IN THE UPPER TRIBUNAL **Upper Tribunal case No.** CH/1987/2017
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell Judge of the Upper Tribunal

Hearing date: 17 August 2018

Venue: Caernarfon Court Centre

Attendances: For the Appellant, Mr John Hughes (non-legally qualified lay representative).
For the Respondent, Ms Harris of counsel instructed by Flintshire County Council's Legal Services Department

Decision: The decision of the First-tier Tribunal (2 March 2017, Wrexham, file reference SC 209/16/00653) did not involve the making of an error on a point of law. This appeal is **DISMISSED**.

REASONS FOR DECISION

A. The grounds of appeal

1. Upper Tribunal Judge Gray granted the Appellant Miss D permission to appeal to the Upper Tribunal on the following grounds:

(1) the First-tier Tribunal seemingly found that Miss D rang either the DWP or HMRC to discuss housing benefit. Arguably, the tribunal erred in law by failing to make findings of fact about what was said during the telephone call. Was Ms D given advice, was it mistaken and did it cause an overpayment? See the definition of "official error" in regulation 100(3) of the Housing Benefit Regulations 2006;

(2) arguably, the tribunal erred in law by failing to go on to consider whether Miss D might reasonably be expected to know that starting work might affect her entitlement to, or the amount of, housing benefit so as to give rise to the duty to disclose a change of circumstances under regulation 88(1) of the 2006 Regulations. The contents of the telephone call might have had a bearing on that issue.

2. Judge Gray refused to grant permission to appeal on any other ground, including the unfairness grounds advanced on Miss D's behalf.

B. The hearing before the Upper Tribunal

3. In the light of the grounds on which Miss D was granted permission to appeal, it came as something of a surprise to me at the hearing when her representative, Mr Hughes, categorically informed me that she had not, and never would, argue that she made a pre-employment telephone call to either the DWP or HMRC, in which she discussed her housing benefit entitlement. As a result, I do not allow this appeal on either of the grounds on which permission to appeal was granted. I cannot find that a ground of appeal is made out if an Appellant expressly disclaims that ground.

4. I am grateful to counsel for the local authority for her pragmatic and co-operative response to the development described above. It meant the hearing was not a waste of time. Ms Harris confirmed that the authority would not object to the introduction of supplementary grounds of appeal. These are the grounds which Mr Hughes says he came to the hearing prepared to argue on behalf of Miss D, namely:

(1) Whether the First-tier Tribunal erred in law by failing to find that the local authority's management of the Housing Benefit Data Matching Process was so deficient as to amount to an official error; and

(2) Whether the First-tier Tribunal erred in law in finding that Miss D had not, as she argued, made a telephone call to the local authority in which she informed them that she had been offered work and was advised that her proposed work would not affect her housing benefit.

5. I therefore directed that the grounds of appeal were to be supplemented by the above grounds.

C. Why this appeal is dismissed

6. First, Mr Hughes' argument about the local authority's management of the data matching exercise.

7. Shortly before the hearing, Mr Hughes supplied a letter dated 2 November 2016 written to himself by the DWP. The letter responds to Mr Hughes' request under the Freedom of Information Act 2000 for information about "how [the Housing Benefit Data Matching Service] works with local authority and is it automatic by local authority or is it only for high risk benefit cases?" The DWP letter includes the following passages:

> "…LAs provide the DWP with a monthly download of HB information held on their own IT systems, which we match against a range of internally and externally sourced data that DWP has available to it.

> Once the matches have been undertaken the 'discrepancy and risk cases' are sent back to LAs; via secure encrypted email. LAs then consider each individual case, taking appropriate action and or manually correcting HB claims when it is appropriate to do so".

8. Before the hearing began, a copy of the DWP letter was supplied to counsel for the local authority.

9. Mr Hughes draws attention to the document at p.97/289 of the First-tier Tribunal bundle. The document describes itself as *Housing Benefit Matching Service; Referral Sheet – Production Rule*. It gives 16 June 2014 as "date of extract" and 27 June 2014 as "date of match". The local authority's written response to Miss D's appeal to the First-tier Tribunal states that this document was supplied to them by the DWP. I see no reason to doubt that.

10. Mr Hughes argues the referral sheet shows that Miss D's data match was not performed until 15 months after she started working, which was also many months after her 'last shift'. As I understand it, he goes on to argue that this shows the local authority unfairly waited for many months after Miss D stopped working before responding to a data match, which amounts to an official error.

11. In response, Ms Harris for the local authority argues that, once the local authority has supplied monthly claimant data to the DWP, their role in the matching process is essentially passive until, that is, the DWP notify them of a 'match'. The local authority cannot comment on the DWP's performance of its responsibilities under the matching arrangements but they assert that they acted with reasonable speed once they received the match data in April 2014. The First-tier Tribunal did not err in law by failing to find that the local authority's operation of its responsibilities under the matching process amounted to an official error.

12. I agree with Ms Harris that the First-tier Tribunal did not err in law by failing to find that the local authority's performance of its responsibilities under the data matching process amounted to an official error. By the date of the DWP referral, the overpayment period had finished. It ended on 5 January 2014. It is therefore impossible for the local authority's exercise of its responsibilities under the data matching arrangement to have had any causative role in Ms D's overpayment. The First-tier Tribunal did not err in law by failing to find that the authority's exercise of those responsibilities amounted to an official error.

13. At the hearing, I asked Mr Hughes to elaborate on his argument that the First-tier Tribunal perversely rejected Miss D's evidence that she made a telephone call to the local authority to discuss her impending work. Mr Hughes argues that Miss D was pressurised when giving her evidence, which made her distraught. This is in fact an argument that Miss D did not have a fair hearing.

14. Ms Harris for the local authority argues that there is no proper basis on which the Upper Tribunal could hold that the First-tier Tribunal's rejection of Miss D's evidence was perverse (a finding that was not open to the tribunal on the evidence) or that she did not, in relation to this issue, have a fair hearing. I agree with these submissions.

15. The First-tier Tribunal's finding that Miss D did not make the claimed telephone call was arrived at after hearing oral evidence. The finding was also perfectly well reasoned. The tribunal considered that Miss D's oral evidence was vague. It also relied on documentary evidence showing that calls, apart from the disputed call, were recorded in writing. The tribunal was entitled to rely on these considerations. The tribunal's finding was not perverse.

16. So far as the argument that Ms D did not have a fair hearing is concerned, I was not at the hearing and so all I can do is consider whether the documentary evidence substantiates Mr Hughes' argument that Miss D was placed under unfair pressure at the hearing. For the following reasons, the evidence would not permit me to find that Ms D was unfairly treated at her hearing before the First-tier Tribunal. The telephone issue did not emerge at the hearing – Miss D was not taken unawares by a new issue. Furthermore, the First-tier Tribunal's record of proceedings shows that the telephone issue was discussed on a number of occasions throughout the hearing. In fact, the record indicates that it was the main topic of discussion at the hearing. Finally, while the letter that Mr Hughes wrote to the First-tier Tribunal shortly after receiving its decision complained about the tribunal's "intense and prolonged questioning of the Appellant on 'failure to disclose'", it did not argue that, as a result, Miss D was inhibited in giving oral evidence about her version of events.

17. In conclusion, I decide that the First-tier Tribunal's decision did not involve any error on a point of law. This appeal is dismissed.

Signed on original
on 18 August 2018 **Upper Tribunal Judge Mitchell**

Amendments made to anonymise the reasons for this decision, as a prelude to its publication on the Upper Tribunal's website – 12 December 2018.

Upper Tribunal Judge Mitchell