



Housing benefit overpayments - 'official error'

In the first of two articles on the recovery of Housing Benefit overpayments, Desmond Rutledge considers the exemption from recovery where the overpayment is the result of 'official error'

"Overpayments due to official error are currently running at almost twice the rate of those arising as a result of fraud."

Unlike the recovery provisions for benefits administered by the DWP, the test for recovery of overpayments of Housing Benefit (HB) does not depend upon it having occurred by reason of misrepresentation or a failure to disclose. The basic rule is that all HB overpayments are recoverable unless the claimant can bring themselves within the exemption for non-recovery (regulation 100 of the Housing Benefit Regulations 2006).

The burden of proof lies on the claimant to bring him or herself within the exemption¹ which can only come into play if:

- the overpayment was caused by 'official error' (defined in reg 100(3));
- the claimant (or the person to whom the payment was made) did not materially contribute to the error and;
- the claimant could not

reasonably be expected to realise that they were being overpaid (reg 100(2)).

Local authorities (LA)² have a strong financial incentive to pursue overpayments of HB/CTB. This is because the subsidy which they claim from the DWP to administer HB/CTB is reduced if the LA does not recover sufficient overpayments.³ According to a DWP report,⁴ overpayments due to official error are currently running at almost twice the rate of those arising as a result of fraud.⁵ Such is the concern over errors that official guidance has reminded LAs that if a decision is made to award HB before all of the relevant information and evidence has been received, and these results in an incorrect payment, the cost will have to be met by the LA.⁶

MEANING OF OFFICIAL ERROR

The regulations state that an official error is a mistake in the form of an act or an omission made by an official acting on behalf of the LA, DWP or HM Revenue and Customs. If the

claimant has materially contributed to the mistake then it will not normally count as an official error.⁷ The term 'official error' is not defined but it has been described as a clear and obvious error of fact or law,⁸ having regard to the material before the decision-maker at the time the original decision was made.⁹ It can include a Wednesbury unreasonable decision,¹⁰ though it is not confined to public law errors.¹¹

Official error and delay

If the LA issues an incorrect payment after this period it would usually amount to a mistake in the form of an 'omission'. From 1 April 2009 the subsidy regulations have been amended¹² to provide that if the delay in processing the change of circumstances is due to something out of the LA's control, such as staff shortages due to sickness, the LA can decide to classify the overpayment as an 'administrative delay' which is automatically recoverable from the claimant. The question whether the delay in processing a change of circumstances is an official error

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or an administrative error is likely to be the subject of appeals to a tribunal.

The case-law does not identify any particular length as being critical and the Commissioners have tended to treat the issue as a question of degree to be decided by the tribunal. CH/858/2006 held that processing a change within one month was 'sufficiently prompt'. The Commissioner, in CH/454/2006, did not disturb a finding that three months delay did not amount to official error, holding that the delay would need to be 'particularly protracted' to be an official error. But see CH/2558/2007 in which the deputy Commissioner opined that a failure to suspend benefit could be categorised as a mistake if the LA has been unreasonably slow in investigating the information at its disposal.

Causation

The lead case on whether an overpayment 'arose in consequence' of an official error is *R (on the application of Sier) v Cambridge City Council Housing Benefit Review Board* [2001] EWCA Civ 1523. The Court held that a common sense distinction should be made between cases where the overpayment has been caused by an 'uninduced official error' and those cases where the claimant was 'substantially responsible' for the overpayment.¹³ The factual scenario in *Sier* was that the claimant was paid HB on two separate properties because he had failed to tell Cambridge City Council that he had taken out a second tenancy in London and had claimed HB on it. The claimant nevertheless argued that the

resulting overpayment had been caused by official error because the Benefit Agency had failed to send his claim for HB (form NHB8) to Cambridge City Council when he claimed IS. The Court held that it was 'self-evident' that the overpayment on these facts had been caused by the claimant's failure to notify Cambridge that he had claimed HB on a new property in London. But the legal effect of the test in *Sier* means that a claimant's failure to notify a change of circumstances is not necessarily fatal to showing that the overpayment is non-recoverable. Everything depends on the circumstances of the particular case.

COMMISSIONERS' DECISIONS

Mistake caused by the DWP

In CH/3083/2005 the claimants entitlement to JSA ceased when she found full-time employment in February 2004. The Jobcentre advised her to complete a JSA signing-off card to indicate that she wished to claim the one month's extended payment of HB. The LA did not receive any notification from the DWP and HB continued to be paid until August 2004. The Commissioner held that the DWPs failure to notify the LA about the extended payments was an official error and, for the initial period at least, the DWPs failure was 'substantially more potent' as a cause of the overpayment than the claimant's failure to notify the LA direct. The Commissioner went on to hold that the claimant ought to have made enquiries by mid April 2004, when she would have discovered that HB payments were

continuing. From 1 May 2004 onwards (but not before), the cause of the overpayment was not the official error made by the DW but the fact that the claimant did not ask the LA why she was continuing to be paid. See also CH/3761/2005 in which a personal advisor told the claimant that he did not need to inform the LA that he had found employment as the Jobcentre would do so. The Commissioner said that, in contra to *Sier*, it was the Jobcentre's advice which caused the claimant not to comply with his obligation to notify the LA.

LA's failure to pass information onto the HB section

R(H)10/08 held that an omission on the part of a LA's housing office to pass on information to the HB section within the same LA could amount to an official error. The claimant was a council tenant who was in receipt of state pension credit and HB. She travelled to Ghana and intended to stay for eight weeks, but in the event, had to stay for nearly a year. When the LA determined that there had been a recoverable overpayment of HB the claimant appealed on the basis that she or her ex-husband had informed the housing office responsible for her tenancy that she was in Ghana. An appeal tribunal accepted that she had told the housing office of her stay in Ghana but held that this did not amount to sufficient notification to the benefits office where HB claims are processed. Allowing the appeal, the Duty Commissioner said that the tribunal had failed to consider whether the alleged omission of

"Failure to notify a change of circumstances is not necessarily fatal to showing that the overpayment is non-recoverable."



the housing office to pass on information to the benefits service could amount to an official error as the term 'relevant authority' in the exemption for recovery of an overpayment was not confined to one department within the LA. CH/2567/2007 is a decision to the same effect where the Commissioner observed that the claimant's duty to report any change to the 'designated office' had to be viewed in the context of the provisions on recoverability of an overpayment.

LA's failure to identify information provided by the claimant

In CH/602/2004 the claimant omitted to mention that he was in receipt of Industrial Injuries Disablement Benefit (IIDB) on the claim form for Council tax Benefit (CTB), but before the award was made he provided bank statements in which the payments of IIDB were clearly identified as 'DSS IIB' against his national insurance number. The LA failed to include his disablement benefit when calculating the award of CTB. Allowing the appeal, the Commissioner said the facts were quite different from those in CH/69/2003 where the only evidence available to the LA was a series of unidentified 'bank credits'.

The claimant in CH/3925/2006 had previously received a childcare allowance in her claim for HB. The LA continued to include a childcare allowance when she reclaimed HB even though she had not included any childcare costs in the claim form and had produced a Tax Credit award letter which stated that she had no qualifying childcare costs. Relying on

THE LEGISLATION

Recoverability of HB overpayments is governed by the Social Security Administration Act 1992, section 75 and the following regulations from the Housing Benefit Regulations 2006 (SI 2006/213):-

- Regulation 98 on the need to revise or supersede the decision awarding benefit;
- Regulation 99 on the meaning of an overpayment;
- Regulation 100 which prescribes the circumstances in which an overpayment is recoverable. The general rule is that all overpayments are recoverable (para 1). This is subject to the proviso (para 2) that an overpayment will not be recoverable if it is caused by official error (defined in para 3) and the claimant could not reasonably have realised that they were being overpaid.

See also the equivalent provisions for council tax benefit in s76 of the Social Security Administration Act 1992 and regulation SI 2006/215. Note the separate regulations (SI 2006/214 and 216) for claimants over 60.

CH/69/2003, the LA argued that it was not required to analyse the tax credit letter for possible evidence about childcare costs for the HB claim. The Commissioner said CH/69/2003 had to be read against the factual background in that case. It should not be read as authority for the proposition that a LA does not make a mistake by failing to notice in a document produced for one purpose (e.g. capital), evidence which is relevant to something else (e.g. income). Each case must be considered on its own facts. In this case the LA's failure to consider the tax credit letters more carefully before awarding benefit in this case amounted to an official error.

Is a future change of circumstances predictable?

In CH/520/2006 an overpayment of CTB occurred because the claimant's income changed when his son reached his 19th birthday, as an award of Child Tax Credit came to an end. The deputy Commissioner said the change in

the Tax Credits was predictable and the period of the award of CTB should have been made to end in the week the claimant's son had his 19th birthday.

In CH/687/2006 the LA were aware at the time it made an award of HB that the claimant's partner was in receipt of short-term Incapacity Benefit (IB) paid at the higher rate. The claimant did not notify the LA of the increase in her partner's IB to the long-term rate. HB continued to be paid at the same rate for a period of three years. The deputy Commissioner held that there had been no error on the part of the LA as the claimant's future income depended on factors outside of its knowledge, e.g. the date the short-term rate of IB had first been awarded. It is arguable that CH/687/2006 did not really deal with the argument that the LA's failure to suspend benefit after six months amounted to a mistake based on its failure to make proper enquiries: see CH/2558/2007. A competent LA would have been

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aware that short-term IB is only payable at the higher rate for a maximum of six months and arrangements should have been made for payment of HB to be suspended¹⁴ in six months' time on the basis that it was predictable that a question would have arisen by that stage regarding the claimant's entitlement; there was bound to be a material change in the claimant's income whether her partner's IB continued to be paid or not.

CONCLUSION

The brief survey of Commissioners' decisions above shows how cases which appear to involve similar facts can nevertheless produce very different outcomes once the circumstances in which the overpayment arose is fully investigated. Where it can be established that the overpayment was caused by official error the claimant still needs to show that they could not reasonably realise they were being overpaid before the overpayment can be categorized as non-recoverable. This aspect of the exemption from recovery will be considered in part two of this article, which will appear in the next edition of Adviser.

FOOTNOTES

1. See CH/4918/2003 para 16, CH/3436/2004 para 22, and CH/2713/2006 para 11.
2. 'Relevant authority' in the legislation means an authority administering housing benefit: HB Regs 2006, reg 2.
3. The subsidy can be reduced by 40, 50 or 100% in accordance with thresholds contained in Article 18 of the Income-Related Benefits (Subsidy to Authorities) Order 1998 (SI 1998/562) where the LA does not recover sufficient overpayments

expressed as a percentage of the total correct payments made,

4. Out of a total annual budget of £15.7 billion, 0.9 (£140 million) is estimated to have been overpaid due to fraud and 1.3% (£210 million) due to official error: Estimated Overpayments for 2007/08: Figure 4A at page 24 of Fraud & Error in the Benefit System.
5. Out of a total annual budget of £14.9 billion, 2.83% (or £420 million) is estimated to have been overpaid due to claimant error, 1.4% (£210 million) due to official error and 1.0% (£150 million) due to fraud.
6. G24/2008 paras 18-20.
7. R(H) 1/04 para 26.
8. For example, CH/3/2008 held that a LA's failure to apply the correct rule for calculating fluctuating earnings amounted to a mistake: see CH/3/2008.
9. R(H) 2/04 para 13 and CH/1602/2007 para 16.
10. CDLA/393/2006 para 10.
11. CPC/26/2005 para 23.
12. The Housing Benefit and Council Tax Benefit (Amendment) (No. 2) Regulations 2008 (SI 2008/2824).
13. See Simon Brown LJ at paragraphs 30 – 31.
14. Housing Benefit and Council Tax (Decisions and Appeals) Regulations 2001 (SI. 2001/1001) reg 11(2).

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CAPITAL

Application of Leeves v CAO

CIS/2287/2008

*Commissioner Jacobs,
23 September 2008*

The claimant was claiming IS, declaring £750 capital. An earlier claim for IS had been terminated and an overpayment calculated on the grounds that he had excess capital. The new claim was refused on the ground that he still possessed excess capital. He appealed, arguing that capital should be reduced: (i) under REG 14 SS (PAO) REGS 1988; (ii) in respect of an overpayment of HB; and (iii) to take account of the difference he had to pay between his housing benefit and his rent. The Tribunal upheld the decision and the claimant appealed.

HELD: Appeal dismissed. The Commissioner considered LEEVES v CAO and subsequent Commissioner's decisions before concluding that the decision applies to the classification of an asset as capital. It only applies at the moment of receipt or attribution and for the purpose of classification, not thereafter. A demand for repayment after something has become capital in the claimant's hands is outside the scope of LEEVES. Although there is no formal diminishing rule for actual capital, a similar result can be attained using inferences in the fact finding process. REG 14 reduces the amount of an overpayment that is recoverable. It does not alter the fact that the claimant retains actual capital for the purposes of a later claim.

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