

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, since it is not expedient for me to make the findings of fact which are necessary to decide what decision the tribunal should have given, I refer the case for rehearing before a differently constituted tribunal.
2. This is an appeal, brought with my leave, against the decision of the tribunal made on 15 March 2005, dismissing the claimant's appeal against a decision of the respondent housing authority that housing benefit of £183.92 and council tax benefit of £63.15 for the period 12 April 2004 to 16 May 2004 were recoverable from the claimant as having been overpaid.
3. The claimant is a local authority tenant who was awarded council tax benefit and housing benefit in the form of rent rebate from 28 July 2003 to 25 July 2004 on the basis of entitlement to income support. However, the claimant found work and therefore ceased to be entitled to income support from 8 March 2004. Under regulation 67 of the Housing Benefit Regulations 1987 and regulation 58 of the Council Tax (General) Benefit Regulations 1992, entitlement to housing benefit and council tax benefit ended on 14 March 2004, but the claimant was entitled to and received an extended award of both benefits until 11 April 2004 under Schedules 5A of the 1987 and 1992 regulations.
4. The authority was informed that the claimant was no longer entitled to income support on 10 March 2004 and wrote to the claimant on 15 March 2004, informing him that he must start paying full rent and council tax from 12 April 2004. The letter enclosed a form for the claimant to re-claim benefit on the basis of his income and, although the claimant returned the form on 5 May 2004, it did not contain sufficient information for his entitlement to be determined.
5. The authority mistakenly continued to credit the claimant's rent and council tax accounts from 12 April until 17 May 2004, and it is the amounts so credited which form the subject of this appeal. It is not in dispute that the claimant attempted to pay rent and council tax after 12 April, and there is a record of a telephone conversation between the claimant and the authority's council tax section on 7 May 2004, in which the claimant was told that he still had full benefits credited to his council tax account. In his request for a revision of the overpayment decision, the claimant stated that he telephoned the authority's benefit section on three occasions to complain about being overpaid, but was told that the payments were correct and that he should pay no rent for two weeks and a reduced amount of rent for a third week. The claimant states that he paid the amounts of rent requested after being assured that everything was correct. No record of any conversations with the authority's benefits section exists, but the claimant did apparently pay rent on 1 May, 7 May and 18 May 2004.
6. No further action was taken in respect of the overpayments until 21 October 2004, when the claimant was sent separate letters in respect of the overpayments of housing benefit and council tax benefit, notifying him that it had been decided that the amounts of overpaid benefit were recoverable. The authority reviewed the decision in response to the claimant's

revision request, but in a letter dated 17 November 2004, the authority, while accepting that the overpayments had been caused by official error, nevertheless maintained their position that the overpayments were recoverable:

“In considering if it is reasonable to expect you to have appreciated that you were being overpaid at the time, I have considered the following information.

You made rent payments during the overpaid period on 1 May, 7 May and 18 May 2004; you contacted the Council Tax Section of the Council on 7 May 2004, you were informed that you still had Council Tax benefit for the whole year on your account and were informed by letter dated 15 March of the period of extended payment.

Also in your letter you refer to a number of telephone calls you made to the Benefits Service in June 2004 to discuss the overpayments and were advised that the benefit payments were correct but unfortunately I have been unable to establish whom you spoke to in June 2004 about the overpayments.

In view of the above, I consider it reasonable to expect you to have appreciated that you were being overpaid at the time as you were advised by letter dated 15 March 2004 that the period of extended payment was from 15 March 2004 to 11 April 2004 and were advised on 7 May 2004 by the Council Tax Section that you still had Council Tax Benefit for the full year on your account.”

7. Regulation 99(1) of the Housing Benefit (General) Regulations 1987, as amended, provides:

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

(2) Subject to paragraph (4) 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, or of any notice relating to that payment reasonably have been expected to realise that it was an overpayment.”

(3)...

(4)...”

Regulation 84(2) of the Council Tax Benefit (General) Regulations 1992 provides:

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

(2) Subject to paragraphs (4) and (5) and excepting any excess benefit arising in consequence of a reduction in tax or substitution to which regulation 83 refers, 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”.

8. It appears that prior to the hearing the claimant had repaid all the overpaid council tax, and the tribunal treated the appeal as being solely against the decision to recover overpaid housing benefit. Although the tribunal's decision notice upheld the authority's decision on the same basis as that set out in the authority's letter of 17 November 2004, the statement of reasons gave a different reason for dismissing the appeal, namely, that the claimant could reasonably have been expected to know that he had been overpaid benefit when he received the letter of 21 October 2004:

“Pursuant to regulation 99(2) it was not necessary for the Appellant to realise, at the time of receipt of the payments, that he was being overpaid HB as the Regulation is satisfied if the Appellant could reasonably have been expected to realise that it was an overpayment at the time of receipt of any notice relating to the overpayment.

I found that the Appellant could reasonably have been expected to know he had been overpaid at the time of receipt of the Local Authority letter of 21 October 2004, because he already knew that the payments should have ceased after the end of the extended payment of HB on 11 April 2004.”

9. I gave leave to appeal on 23 June 2004 because it seemed to me to be arguable that the 'notice' referred to in regulation 99(2) of the 1987 regulations (and regulation 84(2) of the 1992 regulations) must refer to notice of the making of the relevant payment, and not a later notification of an overpayment, and the authority now accepts that the tribunal were wrong in law in treating the letter of 21 October 2004 as a notice relating to the overpayment for the purposes of regulation 99(2). In *CH/1176/2003* it was held that the 'notice' referred to in regulation 99(2) must relate to the payment, and not the overpayment. A claimant will always realise that he has been overpaid once he receives a notice to that effect, and regulation 99(2) would therefore provide no protection if it could apply to a notification that an overpayment had occurred. The decision of the tribunal is therefore erroneous in point of law, and must accordingly be set aside.

10. The addition in 1991 of the words "or of any notice relating to that payment" to regulation 99(2) of the 1987 regulations was no doubt intended to deal with cases, such as this, where a claimant does not actually receive rent, and who will therefore normally only become aware of a notional payment of rent by way of a credit to the claimant's rent account if notice is given. By section 134(2) of the Social Security Administration Act 1992, the word "pay" includes a reduction in the amount of payments which a person has to make to an authority by way of rent, so that for the purposes of regulation 99 of the 1987 regulations, there is a payment of housing benefit each time rent is credited to a claimant's rent account. If rent is wrongly credited to the account of a claimant who is in receipt of housing benefit, and the claimant, despite not receiving notice, is aware that rent has been credited to his account, regulation 99(2) of the 1987 regulations requires consideration of whether the claimant could reasonably be expected to realise that there has been an overpayment of housing benefit at the time when the rent is credited to his account. In relation to council tax benefit, regulation 83 of the 1992 regulations provides that "excess benefit" means any amount which has been allowed by way of council tax benefit to which there was no entitlement, and if no notice relating to the allowance has been given, regulation 84(2) requires consideration of whether the claimant could reasonably be expected to realise that excess benefit was being paid "at the time the benefit was allowed". In the case of both housing benefit and council tax benefit, if no notice is given of a rebate or allowance, it is therefore necessary to consider what a claimant ought reasonably to have realised at the time when the rent or council tax account was credited.

11. Although the respondent authority accepts that the tribunal's decision was wrong in law, it has submitted that I should substitute a decision to the same effect, substantially on the basis set out in the authority's letter of 21 October. The claimant's representative has submitted that I should refer the case to a new tribunal for rehearing, so that findings of fact can be made in order to decide whether the claimant could not reasonably have been expected to realise to realise that there was an overpayment of benefit at the times when credits were applied to his rent and council tax accounts.

12. I accept the submission of the claimant's representative. In *CH/1176/2003* Mr Commissioner Jacobs held that the context of regulation 99(2) is the likelihood that a claimant who could not reasonably be expected to realise that an overpayment of housing benefit had occurred was likely to spend the money quickly, and that it is for that reason that the regulation places emphasis on the time of payment. The evidence in this case shows that that was precisely the concern raised by the claimant, since the note of the telephone conversation on 7 May 2004 records the claimant as saying that "he would rather get a bill now than wait months and find he has a huge amount to pay back". No doubt regulation 99 of the 1987 regulations and its equivalent in the 1992 regulations contemplate that a housing authority which is made aware of an overpayment will normally take whatever steps are necessary to bring the overpayment of benefit to an end. However, if the authority fails to do so and reassures the claimant that there has been no overpayment, the question of whether the claimant could reasonably be expected to have realised that an overpayment has occurred must be decided in the light of what the claimant has been told by the authority. The authority's submission in this case proceeds on the basis that it is unnecessary to make findings of fact with regard to what the claimant was told when he telephoned their council tax and benefits sections, but a claimant must be allowed to argue that it was reasonable to accept what he was told by the authority's own officers. Findings of fact with regard to what the claimant was told are therefore crucial in order to decide whether the claimant ought reasonably to have realised that the payments of benefit in each of the periods following those telephone conversations were overpayments.

13. In a letter to the tribunal, the claimant argued that he could not reasonably be expected to have realised that he was being overpaid housing benefit on the basis of what he was told in the course of his telephone conversation with the council tax section on 7 May. There is some indication that the claimant was credited with housing benefit after 11 April because any award of benefit on his new claim would have followed on continuously from the expiry of his extended award, and it may be that there was a genuine, although mistaken, belief that there was no overpayment of housing benefit for that reason. That, however, is a matter which will have to be investigated by a new tribunal.

14. I therefore refer this case for rehearing before a differently constituted tribunal. The tribunal should ascertain whether the claimant has, in fact, abandoned his appeal in respect of overpaid council tax benefit. The tribunal should then make findings of fact with regard to what the claimant was told during each of his conversations with officers of the respondent authority. On the basis of those findings, it should then decide whether the claimant could reasonably have been expected to realise that there was an overpayment of benefit on each of the dates on which payments were credited to the claimant's rent account or council tax account.

15. For those reasons, my decision is as paragraph 1.

(signed on the original)

E A L BANO
Commissioner
23 September 2005