DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the Manchester appeal tribunal, held on 13th February 2002 under reference U/40/072/2001/04556, is not erroneous in point of law.

The appeal to the Commissioner

2. This case concerns an alleged recoverable overpayment of housing benefit and council tax benefit. It comes before me as an appeal to a Commissioner against the decision of the appeal tribunal brought by the claimant with the leave of the district chairman who heard the appeal. The appellant is the claimant. The respondent is Manchester City Council. The Council does not support the appeal.

3. The claimant's representative has asked for an oral hearing of the appeal. She has given no reason for the request. I refuse it. I have recently held an oral hearing on issues related to this appeal in *CH/4943/2001*. Nothing in the observations in this case suggests that it is appropriate to reconsider the arguments considered in that case. The other issues raised in this case are well known to me from my social security jurisdiction and do not merit an oral hearing.

The history of the case

4. The claimant was in receipt of housing benefit and council tax benefit. The awards had been calculated on the basis of the claimant's income as disclosed in her claim. That income increased over the Christmas period. When the increase was discovered, the local authority reassessed the claimant's entitlement to the benefits on the basis of her income, including the additional income over the Christmas period, averaged over the period of the awards. An overpayment was calculated and the local authority decided that it was recoverable from the claimant. The claimant exercised her right of appeal. She was represented by the local authority's Welfare Rights Service. As a result of the representative's arguments, the first hearing of the appeal was adjourned with two directions. The first was that the local authority produce evidence of the decision under appeal. The second was that the local authority recalculate the overpayment on a week by week basis to reflect the income actually received during that week. At the resumed hearing before a different chairman, the tribunal held that the overpayment, as recalculated, was recoverable from the claimant. The claimant's representative drafted detailed grounds of appeal. The tribunal's chairman granted leave, commenting that the issues raised were appropriate for comment by a Commissioner. Since leave was granted, I have dealt with some of the issues in *CH/4943/2001*. As far as possible, I will avoid repeating what I wrote in that decision. The decision is available on the internet at www.osscsc.gov.uk.

Was there a review?

5. The claimant's representative argues that the overpayment was not recoverable unless the local authority had reviewed the decisions making the awards. I accept that argument. However, I disagree with the representative in the lengths to which she expects the local authority to go in order to prove that the review took place.

6. I commented in *CH/4943/2001, paragraph 11* that

'Local authorities should always include a copy of the decision under appeal in the submission to the appeal tribunal.'

I do not know what the capabilities are of the computer system used by the local authority in this case. It would be surprising if it was impossible to produce a copy of a decision, even one generated by the computer software. Even if an actual decision cannot be produced, the documents that are generated should be sufficient to show that the review took place.

7. The observations refer to the burden of proof and the balance of probabilities. I do not consider that probabilities have anything to do with whether or not a review took place. Either it did or it did not. The evidence should be capable of proof one way or the other without reference to probabilities.

8. The direction on this issue, given at the first hearing, resulted in a submission from the local authority consisting of a witness statement of 2½ pages with 11 Appendices. The statement constructs an audit trail of the computer system and records. It goes into detail of faults reported during the relevant period. The representative in her observations on the appeal now refers to the possibility of faults existing that were not reported or not even known. This argument has got out of hand. It now reads more like a detective novel than submissions in a legal proceeding. The simple truth is this. The evidence in this case shows clearly that a review took place. No one with any sense would doubt it. Local authorities should not be put, as a matter of general practice, to the extensive trouble that the tribunal's direction imposed in this case. It is only in the most exceptional case that the evidence will be such as to justify, let alone require, the sort of exercise that the local authority undertook. To be fair to the tribunal, I am not sure that it intended so extensive a response as the local authority provided.

9. The Commissioners' experience of this jurisdiction is that representatives are taking this procedural point regularly. Its only effect is to prolong the proceedings. That, of course, may be the tactic.

Regulation 104 and regulation 90

10. Regulation 104 of the Housing Benefit (General) Regulations 1987 and regulation 90 of the Council Tax Benefit (General) Regulations 1992 are identical. They provide for the calculation of the overpayment. In particular, they require the local authority to take account of how the claims and awards would have been dealt with if the local authority had known the full facts.

11. I criticised the local authority in *CH/4943/2001* for not applying regulation 104. In this case, the local authority had not properly applied that regulation or the equivalent regulation 90. It had taken the additional income over the Christmas period into account over the whole of the period of the awards. My first thought was that that was the only permissible method of calculation. My reasoning was based on regulations 21(1)(a) (housing benefit) and 13(1)(a) (council tax benefit). They require the local authority to estimate the likely average income over the benefit period. 'Benefit period' is defined by regulations 66 (housing benefit) and 57 (council tax benefit). The definition did not seem to allow a shorter period than the period of the award without a fresh claim. However, on considering the matter further, I have concluded that regulations 104 and 90 authorise a different method of calculation. If the increase in income had been notified as it began, the local authority could have terminated the existing award and required a new claim. The existing benefit period would have come to an end and a

new one would have begun. As the claimant's income was basically constant, except for an increase in a relatively short period, it was appropriate for the increase to be limited to the period during it was paid. Regulations 104 and 90 allowed that to be done, both as originally enacted and as substituted from 2nd October 2000. The local authority had not performed those calculations. However, that was a deficiency that the tribunal could, and did, correct. See *CH/4943/2001*.

Defective notice

12. I dealt with this in detail in *CH/4943/2001*. The test to apply if there has been a review is this: did the claimant suffer as a result 'substantive harm' or 'significant prejudice'? The answer is obviously that she did not. Any defect has delayed the time when the recovery of the overpayments begin. If anything, that has been to her advantage, albeit temporarily.

Bias and a fair hearing

13. The claimant's representative has criticised the chairman for the way in which she investigated the case. She argues that the chairman was not even-handed in her approach and did not take the same sceptical and questioning approach to the evidence and arguments of the local authority as it did to her submissions. I reject these criticisms of the chairman's conduct of the proceedings.

14. If there was a difference in the way the chairman dealt with the two arguments and evidence of the parties, it was justified by the difference in the content of the arguments and evidence. The local authority's evidence presented to the tribunal at the resumed hearing was more than sufficient to prove the local authority's case. It showed that there had been a review. It also contained a corrected calculation of the overpayment that correctly applied regulations 104 and 90. On the other hand, the argument put by the representative could not be accepted as presented. Some chairman might simply have listened to it without comment and then rejected it. The chairman in this case did the representative the courtesy of treating it seriously and patiently investigating whether there might be something in it to the claimant's advantage. The consequence of that consideration, patience and courtesy has been an allegation of bias and lack of fairness. I reject those arguments. The chairman's conduct was within the limits allowed by her control of the proceedings and was a proper exercise of the tribunal's inquisitorial role.

Summary

15. I dismiss the appeal. The tribunal's decision was faultless.

Signed on original

Edward Jacobs
Commissioner
5th August 2002