

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Upper Tribunal case No. CPC/2240/2015

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (6th November 2014, Fox Court, file reference SC 242/14/00768) involved the making of an error on a point of law. It is **SET ASIDE** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of that Act, I **RE-MAKE** the decision as follows:

1. Mr E's appeal against the Secretary of State's decision of 15th February 2013 is allowed.
2. The Secretary of State's decision is set aside. While Mr E was overpaid pension credit between 26/12/2005 and 22/02/2009, as the Secretary of State decided in a separate decision of 15th February 2013, he did not, for the purposes of section 71(1) of the Social Security Administration Act 1992, fail to disclose a material fact in consequence of which the overpayment was made.
3. Since the Secretary of State's decision has been set aside, he is not currently, nor was he previously, entitled to recover the overpayment from Mr E.

REASONS FOR DECISION

1. Mr E's pension credit award was not adjusted to take account of his receipt of additional income in the form of an occupational pension. When this came to light, the Secretary of State decided to supersede Mr E's award to take account of that income. The supersession was retrospective and so it generated an overpayment. Mr E did not appeal to the First-tier Tribunal against this decision.
2. The Secretary of State also decided the overpayment was recoverable from Mr E under section 71(1) of the Social Security Administration Act 1992. According to the Secretary of State, the section 71(1) conditions were met because Mr E had failed to disclose a material fact, which he was under a duty to disclose, in consequence of which the overpayment arose. The precursor duty to disclose existed, argued the Secretary of State, in the light of disclosure obligations set out in a pension credit booklet (IN4) issued to Mr E.
3. What makes this case potentially of interest beyond the parties is its context, namely administrative changes in the previous decade in consequence of the replacement of the income support minimum income guarantee for pensioners with pension credit. As I understand it, those arrangements included a transfer of case responsibility from the Jobcentre Plus arm of the Department for Work & Pensions (DWP) to its Pensions Service arm.
4. I can describe the material issues arising on this appeal by quoting the observations I made when granting Mr E permission to appeal against the First-tier Tribunal's decision:

“1. I have decided that Mr [E] has a realistic prospect of persuading the Upper Tribunal that the First-tier Tribunal erred in law.

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2. The Tribunal found that, when Mr [E] was first awarded pension credit, he was instructed to notify those changes listed in the IN4 booklet. However, a piece of the jigsaw seems to be missing. The instruction was spread across two documents, the leaflet itself and the award letter which accompanied it (see p.4 of the specimen IN4 in the papers). The award letter contained the telephone number to which changes were to be notified or, if notified in writing, the relevant postal address.
- 3...there is a feature of this case that raises the question whether it was fair for the First-tier Tribunal to proceed without having had sight of the award letter and the telephone number which it displayed.
4. Mr [E] says he made disclosures to Jobcentre Plus and the Tribunal seems to have accepted that. In the early part of 2005, his Jobcentre Plus letters gave 0845 6002773 as his contact number. Then on 30th November 2005, he received a letter on *Pension Service* headed note-paper (p.120). This includes the very same contact number – 0845 6002773.
5. That these numbers match raises the possibility that the telephone number in the Pension Credit award letter was the same number as that previously displayed on Mr [E's] Jobcentre Plus letters. The specimen letter at p.46 does not assist; it contains no telephone number. Hence, Mr [E], in making disclosure to what he thought was Jobcentre Plus, might in fact have made a disclosure in accordance with the instructions in the IN4 booklet. Arguably, the First-tier Tribunal, being an inquisitorial tribunal, erred in law by failing to investigate that possibility. I grant permission to appeal on that ground.”
5. The Secretary of State supports the appeal. In a helpful response, his representative says that, due to the passage of time, the DWP cannot comply with the Upper Tribunal's direction to supply a copy of Mr E's pension credit award letter. The representative also takes the view that the First-tier Tribunal should have investigated the possibility that Mr E, in making a telephone disclosure via a number that was at one stage linked to Jobcentre Plus, might in fact have complied with the obligation to disclose imposed on him by the IN4 booklet (read with his pension credit award letter). I agree that the First-tier Tribunal erred in law in that respect, as I described in paragraph 5 of my reasons for granting permission to appeal, and I set its decision aside.
6. The representative goes on to make the point that the onus is on the Secretary of State to show that the conditions in section 71 of the 1992 Act are made out. He fairly concedes that, in the circumstances, the Secretary of State is unable to do so. Accordingly, I re-make the decision made by the First-tier Tribunal in the terms set out at the head of these reasons.
7. Mr E requested a hearing of this appeal but I refuse that request. A hearing would be pointless because the decision I give achieves the objective he seeks.

(Signed on the Original)

Mr E Mitchell
Judge of the Upper Tribunal
21st December 2015