

PLH

Rhif ffeil/ Commissioner's File: CH 5485/02

DEDDFAU NAWDD CYMDEITHASOL 1992-1998
SOCIAL SECURITY ACTS 1992-1998

APÈL YN ERBYN DYFARNIAD TRIBIWNLYS APÈL
YNGHYLCH CWESTIWN CYFREITHIOL
APPEAL FROM DECISION OF APPEAL TRIBUNAL
ON A QUESTION OF LAW

DYFARNIAD Y COMISIYNYDD NAWDD CYMDEITHASOL
DECISION OF THE SOCIAL SECURITY COMMISSIONER

<i>Apelydd/Appellant:</i>	<i>[the claimant]</i>
<i>Atebydd/Respondent:</i>	Cardiff CC
<i>Cais am/Claim for:</i>	Housing Benefit
<i>Tribiwnlys/Appeal Tribunal:</i>	Cardiff
<i>Rhif achos/Tribunal case ref:</i>	U/03/188/2002/04774
<i>Dyddiad/Tribunal date:</i>	29 October 2002
<i>Rhesymau/Reasons issued:</i>	7 November 2002

[GWRANDAWIAD/ ORAL HEARING]

1. This is an appeal by the claimant against the decision of the Cardiff appeal tribunal consisting of the chairman Mrs Curran sitting alone on 29 October 2002, in which it was held that a total of £345.94 overpaid housing benefit for the periods 1 May to 10 September 2000 and 30 October 2000 to 4 February 2001 was recoverable under section 75 **Social Security Administration Act 1992** as amended. The appeal as regards the earlier period was abandoned at the hearing by the claimant's representative conceding that this part of the overpaid benefit was recoverable, and this appeal concerns only the tribunal's decision that the overpaid benefit for the latter period, amounting to £147.42, was also recoverable.

2. The decision of the tribunal chairman set out in the statement of reasons sent to the parties on 7 November 2002 was that the statutory conditions to make this overpaid amount recoverable under section 75, and regulation 99 **Housing Benefit (General) Regulations 1987** SI No. 1971, were met. In particular, it did *not* fall within the exception in regulation 99(2) for an overpayment caused by an official error to which the claimant herself had not materially contributed, as the tribunal held specifically that the primary cause of her having got too much housing benefit for this period had been her own failure to notify the Council that she was getting more Working Families Tax

Credit than the amount she had previously told them she was getting, that amount being directly relevant to the calculation of her housing benefit which depends on income.

3. I held an oral hearing of the appeal at which Mr Warren Palmer, solicitor, of the Roath Speakeasy Advice Centre, appeared for the claimant (who is one of their own employees), and the Council was represented by Miss J Reynolds, solicitor, of its legal department, assisted by Mrs E C Crippen, its Housing Benefit Appeals Manager.

4. There can be no doubt that the claimant was awarded and the Council paid too much for her housing benefit for both of the periods in question, and the reason was that the Council based its award calculations on the figures she herself notified to them for her working families tax credit on two separate occasions, the amounts she told them on each occasion turning out afterwards to have been too low. Originally on 17 April 2000 she sent in a notification from the Inland Revenue saying that her Working Families Tax Credit would be £59.88 a week for 26 weeks from 25 April 2000, but she failed to notify the Council when this was subsequently increased to £88.15 a week for the same period. As a result her housing benefit for the same period was overpaid, because her income was taken as including only the lower WFTC figure she had given them. This was clearly shown on the calculation details sent to her with the housing benefit award letter dated 21 June 2000 at pages 13 to 19, the first page of which drew her attention in the clearest possible terms to her continuing duty to inform the Council of *any* changes in circumstances, including in particular any change in her income (regulation 75 of the housing benefit regulations already cited).

5. She did not tell the Council the correct figure for that period until 2 October 2000, when she submitted a form to claim renewal of her housing benefit from the end of October. In answer to one of the questions on that form she disclosed that she had been receiving family credit (the old name for WFTC) since April at £88.15 per week, saying she had made a further application for WFTC on 30 September 2000: page 25. On the basis of that, the Council made an award of housing benefit for the renewal period from 30 October 2000 to 29 April 2001 based on her income including WFTC at £88.15 per week, the figure she gave in the form. This too was clearly shown in the award letter and calculation she was sent dated 17 October 2000 at pages 51 to 53, which also contained the clear and explicit reminder that she must inform the Council of any change in her income.

6. Again the claimant's WFTC was recalculated by the Inland Revenue, and awarded at a higher rate for the period covered by the Council's calculation, this time at £105.35 for the 26 weeks from 24 October 2000. That meant that the housing benefit

being paid for her was excessive; but again she failed to tell the Council of the change. The tribunal found that as a fact, based on her own clear admission in oral evidence, recorded in the chairman's note at page 124. The truth only came to light early the following year when an audit was conducted of her benefit entitlement. As a result, her true entitlement for both the earlier and the later periods was then redetermined. Decisions dated 1 March 2001 were issued showing how this had been done and determining that the total overpaid amount then calculated at £474.54 was recoverable: see pages 55 to 68. That amount was subsequently altered downwards in the claimant's favour in the revised decision dated 12 June 2002 that a total of £345.94 still remained recoverable (pages 97 to 98) which was the decision under appeal to the tribunal.

7. The principles governing whether an overpayment of housing benefit is recoverable under section 5 **Social Security Administration Act 1992** are significantly different from those familiar in the main Social Security jurisdiction under section 71 which depend on the authorities establishing that an overpayment is the consequence of misrepresentation or failure to disclose a material fact. In the housing benefit context, the general principle is that *all* housing benefit which turns out to have been overpaid by mistake or for any other reason is recoverable, either by the Secretary of State or by the authority which overpaid it, *except* in the single instance provided for in regulation 99, namely where the overpayment has been:

“99. - (2) ... 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 that payment, reasonably have been expected to realise that it was an overpayment.”

and for this purpose:

“(3) ... ‘overpayment caused by official error’ means an overpayment caused by a mistake made whether in the form or an act or omission by –

- (a) the relevant authority;**
- (b) an officer or person acting for that authority; ...**

where the claimant, a person acting on his behalf or any person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission.”

Overpayments which do not fall within that exception are in principle recoverable, there being separate provisions in section 75(3) and regulation 101 as to the persons from whom recovery may or may not be sought; no issue on the application of those provisions was raised at the tribunal or arises on this appeal.

8. On behalf of the claimant Mr Palmer attacked certain of the tribunal's findings of fact as perverse, and submitted that on the material before it the approach to the

question of “official error” had been unreasonable and wrong; no reasonable tribunal could have held otherwise than the overpayment for the latter period still in dispute fell within the exception for official error, and a decision to that effect should be substituted. The three points where he said there were perverse and unreasonable findings of fact were first, a comment in the tribunal’s statement of reasons at page 130 that it would have been “perfectly possible” for a further award of WFTC to have been made at the same rate as the current £88.15 first disclosed to the Council on the renewal form at page 25; second a reference in the statement of reasons at page 129 to the claimant having agreed she had not informed them of the increase in her WFTC “due to difficulties in her personal life”; and third the finding on page 130 that the primary cause of the overpayment had been her failure to notify the Council of the change in WFTC.

9. I did not find Mr Palmer’s submissions on any of those points at all arguable, and I reject them. In this as in the main social security jurisdiction, it is for the tribunal hearing and assessing the evidence to determine the facts; and there can be no question of the tribunal’s findings on such issues being interfered with on an appeal confined to questions of law unless they are so wholly beyond the bounds of reasonableness as to lead to the conclusion that some misdirection of legal principle must have occurred. The findings criticised by Mr Palmer are nowhere that threshold to justify interference on legal grounds. On the contrary, each of them appears to me to have been justified on the evidence before the tribunal, in particular on express admissions and other evidence from the claimant herself clearly recorded in the chairman’s note; and to provide an entirely proper basis for the conclusion that the primary cause of the mistaken overpayment of housing benefit (even assuming this might count as an “error” on the part of the Council) had been her own failure to tell them the true amount of her WFTC.

10. Mr Palmer’s main submission therefore focussed on what the true nature of the “error” had been in this case that led to the claimant getting too much benefit for the renewal period from the end of October 2000 onwards. In his submission, the tribunal had adopted the wrong approach to this, and instead should have defined it as he did, as a mistake on the part of the Council, for which they were wholly to blame, in having proceeded to make *any* award of housing benefit to the claimant for the renewal period from 30 October 2000 on the basis of the information she provided in the renewal form asking for it. That was because the information on page 25 about the hitherto undisclosed benefit of £88.15 a week dating back to April 2000 ought to have alerted them to the likelihood that an award of WFTC for the normal 26 weeks from that date would be due shortly to expire, and that any new award of WFTC to take effect during

the renewal period for housing benefit from the end of October onwards would or might be at some different weekly rate (he admitted that might be higher or lower).

11. In those circumstances, Mr Palmer boldly submitted that it was the Council's own fault for having awarded the claimant any continuing entitlement to housing benefit for the renewal period when they had only the current weekly WFTC figure of £88.15 she had belatedly given. He asserted that by making a renewal award based on her figure in October 2000, the Council had "led her to believe that nothing further remained to be done on her part by way of disclosure" of the true amount of any further WFTC award made, and on that basis her contribution to the causation of the overpayments had been as he put it "negligible" so that it should have been disregarded by the tribunal.

12. I am bound to say that I did not find this line of argument any more persuasive than the earlier one, and the suggestion that the Council had in any way induced the claimant to believe she had made full disclosure of the relevant facts about the level of her benefit when plainly she had not was obviously absurd. For a person of intelligence as the tribunal found the claimant to be, there could have been no possible ground for mistaking that the housing benefit calculation notified to her on 17 October 2000 was based on a figure of £88.15 for WFTC, and that she was required to notify the Council if this changed. It was her failure to do that (the second such failure on her part, in her duty to notify the Council if the information and figures previously given by her became incorrect) that caused the mistaken overpayment for the period from 30 October 2000 onwards, as the tribunal expressly held.

13. In my judgment, the submissions of Miss Reynolds and Mrs Crippen on this issue were entirely correct. While the Council might perhaps have taken a more hardnosed attitude and insisted on being notified of the actual award figure for WFTC, or at least on making some further enquiries about the progress of her claim for it, before determining the housing benefit for the renewal period from 30 October 2000, it was not in my view an "error" or "mistake" in terms of regulation 99 not to do so. Still less was it a "breach of duty towards the claimant" as alleged by Mr Palmer, for the Council to maintain the continuity of her housing benefit by making her a new award on 17 October on the best information currently available (the figure she herself provided) and trusting her to notify them if it should transpire this needed correction. That in my judgment is nowhere near the kind of "mistake" envisaged by the wording used in this regulation, which is a "clear and obvious" error of fact or law made by some officer on the facts disclosed to him, or which he had reason to believe were relevant: cf. **R(SB) 2/93**, paragraph 6; **R(SB) 10/91** paragraph 11; **CH 571/03**.

14. Secondly and in any event, as held by the tribunal, what *caused* the overpayment in this case was the claimant's own failure to notify the Council of the true amount of her WFTC entitlement as soon as the figure given by her and reflected in their award calculation became incorrect. That it seems to me was an entirely practical and justified assessment of the reason for what actually happened in this case, in accordance with the common sense approach to questions of causation and responsibility that ought to be adopted on overpayment questions such as this: **R (Sier) v Cambridge Housing Benefit Review Board** [2001] EWCA Civ 1523, 8 October 2001. It precludes any question of the exception in regulation 99(2) applying even if there had been some error by the Council along the way.

15. This appeal is accordingly dismissed. In my judgment both the Council's operation of the procedure and the decision of the tribunal in this case were entirely reasonable and proper, and obviously so, and Mr Palmer's criticisms of them unjustified. It was emphasised to me that the claimant's good faith was not in question. That might I think have been better demonstrated by putting forward some arrangement before now for the repayment of at least some of the £345.94 (all, I was told, still outstanding) than by pursuing this appeal in the way it has been for the final £147.42, on grounds her advisers with all their experience must have seen were without merit.

(Signed)

P L Howell
Commissioner
1 May 2003