribunal found as a fact that the claimant did not know at any relevant time that the amount of her partner's IB had increased, and gave reasons for this finding. This led it to conclude both that the claimant had not caused the overpayment and that she could not have been reasonably expected to realise that overpayments had been made. In relation to the first issue, the tribunal stated in its formal decision that:-

"For the reasons set out in Mr Stainsby's submission, the Tribunal finds official error ...In addition to the law cited by Mr Stainsby, the Tribunal considered that this was a case where the Local authority could have applied some of the principles set out in the House of Lord's decision of Kerr v Department of Social Development for Northern Ireland in particular the duty on first tier decision makers to explore information which is within their remit to do so"

19. The tribunal in its subsequent statement of reasons explained its decision on the first issue in this way:

" In this case the tribunal accepted the arguments put forward by the [claimant]....Of course [the claimant] had a duty to report changes in her circumstances and any changes of which she is aware. It is now settled law that a person cannot be held liable for failing to disclose what they do not know.

CIS/222/1991 spells out the inquisitorial role of the Adjudicating Authority and that has now been underlined in the House of Lords in Kerr. The Authority would know from 15.4.03 that [the partner] was in receipt of short term [IB] (see page 150). The Council know or could be reasonably expected to know that long term [IB] is awarded after 52 weeks of incapacity. The rates of [IB] are provided to all Local Authorities.

The Council ought to have been put on notice when it received the claim form from [the claimant] on 15.4.03. The only detail they needed to know was the date [the partner] became incapacitated. The tribunal finds that the failure to make that basic inquiry was the cause of a subsequent overpayment.

Notwithstanding this, it should have been clear in April 2003 that it was not possible that short term benefit for [the partner] would continue beyond 23.9.03. By September 2003 the Council could have superseded its decision of 25.4.03 on the grounds that it was anticipated that a change of circumstances would occur.

It was noted that the Council made a further error on 6.4.04 [sic] when it made a determination of fact that [the partner] was in receipt of short term higher rate [IB] at the rate of £66.15 per week. In the intervening period there had not been any notification that [the partner] had been deemed capable of work and therefore he must have been in receipt of long term [IB] when the decision of 6.3.04 was made"

The issue and submissions on this appeal

20. It is common ground between the parties that the only issue which arises on this appeal is whether the acts or omissions of the Council amounted to an official error for the purposes of regulation 99 of the 1987 Regulations and the equivalent provision in the 1992 Regulations.

21. The submissions of the Council are set out in its grounds of appeal and in its written comments on claimant's submissions, and in the oral submissions of Mrs Cambridge. They can be summarized as follows. First, the tribunal erred in law by misdirecting itself as to the nature and extent of any duty of a local authority to undertake further inquiries and as to the effect and implications of the Kerr case and CIS /222/91. The decisions in R(H) 2/04, CH/1908/2003 and CH/412/2003 (to which I refer below) show that there is no duty on local authorities to make further inquiries in the circumstances which arose in this case.

22. Second, in relation to the position as at April 2003 the tribunal erred in concluding that the Council should have made further inquiries in that there were other factors outside its jurisdiction and control which would determine whether the partner continued to be entitled to IB, such as whether he remained incapable of work, and it was not possible to anticipate the outcome. Reliance was properly placed on the claimant's obligation to report changes of circumstances. A duty to make further inquiries in such circumstances would place an unacceptable burden on Councils.

23. Third, in relation to the finding that in any event it should have been clear in April 2003 that it was not possible that the partner would have been on short term IB by September 2003 and that by September 2003 the Council could have superseded its April 2003 decisions on the grounds of anticipated changes in circumstances, the tribunal erred in that the Council did not know as a fact that this was the case. The Council could not reasonably be expected to diarise that date with a view to taking some action because other factors may have affected the partner's entitlement to IB, including his becoming capable of work. The Council could not have exercised its powers under regulation 66 (2) of the 1987 regulations because there would have been no grounds for determining whether there was likely to be a change and when it would occur in that there was no certainty that IB would continue to be paid to the partner nor an automatic right to progress to the long term rate. It would have led to delay to the detriment of the claimant.

24. Fourth, in relation to the finding that the Council made a further error in March 2003, the review then undertaken was a computerised exercise limited to adjusting the figures on which the decisions had been based in the light of statutory up-rating, and did not involve any individual re-consideration of entitlement on other grounds.

25. The submissions by Mr Stainsby on behalf of the claimant are set out in his written and oral submissions to the tribunal, in his written submissions on this appeal, and in his oral submissions to me and can be summarized as follows.

26. First, although he accepts there is no express statutory duty on a local authority to make further inquiries, the inquisitorial nature of the adjudication process requires further inquiries or investigations to be made at the least where information provided by a claimant clearly and obviously calls for such inquiries or investigation. In support of this general submission he relies specifically on the judgment of Baroness Hale of Richmond of the House of Lords in Kerr v Department for Social Development reported as an appendix to R 1/04 (SF), on the decision of the Commissioner in CIS/222/91 and on the decision of the deputy Commissioner CH/530/2006. He distinguishes on the facts the decisions in CH/1908/2003,

CH/412/2003 and R (H) 2/04 para 13 to all of which I refer in more detail below. He describes the duty or obligation for which he is contending as a duty of reasonable diligence or as a common sense requirement.

27. Second, in reliance on this approach he submits that the information provided by the claimant in her April 2003 claim clearly and obviously called for further inquiry because the terms of section 30A (4) and (5), and section 230B (2) of the 1992 Act provide that lower rate short term IB is payable for first 196 days of incapacity, higher rate short term IB for the next 196 days of incapacity and thereafter for continuing incapacity only the long term rate is payable and those provisions are well known to local authorities. Thus, when the Council was alerted to the fact that the partner was on the higher short term rate it should have ascertained when his entitlement to IB commenced by exercising its powers under Regulation 6 of the Social Security (Claims and Information) (Housing Benefit and Council Tax benefit) Regulations 2002 to obtain this information from the DWP.

28. Third, if the Council had taken these steps it could either have exercised its powers under regulation 66 (2) of the 1987 Regulations to determine a suitable benefit period reflecting the period during which the partner would have been in receipt of higher rate short term IB or subsequently its powers under regulation 7(2) (ii) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 to supersede the April 2003 decisions on the basis of an anticipated change of circumstances. It is further argued that if the Council's contention that there is no requirement to make further inquiries is correct these statutory powers would be otiose.

29. Fourth, the failure to make inquiries and/or take further action amounts to an official error which was the sole cause of all the subsequent overpayments. In support of this submission reliance is placed on the judgement of Richards J in R on the application of Sier v Cambridge City Council [2001] EWHC Admin 160 at paragraph 20 where it was held that a mistake for the purposes of regulation 99 of the 1987 Regulations was not the same as a breach of duty and could encompass a failure to exercise a power.

30. Fifth, there was a further official error in March 2004 when the Council reviewed its earlier awards and assumed without evidence or justification that the partner was still on short term IB. The fact that the exercise was computerised did not mean that it was any less a mistake.

The relevant case law

Kerr

31. Specific reliance was placed by Mr Stainsby on two paragraphs (61 and 62) in the speech of Lady Hale , with which speech the four other law lords expressly agreed. In paragraph 60 Lady Hale stated that

> " Ever since the decision of the Divisional Court in R v Medical Appeal Tribunal (North Midland region) Ex p Hubble [1958] 2 QB 228 it has been accepted that the process of benefits adjudication is inquisitorial rather then adversarial."

32. She also cited part of the judgement of Diplock J as he then was, including

> " any such claim [to benefit] requires investigation to determine whether any, and, if so, what amount of benefit is payable....

33. In paragraph 62 Lady Hale said:

> " What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows which question it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced" *Emphasis added because Mr Stainsby relies on this sentence*

CIS/222/91

34. The main issue which arose for decision in this case was whether, in the context of an appeal against a decision, upheld by the tribunal, that overpayment of supplementary benefit was recoverable upon the ground that the claimant had misrepresented a material fact, the overpayment was caused by the claimant or resulted from an error on the part of the adjudication officer. It arose on these facts. In her claim form for supplementary benefit the claimant answered question 10 about her home by stating both that she paid a ground rent of £32-50 per month and also that her property was not a leasehold property. In fact it was not a leasehold property and the ground rent was actually the amount the claimant paid as general rates. Under the then relevant legislation ground rent was relevant only where she owned a leasehold granted for more than 21 years. In allowing the appeal the Commissioner in paragraph 7 (on which reliance is placed) said this:-

> " It follows that ground rent could only be brought into the assessment of a claimant's requirements for supplementary benefit purposes if the lease of the property to which it related had been granted for a term exceeding 21 years. Clearly in the instant case that question was never investigated by the adjudication officer who initially awarded benefit. In my judgement the claimant's answer to part 10 of form A1 were so plainly inconsistent and ambiguous as to put the adjudication officer on notice. Quite apart from the inherent improbability of ground rent of £32-50 a month being payable on a long leasehold, the claimant unequivocally said that her home was not a leasehold. That the adjudication officer saw fit to make an award without resolving that obvious conflict and, moreover, took into account ground rent without establishing whether the conditions [of the relevant regulation] were satisfied, seems to me manifestly an error on the part of the department rather than misrepresentation by the claimant.

Supplementary benefit cases: R (SB) 10/91 and R (SB) 2/93

35. In these two supplementary benefit cases, which are referred to R(H) 2/04 but were not specifically cited to me, the Commissioners were concerned with regulation 72 (1) (a) of the Social Security (Adjudication) Regulations 1986 which empowered an adjudication officer to review a decision if satisfied

> " that the decision under review was erroneous by reason only of a mistake made , or something done, or omitted to be done by an officer of the Department ....or by an adjudicating authority....and that the claimant neither caused nor materially contributed to that mistake, act or omission"

36. In the former case the Commissioner in dismissing a contention that the regulation imposed a duty on the Department to keep a claimant's conditions of entitlement under review said this:"

> "11. ....[the regulation] refers only to clear mistakes of fact and law in relation to an actual issue in a given case at a time when the officer of the relevant department etc was actively required by his duties under the social security legislation to arrive at a decision or take some administrative act. It certainly does not impose a general duty on the officers of the Department of their own accord to keep all cases under review in order to see whether or not any particular exempting regulation might apply"

37. In the latter case the Commissioner in commenting on the same regulation said this:

> " [the regulation] does not impose a duty on officers of the department to interrogate claimants as to every conceivable circumstance which might affect their award of supplementary benefit. The mistake envisaged by the regulation is a clear and obvious mistake made by the officer of the Department on the facts disclosed to him or which he believed to be relevant."

HB and CTB decisions: R(H) 1/04, R(H) 2/04; CH/412/2003; CH/1908/2003; CH/530/2006

R (H) 1/04

38. The context of this case (which was not specifically cited to me) and the issues which arose are conveniently summarized in paragraph 2 of the decision:-

> " ....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 awards , and a similar decision was the made in relation to council tax. The issue in this 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 whether that error caused the overpayment"

39. In allowing the appeal against the tribunal's decision that the overpayment had been caused by the Council's official error in failing, on receipt of the claim form showing the occupational pensions income of £556 per month, to check with the Benefits Agency whether the income support award was correct, the Commissioner in paragraph 22 said this:

> " The tribunal's reasoning includes 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 judgement 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 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 judgement aount to a "mistake". The Tribunal erred in law in holding that it did."

R (H) 2/04

40. In this case the claimant made a claim for housing benefit in April 2000 giving the figure for working families' tax credit ("WTFC") that she was receiving at the time, and benefit was calculated on that figure and awarded. The decision notice clearly set out the income on which the calculation was based and advised her of her duty to inform the authority of any change of circumstances, including in particular any change in her income . However, when the amount of WFTC was increased by the Inland Revenue, she did not inform the authority of the change until she made a renewal claim in October 2000 when she also informed them she had made a renewal claim for WFTC. Again housing benefit was awarded based on the figure she had given and again when the Inland Revenue later increased the amount of her WFTC, she did not inform the authority. In March 2001 the authority redetermined her entitlement for both periods and decided that the overpaid housing benefit was recoverable. The claimant appealed against the recoverability decision for the second period, contending that the overpayment was caused by official error. The tribunal dismissed her appeal, but on appeal to the Commissioner it was argued that the authority erred in making any award whilst the decision on the WFTC renewal claim was pending. In dismissing the appeal, the Commissioner in paragraph 13 addressed this argument as follows:

> "....While the Council might perhaps have taken a more hard nosed attitude and insisted on being notified of the actual award figure for WFTC, or at least on making some further inquiries about the progress of her claim for it, before

determining the housing benefit for the renewal period from 30 October 2000, it was not in my view an "error" or "mistake" in terms of regulation 99 not to do so. Still less was it a "breach of duty towards the claimant" [as argued] for the Council to maintain the continuity of her housing benefit by making her a new award on 17 October on the best information currently available (the figure she herself provided) and trusting her to notify them if it should transpire this needed correction. That in my judgement is nowhere near the kind of "mistake" envisaged by the wording used in this regulation, which is a "clear and obvious" error of fact or law made by some officer on the facts disclosed to him, or which he had reason to believe were relevant: cf R(SB) 2/93, paragraph 6; R(SB) 10/91, paragraph 11; CH/571/ 2003 [now reported as R(H) 1/04]

CH/412/2003

41. In this case an overpayment had been made in circumstances where the claimant, who had initially moved into a rest home on a temporary basis and had informed the Council that he done so, went into permanent care, but did not notify the Council. The Commissioner rejected the argument that the overpayment had been caused by the Council's official error in failing to conduct enquiries to ascertain whether he was in permanent care in circumstances where there was nothing in the information which it had been given to suggest that he had moved into permanent care.

CH/1908/2003

42. In this case the central issue before the Commissioner was whether, when an application for housing benefit is received or subsequent renewal claim is made, the local authority is under an obligation to investigate or check any details of the claimant's income to ascertain whether income support had been correctly awarded. The Commissioner held that the authority had no such obligation on the ground that the award of income support was a matter for the department by whose decision the authority was bound: see para 26.

CH/530/2006

43. In this case, which Mr Stainsby argues is relevant the issue, before the deputy Commissioner, was whether in circumstances where it was predictable that the claimant's income from an award of working tax credit would end when the claimant's son became 19 his award of housing benefit on a renewal application ought to have been for the period until his son reached 19, which the local authority had not done . The deputy Commissioner held that it should have been calculated to a period ending when the son became 19 because it was predictable that his income would then change: see paras 26 and 27. It appears from the facts of the case there had in fact been no overpayments of benefit and no consideration had to be given to the effect of a failure to award benefit for the wrong period in the context of regulation 99.

Did the tribunal err in law?

44. In my judgment the tribunal did err in law in holding that the fact that the Council did not make further inquiries in April 2003 as to when the claimant's partner's period of incapacity began and in holding that the award on renewal in March 2004 was made on the basis of unjustified assumption amounted to official errors for the purposes of regulation 99. In particular, I consider that the tribunal misdirected itself in law as to the circumstances in which a local authority may have to make further inquiries and the effect of not doing so.

45. It is plain both from the terms of the tribunal's decision and its subsequent statement of reasons that it considered that the general inquisitorial role involved in the adjudication process as explained in Kerr and the decision in CIS/222/91 were authority for imposing a general duty on decision makers to seek more information, that the duty arose in this case in April 2003, and on the facts was breached.

46. In my judgement the tribunal in relying on these cases to conclude that there was a general duty failed to interpret the cases correctly or to recognise the necessary qualifications there must be on applying any such duty to future circumstances, particularly having regard to the obligation placed on claimants by regulation 75 (1) of the 1987 Regulations. I therefore accept the thrust of the Council's first and second submissions summarized in paragraphs 21 and 22 above.

47. As to Kerr , whilst I accept that the approach described by Lady Hale and agreed by the House in the passages cited above should apply equally to claims for HB and CTB, it is to be noted that the approach was described in very general terms and in the context of determining entitlement to benefit where all the requisite information was not known to the claimant. The guidance was not directed specifically to the issues which arise in this case in the context of overpayments, and in particular to whether inquiries should be made to predict future entitlement. The guidance did not in itself justify the tribunal in holding that the Council in this case should have made further inquiries. I do not accept the submission of Mr Stainsby that the last sentence in paragraph 62 of Lady Hale's speech provides specific support for his contention that the Council in this case should have made inquiries of the DWP before making the April 2003 awards.

48. As to CIS/222/91, it can be seen that the Commissioner in that case did not purport to lay down a general rule as to when further investigations may be required. It is also clear that in that case further inquiries were required because there was a clear ambiguity and inconsistency on the face of the claim form which had to be resolved before the claim could be properly assessed. That case did not justify the tribunal in holding that further inquiries were required in this case where there was no ambiguity or inconsistency which had to resolved before the claim could be assessed.

49. Although the decisions in the supplementary benefit cases and housing benefit cases set out in paragraphs 36 to 38 above were not cited to the tribunal, they provide no support for a general unqualified duty to make further inquiries with a view to determining what might occur in the future in order to or to treat a failure to make such inquiries as a "mistake" or "official error" for the purposes of regulation 99. In so far as these decisions give general guidance, the facts must be such that it is clear

and obvious further inquiries need to be made in order to determine entitlement at the time of the claim, and not as to what may affect entitlement in the future.

50. Further, in considering whether there is any obligation in housing benefit cases to make further inquiries in relation to matters which may affect entitlement to benefit in the future it is important to keep in mind that regulation 75 (1) places the onus squarely on the claimant to notify the local authority of any changes of circumstances which the claimant might reasonably be expected to know might affect entitlement to, or the amount of, benefit. Thus, a local authority is entitled to assume that a change of circumstances which occurs in the future would be notified to it. Although the tribunal mentioned the duty in is reasons, it erred in not taking that duty into account when holding that further inquiries should have been made to seek to establish what might change in the future.

51. For these reasons I reject Mr Stainsby's submissions summarized in paragraph 25 above, and conclude that the tribunal's decision was erroneous in law..

My decision

52. As the facts are not in dispute, it is expedient for me to exercise my powers under the 2000 Act to make fresh findings of fact and give an appropriate decision.

53. I find that there was no need for the Council in April 2003 to make further inquiries into the IB of the claimant's partner and the fact that it did not do so was not a "mistake" or "official error" for the purposes of regulation 99. The Council had all the information it needed to make an award of benefit and was not obliged to speculate as to what the income of the her partner might be in the future. His future income would depend on factors outside the Council's knowledge and control, including whether he might become capable of work . The Council was entitled to assume that if his income changed in the future it would be notified in accordance with the requirement imposed on the claimant by regulation 75 (1). The fact that, as the tribunal subsequently found, the claimant did not know that her partner's IB increased in July 2003 does not invalidate this assumption. The position facing the Council in April 2003 fell well short, in my judgement, of circumstances where it was clear and obvious that further inquiries are required. To the limited extent that the deputy Commissioner's decision in CH/530/2006 is relevant, the factual circumstances with which he was concerned are plainly distinguishable in that there it was predictable that the claimant's income would fall because it was dependant on one known fact - the date of his son's birthday – but here the partner's future income was not predictable because it depended on unknown factors.

54. I thus reject the submissions of Mr Stainsby summarised in my paragraph 27 above. I also reject his specific submission that the failure to make further inquiries and then act on the information obtained would have the effect of rendering the Council's powers under the then regulation 66 (2) of the 1987 regulations or its powers under regulation 7 (2) (ii) of the 2001 Regulations otiose. There are a number of obvious

circumstances, such as the birthday of a child, in which these powers could be appropriately exercised.

55. I also find that the Council did not make an official error in March 2004 on reviewing the April 2003 awards in the light of annual statutory up-rating. The review was limited to that purpose and did not involve, and need not have involved, a re-consideration of any other circumstances relevant to the awards. The Council again was entitled to act on the assumption that changes in the claimant's income would have been notified. I thus accept the submissions of the Council on this use and reject those of Mr Stainsby.

56. As I have found that there was no official error on the Council's part, it must follow that the claimant cannot bring herself within the exception to the general rule under regulation 99 that overpayments are recoverable. My decision is set out in paragraph 1 above.

(signed on the original) **Christopher Whybrow QC**

Deputy Commissioner

16 October 2006