

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CH/775/2019

Before Deputy Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 4 December 2018 is set aside and the case is remitted to the First-tier Tribunal to be re-decided at an oral hearing (subject to any further direction by the First-tier Tribunal) in accordance with my reasoning below.

REASONS FOR DECISION

1. This is an appeal brought by the claimant, with permission granted by Upper Tribunal Judge Mitchell, against a decision of the First-tier Tribunal dated 4 December 2018 whereby it dismissed his appeal against a decision of the local authority dated 18 September 2017 that, in the First-tier Tribunal's view, had been revised on 23 March 2018.

2. The procedural history of the case is complicated but I can take it fairly briefly in view of the amount of common ground between the parties and the detailed terms of Judge Mitchell's grant of permission to appeal.

3. The claimant had been entitled to income support and housing benefit. In August 2017, the claimant's award of income support was terminated with effect from the day after it had last been paid. The last day of payment had been 11 April 2017 (doc 16). On 11 August 2017, the local authority was informed of the cessation of the award of income support and it suspended payments of housing benefit with effect from 21 August 2017. On 17 August 2017, it asked the claimant "to confirm your household income and savings since 11.04.17" but did not require the claimant to supply any particular documents (doc 14-15). The claimant completed an on-line form stating that there had been no changes in his circumstances other than the cessation of his income support which, he said, he had challenged and he provided some bank statements (doc 18-38). The local authority appears to have overlooked that response and, on 18 September 2017 (doc 39-40), decided without further ado that the claimant was not entitled to housing benefit from 17 April 2017 and that he had been overpaid housing benefit from 17 April 2017 to 21 August 2017 amounting to £2,934.00, which sum was recoverable from him. (I think that 21 August 2017 was the date on which the last fortnightly payment was made and it may have been in respect of a period ending on the day before, but nothing turns on that detail. The overpayment was calculated as exactly 18 weeks' worth of housing benefit.) The claimant was told that he had one month in which to apply for revision by providing "proof of your household income, savings and bank statements covering the overpaid period". He protested and, on 27 September 2017, he submitted an appeal (doc 114-115).

4. On 11 October 2017, the local authority wrote to the claimant (doc 122-123) to say that it was prepared to revise the decision provided that the claimant provided certain information. The claimant did not fully comply and, on 20 November 2017, he was given one month to provide the information. He was also told that he could appeal, notwithstanding that he had already done so.

5. On 22 February 2018, the First-tier Tribunal allowed the claimant's appeal "in part", setting set aside the local authority's decision of 18 September 2017 but stating that the claimant was now bound to comply with the request for information dated 11 October 2017 and that then the local authority would be bound to issue another decision that would "carry a new right of appeal" (doc 209). On the same day that the decision was made and before the full reasons (doc 211 to 214) had been issued, the local authority wrote to the claimant restating the request for information (doc 283-284). In the absence of what it regarded as a satisfactory response, it then wrote on 23 March 2018 (doc 318), stating that it would "not be able to revise your Housing Benefit ... and your claim will remain terminated and this decision supersedes the decision dated 18 September 2017". The claimant was informed that he could appeal and, on 20 April 2018, he submitted such an appeal (doc 367). On 8 June 2018, he also applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision of 22 February 2018. On 9 August 2018, the First-tier Tribunal reviewed and set aside the decision of 22 February 2018 so that the appeal against the decision of 18 September 2017 needed to be re-determined. Thus, at that stage, the claimant potentially had two appeals pending before the First-tier Tribunal, one against the decision of 18 September 2017 and one against the decision of 23 March 2018.

6. On 21 September 2018, the first of those appeals came before the First-tier Tribunal. The local authority was not represented at the hearing. It seems that the local authority had not submitted the second appeal to the tribunal by then but, if that is so, the judge was nonetheless told about it by the claimant. She adjourned the proceedings with directions to both parties to provide various documents (doc 398-399) and, perhaps unnecessarily, recused herself from further involvement in the case because it had been she who had set the earlier decision aside. The local authority's submission in the new appeal was added to the file in the original appeal as was a considerable amount of documentation provided by the claimant. It is arguable that the claimant did not fully comply with the directions that had been issued to him but, to the extent that he did not, either he said he was unable to do so because he did not have the documents that had been requested or the information was subsequently provided orally at the hearing on 4 December 2018 or else the information appears to have ceased to be relevant. The local authority made it clear that its case was that the claimant had undisclosed income because he had "failed to provide proof of how he has supported himself in writing or verbally with regards to his day to day living and the authority does not accept that he has not had any form of income from the date that his Income Support ended". It appears to have dropped an earlier suggestion that the claimant owned the property in which he lived, after the claimant had pointed out that not only had the local authority been paying him housing benefit for some years but it had previously paid arrears directly to his landlady and that it could see from its council tax records and the electoral register that the property was divided up into flats.

7. The appeals came before the First-tier Tribunal for hearing on 4 December 2018. The First-tier Tribunal noted the complications that arose because the decision of 23 March 2018 had been made following the first decision of the First-tier Tribunal that was subsequently set aside but it took the view that there was only one appeal before it because the decision of 23 March 2018 should be treated as a

revision (*i.e.*, a remaking of the decision in the light of new evidence, albeit to the same effect) of the decision of 18 September 2017. It dismissed the appeal on the ground that, although the local authority had been wrong on 18 September 2017 to consider that the claimant had failed to comply with an “information requirement” (because he had not failed to comply with the precise terms of the letter of 21 August 2017), it had been right to consider that he had failed to comply with the requirements imposed by the letters of 11 October 2017 and 22 February 2018 and so properly made the decision it did on 23 March 2018 under regulation 14 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002). Indeed, the claimant had accepted that he had not fully complied with those requirements.

8. As Judge Mitchell pointed out when giving permission to appeal, the problem with that analysis is that it involved the First-tier Tribunal taking account of circumstances (*i.e.*, the claimant’s failure to provide all the information or documents that he was required to provide) not obtaining at the date of the Secretary of State’s original decision on 18 September 2017, contrary to paragraph 6(9)(b) of Schedule 7 to the Social Security, Pensions and Social Security Act 2000, and there is no separate right of appeal against a revision or refusal to revise. The local authority accepts that the decision must be set aside on that ground.

9. However, in my judgment, there is a more fundamental error in the First-tier Tribunal’s decision, which arises out of the way in which the local authority argued its case. The local authority has always claimed to have made its decisions under regulation 14 of the 2001 Regulations, which provides –

“14.—(1) A person in respect of whom payment of benefit or a reduction has been suspended—
(a) under regulation 11 and who subsequently fails to comply with an information requirement; or
(b) under regulation 13 for failing to comply with such a requirement,
shall cease to be entitled to the benefit from the date on which the payments or reduction were so suspended, or such earlier date on which entitlement to benefit ceases.”

In CH/2995/2006, I observed –

28. ... It seems to me that the words “or such earlier date on which entitlement to benefit ceases” in regulation 14(1), which are arguably surplusage, must envisage there being such alternative grounds for revision or supersession.

29.

30. ..., a termination under regulation 14 cannot be effective in respect of any period before the date of suspension. Suspension under regulation 11 or 13 is concerned only with payment and does not affect entitlement, which is why there is no right of appeal against a suspension (see regulation 16 of, and paragraph 5 of the Schedule to, the 2001 Regulations). Nor can a suspension involve the recovery of payments, or reductions of liability, that have already been made. A suspension preserves the *status quo* and is the temporary cessation of payments or reductions in liability until a decision in respect of which there is a right of appeal is made in respect of entitlement. Therefore, the reference in regulation 14 to “the date on

which the payments or reduction were so suspended” can only be to the date on which the suspension decision was actually made. The only situation in which suspension can affect the payment of benefit due before on which the date the suspension is made is where arrears have accumulated before the date of suspension and payment of the arrears is suspended. Even then, entitlement may be terminated under regulation 14 only from the date of the suspension unless some other ground of revision or supersession is identified in respect of the arrears.”

10. In both its decisions, the local authority made what it called an “overpayment decision”. That decision was not made under regulation 14 but could only have been made as a supersession of the existing award on the ground that there had been a material change of circumstances such that entitlement had ceased before the payments had so that the payments had been revealed to be overpayments, coupled with a decision that the overpayments were recoverable. Although it did not put it quite like this, what the local authority appears to have done is inferred from what it regarded as the claimant’s failure to provide evidence that he had had a sufficient income to disentitled him from housing benefit ever since he had ceased to receive income support. That was a legitimate reasoning process. But if entitlement ceased with effect from 17 April 2017 by virtue of such a supersession, entitlement did not cease from the date of the suspension of payments and an additional decision under regulation 14 was unnecessary and inappropriate.

11. It follows from this analysis that the First-tier Tribunal erred in failing to address the crucial question whether the claimant did in fact have an undisclosed income from 17 April 2017 (or from some other date), sufficient to disentitle him from housing benefit. Only if satisfied that he did have such an income and only if it was prepared to infer that the amount of it was such as to disentitle the claimant from housing benefit from 17 April 2017 could it decide the case completely against the claimant. If not so satisfied but if it was satisfied that benefit had rightly been suspended, it could then consider whether entitlement had ceased with effect from 21 August 2017 by virtue of regulation 14 because the claimant had failed to comply with an information requirement.

12. In this case, the local authority appears to accept that there was no failure to comply with an information requirement before the decision made on 18 September 2017. Entitlement ceased by virtue of that decision and so there was no question of payments being suspended until 22 February 2018 when the claimant’s appeal was allowed in part by virtue of the First-tier Tribunal’s first decision and the local authority arguably suspended payments again. But if there was a further suspension then, it seems to me that it fell with the First-tier Tribunal’s decision when that was set aside, because the result was that the local authority’s decision of 18 September 2017 was reinstated, subject to the pending appeal. Again, entitlement could not have ceased when the payments were suspended if it had already ceased. Any request for information would have been in connection with a new claim or a possible revision of the termination of entitlement, rather than in connection with the possible supersession or revision of an existing award. Accordingly, the only live issue on the appeal before the First-tier Tribunal in this case was whether the claimant actually satisfied the conditions of entitlement to housing benefit, rather than whether or not he had failed to provide requested information. A failure to provide information may of course be relevant when assessing a claimant’s other evidence and adverse inferences may be drawn, but the object of the exercise is to find the true state of

affairs, rather than merely deciding the case on procedural grounds. Thus the First-tier Tribunal failed to address that key issue before it, although it is easy to see why given the way that the case was presented to it.

13. As the First-tier Tribunal erred in law for the reasons that I have given, its decision must be set aside and the issue that it failed to consider must be determined. The local authority would like the Upper Tribunal to determine that issue and it maintains its stance that the claimant has had an undisclosed source of income, but it does not seek an oral hearing. The claimant wants an oral hearing. An oral hearing has not been necessary for the purpose of my determining that the First-tier Tribunal erred in law but it is necessary for the proper determination of the outstanding issue of fact, given that the local authority is not prepared to accept the claimant's evidence at face value and the claimant has asked for a hearing. On the other hand, I consider that that issue of fact can be dealt with more appropriately before the First-tier Tribunal than before the Upper Tribunal. Accordingly, I refuse the claimant's request for a hearing before the Upper Tribunal but, having allowed the appeal on points of law, I remit the case to the First-tier Tribunal who must hold an oral hearing (subject to any further direction it may issue in such event as the claimant indicating that he no longer wishes there to be a hearing).

14. Both the appeals submitted by the claimant to the First-tier Tribunal will be before it again. Although I have decided that any suspension of payments on 22 February 2018 fell with the reinstatement of the local authority's decision of 18 September 2017, there was still a second decision by the local authority on 23 March 2018 as to the claimant's entitlement to housing benefit and there were appeals before the First-tier Tribunal against both decisions. If the First-tier Tribunal were to consider that the claimant either had, or did not have, an undisclosed income of a particular amount throughout the period from 18 September 2017 until 23 March 2018, the fact that there had been a second decision by the local authority on 23 March 2018 would be academic and it would be unnecessary for the First-tier Tribunal to make a decision on the appeal submitted on 20 April 2018 as well as on the original appeal. However, if it were to find that there had been a material change of circumstances between 18 September 2017 and 23 March 2018 (and I note that the claimant appears to have started receiving payments of jobseeker's allowance towards the end of that period (doc 819)), it would be able to give such decision as the local authority could have given on 23 March 2018 (see R(IB) 2/04), by way of supersession of an existing award or on a new claim (if the claimant were to be treated as having made one), to reflect that change of circumstances.

Mark Rowland
5 March 2020