IN THE UPPER TRIBUNAL **Case Nos** CPC/4519/2014
ADMINISTRATIVE APPEALS CHAMBER CPC/4520/2014

Before UPPER TRIBUNAL JUDGE WARD

Decision: Whether it will help the claimant remains to be seen, but the appeals are allowed as set out below. The decisions of the First-tier Tribunal sitting at Scarborough on 2 July 2014 under references SC010/13/01498 and 01499 involved the making of an error of law and are set aside. The cases are referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraphs 33-40 of the Reasons.

REASONS FOR DECISION

1. The claimant challenges a decision that certain amounts paid to him by way of state pension credit are recoverable. The entitlement and recoverability decisions were originally taken by the DWP on 22 August 2013. The latter decision was to the effect that the claimant had been overpaid state pension credit between 6 March 2006 and 18 August 2013, of which £12,312.75 was recoverable on the ground of misrepresentation, but that £7,206.26, covering the period from 24 November 2008 to 9 October 2011, when the claimant had been compulsorily detained under the Mental Health Act 1983, was not.

2. As at 1 July 2014 the claimant remained subject to a community treatment order and in receipt of medication. However, he does not have an appointee in respect of his benefit matters, nor an attorney, and has made no suggestion or otherwise indicated that he does not understand what is going on or lacks capacity to conduct this litigation. The evidence on file from his care co-ordinator, a Community Psychiatric Nurse, does not indicate such a difficulty at the time it was written. Some of the claimant's decisions in the present case might not be those which others might have taken, but that does not of itself mean that he lacks capacity.

3. He first appeared before me, unrepresented, at an oral hearing of his application for permission to appeal which he had requested, held in Leeds on 12 March 2015. Mr Stephen Cooper, solicitor, represented the Secretary of State. In the light of Mr Cooper's submissions, it appeared possible that the claimant might be worse off by proceeding with his appeal, in that if it succeeded, another tribunal might decide that a lesser or greater amount than, or the same amount as, the first tribunal had decided was recoverable. The claimant immediately indicated at the hearing that he wished to proceed with the appeal, but I preferred to defer my decision on the application for 6 weeks and to set out the issues in Directions, which he could show to the Citizens Advice Bureau, who had already to a degree been assisting him and with whom he had an appointment the following day, and to consider with them whether he wished to withdraw or proceed. By a series of emails dated 9 and 10 June he indicated his wish to proceed with the appeal. On 11 June I gave permission to appeal.

4. On 18 September 2015 a careful submission was received from Mr Wayne Spencer on behalf of the Secretary of State, agreeing that the tribunal had been in error of law and suggesting that the case should be remitted to the First-tier Tribunal. When this was sent to the CAB, their response was that they were no longer acting for the claimant. After some postal problems, a reply was received from the claimant himself in late November saying, simply:

> "The whole case is about a clerical error by the social and I request that all payments taken off are returned to me immediately."

5. Nobody has asked for an oral hearing of the appeal. I do not think one would be likely to prove fruitful, and it is in the interests of justice to decide the appeal on the papers.

6. The claimant had on 23 March 2006 signed a state pension credit form SPC1. The form had been completed by an interviewing officer of the DWP, who had signed to confirm that:

> "I have read back to the customer the entries I made on this form based on the information they gave me. The customer agreed they were correct."

The form was completed so as to indicate that the claimant did not get a pension other than UK state retirement pension nor expect to do so within the next 12 months. State pension credit was then, by a decision of unknown date, awarded to him from 6 March 2006 on the basis that he did, indeed, have no money coming in from an occupational pension. On 25 July 2013 he completed a review form indicating that he had an army pension which had commenced on 4 March 2006, that his army pension was £257 per month and that the first payment had been made on 4 March 2006, on which date he also received a lump sum of £3,000, which did not contain any arrears. It is evident from the figures he gave that he was somewhat confused in replying, in places mixing up his army pension (which was what he had been asked about) with other pension income.

7. The decisions summarised in [1] above were then taken. At the oral hearing of his ensuing appeal, the First-tier Tribunal accepted evidence from the claimant that, contrary to what he had put on the review form, although entitled to the army pension from 6 March 2006, he did not receive the first payment until 2008 – this consisted of arrears back to 6 March 2006 - and regular monthly payments thereafter. The tribunal further found as fact that the claimant did not notify the DWP of it at the time of receipt of the pension. He used it to pay a lump sum off his mortgage.

8. The tribunal upheld the DWP's decision that the overpayment was recoverable under section 71 of the Social Security Administration Act 1992 ("the SSAA"), but did so on the basis of failure to disclose a change of circumstances rather than on the ground of misrepresentation on which the DWP had originally relied.

9. At this point it is convenient to set out the two main sections of the SSAA to which reference is made here- section 71, which was the basis on which the DWP's original decision and that of the First-tier Tribunal proceeded, and section 74.

10. Section 71 provides the general basis for recovery of overpayment of social security benefits (except where the regime applicable to certain benefits with effect from April 2013 applies), and at the date of decision was in the following terms:

> "(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—
> (a) a payment has been made in respect of a benefit to which this section applies; or
> (b) any sum recoverable by or on behalf of the Secretary of State in connection with any such payment has not been recovered,
> the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.
>
> (2) Where any such determination as is referred to in subsection (1) above is made, the person making the determination shall in the case of the Secretary of State or the First-tier Tribunal, and may in the case of the Upper Tribunal or a court —
> (a) determine whether any, and if so what, amount is recoverable under that subsection by the Secretary of State, and
> (b) specify the period during which that amount was paid to the person concerned.
>
> (3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.
> …
> (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1)…unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under section 9 or superseded under section 10 of the Social Security Act 1998.
> …
> (11) This section applies to the following benefits—
> …
> (ab) state pension credit;
> …"

I take the opportunity to emphasise, for the claimant's benefit, that the section can apply where a person has acted wholly innocently. He says he has done no criminal act. Nobody is suggesting that he has.

11. Section 74 makes special provision (the scope of which is discussed below), in the following terms:

> "(1) Where—
> (a) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and
> (b) it is determined that an amount which has been paid by way of income support, an income-based jobseeker's allowance, state pension credit or an income-related employment and support allowance would not have been paid if the payment had been made on the prescribed date,
> the Secretary of State shall be entitled to recover that amount from the person to whom it was paid.
>
> … "

12. For the "prescribing" involved, we must turn to the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988/664. For present purposes, it suffices to note that:

> a. income required to be taken into account in accordance with Part III of the State Pension Credit Regulations is "prescribed income" (reg 7(1)(a)). This extends to income from an occupational pension: see State Pension Credit Act 2002, ss.15(1)(c) and 16(1)(f);
>
> b. by reg 7(2):
>
> > "The prescribed date in relation to any payment of income prescribed by paragraph (1)(a) is–
> > (a) where it is made in respect of a specific day or period, that day or the first day of the period;
> > (b) where it is not so made, the day or the first day of the period to which it is fairly attributable."

13. The tribunal found that no payment was actually received until 2008, albeit, when it was, it included arrears going back to 2006. Nonetheless it upheld the DWP's decisions, which were predicated on the claimant having had the income since 2006. Was that the right approach?

14. Mr Spencer points out that the legislation in relation to income support and jobseeker's allowance contains express provisions that exhaustively stipulate how the weekly amount of a given payment of income is to be calculated for the purposes of those benefits, dealing with such matters as when the period over which a payment is to be taken into account starts and ends and for determining the amout of weekly income to be taken into account during that period. The legislation in relation to state pension credit, by contrast, is far less comprehensive. The point was helpfully expressed by Upper Tribunal Judge Mesher in R(PC)3/08 at [24]:

> "24. Further, the SPC legislation must operate on an assumed notion of a period of attribution of income, to use the Secretary of State's term. It seems to me that there is a hole in the legislative scheme. The conditions of entitlement are in terms of whether a claimant "has" income. That test must be applied primarily as at the first day from which SPC could be awarded, but it is left unstated just what having income at that date means. There are no general provisions that payments are to be treated as paid on any particular date or to be taken into account for any particular period (although regulation 13B of the SPC Regulations provides, for purposes that I currently do not understand, for the day of a week on which various benefits are to be treated as paid and with effect from 5 April 2004 regulation 17ZA deals with final payments of income). Yet the scheme must work on the basis that someone like the claimant, who received a payment of retirement benefit before the first day of potential entitlement to SPC (6 October 2003) and was due to receive the next payment after that date and the benefit week containing that date, had that income at that date. An unstated principle of attribution must operate. Although the express purpose of regulation 17 of the SPC Regulations is merely the conversion of amounts into weekly income, it both supports the taking into account of actual payments of income (as opposed to the existence of sources of income) and having regard to the period in respect of which a payment of income is made."

15. This principle was cited with approval by Upper Tribunal Judge West in CH/48/2014 and applied to housing benefit, another benefit which, like state pension credit, does not have any provisions which state that payments are to be treated as paid on any particular date or to be taken into account for any particular period. It followed that

> "income payable in arrears falls, for housing benefit purposes, to be attributed forward from the date of receipt rather than backwards over the period in respect of which it was earned" (at [15]).

16. Mr Spencer submits, correctly in my view, that the words cited are consistent with R(PC)3/08 and apply equally to state pension credit. Consequently, he submits, the tribunal erred by not making findings as to when the individual payments comprised within the first pension payment were due to be paid.

17. It seems to me certainly that it follows that in the period from March 2006 to 2008 when the tribunal found the first pension payment to have been received, the claimant could not be taken as having income derived from the pension payments.

18. He then submits that "the specific regime for belated payments is an exhaustive one." I am not persuaded without further argument that that is so if it is intended as a general proposition. I do not exclude the possibility that in otter cases, perhaps involving other benefits, there may be cases in which recovery can be effected either under s74 or under some other provision. But

because of the principles set out above, in respect of the period 2006-2008 in the present case, recovery could not be based on s71. To that extent the tribunal erred in law. It is not necessary to rule (in particular, as to whether recovery under that section was "raised by the appeal" for the purpose of s.12(8)(a) of the Social Security Act 1998) on whether the tribunal erred by not considering s.74, when so far as I can see it was not relied on by the DWP in making the decisions under appeal or mentioned in the submission.

19. Perhaps because the tribunal failed to appreciate the above matters, its findings of fact in relation to the payment of the lump sum were not as specific as they should have been, and thereby it further erred in law. In particular, there is no finding as to the date in 2008 up to which arrears were paid through the lump sum, before the switch was made to ongoing monthly payments.

20. The Secretary of State did not seek to rely on s.74 but now apparently does and in remitting the case to the First-tier Tribunal I need to provide guidance on the application of that section. Mr Spencer suggests that the section should be read as applying only to payments made after their due date, even though it does not expressly say so. I agree that it (and the accompanying regulations) does not: the wording of "prescribed date" in reg 7 is such that it could, if read strictly, cover ongoing payments made in arrears that were paid on their due date, being (say) the last day of a four week period just ending. He suggests that both the wording of the provision and consideration of its purpose and consequences lead to that conclusion. The wording of the section, in allowing the recovery of the benefit that "would not have been paid if the payment had been made on the prescribed date" implies that a delay has occurred in the payment of the prescribed income. As to the purpose and consequences, if a payment in arrears is made when it is legally due, it is, or can be, taken into account over a future period that starts on the date of payment and it serves no useful purpose to ask how much less the Secretary of State would have paid if the payment had been made at the start rather than the end of the period it covers. I agree with the submission that

> "the only sensible view of section 74(1) is that it is intended to apply to the situation where a payment of prescribed income is paid after it was supposed to have been paid, with the result that the Secretary of State has been obliged to make a payment of state pension credit without taking the delayed income into account. Once the income is finally paid, the Secretary of State is entitled to recover the amount of the benefit he would not have paid if the income had been paid on time."

21. It may be helpful to summarise a number of authorities about the operation of s.74:

> a) The obligation to replay under s.74 does not depend on it being anyone's fault that the situation has arisen: R(IS)14/04 at [20];
>
> b) One cannot read into s.74 the sort of limitations on the power to recover which exist under s.71: CIS/625/1991 at [5];

c) Nor can a claimant rely on the operation of the principle of legitimate expectation to defeat the right of recovery under s.74: CIS/155/2001 at [12];

d) Section 74 confers an entitlement to recover, conferring a discretion on the Secretary of State: CIS/155/2001 at [15].

22. I now turn to s.71 which, as noted, could only in any event lead to a right of recovery in respect of state pension credit during a period in respect of which the claimant actually received income falling to be taken into account for state pension credit purpose.

23. I consider that there was a breach of natural justice in how the tribunal managed the transition from the DWP's case for recovery, which had been based on misrepresentation, to the tribunal's decision, which was based on failure to disclose. A claimant is entitled to know why he is thought to be liable to pay back an overpayment and to have an opportunity to consider and formulate a reply to the evidence and arguments said to be against him. In R(SB) 40/84 the commissioner gave guidance at [12] as to the steps that should be put in place where a tribunal was minded to switch from failure to disclose to misrepresentation. In CIS/97/1991 an attempt was made to distinguish that case so that it did not apply to an intended switch from misrepresentation to failure to disclose, on the ground that misrepresentation was, as it were, a more serious charge than failure to disclose. I do not accept that as a valid basis of distinction. Failure to disclose and misrepresentation have like consequences under s.71 of the 1992 Act and the principle that a person facing an obligation to repay needs to know the case against him should apply equally, albeit how to give effect to that principle may vary according to the subject-matter and facts of the case.

24. Nor do I consider that the tribunal adequately identified the source of the obligation to disclose. It is firmly established that a failure to disclose for the purposes of s.71 refers to a legal duty to disclose. The source of such a duty is to be found so far as relevant in regulation 32(1A) and (1B) of the Social Security (Claims and Payments) Regulations 1987. Regulation 32(1A) comes into play where a person has been given an unambiguous instruction to disclose a particular type of change. Regulation 32(1B) covers any change of circumstances which the claimant "might reasonably be expected to know" might affect his benefit and requires the person to disclose "as soon as reasonably practicable" thereafter to "the appropriate office." Unsurprisingly since it was not the basis on which the Secretary of State had thus far sought recovery, there was no evidence as to the instructions given to the claimant in leaflets, uprating letters and so on.

25. The tribunal held (statement of reasons para 7) that:

> "There is an ongoing obligation on all benefit claimants to notify the [DWP] of any change in circumstances. Including specifically the receipt of additional income."

As a statement of law that goes beyond reg 32(1B) and is too wide. The tribunal also relied upon the claim form where a person signs to indicate "I understand that I must promptly tell the office that pays my credit of anything that may affect my entitlement to, or the amount of, that credit." That likewise appears to go beyond reg 32(1B) and to lack the specificity envisaged by reg 32(1A) to give rise to a legal duty, quite apart from the possibility of any difficulties which might be caused by the limited terms of the declaration completed by the DWP official who had completed the form on the claimant's behalf.

26. What about the period from 24/11/08 to 09/10/2011, in respect of which the DWP's original decision did not argue that the overpayment was recoverable? The reason why it was considered it non-recoverable was because "it did not arise as a consequence of the misrepresentation of the material fact" (file 4520 at p44) because the claimant "was for that period staying in the Humber centre for mental illnesses therefore this payment was not caused by a misrepresentation" (reconsideration, at p48). The First-tier Tribunal relied on the concession by the DWP that the sum was not recoverable to conclude that it was not recoverable for that period on the basis of failure to disclose either. It is for the Secretary of State to make a decision on recoverability for such period as he thinks fit and in view of the decision he did take, I do not criticise the tribunal for not going behind the apparent concession: under s.12(8)(a) it had a discretion whether or not to do so.

27. It is nonetheless unclear what was behind the period carved out under the original decision. I have not been addressed in relation to the hospitalisation provisions applicable to state pension credit. It may have been thought that, if state pension credit was not payable to the claimant while he was in hospital but it nonetheless was, that broke the chain of causation, but I am unable to locate any provision having such effect and if such a view was held, it may well have been erroneous. Nor is it clear why between 26 January 2009 and 22 February 2009 the claimant was apparently not paid state pension credit anyway, but it was paid for the remainder of the period of his hospitalisation.

28. Absent that, as Mr Spencer submits, the claimant's mental health problems appear only to be relevant to questions of liability to repay the overpayment to a limited degree.

29. They have no bearing in relation on liability to repay under s.74 which operates in a wholly impersonal way.

30. As regards liability for failure to disclose under s.71, assuming the army pension was first paid in 2008, the key questions are:

(a) did the claimant know that he had received the pension? And

(b) was he capable of carrying out the necessary disclosure?

Beyond that, his mental health problems would not provide a defence to liability to repay: B v SSWP [2005] EWCA Civ 929 ; R(IS)9/06 and B v United Kingdom Application No 36571/06 [2012] ECHR 255.

31. The claimant in effect says the overpayment is all the DWP's fault and invites me to rule that the whole sum is not recoverable. I am not in a position to do that. The facts are not sufficiently clear to make any ruling.

32. The Secretary of State invites me to remit the case to the First-tier Tribunal and to give directions about the evidence to be provided. It seems to me though that it is for him to make out the case for recoverability. He has wide information-gathering powers and if, for instance, he wishes to obtain details of the sums paid to the claimant by way of army pension from the relevant agency, I should be surprised if he is not in a position to do it. Given the shortcomings in the completion of the 2013 review form by the claimant (see [6]), I suspect that such a process is more likely to yield accurate information. I am therefore making directions requiring him to file a wholly new submission in these cases, supported by such evidence as he sees fit. I recognise that it may take a little while to assemble the necessary material, and have allowed a longer time limit accordingly. If he has difficulty in obtaining the evidence himself, it would of course be open to him to apply to the First-tier Tribunal for it to use its various powers in that regard and for any necessary extension of time.

33. I direct therefore that the question of whether the claimant was, by reason of the receipt of his army pension, paid too much state pension credit during the period in question and, if so, whether the amount overpaid is recoverable from him is to be looked at by afresh by the First-tier Tribunal by way of a complete re-hearing in accordance with the legislation and this decision. I emphasise for the claimant's benefit that the tribunal will be concerned only with whether a payment is <u>recoverable</u>. Whether, even if it is adjudged to be recoverable, the Secretary of State proceeds <u>actually to recover it</u> is a matter in respect of which the Secretary of State has a discretion.

34. The Secretary of State must within 2 months of the date of the letter issuing this decision send to the First-tier Tribunal a revised submission on these appeals, supported by all documentary evidence on which he wishes to rely. It should make clear whether or not recovery is sought for the period 24/11/08 to 09/10/2011 and (as one of the claimant's complaints is that the latitude afforded to him by the previous decision was not extended to the remainder of the overpayment period) provide a brief explanation for the position adopted.

35. The claimant must within one month of being sent the Secretary of State's revised submission send to the First-tier Tribunal any written submission he wishes to make in reply and copies of all documentary evidence on which he wishes to rely. If he needs to obtain medical or other evidence but finds that he cannot do so, he too may apply to the First-tier Tribunal for it to use its powers in that regard.

36. I leave it to the First-tier Tribunal to determine whether the parties seek an oral hearing and/or whether one is otherwise necessary.

37. The tribunal may, but need not, go behind any concession made by the Secretary of State as to the period in respect of which he is seeking recovery: Social Security Act 1998, s.12(8)a) but if it does, must provide the parties with a fair opportunity to address the point.

38. Likewise, if the tribunal is considering recovery on a basis other than that advanced by the Secretary of State, it must ensure that the claimant is given a fair opportunity to address it.

39. The tribunal will need to make full findings of fact on all points that are put at issue by the appeals.

40. The tribunal must not take account of circumstances that were not obtaining at the time of the decisions under appeal - see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

41. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that these appeals have been allowed on a point of law.

42. As I have done previously, I encourage the claimant to take welfare benefits advice in connection with this case.

CG Ward
Judge of the Upper Tribunal
13 January 2016