

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

Before Upper Tribunal Judge Kate Brunner QC

This appeal by the respondent succeeds.

The decision of the First-tier Tribunal reference SC240/15/00902 involved an error of law.

I set aside that decision and remake it in the terms below.

The overpayment of housing benefit for the entire period in dispute (27 January 2014 to 28 February 2015) is recoverable.

This decision is made under section 12(1), 12(2)(a), 12(2)(b)(ii) and 12(4) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Factual Background

1. The issue in this case is the interpretation of regulation 100(2) of the Housing Benefit Regulations 2006 relating to recoverability of overpayments of housing benefit:

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

(2) Subject to paragraph (4) this paragraph applies to an overpayment caused by 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.

2. The claimant applied for housing benefit in January 2014. He was sent notification on 3 March 2014 that he was entitled to housing benefit. That letter notified the claimant that a payment for arrears covering January and February 2014 was being made on the 3 March 2014, and that ongoing payments would be made. All payments were to be by BACS direct to the claimant's account. There is no evidence as to when the letter or payment was received but it is likely that the BACS payment was received on 3 March 2014 and the letter shortly thereafter.
3. On 24 February 2015 the Local Authority decided that the claimant had been overpaid housing benefit for the period of 27 January 2014 to 28 February 2015. The claimant appealed, arguing that no

payment was recoverable as he had made full disclosure of his wages.

4. The First-tier tribunal ('FTT') heard the appeal on 10 September 2015 and 19 January 2016. The claimant did not attend.
5. The overpayment of housing benefit arose from two sources. One was undeclared earnings by the claimant's partner. The FTT found that led to a recoverable overpayment, and there is no appeal on that point.
6. The second source of overpayment was a miscalculation by the Local Authority of the claimant's earnings. The claimant had two employers and provided wage slips from both. The Local Authority used one set of wage slips only when calculating benefit.
7. It was accepted by the Local Authority that the overpayment had arisen as a result of an official error. However the Local Authority submitted that the overpayment was recoverable because the claimant should have realised he was being overpaid, having received the letter on 3 March 2014 which set out the incorrect figure for weekly income (p50). In other words, the claimant had real or imputed 'guilty knowledge' from the start of his receipt of the benefit.
8. The FTT allowed the appeal in part. It found that the claimant would have been able to realise that the income used in the calculation was incorrect if he had read the letter dated 3 March 2014. There was no evidence from him about any difficulties in understanding the letter. He could reasonably have been expected to realise he was being overpaid on receipt of the letter. The FTT found that payments made after that letter was received were recoverable, but payments made before that letter was received were not recoverable as the claimant had no idea that he was being overpaid. The effect of this was that part of the overpayment, in respect of the period 27 January 2014 to 28 February 2014, was not recoverable. The remainder was.
9. The Local Authority appealed the FTT's decision. Permission to appeal was given by the FTT on 18 May 2016 on the ground that it was arguable that the FTT had incorrectly interpreted regulation 100.
10. The Local Authority submits:
 - (1) that the FTT was wrong to find that the period 27 January 2014 to 28 February 2014 was not recoverable
 - (2) that the FTT focussed on one limb of the test, namely whether the claimant could reasonably have been expected to identify the overpayment when he received the payment

- (3) that the FTT did not address the other limb of the test, namely whether the claimant could reasonably have been expected to identify the overpayment when he received notice relating to that payment
 - (4) that the letter of 3 March 2014 was a notice relating to that payment
 - (5) that as the FTT found that the letter of 3 March should have alerted the claimant to the overpayment, the FTT should have found that the period 27 January 2014 to 28 February 2014 was recoverable.
11. The claimant has not made submissions to this tribunal.

Discussion

12. This appeal raises a number of issues of construction and application of regulation 100, namely:
- (1) Should an overpayment be looked at as a whole, or as a series of payments?
 - (2) Does a claimant have to prove both limbs of s100 or only one?
 - (3) Where a notice bestows or imputes 'guilty knowledge' is a payment made before receipt of that notice recoverable?
13. Where I refer to 'overpayments' in this decision, it should be understood that I am referring to overpayments which are caused by an official error, and which are therefore potentially not recoverable if the remainder of regulation 100(2) applies.

Should an overpayment be looked at as a whole, or as a series of payments?

14. Local Authorities will often refer to 'an overpayment' when talking about series of payments, each of which they say is an overpayment. However, regulation 100 can only properly be applied by a Local Authority or tribunal if each of those alleged overpayments is considered separately, given that a claimant's actual or imputed knowledge will change over time.
15. I note that this is in line with the approach taken by the tribunal and local authority in this case, and in line with previous case law including *CH 858 2006* in which Judge Jacobs said this, addressing a parallel provision in the 1987 regulations:

'There are two respects in which an overpayment may undoubtedly be split so that part is recoverable and part not. I have already referred to the distinction drawn in regulation 99 between overpayments that were caused by official error and those that were not. As I have said, I accept the point made by Ms Jackson on this

distinction. The legislation also requires, when appropriate, that an overpayment is split by reference to time. The focus of attention under regulation 99(2) is on the time of 'the payment' or notice of the payment. That requires an individual consideration for each payment or notice. And that inevitably requires the overpayment to be split by reference to time if different considerations applied at different times so that the claimant could reasonably have been expected to realise that an overpayment was being made for part of the time but not for the remainder.'

16. The question should therefore be answered: 'an overpayment should be looked at as a series of payments'.

Does a claimant have to prove both limbs of s100 or only one?

17. A claimant has the burden of proving the 'defence' under s100(2) (*CH 4918/2003*), but what is it that s/he has to prove? Is it that either s/he had no actual or imputed 'guilty knowledge' at the time of receiving the money or s/he had no actual or imputed 'guilty knowledge' receiving a notice? Or is it that s/he had no actual imputed 'guilty knowledge' at the time of receiving the money and s/he had no actual or imputed guilty knowledge at the time of receiving the notice. The regulation could arguably on its face be interpreted in either way.
18. The limb relating to notice of payment has raised a number of issues over the years. It is useful to return to its history and the rationale of the overpayment regulations as a whole, and I cannot do better than quote Commissioner Jacobs (as he then was) in *CH/1176/2003* (again dealing with the predecessor of regulation 100):

'7. Regulation 99(2) applies only to overpayments for which the claimant was in no way responsible. Nonetheless, it allows recovery in limited circumstances. Those circumstances are that the claimant could reasonably have been expected to realise that an overpayment was being made at a specified time. The specified time is either when the payment is received or when notice relating to the payment is received.'

8. The context in which regulation 99(2) will operate is relevant. It only applies to cases in which the claimant was on low income at the time of the payment. And the payment involved will have been made to help the claimant pay rent on a dwelling. In those circumstances, it is likely that the money will be spent fairly quickly. That, I believe, accounts for the emphasis on the time of payment or notice relating to payment. If the claimant could not reasonably have been expected to realise that an overpayment had been made, it is likely that the money will have been spent and spent in

reliance on the claimant being properly entitled to it. In other words, regulation 99(2) contains an element of protection for a claimant who has relied on being entitled to the payment. The provision is not worded in those terms or limited to cases where there has been reliance. But that rationale provides a context in which the terms of the legislation must be interpreted.

9. The reference to the time of receipt of any notice relating to the payment was inserted into regulation 99(2) by amendment in 1991. Circular HB/CCB 90/23 states that its purpose was to cover cases of rent rebate in which no money is actually transferred to a claimant. But the wording is not limited to cases of rent rebate. The wording is general and there is no reason to limit it to those cases. It is equally relevant to cases in which money is actually paid to the claimant, because the notice may explain the basis on which it is being paid.

10. In short, regulation 99(2) protects the public purse by allowing for the recovery of an overpayment for which a public official was wholly responsible, subject to protection for a claimant in circumstances in which there could reasonably have been reliance on entitlement to the payment.'

19. Any interpretation of regulation 100 where there is ambiguity must bear that rationale in mind.
20. In *R(H) 1/02* Commissioner Turnbull as he then was dealt with a case where part of the overpayment was a sum credited to the claimant's account in error on 10 August, and notified to the claimant on 15 August. That case dealt with previous regulations in the same terms as regulation 100. Paragraph 6(2)(a) reads as follows:

*'The question is whether 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." The time of "receipt" of this payment may, on a correct analysis, have been 10 August 2000 (the date when it was credited to the Claimant's rent account), and at that date the Claimant was of course unaware that it had even been made. She was not aware of that until she attended with her rent card on 17 August. But even if the time of receipt was 10 August, and not 17 August when she actually received a financial benefit by not paying the instalment of rent which she had been expecting to have to pay, the words of Reg. 99(2) which I have just quoted did not in my judgment render the payment irrecoverable unless she could not have been expected to realise that it was an overpayment both (a) when she received the payment **and** (b) when she received "any notice relating to that payment." It is possible to argue that those words mean that the payment is irrecoverable if the relevant person*

could not at one or other of the two dates reasonably have been expected to realise that it was an overpayment. However, the more natural reading is in my judgment that if the relevant person could at either of the dates reasonably have been expected to realise that it was an overpayment, the exception in Reg. 99(2) does not apply.

21. I agree that the more natural reading of regulation 100 is that a claimant must show that they did not have actual or imputed guilty knowledge on both of the two dates: date of receipt of payment and date of receipt of notice.
22. The alternative reading would lead to absurdity. Consider a claimant who received a £10,000 bank transfer on a Monday but was unaware who it was from, and received a letter on a Tuesday which made crystal clear that it was from the Local Authority and there had been an error in calculation. The claimant might say 'I could not have been expected to realise that the payment was an overpayment on Monday when I received the payment'. If a claimant only had to show lack of guilty knowledge on one of the dates, the payment would not be recoverable. If a claimant had to show lack of guilty knowledge on both dates, she would fail to show lack of guilty knowledge on receipt of the notice and the £10,000 would be recoverable.
23. The natural reading also fits with the rationale of the regulations with one caveat: the Local Authority and tribunal should interpret 'any notice relating to that payment' as being a notice close in time to the payment. If 'any notice relating to that payment' is interpreted too widely, the potential for gross unfairness to the claimant arises. As pointed out by Commissioner Jacobs (as he then was) in *CH/1176/2003* at para 31, a wide interpretation could encompass a letter months after an overpayment saying 'we have paid in error', which would plainly defeat the purpose of the legislation.
24. In *R(H) 1/02* at paragraph 6(2)(b) Commissioner (as he then was) Turnbull interpreted the phrase in this way (my emphasis):

'The notices dated 15 August 2000 were clearly "relating to that payment" within the meaning of Reg. 99(2). No doubt some limitation must be placed on the word "any" in the phrase "any notice relating to that payment" so that a notice which is not sufficiently closely related to receipt of the payment must be disregarded for this purpose. But here the notices were the first written notification of the payment and were received by the Claimant at or about the same time as she became aware of the payment.'
25. I adopt that phraseology, save that I would add that a notice alerting a claimant to a payment before that payment is received is also capable of being a notice 'relating to that payment'. It would be

unhelpful to propose a definitive timeframe, but the rationale of the legislation should be borne in mind, that those on low incomes who have innocently used money which they believed was theirs should not be penalised by recovery of that sum.

26. I am alive to the potential argument that this narrow reading unnaturally restricts the phrase 'relating to'. Thus, a notice sent one month after a payment is received, which is the first document sent referring to that payment, and which clearly on its face refers to and explains that payment, would ordinarily be said to 'relate to' that payment. Under the narrow interpretation above, it would not relate to the payment for the purposes of regulation 100. This mild violence to the English language is considerably more tolerable than the absurdity and unfairness caused by the alternative interpretation.
27. The question is answered in this way: a claimant has to prove both limbs of regulation 100(2). A claimant must prove lack of actual or imputed guilty knowledge both at the time of receipt of payment, and at the time of receipt of notice relating to that payment, which means a notice before, at, or about the same time as the payment.

Where a notice bestows or imputes 'guilty knowledge' is a payment made before receipt of that notice recoverable?

28. An overpayment made after a notice which bestows or imputes guilty knowledge is plainly recoverable (either on the basis that the claimant has guilty knowledge at the time of the notice relating to the payment, or that they have guilty knowledge at the time of receipt of each subsequent payment). What of an overpayment made before the notice, in a situation where the claimant did not have guilty knowledge until receipt of the notice?
29. On the face of the regulation, a payment made is recoverable if a notice relating to that payment bestows or imputes guilty knowledge. The regulation does not say that the notice has to be before the relevant payment in order for it to trigger recoverability of that payment. The only requirement is that the notice relates to 'that payment' : any payment which the notice relates to is recoverable, whether the payment is made before or after the notice. If the phrase 'relating to that payment' is interpreted narrowly, as I have done above, then there is no difficulty caused by this literal reading of the regulations.
30. There is no basis for inserting a requirement that a notice only triggers recoverability of payments which are later in time. Such an interpretation would plainly lead to absurdity. On that basis, our claimant who receives a £10,000 on Monday from an unknown source, and a letter on Tuesday putting her on notice of the error, could hide behind the chronology to say that the money was

irrecoverable. Recoverability would be dictated by the relative swiftness of the postal system and the banking system.

31. In some Upper Tribunal cases, payments made before a notice imputing guilty knowledge have been deemed recoverable. In *R(H) 1/02* Commissioner Turnbull found that a claimant had guilty knowledge from receipt of a notice on 15 August. He found that a sum credited 5 days previously was recoverable.
32. However, In *KR v City and County of Swansea [2015] UKUT 185 AAC* Judge Wright emphasised that if a decision notice is the sole basis of it being argued that a claimant could reasonably have been expected to realise they were being overpaid, that expectation could not arise before the person had received the decision notice and read it:

1. The parties are agreed that the First-tier Tribunal ("the tribunal") erred in law for the reason I gave when I gave permission to appeal. This was:

"I give permission to appeal, however, because it seems to me very well arguable that the tribunal erred in law in concluding that the "official error" overpayment was recoverable even for the period before [the appellant] received the 27 January 2014 notice. Given the finding of the First-tier Tribunal that [the appellant] (could only have) realised he was being overpaid once he had read the 27 January 2014 notice, surely the overpayment can only be recoverable from that date and not 18 January 2014. In the circumstances it seem to me that the correct decision ought to have been that the overpayment is only recoverable from either 27 January 2014 or, more arguably, the date [the appellant] received this notice (say, 30 January 2014) and that, if it is agreed the First-tier Tribunal erred in deciding the overpayment was recoverable from 18 January 2014, its decision ought to be set aside and I make the decision it ought to have made."

2. As I say, both parties are agreed that the tribunal erred to this extent, and I agree with them. It is a not infrequent error made by local authorities and the First-tier Tribunal. If in an 'official error' case, as here, the sole basis for the claimant being reasonably expected to realise he is being overpaid is the decision notice, axiomatically that expectation cannot arise before he or she has received the notice and read it. Here it is conceded that that date was 30 January 2014, and accordingly the overpayment is only recoverable from then.'

33. I do not read this decision to be saying that under no circumstances can an overpayment made before the date of a notice which

imputes guilty knowledge be recoverable. If that was its meaning, then I would disagree. I read this decision to be directed at the erroneous practice of treating a series of overpayments as a single overpayment, and leaping from a finding that the claimant had guilty knowledge at some point to a finding that the entire series of overpayments is recoverable, whenever they occurred.

34. Another way of formulating this decision would be that the notice received on 30 January 2014 could not be said to relate to a payment on 18 January, applying the narrow formulation as above. Thus, the claimant had shown that both at the time of receipt of the 18 January payment and at the time of receipt of any notice relating to that payment (which there was none) she had no actual or imputed guilty knowledge, and that payment was therefore not recoverable.
35. I would therefore answer the question in this way: where a notice bestows or imputes guilty knowledge a payment made before receipt of that notice is recoverable providing that the notice relates to that payment, and applying the narrow interpretation of that phrase as above.

Decision

36. The First-tier Tribunal made an error of law in its interpretation and application of regulation 100(2). That decision is therefore set aside. I have sufficient information to remake the decision.
37. The payments of housing benefit to the claimant for the period from 27 January 2014 to 28 February 2015 included an overpayment of £3,165.28.
38. A small part of this overpayment arose because the claimant's partner's income had not been declared. There is no suggestion that this payment arose because of an official error, and this payment is recoverable under regulation 100.
39. The remainder of the overpayment arose because the Local Authority had overlooked one of the claimant's jobs. The claimant had provided wage slips for all employment. It is accepted that this overpayment was an official error and I find that it was.
40. The claimant was sent notification on 3 March 2014 that he was entitled to housing benefit. That letter notified the claimant that a payment for arrears covering January and February 2014 was being made on the 3 March 2014, and that ongoing payments would be made. The weekly income figure is clearly stated on the letter, and the discrepancy between that weekly income figure and the claimant's actual income is stark. There is no assertion from the

claimant that he did not understand the letter. I find that the claimant on reading the letter of 3 March 2014 should have realised that his income was grossly understated (by about a half), and should have realised that understatement of his income would lead to overpayment of benefit.

41. The claimant would have received the letter a few days after its date, and therefore a few days after the payment of arrears which was made by BACS transfer on 3 March 2014. Thus, the letter of 3 March was a notice which 'related to' that BACS transfer, and to subsequent payments. The claimant could reasonably have been expected to realise at the time of receipt of that notice that the calculation was in error, and therefore that the payment of arrears was an overpayment. The claimant could reasonably have been expected to realise at the time of all subsequent payments that they were overpayments.
42. The claimant therefore does not bring himself within the exception in regulation 100(2) in relation to any of the payments of housing benefit, and as a result all of the overpayments are recoverable under regulation 100(1).

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 2 September 2016