IN THE UPPER TRIBUNAL **Case No.** CH/617/2012
ADMINISTRATIVE APPEALS CHAMBER

Before Judge Mark

Decision: The appeal is dismissed.

REASONS FOR DECISION

1. The claimant, who was then 23 years old, first claimed, and was awarded, housing and council tax benefit in December 2010 by reference to his income based jobseeker's allowance. The housing benefit was then £49.62 per week and the council tax benefit was £8.57 per week. Council tax benefit was subsequently increased to £12.86 per week to 31 March 2011 and to £12.82 per week from 1 April 2011.

2. On 16 March 2011 he started work and informed the council. His benefits were suspended and he made a fresh claim to income related benefits. He provided the council on 31 March 2011 with a copy of his first pay slip, dated the same day. It showed him to have received £237.20 for 40 hours work at £5.93 an hour. By letter of 4 April 2011 the council notified him that he would be receiving housing benefit of £49.62 per week from 21 March to 17 April 2011 and council tax benefit of £12.86 per week for the same period. No calculations showing how those sums had been arrived at were provided. By a letter of the same date, the council also wrote to the claimant confirming that he had told it that he had started work on 16 March 2011 and asking for further payslips when he received them.

3. By a further letter dated 8 April 2011, the council notified the claimant of further housing and council tax benefit awards of £49.62 and £12.82 per week respectively from 18 April 2011. On this occasion, the letter was 6 pages long and included two pages of calculations. The front page of the letter advised the claimant to read the letter very carefully, and that it was especially important that he should check the page marked "**please read this page carefully**" and notify it if any of the information was incorrect. The page so marked was the final page of the letter and contained details of the rent and a section entitled "Gross Weekly Income". That section included the statement "Your Earned Income DUMMY EMPLOYER REF £54.74", and "Gross total weekly income £54.74". The previous page, in respect of which no special request had been made beyond the instruction to read the whole letter carefully, also contained a statement "Gross weekly income £54.74".

4. It now appears that the £54.74 per week was included as the claimant's income because the person making the calculations had treated the payslip of 31 March 2011 as being for a full month and not just for the period from 16 March. Payment at the rates in question continued to be made until, following a request dated 2 June 2011, the claimant provided his payslips for April and May 2011, from which the council realised for the first time that it had been

calculating benefit on the basis of the claimant's earnings being about half what they actually were.

5. As a result, by a decision dated 17 June 2011, the council decided that the claimant's awards from 18 April 2011 should be changed to substantially reduced amounts, which were specified in that decision. By a further decision of the same date it was decided that there had been overpayments of housing benefit between 18 April and 19 June 2011 totalling £374.18 and of council tax benefit between 18 April 2011 and 31 March 2012 of £447.01. The decision was that the overpayments of both benefits were repayable, limited in the case of council tax benefit to the period to 12 June 2011, as the remaining overpayment was not actually paid but was a mere book entry that could be corrected for the future. The amount of council tax benefit said to be repayable was £78.40.

6. It was rightly accepted by the council that the overpayments were due to official error, but it was contended by the council on the appeal to the First-tier tribunal that the claimant could not rely on regulation 100(2) of the Housing Benefit Regulations 2006 or on regulation 83(2) of the Council Tax Benefit Regulations 2006 because it was contended the claimant could reasonably have been expected to realise that there was an overpayment and excess benefit. For this purpose, the question of what the claimant could reasonably be expected to realise is a question of fact for the tribunal. In that the process of benefits adjudication is inquisitorial rather than adversarial, evidence gathering is a co-operative process and it should rarely be necessary to resort to a question of a burden of proof (R 1/04 (SF)). Further, what must appear is that the claimant could reasonably have been expected to realise that there was an overpayment. It is not sufficient that he should have realised that there might have been one (*R v Liverpool CC v Griffiths*, [1990] HLR 312, at 317; CH/2554/2002).

7. Thus, in CH/2554/2002, Mr. Commissioner Jacobs stated at paragraph 9:

   "The tribunal has to determine whether the claimant could 'reasonably have been expected to realise that it *was* an overpayment'. It is not relevant whether the claimant could reasonably have been expected to realise the *amount* by which she was being overpaid. Nor is it relevant whether the claimant could reasonably have been expected to realise that there *might* be an overpayment. What matters is whether the claimant could reasonably have been expected to realise that the amount she was receiving definitely contained some element of overpayment."

8. The tribunal, at a paper hearing, upheld the claimant's appeal. The only evidence before the tribunal from the claimant was in the form of a handwritten letter dated at the end 16 July 2011. This stated that the council wrongly assumed that he would have known that too much benefit was being paid. The assumption was wrong, he stated, because he had never been on benefits before and nobody from the council had informed him that it was possible to be overpaid. He had initially been assessed for benefit before his first pay slip was provided and he had been notified after providing it that the rates of benefit remained the same. He had always given correct information promptly and the council had misled him.

9. In the decision notice the judge set out the facts and continued "Having looked at the documents and particularly the notification letter which runs to 6 pages and contains 2 pages of figures I find that the error is not easily identifiable. Based on his age and experience I find [the claimant] was entitled to trust in the professional expertise of the Council officers. He had provided all the information and had no reason to think a mistake was likely." The Decision Notice was stated to be the full statement of reasons.

10. That approach appears to be similar to that of Deputy Commissioner Ovey, as she then was, in CH/2943/2007, where a claimant, who had also not previously claimed benefits, had given correct information as to her earnings, but the council had calculated her entitlement on the basis of earnings of less than a quarter of the amount she had disclosed.

11. At paragraphs 14 and 15 of her decision, the Deputy Commissioner stated as follows:

> "14. It is accepted by both parties that the correct approach to cases such as the present is to follow the three stage approach described in *CH/2554/2002*, namely:
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> (1) to identify the correct legal test, which is whether the claimant (in a case like the present) could reasonably have been expected to realise that there was an overpayment;
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> (2) to identify the information the claimant had about the housing benefit scheme;
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> (3) to determine what the claimant could reasonably have been expected to realise from that information.
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> 15. In this case, it seems to me clear that in substance the local authority is relying on the facts that both decision notices told the claimant that the benefits were being calculated on the basis of weekly earnings of £46.95 and that she knew that her weekly earnings were in fact about £210. It is said that she could therefore reasonably have been expected to realise that benefit calculated on that basis would include an element of overpayment. The claimant resists that conclusion by contending that given her general lack of familiarity with the benefits system by contrast with the local authority's expertise and her educational position she could not reasonably be expected to have realised that the local authority had made a mistake and were therefore overpaying her instead of using a special benefits method of calculating income."

12. In remitting the case for rehearing before a new tribunal, the Deputy Commissioner also stated at paragraph 21 of her decision:

> "21. I draw attention to the following points:
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> (1) in my view a claimant cannot reasonably be expected to seek advice about the local authority's decision notice because she does not understand all the figures unless she has some reason to believe that the figures are wrong. Despite what the local authority says in this case about explanations in the documents, the information given about

> disregards and the applicable amount does not of itself enable a claimant to know whether or not the figures used are correct; they are prescribed and, in a sense, arbitrary amounts. A claimant who has given clear and correct information is entitled to start from the basis that the local authority has such information when stating her weekly earnings"

13. The council in the present case has referred to a number of decisions of Judges of the Upper Tribunal which it contends should lead to this appeal being allowed. Firstly it refers to the decision of Judge May QC in CH/240/2009. In that case the error in the calculations of the council in calculating entitlement had been in stating that the claimant was paying £121 child care cost and that that sum had been deducted from his earnings in working out his total weekly income. In fact the amount was £40. The First-tier Tribunal concluded that the claimant was unaware that the council was using the wrong figures for child care costs and that, taking into account other changes in the figures on which her benefit had been calculated, there was no real reason why the claimant should need to look at the details of the computations. It pointed out that the vast majority of people notoriously had great difficulty in understanding computerised print outs of tax, benefit and other financial assessments and the general concern was the "bottom line". The First-tier Tribunal therefore allowed the claimant's appeal against the overpayment notice.

14. In setting aside the decision of the First-tier Tribunal and substituting his own decision upholding the council's decision, Judge May stated as follows:

> "6…. In my view the tribunal went beyond the bounds of a reasonable judgment on the facts found by them by concluding that it was not reasonably to have been expected of the respondent to have been aware that there had been an overpayment. As a matter of principle I hold that claimants can be reasonably expected to read notices in relation to their benefits which are sent to them by the local authority. The relevant notices by the appellants in this case are quite clear in their terms. It is quite obvious from reading them the basis on which the benefit was calculated. The amount of childcare costs was both substantial and materially in error. I find it difficult to understand how it can be said in these circumstances that it was not reasonably to be expected of the respondent to read the notices which had been sent to her and upon reading them become aware that the benefit had been calculated wrongly and in a manner which substantially benefited her."

15. Insofar as Judge May is basing his decision on what claimants in general can be expected to do, or as to what should have been quite obvious, he appears to be departing from the approach of Judge Jacobs in CH/2554/2002, at paragraph 13, where he said that "The issue for the Tribunal was what could reasonably be expected of *the claimant*." He then went on to say "The issue will be what could reasonably be deducted from the information available to the claimant. What a claimant could reasonably have been expected to realise is a question of fact. It depends on the information available to the person and on an analysis of what that information could have revealed."

16. It seems to me that what the claimant could reasonably have been expected to realise must be a subjective matter depending on the claimant's abilities and

understanding. He may reasonably be expected to look at the letter sent to him, but he cannot reasonably be expected to understand everything in it, and still less automatically to realise from anything that did not look right, or that he did not understand, that there not merely might be an overpayment but that there was one. In my judgment, what can reasonably be expected of a typical claimant is far closer to the view of the tribunal under appeal before Judge May than the view of Judge May. Most people, as that tribunal stated, simply cannot cope with long documents and will glaze over long before they get to page 5 or 6. While it is a question of fact in each individual case, it is wholly unrealistic to expect most of them to be able to cope with such a document, even to the point of picking up something that may look obvious to the judge hearing the appeal or to the council officer who is used to dealing with such documents.

17. That, however, was not the approach of Judge May, nor was it the approach of Mr. Commissioner Rowland, as he then was, in CH/866/2006, where he too approached the matter on the basis that the claimant could reasonably be expected to check the figures and, on the facts, to have realised from them that the likely consequence of the error there was that she was being overpaid. I also note that although Mr. Commissioner Rowland refers to the claimant realising the likely consequence of the error, the requirement is not that the claimant should realise that it was likely that there was an overpayment but that there was one, as pointed out in *Griffiths* and in CH/2554/2002.

18. A further case referred to on this appeal is CH/1399/2011. In that case, the claimant's appeal to the Upper Tribunal was dismissed. The First-tier Tribunal had found that the claimant did read notices from the local authority setting out the calculation of her entitlement and had read the part of the notices regarding checking the calculation. The issue was whether she had not understood the calculation and the tribunal found as a fact that any reasonable person would have found it glaringly obvious that the amount of income as shown on the notices was significantly less than that which the claimant actually received by a substantial amount, almost £75, and that as such it was probable that there was some element of overpayment rather than a mere possibility. Again the reference to "probable" is inconsistent with the wording of the regulation and the decisions to which I have referred.

19. Finally, the council refers to the recent decision of Judge May QC in CSH/295/11, where he held that a claimant who had provided correct information could not simply rely on that fact where a clear error has been made in relation to the basis for his entitlement. The tribunal had made no findings of fact as to what the claimant had read when he received the notice of the award of benefit. Judge May remitted the case to a new tribunal emphasising the need for full findings of fact. He stated "If the claimant was given notification which demonstrably showed that the assessment of his benefits was made on an assessment which was erroneous in fact it was clearly arguable that he could reasonably have been expected to realise that there had been an overpayment and excess benefit."

20. I agree with the approach of Judge May in CSH/295/11. Depending on all the facts, which need to be found, if there is an error in the figures on which calculations of benefit have been made, and these have been seen, or can reasonably have been expected to be seen by the claimant, then it may follow, depending on all the circumstances, that he could reasonably also be expected to realise that there had been (as opposed to probably had been) an overpayment. That requires proper findings of fact to be made. However, the fact that the point is arguable does not mean that it is necessarily correct. In this case, the claimant may or may not have been capable of reading the 6 pages of information and may or may not have been capable of absorbing them. Even if, contrary to what he appears to have stated in his letter to the council, he did succeed in absorbing them, and even if he did notice the error in the amount of income, the description of the income in the calculations was "DUMMY EMPLOYER REF", and he could easily have been misled by this. Further, the claimant's income for the second half of March was only £237.20, or under £120 per week, and even if the claimant had noticed the mistake, I am unconvinced that he, as a relatively new benefits claimant could reasonably be expected to have realised that, with such a small income in any event, the sums he received were, or even were likely to be, overpayments.

21. I consider that it would have been open to a tribunal to arrive at a different conclusion of fact from that arrived at by this tribunal, but it appears to me that the tribunal was entitled to come to the conclusion to which it came and gave adequate reasons for that decision. It is not necessarily the case that every claimant must be taken to have both read the letter and to have understood the calculations. Nor is it necessarily the case that an error of this kind would lead to the conclusion that there was an overpayment as opposed to the conclusion that there may, or even that there probably was, an overpayment. The council stated that they did not require an oral hearing, and while a different tribunal may have considered that it might adjourn and advise one or both sides to attend for questioning at the adjourned hearing, it appears to me that the tribunal was entitled to proceed on the papers for the reasons it gave and to come to the conclusions of fact to which it came.

22. The appeal is therefore dismissed.

(signed) Michael Mark
Judge of the Upper Tribunal

20 December 2012