



Case No UA-2021-000675-HB
[2024] UKUT 39 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appellant: The London Borough of Waltham Forest
Respondent: CA

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC 124/20/00851
Tribunal Venue: Sutton
Decision date: 3.9.21

Upper Tribunal Case No. UA-2021-000675-HB
The London Borough of Waltham Forest v CA [2024] UKUT 39 (AAC)

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC 124/20/00851) of 3.9.2021 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before a differently constituted the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. The issue in this appeal concerns the recoverability of housing benefit paid to CA (the Respondent in these proceedings but the Appellant in the proceedings before the First Tier Tribunal) after she commenced employment on 13th January 2020 for the period 27th of January 2020 to the 23rd of March 2020.
2. CA received Housing Benefit from 2011. On 13th January 2020 she commenced employment with Pulse Healthcare Limited but did not immediately report this change in circumstances for various reasons, including illness and bereavement. CA sent an e-mail to Revenue Services on the 5th of March 2020 stating she had started full time employment. The local authority replied by way of letter of the 23rd of March 2020, erroneously requesting information regarding her full-time education course and advising her housing benefit had been suspended. This letter was followed up with an e-mail on the 24th of April 2020 to which CA replied stating she was not in full-time education but had commenced full-time employment.
3. CA stated she phoned DWP in January 2020 to inform them of her full-time employment. She states was advised she was entitled to extended payments of housing benefit as she had not worked for the previous two years. This information was not sent to the local authority, who did not receive any notification from DWP that CA's payments of Universal Credit had ceased. The local authority decided on the 25th of June 2020 that CA had been overpaid by £1828.20 for the period 27th of January 2020 to the 30th of March 2020 (dates amended to the 27th of January 2020 to the 23rd of March 2020). The local authority considered this had arisen as a result of CA commencing work on the

13th of January 2020, but not notifying it of this change until 5th of March 2020 and that the overpayment was recoverable.

The appeal to the First-tier Tribunal

4. CA appealed the local authorities' decision of 27th April, as reconsidered on the 25th of June 2020, to the First-tier Tribunal (FTT). The FTT allowed CA's appeal, setting aside the decision, finding none of the overpayment of Housing Benefit was recoverable. The FTT divided the overpayment figure into two separate periods, firstly, the period from 27th of January 2020 - 4th of March 2020 (£1231.85) and secondly, the period from the 5th of March 2020 - 23rd of March 2020 (£596.17). It did this largely because CA initially contested the recoverability of the overpayment for the second period only, however, after receiving legal advice at the FTT hearing, she contested the recoverability of the overpayment for the entire period.
5. The FTT decided the overpayment was not recoverable for any of the relevant period(s). In respect of both "periods" the FTT took the view the overpayment was due to official error to which CA did not contribute to and she could not reasonably be expected to realise an overpayment had been made.

The Proceedings before the Upper Tribunal

6. The Appellant local authority applied for permission to appeal against the FTT's decision. On 2nd November 2021 the First-tier Tribunal Judge granted permission to appeal on the basis there was an arguable point of law involved relating to whether universal credit (UC) claimants could rely on Housing Benefit Regulations when DWP fails to notify the Housing Benefit Authority the claimant has started to work. The specific Housing Benefit regulation(s) are not identified. The grant of permission also referred to "*several other issues, which may have sufficient merit to warrant leave to appeal, but as the matter will be before the Upper Tribunal, they may be considered*". Regrettably, the FTT Judge does not elaborate. It would be helpful when permission to appeal is being given at the FTT if the specific issues and regulations in question are identified, rather than simply referred to in general terms. If there are other issues which the FTT considers the Upper Tribunal might usefully consider, it would be apposite to clearly set those out when granting permission to appeal. This avoids the need for the Upper Tribunal to engage in Delphian deliberations.
7. Judge Jones gave case management directions allowing the Respondent to supply a written response to the appeal and suggesting an oral hearing would be appropriate given the complexity of the issues involved.

8. The appeal was transferred from Judge Jones to me. I held an oral hearing of the appeal at Field House on 31st May 2023. This was attended by both parties who were legally represented.
9. Counsel for the Appellant submitted at oral hearing that the FTT's decision involved an error of law on a number of grounds. He noted that CA was in the unusual "loophole" situation of receiving both universal credit (UC) and housing benefit (HB) being in temporary accommodation and it was not self-evident there was a duty to disclose on UC. In summary he argued that the FTT made the following errors of law:
 - (i) The FTT failed to identify where the duty on UC to notify the local authority of a change of circumstances comes from.
 - (ii) It was incorrect to find there was official error in relation to the entire period.
 - (iii) there was a failure to fully consider whether CA had contributed to the error. Counsel also argued Regulation 88 of the Housing Benefit Regulations 2006 contained no reference to a one-month time limit and any relevant change should be notified as soon as it happens.
 - (iv) The case law demonstrates that if a claimant has not complied with their own duty to disclose, they are not able to assert official error on the part of the local authority as per *R(Sier) v Cambridge CC HBRB [2001] EWHC Admin 160*.
 - (v) There was no official error from 5th March 2020 as it was unreasonable to expect the local authority to act instantly on a disclosure particularly in the context of a pandemic. In their written submission the Appellant local authority submits no official error has occurred during the period 2/03/2020 (presumably meaning 2/2/20) to 8/03/2020 because the payment was made prior to the Appellant's notification on 5/03/2020. The Respondent does not believe that the FTT has given this point any consideration.
 - (vi) The Appellant also contends the FTT has failed to address the issue regarding notifications of *changes* in circumstances. It has referred to the singular "change" throughout the statement of reasons. The authority was clear in part 7, paragraph 15 of its submissions, that the claimant's earnings changed no fewer than 10 times during the period of the overpayment (24/01/2020 to 30/03/2021), changes which ought to have been individually notified to the local authority. It is argued that the FTT formed the view that only the first notification was relevant. The Appellant submits the FTT was required to make a clear finding of fact in respect of *each payment or change* to enable it to determine whether the overpayment caused by the claimant first finding work and then receiving an increase in income, were the results of official error.
10. The representative for CA submitted;

- (i) It was reasonable to expect a local authority to act on a disclosure immediately.
- (ii) UC were under a duty to inform the local authority of the change of circumstances and *Sier* could be distinguished.
- (iii) It was not reasonable to expect CA to know an overpayment had been made at that time. This is a subjective test.
- (iv) The Local Authority made an official error in not suspending HB payments.
- (v) Extended payments should run on in these circumstances otherwise this would be an anomalous situation vis a vis other benefits.
- (vi) Tribunals have been willing to look at claimants' circumstances in the round when considering official error.

11. At the suggestion of the parties, I issued further case management directions on 2nd June 2023 requesting submissions clarifying when the Respondent's award actually came to an end and whether Universal Credit is a qualifying income-based benefit for the purposes of Regulation 2 of the Housing Benefit Regulations 2006. The parties were requested to indicate the implications of this as regards the issues in this appeal. Further submissions from both parties have been received and I thank both representatives for their helpful oral and written arguments.

The legislation

12. The rules governing the recoverability of housing benefit overpayments are arguably more stringent than the rules relating to benefits paid by the DWP. For housing benefit overpayments, the starting point is that all overpayments are recoverable. This is subject to the exception set out in regulation 100 of the Housing Benefit Regulations 2006 (SI 2006 No.213) which provides;

Recoverable overpayments

100.—(1) *Any overpayment, except one to which paragraph (2) applies, shall be recoverable.*

(2) *Subject to paragraph (4) this paragraph applies to an overpayment [which arose in consequence of] an official error where the claimant or a person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.*

(3) *In paragraph (2), “overpayment [which arose in consequence of an official error]” means an overpayment caused by a mistake made whether in the form of an act or omission by—*

(a) the relevant authority;

(b) an officer or person acting for that authority;

(c) an officer of—

(i) the Department for Work and Pensions; or

(ii) Revenue and Customs,

acting as such; or

(d) a person providing services to the Department for Work and Pensions or to the Commissioners for Her Majesty's Revenue and Customs, where the claimant, a person acting on his behalf or any other person to whom the payment is made, did not cause or materially contribute to that mistake, act or omission.

13. In summary housing benefit overpayments are, therefore, generally recoverable. The only exception to this general rule is if:

- 1) the overpayment was caused by an official error which no relevant person caused or contributed to; *and*
- 2) no relevant person could reasonably have been expected to realise that there was an overpayment either at the time it was made or when they were notified of the payment.

14. In terms of the duty to notify changes of circumstances, this is dealt with in Regulation 88 of the 2006 Regulations.

Duty to notify changes of circumstances

88.—*(1) Subject to [paragraphs (3) and (6)], 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 ... to the designated office—*

(a) in writing; or

(b) by telephone—

(i) where the relevant authority has published a telephone number for that purpose or for the purposes of regulation 83 (time and manner in which claims are to be made) unless the authority determines that in any particular case or class of case notification may not be given by telephone; or

(ii) in any case or class of case where the relevant authority determines that notice may be given by telephone; or

(c) by any other means which the relevant authority agrees to accept in any particular case.

15. This regulation imposes a general duty on the claimant to report any change of circumstances to the authority which might affect their right to, the amount of, or the payment of, benefit.

ERROR OF LAW

16. The question for the Upper Tribunal is whether the FTT made a material error of law based on any of the reasons advanced by the appellant. In my judgment the FTT was in error of law in this case.

17. I agree with the ground advanced in the Appellant's written application for permission to appeal and referred to in oral argument, namely, that as the Respondent's earnings had changed a number of times during the period of the overpayment, the FTT was required to make a clear findings of fact in respect of *each* change of circumstances. It was required to make findings to enable it to determine whether the overpayments caused by the Respondent first finding work and then receiving increases in income were the results of official error.

18. The FTT by considering the issue of notification as a single, one-off event (specifically referred to in paragraph 8 of the written reasons) failed to make sufficient findings of fact and, axiomatically, to provide sufficient reasons for its decision in this regard. I agree with Judge Brunner's decision *in Calderdale Council (HB)[2016] UKUT 396 (AAC) (CH/1633/2016)* that overpayments should be considered separately as a series of payments, given that a claimant's actual or imputed knowledge of overpayments will change over time (following Commissioner Jacobs, as he then was, in CH/858/2006).

19. Having decided the decision of the FTT is in error of law and further findings of fact are required I am not required to consider other issues raised by this appeal ,however, it may be helpful to consider some of those issues.

Extended payments; Is Universal Credit a Qualifying Benefit?

20. The Housing Benefit Regulations 2006 SI No 213 provide for extended payments if certain criteria are fulfilled, including receipt of a "qualifying income-related benefit": regulation 72(1)(a). The definition of "qualifying income-related benefit" is contained in regulation 2(1) of the 2006 Regulations;

qualifying income-related benefit" means—

(a) income support;

(b) income-based jobseeker's allowance;

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(c) income-related employment and support allowance;

21. This issue is relevant to whether the Respondent was or could have been in receipt of extended payments and therefore to the *amount* of any overpayment. The Respondent stated she was advised by DWP she would be entitled to extended payments of HB for a further 4 weeks.
22. Counsel for the Appellant local authority argued that the Respondent's award of UC was terminated with effect from January 24th, 2020. The Respondent was therefore overpaid HB from January 27th, 2020, the date on which the first payment of HB was made through a credit to her rent account. He submitted universal credit is not a qualifying income-based benefit for the purposes of Regulation 2 of the Housing Benefit Regulations 2006.
23. Counsel for the Appellant argues the definition of "qualifying income-related benefit" in regulation 2(1) of the 2006 Regulations refers to three legacy benefits: income support, income-based jobseeker's allowance and income-related employment and support allowance. UC is not listed in the definition and is not therefore a "qualifying income-related benefit". He argues there is no way to read regulation 2(1) as if UC was listed in the definition. He submits therefore the amount of the overpayment of HB falls to be calculated on the basis that CA had no entitlement to extended payments of HB.
24. The Respondent's representative in her further submission does not dispute the end date of the universal credit claim as 24th January 2020. She disagrees however with the submission that UC is not a qualifying benefit. She submits that if the local authority's interpretation of Regulation 2 is correct then Regulation 72(1)(c) will soon be otiose due to the decreasing numbers of people in receipt of legacy benefits and this interpretation is contrary to public policy. She also argues that as universal credit largely replaces the benefits referred to the provision should be read to include it.
25. While the Respondent's argument may have some force in logic, in considering the interpretation of this statutory instrument, I am mindful of the primacy of the text taking into account the regulation as a whole and that words should be given their ordinary natural meaning in this context (*R on the application of O (a minor, by her litigation friend AO) v SSHD* [2022] UKSC 3. On that basis I do not consider there is any way to read this provision as including universal credit as a qualifying benefit without effectively redrafting the regulation or at the very least straining the statutory language far beyond its ordinary natural meaning. As such in my judgement, universal credit is not included regulation 2 and the Respondent would not have

been eligible for extended payments on this basis. This view is not however, material to my decision in this case.

Directions for the re-determination of the Appellant's appeal

I direct as follows:

1. The appeal against the Secretary of State's decision of 27th April, as reconsidered on the 25th of June 2020, is remitted to a differently constituted First-tier Tribunal for re-determination. The next tribunal should make fresh findings of fact and cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.
2. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.
3. The Tribunal may find it helpful to make careful findings of fact in relation to issues which may be raised at hearing including the duty to notify of changes of circumstances (as referred to at paragraph 14 above) the information provided to the Respondent regarding this duty, whether there was an official error and if so the period(s) it relates to and whether there was any contribution to this error by the claimant. The FTT should also carefully consider and make findings of fact in regard to whether no relevant person could reasonably have been expected to realise that there was an overpayment either at the time it was made or when they were notified of the payment.
4. The First-tier Tribunal is to hold an oral hearing of the remitted appeal unless the Respondent makes a written request to the First-tier Tribunal for the matter to be decided on the papers without a hearing. Such a request and any representations are to be received by that Tribunal within one month of the date on which this decision is issued. Thereafter, the Tribunal would have to decide whether to proceed without a hearing or if there is to be a hearing, the form of any hearing (whether in-person or remotely by video or telephone), after considering the parties' representations or preferences and in accordance with the FTT procedural rules
5. If the Appellant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.

Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social

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Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if relevant to the circumstances at the date of the decision under appeal.

(Signed on the Original)

E Fitzpatrick

Judge of the Upper Tribunal

Date 17th January 2024