DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant,

The decision of the Sheffield First-tier Tribunal dated 6 December 2016 under file reference SC147/16/01997 involves an error on a point of law and is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *The Appellant's appeal is allowed.*
>
> *The Council's decision dated 6 September 2016 in relation to the Appellant's entitlement to housing benefit and council tax benefit is revised.*
>
> *The Appellant's earnings are to be calculated on the basis that they do not include the sum of £1,222.22 a month by way of the 'BS loan'.*
>
> *The Council is directed to recalculate the Appellant's claim accordingly.*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The subject matter of this appeal

1. This appeal is about the meaning of a claimant's "income" and "earnings" in the context of the housing benefit scheme.

2. In particular, if a claimant has been made redundant and receives a redundancy payment, but is then re-employed by the same employer on terms that he repays his redundancy payment by way of monthly deductions from his wages, are such repayments part of his income and earnings for the purposes of calculating his housing benefit entitlement?

3. The short answer to that question in the circumstances of this appeal is 'No, they are not'. The Council and the Secretary of State for Work and Pensions both support the Appellant's appeal. I could therefore issue a short decision to that effect by consent. However, I am giving a longer answer to the same question as other claimants might have the misfortune to find themselves in the same position as this Appellant. I am also acutely conscious that this Appellant has had to cope with major financial problems because of the way his case has been handled.

An outline of my decision

4. I am allowing the Appellant's appeal to the Upper Tribunal. I am doing so because there is a legal error in the decision by the First-tier Tribunal (FTT). I am also re-making the decision (as set out above) in the terms that the FTT should have made the original decision. The result is that the Appellant's housing benefit (and council tax benefit) entitlement for the relevant period should be calculated on the

basis that his income and earnings did not include the monthly repayments of his redundancy money.

The factual background

5. There is no dispute about the facts. The Appellant worked in the steel industry. He was made redundant in March 2016 and received a redundancy payment amounting to nearly £15,000, which was used to pay off debts and fund home improvements. However, in May 2016 he was offered his old job back, but on condition that he repaid his employers the redundancy payment over the course of the same tax year by way of monthly deductions from salary. The Appellant agreed to re-employment on those terms.

6. This arrangement had a dramatic impact on the Appellant's finances. His August 2016 payslip was typical. His basic monthly wage (excluding overtime) was £2,719.04. However, in addition to deductions for tax and national insurance he also had to repay £1,222.22 a month to his employer, described on his payslip as "BS loan". In all, for that month, his gross salary was £3,446.35 but his net pay was only £1,332.75. His redundancy money repayments amounted to around 40% of his wages and the deductions carried on every month until the end of the 2016/17 tax year.

7. In July 2016 the Appellant made a fresh claim for housing benefit and council tax benefit. He added an explanation on the claim form about his circumstances and stated that as from May 2016 "my wages will be around £1,000 p.m. because of deductions". The Council wrote to him on 5 September 2016 saying that "unfortunately, you do not qualify for any benefit". The reverse of the letter showed that his net weekly earned income had been assessed at being £443.59, i.e. in excess of £1,900 a month. It was plain that no allowance had been made for the fact that he was having to make substantial monthly repayments out of his wages in respect of his redundancy pay.

8. The Appellant appealed to the FTT. He has explained his thinking clearly in a written submission to the Upper Tribunal:

> "All I am asking for is some help or reduction in housing rent and council tax for this period, May 2016 to April 2017. This would then clear the arrears which I am now paying off at the moment. I could have refused my job back and got all benefits and have no arrears, but I wanted to return back to my job and support my family in a correct manner."

The First-tier Tribunal proceedings

9. The Council prepared a response for the FTT appeal. It included the following passage by way of explanation:

> "The Decision Maker [DM] would advise that whilst [the Appellant] is having deductions made from his wages in order to repay the redundancy money he received in April 2016, this is not a deduction which may be taken into consideration when assessing [the Appellant's] income. The items which may be taken into consideration and deducted from gross wages are as set out in Schedule 4 to the regulations. The deductions which are taken into consideration are tax, National Insurance [NI] contributions and 50% of any amount paid in respect of a pension. There is nothing in the regulations, or schedule to those regulations, which state that deductions in respect of other items, such as the repayment of redundancy payments, should be taken into consideration when assessing earnings".

10. The FTT heard and dismissed the appeal on 6 December 2016. The FTT's decision notice explained that "there are no grounds that allow the Housing Benefit department to come to any conclusion other than which they have done in this case. Unfortunately no allowance can be made in relation to the redundancy pay that the appellant has had to re-pay".

11. The FTT's statement of reasons summarised the facts, which as noted were not in dispute, and essentially did little more than repeat the explanation provided by the Council in its written response to the appeal (see paragraph 9 above). The FTT judge noted that "I acknowledge that this is particularly hard on [the Appellant and his wife but] there is no facility for me to make any decision other than to say that this appeal must fail."

12. The Appellant applied to the FTT for permission to appeal to the Upper Tribunal but was refused. Fortunately the Appellant did not give up but persevered, and I subsequently gave permission to appeal. I also joined the Secretary of State for Work and Pensions to the appeal as it appeared to me the case might have wider ramifications, beyond the Appellant's own circumstances.

The Upper Tribunal's analysis

Introduction

13. In this section I deal with (1) the legislative framework; (2) the relevant case law; and (3) their application to the circumstances of this appeal.

The legislative framework

14. The housing benefit means test depends in large part on the claimant's "income" (see Social Security Contribution and Benefits Act 1992, section 130(1)(b)). A claimant's "income" is assessed according to Part 6 of the Housing Benefit Regulations 2006 (SI 2006/213). Such income is to be calculated on a weekly basis (regulation 27). Provision is made for averaging the weekly earnings of employed earners (from now on, employees – see regulation 29) and for attribution into weekly amounts (regulation 33). There is then an expansive definition of the meaning of an employee's "earnings" (see regulation 35). There is no suggestion that the moneys in issue here fell within the exceptions in regulation 35(2). Finally, regulation 36(1) provides that an employee's average weekly earnings for the purpose of regulation 29 are to be the net earnings. Net earnings are defined in turn as a person's gross earnings less tax, NI and half of any pension contributions (regulation 35(3)). In addition, the particular types of sum (such as the £5 or £20 earnings disregards) mentioned in paragraphs 1-14 of Schedule 4 to the Regulations are to be disregarded in such a calculation (regulation 35(2)).

15. The lay-out of regulation 35 encourages local authority decision-makers to approach an assessment in the way the Council did here, namely by three simple steps: (1) identify gross average weekly earnings; (2) deduct tax, NI and half any pension contributions; and finally (3) deduct any Schedule 4 disregards. In the standard type of case this approach may work well. The problem in a less straightforward case is that a more fundamental question may be missed, namely what actually is meant by a person's 'income' or 'earnings'.

The relevant case law

16. There are three cases that are of particular assistance. The starting point in the case law is perhaps *Leeves v Chief Adjudication Officer* [1999] ELR 90, reported as R(IS) 5/99. In short, a mature student received a student loan but then abandoned the course of study, the loan being repayable in that event. The Court of Appeal held

that where there was such a "certain and immediate liability" to repay then the payments in question were not income, but had become capital subject to an obligation to repay.

17. The closest case to the present on the facts is arguably R(TC) 2/03, a working families tax credit case in which the claimant's partner had had to repay an earlier overpayment of wages. In that case the partner had three payslips that showed a figure for 'salary' of £1,040.60 a month. However, for two of those months the payslips showed a deduction described as 'overpayment' of £76, reflecting the repayment of the previous salary overpayment, so that the 'gross for tax' figure was £964.60. The tax credits decision-maker took as the gross pay the figure of £1,040.60 for all three months, then applying the actual deductions for income tax and national insurance in each month. The appeal tribunal confirmed the tax credits decision under appeal.

18. Allowing the claimant's further appeal, Mr Commissioner Mesher concluded that the most natural analysis of the situation was that there had been a variation of the partner's contract of employment by agreement, so that he was only entitled to receive £964.60 gross for the months in question:

> "13. However, it is necessary to look at what actually did happen, not at other things which might have happened, but did not. When the accidental overpayment to P was discovered, his employer agreed with him to recoup the overpayment over three months. The most natural analysis is that there was a variation of his contract of employment by agreement, so that he was only entitled to receive £964.60 gross in the three months. There was consideration on both sides for the agreement on that effect over the three months. An alternative analysis might be as follows (I do not think that I need to explore whether the employer might also acquire rights under broader restitutionary principles). Monthly paid employees are normally entitled under their contracts of employment to a salary expressed on an annual basis, to be paid monthly. If, by mistake, too much is paid in one or more months, then it could be said that the employee's entitlement to remuneration in the following months would be correspondingly reduced. But that would be subject to a specific agreement about the amount that the employee is to be paid in the following months. The situation is different from the making of deductions from salary for payments to the employer for other purposes, like membership of clubs or the repayment of season ticket loans or advances of pay. The circumstances of an overpayment of contractual remuneration having been made, coupled with an agreement about the precise consequences on future payments of remuneration, alters the content of the employer's obligation under the contract to pay remuneration."

19. I should also refer to CH/1672/2007, a decision of Mr Commissioner Williams. In that case the claimant was subject to a High Court order, following a decree of judicial separation, as a result of which he was required to pay half of his occupational pension to his wife. The Commissioner held (at paragraph 55) that the wife's half of the claimant's pension payments did not amount to his income, as he was persuaded:

> "that the proper interpretation of the relevant statutory test of income, in its ordinary sense, but also in the context of these arrangements, is that Mr K's income should be regarded as the amount he has left from his occupational pension after he has passed on to Mrs K the sums he is required to pay to her from that pension under the High Court pension-splitting order. It is important in this context to appreciate that the High Court order was at the initiative of Mrs K

> and that, although Mr K consented to it at the time it was made, it is not in any meaningful sense a voluntary disposal of his income or a diversion of it for his own purposes either then or at any later stage. While he may have received sums from the pension trustees of an income nature, that is not of itself decisive. The sums he is required to pay Mrs K from that pension under that order are not in any ordinary sense of the word his income. Those sums are her income. And the rules in question will treat them as her income. They should not be read to treat them also as his income when he has no practical power to treat them as his income. And I see no specific provision in the Regulations that requires me to do that. The statutory scheme includes provisions to add back to income sums that are diverted from income for various reasons and in various ways, but none of them are specifically relevant to this case. And, in particular, I interpret the order as one moving the sums from Mr K to Mrs K for Mrs K's purposes, not those of Mr K, and of being a transfer in respect of her and not of him. And I take that view because it is accepted that the scheme so regards the receipt by Mrs K of those sums."

The application of those principles to the circumstances of this appeal

20. There are at least two ways of looking at this case which support the conclusion that £1,222.22 per month was not the Appellant's earnings or income. On one view, given the "certain and immediate liability" to repay, it was effectively a payment of capital, not income, and a capital sum which was immediately recouped by the employer. This interpretation would be founded on *Leeves v Chief Adjudication Officer*.

21. The alternative view, and one advocated by Mr Roger Jennings, for the Secretary of State, is that the present case is more akin to Social Security Commissioner's reported decision *R(TC) 2/03* – the Appellant had agreed a contractual variation in his contract of employment to allow the repayment of the redundancy money to be made, such that the money in question did not amount to income in the first place. As Mr Jennings rightly argues, the context and the nature of the arrangement are all important. The deductions in the present case are quite different to the other types of deductions commonly made from wages that are not allowable in calculating a person's income for benefit purposes (e.g. an advance of salary or membership of clubs etc). On that analysis the £1,222.22 was arguably neither capital nor income. I agree with Mr Jennings that that is the better view in the circumstances of this case.

22. It follows that in the present case the Appellant's gross earnings, from which his net earnings is then determined, does not include the amount labelled as 'BS loan' on his payslips. The Council now agrees with that approach.

23. I therefore allow the Appellant's appeal.

Disposal of the appeal

24. I set aside the FTT's decision of 6 December 2016 as it involves an error of law. As already mentioned, the facts are not in dispute here. It follows that I can re-make the FTT's decision in the terms it should have done, as set out at the head of these reasons. The effect of that is the Council should recalculate the Appellant's entitlement to benefit excluding the 'BS loan' sum of £1,222.22 a month from the assessment of his earnings.

One further matter

25. In its response to the original appeal to the FTT, the Council included the following paragraph in its summary of its decision;

> "The decision regarding the amount of HB that [the Appellant] is entitled to is not within the jurisdiction of the Tribunal. Furthermore, the appeal against the decision by the Benefit Section regarding outgoings is misconceived/misguided as there is nothing within the HB regulations which allows these to be considered and the Benefit Section does not have discretion to disregard benefit regulations. In addition the Tribunal does not have the jurisdiction to instruct the Benefit Section to disregard regulations set by law."

26. In the light of that, the Council's response went on to make an application that the FTT strike out the Appellant's appeal as having no reasonable prospects of success under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685).

27. Fortunately, whether by luck or good judgement, the FTT simply ignored that application. If that was an error of law by the FTT, it was not a relevant or material error, as it did not affect the outcome.

28. The fact remains it was not the Appellant's appeal that was misconceived or misguided but rather the Council's decision and its subsequent strike out application. The assessment of a claimant's entitlement to housing benefit following an appealable decision by a local authority is a matter that falls squarely within the jurisdiction of the FTT. There is a world of difference between a case that falls within jurisdiction but has no reasonable prospects of success and a case which is outwith the FTT's jurisdiction altogether. As Upper Tribunal Judge Levenson helpfully explained in *FL v FTT and CICA* [2010] UKUT 158 (AAC):

> "16. The point is that whatever decision it thought it should or was obliged to reach, the First-tier Tribunal here had jurisdiction to do it or not to do it. It had jurisdiction to 'enter on the inquiry'. The applicant exercised a right of appeal, the tribunal was seized of the matter, and it should have made a proper decision. To do as it did was to run the risk of denying the claimant a hearing on the facts and merits of her appeal.
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> 17. The First-tier Tribunal would only be without jurisdiction to consider an appeal when no right of appeal to it had been created in respect of a particular matter or where the exercise of such a right was subject to a condition precedent which had not been satisfied."

29. In the present case a less determined Appellant might have given up pursuing their appeal, faced with the Council's (mistaken) insistence that the FTT had no power to consider the appeal. Fortunately that did not happen here.

Official guidance

30. Those responsible for the official guidance on housing benefit provided to local authority decision-makers up and down the land should perhaps review such guidance to ensure that attention is drawn to the need in appropriate cases to consider whether a payment is actually a claimant's "income" in the first place. The simple three-step approach outlined in paragraph 15 above does not work in every case, as this appeal shows.

Conclusion

31. I conclude that the decision of the First-tier Tribunal involves an error of law for the reason summarised above. I therefore allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section

12(2)(a)). There does *not* need to be a full re-hearing of the case by a new First-tier Tribunal (section 12(2)(b)(i)). I accordingly re-make the decision myself as set out above (section 12(2)(b)(ii)).

Signed on the original
on 6 October 2017

Nicholas Wikeley
Judge of the Upper Tribunal