

**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 East Ham First-tier Tribunal dated 1 April 2016 under file reference SC124/15/01737 involves an error on a point of law and is set aside. The Upper Tribunal is in a position to re-make the decision under appeal. The Upper Tribunal's re-made decision is as follows:

“The Tribunal allows the Appellant’s appeal against the Council’s decisions dated January 17, 2011 and July 23, 2014. The Appellant was entitled to income support until October 22, 2010 and thereafter to jobseeker’s allowance as from October 23, 2010. It follows that under the passporting rules the Appellant was entitled to housing benefit and council tax benefit for the period from October 25, 2010 to December 20, 2010. It follows from that that the Appellant is accordingly not liable to repay overpayments of both benefits for that period. The Appellant’s eligible rent was also not subject to a 14% deduction under regulation B13, as she was exempt under the transitional protection rules.”

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

An outline of my decision

1. In this decision I refer to the Appellant in that way and to the Respondent local authority simply as “the Council”. I allow 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 set aside the FTT’s decision. I can also re-make the FTT’s decision, rather than send it back for re-hearing.

2. My re-made decision, in summary, is as follows. I allow the Appellant’s appeal against the Council’s decisions dated January 17, 2011 and July 23, 2014. The Appellant was entitled to income support until October 22, 2010 and to jobseeker’s allowance as from October 23, 2010. It follows that under the passporting rules the Appellant was entitled to housing benefit and council tax benefit for the period from October 25, 2010 to December 20, 2010. It follows from that that the Appellant is accordingly not liable to repay overpayments of both benefits for that period. The Appellant’s eligible rent was also not subject to a 14% deduction under regulation B13, as she was exempt under the transitional protection rules.

The Council’s original decision(s)

3. The procedural history of this appeal is somewhat complex. Shorn of unnecessary detail, the sequence and essence of the Council’s original decisions are as follows.

4. On January 17, 2011, the Council decided to stop the Appellant’s housing benefit and council tax benefit with effect from October 25, 2010 (p.38). This was on the basis that the Appellant’s passported housing benefit entitlement had ceased as

her income support entitlement had itself ended on October 22, 2010. As a result, the Council decided there was a recoverable overpayment of housing benefit (£470.80) and an excess payment of council tax benefit (£405.69).

5. On April 8, 2011, the Council recognised that the Appellant had been awarded jobseeker's allowance for the period from December 21, 2010 to January 14, 2011, but put the housing benefit claim "on hold" until further information was made available (p.77).

6. On June 22, 2011, the Council noted that the Appellant had an outstanding appeal against a DWP income support decision in relation to the period from October 22, 2010 to December 21, 2010 (p.111). The Council accordingly deferred the Appellant's claim to backdate entitlement for housing benefit and council tax benefit for the same period. As the FTT subsequently observed, then "the matter appeared to have lain dormant from May 2011 until January 2013" (p.331 at paragraph 13).

7. On July 23, 2014, the Council decided that the Appellant was not entitled to an exemption from the application of the 'bedroom tax' rules (p.123). The Council based that decision on its finding that there had been a gap in the Appellant's housing benefit entitlement for the period from October 25, 2010 to January 3, 2011.

8. On February 16, 2015 the Appellant appealed against the Council's decision of July 23, 2014 (p.128). On June 12, 2015 the Appellant sent in further grounds of appeal (p.166). On August 17, 2015 the Council wrote to the Appellant about her appeals against the decisions dated January 17, 2011 and July 23, 2014 (p.161). The Council reviewed but confirmed those decisions.

The proceedings before the First-tier Tribunal

9. On September 4, 2015 the Council applied to the FTT for directions requiring the production of certain documents from the Appellant (p.206). On November 24, 2015 the FTT held a directions hearing (p.238). Some further evidence was filed.

10. On April 1, 2016 the FTT held a substantive hearing of the appeal. It is clear the FTT gave the matter careful consideration – the record of proceedings runs to 19 pages and shows that the hearing lasted the best part of the morning session. Quite reasonably, given the factual complexity of the case, the FTT Judge reserved her decision on the appeal.

11. In short, the FTT dismissed the Appellant's appeal (decision notice at p.323, statement of reasons at pp.326-335). The FTT decided (i) the Appellant was not entitled to housing benefit or council tax benefit from October 25, 2010 to December 20, 2010; (ii) she was accordingly liable to repay overpayments of both benefits for that period; and (iii) she was also liable to a 14% deduction from her eligible rent owing to the operation of regulation B13 (the so-called 'bedroom tax'), as she was not exempt under the transitional protection rules (which, in turn, was because of the break in her housing benefit entitlement in the latter part of 2010).

12. In the summary of reasons on the decision notice, the FTT Judge also made it clear that she found that (i) the Appellant had been paid income support until December 2010, and thereafter had qualified for jobseeker's allowance; (ii) she had not been entitled in law to income support from September 2010 (when her carer's

allowance ceased) through to December 20, 2010, despite ongoing payments of that benefit; (iii) she had not been entitled to any income-based benefit after October 25, 2010; and (iv) in the absence of the Appellant producing details of her means, she was therefore not entitled to either housing benefit or council tax benefit for the period from October 25, 2010 to December 20, 2010.

13. The Appellant applied for permission to appeal, which was refused in short order by the District Tribunal Judge.

The proceedings before the Upper Tribunal

14. I directed an oral hearing of the renewed application for permission to appeal to the Upper Tribunal. By this time the Appellant had secured the services of the Free Representation Unit, and in particular of Mr A Habteslasie of Counsel, acting *pro bono*. I am particularly grateful to Mr Habteslasie for the helpful and measured way he has made his submissions. He produced a detailed skeleton argument for the purposes of the permission hearing which, while it was not persuasive in all respects, was sufficient for me to grant the Appellant permission to appeal (p.366).

15. Technically I made a grant of limited permission to appeal. I refused permission to appeal on what I described as Grounds 1 and 2.

16. Ground 1 concerned the issue of the personal injury (PI) trust. It was argued by the Appellant that information relating to the PI trust did not need to be disclosed to the Council as the funds placed in a PI trust are disregarded for income support (IS) purposes (and other means-tested benefits). As I explained when refusing permission on this ground:

'8. This ground is based on a misapprehension. The starting point is all income and capital must be declared. Strictly even disregarded capital must be declared. The DWP or local authority may need to be satisfied that the funds in question do indeed fit the statutory criteria – and of course it is for the claimant to show that a particular disregard applies. As Lord Hope held in the House of Lords' decision in *Kerr v Department for Social Development* [2004] UKHL 23 "facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry" (at para. [16]).'

17. Ground 2 was basically a "facts and reasons" challenge relating to regulation B13 on the 'bedroom tax'. The FTT had dealt with this issue at some length; it directed itself properly as to the relevant law (see *SSWP v Nelson and Fife Council (HB)* [2014] UKUT 525 (AAC); [2015] AACR 21). It found the facts clearly and concisely. Against that background, it gave summary but sufficient reasons. The evidence before the FTT and on file showed plainly that whatever its actual use, the room in question could properly be regarded as a bedroom. I accordingly refused permission to appeal on this second ground. But I gave permission on Grounds 3, 4 and 5.

18. Ground 3 referred to the FTT's treatment of the DWP letters of December 2010 and April and June 2011, regarding the Appellant's receipt of income support and jobseeker's allowance.

19. The related Ground 4 was that the FTT had drawn an incorrect inference from the DWP letter of June 27, 2011 (at p.227). The main thrust of this argument was that the clear inference from that DWP letter, so it was said, was that the Appellant was entitled either to income support or jobseeker's allowance during the material period.

20. The final Ground 5 was the argument that the FTT had erred in law by assuming that receipt of income support but in the absence of entitlement to that benefit during the material period did not qualify the Appellant for housing benefit. Mr Habteslasie put this argument on the basis that the FTT had misunderstood and misapplied the Court of Appeal's decision in *R v South Ribble DC HBRB ex p Hamilton* [2000] 33 HLR 102. The Court of Appeal held there that the statutory definition of "a person on income support" must be read as meaning a person who was *lawfully* entitled to income support. I was not wholly persuaded by that line of argument, but I gave permission as Upper Tribunal Judge Mesher in *SD v Newcastle CC (HB)* [2010] UKUT 306 (AAC) had held that a DWP decision that a person was no longer entitled to income support was only effective once notified and decisions on housing benefit had to recognise that legal reality.

21. I have now had the advantage of having seen further detailed written submissions from Mr M Clifford for the Council and from Mr Habteslasie on behalf of the Appellant. Neither party has sought an oral hearing of the appeal proper. I consider that an oral hearing is not necessary to dispose of the appeal fairly and justly. The appeal has been fully argued in the written submissions.

A preliminary point about the statement of reasons

22. Unfortunately the FTT's detailed statement of reasons does not use sequential paragraph numbering. Instead, and somewhat confusingly, the paragraph numbering runs from [1]-[29] under the heading 'Issues and Findings of Fact' and then starts again at [1] and runs to [35] under the heading 'Reasons'. The Senior President of Tribunals has issued a Practice Statement on the *Form of Decisions and Neutral Citation: First-tier Tribunal and Upper Tribunal on or after 3 November 2008*. This provides that "First-tier and Upper Tribunal decisions must be prepared for delivery, or issued as approved decisions, with paragraph numbering." By implication that must mean a single run of sequential paragraph numbering, or it becomes difficult to identify which passage is being referred to at any given time. As the Upper Tribunal has noted on countless occasions, compliance with the Senior President's Practice Statement is a matter of good judicial practice, although a failure to do so is not an error of law. In this Upper Tribunal decision, in the interests of clarity, para [F13] means paragraph [13] under the FTT's heading for fact-finding (F) and para [R27] means paragraph [27] under the reasons (R) heading (and so on).

The Upper Tribunal's analysis

Introduction

23. I need say no more about Grounds 1 and 2, given that permission to appeal was refused on those grounds. I would simply say I have reservations about the Council's suggestion at paragraph 4 of its submission, implying that the Appellant has been wasting the time of the FTT and the Upper Tribunal. The Appellant had every right to challenge the FTT's decision as it was contrary to her interests. In addition, an essential plank of her case throughout has been that she was entitled to a relevant DWP benefit at all material times and so the Council did not need to make further enquiries as to her capital. However, I will say that both parties seem to have got themselves into an unhelpfully adversarial frame of mind – there has clearly been a

long record of complaints made by the Appellant against the Council (see p.156) and the Council has made allegations of dishonesty against the Appellant (p.375, paragraph 35).

24. I therefore focus on grounds 3, 4 and 5 in this decision. Grounds 3 and 4 can conveniently be taken together as both primarily concern the DWP letter of June 27, 2011 (p.227).

Grounds 3 and 4

25. The FTT's findings of fact and reasons on the Appellant's entitlement (or otherwise) to DWP income-related benefits during the last three months of 2010 were neatly summarised on the FTT's decision notice (see paragraph 12 above). The FTT's relevant findings of fact were at paragraphs [F2]-[F6], [F12], [F16]-[F18] and [F21]-[F22]. Its reasons were at [R7]-[R12], [R15] and [R24]-[R28].

26. In short, the FTT concluded that the Appellant's lawful entitlement to income support ended on October 22, 2010 ([R7] & [R9]), that she had continued to receive income support thereafter due to DWP official error ([R8]) but was not then lawfully in receipt of income support ([R25]), and that her jobseeker's allowance entitlement started from December 21, 2010 ([R15]), backdated but only to December 10, 2010 ([R27]). The key passage in the FTT's reasoning is at [R27]:

"27. She subsequently became entitled to JSA, backdated to 10.12.2010 (pp.132 and 227-229). The letter she obtained from the DWP (pp.227-229) [*note: i.e. the letter of June 27, 2011*] indicated that her JSA had been backdated, and might have been backdated further, had she not already been paid IS for that period. The letter was far from clear, but did not state that she was entitled to backdated JSA [*note: presumably meaning to a date before December 10, 2010*], and she did not appear to satisfy the criteria for backdating to the end of the IS claim."

27. Accordingly, the FTT decided, the Appellant could not rely on the DWP benefit passporting rules for the period from October 22, 2010 to December 10, 2010 ([R28] – the reference to 10.10.2010 in that passage is plainly a typographical error). In the absence of a passported entitlement to housing benefit, the FTT concluded, the Council was entitled to ask for proof of income and capital in assessing whether the Appellant qualified for housing benefit and council tax benefit.

28. Mr Habteslasie argues that the purport of the DWP letter of June 27, 2011 is clear, namely that the Appellant was entitled to either income support or jobseeker's allowance for the period from October 22, 2010, and not simply jobseeker's allowance for the period back to December 10, 2010.

29. Mr Clifford, the Council's appeals officer, contends that the FTT was entitled to read the DWP letter of June 27, 2011 and related correspondence as proof that the Appellant was not entitled in law to income support from September 6, 2010 through to December 15, 2010, even though income support was in fact paid for that period. The DWP letter, it is said, falls short of confirming the Appellant's entitlement to income support up to December 10, 2015. Indeed, the reference to the decision not to pursue recovery as there had been official error demonstrated there had been an overpayment of income support (and so no entitlement during the relevant period).

30. However, as Mr Habteslasie rightly observes, the DWP letter of June 27, 2011 was not itself a (formal) decision letter. Rather, it was a letter in response to a complaint by the Appellant. It has to be read in that light with some “reading between the lines”. The FTT rightly accepted (and it is not in dispute) that it showed the Appellant had been paid arrears of jobseeker’s allowance for the (limited) period from December 10 to December 20, 2010 ([F17]), i.e. from the date that the actual payments of income support stopped. The FTT regarded the letter as “far from clear” but not as showing any further backdated entitlement to jobseeker’ allowance ([R27]). However, even if it is rather ambiguous, one reasonable reading of the final paragraph on the first page of that letter (at p.227) is that the Appellant was paid backdated jobseeker’s allowance only back to December 10, 2010 (and not to the date the income support claim was retrospectively ended) as she had in fact already been paid income support for the relevant period. I bear in mind that the actual weekly amounts of income support and income-based jobseeker’s allowance are the same (i.e. as regards personal allowances and premiums).

31. The letter of June 27, 2011 refers to the earlier DWP letter of April 28, 2011. That letter (p.364), which was not before the FTT, refers to a payment of arrears of jobseeker’s allowance *for the period from October 22, 2010 to December 21, 2010*. The letter of June 27, 2011 then acts as a correction to that statement. It explains that as income support had been in payment those payments were used to offset the arrears of jobseeker’s allowance otherwise due.

32. I accept, of course, that the letter of April 28, 2011 was not before the FTT. However, the FTT has failed adequately to explain why the letter of June 27, 2011 did not support the Appellant’s argument that she was in receipt of a relevant DWP benefit (whether income support or jobseeker’s allowance) throughout the material period. As Mr Habteslasie contends, an entirely reasonable explanation for why the DWP considered that payment by official error of income support precluded backdating jobseeker’s allowance is that the Appellant was actually entitled to jobseeker’s allowance through that period. It also explains, I might add, why the DWP took no action to recover the notional income support overpayment – as it was cancelled out by the jobseeker’s allowance that would otherwise have been paid.

33. In that same context it is true that the letter of June 27, 2011, which was before the FTT, did not categorically state that the Appellant was entitled to backdated jobseeker’s allowance for the whole period in dispute. However, equally, it did not say that she was not so entitled and a reasonable reading of that letter was that she was indeed so entitled to fully backdated jobseeker’s allowance. The FTT added that “she did not appear to satisfy the criteria for backdating to the end of the IS claim” (i.e. back to October 20, 2010). This statement was not subject to any further explanation. The basis for the statement is also unclear, as one of the grounds on which jobseeker’s allowance can be backdated for up to 3 months is where the claimant is given information by an officer of the DWP such that the claimant understood any such claim would not succeed (see Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), regulation 19(4) and (5)(d)).

34. In the present case it is difficult to see how that 3-month backdating facility would not have applied, given the Appellant (i) had Santander statements showing she was being paid income support by the DWP during the relevant period (p.105),

and (ii) had no reason throughout e.g. October and November and the first part of December 2010 to believe that she was *not* entitled to income support, and (iii) had been advised by the DWP letter dated December 6, 2010 that she was currently in receipt of income support (p.130). The Appellant had no reason to think she would be entitled to jobseeker's allowance and every reason to think that she was not – or at least not until she received the letter of December 15, 2010, upon receipt of which she acted promptly to claim backdated jobseeker's allowance.

35. I also regard the way in which the respective cases were put to the FTT as significant. The Council, in its original response to the appeal, characterised the Appellant's case as being that "she was in receipt of Income Support for the period 25/10/2010 to 27/12/2010" (p.27). The Council argued that "cannot be so" for various reasons, not least the DWP evidence that income support entitlement ceased with effect from October 22, 2010. However, that was not actually the way in which the Appellant was putting her case. The Council's characterisation was an oversimplification. The Appellant's argument was that she was lawfully in receipt of either income support or jobseeker's allowance for the period in dispute (see e.g. her letters at p.69 and p.128). Especially with the passage of time, it is not unreasonable for the Appellant to know precisely which benefit applied in which weeks. While the Council obtained information about the Appellant's income support entitlement (see e.g. p.151 and p.209), it appeared to make no attempt to clarify the details of the extent of backdating to jobseeker's allowance, although this was clearly a live issue from the December 2010 local authority input document (see p.48 and see further below).

36. On balance, I therefore find the FTT erred in law in its approach to the letter of June 27, 2011. In summary, the FTT failed sufficiently to investigate the issue of the extent of backdated entitlement to jobseeker's allowance and failed adequately to explain its reasoning. Grounds 3 and 4 accordingly succeed.

Ground 5

37. The appeal file before the FTT included a copy of the DWP's local authority input document dated December 31, 2010, which refers to a jobseeker's allowance claim made on December 21, 2010 (p.42). In her accompanying statement, the Appellant applied for jobseeker's allowance (and housing benefit and council tax benefit) to be backdated to October 22, 2010 (p.47). The Appellant stated that she had only received a letter "yesterday" stating that her income support had been stopped as from the earlier date of October 22, 2010. Presumably "yesterday" meant December 20, 2012. This is confirmed by the further entry on p.48, where the Appellant stated that she had received a letter on December 20, 2010, dated December 15, 2010, stating that her income support had been stopped from October 20, 2010 and her carer's allowance suspended, and had been advised to make a new claim for jobseeker's allowance. I note the electronic notification (or EDT) by the DWP to the Council on December 15, 2010 ties in with that date (p.32).

38. The FTT noted the EDT ([F2]). The FTT also correctly found that the Appellant had only been notified in December 2010 that her income support entitlement had ceased on October 20, 2010 ([F6]). Those findings were repeated in the reasons ([R7]-[R10]). However, the implication of the fact that the Appellant had been notified in December of a change in her income support entitlement that was operative from the earlier date in October 2010 was not explored further.

39. This was why I gave permission on Ground 5. I pointed out that a similar point seemed to have arisen in *SD v Newcastle CC (HB)* [2010] UKUT 306 (AAC), where Upper Tribunal Judge Mesher held that a decision that a person was no longer entitled to income support was only effective once notified, applying the House of Lords authority in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL

36; [2004] 1 AC 604. Accordingly, the claimant in *SD v Newcastle CC (HB)* was regarded as still “on income support” and so entitled to passported housing benefit until such time as she was indeed properly notified about the disallowance of income support.

40. I have considered both representatives’ submissions on this ground of appeal. I am not persuaded by the Council’s reliance on section 1 of the Social Security Administration Act 1992, as that is concerned with the prior question of the need for a claim before entitlement can arise in the first place. The Council’s assertion at paragraph 18 of its response – namely that housing benefit entitlement ceases as soon as the qualifying criteria for that benefit are no longer met – is far too sweeping and is inconsistent with *SD v Newcastle CC (HB)*. Such issues are necessarily dependent on the social security decision-making regime which provides for awards of benefit to be revised, superseded and/or appealed, with appropriate procedural safeguards. Thus 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.”

41. Equally, however, I am not persuaded by Mr Habteslasie’s argument that the decision of the Court of Appeal in *R v South Ribble DC HBRB ex p Hamilton* to the effect that the definition of “a person on income support” must be read as meaning a person who is lawfully entitled to such benefit, is confined to ruling out only cases of fraud. As I noted when giving limited permission to appeal, it is well established that while regulation 2 of the Housing Benefit Regulations 2006 (SI 2006/213) defines a person on income support simply as “a person in receipt of” that benefit, that means a person who is *lawfully* in receipt of income support, i.e. entitled under the benefit entitlement rules (see also e.g. *R v Penrith DC ex parte Menear* [1991] 24 HLR 115). A case of fraud is simply the most obvious example of a person who is not so entitled; but the principle is not confined to cases of fraud. Any other construction would result in an unworkable distinction with claimants in receipt of e.g. income-related employment and support allowance or jobseeker’s allowance, where “payable” (in e.g. regulation 2(3) and (3A)) is defined to mean “properly or lawfully paid” – see *SMcH v Perth and Kinross Council (HB)* [2015] UKUT 126 (AAC)).

42. It seems to me, however, that the Council is arguably on stronger ground when it refers to the passage in the June 27, 2011 DWP letter which refers to the Appellant’s appeal against the DWP decision dated April 20, 2011. That decision was to the

effect that there had been an overpayment of income support for the period from September 6, 2010 to December 15, 2010. That evidence shows that at the latest by the end of April 2011 the Appellant was aware of the DWP's decision that she had no entitlement to income support for the period in dispute. In fact, of course, it is clear from the claim for backdated jobseeker's allowance in December 2010 that the Appellant knew on December 20, 2010, before the Council made its housing benefit disallowance decision, that the DWP had decided that she had no entitlement to income support as from October 22, 2010. That is, in my view, a sufficient basis on which to distinguish this case from the facts of *SD v Newcastle CC (HB)*, where the notice of the DWP decision refusing entitlement for a past period was not given until some years later (see paragraph 20 of that decision).

43. I therefore find that Ground 5 is not made out.

Conclusion and disposal of the underlying appeal

44. I allow the appeal on Grounds 3 and 4 for error of law. As such I set aside the decision of the FTT.

45. There is no good reason to remit this appeal for re-hearing before a new First-tier Tribunal. Indeed, there is every good reason – given (a) the historic nature of the dispute; (b) the fact that further new evidence is unlikely to be forthcoming at this stage; and (c) the parties have fully argued their cases on paper – for the Upper Tribunal to re-make the decision under appeal. I therefore proceed to do so. Given the detailed analysis above, I can do so relatively shortly.

46. The decision-making history of the case is somewhat complex, given the fact that the proceedings before the FTT concerned a series of inter-connected decisions taken by the Council over a number of years. Taking the Council's decisions of January 17, 2011 and July 23, 2014 together, it does not appear to be in dispute that the issues for decision by the FTT were three-fold. As noted at paragraph 11 above, the FTT decided that:

- (i) the Appellant was not entitled to housing benefit or council tax benefit from October 25, 2010 to December 20, 2010;
- (ii) she was accordingly liable to repay overpayments of both benefits for that period; and
- (iii) she was also liable to a 14% deduction from her eligible rent owing to the operation of regulation B13 (the so-called 'bedroom tax'), as she was not exempt under the transitional protection rules.

47. The critical issue here is the first of those decisions as the outcome on the second and third issues flowed naturally from whatever decision was taken as to the result of the first issue.

48. I have to decide this appeal on the balance of probabilities. Reviewing the evidence as a whole, and in particular bearing in mind the terms of the local authority input document and of the DWP letters (responding to the Appellant's complaints) of April 28, 2011 and June 27, 2011, I find the following facts.

49. First, the Appellant's entitlement to income support ceased from October 22, 2010, following the loss of carer's allowance. Second, the Appellant was actually paid

income support (due to DWP official error) up until December 10, 2010. Third, the DWP's decision on her income support entitlement was not notified to her until the letter of December 15, 2010, received on December 20, 2010. Fourth, the Appellant immediately sought advice from the DWP income support office and was advised to claim jobseeker's allowance. Fifth, on December 21, 2010 the Appellant did just that in her claim to the DWP, and asked for her entitlement to jobseeker's allowance, housing benefit and council tax benefit to be backdated to October 22, 2010, i.e. the date from which her income support had been retrospectively withdrawn. Sixth, the DWP backdated her entitlement to jobseeker's allowance for the purposes of payments of that benefit to December 10, 2010, i.e. when income support actually stopped. Seventh, on the balance of probabilities I conclude that the DWP accepted the Appellant was entitled to backdated jobseeker's allowance back to October 22, 2010, but did not pay that benefit for that period as income support (in the same sum) had been erroneously kept in payment for that period.

50. I therefore conclude that the Appellant was entitled to income support until October 22, 2010 and to jobseeker's allowance as from October 23, 2010. It follows that under the passporting rules the Appellant was entitled to housing benefit and council tax benefit for the period from October 25, 2010 to December 20, 2010. It follows from that that the Appellant is accordingly not liable to repay overpayments of both benefits for that period. The Appellant's eligible rent was also not subject to a 14% deduction under regulation B13, as she was exempt under the transitional protection rules.

The question of the Appellant's capital

51. As noted above, I did not give the Appellant permission to appeal in respect of the challenge to the FTT's conclusion in relation to the issue of the funds in the personal injury trust. As I have concluded that the effect of the DWP's decisions was that the Appellant was entitled to income support until October 22, 2010 and thereafter to jobseeker's allowance as from October 23, 2010 (even if in practice she was paid income support up to December 10, 2010 and paid jobseeker's allowance thereafter), the issue of the Appellant's capital is, on the facts, immaterial. This is because as she was on one or other of those two DWP income-related benefits throughout the material period the whole of her capital was disregarded in any event (see paragraph 5 of Schedule 6 to the 2006 Regulations).

52. I recognise the Council is much exercised by this issue of the capital in the PI trust. The Council asserts that it is reasonable to assume the Appellant has capital in excess of the statutory limit (p.374, paragraph 30). The basis for this assertion is said to be that the Appellant has failed to provide both the Council and the DWP with evidence that the funds in the personal injury trust fit the terms of the relevant capital disregard. The basis for the claim that such information has not been provided to the DWP is unclear from the file.

53. It is also argued (p.374, paragraph 34) that "there is no evidence that, in respect of the 'material period' the DWP had considered as to whether [the Appellant] was acting dishonestly in failing to provide evidence of her funds held in a PI trust". Again, it is unclear whether any such request for information had been made by the DWP. It is further argued that this is an exceptional case, such as *R v South Ribble DC HBRB ex p Hamilton*, so as to allow the Council to go behind the DWP award of benefit.

54. However, it is well established that as a general rule a local authority is bound by the DWP decision on benefit entitlement and capital and income: see also *R v Penrith DC ex parte Menear* [1991] 24 HLR 115. There are two recognised exceptions to this principle (see Findlay et al., *Housing Benefit and Council Tax Legislation 2016/2017* (29th edn, 2016), p.403). The first is where the local authority has evidence not considered by the DWP, in which event the authority can share the information with the DWP and suspend housing benefit in the meantime. This exception seems not to apply, not least as from the file the Council has *suspicious* but precious little *evidence*.

55. The second exception, on which the Council expressly rely, is where there is strong and clear evidence of fraud. If the Council can conclude the claimant is fraudulently concealing resources from the DWP, it may lawfully refuse to award housing benefit. See further *R v South Ribble DC HBRB ex p Hamilton*. However, there are important distinctions between *ex p Hamilton* and the present case.

56. The local authority in *ex p Hamilton* had *evidence* which was strongly suggestive of fraud (the claimant had made a false statement to his landlord about his qualifications; he had agreed to pay rent by standing order but later denied having a bank account; he had paid a large deposit despite being on income support: see paragraph 5 of the judgment of Scott Baker J in the Court of Appeal).

57. The Council in the present case (I repeat) has *suspicious* rather than evidence. In her jobseeker's allowance claim form the Appellant had declared £15,000 to the DWP as being held in trust (p.46). The DWP form stated "evidence not produced at this time" (p.49) (although, of course, it may have been produced on an earlier claim). The solicitors' letter dated March 22, 2010 reported that the compensation payment had been placed in a PI trust. If that was right, then the funds were to be disregarded indefinitely and irrespective of their amount. It is unclear why the Council felt unable to accept the letter from a reputable firm of solicitors.

58. There is, moreover, no evidence on the file that the Council shared its concerns with the DWP at any stage. However, for the reasons set out above, all this is immaterial on the facts as found in this decision.

Conclusion in summary

59. I conclude that the decision of the First-tier Tribunal involves an error of law for the reasons summarised above relating to combined Grounds 3 and 4. I therefore allow the appeal and set aside the decision of the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also re-make the First-tier Tribunal's decision in the terms as set out above at the head of this decision (section 12(2)(b)(ii)).

**Signed on the original
on 21 July 2017**

**Nicholas Wikeley
Judge of the Upper Tribunal**