

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

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Sutton First-tier Tribunal dated 11 April 2017 under file references SC154/17/01071 and SC154/17/01072 involves an error on a point of law and is set aside.

The Upper Tribunal is not able to re-make the decision under appeal. The Appellant's appeal against the Council's decisions dated 15 November 2016 (CTB) and 6 January 2017 (HB), as both since revised, in relation to her liability to repay overpayments is remitted to be reheard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

- (1) The re-hearing will be at an oral hearing;
- (2) The new Tribunal should be differently constituted from the First-tier Tribunal which considered this appeal at the previous hearing on 11 April 2017;
- (3) The Respondent Council is to provide a supplementary submission, to be sent to the HMCTS regional tribunal office in Sutton within one month of the date of issue of this decision, which includes:
 - (a) A clear headline statement of the precise amounts of the claimed HB and CTB overpayments, omitting the amount of £2,105.67 relating to Hollie's non-dependant status which the Council has now conceded is not recoverable;
 - (b) A comprehensive and comprehensible schedule showing how those headline total overpayment figures have been arrived at by reference to the amounts of HB and CTB the Appellant was respectively entitled to (including underlying entitlement) and paid, and the Appellant's income for each period in issue;
 - (c) Copies of any further documents relevant to the Appellant's housing benefit entitlement between 1 September 2009 and 1 April 2010;
 - (d) Copies of all the bank statements for the relevant period provided by the Appellant (and not simply the multiple copies of the same two statements at pp.254-285).
- (4) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal.

These directions may be supplemented or modified as appropriate by later directions by a Tribunal Caseworker, Tribunal Registrar or District Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The subject matter of this appeal

1. This appeal is about whether the Appellant is liable for the recovery of a substantial overpayment of housing benefit and council tax benefit. The case demonstrates the importance of local authorities providing the First-tier Tribunal with both all relevant documentation and a comprehensible schedule setting out the basis for the calculation of the claimed overpayment.

The oral hearing of this appeal

2. I held an oral hearing of this appeal at Field House in London on 17 January 2019. The Appellant attended and was represented *pro bono* by Mr Richard Butler, Solicitor, of the Free Representation Unit. The Council was represented by Mr Andrew Lane of Counsel. I am indebted to them both for their well-focused submissions. I am sorry this decision has perhaps taken rather longer to issue than I may have indicated at the oral hearing, but the Ministry of Justice's well-publicised IT problems have meant my self-imposed deadline proved to be too ambitious.

An outline of my decision

3. I am allowing the Appellant's appeal to the Upper Tribunal. I am doing so because there is a legal error in the decision by the First-tier Tribunal. I do not consider it appropriate for me to re-decide the underlying appeal. The case is accordingly remitted to a new First-tier Tribunal to be heard entirely afresh and subject to the directions at the end of this decision.

A summary of the law governing overpayments of housing benefit

4. What are the principles governing liability for overpayments of housing benefit? I can do no better than rely on the helpful plain English summary by Judge Lane in *LB v London Borough of Lambeth and Secretary of State for Work and Pensions (HB)* [2015] UKUT 237 (AAC):

“29. The regime under which Housing Benefit overpayments are recoverable is primarily one of strict liability under regulation 100 (regulation 83, Council Tax Benefit Regulations 2006). *Any* overpayment is recoverable, *except* one caused by official error. The exception is, however, by no means generous. There must be (i) an official error, (ii) to which the claimant did not contribute, (iii) in circumstances where the claimant could not reasonably have been expected to realise that an overpayment was occurring at specified points in time.”

5. As the reference in brackets in that passage implies, the same principles apply to excess payments of what used to be council tax benefit.

The warehouse of documents

6. Mr Butler graphically described the Tribunal and Appellant as being confronted in this case with a veritable “warehouse of documents”; one of his submissions was that the Council, as respondent to the appeal, was obliged to “provide a torch to shine on the most significant parts”.

7. Certainly, it is the case that once an appeal has been lodged the decision maker “must provide with the response ... copies of all documents relevant to the case in the decision maker's possession” (rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685; ‘the 2008 Rules’)). As the commentary in Findlay et al., *Housing Benefit and Council Tax Reduction Legislation* (30th edn, 2017/18) states:

“It will be particularly important for the authorities to comply with head (b) in overpayment cases. Submissions to the tribunal in such cases regularly fail to include the decision notices for the original (i.e. allegedly incorrect) awards and a proper schedule explaining how the alleged overpayment has been calculated. The tribunal has an inquisitorial role. Without the former information it can be difficult for the tribunal to understand how the overpayment is said to have arisen and – more importantly – verify that the original decision has been properly revised or superseded so that there is an overpayment in the first place” (p.980).

8. The Council’s response to the First-tier Tribunal in the present case has some undoubted strong points. Some care has been taken in tabulating the index (or schedule) of evidence and the chronology in the summary of facts is likewise set out in detail. There is no shortage of copies of benefit decision notices. However, as will become apparent, the Council’s response also has some undoubted weaknesses. In particular, the absence of “a proper schedule explaining how the alleged overpayment has been calculated” is problematic. Despite the enormous size of the response, some key documentation was also missing.

The background to the appeal to the First-tier Tribunal

9. The factual background to this appeal is somewhat complex. By way of an overview, the Council’s case was that there were two components to the housing benefit overpayment, one being caused by the Appellant’s alleged failure to report changes in her earnings and one being caused by her alleged failure to report that her child benefit was stopping (as her younger daughter Hollie had left school). It is right to record at the outset that Mr Lane, for the Council, conceded at the Upper Tribunal oral hearing that the First-tier Tribunal’s decision on the second aspect of the housing benefit overpayment could not stand. This was because there was clear evidence on file, overlooked by the First-tier Tribunal, that the Appellant had in fact notified the Council about the cessation of her child benefit payments for Hollie.

10. The precise details of the decision-making history of the decisions under appeal are rather opaque. If one starts with the Council’s written response to the appeal, there were said to be two decisions in issue.

11. Decision 1, relating to council tax benefit (CTB), was taken on 15 November 2016 and was to the effect that there was a recoverable CTB overpayment of £1,490.84 relating to the period from 1 April 2010 to 31 March 2013 (that date being the last day before the repeal of the CTB scheme). This overpayment was unaffected by the issue about child benefit for Hollie having stopped (which on any basis took place in 2014).

12. Decision 2, relating to housing benefit (HB), was taken on 6 January 2017 and was to the effect that there was a recoverable HB overpayment of £7,793.71 relating to the period from 5 April 2010 to 12 October 2014. This overpayment was affected by both issues (i.e. the Appellant’s increased earnings and Hollie’s child benefit stopping).

13. The First-tier Tribunal (from now on ‘the Tribunal’) dismissed the Appellant’s appeal and confirmed both those decisions. That much is clear. But quite how the Council (and on appeal the Tribunal) arrived at the final figures for ‘Decision 1’ and ‘Decision 2’ is much less clear. I set out below, in outline only, the sequence of decision-making as it is evident from the appeal bundle of nearly 500 pages.

14. On 21 August 2014 the Appellant visited the Council's offices "to have her claim re-assessed" (note of interview at p.93). The interviewing officer reported he had re-assessed the claim based on the Appellant's P60s and most recent payslip. It concluded:

"Housing Benefit overpayment of £7637.30 created for period 05/04/2010-20/07/2014.

Council Tax Benefit overpayment of £1488.70 created for period 01/04/2010-31/03/2013."

15. The following day, i.e. on 22 August 2014, the Council sent the Appellant a sheaf of over 60 pages of computer-generated notification letters (pp.94-156), detailing her revised HB and CTB entitlement for various periods between the start and end dates of the overpayment periods. There was no covering letter or schedule setting out how the aggregate overpayment figures had been calculated. However, if the Appellant – who has dyslexia – had persevered and reached the final 8 pages of the 60-page bundle she would have found there a series of sheets setting out her old benefit entitlement, her new benefit entitlement, the weekly differences for varying periods and a series of running sub-totals for the HB and CTB overpayments respectively. By adding up those sub-totals (on pp.148-156) I have satisfied myself that they do indeed arrive at £7,637.30 and £1,488.70 respectively. Confusingly, however, the Council's written response to the appeal, prepared in February 2017 and located at the front of the bundle (where one might reasonably expect an overarching explanation), contained a different schedule (p.8). Furthermore, as Mr Butler correctly pointed out, neither the 'Breakdown of Housing Benefit Overpayment' table or that for the 'Breakdown of Council Tax Benefit overpayment' on p.8 added up to £7,637.30 and £1,488.70 respectively. These seriously scrambled tables only served to confuse the issues.

16. Be that as it may, this reassessment was followed by further correspondence between the Council and the Appellant. For example, on 10 October 2014 the Appellant completed a change of circumstances form in which she reported that "I work on a zero hours contract and my daughter Hollie has turned 18, is not in education and has applied for jobseeker's allowance". A further decision then seems to have been taken on 31 October 2014. I say that as on that date the Council sent the Appellant a letter stating that "your claim has been updated with this information" (such as she had provided), and requiring further documentation. On 3 November 2014 the Appellant was sent another batch of computer-generated notifications (pp.177-195). The final page has a comparison of old and new entitlements for the whole period in question which correctly totals to £2,105.67. The Council's response to the appeal also explained that "On 31.10.2014 the authority updated [the Appellant's] claim. Her earned income was amended and Hollie was made a non-dependant" (p.9). The response recorded that the reassessment "created a further Housing Benefit overpayment for the period 10.03.2014 to 26.10.2014" (i.e. relating to Hollie's status) amounting to £2,105.67 and that the Appellant had no entitlement to HB after that date.

17. Still further correspondence followed, including an e-mail from the Appellant on 10 March 2015 (p.218A), stating that she wished to appeal against the overpayment decision. The Council acknowledged this by letter dated 18 March 2015 (p.239), which referred back to the decision of 21 August 2014. The Council's letter stated the HB overpayment to be £7,438.50 and £198.80 (i.e. totalling £7,637.30) and the CTB overpayment to be £1,488.70. There was, however, no mention of the £2,105.67 figure arrived at on 31 October 2014. On 13 June 2015 the Council's appeals officer

again wrote to the Appellant in an attempt to explain the basis for the Council's reassessments. She wrote in these terms:

"I have carefully checked the details of your claim in relation to the comments you have made and can confirm that, as stated in our letter issued 18th March 2015, your overpayment balance of £9699.17 for the period 5th April 2010 to 20th July 2014 was generated and notified to you on 21 August 2014."

18. But where does the figure of £9,699.17 come from? The letter of 13 June 2015 included no further explanation of the Council's calculations. Those are shrouded in some mystery. The overpayment decisions notified on 21 August 2014 were for £7,637.30 (HB) and £1,488.70 (CTB) respectively, which sums to £9,126.00. The letter of 18 March 2015 was in similar terms for HB and CTB, even if the same final figures were arrived at by different components. If the separate HB overpayment of £2,105.67 is added in (and the CTB excess payment omitted), the total HB overpayment becomes £9,742.97. So, the origin of the aggregate figure of £9,699.17 (presumably excluding the CTB overpayment) remains unclear.

19. It then appears that the Council asked the Appellant to provide copies of her bank statements. Certainly, the Council's written response states that on 30 June 2016 it received copies of bank statements "covering the period of the overpayment period" (i.e. one assumes April 2010 to July 2014), and referring to the evidence at pp.254-285 of the appeal bundle. In fact, those statements comprise the two statements covering the periods from 31 December 2010 to 15 January 2011 and 18 February 2011 to 21 March 2011 respectively. The appeal bundle then unhelpfully includes those same two statements copied 15 times over. The Appellant may well have been confused by all this documentation but I do not think it likely she provided the Council with 15 copies of the same documents.

20. On 15 November 2016, following a meeting with the Appellant, the Council issued another bundle of computer-generated benefit notifications, but only in relation to CTB (not HB) and only for the period from January 2012 (pp.286-304). These notices culminated in additional CTB overpayment in the princely sum of £2.14 (p.304). This meant, according to the Council's written response, that the total CTB overpayment stood at £1,490.84 (i.e. the existing £1,488.70 + the new £2.14). That calculation at least adds up.

21. On 12 December 2016 the Appellant had a further meeting with one of the Council's officers. Yet another reassessment was carried out and it seems the Appellant (very understandably) agreed that an underpayment of HB for a later period should be offset against the recoverable overpayment. The Council sent the Appellant a further wodge (to use a non-technical term) of over 100 pages of computer-generated benefit notifications for the period from January 2012 through to April 2016 (i.e. beyond the stated overpayment period), filed in the appeal bundle at pp.308-412. In a separate letter the Council apologised for the excessive number of pages but (correctly) stated "This is a legislative requirement" ('this' being the notifications, not their undue length). However, unlike some of the previous notifications, there were it seems no final pages setting out how the overpayments (or underpayments) had been calculated and aggregated. There was, however, a letter from the Council dated 10 January 2017, which stated that the reassessment had been carried out based on the bank statements that the Appellant had provided (and presumably not just the two statements contained in the response). The Council's letter concluded as follows (having also noted the HB overpayment stood in total at £9,699.17):

“Doing this created a further overpayment of £1038.59 for the period 02.01.2012 to 23.02.2014. This overpayment has been offset by an underpayment for the same period.

A further underpayment of £1905.46 for the period of the overpayment was also created and this was offset against the balance of £9699.17 reducing it to £7793.71.

As you had further entitlement to Housing Benefit and you stated at our meeting that you wanted these credits used to reduce your overpayment. The credit of £1993.24 was used to further reduce the balance on your overpayment and the outstanding balance now stands at £5800.47.”

22. There are no other calculations or explanations on the appeal file as to how those various component sub-totals had been reached.

The First-tier Tribunal’s decision

23. The Tribunal heard the Appellant’s appeal on 11 April 2017. The Appellant attended with a friend. The Tribunal dismissed both appeals. It issued two decision notices, one for the HB appeal and one for the CTB case, and later prepared a more detailed single joint statement of reasons (although one which makes no mention of the CTB issue). The latter set out why the Tribunal considered there had been no “official error” by the Council for the purposes of regulation 100(2) of the Housing Benefit Regulations 2006 (SI 2006/213).

24. The Tribunal’s decision notice for the HB appeal confirmed a recoverable overpayment of £7,793.71 for the period from 5 April 2010 to 12 October 2014. In the summary reasons, the Tribunal recorded that the Appellant had failed to disclose her increased income and was late in declaring her daughter’s change of status to a non-dependant.

25. The decision notice for the CTB appeal confirmed the recoverable overpayment as being £1,490.84, covering the period from 1 April 2010 to 31 March 2013. The reason given for the overpayment was the failure to disclose increases in the Appellant’s income (this period, as noted above, pre-dating the daughter’s change of status).

The Appellant’s grounds of appeal to the Upper Tribunal

26. The Appellant’s original grounds of appeal to the Upper Tribunal were understandably not framed in legal terms. She explained that she suffered from dyslexia and that she had always been advised everything was in order when she had made various enquiries at the Council’s offices. I gave permission to appeal as I was concerned (putting it broadly) as to whether the Tribunal (a) had had sufficient evidence before it to reach the decisions it had; and (b) was entitled to find on the evidence before it that there had indeed been no “official error” on the part of the Council.

27. At the Upper Tribunal oral hearing, Mr Butler for the Appellant developed the six grounds of appeal he had advanced in his skeleton argument, building on some of the provisional observations in my grant of permission to appeal. He submitted that the Tribunal had failed (a) to ensure the documentation was sufficient to determine the Appellant’s liability to repay; (b) to probe the Council’s case sufficiently; (c) to interrogate the evidence as to the Council’s notification to the Appellant of the need to report changes in fluctuating earnings; (d) to state the law correctly as to the need (or otherwise) for a legal duty to exist for the Council to ask the Appellant for her

payslips; (e) to explore the Council's failure to review the Appellant's entitlement for some years; and (f) to have regard to the Council's prior knowledge that the Appellant had stopped receiving child benefit for Hollie.

The Upper Tribunal's analysis

Introduction

28. It makes sense to deal with ground (f), the last of those six grounds of appeal first, as that is where there is common ground between the parties. After that I turn to consider grounds (a)-(e), which are contested.

Ground (f): the Council knew the Appellant had stopped getting child benefit for Hollie

29. This final ground of appeal succeeds, as Mr Lane very fairly conceded it must do in his opening submissions at the oral hearing.

30. The Tribunal had decided that the separate HB overpayment relating to the alleged late notification of Hollie's change of status was a "customer error" and as such was recoverable from the Appellant. In doing so, the Tribunal had relied on the Appellant's e-mailed notification of 10 October 2014 (p.162; see paragraph 16 above), also finding that there had been no prior notification by her of this change of circumstances. However, the Tribunal had overlooked the interview note dated 30 January 2014 (p.67), in which it was recorded that "Customer also stated that her daughter is looking for apprenticeship and will advise outcome, child benefit has stopped but she has no evidence of this; states would have been at the time of tax credits, will provide evidence so claim can be amended". Despite this information, Hollie remained in the calculations for the Appellant's HB entitlement (including the family premium) until later the same year.

31. Mr Lane readily acknowledged this meant that the Council's argument that there was a recoverable overpayment amounting to £2,105.67 could not stand. He conceded that the Tribunal had accordingly been in error of law in overlooking the implications of the interview note of 30 January 2014. It followed he did not seek to support the Tribunal's decision on that aspect of the appeal.

32. I also accept that the Tribunal was in error by failing to consider the interview note of 30 January 2014. It appears that the clerk recording the information from the Appellant's visit to the Council on that occasion had focussed on other issues (such as her tax credits stopping and rent increasing). I am entirely satisfied the Appellant reported that her child benefit had stopped (or at least was in the process of stopping – it appears entitlement finally came to an end on 3 March 2014: see p.171). The appeal file shows she understood the significance of that type of change of circumstance, as she had previously reported the same information in relation to her elder daughter's change of status (p.31). The additional disclosure that Hollie was not in full-time education and was looking for an apprenticeship was further confirmation that she had left school and not eligible for child benefit to be paid. It was plainly an official error by the Council not to follow up on the disclosure about Hollie's child benefit ending. Mr Lane did not seek to suggest that the Appellant should have realised that Hollie was wrongly still included in her HB claim thereafter. In my view he was right not to do so, as the Appellant could not reasonably have been expected to realise that an overpayment was occurring – after all, Hollie apparently had no income of her own and the Appellant was still having to support her.

Ground (a): was the appeal documentation sufficient to determine the liability to repay?

33. This first ground of appeal also succeeds. Mr Butler's principal argument was that on the face of the documents presented to the Tribunal by the Council it was not

possible properly to determine the extent of the overpayment or to make the necessary findings of fact relevant to the operation of regulation 100. In doing so, Mr Butler primarily focussed on the 'explanation' given in the Tables at paragraph 30 of the Council's response (p.8). There is no question, putting it bluntly, that those figures in the Tables do not add up and Mr Lane very wisely did not seek to pretend that they did. That paragraph in the response was clearly a failure by the Council to present its case clearly and cogently. However, it may be questionable whether that lack of transparency in itself led to a material error of law by the Tribunal. I say that as it appears the arithmetic is correctly set out in some overpayment schedules buried deep in the appeal bundle (see paragraph 15 above). So, if one digs deep enough, a process of forensic archaeology reveals that there are pages which do sum to the totals of £7,637.30 for HB and £1,488.70 for CTB.

34. There is, however, a further problem with the clarity (or lack of it) of the appeal response documentation. The Tribunal concluded that there was a recoverable HB overpayment of £7,793.71 for the period 05 April 2010 to 12 October 2014 (statement of reasons at para. [1]). In terms of how it got to that conclusion, the Tribunal stated as follows:

"4. Although not specifically conceded by [the Appellant] the amount of the overpayment was correct. The Council had calculated the overpayment on three occasions. First to take account of her additional earnings, it was then increased to take account of late notification of her daughter leaving school and becoming a non-dependent. It was then revised again on 12-12-2016 when the overpayment was calculated again by the Council in a manner that was more advantageous to [the Appellant] as it took account of fluctuations in her earnings so that when she was earning less her entitlement was increased and when she earned more it was reduced. This resulted in a net decrease to the overpayment so that the appealable amount stood at £7,793.71."

35. In short, the Tribunal accepted the Council's explanation at face value and without sufficient probing. However, as explained above (see paragraphs 17-22) it is very difficult or rather impossible to discern quite how the Council arrived at the figure of £7,793.71 (leaving aside the issue of the extent of the overpayment relating to Hollie's status). The Council effectively admits as much in its written response to the Upper Tribunal appeal, which stated that "regarding the overpayment supersession decision of 13/12/2016 and evidence provided, document 56, page 306, a breakdown of this decision is available, should the Upper Tribunal request" (p.450). However, that breakdown should have been placed before the Tribunal below. In addition, the appeal file contains only two bank statements out of a much longer run of monthly statements. Again, the Council's response to the Upper Tribunal appeal concedes that "A breakdown of the monthly earned income figures used was not included in the submission but is now submitted for the records" (p.451). It is the Council's responsibility to make out its case and satisfy the First-tier Tribunal as to both the accuracy of the information relied upon and the methodology employed in calculating the claimed overpayment. The Council failed to do so here; moreover, the Tribunal erred in law by taking the approach that it did. This ground of appeal therefore also succeeds.

Ground (b): did the Tribunal probe the Council's case sufficiently?

36. On one level this ground of appeal overlaps with ground (a) immediately above. However, Mr Butler also put the point in a different way. It was not disputed that the Appellant has started her employment in 2009. Yet the earliest document included in the Council's response to the Tribunal appeal was a benefit notification dated 11 March 2010, referring to entitlement as from April 2010 (p.1). The Council had not

produced any earlier HB claim form or any notification by the Appellant about her new employment and her wages. Mr Butler's submission was that the Tribunal should have spotted the absence of such evidence and should have called for the evidential gap to be filled, not least as it could be relevant to the issues arising under regulation 100. To reinforce the point already made, I might interpose here that once an appeal has been lodged, the decision maker "must provide with the response ... copies of all documents relevant to the case in the decision maker's possession" (rule 24(4)(b) of the 2008 Rules).

37. The Council, rather than producing such documents to the First-tier Tribunal, has again provided them to the Upper Tribunal. Its written response to the Upper Tribunal appeal includes a copy of a *Starting work form: Housing Benefit and Council Tax Benefit*, completed by the Appellant and received on 11 September 2009 (pp.455-466). It also includes her first two payslips (pp.453-454).

38. As it happens, the *Starting work form* does not take matters very far forward, if at all. The Appellant stated that she was working 16 hours a week in care work for £8.63 an hour and was being paid four-weekly (in fact the subsequent payslips suggest she was paid monthly, which is not quite the same thing). There was no suggestion it was a zero hours contract – indeed, the reference to working 16 hours a week rather suggested otherwise. Nor do I think much can be read into the two payslips. Omitting a training allowance, the first shows she worked 56.75 hours and the second 61.5 hours (i.e. approximately 13 and 14 hours a week respectively, if indeed paid monthly). Including the training allowance, the hours worked were between 16 and 18 hours a week. If anything, the pay slips would seem to confirm the statement on the *Starting work form* that the Appellant was working (give or take) 16 hours a week

39. It is not clear whether any other payslips were produced at that time (i.e. from September 2009 to April 2010). The Council say they were not, which was also the Tribunal's conclusion. Subject to that, it does not appear to me that the omission of the *Starting work form* and the first two payslips from the appeal bundle had any material effect on the outcome of the appeal. So, while the Council's response to the Tribunal appeal was incomplete as regard the initial documentation, I conclude that the Tribunal's failure to press for such information was not material. Accordingly, this ground of appeal succeeds insofar as it overlaps with ground (a) but not on this separate point about the 2009 documentation.

Ground (c): did the Tribunal interrogate the evidence concerning the Council's explanation of the need to report changes in fluctuating earnings?

40. This ground of appeal was the principal focus of both the later written submissions and the Upper Tribunal oral hearing. It is helpful to start with the Tribunal's findings and reasons. The Tribunal found (at paragraph [3]) it was undisputed that the Appellant started work in 2009, that she worked on a zero hours contract and so worked different hours each pay period, that she had notified the Council of her first wages after starting work and that she had notified certain changes of circumstances (e.g. her rent increasing and her (elder) daughter moving out).

41. In terms of its reasons for upholding the decision that there was a recoverable overpayment caused by a failure to notify changes in earnings, the Tribunal set these out at paragraphs [11]-[16] of the statement of reasons. The Tribunal concluded that the Appellant was aware of the need to inform the Council of changes in circumstances including variations in earnings (paragraph [11]). The Tribunal found the Appellant's verbal (i.e. oral) evidence "a little less clear" in that "she could not

remember if she had told them of the change in wages but also that she thought there were other occasions that she went down to report a change in wages even though they were not recorded in the Council's records" (paragraph [12]). As to that, the Tribunal found as follows:

"14. There was no evidence she informed them of the changes in her wages that has not been recorded in the papers. It is accepted the Council can lose notifications and information but it is unlikely that they would have lost every notification if she had been down on various occasions...".

42. Overall, the Tribunal found that the Appellant had operated, given her fluctuating earnings and despite knowing her average hours had gradually increased over time, "perhaps in the over-optimistic hope that it would more or less balance out" (paragraph [15]).

43. Mr Butler contended that the Tribunal's assertion that "there was no evidence she informed them of the changes in her wages that has not been recorded in the papers" (paragraph [14]) revealed an error of law. He argued this was premised on the fallacious view that a claimant's uncorroborated oral evidence is no evidence at all, a proposition that was rejected in the decision of the Social Security Commissioner in CH/4065/2001 (and indeed elsewhere in the case law). While Mr Butler's statement of legal principle is undeniably correct, I am not persuaded the criticism is validly made here. I agree with Mr Lane's submission that his is an overly analytical approach. All the Tribunal was saying was that the evidence given orally was not reflected in the documentation in the bundle, which the Tribunal preferred. Thus, the Tribunal plainly meant "there was no *independent* evidence she informed them"; reading the statement of reasons as whole, it is clear the Tribunal found several reasons when evaluating the evidence as to why it did not accept the Appellant's account of earlier (but unrecorded) notifications of changes in earnings.

44. Mr Butler further argued that the Appellant had notified the Council of her variable hours back in 2009, which also had implications for the advice the Council should have given her about reporting earnings periodically. The difficulty with this submission is that it is a straightforward attempt to challenge the Tribunal's factual findings. As it is, the *Starting work form* and the first two payslips (which, of course, were not in front of the Tribunal) lend no real support to the claim that the Council was on notice from the outset of the fact that the Appellant was working under a zero hours contract. I readily accept that the Council was undoubtedly advised about the zero hours contract at a later stage. Granted, the Appellant told the Council about the nature of the contract in both July 2014 and October 2014 (pp.81-82 and p.162). However, this was after the Council had begun inquiries into her proper benefit entitlement. It is right, however, that the Tribunal's reasons do not directly address the question of *when* the Appellant first advised the Council that she was on a zero hours contract.

45. All that said, Mr Butler's submissions focussed on, as he saw it, the inadequacies in the Council's various communications as to the types of changes that needed to be notified by claimants. The difficulty with this approach is that it may be looking at the issue the wrong way around. Mr Lane, by contrast, focussed on the Appellant's obligations and especially on regulation 88(1) (headed "Duty to notify changes of circumstances"). The material part reads as follows:

"... if at any time between the making of a claim and a decision being made on it, or 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 in writing to the designated office."

46. At this stage it is also important to note regulation 29, which deals with how to calculate the average weekly earnings of employees. Regulation 29(3) provides as follows:

"(3) Where the amount of a claimant's earnings changes during an award the relevant authority shall estimate his average weekly earnings by reference to his likely earnings from the employment over such period as is appropriate in order that his average weekly earnings may be estimated accurately but the length of the period shall not in any case exceed 52 weeks."

47. In this context it is helpful to refer to Judge Shelley Lane's decision in *LB v London Borough of Lambeth and Secretary of State for Work and Pensions (HB)* [2015] UKUT 237 (AAC), which is relied upon by Mr Lane (no relation). Judge Lane analyses both regulations 29 and 88. She was clear that there can be an overpayment where earnings are based on an averaging exercise (at paragraph 37). However, that was a case in which it was accepted on the facts that while "the claimant did not report every single change in her earnings as it happened, but she did report changes in her earnings regularly" (at paragraph 60). That acceptance notwithstanding, Judge Lane pointed to "the very wide scope of the duty in regulation 88(1) to report changes which the claimant *might* reasonably be *expected* to know *might* affect his benefit" (paragraph 45). Furthermore, Judge Lane was "unable to accept that [a] claimant is freed from the obligation to notify changes in earnings by the side wind of averaged earnings" (paragraph 42). As such, "the claimant remains under the standard duty to report changes of circumstance, and whether he knew or might reasonably be expected to know that the change in his earnings might affect his benefit would simply be a question of fact" (paragraph 53). Judge Lane's conclusion, which resonates in the context of the present appeal, was as follows:

"57. There does not appear to be any foolproof way for claimants to insulate themselves from the ill-effects of receiving too much or too little benefit, apart from reporting changes, big or small, as soon as they occur. Frequent reporting of this sort would, no doubt, be an unwelcome burden for both claimants and Authorities. For a great many, however, the averaging exercise will be sufficiently accurate to minimise hardship."

48. Mr Lane's submission, however, was that the present case was not actually a regulation 29(3) case at all. Rather, the Appellant had provided her first two monthly payslips and her earnings had then been appropriately assessed under regulation 29(1). Thereafter, the onus was on her (see regulation 88) to notify the Council of changes in her earnings. I accept that as a matter of law the primary onus was on the Appellant, and so overall I do not uphold this ground of appeal. However, in doing so I am making no findings of fact. It will be for the new First-tier Tribunal to determine afresh, as best it can on the available evidence, what the Appellant told the Council and when.

Ground (d): was there a legal duty for the Council to ask the Appellant for her payslips?

49. This ground of appeal relates to a relatively narrow point. In the final substantive paragraph of the statement of reasons the Tribunal reasoned as follows (with emphasis added):

“16. While I accept there was no deliberate intention to misinform the Council it would have been reasonable for [the Appellant] to have checked the figures supplied in their letters which clearly set out the amount of wages being used for the calculation. Likewise it would have been reasonable for her to have informed the Council when her monies increased (and indeed decreased) rather than simply hope it would all balance out. It is accepted that the Council did not ask for this information for a long period of time and it would have been better from a practical point of view if they had *but they are not legally required to do so.*”

50. Mr Butler’s submission related to the italicised phrase. This suggested, he argued, that the Tribunal was under the erroneous impression that the Appellant had to prove the existence of a legal duty on the part of the Council to advise a claimant to notify changes in circumstances if she was to avoid having materially contributed to an official error (or to have been reasonably expected to realise there was an overpayment). Mr Butler also pointed out that the respondent’s breach of duty is not a necessary condition for official error (see *R v Liverpool City Council ex parte Griffiths* [1990] 22 HLR 312).

51. I accept that there is nothing in the case law to suggest that an omission can only constitute an official error if there was a legal duty on the Council to carry out the act concerned. To that extent I accept Mr Butler’s statement of principle. However, I am not persuaded the Tribunal materially erred in law in this respect. I say that for two reasons. The first is that the italicised passage is very much a throwaway observation of secondary relevance to the Tribunal’s reasoning. The second is that in any such overpayment scenario the overriding and critical question was established by the Court of Appeal’s decision in *R (Sier) v Cambridge City Council* [2001] EWCA Civ 1523, where Simon Brown LJ identified the key question as being whether the overpayment was “the result of a wholly uninduced official error or rather the result of the claimant’s own failings” (at paragraph 30). Once the Tribunal had found that the Appellant had not reported changes in her earnings – and accepting for the present that finding was open to the Tribunal on the evidence – then realistically *Sier* pointed almost inevitably to the latter conclusion (i.e. ‘claimant error’ rather than ‘official error’). For that reason, I conclude ground (d) is not made out.

Ground (e): the Council’s failure to review the Appellant’s entitlement for some years

52. Mr Butler sought to argue that the Tribunal erred in law as it had failed to consider the Council’s own failure to review or reconsider the Appellant’s income details for a period of almost five years. He observed that delay by itself could amount to official error (see *HC v Hull City Council* [2013] UKUT 330 (AAC)). It may be true to say that 20 years ago the present type of cumulative overpayment of HB may not have arisen. That was because in those days (pre-2003/2004) awards of housing benefit were for fixed periods and as matter of course local authorities typically conducted annual reviews of claimants’ proper benefit entitlement. For better or worse the administration of the housing benefit regime is very different today. It seems to me this ground of appeal faces the same problems as grounds (c) and (d) above, and particularly the binary choice posed by Simon Brown LJ in *R (Sier) v Cambridge City Council*. It follows this ground of appeal also fails.

What now then?

53. The appeal succeeds on grounds (a) and (f). I dismiss ground (b) insofar as it is different from ground (a). I also dismiss grounds (c), (d) and (e). I therefore allow the Appellant’s appeal on grounds (a) and (f). I also set aside the decision of the First-tier Tribunal of 11 April 2017 as it involves an error of law. I have considered whether I can re-decide the underlying appeal myself. However, given my conclusions above, I

do not think it is simply a question of removing the element of the HB overpayment which relates to Hollie's child benefit status. There remains the uncertainty and confusion over the calculation of the other elements of the HB and CTB overpayments. I regret the further delay that will ensue, but there will need to be a fresh hearing before a new First-tier Tribunal, subject to the directions below.

54. I have considered separately whether the Tribunal's decision on the CTB appeal can stand. That aspect of the appeal was unaffected by the issue of Hollie's status. The arithmetic underpinning the calculation of the excess payment of CTB is tolerably clear. However, the liability for that overpayment is likewise affected by the process of calculating the Appellant's income, and the Tribunal was not provided with the relevant documentation. The Tribunal's statement of reasons also makes no mention of the CTB liability. I have therefore concluded that the Tribunal's CTB decision also falls.

55. The new First-tier Tribunal is not bound by any of the findings of the previous Tribunal. It will therefore have to satisfy itself as to the accuracy of the Council's calculation of the aggregate amounts of the HB and CTB overpayments respectively. It must also come to its own conclusions as to whether there was any official error on the part of the Council and, if so, whether the claimant contributed to such error and whether she could not reasonably have been expected to realise that an overpayment was occurring at the relevant dates.

Conclusion

56. I conclude that the decision of the First-tier Tribunal involves an error of law for the reasons summarised above. I therefore allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There needs to be a full re-hearing of the case by a new First-tier Tribunal (section 12(2)(b)(i)). I also make the following directions.

The following directions apply to the re-hearing:

- (1) The re-hearing will be at an oral hearing;
- (2) The new Tribunal should be differently constituted from the First-tier Tribunal which considered this appeal at the previous hearing on 11 April 2017;
- (3) The Respondent Council is to provide a supplementary submission, to be sent to the HMCTS regional tribunal office in Sutton within one month of the date of issue of this decision, which includes:
 - (e) A clear headline statement of the precise amounts of the claimed HB and CTB overpayments, omitting the amount of £2,105.67 relating to Hollie's non-dependant status which the Council has now conceded is not recoverable;
 - (f) A comprehensive and comprehensible schedule showing how those headline total overpayment figures have been arrived at by reference to the amounts of HB and CTB the Appellant was respectively entitled to (including underlying entitlement) and paid, and the Appellant's income for each period in issue;

- (g) Copies of any further documents relevant to the Appellant's housing benefit entitlement between 1 September 2009 and 1 April 2010;
 - (h) Copies of all the bank statements for the relevant period provided by the Appellant (and not simply the multiple copies of the same two statements at pp.254-285).
- (4) The new tribunal must consider all the evidence afresh and is not bound in any way by the decision of the previous tribunal.

These directions may be supplemented or modified as appropriate by later directions by a Tribunal Caseworker, Tribunal Registrar or District Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

**Signed on the original
on 06 February 2019**

**Nicholas Wikeley
Judge of the Upper Tribunal**