

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. CH/1521/2015**

**Before: Upper Tribunal Judge K Markus QC**

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 17 February 2015 under number SC147/14/01379 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

**Directions**

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**
- 3. The parties to the First-tier Tribunal appeal should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
- 4. The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

**These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

**REASONS**

**Introduction**

- 1. This appeal concerns two decisions by the First Respondent that it overpaid housing benefit to the Appellant and that the overpayments are recoverable. The Appellant's appeal was dismissed by the First-tier Tribunal on 17 February 2015. The First Respondent's response to my grant of permission to appeal generated some further observations and directions by Upper Tribunal Judge Mark, to whom the appeal had been transferred at that time. I subsequently invited the Secretary of State to join the proceedings and make submissions, because it seemed to me that those directions raised matters which may be of wider importance. The Secretary of State accepted the invitation and made written submissions.**

2. No party has requested an oral hearing of the appeal and I have decided that an oral hearing is not necessary. This is an appeal on a point of law. Oral evidence is irrelevant.

### **Background facts**

3. The Appellant had lived with his wife and children in the family home since April 2001. The tenancy was in the Appellant's wife's name. The landlord was and is the Respondent local authority ("the Council"). The Council is also the housing authority with responsibility for funding and administration of housing benefit. The Council's housing stock is managed by Sheffield Homes, an arms length management organisation which, although created by the Council, is independent of it. Its employees are not Council employees. It acted as the designated office for the purpose of notification of changes in circumstances relating to housing benefit but for the purposes of this appeal I accept the Council's assertion that Sheffield Homes did not exercise any other benefit functions on its behalf.
4. The Appellant had claimed housing and council tax benefit in respect of the rent since he moved to the family home. Housing benefit was paid by the Council by way of a rent rebate which was credited the Appellant's wife's rent account. The Appellant's relationship with his wife broke down and the Appellant moved out of the family home in January 2013. Housing benefit continued to be paid by way of rent rebate credited to his wife's rent account. In June 2013 the Council received information indicating that the relationship had broken down. It wrote to the Appellant asking for details of changes in his circumstances. Copies of these letters are missing from the bundle. The Appellant's claimed that he did not receive the letters. In any event, he did not reply. On 2 July 2013, in the absence of a response from the Appellant, the Council terminated his housing benefit with effect from 17 June 2013, which was the Monday following the date of change to his wife's tax credits made consequent on their separation. On 2 July 2013 the Council decided that housing benefit paid between 17 June and 2 July was an overpayment.
5. On 5 September 2013 the Appellant's wife wrote to the Council saying that the Appellant had left the family home on 12 January. She said that she would have put a claim in earlier but that the Appellant had told her to keep the existing claim because they might get back together. On 18 September the Council decided that there had been an overpayment of housing benefit between 14 January and 17 June 2013.
6. On 28 January 2014 the Appellant wrote a letter of appeal. He said that it was not his responsibility to notify a change of circumstances, as he was not the tenant. The Council refused to change the decision. On 5 August 2014 the Appellant wrote stating that he had tried calling "housing and benefits" but that "as the house and indeed claim was not in my name due to data protection I was unable to make any changes and this was the Tennant [sic] to make not myself. I exhausted all options I could try." It is clear from the written submissions and other documents (and it is not disputed) that the reference to "housing and benefits" and, in later correspondence, to "housing", is a reference to the local housing office of Sheffield Homes.

7. On 15 October the Appellant sent written submissions to the First-tier Tribunal repeating that he had not been able to communicate with “housing” and saying that, had housing benefit been claimed by his ex-wife after he left, she would have been entitled to more benefit than had in fact been paid as she was not working and he had been. He sent additional submissions, received by the First-tier Tribunal on 27 October, in which he also said that housing benefit had been claimed by him rather than his wife because that is what housing officers told him to do. He explained that he had been homeless when he first left the family home and so had not tried to inform housing of the position immediately, but after a short while he tried but could not speak to anyone because of data protection issues.

### **The decision of the First-tier Tribunal**

8. An oral hearing took place before the First-tier Tribunal on 17 February 2015. The Appellant was present and a presenting officer attended on behalf of the Council. The Appellant explained the matters set out in his written submissions. Otherwise he did not dispute the facts.
9. The First-tier Tribunal confirmed the Council’s decisions. It decided that the Council was not aware that the Appellant had left the premises in January 2013 that housing benefit was paid throughout the relevant period, that the Appellant was aware that he was the claimant and was aware of his obligation to notify the Council of any change in circumstances including that he had left, and that he did not make any such notification. The tribunal concluded:

“13. The responsibility was on him and although he maintains that his wife should have notified the Local Authority this does not absolve him of his responsibility. I do not find that there has been any official error and that the overpayment for the periods is recoverable. Notwithstanding his domestic situation it would have been reasonable for [the Appellant] to have notified the Local Authority.

14. While I can understand the difficulties [the Appellant] would have had following the separation from his family nevertheless the benefit continued to be paid to him as claimant when it should not have been and it is therefore recoverable.”

### **The submissions in the Upper Tribunal**

10. In the Upper Tribunal proceedings the Appellant has further explained the unsuccessful attempts he had made to contact “housing” and that he had thought that his ex-wife would have made her own claim for housing benefit. In addition, he said that letters were sent to the former family home and thrown away by his ex-wife, so she bore responsibility for at least some of the overpayment. Finally, he said that no more benefit had been paid than his ex-wife would have been entitled to had she claimed in her own right.
11. The Council does not support the appeal. It does not accept that the Appellant was advised that he had to claim for housing benefit because he was in employment. Either member of a couple may make a claim. In any event, such advice would not amount to official error because it did not cause the overpayment. The Appellant understood that he was under an obligation to notify the designated office (Sheffield Homes) that he had moved out of the family

home. Overpayment of housing benefit arose because he did not do so. Although the First-tier Tribunal's statement of reasons did not refer to the Appellant's claim that he unsuccessfully attempted to notify Sheffield Homes that he had moved out, the Council submits that it is implicit in the tribunal's reasons that it rejected his account, because it said "I do not find that he had made any notification himself to the Local Authority". If that is wrong, consideration of the Appellant's factual case in that respect would not have materially affected the final decision because the Appellant's evidence was not believable. All overpayments are recoverable unless arising from official error in accordance with regulation 100 of the Housing Benefit Regulations. Any actions or inactions by Sheffield Homes in the exercise of the designated office function may amount to an error within regulation 100. However Sheffield Homes was not required to advise the Appellant to contact the Council as it does not appear that it knew that he had moved out. In any event the Appellant contributed to the error by not contacting the Council himself. The Council accepts that if contrary to its position there was an official error, the Appellant may not have been reasonably expected to know that he was receiving an overpayment because it was paid by way of rent rebate to his former wife's account and he did not receive notice of the payments.

12. The Council says that the sums in question were not simply internal bookkeeping entries. They were paid to in accordance with section 134 Social Security Administration Act 1992. His ex-wife did not make a valid claim for housing benefit before August 2013 and so it is impossible to say whether she would have been entitled to housing benefit for the period in question.

### **Legal Framework**

13. One of the basic conditions of entitlement to housing benefit is that the claimant is liable to make payments in respect of a dwelling: section 130(1)(a) Social Security Contributions and Benefits Act 1992. Regulation 8 of the Housing Benefit Regulations 2006 ("the Regulations") provides for the circumstances in which a person is to be treated as liable to make such payments, and includes the partner of the person who is liable to make them. Regulation 82 provides that a couple may agree which of them is to make the housing benefit claim. By regulation 2(1), "partner" means a member of a couple, and a "couple" includes two people who are married to each other and are members of the same household.
14. Section 134(1A) Social Security Administration Act 1992 (SSAA) provides that where rent is due to a local housing authority, housing benefit shall take the form of a rent rebate. By section 134(2) this may be by way of:
- "a) a payment or payments by the authority to the person entitled to the benefit;
  - b) a reduction in the amount of any payments which that person is liable to make to the authority by way of rent; or
  - c) such a payment or payments and such a reduction;
- and in any enactment or instrument ... "pay", in relation to housing benefit, includes discharge in any of those forms."
15. Regulation 88(1) of the Regulations sets out the duty to notify a change of circumstances as follows:

“... if at any time ... during the award of housing benefit, there is a change of circumstances which the claimant, or any person by whom or on whose behalf sums payable by way of housing benefit are receivable, might reasonably be expected to know might affect the claimant’s right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances by giving notice to the designated office:

(a) in writing; or

(b) by telephone –

(i) where the relevant authority has published a telephone number for that purpose ...”

16. Regulation 2(1) defines “designated office” as “the office designated by the relevant authority for the receipt of claims to housing benefit”.

17. Regulation 99 defines an overpayment as “any amount which has been paid by way of housing benefit and to which there was no entitlement under these Regulations”.

18. Regulation 100 provides for recovery of overpayments as follows:

“(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.

(2) Subject to paragraph (4) this paragraph applies to an overpayment which arose in consequence of 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.

(3) In paragraph (2), “overpayment which arose in consequence of an official error” means an overpayment caused by a mistake made whether in the form of 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 other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission.”

## **Discussion**

### **Overpayment**

19. The Appellant disputes that there was an overpayment, because he says his ex-wife would have been entitled to housing benefit after he left. His views as to this are understandable, but the legal position is different.

20. While they were living together, both the Appellant and his wife were entitled to claim housing benefit because regulation 8 treated them both as liable to pay the rent. Entitlement to benefit is dependent on making a claim (section 1(1) Social Security Administration Act 1992). Regulation 82 allows a couple to choose who should be the claimant, but they cannot both be. As the Appellant was the claimant in this case, only he was entitled to housing benefit. Section 134(2)(b) of the SSCA meant that housing benefit could be paid by way of rent rebate to his ex-wife’s rent account.

21. After the Appellant left the family home, he was not entitled to housing benefit in respect of the rent for that property as he was no longer treated as liable to pay the rent. The Appellant's ex-wife was not entitled to housing benefit because she had not made a claim. It follows that housing benefit paid after he left the home was an overpayment within the meaning of regulation 99.

Official error

22. The Council disputes the Appellant's assertion that he was told to make the housing benefit claim but submits that, even if he was, that was not an official error causing the overpayment. I agree. While there could have been no overpayment to the Appellant if he had not been the housing benefit claimant, the overpayment did not arise in consequence of that circumstantial factor. Taking a common sense view, the overpayment arose because the Council was not aware that the Appellant had moved out of the family home.
23. The Appellant's case was that he attempted to inform the housing office (Sheffield Homes) that he had left the family home but that the housing office would not speak to him because he was not the tenant, and so he told his ex-wife and she said she would deal with it. He says that there was nothing more that he could have done. The First-tier Tribunal did not make any determination of the Appellant's factual case in this respect. Although it found that the Appellant did not notify the Council that he had moved out, it did not explain the basis of that finding nor whether it had considered the possibility that he had attempted to notify Sheffield Homes.
24. I reject the Council's submission that this omission was immaterial because the Appellant's account was implausible. The Council relies on the fact that the Appellant did not originally say that he had attempted to contact the housing office, but there may have been an acceptable explanation for this. The Appellant was present at the oral hearing and the First-tier Tribunal could have questioned him as to his case and the way in which he developed it, and made its own assessment of the facts. I do not accept the Council's submission that it is inherently implausible that the local housing office would have refused to discuss matters with the Appellant. Again, this is a matter which the First-tier Tribunal should have explored further and upon which it should have reached its own finding on the evidence.
25. The Court of Appeal in R(Sier) v Housing Benefit Review Board of Cambridge City Council [2001] EWCA Civ 1523 said that the purpose of what is now regulation 100(3) is that "a person is to be relieved of the obligation to repay an overpayment when that has been occasioned by an administrative mistake and not by any fault on the part of the recipient" (paragraph 25). Regulation 100(3) raises a single composite question: "was the overpayment the result of a wholly uninduced official error, or was it rather the result of the claimant's own failings...?" (paragraph 30). As the Commissioner said in R(H) 10/08, "the issue should be approached by posing the broad common sense question as to what was the substantial cause of the overpayment".
26. I conclude that it would have been open to the tribunal, if it had accepted the Appellant's factual case, to decide that the substantial cause of the overpayment was the failure by the local housing office to allow the Appellant to report a

change in circumstances rather than a failing of the Appellant. The local housing office of Sheffield Homes was the designated office to which the Appellant was obliged to notify a change of circumstances. In the light of regulation 100(3)(b), the Council correctly concedes that a mistake by staff at the local housing office in respect of that function may amount to an official error. In the case of a couple, the tenant and the housing benefit claimant may be different people, and so it was incumbent on the housing office to have some means of enabling a claimant who was not the tenant to notify a change of circumstances. I do not agree with the Council that there would only have been an official error if the Appellant had not only contacted the housing office with a view to informing them that he had moved out, but had also told the housing office that he had in fact moved out and that he was contacting them in connection with his benefit claim. This would depend on the facts, in particular what happened during the telephone conversation, and the tribunal's assessment as to whether the Appellant could reasonably have done more to explain the reason for his contacting the housing office or to have notified the change of circumstances. In that context, it is relevant to bear in mind the observation of Upper Tribunal Judge Mark in West Somerset District Council v JMA (Housing Benefit) [2010] UKUT 190 (AAC): "It is self evident that claimants need help to know what they are to do to comply with the rules as to benefits." (paragraph 26).

27. Finally the Council now concedes that on the facts of this case it could not be said that, at the time of receipt of payment or of notice relating to it, the Appellant could reasonably have been expected to realise that there was an overpayment for the purposes of regulation 100(2). I agree with this. The Appellant did not receive housing benefit payments because they were made by way of rebate to his wife's rent account. If his factual account is accepted, he did not receive notices relating to the payments because his wife did not forward letters to him.
28. It follows from the above analysis that the First-tier Tribunal materially erred in that it failed to address the relevant factual or legal issues involved in deciding whether the overpayment in this case was not recoverable pursuant to regulation 100(2) and (3). On that basis, I allow the appeal.

#### Other issues

29. In the light of my conclusions above, it is not necessary for me to determine whether the First-tier Tribunal also made errors of law in deciding that the overpayment was recoverable from the Appellant. However, if the First-tier Tribunal which considers this case on remittal decides that there was a recoverable overpayment, this issue will arise and so I briefly address it.
30. The effect of regulation 101(2), which I have not set out, is that an overpayment is generally to be recovered from the person to whom housing benefit was paid or from the claimant, if different. But if it arose in consequence of an official error which the person to whom the benefit was paid (and not the claimant) could reasonably have been expected to realise that it was an overpayment, it is only recoverable from that person and not the claimant.
31. Judge Mark had raised the possibility that the overpayment was in truth merely a matter of accounting or that any overpayment should be recovered from the Appellant's former wife rather than the Appellant if she was in any event entitled

to benefit during the overpayment period. As for the former, such a circumstance is addressed by regulation 104(1) which provides for the amount of a recoverable overpayment to be reduced by the housing benefit to which the claimant or their partner were entitled during the period in question. It does not apply in this case as the Appellant and his wife were not partners during the overpayment period. In addition the Secretary of State's representative thought that regulation 100(4) might apply in this case but has not elaborated on this and there is no evidence to support such a finding.

### **Disposal**

32. In the light of my decision that the First-tier Tribunal erred in law, I set aside its decision. As is clear from what I have said, further findings of fact are required. I am not in a position to make those findings on the evidence before me. Therefore I have decided to remit the appeal to a differently constituted First-tier Tribunal for fresh determination.

**Signed on the original  
on 13 May 2016**

**Kate Markus QC  
Judge of the Upper Tribunal**