IN THE UPPER TRIBUNAL **Case No.** CIS/1369/2013
ADMINISTRATIVE APPEALS CHAMBER

BEFORE UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed.

The decision of the First-tier Tribunal sitting at Birmingham on 31 July 2012 under Ref: SC024/11/12753 involved the making of an error of law and is set aside. Acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision as follows:

The Secretary of State's decisions of 17 March 2011 and 26 May 2011 are quashed. The matter is referred back to the Secretary of State who must take amended decisions on entitlement and overpayment in accordance with paragraph 29 of the Reasons below. The Secretary of State must notify the appellant of those amended decisions within one month of the date of the letter issuing this decision to the parties.

If the appellant disputes the amended decisions, he may refer them back to the Upper Tribunal, by writing to the Upper Tribunal explaining the basis of disagreement. His letter must be received by the Upper Tribunal within one month of the date of the letter from the Secretary of State notifying him of the amended decisions.

REASONS FOR DECISION

1. The appellant had been on income support since at least 2001. On a date which is not in evidence but which appears to have been in the course of 2010 the DWP received information through the Generalised Matching Service ("GMS") that in addition to a bank account into which his benefit was paid, the appellant had two building society accounts, one with Nationwide ending in 2822 and one with the West Bromwich Building Society ending in 6410. Interest payments of £200 and £89.02 respectively were shown for these accounts.

2. The appellant was interviewed by a visiting officer on 30 November 2010 and signed a statement acknowledging that he had "the two accounts that is in the allegation". He agreed to provide details of them covering the period from March 2001 onwards, by 14 December 2010. He did not provide the information requested and instead wrote a letter of complaint regarding the visit. A reply was issued to him on 23 December 2010 in which he was reminded of the requirement to provide the necessary information. A follow-up letter was sent on 2 February 2011 enclosing duplicate forms but the appellant still failed to provide the information and with effect from 14 February 2011 payments of benefit were suspended.

3. On 17 March 2011 a decision was taken that the appellant had capital in excess of £8,000 from the date of claim and £16,000 from 10 April 2006 (which was when the capital limit was increased).

4. This decision did not in terms say that it was being taken on revision but, given that it was looking at the decision from the date of the original award on the basis of additional information having come to light, that was clearly what was going on.

5. The matter was then referred for a decision on overpayment which was taken on 26 May 2011 and was in terms that an overpayment of income support had been made from 7 January 2005 to 11 February 2011 (both dates included) amounting to £99,161.10 and was recoverable on the basis of failure to disclose. The 2005 date was adopted because the Department's records did not go back any earlier. The calculation of the overpayment left out of account a period 22 July 2010 to 12 August 2010 where the appellant had already been disentitled on other grounds, but was otherwise of the full amount payable to him, which had been of around £300 weekly.

6. The appellant appealed against that decision. He enclosed a letter to the West Bromwich Building Society in which he had asked for the balance in his account "in July 2010 up to current date or when the account was closed". These were of course the wrong dates and I suspect that July 2010 may have been selected as being shortly after the date when the matter was first raised with him following the GMS referral. A response from the building society was attached, giving the figures for that limited period only. He also wrote to the Nationwide, quoting a number which was different from that given by the GMS and asked them to "please confirm if the above account number is my account and also the balance on this account from July 2010 to current date or when the account was closed." Unsurprisingly, the Nationwide replied confirming that the account number given was invalid and that they could not provide any details.

7. In February 2012, when appeal proceedings were pending, a photocopy of form A42 was submitted on the appellant's behalf by which the DWP was authorised to obtain documents about the appellant's financial affairs. The appellant asserted it had been supplied previously, although the post code on the Post Office receipt showing where it had been sent was of a Belfast address which is the address for undelivered post rather than of any office that was actually handling this case.

8. The appeal proceeded as a hearing in absence and the Secretary of State was not represented. The tribunal on 31 July 2012 upheld the decision of 26 May 2011 and by extension that of 17 March 2011. The judge set out the facts and concluded that "[the appellant] had not provided evidence requested (Social Security (Claims and Payments) Regulations 1987, regulation 32). I further found that he had failed to disclose the material fact of his capital and the overpayment of benefit was recoverable."

9. Section 71 of the Social Security Administration Act 1992 at the date of the overpayment decision provided:

> "(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.

(6) Regulations may provide—
(a) that amounts recoverable under subsection (1) above … shall be calculated or estimated in such manner and on such basis as may be prescribed;
(b)...
...
(11) This section applies to the following benefits—
...
(b) income support;
..."

10. As recovery of the overpayment was dependent on there having been a revision or supersession and it had been the Secretary of State who needed to instigate it, it was for the Secretary of State to establish grounds for supersession. However, by regulation 32 of the Social Security (Claims and Payments) Regulations 1987/1968:

"(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State

> may require for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.
>
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect—
> (a) the continuance of entitlement to benefit; or
> (b) the payment of the benefit,
> as soon as reasonably practicable after the change occurs by giving notice [of the change to the appropriate office–
>
> (i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or
> (ii) in writing if in any class of case he requires written notice (unless he determines in any particular case to accept notice given otherwise than in writing)."

11. Regulation 14 of the Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988/664 provides:

> "(1) For the purposes of section 53(1) of the Act[1], where income support... has been overpaid in consequence of a misrepresentation as to the capital a claimant possesses or a failure to disclose its existence, the adjudicating authority shall treat that capital as having been reduced at the end of each quarter from the start of the overpayment period by the amount overpaid by way of income support... within that quarter.
>
> (2) Capital shall not be treated as reduced over any period other than a quarter or in any circumstances other than those for which paragraph (1) provides.
>
> (3) In this regulation–
> *"a quarter"* means a period of 13 weeks starting with the first day on which the overpayment period began and ending on the 90th consecutive day thereafter;
> *"overpayment period"* is a period during which income support... is overpaid in consequence of a misrepresentation as to capital or a failure to disclose its existence."

The tribunal did not allude to regulation 14 at all but if that regulation were to be applied, it would, in order for the decision to be valid, have meant that towards the end of the overpayment period (at which point the appellant's capital still had to be over the £16,000 cut-off) this had to be so even <u>after</u> deduction of some £99,000

[1] This has become section 71 of the 1992 Act but, it appears, the statutory reference not updated.

applying regulation 14. In other words, capital arising from these accounts had to be attributed to the appellant in a sum of some £115,000.

12. The appellant has in latter years been a very sick man in physical terms and more recently still he is said to have developed significant problems of depression and cognitive difficulty. I limit myself to saying that the conduct of the appellant or those assisting him in relation to the DWP's enquiries appears initially to have been evasive and un-cooperative and I agree entirely with the tribunal that he was in breach of his duty under regulation 32. However, difficult to deal with as the appellant may have been, the DWP could have done more than it did in preparing the case. The GMS referral was not within the case papers (and could not be produced in the course of these proceedings, either by the DWP office or by those now responsible for the GMS). There was no indication that the DWP had sought to use its powers under section 109B of the Social Security Administration Act 1992 to obtain information from the financial institutions concerned nor to do so with the belatedly obtained consent of the appellant. Nor had it gone back to HM Revenue and Customs (as a likely source of the GMS information) pursuant to the arrangements permitted at that time by section 122 of the Social Security Administration Act 1992 (now section 127 of the Welfare Reform Act 2012.) It does seem likely if HMRC in 2010 had account details and interest figures for one tax year from those institutions, they would equally have done so, subject to questions of preservation of data for further years, as returns of balances on account with financial institutions were and are regularly required from such institutions, at that time under section 17 of the Taxes Management Act 1970 and, in the case of ISAs, by the Individual Savings Account Regulations 1998/1870.

13. I remind myself that in *Kerr v Department for Social Development* [2004] UKHL 23 [2004] 1 WLR 1372 Baroness Hale, after summarising the process of claiming and adjudicating upon benefits, said:

> "61. Ever since the decision of the *Divisional Court in R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble [1958] 2 QB 228* , it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at p 240:
>
> "A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds … Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action."
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> 62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the

> department rather than the claimant, then the department must take the necessary steps to enable it to be traced.
>
> 63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998, "a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself."

14. As to the principles to be applied where the information available to a decision maker falls short of what is needed for a clear decision, Lord Hope of Craighead set out the following:

> "16. But there some basic principles which made be used to guide the decision where the information falls short of what is needed for a clear decision to be made one way or the other:
>
> (1) Facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry.
>
> (2) But the claimant must be given a reasonable opportunity to supply them. Knowledge as to the information that is needed to deal with his claim lies with the department, not with him.
>
> (3) So it is for the department to ask the relevant questions. The claimant is not to be faulted if the relevant questions to show whether or not the claim is excluded by the Regulations were not asked.
>
> (4) The general rule is that it is for the party who alleges an affirmative to make good his allegation. It is also a general rule that he who desires to take advantage of an exception must bring himself within the provisions of the exception. As Lord Wilberforce observed, exceptions are to be set up by those who rely on them: *Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107* , 130."

15. The present case gives rise to two difficulties in applying these principles:

(a) Whereas *Kerr* concerned a claim for benefit, where, in the normal way, it was for the claimant to establish entitlement, the present case was one where it was the Department who needed to assert grounds for supersession or revision.

(b) Even if one assumes, as appears to be the case, that the appellant was not at that point impaired by his cognitive difficulties in coming up with the evidence, how

far does the ability to decide matters against him when he fails to do so stretch? The principle was set out in CIS/5321/1998 in terms that:

> "a claimant must to the best of his or her ability give such information to the adjudication officer as he reasonably can, in default of which a contrary inference can always be drawn."

But what contrary inference? Here the Department had come up with minimal evidence as to the existence of two accounts, on which known amounts of interest had been paid in (as was to be inferred, and is now known), one tax year. From that, it was possible to make an informed estimate of the amount of capital which had produced that interest. Even without evidence as to historic interest rates (which does appear to be available to decision-makers and others from sources on the internet) a tribunal could calculate that interest of £200 (let it be assumed, to the appellant's disadvantage, net) would require capital of £12,500 if interest rates were at 2% or £5,000 if they were at 5%. Net interest of £89.02 would require capital of £5,341 if interest rates were at 2% or £2,136.40 if they were at 5%. The general tenor of these rough calculations is accepted by the Secretary of State's present representative.

16. Even if one takes a low interest rate figure (and rates were not as low then as they are now), leading to a higher capital figure being needed to generate the same amount, the effect of the DWP's decision, confirmed by the tribunal, was to attribute to the appellant in consequence of his non-compliance with regulation 32 a sum of capital which was at a minimum some six or seven times that disclosed by the evidence.

17. It may be legitimate to make a finding on a particular issue against a party who has had a reasonable opportunity to deal with it and has not done so (for a helpful review of the principles, see the decision of Mr Commissioner Jacobs in CCS/3757/2004). However, what has happened here is that the First-tier Tribunal's endorsement of the capital figure is unreasoned. It failed to apply regulation 14 and to appreciate its impact on the findings it was making and failed to give any or sufficient attention to the amount of capital necessarily to be implied from the evidence as to interest which it did have. It has reached a conclusion which if regard is had to those matters, is irrational and one which in my view no reasonable tribunal could reach. For these various reasons, it erred in law.

18. That is to say that there were not inferences which might have been open to a tribunal to draw based on the evidence it had and given the lack of further response from the appellant. If he had a given sum at one date in the overpayment period and there is no reason to think otherwise, then I see no reason why (without prejudice to the operation of reg 14) he should not be taken as having had it throughout the period. If he chose not to provide either the capital balance on the account from time to time or particulars of the interest rate applicable to it at the time at which there was evidence of the interest payable, then I consider it would be open to a tribunal to select the least helpful interest rates for the appellant (i.e. a low one) out of those which were realistically possible.

19. I have already drawn attention to steps which the DWP might have taken to obtain further evidence, but did not. The tribunal's function is one of ensuring "the true amount of social security benefit to which the claimant is properly entitled": see R(IS)17/04 at [26]. If it had a concern in the light of the poor quality evidence and the appellant's un-cooperative approach that he had more capital than the evidence had so far disclosed, it was open to the tribunal to use its powers under rule 16 of its rules to require the production of relevant documents from the financial institutions concerned or from HMRC. I can detect no sign that consideration was given to such steps. Had it done so, less might have needed to be left to inference. In my view it failed to follow the inquisitorial approach required of it and thereby was further in error of law.

20. Following the tribunal hearing the appellant instructed solicitors who applied for permission to appeal. They were directed to obtain the statements from the two financial institutions covering the whole of the relevant period. In relation to the West Bromwich Building Society, a statement was provided, to which I return below. In relation to the Nationwide, the solicitors wrote this time using the number given by the DWP as being that given by the GMS for the account but the solicitors were advised by the Nationwide that that number also was an invalid account number. Conversely they did subsequently produce a passbook for a further Nationwide Account, ending in 2857, which showed a balance at 1 January 2008 of £340.50 (approx. - the last digit is not legible) remaining more or less unaltered apart from the receipt of minimal interest until 7 February 2011 when it was closed, at which point the balance was £345.26.

21. Because of the poor quality of the evidence from the DWP, the historical non-cooperation of the appellant and those advising him and the possibility that the appellant might have further accounts which he had previously failed to mention, I issued a witness order to HM Revenue and Customs seeking:

> "all documents in their possession or control[2] (including printouts of computer records) tending to show the extent of income received by [appellant] of [address] [NINO] by way of interest or otherwise by return on capital during the tax years 2004/5 to 2010/11 inclusive (or any part thereof) or the source of such income."

22. This was not initially successful in that HMRC failed to respond in a timely fashion and when they did they failed to engage with what the order had actually asked for. What they did provide included their computerised records derived from what they indicated was the appellant's tax returns, apparently for 2003/4 (outside the period asked for) and 2004/5. The appellant's daughter disputes that they relate to him. They show among other matters a figure for "profit from partnerships" and "profit from UK land and property". Those matters may, if established, call into question whether the appellant at the time covered by that material met the conditions of entitlement for income support at all and or, if he did, whether he had

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[2] I record that HMRC subsequently indicated that if such Orders were to be made against them their preference (in view of the vast number of records they hold) would be to be ordered to conduct a "reasonable and proportionate search" rather than "all documents in their possession or control". No application was made to amend the order, however.

capital assets other than those with which I am concerned and/or income also requiring to be taken into account for income support purposes. None of those are the matters with which I am concerned, which are merely the recovery of the claimed overpayment on the basis of his accounts with financial institutions. It is a matter for the DWP whether to further revise the decisions awarding the appellant benefit as a result of this additional information.

23. So far as accounts with financial institutions go, as noted above, banks and building societies are required to report interest to HMRC, formerly under section 17 Taxes Management Act 1970 and now under paragraph 12 of Schedule 23 to the Finance Act 2011. Different mechanisms appear to be in force for ISAs: see http://www.hmrc.gov.uk/isa/isa-guidance-notes.pdf. I required the attendance of a senior official from HMRC to explain why in the light of these provisions no records had been provided, even in relation to an account which it was undisputed the appellant had at the material time. A senior solicitor, a deputy team leader in HMRC's Solicitor's Office, duly appeared before me and helpfully made good the earlier shortcomings in HMRC's response. She explained that the evidence provided through what were formerly section 17 returns was, subject to a de minimis level, captured with a view to matching it to taxpayers' identities. The data is searchable through a system known as "Connect" and was previously through one known as "Third Party Information Mart". Written evidence was provided by a further official of HMRC that she had conducted the relevant searches. There was no "third party information" (which would have included section 17 returns) available for the years prior to 2009/10. Nor was there any available for the years 2009/10 to 2013/14, for which according to HMRC's solicitor there were five possible reasons:

(a) data matching had failed

(b) the accounts did not bear interest

(c) the level of interest was below the de minimis limit

(d) a special status was applied to the taxpayer for security reasons but this was highly unlikely and

(e) the information had been deleted due to effluxion of time.

24. This evidence had some value. On the one hand it points against the existence in 2009/10 and 2010/11 of accounts containing the large sums that would justify the DWP's decision. On the other hand, it also means that no Nationwide account (of whatever numbering) appears either, although that could be explicable by a very low interest rate causing it to fall below the de minimis limit or indeed if the appellant had had to spend the money in it. It goes without saying, bearing in mind the lack of any relevant evidence going back before 2009/10 when the Upper Tribunal's enquiry was made in 2014, that the enquiry would have been better made by the DWP in 2010 or by the First-tier Tribunal in 2012.

25. I then issued an order (and supplemental order) to Nationwide, following which statements and a narrative were provided.

26. The appellant's daughter latterly provided additional evidence going to accounts held by her father and as to building work carried out which it was suggested accounted for sums withdrawn from the West Bromwich account (see below).

27. Having found the tribunal to have been in error of law for the reasons at [17] and [19], I make the following findings of fact:

(a) The appellant had since 10 May 1999 had an account with Portman BS, which was transferred to Nationwide in 2008, where it became Instant Access Account "2857". The account was closed on 7 February 2011. The interest rate was nominal, between 0.1% and 0.4%, and the balance on the account varied between £335 at the start of the period which was the subject of the claimed overpayment (1.4.05) and £345 at the end of it.

(b) Until it was closed on 8 February 2011 the appellant had an account with the West Bromwich Building Society reference 6410 with the balances from time to time shown in the letter dated 13 February 2013 from the Building Society to the appellant's then solicitors which appears in the Upper Tribunal bundle at pages 65 and 66. The account was already in existence at 1 April 2005, when it had a balance of £8,202.53. Balances before then are not directly in evidence. From that account £10,000 was withdrawn on 17 May 2005, and £500 and £4,495, each on 20 March 2010. The sums withdrawn were used for building works carried out to the house and garden at the appellant's former family home at 98….. Road, to accommodate the appellant's increasing disability and otherwise, as set out in the appellant's daughter's letter of 8 June 2015 (UT pp209-210)

(c) The appellant had a further account with the Nationwide, once again following transfer from Portman BS in 2008, whose number ended in 8458. Direct evidence is available as to its balance only from 19 July 2008, until 14 February 2014 when it was closed. Fluctuations in the balance were minimal and it may be taken as £105 throughout. The appellant's daughter disputes that he had this account but I am satisfied in the light of the evidence from Nationwide that he did.

(d) Between 10 May 1999 and 9 October 2007 the appellant had an account with Portman BS in which the balances were as appear at pages 189 and 190 of the Upper Tribunal bundle. Apart from momentarily on 9 October 2007 the balance never exceeded £350. This was in due course transferred to the Nationwide where it became, on the balance of probabilities, the account referred to in (c) above.

(e) The appellant at no time had an account with Nationwide corresponding to the various account numbers in the papers ending in 2822. Nobody (including the Nationwide themselves) have been able to produce corroborative evidence of such an account. In the light of the course events have taken, I conclude that the appellant in signing the statement referred to at [2] above, was acknowledging holding an account with Nationwide rather

than one with the specific 2822 number. The GMS information asserting that such an account was held was in error.

28. I am prepared to accept on the sparse evidence I have, that the sums withdrawn from the West Bromwich account were necessarily spent and that the appellant should not be treated as continuing to possess them (indeed, the Secretary of State's representative queries whether it would be open to me to do otherwise in the light of the appellant's present poor mental capacity.)

29 It follows from these findings that (as I understand the Secretary of State's representative to accept) the only period now falling to be considered is that from the Secretary of State's self-imposed start date of 7 January 2005 to 16 May 2005 (the date before withdrawal of the funds for the first tranche of building work from the West Bromwich BS). During that time, but not thereafter in the period covered by the present decision, the appellant's capital may have exceeded the capital limit (£8,000) then in force.

(Signed on the Original)

C G Ward

Judge of the Upper Tribunal

2 February 2016