[2020] UKUT 311 (AAC)
Appeal No. CH/2383/2018

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between

NSP

Appellant

-v-

Stoke-on-Trent City Council

First Respondent

-and-

AT

Second Respondent

Before Upper Tribunal Judge Poynter

Decision date 3 November 2020
Decided on consideration of the papers

DECISION

The appeal to the Upper Tribunal succeeds.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC049/18/00862) which was decided at Stoke-on-Trent on 6 June 2018.

I set that decision aside and re-make it as follows.

1. **The appeal is allowed**

2. **The decision issued by Stoke on Trent City Council on 20 June 2017 is set aside.**

3. The appellant has been overpaid the sum of £753.60 as housing benefit paid under the claim made by the second respondent for the period from Monday 20 August 2012 to Sunday 3 February 2013, both dates included.

4. The said sum of £753.60 is recoverable from the second respondent.

5. Neither the said sum of £753.60, nor any part of that sum, is recoverable from the appellant.

REASONS

Introduction

1. NSP (the Landlord) appeals to the Upper Tribunal with my permission against the above decision of the First-tier Tribunal. The Tribunal upheld a decision of Stoke-on-Trent City Council (Stoke) that the Landlord had been overpaid the sum of £753.60 as housing benefit (HB) paid under the claim made by AT (the Tenant). That sum was calculated as £31.40 per week for the period of 24 weeks from Monday 20 August 2012 to Sunday 3 February 2013, both dates included.

2. This appeal raises important issues of procedure and substance for the First-tier Tribunal when it decides an appeal against a local authority decision to recover an overpayment of HB from the person to whom the original payment was made (typically a landlord) rather than the claimant (who will always be a tenant or licensee or similar).

3. In summary, I decide that

(a) The claimant is **always** the second respondent to an appeal made by a landlord. That means that he is entitled to be

(i) served with the local authority's response to the appeal and all the papers subsequently generated by the appeal that are served on any other party;

(ii) given an opportunity to respond to the appeal;

(iii) notified of all hearings of the appeal (including case management hearings)

and to attend and participate in any such hearing in the same way as any other party.

That state of affairs arises by operation of law. It is not necessary for the First-tier Tribunal to give a direction under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the SEC Rules) to bring it about.

(b) Although the circumstances in which a landlord can appeal against a HB decision are limited, where those circumstances exist, the landlord's right of appeal is not limited and he is entitled to raise **all** relevant issues of fact and law.

In particular, a landlord appealing against a decision that an overpayment is recoverable from him is not restricted to arguing that the overpayment is not recoverable, or is not recoverable from him. He is also entitled to argue that, for example, there has been no overpayment or that the amount of the overpayment has been calculated incorrectly.

(c) In an appropriate case, a landlord who brings such an appeal is entitled to a decision that a recoverable overpayment is recoverable from him and the claimant jointly rather than from him alone.

(d) If the circumstances specified in regulation 101(2)(b) or (c) of the Housing Benefit Regulations 2006 (the HB Regulations) exist, a landlord who brings such an appeal is potentially entitled to a decision that a recoverable overpayment is not recoverable from him but is solely recoverable from the claimant (or some other person).

(e) In the absence of a specific direction under rule 15(2)(b) of the SEC Rules, the First-tier Tribunal has no power to refuse to consider relevant evidence merely because it confidential information about people who are not parties to the appeal. All relevant evidence is admissible and, in the absence of such a direction, must be taken into account. The issue for the First-tier Tribunal is not whether to hear such evidence but how much weight to attach to it.

4. None of the above points is new. The first four should be familiar to all SEC judges who are ticketed to hear HB appeals. The fifth should be familiar to all SEC judges irrespective of the tickets they hold. The events of this appeal suggest, however, that it is necessary for them all to be restated.

Background

5. The Tenant was born in August 1962 and was 50 years of age at the time of his claim for HB.

6. The Landlord is the owner of a property (the Property) in the area administered by Stoke. The Property is divided into four dwellings, which are usually let to vulnerable adults.

7. One of those dwellings qualifies for the one bedroom rate of local housing allowance (LHA) and the other three qualify for the shared accommodation rate.

8. The shared accommodation rate is lower than the one-bedroom rate. At the relevant time, the weekly one-bedroom rate of LHA in the broad rental market area that includes the Property was £78.46 while the weekly shared accommodation rate was £47.06, a difference of £31.40.

9. This appeal concerns Room 4 at the Property, which was eligible for the shared accommodation rate only.

10. On 23 August 2012, the Landlord and the Tenant signed a tenancy agreement, by which the former let a dwelling identified as "No. 4" at the address of the Property to the latter on an assured shorthold tenancy for six months from 20 August 2012 at a weekly rent of £80. The tenancy agreement does not give further details of what accommodation was included in "No. 4".

11. On the same day, the Tenant claimed HB from Stoke. He described the dwelling in which he lived in the same terms as the tenancy agreement. He was asked to give details of the accommodation available in the Property as a whole as well as which types of room were for his sole use and which were shared. In response, the tenant gave the following information

How many	In total	For your sole use	Shared
Living rooms	2	1	
Bedrooms	2	1	
Bedsit rooms	2		
Kitchens			
Bathrooms	1		1

The Tenant signed the form containing that information under a formal declaration that, among other things,

> "The details given on the form are true and complete."

and that,

> "I have read this declaration carefully before signing it".

12. The claim form also contained a declaration by one, MH, in the following terms

> "**<u>Form filled in by someone else</u>**
>
> I declare I have asked the person claiming all of the questions on this application form and have confirmed that the answers I have written on this form are correct.
>
> Name [MH] **Are you an employee of the council?** Yes ☐ No ☒
> Signature [MH] **Contact telephone number** [Number redacted]"

The Tenant also signed a section of the form consenting to Stoke discussing the detail of his claim with MH. The Tribunal found as a fact that MH was "from the CAB" and that he had "supported many of [the Landlord's] tenants".

13. With commendable speed, Stoke awarded the Tenant HB on the same day as the he claimed it. The award was at the weekly rate of £78.46—*i.e.*, it was calculated using the one-bedroom rate of LHA—from Monday 20 August 2012, payable 4-weekly in arrears to the Landlord, the first payment to be on 10 September 2012. A notice with the details of that award was sent to the Landlord (and, presumably, also to the Tenant, although the papers do not contain a copy).

14. Unfortunately, and despite his formal declaration, the information the Tenant gave in support of his claim was incorrect.

15. On or before Sunday, 3 February 2013, the Tenant ceased to live in the Property.

16. More than four years later, on 15 May 2017, officers from Stoke inspected the Property and established that "No. 4" was a bedsit. In other words, the Tenant did not have the exclusive room use of 1 bedroom and 1 living room, but rather of one bedsit room with shared use of a communal bathroom on the third floor of the Property.

17. That inspection led Stoke to write to the landlord on 20 June 2017 stating that it had reassessed the Tenant's entitlement to HB "based on shared room [*sic*] criteria" and that

> "The result of this is to create an overpayment of
>
> **£753.60 for the period 20/08/2012 – 03/02/2013**
>
> This will be recovered from your ongoing payments of housing benefit."

There is no indication in the papers that a similar letter was sent to the Tenant.

Procedural history

18. On 27 June 2017, the Landlord appealed to the First-tier Tribunal against Stoke's decision.

19. That appeal proceeded on the basis that the only parties were Stoke and the Landlord. There appears to have been no attempt to inform the Tenant of the appeal, or to give him the opportunity to respond to it, or to notify him of the hearing.

20. The hearing took place on 6 June 2018 and the Tribunal refused the Landlord's appeal and confirmed Stoke's decision.

21. The summary of the Tribunal's reasons (at paragraph 5 of its decision notice) reads

> "5. Having considered all the available evidence and applied the law the appeal fails because, on the evidence [before] me, the Local Authority had been paying housing benefit to [the Landlord] on the basis that his tenant had exclusive occupation of two rooms, and so was entitled to receive the benefit at the one bedroom rate. The reality was that the tenant had a single bedsit room, and was entitled only to the shared accommodation … rate. The overpayment arose because inaccurate information had been given to the Local Authority when the claim for benefit was made by the tenant. There was no official mistake. [The Landlord] ought reasonably to have known that the wrong rate was being paid."

22. The Landlord then applied to the First-tier Tribunal for permission to appeal against that decision. On 23 August 2018, a District Tribunal Judge refused permission to appeal on the basis that the decision did not contain any error of law and added

> "[The Landlord] should be aware that as a landlord he only has a very limited rights of appeal in relation to Housing Benefit. His right of appeal is limited to whether he has received an overpayment, and whether it is recoverable from him. Matters concerning whether the benefit calculation was correct or not are only open to appeal by a benefit claimant, and not by a landlord. …"

23. The landlord then renewed his application to the Upper Tribunal and, on 31 October 2018, I gave permission to appeal expressing the preliminary view that the Tribunal had made multiple errors of law. That preliminary view now also represents my concluded view and I discuss those errors in more detail below.

24. Finally, on 16 March 2020, I ruled that, by operation of law, the Tenant is—and had always been—the second respondent to this appeal and gave directions to enable him to participate in the proceedings if he wished. I also warned him that

> "You will be legally bound by the Tribunal's decision even if you choose not to take part in the appeal."

25. I regret the length of time that it took to give those directions. However, there was no point in doing so until the Upper Tribunal had an address at which to serve the Tenant with the appeal papers and the Tenant proved difficult to trace. A current address was eventually confirmed and the directions of 16 March 2020 and a copy of the appeal papers were sent to the Tenant at that address. The Tenant has not responded to those directions, but neither have the papers been returned undelivered by the Royal Mail. I am satisfied that the Tenant has now been validly notified of the proceedings and given an opportunity to participate in them. Accordingly, the proceedings before the Upper Tribunal are now properly constituted.

The law

Recovery of overpayments

Social Security Administration Act 1992

26. So far as relevant, section 75 of the Social Security Administration Act 1992 (the 1992 Act) provides as follows

> "**Overpayments of housing benefit**
>
> **75.**–(1) Except where regulations otherwise provide, any amount of housing benefit determined in accordance with regulations to have been paid in excess of entitlement may be recovered either by the Secretary of State or by the authority which paid the benefit.
>
> (2) Regulations may require such an authority to recover such an amount in such circumstances as may be prescribed.
>
> (3) An amount recoverable under this section shall be recoverable—
>
> (a) except in such circumstances as may be prescribed, from the person to whom it was paid; and

(b) where regulations so provide from such other person (as well as, or instead of, the person to whom it was paid) as may be prescribed."

Housing Benefit Regulations 2006

27. As the claimant has yet to reach the qualifying age for state pension credit (see paragraph 5 above) his entitlement to HB, and questions of liability to repay overpayments of HB, are governed by the Housing Benefit Regulations 2006 (the Regulations) rather than different scheme established by the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 for people above working age.

28. The rules about overpayments appear in Part XIII of the Regulations. The provisions that are relevant to this appeal are in regulations 99-101, the material parts of which are in the following terms:

"**Meaning of overpayment**

99. In this Part, "overpayment" means any amount which has been paid by way of housing benefit and to which there was no entitlement under these Regulations (whether on the initial decision or as subsequently revised or superseded or further revised or superseded) ….

Recoverable overpayments

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

(2) … 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 HMRC,

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.

(4) …

Person from whom recovery may be sought

101.—For the purposes of section 75(3)(a) of the Administration Act (prescribed circumstances in which an amount recoverable shall not be recovered from the person to whom it was paid), the prescribed circumstance is—

(a) housing benefit has been paid in accordance with regulation 95 (circumstances in which payment is to be made to the landlord) or regulation 96 (circumstances in which payment may be made to a landlord);

(b) the landlord has notified the relevant authority or the Secretary of State in writing that he suspects that there has been an overpayment;

(bb) the relevant authority is satisfied that the overpayment did not occur as a result of any change of dwelling occupied by the claimant as his home;

(c) it appears to the relevant authority that, on the assumption that there has been an overpayment—

(i) there are grounds for instituting proceedings against any person for an offence under section 111A or 112(1) of the Administration Act (dishonest or false representations for obtaining benefit); or

(ii) there has been a deliberate failure to report a relevant change of circumstances contrary to the requirement of regulation 88 (duty to notify a change of circumstances) and the overpayment occurred as a result of that deliberate failure; and

(d) the relevant authority is satisfied that the landlord—

(i) has not colluded with the claimant so as to cause the overpayment;

(ii) has not acted, or neglected to act, in such a way so as to contribute to the period, or the amount, of the overpayment.

(2) For the purposes of section 75(3)(b) of the Administration Act (recovery from such other person, as well as or instead of the person to whom the overpayment was made), where recovery of an overpayment is sought by a relevant authority—

(a) subject to paragraph (1) and where sub-paragraph (b) or (c) does not apply, the overpayment is recoverable from the claimant as well as the person to whom the payment was made, if different;

(b) in a case where an overpayment arose in consequence of a misrepresentation of or a failure to disclose a material fact (in either case, whether fraudulently or otherwise) by or on behalf of the claimant, or by or on behalf of any person to whom the payment was made, the overpayment is only recoverable from any person who misrepresented or failed to disclose that material fact instead of, if different, the person to whom the payment was made; or

(c) in a case where an overpayment arose in consequence of an official error where the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf, could reasonably have been expected, at the time of receipt of the payment or of any notice relating to that payment, to realise that it was an overpayment, the overpayment is only recoverable from any such person instead of, if different, the person to whom the payment was made.

(2A) …

(3) For the purposes of paragraphs (1) and (2A), "landlord" shall have the same meaning as it has for the purposes of regulation 95.

> (3A) For the purposes of paragraph (2)(c), "overpayment arose in consequence of an official error" shall have the same meaning as in regulation 100(3) above."

29. In *B v SSWP*, [2005] EWCA Civ 929 (also reported as R(IS) 9/06), the Court of Appeal decided that, for overpayments of the benefits administered by the Department for Work and Pensions, there could be no "failure to disclose" a material fact unless the person who omitted to disclose that fact was under a legal duty to disclose it. In my judgment, the same is also true of the phrase "failure to disclose" where it occurs in in regulation 101(2)(b). It is therefore necessary to consider what, if anything, Landlord was legally obliged to disclose in this case.

30. The obligation to provide evidence and information is established by regulation 86 of the Regulations, and the duty to notify changes of circumstances by regulation 88.

31. Regulation 86 is lengthy and it is only necessary for me to quote paragraph (1), which is in the following terms

> "**Evidence and information**
>
> **86.**–(1) Subject to paragraphs (1A) and (2) and to paragraph 5 of Schedule A1 (treatment of claims for housing benefit by refugees), a person who makes a claim, or a person to whom housing benefit has been awarded, shall furnish such certificates, documents, information and evidence in connection with the claim or the award, or any question arising out of the claim or the award, as may reasonably be required by the relevant authority in order to determine that person's entitlement to, or continuing entitlement to, housing benefit and shall do so within one month of the relevant authority requiring him, or the Secretary of State requesting him, to do so or such longer period as the relevant authority may consider reasonable."

32. Regulation 88 provides as follows

> "**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.

(2) [*Revoked*]

(3) The duty imposed on a person by paragraph (1) does not extend to changes in—

(a) the amount of rent payable to a housing authority;

(b) the age of the claimant or that of any member of his family or of any non- dependants;

(c) these Regulations;

(d) in the case of a claimant on income support, an income-based jobseeker's allowance or an income-related employment and support allowance, any circumstances which affect the amount of income support, an income-based jobseeker's allowance or an income-related employment and support allowance but not the amount of housing benefit to which he is entitled, other than the cessation of that entitlement to income support, an income-based jobseeker's allowance or an income-related employment and support allowance.

(4) Notwithstanding paragraph (3)(b) or (d) a claimant shall be required by paragraph (1) to notify the designated office of any change in the composition of his family arising from the fact that a person who was a member of his family is now no longer such a person because he ceases to be a child or young person.

(5) [*Revoked*]

(6) Where—

(a) the claimant or the claimant's partner is in receipt of income support or jobseeker's allowance;

(b) the change of circumstance is that the claimant or the claimant's partner starts employment; and

(c) as a result of that change of circumstance, either entitlement to that benefit will end or, where the claimant or claimant's partner is in receipt of a contribution- based jobseeker's allowance, the amount of that benefit will be reduced,

the claimant may discharge the duty in paragraph (1) by notifying the change of circumstance by telephoning the appropriate DWP office if a telephone number has been provided for that purpose."

Right of appeal and procedure before the First-tier Tribunal

Child Support, Pensions and Social Security Act 2000

33. Paragraph 1(2) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 (the 2000 Act) defines "relevant decision" in the following terms:

"(2) In this Schedule "relevant decision" means any of the following—

(a) a decision of a relevant authority on a claim for housing benefit;

(b) any decision under paragraph 4 of this Schedule which supersedes a decision falling within paragraph (a), within this paragraph or within paragraph (b) of sub-paragraph (1) of that paragraph;

but references in this Schedule to a relevant decision do not include references to a decision under paragraph 3 to revise a relevant decision."

34. Paragraph 6 of the 2000 Act establishes a right of appeal to the First-tier Tribunal as follows

"**Appeal to First-tier Tribunal**

6.—(1) … this paragraph applies to any relevant decision (whether as originally made or as revised under paragraph 3) of a relevant authority which—

(a) is made on a claim for, or on an award of, housing benefit; or

(b) does not fall within paragraph (a) but is of a prescribed description.

(2) …

(3) In the case of a decision to which this paragraph applies, any person affected by the decision shall have a right to appeal to the First-tier Tribunal.

(4)-(5) …

(6) Where any amount of housing benefit is determined to be recoverable under or by virtue of section 75 … of the Administration Act (overpayments …), any person from whom it has been determined that it is so recoverable shall have a right of appeal to the First-tier Tribunal.

(7) A person with a right of appeal under this paragraph shall be given such notice of the decision in respect of which he has that right, and of that right, as may be prescribed.

(8)-(9) …"

Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001

35. The phrase "person affected" in paragraph 6 of Schedule 7 is defined by regulation 3 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (the Decisions and Appeals Regulations) as follows

"**Person treated as a person affected by a decision**

3.—(1) For the purposes of Schedule 7 to [the 2000 Act] and subject to paragraph (2), a person is to be treated as a person affected by a relevant decision of a relevant authority where that person is—

(a) a claimant;

(b)-(d) …; or

(e) a landlord or agent acting on behalf of that landlord and that decision is made under—

(i) regulation 95 (circumstances in which payment is to be made to the landlord) of the Housing Benefit Regulations;

(ii) regulation 96 (circumstances in which payment may be made to the landlord) of those Regulations;

(iii) regulation 76 (circumstances in which payment is to be made to the landlord) of the Housing Benefit (State Pension Credit) Regulations;

(iv) regulation 77 (circumstances in which payment may be made to the landlord) of those Regulations.

(2) Paragraph (1) only applies in relation to a person referred to in paragraph (1) where the rights, duties or obligations of that person are affected by a relevant decision."

The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008

36. Finally, and so far as is relevant to this appeal, rule 1(3) of the SEC Rules defines "respondent" as follows

""respondent" means—

(a) in an appeal against a decision, the decision maker and any person other than the appellant who had a right of appeal against the decision;

(b)-(cc) … or;

(d) a person substituted or added as a respondent under rule 9 (substitution and addition of parties);" (my emphasis).

The Tribunal's reasons

37. The Tribunal's written statement of reasons set out the factual background and summarised the parties' cases with admirable concision. It then continued:

"Analysis, findings and conclusions

6) In this case, the dispute between the parties was confined to a narrow but important issue. It was not in dispute that:

(i) [the Landlord] received an overpayment of housing benefit; and

(ii) the amount of the overpayment was in the sum of £753.60.

[The Landlord] did not challenge the Local Authority's account of the nature of the accommodation available to [the Tenant], or the calculation of entitlement based upon that. The dispute was as to whether the local authority was entitled to recover the overpayment.

7) The relevant law is set out at paragraph 100 of the Housing Benefit Regulations 2006. Paragraph 100(1) establishes the general principle that any overpayment shall be recoverable. Paragraph 100(2) and (3) sets out the exception to the usual rule that overpayments are recoverable. To rely upon the exception, [the Landlord] must establish that the following conditions are met:

(i) the overpayment arose in consequence of an official error;

(ii) he did not cause or materially contribute to the error; and

(iii) at the time of receipt of the payment, he could not reasonably have been expected to realise that it was an overpayment.

8) In making his case, [the Landlord] introduced a number of arguments that had no relevance to the matters before me. He made generalised allegations of corruption against the local authority, and alleged that the leader of the council had admitted to corruption within the local authority. My responsibility was confined considering the specific matters raised by the appeal before me. I make no findings on these matters since they were not relevant to my decision. [The Landlord] also told me, repeatedly, that he is a pensioner. Again, that had no bearing on the matters before me. [The Landlord] was a landlord at the relevant time, and so carried all the usual responsibilities that goes with that, irrespective of his age.

9) The only potentially meritorious argument was that there had been an official error in calculating the housing benefit which gave rise to an overpayment. In respect of this, [the Landlord] sought to rely on the differences between the standard and discretionary schemes. He also argued that he was notified of the basis for [the Tenant's] award. The difficulties with that argument are:

(i) as a matter of fact, [the Tenant] was on the standard scheme. The nature and number of rooms was, therefore, relevant to a calculation of his level of entitlement. The miscalculation arose because of inaccurate information contained on the application submitted by [the Tenant] with

the help of the CAB. There was no official error on the part of the local authority.

(ii) The local authority was correct to award benefit under the standard scheme because [the Tenant] met the conditions for benefit to be awarded under that scheme. The calculation on page 25 of the bundle makes that clear, and [the Landlord] did not challenge that.

(iii) [The Landlord] argued that matters would have been different had [the Tenant] been on the discretionary scheme rather than the standard scheme. Maybe so, but the local authority awarded housing benefit in this case under the standard scheme. It does not seem to me in anyway helpful to speculate on what the position might have been had it been awarded under some different scheme that it was not, in fact, awarded under. I have to deal with the facts as they were, and not as they might have been had he [*i.e.*, the Tenant] eligible to be awarded the benefit under some other scheme, and had it been so awarded.

(iv) [The Landlord] was sent notice of the benefit calculation (page 25). That explicitly says that the calculation was based on the local housing allowance. [The Landlord] should have understood what that meant. If he did not know, it does not assist him because, as the landlord, he ought to have known. The notice also informed him of his right to ask the local authority to look at the matter again if he disagreed with the decision, or to ask for a more detailed explanation if you want to do so. Again, the responsibility lay with him. The notice also explicitly told him that any overpayment might be recovered from him.

10) Having considered all these points, I am satisfied that the overpayment did not arise in consequence of an official error. The general position under the rules, therefore, applied. The overpayment was recoverable from [the Landlord]."

Discussion

The Tenant was a respondent to the Landlord's appeal

38. The First-tier Tribunal went wrong because it failed to appreciate that the Tenant was a party to the appeal before it. It therefore stopped when it decided that the overpayment was recoverable and did not go on to consider the issue raised by regulation 101, namely, *from whom* it was recoverable.

39. That may be unsurprising because, as the proceedings were constituted, there was only one party from whom recovery could be sought. It was nevertheless an error of law.

40. There are two reasons why that is the case. The first is procedural and the second substantive.

Procedural considerations

41. The first—procedural—reason arises from an aspect of the social security system that was explained by Mr Commissioner Powell (as he then was) in a passage quoted by Upper Tribunal Judge Wikeley in *SS v North East Lincolnshire Council (HB)* [2011] UKUT 300 (AAC):

> "5. The benefits system, as Mr Commissioner Powell … explained in Social Security Commissioner's decision CA/1020/2007 (at paragraph 12), is a "decision based" system:
>
> > "What is meant by this is that the system proceeds, or is based, on formal decisions being given. If a benefit is awarded it must be awarded by a formal and identifiable decision. If that decision is to be altered by, for example, increasing or decreasing the amount involved, it can only be done by another formal and identifiable decision. Likewise a decision is required if the period of the award is to be terminated, shortened or extended. If a payment of benefit is to be suspended, leaving the underlying entitlement in being, a formal decision is again required.""

42. It follows that, even when a local authority only seeks to recover an overpayment from a landlord, every[1] overpayment decision involves—even if only implicitly—a decision that the tenant/claimant was not entitled to HB during a period for which it had previously been awarded to him.

43. For benefits that are administered by the Department for Work and Pensions, the decision-making process makes that clearer. Under section 71(5A) of the 1992 Act, a recoverable overpayment cannot arise "unless the determination in pursuance of which

[1] As is almost invariably the case in social security law, there is an exception to that. The HB scheme contains no provision equivalent to section 71(4) of the 1992 Act. If, as the result of a computer error, benefit awarded to a claimant was paid more than once to a landlord's bank account, the local authority would have to rely on section 75 and Part XIII of the Regulations in order to recover it. In such circumstances, the local authority's decision would not imply that the claimant was not entitled to the benefit that had been awarded and the claimant's "rights, duties or obligations" would not be affected by it. Such circumstances give rise to appeals so infrequently that I have decided to ignore them—and to express myself in absolute terms—in the main body of this decision.

it was paid has been reversed or varied on an appeal or has been revised …or superseded". Appeals involving overpayments of DWP benefits therefore usually involve two separate decisions. The first, which is known as the "entitlement decision", revises or supersedes the earlier decision to award benefit so as to reduce or extinguish entitlement to benefit from a date in the past. The second, the "overpayment decision", first quantifies the amount of benefit that has been overpaid in the light of the entitlement decision and then decides how much of that overpayment is recoverable and from whom.

44. Even though section 75 of the 1992 Act (see paragraph 26 above) contains nothing equivalent to section 71(5A), the same process has to be followed where a local authority wishes to recover an overpayment of HB. Confusion sometimes arises because some software used to administer HB elides the two stages of the process.

45. It nevertheless remains the case that, subject to the local authority's powers to revise or supersede its earlier decisions, decisions to award HB are final. A claimant who has been awarded HB for a period continues to be entitled to it for that period, unless and until the decision that made the award is either revised or retrospectively superseded so as to remove the entitlement. And, following Mr Powell in *CA/1020/2007* and Judge Wikeley in *SS*, removal of entitlement can only occur as the result of a "formal identifiable decision".

46. Regulation 99 (see paragraph 28 above) defines an overpayment as an "amount which has been paid by way of housing benefit and to which there was no entitlement". As an entitlement to HB persists until the awarding decision has been revised or superseded, there can be no overpayment, let alone a *recoverable* overpayment, until revision or supersession has taken place.

47. Once it is realised that every HB overpayment decision involves a decision to terminate an award of benefit retrospectively, it becomes obvious that the claimant—to whom that award was, after all, made—needs to have a right of appeal against it. He may wish to argue that HB was correctly awarded for the retrospective period and that the award should continue for the future.

48. It is therefore no surprise that such a right of appeal does in fact exist:

(a) A superseding decision, or a decision that has been revised, is a "relevant decision" that is "made … on an award of, housing benefit" within paragraph 6(1) of Schedule 7.

(b) A "person affected" by such a decision has a right of appeal against it under paragraph 6(3).

(c) A claimant is a "person affected" because regulation 3(1)(a) of the Decisions and Appeals Regulations says so. And regulation 3(2) is satisfied because the rights of the claimant are affected by the decision for the reasons given above.

(d) If the local authority decides the overpayment is recoverable from the claimant (whether solely or jointly with anyone else), he will *also* have a right of appeal by virtue of paragraph 6(6) of Schedule 7.

49. It follows that, if a landlord appeals against an overpayment decision but the claimant does not, the claimant will nevertheless be a "person other than the appellant who had a right of appeal against the decision" and will therefore be a respondent to the appeal by virtue of head (a) of the definition in rule 1(3) of the SEC Rules (see paragraph 36 above).

50. In those circumstances, the claimant becomes a respondent by operation of law. Whether he wishes to participate in the proceedings is irrelevant.

51. It is also irrelevant that the claimant's whereabouts may be unknown, although that will obviously raise practical difficulties about giving notice of the proceedings.[2]

52. Finally, it is irrelevant that no order has been made under rule 9 of the SEC Rules adding the claimant as a respondent. As a matter of logic, a person who is already a respondent to the appeal cannot be "added" as a respondent unless, perhaps, he is a party in more than one capacity (*e.g.*, in his own capacity and as the personal representative of someone who had died). The definition in rule 1(3) recognises that those who have a right of appeal but have not appealed, and those added under rule 9, are distinct categories of respondent. The former are covered by head (a) and the latter by head (d).

<u>Substantive considerations</u>

53. The second—substantive—reason is the existence of regulation 101(2). Its provisions need to be considered in any overpayment case where:

(a) the original payment of HB was made to the landlord; and/or (irrespective of the identity of the original payee)

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[2] The difficulties are unlikely to be insuperable. The local authority may have a current address. If not, the number of people who neither receive a social security benefit, nor pay national insurance contributions, is small. Either the Secretary of State for Work and Pensions or HM Revenue & Customs is likely to have a current address for most people and the First-tier Tribunal has the power to require disclosure by an order under rule 16(1)(b) of the SEC Rules.

(b) the overpayment was caused by a misrepresentation as to, or a failure to disclose, a material fact; or

(c) the overpayment arose in consequence of an official error but a relevant person[3] could reasonably have been expected to realise that it was an overpayment.

54. In particular, by regulation 101(2)(a). an overpayment is always recoverable from the claimant as well as the person to whom the original payment was made unless regulation 101(1) applies (in which case it is only recoverable from the claimant) or the circumstances in regulation 101(2)(b) or (c) exist (in which case the overpayment is only recoverable from the person who misrepresented or failed to disclose a material fact or who could reasonably have been expected to realise that an official error overpayment was an overpayment).

55. It is thus possible that an overpayment of HB will be recoverable from more than one person. It is worth restating that, in *R(H) 6/06*, a Tribunal of Commissioners stated as follows:

> "**Decisions where there is joint liability**
>
> 59. It seems to us that a lot of confusion might have been avoided if, where overpayments were recoverable from more than one person concurrently, local authorities had issued decisions in respect of all those from whom they were recoverable. Had that been done, the erroneous idea that the legislation provided for overpayments to be recoverable from only one person would not have taken such a hold. The problem seems to have been caused by local authorities deciding from whom they would recover an overpayment before issuing any decision as to recoverability. Logically, as we have said, the choice as to against whom to enforce a right of recovery does not arise until it has been decided from whom the overpayment is recoverable. Making decisions against all of those from whom an overpayment is recoverable is also right in principle. It is difficult for a local authority to justify not making a decision against any person from whom it is entitled to recover public money. Equally, any person from whom it is decided that an overpayment is recoverable is entitled to a decision which shows from which other persons the local authority is also entitled to recover the overpayment.
>
> 60. In every case where a recoverable overpayment has been made, the local authority should make a single decision referring to all of those from whom the overpayment is recoverable, rather than separate

[3] The phrase "relevant person" does not appear in the Regulations but is a convenient shorthand for "the claimant, or a person acting on the claimant's behalf, or any person to whom the payment was paid, or any person acting on their behalf" in regulation 101(2)(c).

> decisions addressed to each of them. Moreover, where a local authority decides that an overpayment is not recoverable from the person to whom it was made, a proper decision to that effect should be made and included within the decision as to the person from whom the overpayment is recoverable. It should then be communicated to the person to whom the overpayment was made and to those from whom it is recoverable. The advantage of that is that, if there is an appeal, all those potentially affected by the appeal will be parties to the proceedings and neither the local authority nor a tribunal will consider one person's liability without regard to the liability of others. As the local authority has to go through the process of identifying those from whom an overpayment is recoverable before taking any action to recover it, we do not consider it will be burdensome to record the decision properly and issue copies to all those concerned" (my emphasis).

Some parts of *R(H) 6/06* must now be read with caution because it was decided at a time when a tenant claimant was not automatically a party to a landlord's appeal against an overpayment, and when appeal tribunals (the forerunners of the Social Entitlement Chamber of the First-tier Tribunal) had no power to add additional parties to the proceedings. However, in my judgment, the passages of the decision that I have quoted (among others) remain good law.

56. This was clearly not a case in which regulation 101(1) applied. But unless the Tribunal considered regulation 101(2)(b) and (c) and reached a positive conclusion that neither applied—which, from its statement, it did not—regulation 101(2)(a) required it to decide that the overpayment was recoverable from the Tenant *as well as* from the Landlord. The Landlord would have been entitled to such a decision even though it would not have affected his own liability to repay the overpayment: see the final sentence of paragraph 59 of *R(H) 1/06*.

57. Which brings this discussion full circle. The Tribunal clearly could not have given that decision when the Tenant had neither been notified of the proceedings nor afforded the opportunities to participate to which, as a respondent to the appeal, he was entitled.

Conclusion

58. For all those reasons, the Tribunal's decision involved making an error of law. For the reasons I give below, its decision not only might have been, but would have been, different if the error had not been made. I therefore exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set the decision aside.

Reasons for re-making the decision

59. Having taken that step, section 12(2)(b) requires me either to remit the case to the First-tier Tribunal with directions for its reconsideration or to re-make the decision myself.

60. I have decided to do the latter. Although the Tribunal's decision was vitiated by error of law, its findings of fact were sound. And on those findings, the law only permits one decision. It is therefore expedient that I should give that decision myself. To remit the case would be pointless, cause delay, and potentially open the door to further error.

Reasons for the remade decision

61. These can be stated briefly:

(a) The Tribunal was correct to conclude that the overpayment was not caused by any official error. That means that regulation 101(2)(c) has no application to the case.

(b) On the contrary, as the Tribunal accepted (in the summary of reasons on its decision notice: see paragraph 21 above) it was caused by the Tenant misrepresenting the material fact that he occupied a bedsit with shared use of a bathroom (see paragraphs 11 and 14 above).

(c) In those circumstances, regulation 101(2)(b) applies and the overpayment is "only" recoverable from the Tenant (as the person who misrepresented the material fact) "instead of" the Landlord (as the person to whom the payment was made).

62. For the sake of completeness, I should add that this was not a case in which the Landlord failed to disclose any material fact. For there to be a *failure* to disclose, there needs to be a breach of a legal duty to disclose. The Landlord was not in breach of any such duty.

63. Regulation 86 only imposes duties on "a person who makes a claim, or a person to whom housing benefit has been awarded" (see paragraph 31 above). The Landlord did not fall into either of those categories.

64. The duty imposed by regulation 88 applies to a wider group of people, including "any person by whom or on whose behalf sums payable by way of housing benefit are receivable". The Landlord is therefore subject to that duty. But he was not in breach of it. The duty is to give notice to Stoke of any *change of circumstances* that he "might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit". In this case, no such change of circumstances occurred.

The Tenant occupied a bedsit throughout the period of his claim. Nothing changed. The overpayment occurred because the Tenant did not tell Stoke that that was the case.

65. Stoke argued before the Tribunal that the Landlord ought to have known at the time that he was being overpaid. The Landlord denies that but, even if it were so—and although the result is counter-intuitive—it would be irrelevant. Whether a relevant person "could …, 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" is only relevant in cases where the overpayment has been caused by an official error: see regulations 100(2) and 101(2)(c). The overpayment in this case was not so caused. Regulation 88 does not impose a generic duty on those by whom payments of HB are receivable to notify a relevant authority if they ought reasonably to have realised that the award is wrong.

66. I have not overlooked the complications that potentially arise from the declaration made by MH who helped the Tenant with his claim (see paragraph 12 above). I have, however, concluded that MH's involvement does not change my conclusions.

67. The Tribunal found that MH was "from the CAB" (*i.e.*, the Citizen's Advice Bureau). Even if one reads the declaration he made as asserting that the answers given by the Tenant were true, MH was not the Landlord's agent: his client was the Tenant. It is not possible to read the claim form as containing misrepresentations made by MH on the Landlord's behalf.

68. In any event, that is not how I read the declaration. Although it could have been worded more clearly, I read the sentence "I declare I have asked the person claiming all of the questions on this application form and have confirmed that the answers I have written on this form are correct" as saying that MH confirmed that the answers were correct by checking with the Tenant, not that he was confirming those answers from personal knowledge, or had obtained confirmation by making an independent enquiry into the facts.

69. To conclude, the Tenant caused the overpayment by misinforming Stoke about the accommodation he occupied. He is therefore liable to repay that overpayment. The Landlord did not. He is therefore not so liable.

Other points

70. Before concluding, I must briefly discuss two other issues

The scope of a landlord's right of appeal against an overpayment decision

71. It will be remembered from paragraph 22 above, that the District Tribunal Judge who initially refused the Landlord permission to appeal, expressed the view that the landlord's right of appeal was limited to whether he had received an overpayment, and whether it was recoverable from him; and that matters concerning whether the benefit calculation was correct or not are only open to appeal by a benefit claimant, and not by a landlord.

72. For the sake of completeness, I record that that is incorrect. Landlords from whom a local authority seek to recover an overpayment have a full right of appeal. That is because paragraph 6(6) of Schedule 7 to the 2000 Act gives them a right of appeal and nothing in primary or secondary legislation limits the scope of that right. Further, there must be an issue as to whether the law as described by the District Tribunal Judge would be compliant with Article 6 of the European Convention on Human Rights.

73. Be that as it may, the views expressed by the District Tribunal Judge are inconsistent with longstanding authority: see the decisions of the Tribunals of Commissioners in *R(H) 3/04* at [35] and [50] and *R(H) 6/06* at [38].

Evidence relating to non-parties

74. At paragraph 5(1) of the statement, the Tribunal recorded in passing that:

> "([The Landlord] sought to show me a document relating to a tenant of his that he said proved [a particular submission]. I refused to let him present it because it related to an entirely different tenant at a different property, and her permission had not been obtained for him to show me confidential material relating to her claim.)"

75. In my judgment, the Tribunal would have been entitled to refuse to allow the Landlord to present that document because, on the law as I hold it to be above (and also on the law as the Tribunal understood it at the time), it cannot conceivably have been relevant.

76. However, if the document had been relevant, the Tribunal would not have been entitled to refuse to receive it on the grounds that it was confidential to a non-party. The Tribunal only has power to exclude relevant evidence in the circumstances specified in rule 15(2)(b) of the SEC Rules and when an express direction has been given to that effect.

77. The consent of the other tenant was neither here nor there. On the contrary, had the document been relevant, the Tribunal would have been entitled to require the other

tenant to produce it—irrespective of how confidential she considered it to be—by making an order under rule 16(1)(b). The fact that the Landlord was already in possession of the document merely avoided the need for such an order (or would have done, had the document been relevant).

78. I would, however, point out that if the First-tier Tribunal is concerned that the interests of any person, whether or not a party to the proceedings before it, might be damaged by the wider publication of a confidential document, it has power under rule 14(1)(a) to make an order prohibiting the publication or disclosure of that document.

Authorised for issue
on 3 November 2020

Richard Poynter
Judge of the Upper Tribunal