

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

As the decision of the First-tier Tribunal (made on 2 June 2017 at Stockport under reference SC946/16/00129) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the claimant's purported appeal against the decision contained in the letter dated 29 December 2015 is outside the First-tier Tribunal's jurisdiction under section 38 of the Tax Credits Act 2002 and is struck out.

REASONS FOR DECISION

1. In England and Wales, all courts are statutory, as are the tribunals under the Tribunals, Courts and Enforcement Act 2007. For some, their jurisdiction is general; for others, it is limited. It is the nature of tribunals that their statutory jurisdiction is limited. In this case, the First-tier Tribunal Judge lost sight of the limits on the jurisdiction and powers of his tribunal, and was drawn into applying an approach that might (I put it no higher than that) have been permissible if he had been exercising general jurisdiction.

A. History and background

2. The claimant was paid tax credits of £2519.20 for the tax year 2014/2015 pursuant to a decision of 29 May 2014. That was based on an income figure of £6063. On 14 October 2015, the Commissioners decided that the correct entitlement was £136.84, based on an income of £17,751. This led to an overpayment of £2382.36. I do not know when the claimant was notified of that. He must have asked the Commissioners to reconsider the matter, because on 29 December 2015, the Commissioners wrote to the claimant explaining why he remained liable for the overpayment and how it could be recovered from him.

3. The claimant purported to exercise a right of appeal to the First-tier Tribunal against the decision in the letter of 29 December 2015. The case first came before a judge for decision on 11 November 2016, when the appeal was dismissed. That decision was set aside and the case came before a different judge on 2 June 2017. This time the appeal was allowed. I gave the Commissioners permission to appeal against that decision.

4. The claimant has replied to the appeal, but has asked for an oral hearing. The Upper Tribunal has a discretion whether or not to hold a hearing: rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The test I have to apply is whether 'fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake': *R (Osborn) v Parole Board* [2014] AC 1115 at [2(i)]. I am required to have regard to the claimant's views: rule 34(2).

His only reason is 'I would like to be present to hear the decision.' He has not suggested that he would be able to contribute any useful argument to counter those put by the Commissioners and I can see no value that a hearing would add to the proceedings. It is clear that there is only one decision that I could properly make on this appeal. I now explain why.

B. The First-tier Tribunal's reasoning

5. The judge's reasoning was this. he began by setting out some fundamental principles of administrative law:

- A claimant must be able to understand what the Commissioners' decision says.
- A tribunal must also be able to see what the decision says.
- The right of access to justice is a paramount constitutional right.
- There must be an unimpeded right to a specialist tribunal.

He then cited decisions of the Upper Tribunal that had criticised the manner in which tax credit appeals were prepared and presented.

6. The next step in his reasoning was that a challenge to an overpayment could only be by way of a change to the underlying entitlement decision. Notification was essential to a decision becoming effective. The Commissioners were unable to provide the fundamental documents on which the overpayment was based, so they could not prove that the claimant had been told to report changes in his income. The Commissioners were unable to prove that there had not been an official error. This lack of documents was not necessarily fatal for the Commissioners, provided there was evidence from other sources. In this case, there was no sufficient evidence to allow a finding in the Commissioners' favour.

C. How the tribunal got it wrong

The letter of 29 December 2015

7. The judge began his written reasons by saying: 'The appellant appeals against a decision dated 29 December 2015.' That was correct, but there were two reasons why the tribunal could not entertain an appeal against that decision. First, there was no right to appeal against that decision. A right of appeal has to be conferred by statute. In the case of tax credits, the right of appeal is conferred by section 38 of the Tax Credits Act 2002. The right is conferred in respect of decisions made under specified sections. The decision conveyed in the letter of 29 December 2015 may have been made under section 28 or section 29 of the 2002 Act. Neither of those sections is listed in section 38 as carrying the right of appeal.

8. Second, even if section 28 or section 29 were listed in section 38, the right of appeal could only be exercised after the decision has been subject to the mandatory reconsideration procedure under section 21A of the 2002 Act: see section 38(1A). That had not been done. It was not possible to treat the letter itself as a mandatory reconsideration of the earlier notification, because that procedure only applies to decisions listed in section 38. It is not possible to bring

a case within section 38 by the simple expedient of going through a procedure that does not apply.

The decision of 14 October 2015

9. The judge recorded, in paragraph 12 of his written reasons: 'The FtT does however have power to set aside the entitlement decision which gives rise to the overpayment.' And in paragraph 15 he said: 'Plainly, an appellant cannot succeed in an appeal in respect of an overpayment of tax credits absent an official error in respect of the entitlement decision.' I will have more to say about official error later, but the judge was right that the way to challenge an overpayment was by way of appeal against the entitlement decision. If that decision was wrong, the overpayment decision would also be wrong. In this case, the entitlement decision was made on 14 October 2015 under section 18 of the 2002 Act. Section 38 confers a right of appeal against a decision made under that section, but only if it has been through the mandatory reconsideration procedure. The claimant had not purported to appeal against that decision and, even if he had, the necessary procedure had not been followed. The result was that the entitlement decision was not before the tribunal and he could not have treated the appeal as against that decision. To be fair to him, he did not do so.

Jurisdiction without an appeal

10. The result of my analysis so far is that the judge did not have an appeal before him. The First-tier Tribunal's jurisdiction in tax credits is limited to appeals. It has no power to act without an appeal. The judge's approach amounted to attacking a decision that was not before him and doing so in order to attack a decision over which he had no jurisdiction. As I said in my opening paragraph, the judge proceeded in a manner that might be permissible in a court of general jurisdiction, but not in a tribunal with limited jurisdiction.

Official error and the lack of evidence

11. I said I would have more to say about official error. The judge relied on official error in support of his argument that the decision-making, in so far as it was in evidence before him, was fatally flawed. Official error is governed by section 21 and applies to decisions made under specified sections. Sections 28 and 29 are not listed in the section. The judge failed to notice that he was applying official error to the only decision that was under appeal before him and that, under section 21, it could not apply. He appears to have assumed that he could find a flaw in a decision other than the one under appeal, and that that would then undermine the decision that was before him. The flaw in that reasoning is once again that he did not have jurisdiction over the decision before him and no flaw in that decision or in any underlying decision could give him jurisdiction.

Other issues

12. In fairness to the thorough submission on behalf of the Commissioners, I should record that it argued that:

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- there was adequate evidence before the judge to make findings that he felt unable to make, and
- assuming the judge had been correct in his criticisms of the decision-making process, he had failed to exercise the power, indeed the duty, that he would have had to determine the claimant's correct entitlement to tax credits.

Given the fundamental flaws I have already identified, I do not consider it necessary to add further to the list.

D. What the tribunal should have done

13. The correct approach for the tribunal was to recognise that it had no jurisdiction to entertain the appeal brought by the claimant and to strike the case out under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. I have re-made the tribunal's decision to that effect.

**Signed on original
on 16 March 2018**

**Edward Jacobs
Upper Tribunal Judge**