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THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CH/3776/2001

SOCIAL SECURITY ACTS 1992-1998

**APPEAL FROM DECISION OF AN APPEAL TRIBUNAL ON A QUESTION OF
LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

COMMISSIONER: Mr C. Turnbull

Claimant : Miss Denise Dewhurst
Respondent : Borough of Pendle
Tribunal : Burnley
Tribunal Case No : U/40/123/2001/00560
Date of Tribunal Hearing : 3 July 2001

1. This is an appeal by the Claimant, brought with the leave of the Chairman, against a decision of the Burnley Appeal Tribunal made on 3 July 2001. For the reasons set out below I allow the appeal and set aside the Tribunal's decision as erroneous in law. Pursuant to the power in para. 8(5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 I make the decision which the Tribunal ought in my judgment on its findings of fact to have made, namely that the overpayments of housing benefit and council tax benefit referred to in paragraph 6(2) and (3), but not 6(1), below, are recoverable from the Claimant. I remit to the Respondent (the Borough of Pendle)("the Council") the determination of the amounts falling within those respective categories, with liberty to each of the parties to apply back to me if the Council's further determination is disputed by the Claimant.

2. The Tribunal's decision was to dismiss the Claimant's appeal against a determination made by the Council on or about 2 November 2000 that overpayments of £1126.56 housing benefit and £253.10 council tax benefit were recoverable from the Claimant.

3. Pursuant to a direction made by another Commissioner I held an oral hearing of this appeal at which the Claimant was represented by Mr. Richard Roxburgh of the Lancashire County Council Welfare Rights Service and the Council was represented by Mr. P. Haywood, who is or was employed in the Council's Treasury Services Department. I am grateful to both of them for their submissions.

4. The circumstances in which the overpayments arose were, in outline, as follows:

(1) The Claimant was a tenant of the Council, and was from before March 2000 entitled to housing benefit and council tax benefit, which were paid by way of rent rebate.

(2) As from 27 March 2000 the Claimant's wages increased from £61.86 per week to £123.09 per week, which resulted in her ceasing to be entitled to either of those benefits. However, the Council was unaware of that increase, and so went on making the rebates at the same rate after 27 March. The Claimant's entitlement was due to expire on 25 June 2000, and on 5 May 2000 she signed a review form, for the purpose of renewing her entitlement, which correctly set out the amount of her wages.

(3) However, there was substantial delay in calculating the amount of her new entitlement, during which the benefits continued to be paid by way of rent rebate at the rate which had been applicable from before 27 March 2000 - i.e. the old rate.

(4) On 9 August 2000 the amount of the Claimant's entitlement to those benefits was recalculated with effect from 27 March 2000. However, owing to what is conceded to have been an error by the Council an incorrect figure for the Claimant's weekly wages (£37.20 instead of £123.09) was used in that calculation, resulting in the sums to which the Claimant was determined to have been entitled as from 27 March 2000 by way of housing and council tax benefit being higher than those with which she had been credited from week to week in her rent account. The actual position, as I have said, was that the Claimant had no entitlement.

(5) On 10 August 2000 the Council in its records credited the Claimant with a lump sum by way of rent rebate equal to the arrears which it had (erroneously) calculated to be due to her in respect of the period since 27 March 2000. On 17 August 2000 the Claimant attended the Council's rent payment shop with her rent card, and was told that a sum of £114.39 arrears of rent which had existed the previous week had now become a rent credit of £368.21. That was due to the sums which the Council had credited by way of supposed arrears of housing and council tax benefit.

(6) On 15 August 2000 were generated notices by the Council to the Claimant stating how her increased entitlement to those benefits had been calculated. They showed that the incorrect figure of £37.20 for her wages had been used. It is common ground that those notices were sent on or about 15 August 2000, and so would have been received by the Claimant shortly thereafter.

(7) However, the Claimant did not alert the Council to the mistake, if indeed she noticed it, and the Council therefore continued to pay housing and council tax benefit, week by week, resulting in further overpayments.

(8) It was not until the beginning of November 2000 that the Council realised its mistake. On 2 November 2000 notices were sent by the Council to the Claimant stating (a) that her correct entitlement to both benefits from 27 March 2000 had in fact been nil (b) the amounts of the overpayments and (c) that the Sundry Debtors section would contact her separately about repaying the debt.

(9) The Claimant requested a review, stating: "I do not believe these overpayments are recoverable." She stated that she had always given correct information about her circumstances and that the fact that she had been overpaid came as a complete surprise to her. However, on 30 November 2000 the Council (through Mr. Haywood) replied stating that it had decided not to classify the overpayments as irrecoverable:

"Whilst I accept that the overpayment occurred because of an official error, I believe that you could have been expected to realise that an overpayment was occurring. The earnings from your two jobs were incorrectly input as £37.20 per week. The amount of earnings being used in your benefit calculation were clearly stated in the notifications issued to you."

5. Mr. Roxburgh's first argument is that Tribunal erred in law in failing to distinguish between the overpayments made before and after the time when the Claimant received the notices of 15 August 2000 date stating the (incorrect) figure for her wages which had been used in the calculations. I accept that the Tribunal's decision was erroneous in law in failing to analyse sufficiently precisely how the legislative provisions concerning overpayment applied to the facts of this case. The Tribunal should have looked more closely at precisely when and why the overpayments arose, and should then have sought to apply the statutory provisions to those facts. I shall refer to the provisions relating to housing benefit. Those relating to council tax benefit are in similar form. The most important is Reg. 99 of the Housing Benefit (General) Regulations 1987 ("the 1987 Regulations"):

"(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 an official error where the claimant or a 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 the payment, reasonably have been expected to realise that it was an overpayment.

(3) [Defines “overpayment caused by an official error”]

(4)

6. There were in my judgment 3 relevant categories of overpayment:

(1) The overpayments made from week to week during the period from 27 March 2000 to 10 August 2000 (when the further overpayment by way of lump sum arrears in respect of that period was credited). These overpayments may well not have been caused by official error. However, until its written submission to the Tribunal, when it sought to recover this part of the overpayments on the alternative footing simply that they were not caused by official error, the Council had accepted that the entirety of the overpayments were caused by official error. During the hearing before me Mr. Haywood in effect abandoned the alternative contention. I must therefore, it seems to me, deal with the matter on the footing that all the overpayments were caused by official error. On that footing this category of overpayment is not recoverable, because the Tribunal found – that finding being implicit in the reliance which it placed in its reasons on the notices dated 15 August 2000 - that the Claimant could not reasonably have been expected to know during this period that she was being overpaid.

(2) The lump sum credited to the Claimant’s rent account on 10 August 2000 in respect of the period between 27 March 2000 and about that date. That was a further overpayment in respect of that period. It was undoubtedly caused by official error. However, it is in my judgment (subject to Mr. Roxburgh’s second argument, dealt with below) recoverable.

(a) The question is whether the Claimant “could not, at the time of receipt of the payment or of any notice relating to the payment, reasonably have been expected to realise that it was an overpayment.” The time of “receipt” of this payment may, on a correct analysis, have been 10 August 2000 (the date when it was credited to the Claimant’s rent account), and at that date the Claimant was of course unaware that it had even been made. She was not aware of that until she attended with her rent card on 17 August. But even if the time of receipt was 10 August, and not 17 August when she actually received a financial benefit by not paying the instalment of rent which she had been expecting to have to pay, the words of Reg. 99(2) which I have just quoted did not in my judgment render the payment irrecoverable unless she could not have been expected to realise that it was an overpayment both (a) when she received the payment and (b) when she received “any notice relating to the payment.” It is possible to argue that those words mean that the payment is irrecoverable if the relevant person could not at one or other of the two dates reasonably have been expected to realise that it was an overpayment. However, the more natural reading is in my judgment that if the relevant person could at either of the dates reasonably have been expected to realise that it was an overpayment, the exception in Reg. 99(2) does not apply.

- (b) The notices dated 15 August 2000 were clearly "relating to the payment" within the meaning of Reg. 99(2). No doubt some limitation must be placed on the word "any" in the phrase "any notice relating to the payment" so that a notice which is not sufficiently closely related to receipt of the payment must be disregarded for this purpose. But here the notices were the first written notification of the payment and were received by the Claimant at or about the same time as she became aware of the payment.
- (c) The Tribunal found, and was clearly entitled to find, that at the time of receipt of those notices the Claimant could reasonably have been expected to realise, by virtue of the incorrect figure for her wages used in the calculation, that the additional lump sum which had been credited was an overpayment.

(3) The further overpayments made week by week between 10 August and about 2 November 2000. These are (again, subject to Mr. Roxburgh's second argument) recoverable for the reasons given in (2) above, but also (as regards the period after receipt of the notices dated 15 August) because at the date of receipt of the payments the Claimant ought, as the Tribunal found, to have realised that they were overpayments.

7. Mr. Roxburgh's second argument (or rather group of arguments) concerned the adequacy of the procedure, and proof of procedure, adopted by the Council in seeking to secure recovery of the overpayments. These arguments were not raised before the Tribunal, or indeed in the grounds for this appeal, but only at the stage when Mr. Roxburgh made some further submissions in response to queries raised by a Commissioner.

8. First, he argued that there was insufficient evidence that the erroneous determinations made on 9 August 2000 as to the amount of the Claimant's entitlement had been reviewed and revised under Reg. 79 of the 1987 Regulations (as then in force). However, that argument, it seems to me, goes to whether there was anything which could properly be called an overpayment at all within the definition in Reg. 98. However, it was not contended before the Tribunal that there was no overpayment. The argument for the Claimant was that the admitted overpayments were not recoverable. (Mr. Haywood told me that in fact notices similar to those sent on 15 August 2000 had in fact been sent on or about 2 November 2000 explaining how the corrected entitlement was calculated. These could have been put before the Tribunal if the issue had been raised). Although it was of course for the Council to establish that there was a recoverable overpayment, I do not think that the Tribunal can be said to have erred in law in not considering, in circumstances where the Claimant was ably represented by Mr. Roxburgh, an issue, which had not been raised, as to whether there was any properly proved overpayment. This was particularly so in the light of para. 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, providing that an appeal tribunal need not consider any issue not raised by the appeal.

9. Secondly, he argued that there was inadequate evidence that a determination had been made under Reg. 76 of the 1987 Regulations that the overpayment was recoverable, such a determination being required by s.75 of the Social Security Administration Act 1992. However, the notices dated 2 November 2000 at pages 26 to 37 of the papers are in my

judgment clear evidence of such determinations having been made. No copies of the documents which could be described as the actual determinations are in the papers, but that was in my judgment not necessary, particularly in circumstances where no point about this was taken before the Tribunal by Mr. Roxburgh.

10. Thirdly, he argued that those notices did not comply with Reg. 77 of and para. 14 of Schedule 6 to the 1987 Regulations, so that there was no valid determination to recover the overpayments. He relied, in particular, on the requirements in para. 14(b) that the notice should specify the reason why there is a recoverable overpayment and in (d) that it should specify how the amount of the recoverable overpayment was calculated. However, it seems to me that the notices of 2 November 2000, coupled with the letter of 30 November 2000, did specify those matters. Given that para. 14 must presuppose (in a case like the present) that there has been a valid determination (and notice of it) reviewing the previous incorrect entitlement, the requirement to state how the overpayment was calculated does not require the para. 14 notice to go into the details of calculation of the correct amount of benefit - but merely to state how much was actually paid, and how much ought to have been paid, and then work out the difference. In any event, it may well be, in the light of the decision of the Court of Appeal in *Haringey LBC v. Awaritefe* (32 MLR 517) that a failure to comply with para. 14 would only render the determination invalid if the Claimant suffered significant prejudice as a result of the failure. It is not clear to me that, if (contrary to my view) there was any failure to comply with para. 14, any prejudice has in all the circumstances been suffered by the Claimant as a result.

11. My decision is therefore as set out in paragraph 1 above.

(Signed)

Charles Turnbull
(Commissioner)

(Date)

8 May 2002