DECISION OF THE SOCIAL SECURITY COMMISSIONER

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

I SET ASIDE the decision of the Wakefield appeal tribunal, held on 1 June 2004 under reference U/01/006/2004/00798, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT as follows.

The appeal tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 to the 2000 Act, any other issues that merit consideration.

History and background

2. This case concerns the recoverability of:

Benefit	*Amount*	*Inclusive period*
Housing benefit	£291.54	4 August 2003 to 5 October 2003
Council tax benefit	£70.97	4 August 2003 to 14 September 2003

These amounts were paid because the local authority failed to take into account the maternity pay of the claimant's partner. As far as I know, the claimant does not dispute that he was paid too much by way of those benefits. The only issue is whether he has to reimburse the local authority.

3. The claimant informed the local authority that his partner was receiving maternity pay. The local authority did not take it into account. It accepted that this was an official error on its part, but decided that the claimant could reasonably have been expected to realise that he was being paid too much. The basis for that was the terms of the notification letters to the claimant, which set out the income on which his entitlement to benefit was calculated. That income did not include maternity pay.

4. The claimant exercised his right of appeal, saying that he had declared his partner's maternity pay. There was, of course, no dispute about that. The local authority had decided that it was entitled to be reimbursed despite the fact that it knew about the maternity pay.

5. The claimant opted for a paper hearing. Having considered the papers, the tribunal allowed the appeal. The local authority applied for leave to appeal to a Commissioner, which was granted by a district chairman. I gave case management directions and the appeal is now ready for decision.

The tribunal's reasoning

6. The chairman completed a decision notice. This recorded that the claimant did not have to reimburse the local authority, because he could not reasonably have been expected to realise that he was being paid too much.

7. The local authority applied for a full statement of the tribunal's decision. This set out different reasoning. The chairman first recorded that he had decided that the local authority had failed to show that it had undertaken a revision or supersession. He then recorded as his second ground that the local authority had failed to discharge the burden on proof of showing that the claimant could reasonably have been expected to realise that he was being overpaid.

The revision/supervision ground

8. The local authority argues that it had no warning that this point would be taken, that it should have been allowed to produce further evidence, and that a revision was undertaken in December 2003. I am allowing the appeal on the other ground, so this point is not strictly relevant to my decision. However, I will comment on it because it is one that regularly occurs.

9. It is a legal requirement that the local authority revise or supersede the operative decisions governing the claimant's entitlement to benefit (regulation 98 of the Housing Benefit (General) Regulations 1987 and regulation 83 of the Council Tax Benefit (General) Regulations 1992). That is a pre-condition to seeking recovery from the claimant. Local authorities must, in their submissions to appeal tribunals, make out the case for the recovery of benefit from the claimant. That includes persuading the tribunal that a revision or supersession has been undertaken. Like all Commissioners, I am aware that the computers used by local authorities do not allow them to print out a copy of the decisions that are made. However, that does not prevent them proving in some other way that the proper decisions have been made. They may provide a written statement, from the decision-maker or someone in a position to know, saying that the decisions were made. Or they may ask the tribunal to infer this from the standard procedures undertaken or the structure of the computer system used. Or they may ask the tribunal to infer this from the letters that have been generated and sent to the claimant. I give these merely as possibilities. There may be other things that local authorities can do instead. But the important point is this. However they do it, local authorities must, by evidence or argument, put to the tribunal a case to show that the recoverability decision was properly made.

10. This point has been made abundantly clear by Commissioners over the period in which they have had this jurisdiction. No local authority had any excuse in 2004 for not realising that this was necessary. No local authority had any reason to expect a tribunal to adjourn to allow the local authority another chance to make its case. The local authority, like the claimant, was entitled to a fair hearing. But what is necessary for a fair hearing varies between the parties. Local authorities are in a more informed position that many claimants. They cannot expect the same assistance by way of adjournments in order to make their case.

11. I would have more sympathy for the local authority's argument in this case if the revision/supervision had been the sole basis for the tribunal's decision. If that were so, the local authority would have been able to undertake the process again in order to remedy the deficiency identified by the tribunal. That would not have been for the local authority's

benefit. It may not even have been in the claimant's best interests to allow a further cycle of decisions, reconsiderations and appeals. In those circumstances, it might have been in the best interests of both parties to adjourn to allow the local authority to produce the necessary evidence or argument, if it could.

12. In short, my point is this: local authorities must have their case in order in advance of the hearing. They cannot rely on adjournments to allow them to make good their case.

Should the claimant have realised that he was being overpaid?

13. I consider that the tribunal went wrong in law on this ground, because it did not analyse the evidence rationally, placed an unrealistic burden on the local authority to produce evidence, and misplaced the burden of proof.

Receipt of letters

14. The tribunal commented that there was no evidence that the claimant had ever received the notification letters, except possibly one of '28 September'. (There was no letter of 28 September. I assume that the tribunal was referring to the one of 28 August, which led to a telephone call by the claimant, rather than the one of 26 September.)

15. There are at least three respects in which the tribunal's analysis of this evidence failed to consider the evidence as a whole and to draw appropriate inferences.

16. First, it is expecting too much of a local authority to be able to prove that letters have been received. How can it ever prove that, short of sending every letter by recorded delivery? All it can realistically prove is that its computer generated a letter and that it was then posted. Once it has done that, a tribunal is entitled to infer that the letters were delivered. It is then up to the claimant to show that they did not arrive.

17. Second, it overlooks the fact that the claimant has never denied receiving them. This fact was not in dispute.

18. Third, it overlooks the totality of correspondence between the local authority and the claimant, which does not suggest that there has been a failure of communication between them.

The claimant's capacity to understand the letters

19. The tribunal commented that there was no evidence as to the claimant's capacity to understand the letters, including what previous knowledge he had of the benefit system, or of whether he felt that maternity pay had been properly excluded from the calculation. In the absence of that evidence, the local authority had not discharged the burden of proof.

20. This analysis misplaced the legal burden of proof. For convenience I will explain why by reference to regulation 99(1) and (2) of the Housing Benefit (General) Regulations 1987. The same analysis applies to regulation 84(1) and (2) of the Council Tax Benefit (General) Regulations 1992.

21. Regulation 99 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 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.'

22. The tribunal was correct that the local authority had the legal burden of proving that there was an overpayment and that the decision had been properly made on revision or supersession. However, regulation 99(2) operates as an exception, for which the burden of proof is on the claimant. That is clear from the terms of regulation 99(1), from the structure of regulation 99 as a whole, and from the practical consideration of who is in a position to produce the relevant evidence. As Lord Hope explained in *Kerr v Department for Social Development* [2004] 1 Weekly Law Reports 1372 at paragraph 16:

> 'It is a general rule that he who desires to take advantage of an exception must bring himself within the provisions of the exception.'

This does not mean that the local authority may not have some responsibility for producing evidence in its possession. Baroness Hale said at paragraph 62 that:

> '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.'

In this case, the local authority might have been able to produce evidence of previous claims for housing benefit and council tax benefit, but beyond that it could not go. The other matters referred to by the tribunal were for the claimant to produce, if he wished.

23. The tribunal had alternative courses open to it. One course was to obtain evidence on the matters it referred to. If it felt that it needed that information, the proper course was to adjourn for the claimant either to attend for questioning or to provide written information requested by the tribunal. The other course was to rely on the burden of proof. If it preferred this course, the burden lay on the claimant. He had to take the consequence of the evidence not being available for him to take advantage of regulation 99(2).

Disposal

24. I allow the appeal and direct a rehearing.

Signed on original
on 19 January 2005

Edward Jacobs
Commissioner