

## BENEFITS



# Housing benefit overpayments - the 'reasonably realise' test

**In Adviser 133, Desmond Rutledge began his examination of housing benefit overpayments and recoverability. In his second article, he considers exemption from recovery based on official error and whether the claimant could reasonably realise they were being overpaid.**

**A finding that there has been an official error is a prerequisite to any overpayment of Housing Benefit (HB) being non-recoverable (see Adviser 133). Once this has been established, the claimant still needs to show that they could not reasonably have realised that they were being overpaid in order to bring themselves within the exemption from recovery.**

The 'reasonably realise' test has an objective element as it is based on what could reasonably have been realised. However it is not wholly objective as it has to be applied to the particular claimant.<sup>1</sup> The test uses the concept of a notional reasonable person placed in the circumstances that prevailed when the overpayment occurred as the basis for deciding what the actual claimant ought to have realised.

The Judge in CH/2353/2008<sup>2</sup> said the test was initially a question of fact as to the information available to the individual at the

time of any payment or notice. Then it is a question for the judgment of the decision maker whether it was reasonable for that individual to be expected to have realised that either the payment or the notice included an overpayment (para 6).

CH/1808/2006 considers the effect of a claimant's mental health condition in deciding whether it was reasonable to expect them to realise. Commissioner Augus said, in a case where a letter had been supplied from the claimant's GP describing the poor state of the claimant's mental health, that it was not unreasonable for the tribunal to conclude that the claimant would not be able to give sufficient attention to his benefit claim to detect the LA's error (para 8).

The following extract from the Housing Benefit/Council Tax Benefit Overpayments Guide considers the effect of a claimant's age, intelligence and mental condition and evidence of wrong advice from an official source when deciding whether it was reasonable for them to be

expected to realise.

"2.153 'Reasonably expected to know' can be interpreted in the claimant's favour, if:

- you consider, because of the claimant's age, intelligence (e.g. can the claimant read) or mental condition, that the claimant was genuinely unaware of the official error overpayment
- the claimant states they were wrongly advised by an official source; however, the onus of proof will be on the claimant. In such cases, a statement should be taken from all parties concerned and then the evidence will need to be considered and a decision made on the balance of probabilities"

The Commissioner in CH/2554/2002 states that a three-staged approach should be adopted towards the test<sup>3</sup>:

- First, the tribunal must direct itself to the correct legal test. The test is not what the claimant ought to have realised.<sup>4</sup> The claimant must realise that the amount of benefit they are receiving definitely contains some

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element of an overpayment on each occasion a payment is made or where the claimant receives notice of that payment.<sup>5</sup>

- Secondly, the tribunal must identify what information was available to the claimant.
- At the third stage, the tribunal must determine what the claimant could reasonably have been expected to realise from that information.

While tribunals can take the claimant's experience of dealing with benefits into account there is little scope for imputing knowledge of the HB scheme to a claimant, save in rare cases, such as where the claimant is a former housing benefit officer.<sup>6</sup> Given the nature of the 'reasonably realise' test the exemption from recovery is unlikely to apply in cases where it is clear that an overpayment has occurred. For example, where the claimant knows that they are due to receive £x per week but suddenly receives more than this for no apparent reason, or where the claimant notifies a significant change of circumstances to the local authority (LA), which the claimant knows should lead to a reduction of benefit, but HB continues to be paid at the old rate. The exemption is more likely to apply if the overpayment is the result of a complex or unusual set of circumstances.

Perhaps the most controversial type of case is where the claimant has contacted the LA to raise a relevant issue but the overpayment continues to be paid. Should the contact be taken as evidence that the claimant must have realised they were being overpaid or is the claimant entitled to conclude that

there is no overpayment as a result of what they have been told? Each type of case is considered below.

### CASE LAW

#### Cases where the claimant could be expected to realise they were being overpaid

In CH/361/2004, the LA failed to take the claimant's earnings into account. The overpayment was held to be recoverable as the claimant had received three letters from the LA which stated that the figure used to calculate entitlement to benefit showed her 'earned income' to be '£0'. The Commissioner commented that the error was even plainer in this case than if an incorrect amount had been used instead of nil.

In CH/2713/2006, the claimant continued to receive HB despite informing the LA that she had started working and did not wish to reapply for HB because her wages were too high. A Commissioner rejected the claimant's argument that she did not realise she was being overpaid because she did not check her personal bank account regularly and therefore failed to notice additional payments in excess of £1,300 over a period of four months.

In CH/866/2006, the claimant's award of HB had been assessed to take maintenance into account at £91.29 per week. When the award was later adjusted the LA entered the wrong amount of £21.07. The error was repeated in subsequent decisions over a period of five years. The Commissioner held that the claimant ought to have realised

that she was being overpaid as the wrong figure used was less than a quarter of the true figure.

#### Cases where the claimant could not have realised they were being overpaid

In CH/2879/2006, a claimant, who had retired due to illness, applied for several benefits including Council Tax Benefit (CTB) with the assistance of his local CAB. He declared an occupational pension but the net figure was taken into account when the gross amount should have been used. The Commissioner held that the overpayment was not recoverable as (i) the claimant had produced everything he had been asked to; (ii) he had not been advised that he should check the position with the CAB once the award was made; (iii) he was unused to the benefits system; and (iv) he was seriously unwell.

In CH/858/2006, the LA failed to take tax credits into account when it awarded HB despite the fact that the claimant had supplied HM Revenue and Customs' letter showing she had been awarded tax credits. The Commissioner allowed the appeal as: (i) the claimant had recently come to the UK from the Netherlands; (ii) it was her first HB claim and she did not know that tax credits were taken into account immediately (they are taken into account retrospectively in the Netherlands) and; (iii) the claimant could not have deduced that she was definitely being overpaid from the information available to her.

In CH/2935/2005, a former BT handyman claimed HB for the first time when he was 68 years of age.

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## BENEFITS



He said he could not cope with completing the application form on his own and an officer of the LA helped him to complete it. The LA failed to include his state retirement pension when calculating the award. The claimant told the tribunal that when he got the notification letter he did not read it properly and did not check the figure. The tribunal found that the claimant should have realised that his state pension was not included and that it was reasonable for him to contact the council and make enquiries as to why it had not been included. The deputy Commissioner commented that the way in which the financial information was presented in the notification letter made the letter difficult to follow, even for claimants who could fill in a claim form by themselves. The deputy Commissioner held that if a claimant did check the figures but turned a blind eye to an error that he ought to realise was in his favour, then such a claimant would not be able to take advantage of the exemption:

'However, a typical claimant cannot reasonably be expected to read or understand the calculations, and if such a claimant does not read them, or tries unsuccessfully to understand them, then the council cannot assert that that claimant could reasonably have been expected, when each payment was made, to have realised that it contained an element of overpayment' (para 25).

The claimant in CH/2943/2007 had correctly declared her weekly earnings to be £210 a week but HB was awarded based on the incorrect figure of £46.95 a week.

The claimant completed a 'postal check form' some time later in which she again declared the correct information. The same month she received an annual uprating letter which contained the incorrect information regarding her earnings. The deputy Commissioner held that the tribunal had failed to apply the three-staged approach in CH/2554/2002 and had not asked the correct questions about the discrepancy in the figures or what could be expected of the claimant after she had received the uprating letter. In his directions to the new tribunal the deputy Commissioner observed:

'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' (para 21(1)).

#### **Cases where the overpayment continued despite the claimant contacting the LA**

In CH/3309/06, the claimant had been in receipt of CTB when she succeeded in getting a full-time job

where her earnings took her over the qualifying limit for benefit. She notified the LA at the time but continued to be credited with CTB for a further two years. Over that period the claimant tried to get a corrected council tax bill to show what she really owed. The Commissioner held that the overpayment was nevertheless recoverable because, on the claimant's own evidence, she must have realised she was being overpaid.

A similar scenario arose in CH/42/2008 where a claimant who was being overpaid CTB made telephone calls to the LA pointing out the error but the overpayment continued. The claimant's representative said it could not be right that an honest and diligent claimant of benefit would always be responsible for repaying an overpayment where the claimant spots an error and the LA fails to act. The deputy Commissioner held that if a person could reasonably be expected to realise that the payment was an overpayment then they would be liable for recovery even if they had contacted the LA to try and prevent the overpayment. Accordingly, the phone calls did not absolve the claimant of responsibility for the overpayment.

The harsh result in these two cases can be contrasted with the outcome in the following cases.

In CH/1675/2005, the LA was informed that the claimant was no longer entitled to Income Support but continued to credit the claimant's rent account for another four weeks. The claimant argued that the overpayment was not recoverable because he had telephoned the LA's benefit section

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on three occasions to complain about being overpaid. The Commissioner said that findings on what the claimant had been told were crucial in order to decide whether the claimant ought reasonably to have realised that the payments of benefit in each of the periods following those telephone conversations were overpayments. The Commissioner opined that when a LA is made aware of an overpayment, the legislation contemplates that the LA will take whatever steps are necessary to bring the overpayment of benefit to an end:

'However, if the authority fails to do so and reassures the claimant that there has been no overpayment, the question of whether the claimant could reasonably be expected to have realised that an overpayment has occurred must be decided in the light of what the claimant has been told by the authority' (para 12).

An overpayment of HB arose in CH/3240/2007 because the LA failed to take account of the fact that the claimant was no longer paying childcare costs, despite this having been disclosed to the LA. The claimant contacted the LA by phone about the mistake but despite her call the LA continued to pay benefit at the wrong rate. The claimant's appeal was allowed because the tribunal failed to explore the possible effect of the telephone contact. On remitting the case, the Commissioner commented that there must come a point at which a claimant is entitled to rely on the LA's notification and accept that it knows best.

The decision in CH/1909/2008

### ISSUES TO CONSIDER

- Has there been an official error?
- Was the LA's delay in acting on information in its possession an official error or administrative delay?
- If there was an official error, what was the substantive cause of the overpayment - the official error or some act or omission on the part of the claimant?
- Did the cause of the overpayment change during the period of the overpayment?
- What could this individual claimant reasonably be expected to realise from the information available to him or her?
- It is not enough that the claimant might have realised that they were being overpaid. The test is whether they could have realised that the amount of benefit they were receiving definitely contained some element of overpayment.

illustrates the role disclosure can still play in HB overpayments cases despite it not being a legal element in the test for recovery. The claimant had been awarded £48.33 HB a week based on shared liability of 50% for the rent. In error, the LA revised the claimant's rent liability to 100%, thereby doubling the HB to £96.92 per week. The claimant phoned the LA to make sure the new award was correct. An officer asked if her details had changed. When the claimant told the officer that they had not, the officer confirmed that the award was correct.

The Commissioner noted that recoverability in HB cases was not based on what a claimant did or did not disclose. Moreover, where a clear statement is made by a LA that the claimant's HB has been correctly calculated the claimant could reasonably form the view that there has been no overpayment. But everything was 'crucially dependent' on the facts of the individual case. The claimant's failure to draw

significant information to the attention of the LA was evidentially relevant to whether or not she could reasonably rely on its answer. Given the factual background to the claim, it was not enough for the claimant to simply ask the LA whether her HB had been correctly calculated and confirm that her own circumstances had not altered. Any reasonable person in the claimant's circumstances would have known that where the joint tenant was responsible for half of the rent charged, it was highly unlikely that she could receive HB equivalent to the whole of the rent.

### CONCLUSION

The case law provides useful guidance on how the test on recovery has been applied in specific cases. However, given the fact-sensitive nature of the test, a decision of a Commissioner (or since 3 November 2008, an Upper Tribunal Judge) needs to be read against its factual background and should not be regarded as dictating the result in cases which

**"There must come a point at which a claimant is entitled to rely on the LA's notification and accept that it knows best."**



appear to have similar facts. In each case the tribunal needs to carry out its own assessment of the evidence so it can form a view on whether the exemption applies.

### FOOTNOTES

1. CH/858/2006 para 29. See also CH/609/2004 para 8 and CH/2712/2006 para 11.
2. [2008] UKUT 10(AAC). The case concerned the overpayment of childcare expenses by official error over a period from 2003 to 2007. The Judge held that (i) the statutory question must be posed at each significant point in the period and (ii) that a tribunal will fall into error if it focuses on what the claimant did or did not do without putting that into the overall context of the information flow between the claimant and the Council. There was no explanation in the papers about the calculations the LA submitted was 'simple' or the meaning of 'expense' when it was against this information that the test had to be applied.
3. Paras 7-10. See also CH/609/2004 para 6.
4. R v Liverpool City Council ex parte Griffiths (1990) 22 HLR 312 (QBD), CH/277/2006 para 14 and CH/858/2006 para 24.
5. See CH/1176/2003 paras 20-26 where the claimant was sent a lump sum in error by cheque. In CH/1675/2005 paras 9-10 where the claimant did not receive notice of a rent rebate paid in error, the Commissioner held that the tribunal had to determine when the claimant should have realised that the wrong amount was being credited to their account.
6. CH/2554/2002 para 13.

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### CARERS ALLOWANCE Gainful employment – potential PAYE liability cannot be deducted from earnings

CA/1546/2008 [2009] UKUT 23 (AAC)  
*Judge Bano, 3 February 2009*

The claimant was refused CA on the grounds that she was in gainful employment. The claimant's wages were above the relevant limit but she argued that as CA was a taxable benefit, if it was paid, the tax would be collected via PAYE, which would bring her weekly earnings below the limit. A Tribunal upheld the decision, stating that the claimant could not reduce her earnings by the amount of tax payable on CA, as no tax had in fact been paid. The claimant appealed.

HELD: Appeal dismissed. REG 10(4) SSB (COE) REGS 1996 provides for earnings to be calculated net of tax, but the Judge did not accept that that provision applied to tax liabilities which could be paid via PAYE but where no such deduction had been made, especially in a case such as this where the tax liability only arose if the benefit in dispute was paid.

### EUROPEAN LAW CB payable for child in another EEA country even after employment has ceased

CF/2266/2007 [2009] UKUT 18 (AAC)  
*Judge Mesher, 28 January 2009*

The claimant, a Portuguese national, came to the UK in 2000 and worked until 2004 when he became ill and claimed IS on the

grounds of incapacity. Throughout his stay, he sent money back to Portugal for the upkeep of his two children who were living with their grandmother. He did not realise he could claim CB for the children until 2006 when he submitted a claim which was refused, as HMRC stated that ART 73 REG (EEC) 1408/71 did not apply as he was not in employment, following R(F)1/94 (Adviser 43). The claimant was unsuccessful at appeal and appealed to the Upper Tribunal.

HELD: Appeal allowed and case referred back to HMRC to determine whether the claimant had made the necessary contributions to his childrens' maintenance to qualify for CB. The claimant, when working, had paid NI contributions and whilst in receipt of IS was receiving NI credits, and so he was a person who had been and continued to be compulsorily insured within the scope of ART 1(a)(ii) and so ART 73 applied. R(F)1/94 had been overtaken by subsequent ECJ decisions and should no longer be followed.

### HOUSING BENEFIT Liability where claimant potential beneficiary under a trust

CH/4/2008 [2009] UKUT 7 (AAC)  
*Judge Bano, 16 January 2009*

The claimant was refused HB under REG 9(1)(e) HB REGS 2006 on the grounds that liability was to the trustees of a discretionary trust of which he was a beneficiary. No power of appointment under the trust had been made. A Tribunal upheld the decision and the