

CH 2409 2005

Decision

1. This appeal by the claimant succeeds. In accordance with the provisions of paragraph 8(5) of Schedule 7 to the Child Support Pensions and Social Security Act 2000 I set aside the decisions of the Coventry (paper hearing) tribunal of 1st April 2005 (reference U/04/035/2005/00340) as having been made in error of law as indicated below. I substitute my own decision. This is to the effect that:

- (a) for the period prior to 17th March 2004 there is no recoverable excess council tax benefit in respect of the receipt by the claimant of state retirement pension and private pension, and
- (b) for the period from 17th March 2004 any excess council tax benefit in respect of the receipt by the claimant of state retirement pension and private pension is recoverable from the claimant.

2. I remit to the parties for agreement any calculations as to the amount that is recoverable. Any party is at liberty to restore the matter to the Commissioner for decision in the absence of agreement. This liberty applies for the purposes of calculation only.

Hearing

3. I held an oral hearing of this appeal on 26th April 2006. The claimant attended in person and was represented by Jennifer Twite of counsel, instructed by the Free Representation Unit. The local housing authority ("the authority") was represented by Mr Cullimore. The Secretary of State, who had been added as a party, was represented by Kate Olley of counsel, instructed by the Solicitor to the Department for Work and Pensions. I am grateful to them all for their assistance and for the helpful written submissions.

4. This appeal relates only to council tax benefit ("CTB") and the following matters were agreed by the parties:

- (a) The matter before me related only to recoverability of excess CTB allowed in relation to the receipt by the claimant of state retirement pension and private pension;
- (b) the decision of the tribunal had been made in error of law and had to be set aside;
- (c) the basic facts and calculations were not disputed – the issue was what conclusions should be drawn from those facts – and I should substitute my own decision rather than send the matter back for a fresh tribunal hearing;

- (d) there had been excess CTB but its recoverability (and possibly its recoverability in respect of particular periods) was disputed except in relation to the period prior to 17th November 2003, when it is agreed that any excess payment was not recoverable;
- (e) I had no jurisdiction in this case relation to the actual recovery of any recoverable excess CTB.

Background and Procedure

5. The claimant was born on 11th November 1938. He was liable to pay council tax and, because of his limited income, CTB was awarded to him at some stage. There were frequent changes to the amount of CTB awarded to him, and a number of these have been explained in the submissions from Mr Cullimore. The notifications sent to him each time were quite complex. For example, on 19th June 2003 the authority sent him a five page letter of notification consisting largely of calculations (reproduced on pages 59 to 63 of the bundle of papers before me). This showed entitlement to CTB of £7.75 weekly from 3rd to 31st March 2003, £11.85 weekly from 1st April to 6th April 2003, and £14.19 weekly from 7th April 2003. Each of these sets of calculations showed weekly earnings of £172.69, incapacity benefit of £53.50 rising to £54.40 and disability living allowance (the income from which, plus a certain further amount, was disregarded). From this income was deducted prescribed amounts in respect of day to day living expenses. The remaining income formed the basis for the calculation of entitlement to CTB. The first page of each notification (see for example page 59 of the file) stated in capital letters: "IT IS YOUR DUTY TO TELL US OF ANY CHANGE IN YOUR CIRCUMSTANCES THAT MAY AFFECT YOUR BENEFIT ENTITLEMENT IMMEDIATELY IT OCCURS". The notification continued: "The type of income you should report includes: 1. Changes in your, or your partner's income" followed by a number of other examples.

6. It is important to note that nothing was stated in the notification about any change having to be reported in writing. On the contrary, a paragraph at the foot of the first page (page 59) stated:

"If you want to ask us anything about your claim, we are here to help. You can visit us at the Civic Centre, Benefit Reception or telephone us on [telephone number given]. We are open Monday to Friday between [sic] 9am-5pm."

7. Mr Cullimore also provided an explanation of how the CTB system works from the authority's point of view. Although this explanation was interesting, it seem to me that the details of how accounting transfers are made within a set of computerised accounts are of very little relevance to claimants such as the claimant in the present appeal.

8. On or shortly before his 65th birthday (11th November 2003) the claimant telephoned the authority to inform them that he would be receiving his retirement

pension. He was advised to wait until he had received all the details and then to provide proof of the amounts. No written record of this conversation can be located but he was subsequently able to provide the name of the authority's official to whom he had spoken and the tribunal found as a fact that this conversation had taken place. Mr Cullimore has accepted that it could well have done so, and I see no reason to disturb the tribunal's finding on this. I also accept the claimant's evidence to me that he was also going to receive a private pension (of £112.49 per month) and was waiting for details of this and of his new tax code, and understood the official to be indicating that he need not contact the authority again until he had all these details.

9. On 12th November 2003 the Pension Service issued an award letter to the claimant giving details of his retirement pension. No further award letter was issued to the claimant prior to 7th April 2004. He was entitled to payment from the payday of 5th December 2003, initially of £210.25 weekly and from 7th April 2004 of £216.12 weekly. This information was not before the tribunal but it has been confirmed by a letter of 13th January 2006 from the Pension Service (reproduced on page 147 of the file) and has not been challenged by any of the parties.

10. Some time in the middle of January 2004 the claimant sent all his details to his tax office but by 27th February 2004 he had heard nothing from that office and sent to the authority the Change of Circumstances notification reproduced on page 87. This gave details of all his pensions and confirmed that entitlement to incapacity benefit had ceased once he became a pensioner.

12. On 10th March 2004 the authority issued to the claimant a recalculation of entitlement (pages 5 to 8) with the same information about contacting the Civic centre Benefit reception as that on the earlier notification, to which I have referred above. This showed entitlement to CTB of £14.27 weekly from 23rd June 2003 to 16th November 2003 and £18.11 from 17th November 2003. The small print of the calculations in the notification showed that they were based on £54.40 incapacity benefit (as well as the other sources of income), but made no reference to retirement pension or private pension. Three weeks later, on 1st April 2004 the authority sent to the claimant a letter stating (bizarrely) that to enable his claim for benefit to be considered, the authority required bank statements and pension credit/ state pension and private pension award letters (see page 47). Mr Cullimore has accepted that this information was received on 7th April 2004.

13. On 22nd May 2004 the authority decided (communicated in a letter wrongly dated 19th February 2004 – pages 1F and 2) that because it had not been aware of the increase in the claimant's income until 7th April 2004, there had been excess CTB of £507.20 for the period 23rd June 2003 to 23rd May 2004 and that this amount was recoverable from the claimant.

14. On 1st October 2004 the claimant appealed against this decision on the grounds that he had kept the authority informed. On 1st April 2004 the tribunal considered the

matter in the absence of the parties and confirmed the decision of the tribunal. On 30th June 2005 the chairman of the tribunal refused the claimant leave to appeal to the Commissioner against the decision of the tribunal. He now appeals by my leave granted on 12th August 2005. On 10th January 2006 the Commissioners' Legal Officer directed that there be an oral hearing and arranged for the involvement of the Free Representation Unit. On 1st February 2006 I invited the Secretary of State to be joined as a party to the appeal.

The Applicable Law

15. Section 131 of the Social Security Contributions and Benefits Act 1992 provides entitlement to council tax benefit in respect of "a particular day" if the relevant conditions are satisfied. One of the conditions is that the person concerned is, for the day, liable to pay council tax in respect of a dwelling of which he is a resident (section 131(3)(a)). This means that conditions of entitlement must be satisfied on a daily basis. However, I observe that decisions are not made on a daily basis, and they are in practice made to cover whole periods, often in advance of the date on which the decision is made, and often for past periods.

16. The relevant parts of The Council Tax Benefit (General) Regulations 1992 provide as follows:

2(1) "designated office" means the office designated by the relevant authority for the receipt of claims to council tax benefit, either –

- (a) by notice upon or with a form approved by it for the purpose of claiming to council tax benefit; or
- (b) by reference upon or with such a form to some other document available from it and sent by electronic means or otherwise on application and without charge; or
- (c) by any combination of the provisions set out in paragraphs (a) and (b) above.

65(1) ... if at any time between the making of a claim and a decision being made on it, or during the award of council tax 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 the receipt of council tax benefit, [the claimant] shall be under a duty to notify the change of circumstances by giving notice in writing to the designated office.

83 ... "excess benefit" means any amount which has been allowed by way of council tax benefit and to which

84(1) Any excess benefit, except benefit to which paragraph (2) applies shall be recoverable.

84(2) ... this paragraph applies to excess benefit allowed in consequence of an official error, where the claimant ... 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.

84(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 for Work and Pensions;
 - (ii) the Commissioners for Inland Revenue

acting as such; or

- (d) a person providing services to the Department or to the Commissioners;

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.

16. The drafting of regulation 84(3) is a little unfortunate, because no payment or overpayment is actually made. However, from the context it is clear that references to payment are to be read as references to excess benefit being allowed.

17. For excess benefit not to be recoverable, there must be benefit allowed because of an official error, and it must be the case that the claimant could not reasonably have been expected to realise that there was excess benefit. There cannot be benefit allowed because of an official error if the claimant caused or materially contributed to benefit being allowed because of the error. It might be necessary, as in the present case, to separate out these elements and consider them in respect of different periods separated by particular events. The underlying cause of the errors of law made by the tribunal in this case was its failure to do this.

18. It is now clear, although it was not necessarily clear on the documentation available to the tribunal, that there was no error on the part of the Department for Work and Pensions (or the Commissioners for Inland Revenue).

Prior to 17th November 2003

19. The tribunal upheld the decision that recoverable excess benefit was allowed from 23rd June 2003. However, this could not possibly have had anything to do with the

claimant's pension entitlement. He did not reach the age of 65 until 11th November 2003 and the Pensions Service letter was not issued until 12th November. The tribunal was in error not to have realised and acted on this.

18th November 2003 to 28th February 2004

20. This is the intermediate period. The claimant had given the information in a telephone call, but had not given the information in writing. The authority omitted to act on this information. No recalculation of entitlement was issued until 10th March 2004 and the claimant cannot be expected to have known what bookkeeping transactions were taking place within the authority's computer or ledgers. I do not see how he could reasonably have been expected to realise that excess benefit was being allowed. However, that leaves the question of whether he caused or materially contributed to the "mistake, act or omission". If he did not, there was for that period no excess benefit allowed in consequence of an official error.

21. Ms Twite argued that the claimant could not have caused or materially contributed to the omission because he had done everything that he had been told to do. I would add that there is no suggestion that the claimant was trying to mislead the authority or to keep information from it, or that the authority was misled in any way. Ms Olley argued that by failing to give the information in writing, as required by regulation 65(1), the claimant had caused or materially contributed to the omission. The tribunal identified the relevance of whether the claimant had contributed to the omission but simply did not consider this in relation to the facts, nor did it consider separately the periods before and from 1st March 2004. In these respects it was also in error of law.

22. I reject the argument that failure to comply with regulation 65(1) necessarily and inevitably means that a claimant has caused or materially contributed to the omission. To accept this would be irrational. Neither regulation 65 nor regulation 84 provides this, and the wording of regulation 84 is not consistent with this proposition. Certainly, the failure to give information in writing might be relevant in an appropriate case, but also relevant are questions as to whether and what information was disclosed at all, whether a claimant has done what he was asked to do and, in relation to the practice of this particular authority, whether an official form specifically instructed that information be given over the telephone or in person.

23. Accordingly, I find that the claimant in this case did not cause or materially contribute to the omission of the authority and that, for this period, excess benefit was allowed in consequence of an official error and is not recoverable from the claimant.

From 1st March 2004

24. On 1st March 2004 the authority received the written Change of Circumstances notification reproduced on page 87 (see above). The authority continued to allow excess benefit until 23rd May 2004. This was a considerable delay on the part of the

authority, and the failure to correct the calculation was an omission capable of amounting to official error. The claimant having sent the appropriate written information, I do not see how it can be said that he caused or materially contributed to that error. Thus there was for that period excess benefit allowed in consequence of an official error. However, that leaves the question of whether he could reasonably have been expected to realise that excess benefit was being allowed.

25. Ms Twite did not really address the period after 10th March 2004. Ms Olley and Mr Cullimore relied on the fact that the claimant should have realised that the assessment of 10th March was based on incapacity benefit but made no reference to retirement pension. The tribunal simply conflated the whole period.

26. It seems to me that, in view of what had happened previously, the claimant could reasonably be expected to have checked whether the authority had acted on the information that he had supplied. He is a literate man. He knew what his pension entitlement was. He knew that he was no longer entitled to incapacity benefit. He knew that there was some doubt about whether the authority had the correct detailed information. Had he checked, he would have realised that excess benefit was being allowed. True, there was official error, but that is not enough to avoid repayment. Regulation 84(2) also requires that he 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. From shortly after the receipt of the document of 10th March 2004 (say, 17th March) he could reasonably have been so expected.

H. Levenson
Commissioner
12th May 2006