



[2021] UKUT 256 (AAC)  
Appeal No. CH/1041/2020

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**DBH**

Appellant

**-v-**

**West Lindsey District Council**

Respondent

**Before: Upper Tribunal Judge Poynter**

Decision date: 13 October 2021  
Decided on consideration of the papers

**Representation**

Appellant: In person  
Respondent: DWP Decision-Making and Appeals, Leeds

**DECISION**

The appeal is allowed.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC049/18/00785) which was decided at Boston on 9 July 2019.

That decision is set aside and the case is remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

## **DIRECTIONS**

### **To the First-tier Tribunal**

- 1 The First-tier Tribunal must give directions:
  - (a) adding the claimant's landlord as second respondent to the appeal under rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules");
  - (b) allowing the second respondent (at a minimum) the period of one month prescribed by rule 24(6) and (7) of the SEC Rules to make a written submission in reply to the appeal and the Council's response; and then
  - (c) allowing the claimant (at a minimum) the same period to reply to the second respondent's submission.
- 2 Once the time limited for the claimant's reply has expired, the First-tier Tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by paragraph 6(9)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.
- 3 The second respondent must be given notice of—and, if he so wishes, allowed to attend and participate in—that hearing to the same extent as any other party.
- 4 Subject to paragraph 3 above, the hearing may take place in accordance with any relevant Practice Directions and Practice Statements that are in force during the Covid-19 pandemic.
- 5 The judge of the First-tier Tribunal who made the decision I have set aside is excluded from further involvement in this case.

### **To the claimant**

- 6 You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 9 July 2019 made a legal mistake, not because it has been accepted that you

are not liable to repay any overpayment of housing benefit. Whether or not you are liable will now be decided by the new tribunal.

## **REASONS**

### **Introduction**

1. It is unnecessary for me to discuss the substantive issues in the appeal and, as I have decided to remit the case to the First-tier Tribunal, it is undesirable that I should do so.
2. It will suffice to say that the claimant lived in a rented property in the area administered by the West Lindsey District Council ("the Council"); that he had been awarded housing benefit ("HB") by the Council; and that the benefit so awarded was paid directly to the claimant's landlord rather than to the claimant himself.
3. This appeal has arisen because events occurred that (putting it neutrally) prevented the claimant from being physically present at the property for a significant period.
4. On 23 October 2017, the Council decided that the claimant:
  - (a) was not entitled to HB from and including Monday, 8 May 2017; and
  - (b) was liable to repay the sum of £2,020.97 that had been overpaid by way of HB for the period from 8 May 2017 to 31 October 2017.
5. On 9 July 2019, the First-tier Tribunal dismissed the claimant's appeal (except to the extent that it decided the overpayment period should have begun on 5 June 2017, rather than 8 May 2017). The claimant now appeals to the Upper Tribunal with my permission.
6. The Council supports that appeal, essentially for the reasons I expressed when giving permission and which I now elaborate as follows.

### **Reasons for setting aside the First-tier Tribunal's decision**

7. I have allowed the present appeal and set aside the First-tier Tribunal's decision because the Tribunal made a legal mistake by failing to appreciate that the claimant's landlord should have been added as the second respondent to the appeal.

8. Even once it has been decided that an overpayment of HB is recoverable, there will often still be an issue about *from whom* it is recoverable.
9. I discussed the law relating to that issue in my decision in *NSP v Stoke-on-Trent City Council and AT (HB)* [2020] UKUT 311 (AAC). That decision is available on the website of the Administrative Appeals Chamber and no purpose would be served by repeating that discussion here.
10. In some respects, this appeal is the mirror image of *NSP*, and this decision can be seen as an epilogue to that one. Reference should be had to that decision for the wording of the statutes and regulations to which I refer below.
11. In *NSP*, the appellant was the landlord and I held that the claimant was second respondent by operation of law.
12. In this case, the appellant is the claimant and, as there has been no decision to recover the overpayment from the landlord, he is not automatically a respondent to the appeal. He was, however, a necessary party to the appeal and the Tribunal should have added him as second respondent under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules").
13. The analysis that leads to that conclusion is as follows.
14. As I explained in *NSP* (at [41] to [46]), a decision to recover an overpayment of HB actually requires two decisions. Obviously, there is the recovery decision itself. But a recovery decision necessarily (even if only implicitly) involves a prior decision that, retrospectively, the claimant was not entitled to HB for some or all of the period for which he was awarded it. This is often called the "entitlement decision".
15. The claimant has a right of appeal against an entitlement decision under paragraphs 6(1) and (3) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000: see *NSP* at [48].
16. The landlord, however, does not have a right of appeal against an entitlement decision even if HB was previously being paid to him.
17. Paragraph 6(3) of Schedule 7 confers a right of appeal on a "person affected" by the decision. A landlord is not such a person. The phrase "person affected" is exhaustively<sup>1</sup> defined by regulation 3 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001: see *NSP* at [35].

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<sup>1</sup> See *Wirral MBC v Salisbury Independent Living* [2012] EWCA 84; [2012] AACR 37.

18. That definition does not include landlords in these circumstances for two reasons.

19. The first is that landlords can only be persons affected in relation to the types of decision listed in regulation 3(1)(d)(i) or (e). And decisions about the entitlement of a claimant to HB do not fall within those provisions.

20. The second is that, even when HB is being *paid* direct to a landlord, the *entitlement* to that benefit is the claimant's. Therefore a decision about entitlement does not affect the "rights, duties or obligations" of the landlord. Which, in turn, means that, even if the landlord otherwise fell within regulation 3(1), regulation 3(2)—to which regulation 3(1) is subject—would prevent him from falling within the definition of "person affected".

21. Under paragraph 6 of Schedule 7, the landlord would have had a right of appeal against the recovery decision, if the Council had decided that the overpayment was recoverable from him. In those circumstances, he would also be a person affected by virtue of regulation 3(1)(d)(i).

22. But that is not what the Council decided in this case: it decided that the overpayment was recoverable from the claimant, not the landlord.

23. As the landlord did not have a right of appeal against the Council's decision, he was not a "person other than the appellant who had a right of appeal against the decision" within head (a) of the definition or "respondent" in rule 1(3) of the SEC Rules: see *NSP* at [36]. He was therefore not second respondent to the claimant's appeal by operation of law.

24. But although the landlord was not *automatically* second respondent to the appeal, landlords who have received direct payments of HB that are subsequently held to have been overpaid are necessary parties to an appeal by a claimant against a recovery decision.

25. The reason for that is simple. Section 75(3) of the Social Security Administration Act 1992 says that a recoverable overpayment of HB:

"...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."

26. The general rule is therefore that where a landlord receives direct payments of HB, all such payments that turn out to have been recoverable overpayments are recoverable from the landlord.

27. To justify a decision that such an overpayment is recoverable from anyone other than the landlord—whether as well as, or instead of, the landlord—the local authority (and, on appeal, the First-tier Tribunal) must identify the circumstances that bring the case within one of the exceptions to that general rule prescribed in the Housing Benefit Regulations 2006 or (as appropriate) the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006.

28. Moreover, if the circumstances are such that the overpayment is recoverable from one of a number of people, any one of those people is entitled to a decision from the Tribunal that the overpayment is also recoverable from the others and not just him: see *NSP* at [56] and *R(H) 6/06* quoted in *NSP* at [55].

29. The First-tier Tribunal cannot make a decision that a recoverable overpayment is recoverable from both the claimant and his landlord unless both are parties to the proceedings before it. As the landlord was not automatically a party in this case, it was necessary to add him as a respondent. By omitting to do so, the Tribunal put it out of its power to make a decision to which the claimant may have been entitled.

30. The confusion that has occurred in this appeal could have been avoided if, when deciding that a recoverable overpayment was not recoverable from a landlord to whom the original payment was made, local authorities followed the law set out by the Tribunal of Commissioners in *R(H) 6/06*.

31. The relevant passage is set out in full in *NSP* at [55]. The headnote to *R(H) 6/06* summarises it as follows:

“5. a single decision as to the recoverability of an overpayment should always be addressed to all those from whom it is recoverable and, *if the overpayment is not recoverable from the person to whom the overpayment was made, it should include a decision to that effect and be addressed to that person*” (my emphasis).

It may be that some benefit management software does not permit a decision that a recoverable overpayment is recoverable from some people but not others to be contained in a single document. Even if that is the case, I can see no reason why two sequential decisions cannot be made and both decisions sent to all those named in them. Furthermore, it is difficult to overlook the fact that local authorities have over 15 years in which to bring their benefits management software into compliance with *R(H) 6/06*.

32. But this is not just a matter for local authorities. It is the job of the First-tier Tribunal to ensure that when local authorities do not follow the requirements of *R(H) 6/06* that circumstance is identified and directions are given to put matters right.

33. Those exercising the social security and child support jurisdictions of the Social Entitlement Chamber have an inquisitorial and enabling role. They are supposed to deal with all issues that are clearly apparent from the evidence (see the decisions in *Mongan v Department of Social Development* [2005] NICA 16 reported as R4/01 (IS) and *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495).

34. In this case, it was apparent from the evidence that HB was paid directly to the landlord and that recovery of the overpayment was being sought from someone else.

35. Section 75(3) says that a recoverable overpayment of HB “shall be recoverable ... from the person to whom it was paid” unless (to paraphrase) regulations provide otherwise. It is therefore beyond argument that whether or not regulations did provide otherwise in this case was a matter raised by the appeal.

36. And it should have been obvious to anyone reading those regulations (which, again, are discussed in greater detail in *NSP*) that the landlord needed to be joined as a respondent to the appeal.

37. There is one further consideration. The landlord needed to be a party to this appeal because, if the Tribunal were to decide that the overpayment was recoverable from the claimant instead of him, it is in his interests for the Council to be bound by that decision as between it and him. As things stand, if the Council is unable to recover the overpayment from the claimant, there is nothing to stop it from issuing a separate decision to the effect that it is recoverable from the landlord. Indeed, its duty to its council tax payers might require it to do so. If the landlord were a party to a decision that the overpayment is not recoverable from him, then that would no longer be possible.

38. For all those reasons, the First-tier Tribunal’s decision is in error of law and I have exercised the discretion conferred by section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set it aside.

### **Reasons for remitting the appeal**

39. Having set the decision aside, I must next decide whether to re-make the decision myself or to remit the matter to the First-tier Tribunal with directions. I have chosen to take the latter course.

40. I have decided to take the latter course. Before a final decision is taken, the landlord needs to be added as second respondent and the parties given an opportunity to make further submissions. Then further facts need to be found to establish whether the circumstances of this case fall within one of the exceptions in the regulations that provide that a recoverable overpayment of HB is recoverable from the claimant instead of a landlord to whom the original payment was paid. If not, then the correct decision will be that the overpayment is recoverable from both the landlord and the claimant: see, by analogy, *NSP* at [54].

41. All of those steps, including the hearing I have directed, can take place more conveniently before the First-tier Tribunal at a local venue.

### **Conclusion**

42. My decision is as set out on page 1 above.

Authorised for issue  
on 13 October 2021

Richard Poynter  
Judge of the Upper Tribunal