

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CH/2615/2010

Before Judge Nicholas Paines QC

Decision: The decision of the First-tier Tribunal involved an error of law. I set it aside and remit the case to a differently constituted tribunal for re-determination.

REASONS FOR DECISION

1. A the relevant time the claimant lived with her two children in a rented property; she had a job and also received child tax credit ('CTC') from HMRC, and was in addition receiving housing benefit ('HB') and council tax benefit ('CTB') from her local authority. In June 2008 the claimant received from HMRC a notice of her CTC award for the 2008/2009 tax year. It stated the award as an annual sum of £2635. On 26 June she took the notice to the local authority, who gave her a receipt (page 88) and kept a photocopy which they stamped "original documents seen" (pages 143-147).
2. In June 2009 the claimant received from HMRC a notice of their final tax credits decision for the 2008/2009 tax year. Her entitlement was the same as stated in the June 2008 award notice. The claimant took that to the local authority, who stamped it "original documents seen" (pages 32-34).
3. Despite knowing the amount of the claimant's tax credit award since June 2008, the local authority did not revise her awards of HB and CTC until July 2009, when the amount of her CTC came to their notice as a result of checking the "remote access terminal". They then took a decision dated 29 July 2009 revising her awards of HB and CTC for the period from 26 May 2008 to 5 July 2009, calculating total overpayments of £304.67 of HB and £105.45 of CTB and deciding that these were recoverable.
4. By a further decision dated 12 August 2009 the local authority decided that the claimant had received a further element of overpayment in the period from May to August 2009. Though that decision is in the papers (pages 64-65), there is no appeal against it and it was not considered in the claimant's appeal to the First-tier Tribunal. I assume that the claimant accepts that decision, which was presumably taken as a result of the claimant showing them her CTC award for the tax year 2009/2010.
5. Initially the local authority took the view that the first overpayment made between May 2008 and July 2009 was recoverable because the claimant had not told them of the new rate of her CTC for 2008/2009, but at the hearing before the First-tier Tribunal they accepted that she had shown them the HMRC notices and that the overpayment was caused by their error in not making use of the information.
6. The local authority argued that the overpayment was nevertheless recoverable from the claimant, and the tribunal agreed. The tribunal held that the claimant

could reasonably have been expected to realise that she was being overpaid. The tribunal's reasoning was as follows.

7. In March 2008 the local authority had sent the claimant a notice of a recalculation of her HB caused by a change in her non-dependant deduction, apparently in respect of the period from July to October 2007 (pages 24-25). It contained calculations, including a statement of the "child tax credit element" of her income; this was stated as £41.80. In November 2008 the local authority sent the claimant a further recalculation of her HB, caused by a change in her rent, apparently with effect from 1 December 2008. The calculations again included a statement of the child tax credit element of her income; this was again stated as £41.80.
8. The tribunal held that the overpayment was caused by official error within the meaning of regulation 100 of the Housing Benefit Regulations 2006 (and regulation 83 of the Council Tax Benefit Regulations 2006) because the claimant had informed the local authority of the increase in her CTC, but went on
10. The Tribunal further concluded that in all the circumstances [the claimant] could have reasonably been expected to realise that she was being overpaid. This is because she did not carefully read the notification letters of 11/3/08 and 17/11/08. The section "weekly income" is clearly set out and separately lists her income from wages, Child Benefit and CTC. The figure did not change from £41.80 per week even though her CTC had increased and [the claimant] clearly knew this.
11. In the Tribunal's view [the claimant] could reasonably be expected to check that her income details were accurate and tell [the local authority] if anything was wrong
12. The claimant appeals with permission given by Judge Wikeley (page 134). Her representative submits that that the tribunal's reasoning imposed a test that virtually no claimant who had claimed HB before could hope to satisfy, and cites some Commissioners' case-law. Judge Wikeley observed (and I respectfully agree) that that case-law did not really advance matters, since the issue of reasonableness was ultimately a question of fact for the tribunal. He also pointed out the difficulty that the contents of a notice sent in November 2008 could not give grounds for the claimant to have been expected to realise that she was being overpaid in the period prior to that November. That seems to me to plainly right, with the result that there is a logical flaw in the tribunal's process of reasoning. That is an error of law; the law does not allow tribunals to make errors of logic. I must set the decision aside since that error means that the recoverable amount of the overpayment was at least over-stated.
13. Judge Wikeley also observed that £41.80 (the figure used in the two 2008 HB calculation notices) was the weekly equivalent of the payments being made by HMRC in the 2006/2007 tax year (as to which see page 4 of the papers) and that HMRC were predicting then that the 2007/2008 payment would be higher. It appears that the local authority never revised the claimant's HB or

CTB in the light of her 2007/2008 CTC award, but there is no further information about this in the papers. Even if this had been legally relevant I do not consider that it would have been an error of law for the tribunal to fail to spot this, for the reasons I gave in CH/2484/2006: both parties were represented, neither drew attention to the point and the point did not leap to the eye (I confess to not spotting it myself before reading Judge Wikeley's decision).

14. Though I would not have held that the law did not allow the previous tribunal to reason in the way it did in the paragraphs I have quoted above, I doubt that I would have come to the same conclusion myself; there is room for more than one view on whether a person in the claimant's position could reasonably be expected not only to scrutinise the calculations in the November 2008 notice but also to go back to the March 2008 notice in order to double-check that the local authority had taken into account the increase in her CTC of which she had notified them in June 2008.
15. I remit the case to a freshly constituted tribunal since I do not sufficient information to decide it myself and it is more appropriate for it to be reconsidered by a First-tier Tribunal local to the claimant. The live issues in the case seem to me to be (a) which of the overpayments in the period covered by the local authority's decision "arose in consequence of an official error" and (b) whether the claimant "could not, at the time of receipt of the payment or of any notice relating to the payment, reasonably have been expected to realise that it was an overpayment".
16. Deciding both of these issues requires a tribunal to focus on the time of the payment or payments and/or of a notice or notices relating to it or them. The previous tribunal was amply justified in deciding that the local authority's failure to act upon the June 2008 notification to it of the increase in the claimant's CTC was an official error, but it did not ask itself which of the overpayments made in the period to which the recovery decision relates arose in consequence of that error.
17. The overpayment period started in May 2008, but the information was not given to the local authority until 26 June and a local authority might be allowed a period of time following receipt of information before its failure to process it is properly to be castigated as an error. I leave it to the new tribunal to decide what that period is in the circumstances of this case. The local authority should provide the tribunal with information as to the dates on which payments of benefit were made.
18. As regards payments in the part of the overpayment period that was prior to the local authority's failure to process the June 2008 information, the position is not clear on the papers. As Judge Wikeley has noticed, part of the overpayment in that period may be attributable to the local authority's having failed to take into account an increase in the claimant's CTC in 2007. The cause of that failure is not clear. It might itself be due to an official error. The local authority should explain to the new tribunal why it (apparently) failed to take that earlier increase into account. If the claimant has evidence that she notified her 2007/2008 rate of CTC to the local authority, she would be well

advised to bring it to the tribunal. The local authority should also produce any copies of information relating to the claimant's 2007 CTC that it may have in its files.

19. Similarly, as regards the 'reasonably be expected to realise' issue, the focus has to be on the points in time at which the claimant received notice of payments of benefit (the payments themselves appear to have been made directly to the landlord); it is her state of mind on those dates that is relevant. The local authority should provide that information to the new tribunal so that, in the event of the tribunal concluding that at any point in time the claimant could reasonably be expected to realise that overpayments were occurring, it can decide which payments are affected.
20. I have considered the points made by Judge Wikeley in paragraphs 4 and 5 of his permission decision, but have come to the view that any overpayments that were made after the local authority's official error in failing to process the information it received in June 2008 are to be regarded in their entirety as overpayments that arose in consequence of that official error, irrespective of what it was that had caused it not to take into account the 2007 increase in the claimant's CTC. This is for the following reasons.
21. The local authority's error was an omission within the meaning of the regulations - its omission to calculate the claimant's benefit on the basis of the correct CTC figure which she supplied in June 2008. Had they not made that error, they would thereafter have paid benefit at the correct rate. The situation in this case is in that respect different from the one I considered in CH/3/2008, where there would have been an element of overpayment even if the local authority had not made the error that it made, and I held that the element of overpayment that was not due to official error was recoverable. The difference here is that there would have been no element of overpayment in the period after the official error if the official error had not occurred. Moreover, even if (which there is no reason to suppose) the claimant had earlier been at fault in not telling the local authority of a 2007 increase, that could not have caused or materially contributed to the omission which the local authority committed in 2008.

Judge Nicholas Paines QC
17 June 2011