

IN THE UPPER TRIBUNAL **CH/5411/2014**
ADMINISTRATIVE APPEALS CHAMBER

Claimant and Appellant: **Ayub Vadivala**

Respondent: **Bolton Metropolitan Borough Council**

DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge Kate Brunner QC

ON APPEAL FROM:

Tribunal: **First-Tier Tribunal (Social Security and Child Support)**
Tribunal Case No: **SC122/13/03856**
Tribunal Venue: **Bolton**
Hearing Date: **7 August 2014**

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Brunner QC

This appeal by the claimant succeeds.

The decision of the First-tier Tribunal reference CH/5411/2014 involves an error of law in removing the claimant's entitlement from 5 Oct 2009 to 12 March 2010 without a sufficient evidential basis.

I set aside that decision which now has no effect and substitute the following decision:

I supersede the Local Authority's October 2009 decision from 12 March 2010 under the Housing and Council Tax Benefit (Decisions and Appeals) Regulations 2001 regulation 7(2) on the basis that there was a change of circumstances since the original decision, that change of circumstances being receipt of income from self-employment such as to affect the claimant's entitlement to housing and council tax benefit. The claimant was not entitled to housing and council tax benefit from 12 March 2010.

The payments of housing and council tax benefit from 12 March 2010 to 5 November 2012 (in the case of housing benefit) and 30 November 2012 (in the case of council tax benefit) are an overpayment and excess benefit respectively, and are recoverable. There was no official error.

There is no sum to be deducted under regulation 104 Housing Benefit Regulations 2006.

The Local Authority must tell the claimant the recalculated amount within 1 month of the issuing of this decision. If there is arithmetic dispute over the new calculation of the recoverable overpayment, this matter may be restored by either party to the Upper Tribunal within 1 month of the written notification to the claimant of the new calculation.

REASONS FOR DECISION

The factual background

1. This case concerns overpayment of Housing and Council tax benefit. The claimant was in receipt of Housing and Council Tax benefit from 5 October 2009 on the basis that his sole income was from employment at a curtain business.
2. On 12 March 2010 the Local Authority received information from a member of staff that the claimant had delivered an advertisement for a parcel company which bore his own address and telephone number (p71). No enquiries were made.
3. Following a routine process, the Local Authority made enquiries with the claimant about his income in November 2012. That generated a number of conflicting statements from the claimant: that he had been self employed since September 2012 (p26); that he had been self employed since December 2011 (p27/32); that his employment ended on 31 October 2011 (p43/56).
4. On 5 November 2012 the Local Authority suspended housing benefit and on 30 November 2012 suspended council tax benefit (p142). On 3 January 2013 the Local Authority issued a notification that they had stopped both benefits from the date when they had been suspended (p144).
5. Following further enquiries on 21 February 2013 the Local Authority issued two further notifications which (when considered together) stated that benefit had been stopped from 5 October 2009 and that overpayments were due for the period between the start date of the benefits (5 October 2009) and the dates when they were suspended (5 November 2012 and 30 November 2012).
6. Further information was provided by the claimant, including an assertion which he now accepts to be untrue, that he did not have any involvement with the parcel service and did not know who they were (p63). The Local Authority confirmed their decision.
7. The claimant appealed. His submission (p73) appears to accept that there was a period when he was not entitled to benefits, but submits that he was entitled to benefits for a large part of the relevant period on the basis that he was not self-employed or that when he was self-employed his earnings were minimal.
8. The First-tier Tribunal (FTT) heard his case on 13 December 2013 (p89) and adjourned, requiring further information. The same judge of the First tier Tribunal heard the case on 3 April 2014 and again adjourned for further information (p137).
9. The same judge of the FTT heard the case on 7 August 2014 and upheld the Local Authority's decision. The claimant gave evidence and was represented. In a subsequent Statement of Reasons (p175) the tribunal said it had rejected the claimant's evidence as 'unreliable', found that he had been in receipt of income from self-employment since the date of the award, and that the

decision to revise the award was therefore correct on the basis of ignorance of a material fact.

10. Leave to appeal the FTT decision was given by Judge Lane on 12 February 2015 on the grounds that it was arguable that the tribunal erred in law in:
 - (1) removing the claimant's entitlement from 5 Oct 2009 to 12 March 2010 without a sufficient evidential basis;
 - (2) failing to address the argument that overpayment was caused by an official error through the Secretary of State's failure to follow up information it had about the claimant's self-employment on 12 March 2010.
11. Where I have referred only to Housing Benefit regulations below, parallel regulations and findings apply to the council tax element of the FTT decision and this decision.

Ground 1: start-date

Relevant legal framework

12. A Local Authority may revise a decision under the Housing and Council Tax Benefit (Decisions and Appeals) Regulations 2001 regulation 4(2)(b) where that decision '*was made in ignorance of, or was based upon a mistake as to, some material fact and as a result of that ignorance of or mistake as to that fact, the decision was more advantageous to the person affected than it would otherwise have been but for that ignorance or mistake.*' Thus, in this case, it would have been lawful for the Local Authority to revise the decision under regulation 4(2)(b) on the basis that their original decision was made in ignorance of a material fact, but only if the material fact i.e. receiving income from self-employment which would affect entitlement was in place at the time of the original decision.
13. A Local Authority may supersede a decision under the Housing and Council Tax Benefit (Decisions and Appeals) Regulations 2001 regulation 7(2)(a)(i) where there has been a change of circumstances since the decision had effect. Generally, under regulation 8, such supersession will take effect from the date of the change of circumstances, not the date of the original decision. Thus, in this case, if the self-employment began after the date of the original decision then revision under 4(2)(b) cannot apply, but it would be lawful for the Local Authority to supersede the original decision from the start date of the self-employment.

Discussion

14. The FTT found that the claimant was involved with parcel services and received income from them. There is no doubt that the tribunal was entitled to reach that decision. The issue is over what proper findings could be made about the start date of any extra income.
15. The first date which appears in any evidence linking the claimant to the parcel business is a leaflet with his details which came to the attention of the Local

Authority on 12 March 2010 (p71). The claimant's evidence was that his involvement began around March 2010 with one parcel business which ceased at the end of 2010 (p130). He went into partnership with another man at the start of 2011 and started a second parcel business, and then when he fell out with his partner started a third parcel business in October 2011. The claimant submitted no documentary evidence of turnover, expenses or income from the first or second parcel business, and submitted annual accounts for the third business from April 2012, but no further details such as breakdown of monthly or weekly income.

16. The FTT did not in the Statement of Reasons set out any reason for finding that the claimant's income from the parcel services pre-dated 12 March 2010.
17. There is no direct evidence to contradict the claimant's assertion that his involvement started in March 2010. There is no basis for an inference that his involvement must have started earlier: the claimant's dishonesty is as consistent with a start date in March 2010 as it is with a start date in October 2009. In this situation, the conclusion as to the start date was speculative, and was therefore in error of law. I note that the FTT judge was not assisted by any submission to this effect, despite the judge's specific query about the time frame of overpayment.
18. I therefore set aside the decision of the FTT.
19. No further facts are required, nor is the expertise of the FTT required, so it is proper for me to substitute my own decision.
20. I find that the claimant was in self-employment for the period in question (March 2010 to November 2011) in the parcel business; he effectively accepted that in the course of his evidence, and the documentary evidence shows that to be correct. I reject the claimant's evidence that his involvement in some of those businesses was peripheral and not profitable. I find that the claimant's income from the parcel businesses was income which affects his entitlement to housing and council tax for the following reasons :
 - (1) a leaflet was delivered in March 2010 with his contact details advertising a parcel service suggesting his close involvement with that business (p81);
 - (2) there is evidence from an internet forum of customers' complaints about a parcel service in February and April 2011, with one consumer referring to the claimant's address and another referring to him by name, suggesting his close involvement with the businesses;
 - (3) the claimant has repeatedly been dishonest about the level of his involvement, and has made dishonest assertions to both the Local Authority and the tribunal. He initially denied any involvement with one business at all (p63), then admitted to having used that business once to send a parcel (p70), then stated at tribunal on 13 December 2013 that he had sent two parcels on behalf of the business (p86) and then admitted that he had been involved on 5 separate occasions with receiving or storing or transporting parcels (p130);
 - (4) the claimant has deliberately obfuscated, failing to provide at any stage a clear chronology of his involvement with the various parcel businesses and his level of income from them;

- (5) the inference I draw from the claimant's dishonesty and obfuscation, against the background of the documentary evidence, is that he was in receipt of significant income from self-employment from the start of his involvement with the parcel businesses which he knew would affect his entitlement to benefit, and which in reality would have such an effect. I have considered, and reject, any alternative reason for the various accounts such as confusion or language difficulties.
21. As I find that self-employment commenced after the original decision, revision is not possible. I find that there was a change of circumstances on 12 March 2010 which removed entitlement to housing and council tax benefit, and supersede the decision with effect from that date.
22. The overpayment is recoverable. I have considered whether there is any sum to be deducted under regulation 104 Housing Benefit regulations 2006 to reflect any housing benefit to which the claimant was entitled during the relevant period. The claimant has, as noted above, failed to provide clear, credible and cogent evidence of his income. Under regulation 104, where at all possible, claimants should receive the benefit which accords with their correct circumstances. However, where those correct circumstances are impossible to determine as a result of a claimant's behaviour, neither a Local Authority nor a tribunal can be expected to embark on a speculative journey to arrive at a likely figure. I agree with the comment in R(H) 1/05 that it is for a claimant to demonstrate the correct amount that s/he is entitled to for the overpayment period, or, at least, that it is for a claimant to provide the information required for such a calculation to be undertaken. I therefore find that there is no sum to be deducted under regulation 104 Housing Benefit regulations 2006 and the full sum of housing and council tax benefit between 10 March 2010 and suspension in November 2011 is recoverable.

Ground 2: official error

Relevant Legal Framework

23. The starting point is that all overpayments of housing benefit are recoverable (Housing Benefit Regulations 2006 regulation 100(1)).
24. This default position is subject to the exception in regulation 100(2) (as amended), which
"applies to an overpayment which arose in consequence of an official error where the claimant ... 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."
25. An *"overpayment which arose in consequence of an official error"* within regulation 100(2) means *"an overpayment caused by a mistake made whether in the form of an act or omission"* by one of a number of official agencies, including the local authority (regulation 100(3)).

Discussion

26. The submissions to the FTT raised the issue of the Local Authority failing to investigate (p148) although did not refer directly to the notion of official error. The First-tier tribunal considered evidence relating to whether the local authority had failed to investigate (p161). The FTT may not have appreciated that there was a live issue relating to official error, particularly when the judge's question about whether there was argument about overpayment did not elicit such submissions (p172). The Statement of Reasons (para 36) suggests this was the case: it reads '*it was not argued that the overpayment and excess were due to official error and so they are recoverable from the claimant*'. In any event, any failing by the tribunal to consider that point further- if it was indeed a failing- was not a material error of law for the reasons set out below.
27. The Local Authority here failed to investigate a tip-off which they received from a member of staff in March 2010. If they had investigated the tip-off they would, no doubt, have been subjected to the same smoke-and-mirrors deception which the claimant indulged in subsequently. The information which they were in possession of was insufficient to lawfully revise or supersede the decision to award housing benefit, and they were entitled to proceed on the basis that the claimant had disclosed all that he was obliged to. That failure to investigate a tip off is nowhere near the kind of "mistake" caught by 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 (R(SB) 10/91; CH/571/2003, reported as R(H) 1/04).
28. It is clear that an overpayment will not be irrecoverable if it was substantially caused, not by any official error, but by the claimant's own fault. In my judgment, that was the position here.
29. Furthermore, following my findings at paragraph 20, the claimant could reasonably have expected to know that he was receiving an overpayment, and therefore the exception to recoverability in regulation 100(2) cannot apply.

OBSERVATIONS

30. The Local Authority was asking the FTT to uphold a decision to revise a benefit decision under regulation 4 Housing and Council Tax Benefit (Decisions and Appeals) Regulations 2001. That can be simply stated but was not made plain to either the claimant or the FTT at any time. There is no documentation in the entirety of the paperwork which sets out the legal route which the Local Authority purported to take.
31. The incoherence and imprecision in the documentation provided to the claimant and FTT is startling. By way of example:
- (1) On 21 February 2013 the Local Authority issued two notifications which both stated that benefit had been stopped from 5 October 2009. Neither gave any detail as to the legal or factual basis for the decision. An overpayment is said to arise 'because of a

- change in your income' with no indication that the decision was linked to the parcel business;
- (2) A letter from the Local Authority dated 16 April 2013 (p62) states that the overpayment has been created 'as you have not provided complete information with regard to your employment/self-employment and failed to notify the Local Authority of your circumstances within a calendar month of them occurring'. Neither are a ground for revision;
 - (3) A subsequent letter from the Local Authority (p68) says that the decision will not be reconsidered as 'your employment history is unclear and therefore I do not have sufficient information to award you benefit' with no reference to any ground for revision or supersession;
 - (4) The documentation provided by the Secretary of State to the tribunal (submission, not paginated, June 2013) quotes the regulations relating to supersession and duty to notify, but not revision, which was the power under which it seems they had acted;
 - (5) On 3 April 2014 the judge asked for clarification as to what regulations were applied, and there was discussion about suspension and termination, but not the relevant test of revision (p137). The judge was assisted very little with identifying the relevant regulations, and entirely understandably when he adjourned that hearing he made a direction for the Local Authority to make a submission giving details of the law used to remove entitlement;
 - (6) The Local Authority's response was again entirely unsatisfactory (p140) as it set out the legislation relating to suspension and termination, but not to revision: it provided no clarity to the FTT;
 - (7) At the tribunal hearing on 7 August 2014 the first questions by the judge sought to identify what the Local Authority had purported to do and under what legislation: the presenting officer referred first to supersession and then confirmed that the change was a revision. The presenting officer referred to change in circumstances, which is relevant to supersession but not revision. It is entirely unsatisfactory that a significant portion of the tribunal oral hearing was taken up by the tribunal judge seeking to identify what legal provisions were relied upon;
 - (8) The Local Authority's response to the claimant's submissions to this tribunal (p197) does not refer to any legal propositions. As an example, the submissions state 'the claimant failed to provide satisfactory evidence' without any indication of how that is said to link to any legal consideration.
32. The expertise and persistence of the FTT judge enabled him to make his decision on the basis of the correct relevant regulation, and ignore the irrelevant regulations which had been placed before him. He was entirely unassisted, and indeed was impeded, in that process by the Local Authority.
33. Tribunals and courts have repeatedly sought to emphasise the importance of claimants being able to understand the basis for decisions which affect their benefit entitlement (see for example (R(IB) 2/04 para 25). Phrases such as 'change in circumstances' are not sufficient in decision notices; the reason for overpayment must be explained in clear language (R v Thanet DC ex p Warren Court Hotels LTD [2000] 33 HLR 339, CA). There should have been

no difficulty in this case with the Local Authority stating in plain English that they had revised the claimant's benefits because they considered that the award had been made in ignorance of a material fact, namely his self-employment in the parcel business, and that they were acting under regulation 4. If the Local Authority's standard forms somehow prevent such a clear statement, then those standard forms require urgent revision.

34. I am satisfied in this case that the claimant and his representative understood the factual issues which they were required to address, and that they had all fair opportunity to provide information and evidence to the Local Authority and the tribunal. The lack of clarity in the paperwork has not, in this case, caused prejudice, and has not affected my decision. However, in other cases the Local Authority may well be faced with a determination by tribunal either that their paperwork is so confusing as to prevent a fair hearing for the claimant, or that the decision under appeal has 'so little coherence or connection with legal powers' that it does not amount to a decision at all, and is set aside on that basis, following (R(IB) 2/04.

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 8 January 2016