

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

I SET ASIDE the decision of the Bexleyheath appeal tribunal, held on 19 January 2005 under reference U/45/168/2004/03338, because it is erroneous in point of law.

My DECISION is:

- the claimant was not overpaid housing benefit or paid excess council tax benefit for the inclusive period from 7 April to 3 August 2003;
- the claimant was overpaid housing benefit and paid excess council tax benefit for the inclusive period from 4 August 2003 to 29 March 2004, but no part of that benefit is recoverable from the claimant.

Background

2. This case concerns the recoverability of an overpayment of housing benefit and of an excess payment of council tax benefit.

3. In view of the legal issues raised by the appeal, I directed an oral hearing. It took place before me in the Commissioners' Court in London on 31 August 2005. The claimant attended. He was represented by Mr Derek Stainsby of his Housing Association. Mr Patrick, of the Notting Hill Housing Trust, was also in attendance as an observer. The Secretary of State was represented by Mr Julian Kenny, of counsel. The local authority was not represented at the hearing, but had made detailed written submissions. Mrs Cambridge of the authority was in attendance as an observer. I am grateful to all those who provided written submissions for the parties and to Mr Stainsby and Mr Kenny for their oral arguments at the hearing.

4. My decision accords with the outcome sought by Mr Stainsby and Mr Kenny. My reasoning for the most part agrees with theirs. I have, however, not always found it necessary to go as far as Mr Stainsby sought to persuade me. When this is the case, I have said so. We discussed the local authority's written submission at the hearing. Its latest amended submission was essentially based on the legal basis of a letter which it wrote in November 2003. I explain why I do not accept the local authority's analysis of that letter.

History

5. The history of this case is not entirely clear. The best interpretation I can find of the evidence is this.

The March 2003 claim

6. On 3 March 2003, the claimant submitted a 'renewal' claim for housing benefit and council tax benefit. This led to decisions by the local authority, which were notified to the

claimant in letters of 24 March 2003. These letters appear to me to be self-contradictory. They set out a series of awards ending on 5 April 2004. That suggests a 52 week benefit period. But in the next paragraph, the claimant was told that his entitlement would be 'reviewed on 29 September 2003 and the forms to reapply will be sent to you 8 weeks before then.' This is ambiguous. One interpretation is that, despite the period covered by the awards, the decisions were for a 26 week benefit period. That is consistent with the reference to 'forms to reapply' and with the later action by the local authority. An alternative interpretation is that the awards were for the whole year, but the local authority intended to check on entitlement at the end of September. That is consistent with the reference to review.

The change to monthly payment

7. In June 2003, the claimant notified the local authority that from July he would be paid monthly instead of weekly.

The August 2003 claim

8. On 13 August 2003, the claimant submitted a claim form for housing benefit and council tax benefit. It was clearly a form that was issued personally to him by the local authority, because it was printed with his details, including his benefit reference number. Before a decision was made, the local authority sent the claimant two letters asking for his August wage slip. The first letter was written on 19 August 2003 and allowed the claimant 28 days to reply. It told him that his claim would be treated as withdrawn if he did not provide the information requested. The second letter was written on 2 September 2003 as a reminder, allowing 14 days in which to reply. The claimant provided his August wage slip on 3 September 2003 together with a letter from his employer reporting that he was working occasional overtime. (The overtime had begun in July.) Sending this claim form for completion and warning the claimant that the claim would be treated as withdrawn suggest that the decision of March 2003 had fixed a benefit period of 26 weeks.

9. Everyone now accepts that the local authority now made a mistake in calculating the claimant's income. It averaged his year-to-date income over the whole of the financial year to date. It failed to take account of the fact that there had been a significant change when he began to do overtime. It was wrong for the local authority to average without making inquiries into the pattern of earnings.

10. Based on this mistake, the local authority made decisions, which were notified to the claimant in letters dated 16 September 2003. They dealt compendiously with the 'renewal' claim and a revision of the March 2003 decision. They made a reduced award from and including 7 April 2003. The overpayment of housing benefit was recovered from current entitlement and the excess council tax benefit was recovered from the council tax account.

The revision application

11. The claimant wrote to the local authority asking for a revision on the ground that his income had not been correctly calculated. That letter was received on 22 September 2003. The local authority did not reply until 17 November 2003. I have to deal with this letter in some detail, because of the use that was made of it in argument. The local authority, and initially the Secretary of State, argued that the letter imposed a duty on the claimant to provide

information, which he failed to do. In other words, they argued that the letter was written under regulations 73(1) of the Housing Benefit (General) Regulations 1987 and 63(1) of the Council Tax Benefit (General) Regulations 1992. Mr Stainsby argued that the letter could only have been written under regulation 4(5) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. Mr Kenny supported Mr Stainsby at the hearing. The letter read:

I recently received a letter from you requesting a revision of your Housing Benefit entitlement.

I am currently dealing with your request but require the following additional information-

I have enclosed a certificate of earnings for you to give to your employer to fill in.

Please return this within 1 calendar month from the date of this letter. If I do not receive a response from you I would assume that you no longer wish to continue with your request for a revision.

12. I need to make three comments on this letter.

13. First, the enclosed certificate of earnings asked the employer to give details of the claimant's pay for the last two months. That, of course, would not deal with the claimant's concerns, which were not limited to those months.

14. Second, by its terms the letter did not impose a duty on the claimant to provide the information. At most, it made his application for a revision conditional on provision of the information. It gave him the opportunity to provide it and set out the consequence of not doing so.

15. Third, the letter must have been issued under regulation 4(5), which deals with information needed to deal with an application for a revision. I say that for at least these three reasons:

- the letter was written further to the claimant's letter that expressly asked for a revision – contrast the letter of 19 August 2003, which refers to the claim for housing benefit and council tax benefit;
- the time limit set of one month is the time limit set by regulation 4(5) – contrast the letter of 19 August 2003, which sets the time limit of four weeks provided by regulations 73(1) and 63(1);
- the whole tone of the letter is only consistent with a request for information in relation to a revision – contrast the wording of the letter of 19 August 2003, which makes clear that the information must be provided if the claim is to proceed.

I reject the local authority's argument that its letter was sent under regulation 73(1).

16. The claimant did not reply to the local authority's letter. On my analysis, he was entitled not to. He simply did not respond to an invitation. He was entitled to decide not to pursue his application for a revision. The local authority did not follow up the November letter until February 2004, when it allowed him a further seven days or 'your claim shall be treated as withdrawn'. This reference to a claim does not make sense in the context of the November letter, which was expressly linked to the application for a revision.

The decisions under appeal

17. The next relevant action of the local authority was to make the decisions that were under appeal to the appeal tribunal. They were notified in two letters of 14 June 2004, one dealing with housing benefit and the other with council tax benefit. Both recalculated the claimant's entitlement from and including 7 April 2003 on the ground that his income had changed. This resulted in an overpayment of housing benefit and an excess of council tax benefit. The local authority decided that they were recoverable.

My analysis

Revision or supersession?

18. The decisions notified on 14 June 2004 could only take effect by way of revision or supersession of the decision notified on 16 September 2003.

19. The letters of 14 June 2004 do not set out whether the decisions were made on revision or supersession. They refer to 'review' related to a change in income. The housing benefit letter refers to a 'revised award'. I am not sure that that means revised in the technical sense, but it was correct, even if only fortuitously, because there were no grounds for supersession from April 2003. The local authority's submission to the appeal tribunal refers to supersession, but that is simply wrong.

20. The appeal tribunal treated these decisions as made on revision and it was correct to do so.

Official error as grounds for revision

21. Mr Stainsby argued that the only ground for revision was 'official error' under regulation 4(2)(a) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. This is defined in regulation 1(2)

'official error' means an error made by-

- (a) a relevant authority or a person-
 - (i) authorised to carry out any function of a relevant authority relating to housing benefit or council tax benefit; or
 - (ii) providing services relating to housing benefit or council tax benefit directly or indirectly to a relevant authority;

...
 but excludes any error caused wholly or partly by any person or body not specified [above].'

22. I have already said that the local authority made a mistake in calculating the claimant's income as a result of failing to investigate the pattern of his earnings. That is a mistake in or relating to adjudication that amounts to an official error: *CDLA/3440/2003* at paragraph 8. The claimant did not cause or contribute to that mistake. He supplied the information he was asked for and was not responsible for the way that the information was interpreted.

23. I accept Mr Stainsby's argument that the local authority's official error provided grounds to revise the decision. I do not need to consider Mr Stainsby's further argument that there were no other grounds for revision; it is sufficient that there was an official error.

The overpayment

24. Mr Stainsby accepted at the hearing that the claimant had been overpaid and that, perhaps, the overpayment had been under calculated by the local authority. However, this was, he argued, irrelevant, because the overpayment and excess benefit were not recoverable.

Official error in recovery

25. I deal with this argument by reference to the housing benefit legislation. The council tax benefit legislation is in equivalent terms for this point.

26. The relevant legislation is regulation 99 of the Housing Benefit (General) Regulations 1987:

(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 official error where the claimant or the 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 overpayment, 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 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 for Work and Pensions,
- (ii) the Department for Education and Employment,
- (iii) the Commissioners of the Inland Revenue,

acting as such; or

- (d) a person providing services to either 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 or omission.

27. Mr Stainsby's argued that the official error under regulation 1(2) meant that there had to be an official error under this provision. I do not need to consider whether the difference in the wording of the two definitions could have such significance as to render this argument invalid as a general proposition. It is sufficient to say that on the facts of this case the same mistake by the local authority was an official error under both provisions.

Causation

28. As there was an official error, I have to consider whether the overpayment and payment of the excess benefit were caused by it. This is a separate issue from the existence of an official error. Again, it is sufficient to refer to regulation 99. There is no difference between housing benefit and council tax benefit for the purposes of my decision.

29. Causation in this provision was considered by the Court of Appeal in *R (on the application of Sier) v Cambridge City Council Housing Benefit Review Board* [2001] EWCA Civ 1523. The claimant in that case had been overpaid housing benefit by Cambridge because the local authority was not aware that he also had a home in London. The claimant argued (i) that the Secretary of State had made an official error by failing to send a form to the local authority that would have alerted it to his London home and (ii) that this had caused the overpayment. Lord Justice Latham rejected the argument on causation:

25. ... 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.

26. Bearing that in mind, I consider that Richards J was correct in concluding that the failure to send form NHB8 to Cambridge City Council had not "caused" the overpayment even if that failure did amount to an official error. The overpayment occurred because the appellant continued to claim Housing Benefit for the Cambridge property and failed, in breach of his duty under Regulation 75 of the 1987 Regulations, to notify the Cambridge City Council of what in my judgment was clearly a relevant change in his circumstances and one which he would have appreciated. The administrative failure, if that is the appropriate way of describing it, to send form NHB8 of the Cambridge City Council did not cause any payments to be made. The most that could be said is that as a result of that failure Cambridge City Council was not alerted to the fact that the appellant was no longer entitled to the relevant payments. But it seems to me that the answer to the question posed by the Regulation is clear: this was not an overpayment caused by official error and accordingly the Regulations do not relieve the appellant of the obligation to repay the overpayment, which is the primary rule in such circumstances.

And Lord Justice Simon Brown said:

30. ... In my judgment a single composite question falls to be asked under regulation 99(3). One must ask: "was the overpayment the result of a wholly uninduced official error, or was it rather the result of the claimant's own failings, here his failure in breach of duty to report a change of circumstance?" The answer to that question on the facts of this case is, of course, self-evident.

31. ... If one asks the purpose for which the question arises under regulation 99(3) as to whether the overpayment was caused by an uninduced official error, the common-sense answer is so as to distinguish that sort of case from a case where the claimant himself is substantially responsible for the overpayment. It would be remarkable indeed if the claimant was liable to make repayment in a case where he merely contributed to what might be a fundamental error on the part of the department, and yet wholly escapes such liability even when himself primarily responsible for the overpayment.

30. I have to accept the authority of that decision, which requires me to deal with the causation issue in a common sense way taking into account the purpose of the recovery legislation. I have to do so in the context of the precise wording of the legislation. This establishes the causal link to be investigated is the one between the mistake and the overpayment.

31. What mistakes were made in this case? This question can be answered differently. On one analysis, the mistake was made when the decision-maker calculated the claimant's income by misinterpreting the evidence that the claimant had been asked to provide. The analysis that I prefer, as I have said, is that the mistake was made when the decision-maker failed to investigate in order to obtain more precise information about the pattern of the claimant's earnings. But it does not matter which analysis is correct. The claimant did not contribute to either of these mistakes. He was asked to provide evidence and he complied with that request. He was not in any way responsible either for the fact that the decision-maker did not ask for more details or for the fact that the decision-maker calculated his income by averaging the year-to-date figure over the whole financial year. Both those mistakes were solely the responsibility of the local authority.

32. It seems to me that there is only one answer to Lord Justice Simon Brown's composite question. The overpayment in this case was caused by the local authority without contribution by the claimant. The local authority determined the evidence that the claimant was required to provide, what further investigations were appropriate and how the evidence should be analysed. As a matter of common sense, the local authority caused the overpayment.

Could the claimant reasonably have been expected to realise that he was being overpaid?

33. The issue for me is whether the claimant could have realised that he *was* being overpaid. He certainly realised that his income might have been wrongly calculated. That was why he asked for a revision in September 2003. But on his understanding at the time, he believed that his benefit awards were too low not too high. Is there any reason why he might have realised that the awards *were* (not might have been) too generous to him? The tribunal could find none; nor can I. He had experience of his income being calculated for the purposes of his

entitlement to benefit. But, so far as the evidence shows, he had no previous experience of calculation of monthly paid income or of how overtime was taken into account. Nothing in the documentation that is before me would have alerted him to the method of calculation with sufficient precision to allow him to know that his awards *were* too generous to him. If anything the approach taken by the local authority in its September decision would only have confused him and diverted his attention from the correct method of calculation. That approach concentrated on current evidence that would not provide a breakdown of his varying earnings over the financial year.

The tribunal's decision

34. The tribunal's decision dealt with the period covered by the local authority's decision in three parts:

- 7 April 2003 to 3 August 2003: there was no overpayment or payment of excess benefit in this period, because the claimant had not begun to work overtime. This is indisputably correct. It corrects the mistake made by the local authority, without sufficient inquiry, in its calculation of the claimant's income.
- 4 August 2003 to 15 December 2003: there was an overpayment and payment of excess benefit in this period, but it was not recoverable. The tribunal's reasoning is essentially the same as mine.
- 16 December 2003 to 29 March 2004: there was an overpayment and payment of excess benefit in this period, which was recoverable. This part of the tribunal's decision was based on the local authority's letter to the claimant in November 2003. This allowed one month for the claimant to provide further details of income. The tribunal decided that by failing to provide the information requested within the time allowed the claimant materially contributed to the mistake. That reasoning is wrong for the reasons I have already explained. The letter of November 2003 did not require the claimant to provide information. It was merely an invitation to do so if he wished to pursue his application for a revision. It is not surprising that he did not act on the invitation, because the letter invited him to provide evidence of current earnings, when his point related to the calculation of past earnings. It is not surprising that he would interpret the revision process as being of no relevance to his concerns about his income calculation. Accordingly, the tribunal went wrong in law by wrongly identifying the legal basis for the letter of November 2003. On the correct analysis, there was no basis for treating this period differently from the period of 16 December 2003 to 29 March 2004. For the reasons I have given, there is no basis for recovery during this period.

The meaning of 'allow' in respect of council tax benefit

35. Regulation 84 of the Council Tax Benefit (General) Regulations 1992 is broadly similar to regulation 99 of the Housing Benefit (General) Regulations 1987. There is, however, one difference. Regulation 99 refers to 'payment' of housing benefit, whereas regulation 84 refers to benefit being 'allowed'. Mr Commissioner Mesher considered the meaning of 'allowed' in *CH/0602/2004*. He did not need to come to a conclusion on the issue. In view of my decision on causation, it is unnecessary for me to deal with that issue in this case. However, as I heard

argument from both Mr Stainsby and Mr Kenny, I record my opinion in case it is of help if the issue arises in the future.

36. Mr Stainsby and Mr Kenny both argued that 'allowed' meant paid or credited to a council tax account. I agree.

37. The terminology used in the council tax benefit legislation is not entirely consistent. It differs from that used in the housing benefit legislation, because their operation is different. Housing benefit is paid to the claimant or to the claimant's landlord. Council tax benefit can also be paid, but this is exceptional. The usual way of providing council tax benefit to a claimant is by reducing liability in respect of council tax. See regulation 77(1) of the Council Tax Benefit (General) Regulations 1992.

38. It is, no doubt, for this reason that the heading of regulation 77 refers to the 'Time and manner of *granting* council tax benefit', although this word is not used in the body of the regulation or, as far I have found, elsewhere in the legislation. It also explains why the legislation usually refers to *excess* council tax benefit rather than to *overpaid* council tax benefit, although regulation 84(3) refers to 'an overpayment'.

39. The different methods of providing council tax benefit suggest that the word 'allowed' in regulation 84 covers both possibilities, payment and reduction. Unfortunately, the legislation is again not entirely consistent; regulation 82(1) refers to council tax benefit being 'allowed or paid', which suggests a contrast. However, it would be surprising if recovery of excess benefit was possible if it were granted in one way but not if it were granted in the other.

40. Mr Kenny made the point that regulation 84 was obviously designed to mirror regulation 99 of the Housing Benefit (General) Regulations 1987 and should be interpreted accordingly. Mr Stainsby drew attention to regulation 99(4) which deals with housing benefit that remains credited to a rent account as a result of the award of housing benefit by way of a rent rebate.

Disposal

41. I allow the appeal and substitute the decision, favourable to the claimant, that the tribunal should have given.

**Signed on original
on 09 September 2005**

**Edward Jacobs
Commissioner**