



[2020] UKUT 49 (AAC)

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal Nos. CJSА/2628/2017  
CJSА/1192/2019**

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

**Between:**

**Q**

Applicant

**-v-**

**Secretary of State for Work and Pensions**

Respondent

**Before: Upper Tribunal Judge Poynter  
Decision date: 13 February 2020**

### **ORDER**

**Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is PROHIBITED for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.**

**Failure to obey this Order may be a contempt of court and punishable by a fine or imprisonment**

### **DECISION**

The appeals to the Upper Tribunal succeed.

The decisions of the First-tier Tribunal on 15 June 2017 both involved the making of a material error on a point of law.

Those decisions are set aside.

I re-make the decisions in the following terms:

1. The appeals are allowed.
2. The decisions made by the Secretary of State on 19 and 20 November 2013 are set aside.
3. The Secretary of State is directed to re-calculate Q's entitlement to income-based jobseeker's allowance, and the amount of any overpayment that is said to be recoverable, on the basis that:
  - (a) Q was not the beneficial owner of the sums standing to the credit of the Yorkshire Building Society Account (as defined in paragraph 31 of the Reasons below ) and therefore those sums do not fall to be taken into account as Q's capital;and that
  - (b) any capital possessed by Q, that was derived from a payment made in consequence of any personal injury to Q, fell to be disregarded during any period when it was held in a joint account.
4. If the Secretary of State considers that she is unable to carry out that recalculation on the basis of the information in paragraph 3 above, she may apply to the Upper Tribunal for further directions.
5. If Q takes the view that the Secretary of State has recalculated her entitlement incorrectly, she may apply to the Upper Tribunal to check the calculations.
6. If the recalculations disclose that Q has been overpaid JSA(IB) and there is a dispute as to whether all or part of that overpayment is recoverable, Q may apply for her appeal against the First-tier Tribunal's overpayment decision to be restored and I, or, if I am not available, another Judge of the Upper Tribunal, will decide that dispute.
7. Any application under paragraph 5 or 6 above must be *received* by the Upper Tribunal no later than *two months* from the date on which the Secretary of State's letter notifying Q of the recalculated amount—or, as the case may be, that the recalculations disclose the existence of a recoverable overpayment—was sent to her.

## REASONS

### Confidentiality

1. Before the events that gave rise to these proceedings, the appellant, was awarded compensation by the High Court in proceedings that were subject to an Order providing for the most stringent confidentiality restrictions I have ever encountered. That Order binds the appellant, as well as the defendants to her High Court claim and non-parties who become aware of it.
2. Under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I have power to make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.
3. I consider the appellant to be such a person because identifying her would probably breach the restrictions imposed by the High Court.
4. I have therefore made the Order set out above.
5. I have also directed that in these proceedings, the appellant should be referred to as “Q”. That is not the initial by which she was known in the High Court proceedings. It may or may not be one of her actual initials.
6. Finally, to minimise the risk that I may inadvertently say something that in fact tends to reveal Q’s identity, these reasons will include no unnecessary background detail. As a result, the parties may consider that I have oversimplified some matters (e.g., at paragraph 12 below) but I hope I have not failed to refer to anything essential.

### Other preliminary matters

7. One of the effects of the confidentiality restrictions imposed by the High Court is that Q has not been able to show me the pleadings or the final order in her case. I therefore do not know the exact nature of her claim for compensation.
8. However, it is not in dispute—and in any event the First-tier Tribunal found as a fact—that the compensation Q received was for a personal injury. That conclusion is supported by the limited medical evidence that is available. That evidence also shows that the personal injury was to Q herself rather than to another person.

## **Procedural history**

9. Q received income-based jobseeker's allowance ("JSA(IB)") from a date in January 2008 until a date in December 2010 ("Period 1") and again from a date in November 2011 to a date in April 2013 ("Period 2").

10. Throughout Period 1, and for at least the first five months, or so, of Period 2, Q had capital in various bank accounts that exceeded either the upper JSA capital limit of £16,000<sup>1</sup> or the lower limit of £6,000.

11. Unless that capital fell to be disregarded for JSA purposes, it would either (where it exceeded the upper limit) have excluded her from entitlement to JSA(IB) or (where it exceeded the lower limit but not the upper limit) have caused her weekly rate of that benefit to be reduced by the tariff income rule.<sup>2</sup>

12. Q did not declare that capital when she claimed JSA(IB).

13. However, the Department subsequently became aware of Q's capital through the Generalised Matching Service and, on 19 November 2013, a decision-maker revised the decisions to award JSA so as to remove Q's entitlement to JSA(IB) for the whole of both Period 1 and Period 2

14. Those decisions were notified to Q by a letter dated the following day, 20 November 2013.

15. On the same day, a different decision-maker decided that Q had been overpaid £8,288.84 as JSA(IB) for Period 1 and £5,577.36 for Period 2, and that both those overpayments were recoverable from her because they had arisen in consequence of her misrepresentation of the material fact that she had capital in excess of the limits.

16. Q was notified of those decisions by two separate letters, also dated 20 November 2013.

17. Q applied for "mandatory reconsideration" (technically, revision) of all four decisions but, on 18 March 2014, a third decision-maker refused to revise them. Q then appealed to the First-tier Tribunal.

18. The interlocutory stage of the proceedings before the First-tier Tribunal took considerable time. There were reasons for the delay, but it is unnecessary for me to explain them here. There was a final hearing before a District Tribunal Judge and a

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<sup>1</sup> Jobseeker's Allowance Regulations 1996, regulation 107.

<sup>2</sup> Jobseeker's Allowance Regulations 1996, regulation 116.

financially qualified tribunal member (*i.e.*, an accountant) on 6 June 2017, following which the Tribunal reserved its decision. Then, on 15 June 2017 in a fully-reasoned decision notice,<sup>3</sup> the Tribunal:

- (a) refused the appeal against the entitlement decisions, thereby confirming that Q had not been entitled to JSA(IB) during Periods 1 and 2; and
- (b) allowed the appeal against the overpayment decisions in part. Specifically, the Tribunal confirmed that:
  - (i) Q had been overpaid £8,288.84 for Period 1 and £5,577.36 for Period 2;and that
  - (ii) the full amount of the overpayment for Period 2 was recoverable from Q;but that
  - (iii) only £7,580.02 of the overpayment for Period 1 was recoverable, because the Department conceded that it could not prove that Q had misrepresented the level of her capital in her original, January 2008, claim form but only from a later date in July 2008.

19. The District Tribunal Judge who had presided over the Tribunal refused Q permission to appeal to the Upper Tribunal on 14 August 2017. However, I gave permission following a hearing at which Q was present and accompanied by her mother.

20. In the light of observations I made in the written notice of that decision, the Secretary of State's representative now supports the appeal.

### **The First-tier Tribunal's decision**

21. On the question of whether Q had been entitled to JSA(IB), the Tribunal stated (at paragraph ix):

“The Tribunal found these statements about her capital [*i.e.*, the statements that Q had made in her claim forms] were untrue. [Q]

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<sup>3</sup> *i.e.*, a decision notice which was also a written statement of reasons for the decision within rule 34(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008

confirmed in oral evidence that she had had capital in excess of £16,000 when she made the statements. This was corroborated by the documentary evidence. [Q] had received compensation as a result of a personal injury claim.”

There then followed detailed findings as to the amount of Q’s capital at various dates that were relevant to the decision, which I will omit for the reasons given at paragraph 6 above. To summarise, the Tribunal found that, as at each such date, Q’s capital exceeded £16,000. The statement of reasons then continues:

“During the periods of the overpayments, the sums had not been placed in a personal injury trust. [Q’s] oral evidence was that the sums had been accumulated for the most part [,] not spent. She accepted that she had [a sum substantially in excess of £16,000] at the time of her claims for Jobseeker’s Allowance. An examination of the bank account evidence produced by the Respondent shows the sums as part of the Personal Injury compensation being received into an account in [Q’s] sole name [which the Tribunal identified by the last four digits of its account number]. Money was subsequently moved around between accounts, and [Q’s] evidence was that this was done in cooperation with her father who assisted to place the money in accounts where interest earned could be maximised. There was no evidence to indicate that [Q] ceased to be beneficially entitled to the money moved around in this way. The Tribunal found that [Q] had received and possessed in excess of £16,000 from a date at least 52 weeks before she made her claim for Jobseeker’s Allowance in 2008, and that remained the case when she made her further claim in 2011 and therefore that capital fell to be taken into account.”

22. The rest of the written statement of reasons is taken up with an explanation of why the overpayment was recoverable and the amount of the recoverable overpayment.

23. On the view I take of the matter (see paragraph 50 below) , it is not yet clear whether Q has been overpaid JSA(IB). It is therefore unnecessary at this stage to summarise the Tribunal’s reasons for deciding that any overpayment was recoverable. I should, however, say that the statement does not consider whether Secretary of State had complied with section 71(5A) of the Social Security Administration Act 1992. That is unfortunate because that issue is clearly apparent from the circumstances set out in paragraphs 13 to 16 above. If the Secretary of State has not complied with section 71(5A), then no recoverable overpayment has yet arisen.

24. However, as that issue only arises if the recalculations I have directed in paragraph 3 of the re-made decision above show that Q has been overpaid benefit, I propose to say no more about it at present: see further paragraphs 54 and 55 below.

### **Where the First-tier Tribunal went wrong**

25. The Tribunal made a number of material errors of law. I will deal with them in increasing order of importance.

#### *The amount of any overpayment*

26. As mentioned above, the Tribunal accepted a concession by the Department that the full overpayment for Period 1 was not recoverable because it could not be established that Q had misrepresented the level of her capital when she first claimed but only from a later date. On that basis, the Tribunal held that only £7,580.02 of the total overpayment for Period 1 was recoverable from Q.

27. The problem with that is that, on the Department's own figures, she had only been paid £7,557.60 in JSA(IB) for that period: the calculation is set out in my grant of permission to appeal and it is unnecessary for me to reproduce it here.

28. For any given period, it is not possible for a claimant to have been overpaid more than she was paid. Therefore the overpayment could not have been £7,580.02: it could not possibly have been more than £7,557.60.

29. The Tribunal's conclusion to the contrary is a material error of law.

30. It is surprising that the point was apparently lost on a tribunal that included a financial member, even after Q had expressly raised it.

#### *The amount of Q's capital*

31. When calculating Q's capital, the Tribunal took into account the very substantial sums standing to the credit of a joint account with the Yorkshire Building Society ("the Yorkshire Building Society Account"), which is specified in my grant of permission to appeal.

32. However:

- (a) Q gave evidence that the money in that account was not hers; and
- (b) The presenting officer at the hearing expressly accepted on behalf of the Secretary of State that the Yorkshire Building Society Account was not Q's and that acceptance was recorded in the record of proceedings; and

- (c) The papers included a letter dated 14 April 2015 from the Yorkshire Building Society to Q, which was stated to relate to the relevant account, and continued in the following terms:

“Thank you for your recent enquiry. I can confirm that the account number referenced is not an account that has ever been held in your name either jointly or solely.”

- (d) There was no evidence to the contrary.

33. The Tribunal stated (at paragraph xxii) that a specified sum of money used by Q to purchase her home was transferred from the Yorkshire Building Society Account which it described as “an account in joint names (including [Q])” to an account in her sole name immediately before being withdrawn to make the purchase”. The finding that Q was one of the names on the Yorkshire Building Society Account was contrary to all the evidence and also the express concession made by the presenting officer. It was a finding of fact for which there was no evidence and, therefore, an error of law.

34. That error is material. The schedule of capital shows that, if the amount credited to the Yorkshire Building Society Account is removed from the calculation, Q’s capital fell below £6,000 on a date in March 2012. That would mean that—even ignoring what I say below about personal injury trusts—Q was not disentitled to JSA from approximately that date and had not been overpaid JSA thereafter.

35. At the hearing, Q’s mother told me that the Yorkshire Building Society Account was a joint account in her name and that of her late husband, Q’s father. They had transferred the money to Q’s sole account to enable her to buy her flat. As part of re-making the decision, I accept that evidence. Q was not possessed of the money in the Yorkshire Building Society Account until the day she received it and, later the same day, she used it to buy the home in which she lives, an asset that was disregarded as capital.<sup>4</sup> It follows that the money in the Yorkshire Building Society Account should never have been treated as capital for the purposes of her entitlement to JSA(IB).

### *Conclusion*

36. For all those reasons, and also because of what I say below about personal injury trusts, the First-tier Tribunal’s decisions were in error of law. I exercise my discretion under section 12(8)(a) of the Tribunals, Courts and Enforcement Act 2007 to set them aside.

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<sup>4</sup> Jobseeker’s Allowance Regulations 1996, Schedule 8, paragraph 1.



37. Having done so, I must next decide whether to re-make the decisions myself or remit the case to the First-tier Tribunal. I have decided to take the former course. Given what I say below about trusts of personal injury compensation, what is needed is for the Secretary of State to recalculate the level of Q's capital on correct legal principles, not further proceedings before the First-tier Tribunal.

**“Personal injury trusts”**

38. The Tribunal recorded at paragraph iv of the written statement of reasons that:

“The relevant law in relation to the appeals is set out at section 5 of the Respondent's submission, and is not repeated here.”

39. Section 5 of the response in both appeals stated that:

**“The disputed decision was made in accordance with the following Acts and Regulations**

**Section 134(1) of the Contributions and Benefits Act 1992  
Section 13(1) of the Jobseekers Act**

**Regulations 107, 108, 111 and 113 of the Jobseeker's Allowance Regulations 1996”** (original emphasis)

40. However, as the Tribunal found at paragraph ix, the source of Q's capital was that she “had received compensation as a result of a personal injury claim”. In those circumstances, paragraph 17 of Schedule 8 to the Jobseeker's Allowance Regulations 1996 is also relevant.

41. Schedule 8 is a list of types of capital that are disregarded when a claimant's capital is calculated for the purposes of JSA. Paragraph 17 contains the following item:

“17.—Where the funds of a trust are derived from a payment made in consequence of any personal injury to the claimant or the claimant's partner, the value of the trust fund and the value of any right to receive any payment under that trust”

42. What the Tribunal said about this is quoted under paragraph 21 above. For present purposes, the two most important sentences in that passage are as follows:

“... During the periods of the overpayments, the sums had not been placed in a personal injury trust. ... There was no evidence to indicate

that the appellant ceased to be beneficially entitled to the money moved around in this way. ... .”

43. It is notable that paragraph 17 does not require the trust to be in any particular form. It does not require the existence of something called a “personal injury trust”, or even that there be an express trust. It applies whenever the funds of “a trust” are derived from compensation for personal injury.

44. The Tribunal’s finding that Q did not cease to be beneficially entitled to the compensation she received was plainly correct.

45. But on that basis, the Tribunal’s decision must be legally incorrect because the undisputed evidence shows that for at least some of the time, the vast bulk of Q’s personal injury compensation was held in accounts that Q held jointly with either her father or her mother.

46. Legally a bank account is a debt owed by the bank to the account holders (or *vice versa* where the account is overdrawn). It is what lawyers call a *chose in action*, *i.e.*, a right to sue the bank for the debt.

47. The *legal* ownership of the debt was held jointly by Q and whichever one of her parents was also named on the account. They were the ones with the right to sue the bank if the debt were not repaid.

48. However, as the Tribunal held, the beneficial ownership of the money remained with Q.

49. The *only* mechanism capable of producing such a split between the legal and beneficial ownership is a trust. Given that Q and one of her parents were named on the account but the money in the account was Q’s alone, Q and the parent must have been jointly holding the capital represented by the account on a bare trust for Q in her sole capacity.

50. In those circumstances, the Tribunal should have held that paragraph 17 of Schedule 8 was satisfied to the extent that the money derived from Q’s personal injury compensation was held in a joint account. Its conclusion that paragraph 17 did not apply was wrong in law.

### **Concluding observations**

51. I have therefore re-made the decisions as set out on page 2 above.

52. I draw the Secretary of State's attention to the fact, as I have set aside the Tribunal's decision disentitling Q to benefit, her decision to award JSA(IB) for Period 2 remains in force and will continue do so unless and until there are (or were) grounds to supersede the decision and terminate the award. If my understanding is correct, Period 2 only came to an end because it was considered that Q had excess capital. If so, the recalculations directed above will need to address whether Q had a continuing entitlement to JSA(IB) after the end of Period 2 as well as during the periods that have been in dispute in these proceedings.

53. If Q wishes to have the Upper Tribunal check the Secretary of State's recalculations under paragraph 5 of the re-made decision, she should write to the Upper Tribunal enclosing a copy of the letter from the Secretary of State telling Q the recalculated amount; and explaining why Q does not agree with the Secretary of State's calculations.

54. I have set aside the Tribunal's decision as to the recoverability of the alleged overpayments. However, as I have neither re-decided that issue myself, nor directed the Secretary of State to do so, I remain seised of the issue.

55. It may be that the recalculations I have directed will show that Q has not been overpaid. And if there is an overpayment, it may be that Q will not dispute that it is recoverable. If, however, Q does dispute the existence or amount of a recoverable overpayment, her appeal against the decision in SC921/14/0114 may be restored for a further Upper Tribunal decision. To do that, Q should, again, write to the Upper Tribunal enclosing a copy of the Secretary of State's letter and explaining why Q does not accept that any overpayment is recoverable.

56. Finally, I should record that I have seen correspondence in which the Department have suggested that Q appealed to the Upper Tribunal against a third decision of the First-tier Tribunal that was made on 8 June 2018 (I do not quote the reference for the reasons given at paragraph 6 above). That is not correct. The decision dated 8 June 2018 was in Q's favour and gave her everything she could have obtained from the proceedings. She would have had no reason to appeal against it and she did not do so. Neither did the Secretary of State.

57. I can confirm that the Upper Tribunal has the First-tier Tribunal's file for that case as part of the background to these appeals. However I repeat that no appeal has been made to the Upper Tribunal against the decision of the First-tier Tribunal dated 8 June 2018. If that decision has not yet been implemented, it should be implemented now.

Signed (on the original)  
on 13 February 2020

Richard Poynter  
Judge of the Upper Tribunal