



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2024-000083-SPC
[2024] UKUT 257 (AAC)**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between: CB Appellant
(as executor of YB's estate)

and

The Secretary of State for Work and Pensions Respondent

Before: Upper Tribunal Judge Perez

Decision date: 26 August 2024
Decided on consideration of the papers

Representation:

Appellant: No representation
Respondent: Egle Smith, Department for Work and Pensions, Decision Making and Appeals

DECISION

1. Ms CB's appeal is allowed.
2. The First-tier Tribunal decision dated 17 August 2023 (heard under reference SC154/23/01437) is set aside so far as relating to whether the overpayment is recoverable for claim 5. That part of the case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 19 of this decision.

REASONS FOR DECISION

Introduction

3. The appellant, Ms CB, appeals to the Upper Tribunal with my permission dated 30 March 2024. That permission was given on the papers.

Factual and procedural background

Secretary of State's decisions

4. On 21 March 2022, the Secretary of State made revisions of entitlement and recoverable overpayment determinations in respect of five pension credit claims made from May 2005 to August 2020. The overpayments were found to result from misrepresentations, in each of the five claims, by Mr YB as to the amount of capital he had. The Secretary of State found that the overpayments were recoverable from Ms CB, executor of YB's estate.

Appeal to First-tier Tribunal

5. Ms CB appealed to the First-tier Tribunal.

6. The First-tier Tribunal grouped together and labelled the decision maker's decisions as follows—

- **Decision 1:** the decision maker's five revisions of entitlement in the five claims.
- **Decision 2:** the decision maker's decision that there had been, in consequence of decision 1 and of the diminution of capital rule, overpayments totalling £18,052.38 (the award on claim 2 had been on the basis of £73.28 excess capital).
- **Decision 3:** the decision maker's decision that the overpayments were recoverable under section 71(1) of the Social Security Administration Act 1992 because Mr YB had misrepresented the level of his capital when making each of the five claims because he did not disclose the value of his Hargreaves Lansdown accounts and those misrepresentations had caused the overpayments.
- **Decision 4:** the decision maker's decision that the overpayments were recoverable from the executors of Mr YB's estate.

7. The First-tier Tribunal recorded at paragraph 8 of its Statement of Reasons that Ms CB's representative, Mr Mikulski, had "*confirmed that decisions 1, 2 and 4 were not in dispute*". Ms CB did not dispute that in the permission to appeal application. Strictly speaking, however, a challenge to decision 3, that the overpayments are recoverable under section 71(1), must mean that decision 4 is challenged to the extent that recoverability is challenged at all. I take the lack of challenge to decision 4 to mean that, if the overpayments are indeed recoverable under section 71(1), then it is not disputed that the person from whom they are recoverable is the executor to the estate.

8. The First-tier Tribunal on 17 August 2023 dismissed Ms CB's appeal against all five recoverability determinations. The First-tier Tribunal made that decision based on evidence other than actual evidence of the paper or telephone claims made in this particular case.

9. The First-tier Tribunal refused permission to appeal to the Upper Tribunal.

Grounds of appeal to Upper Tribunal

10. Ms CB applied to the Upper Tribunal for permission to appeal to the Upper Tribunal in respect of the recoverability determinations, that is, the First-tier Tribunal's decision so far as relating to the Secretary of State's decision 3 for all five claims, on the following five grounds—

- (1) Ground 1: the First-tier Tribunal failed to identify the nature of the representation made by YB with sufficient accuracy.
- (2) Ground 2: the First-tier Tribunal should have considered whether to adjourn in light of relevant evidence described by the respondent Presenting Officer at the hearing, or, if that tribunal did consider whether to adjourn, it failed to give reasons why it did not adjourn.
- (3) Ground 3: the First-tier Tribunal failed to resolve a conflict of fact as to the nature of the DWP's electronic records.
- (4) Ground 4: the First-tier Tribunal failed to consider evidence supporting the possibility of DWP error.
- (5) Ground 5: the First-tier Tribunal failed adequately to consider evidence regarding YB's character.

Permission to appeal to Upper Tribunal

11. I gave permission to appeal to the Upper Tribunal on Ground 2 in relation to claim 5. I refused permission to appeal on the rest of Ground 2, and on Grounds 1, 3, 4 and 5.

Submissions

12. The parties have both agreed to my finding that there were the errors of law set out at paragraphs 14 and 15 below. The appellant however invites the Upper Tribunal to decide the issues itself rather than remitting and, in the alternative, to remit to a freshly-constituted First-tier Tribunal panel.

Analysis

Errors of law

13. The grounds said, among other things—

“13. The [First-tier Tribunal] Judge had earlier queried the lack of records from the 2020 claim, as opposed to the perhaps more understandable lack of records from the 2005 claim. Mrs Futers told the FTT that 2020 documentation was “possibly still available” and that the “appeal writer and decision maker haven't provided that”.”

14. I find that the First-tier Tribunal erred in failing to explore whether evidence was in fact still available as to the declarations made for the 2020 claim. Whether that meant adjourning the whole hearing or just the question as to claim 5, that possibility should in my judgment have been explored.

15. In refusing permission to appeal to the Upper Tribunal, the First-tier Tribunal pointed out that there had been no application to adjourn. Where the failure to seek an adjournment was a failure by an experienced representative, an argument might be made that the appellant is fixed with that failure. The representative here however was via the Free Representation Unit, and his level of experience may not have been high. But in any event, the First-tier Tribunal's jurisdiction is inquisitorial. There was the possibility of not having to piece together claim 5 in the way that claims 1 to 4 had been pieced together. The First-tier Tribunal should in my judgment have followed up that possibility and erred in law in failing to do so.

Disposal

16. In granting permission to appeal to the Upper Tribunal, I proposed allowing the appeal so far as relating to whether the overpayment was recoverable for claim 5 and remitting for the Secretary of State (i) to supply to the First-tier Tribunal all evidence the Secretary of State has relating to claim 5, or (ii) to confirm to the First-tier Tribunal that a comprehensive search has been made in all possible places for such evidence and that none has been found. The Secretary of State has agreed to that proposal. The appellant asks however that – for efficiency, expediency and finality – this exercise be done in the Upper Tribunal instead, and that the Upper Tribunal give a substituted decision.

17. I understand why the appellant makes that request. But the First-tier Tribunal is the more appropriate forum for findings of fact to be made on this. I am therefore remitting. I do however accept the appellant's invitation to direct a freshly-constituted panel.

Conclusion

18. It is for all of the above reasons that I allow the appeal so far as relating to whether the overpayment is recoverable for claim 5, and that I remit that question to a freshly-constituted panel.

CASE MANAGEMENT DIRECTIONS

19. I therefore direct as follows—

- (1) The question of whether the overpayment is recoverable so far as relating to claim 5 must be reheard entirely afresh by the First-tier Tribunal.
- (2) If the First-tier Tribunal again finds it to be recoverable, the person from whom it is recoverable is not disputed. I do not however direct the First-tier Tribunal to find again that it is recoverable from Mr YB's estate. I say that in case something arises – when the First-tier Tribunal is considering whether the overpayment is recoverable at all – which puts into question from whom it is recoverable. I do not anticipate that happening. But I do not want to tie the First-tier Tribunal's hands on that point, just in case.

- (3) The First-tier Tribunal panel which rehears the question afresh must contain no-one who was on the panel which decided the case on 17 August 2023.

Rachel Perez
Judge of the Upper Tribunal
26 August 2024