

DECISION OF THE SOCIAL SECURITY COMMISSIONER

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

The decision of the Keighley appeal tribunal under reference U/01/013/2004/00422, held on 26 May 2004, is not erroneous in point of law.

The issue

2. This case concerns the recoverability of (i) an overpayment of housing benefit and (ii) a payment of excess council tax benefit. For convenience, I will refer only to the housing benefit legislation. The council tax benefit legislation is in equivalent terms.
3. There is no dispute that the claimant received too much benefit between 1999 and 2003. This occurred because she did not disclose on her claim forms that she was receiving increasing amounts of pension from a former employer. She had disclosed it on previous forms between 1994 and 1998.
4. In these circumstances, the issue raised by the claimant's representative is this. Was the payment to the claimant made by official error in that the local authority failed to check the information on previous claim forms submitted by the claimant? The representative refers to the local authority's obligations under the Verification Framework.

Appeals

5. The claimant first exercised her right of appeal to an appeal tribunal. The tribunal considered and rejected the representative's argument. It found that the claimant had at least contributed to the mistake that caused her to be paid too much benefit. In doing so, it found that the claimant was an honest and credible witness. I am prepared to deal with the case on that basis, although I have to say that the claimant has been able to offer no explanation for why she stopped disclosing that she was receiving a pension.
6. Mr Commissioner Williams gave the claimant leave to appeal to the Commissioner against the tribunal's decision. He also invited the Secretary of State to become a party to the proceedings, which invitation was accepted. The parties have now made their observations on the appeal. Neither the local authority nor the Secretary of State supports the appeal. Mr Commissioner Williams has transferred the case to me for decision.

The official error issue

7. Was the overpayment caused by official error?
8. This issue is relevant for this reason. If an overpayment was not caused by official error, it is recoverable. If it was caused by official error, the claimant has a possible defence under regulation 99(2).

9. Regulation 99(3) contains the definition:

'(3) In paragraph (2), "overpayment caused by official error" means an overpayment caused by 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) ...
- (d) ...

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.'

10. The claimant's representative argues that the local authority made a single mistake by omission when it failed to compare her 1999 claim form with earlier claim forms. He does not argue that this mistake was repeated for each subsequent claim, but that this single mistake on the 1999 claim has the effect that all subsequent awards were made in official error.

11. If this argument is to succeed, it must have the effect that the local authority's omission was the sole cause of the mistake that led to the overpayment such that it deprived the claimant's omission of any causative effect.

Dual causation

12. I begin by assuming that the local authority's omission to compare claim forms was a mistake for the purposes of regulation 99(3). Even on this assumption, the claimant's omission of the pension from each of her claim forms was at least a contribution to that mistake. This possibility of dual causation has been recognised by the Court of Appeal in *Duggan v Chief Adjudication Officer*, reported as *R(SB) 13/89*, and *Morrell v Secretary of State for Work and Pensions*, reported as *R(IS) 6/03*. Both those decisions confirmed decisions of Commissioners to the same effect. The principle has been regularly applied by Commissioners, including in their housing benefit jurisdiction: see Mr Commissioner Rowland in *CH/0069/2003* at paragraph 9.

13. The claimant's representative argues that the tribunal made the mistake of asking whether the claimant's omission contributed to the overpayment, when the correct question should have been whether she had contributed to the mistake. If I were looking at the wording of regulation 99(3) free from authority, I would be tempted to accept his argument. However, I am not so free. The decision of the Court of Appeal in *R (Sier) v Cambridge City Council Housing Benefit Review Board* adopted a broader analysis which is incompatible with the representative's argument.

Regulation 73

14. The claimant's representative relies on regulation 73 as a source of the local authority's duty to question claimants about their continuing entitlement to benefit.

15. Regulation 73(1) provides:

‘(1) ... a person who makes a claim, or a person to whom housing benefit has been awarded, shall furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of the claim or the award, as may reasonably be required by the relevant authority in order to determine the person’s entitlement to, or continuing entitlement to, housing benefit ...’

16. This confers a power on a local authority to ask a claimant for information and a duty on the claimant to provide the information requested. These are the complementary devices that allow a local authority to obtain, check and verify the information relevant to a claim for benefit and then to make periodic checks to ensure that the claimant remains entitled to any award made on the claim.

17. Regulation 73(2) provides:

‘(2) Where a request is made under paragraph (1), the relevant authority shall-

- (a) inform the claimant or the person to whom housing benefit has been awarded of his duty under regulation 75 (duty to notify change of circumstances) to notify the designated office of any change of circumstances; and
- (b) ... indicate to him either orally or by notice or by reference to some other document available to him on application and without charge, the kind of change of circumstances which is to be notified.’

18. This supplements the local authority’s power under regulation 73(1) by imposing a duty on the authority to remind claimants of their duty to report changes of circumstances and to give guidance on the sort of thing that should be reported. This serves to inform and remind claimants of the duty under regulation 75. But it seems to me that that is not a wholly adequate explanation for imposing this duty on the local authority. The timing is significant. The information or reminder is given at a time when the local authority has asked for information. It therefore counters any possible assumption by the claimant that information must be given *only* at the local authority’s request.

19. I do not see how this regulation, so analysed, can be used as a basis for relieving a claimant of a causal responsibility in respect of information that could and should have been disclosed in response to questions in a claim form.

20. This was an ingenious attempt by the representative to use a provision that places a duty on claimants and ensures that they are reminded of another duty as the basis for an argument that imposes a duty on local authorities with the effect of relieving claimants of their responsibilities for overpayments. It fails because the provision is wholly incompatible with the argument.

21. My analysis is slightly fuller than the chairman’s, but they are both to the same effect. The chairman was right to reject the representative’s argument on regulation 73 for the reasons she gave.

The Verification Framework

22. The claimant's representative also relies on this framework as showing the local authority's responsibilities. As the chairman correctly remarked, the framework is a procedure and does not have the force of law. Nor does it limit the evidence that may be accepted by a tribunal (see my decision in *CH/5088/2002*). That does not, of course, mean that it is of no relevance. But that relevance must be determined by the nature and function of the framework in the context of the applicable principles of law. The framework contains structured guidance to the evidence that should be obtained in order to substantiate the assertions made by claimants. Its function is to improve the quality of decision-making with a view to reducing fraud. If a local authority operates the framework, it forms part of the obligations of those who administer the housing benefit scheme. Accordingly, a failure to operate the framework (properly or at all) is capable of being a mistake by omission for the purposes of regulation 99(3). However, there is nothing in the nature or function of the framework that overrides a claimant's responsibility to answer the questions on claim forms accurately and completely. It does not affect the principle of dual causation.

The Hinchy issue

23. Strictly, this was not in issue before the tribunal and the chairman cannot be criticised for failing to deal with it. However, it was raised by Mr Commissioner Williams in his grant of leave and discussed by the parties. I will, therefore, deal with it.

24. In *Hinchy v Secretary of State for Work and Pensions*, the Court of Appeal decided that a decision-maker for the Secretary of State was deemed to know of other decisions on benefit entitlement made in the name of the Secretary of State. No doubt, the reasoning also applies to a local authority and its decisions on housing benefit and council tax benefit.

25. The reasoning in *Hinchy* would only apply to the advantage of the claimant in this case if it were authority for the proposition that a decision-maker was deemed to know of all information that had at any time been supplied to the Secretary of State or the local authority by the claimant. The Court's reasoning does not go so far. It is limited to other decisions made. In those circumstances, it cannot be applied to the claimant's advantage in this case.

26. The Court of Appeal's decision is under appeal to the House of Lords. I have considered whether the proceedings in this case should be stayed pending the outcome of that appeal. I have decided not to do so, because it seems to me highly unlikely that the House of Lords would extend the reasoning so far.

The Kerr issue

27. I have considered this issue, although it was not raised by Mr Commissioner Williams or in the parties' observations. In *Kerr v Department for Social Development* [2004] 1 WLR 1372, Baroness Hale set out a model of co-operative decision-making. The case concerned a claim for a payment of funeral expenses from the social fund. The claimant's entitlement depended on whether other relatives of the deceased were in receipt of particular benefits. This information was known to the Secretary of State but was not readily available to the claimant. Baroness Hale explained the claims procedure and said (at paragraph 62):

‘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 what questions 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.’

28. The full scope and significance of this model have yet to be worked out by the Commissioners. However, I do not consider that it helps the claimant in this case. Baroness Hale was concerned with responsibility to provide information relevant to a claim and particularly so where the information was readily available to the decision-maker but not to the claimant. That is very different from this case for these reasons. First, the information here was available to the claimant, there it was not. Second, the issue here was responsibility for producing evidence to contradict the supposedly complete information given on the claim form, there it was responsibility for producing information to assist the claimant. Third, the issue here was responsibility for an overpayment, there it was establishing a entitlement.

Conclusion

29. The chairman dealt with the case flawlessly. She investigated all relevant factual issues. She analysed the relevant legislation accurately and applied it correctly to the facts of the case. She did not deal with the *Hinchy* issue, but that was not put to her by either party. It was, therefore, not raised by the appeal before her. Her statement of the reasons for the tribunal's decision is clear and comprehensive. I can find no error of law in the tribunal's decision.

30. I dismiss the appeal.

**Signed on original
on 14 February 2005**

**Edward Jacobs
Commissioner**