Overpayments of benefit and the common law

Conrad Haley suggests potential challenges to common law recovery of benefit

There are detailed rules contained in a number of statutory provisions which enable the Secretary of State for Work and Pensions to recover overpayments of benefit. However, the circumstances that may lead to an overpayment occurring may not enable the Secretary of State to rely on these statutory rules. For example, where a computer issues a duplicate payment to a claimant, any resulting overpayment may not be recoverable. In these circumstances, the Secretary of State frequently attempts to rely on what is described as 'common law' powers of recovery. This article examines the validity of common law recovery and suggests ways in which such practices can be challenged. It applies to England and Wales only.

The general rule provides that recovery action can take place only where:

- The claimant has misrepresented or failed to disclose a material fact **and**
- The overpayment was caused by the misrepresentation or failure to disclose.[1]

There are also additional freestanding conditions specific to the recovery of mortgage interest payments.[2]

Perhaps because of the limited nature of these provisions, which do not enable recover in all circumstances where benefit has been overpaid, the Secretary of State has, over many years, made repeated attempts to recover overpayments by means of what is termed common law powers. There are several potential grounds by which a claimant can challenge such recovery. However, advisers need to bear in mind that any such challenges will be by way of judicial review and, therefore, subject to the time limits of such action. Prompt action or referral to a legal practitioner will be vital in all cases.

The common law power

Where overpayments cannot be recovered under the statutory scheme, the Secretary of State has sought to rely on the principle confirmed by the Privy Council in **Auckland Harbour Board v R.**[3] This principle states that public money paid without legal authority can be recovered. The court held that such payments were 'simply illegal and ultra vires and may be recovered by the Government ...', although there was no absolute obligation upon the relevant Government Department to undertake such recovery.

The question, therefore, arises as to whether such a power still exists. Does the fact that more than three quarters of a century have since passed, during which Parliament has enacted innumerable pieces of social security legislation, (including a detailed scheme for overpayment recovery), remove that power?

Case summary

The following case summary serves as a good example of how the Secretary of State tries to rely on common law recovery.

The facts in E

E was in receipt of income-based Jobseeker's Allowance, with his housing costs being paid directly to his lender. In October 1997 he noticed on his mortgage statement that an unusually high payment had been made by the DSS, (now Department for Work and Pensions) and he queried this with his local office of the Benefits Agency. He was assured that the payment was correct and so he then adjusted his mortgage payments on this basis (he had been paying a shortfall caused by non-dependant deductions). He remained on benefit for some months more and then returned to full time employment in January 1998.

In March 2000, his mortgage lender informed him that it had repaid a large sum to the DSS upon their request and that he was now in arrears. He was also told that, if suitable arrangements to repay the arrears were not made, possession action would follow.

E had at no stage been contacted by the DSS himself. Some time later, and only after the intervention of his local CAB, did the DSS deign to offer any sort of explanation. They informed him that they had written to his lender because a computer error had been made resulting in an overpayment. This was the sum that he had noticed and queried. The DSS also advised that this amount was recoverable 'under the common law' and that he had no right of appeal against this.

It emerged that this factual situation was not unknown and indeed the letter

Benefits

sent to the lender was a standard letter apparently drafted for this very purpose. It was also clear that the Secretary of State was unable to make out any grounds under the statutory provisions for overpayment recovery, hence his reliance on his purported common law powers of recovery.

A challenge to such reliance on common law powers was never tested in the courts in this case. When a claim for judicial review was issued by the Public Law Project on E's behalf, the DSS settled the case before it went to trial. However, it is useful to examine the arguments, which would have been deployed on behalf of E, both in relation to the existence or otherwise of such powers and in relation to the possible defences available to E, had the court determined that the common law powers did coexist with the statutory scheme.

Ground one – the absence of common law powers

It is clear that Parliament has expressly considered the question of social security overpayment recovery and has decided that the matter should be subject to a restrictive statutory scheme, which takes its place in an already highly regulated field of law.

The statutory overpayment recovery scheme imposes many conditions, provides many safeguards, grants appeal rights and imposes strict time limits. A freestanding common law right of recovery would appear to be wholly inconsistent with this, as it contains none of these safeguards.

The contrary argument is, of course, that, if the operation of common law rights of recovery in relation to the product of administrative mistakes was excluded, then the Secretary of State would be deprived of any power to rectify even obvious mistakes, even where they had been quickly discovered and did not cause any prejudice to the claimant. Indeed, the solicitors to the Secretary of State indicated that they would only advise that the power be used where there is 'overprovision' of benefit, which is a payment made **in addition** to the amount assessed as correct by a decision maker.

If the court agreed that the power was available in these narrow circumstances (and E certainly did not accept that this was the case), the following defences were available.

Ground two - change of position

E had changed his position in reliance on the payment made to his lender on his behalf. He took reasonable steps to ascertain whether or not he was entitled to the payment and then adjusted his mortgage payments on that basis. Had the payment not been made, he would have continued to make payments at the previous rate and would not have fallen into arrears. He was not now in a position to repay the arrears and it would be unjust to require him to do so in comparison with the injustice that would result to the Secretary of State if he were denied the recovery. The defence of 'change of position' is similar to the principle of 'estoppel' and is recognised in English law, for example in the case of **Lipkin Gorman**.[4]

The facts in E were very favourable ones and not all claimants would have taken such positive steps. Nevertheless, advisers should try and obtain as much detail as possible from the client as to what happened when the client became aware of the payment in question, what s/he did to query it (or why s/he did not query it) and whether s/he acted differently as a result of receiving it. The aim is to fall within the defence which is available to: *'all persons whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full'* (Lord Goff in **Lipkin**).

Ground three - unlawful exercise of discretion

The Secretary of State retains a discretion whether or not to exercise his powers of recovery. In order for him to lawfully exercise this discretion, he should have considered the following:

- the impact of the recovery on E's mortgage account
- that E would be left in a worse financial position than if no payment had been made
- that E had reported the payment and had been assured it had been correct
- that E had been managing his finances carefully relying on the payment having been properly made
- that recovery could lead to possession proceedings
- whether E had received all of the benefit to which he had been entitled at all relevant times
- whether recovery should be by means of instalments rather than by means of one lump sum
- the fact that the Secretary of State had delayed so long before seeking recovery.

It was clear from E's case that none of this had been done. Given the use of standard letters by the Benefits Agency, it is unlikely that it ever is. Nevertheless, the failure to consider these, (and - in other circumstances - other equally relevant factors) may well render his decision to recover an unlawful one.

Ground four - breach of natural justice

By recovering the overpayment directly and without giving E any prior notice, E was not given the opportunity to make any representations disputing the Secretary of State's entitlement to recover any sum, nor of explaining why any powers that may exist ought not to be exercised in his case, nor as to the appropriateness of the amount and manner of any recovery. In short, the Secretary of State had abused his power by simply disregarding the misleading advice given to E and the consequences of that advice on E and his family.

Such an argument can be of general application.

Ground five – breach of human rights

A decision as to entitlement to welfare benefits is a determination of 'civil rights' within the scope of Article 6(1) of the European Convention of Human Rights.[5] This Article guarantees the claimant (or former claimant) a fair hearing where that entitlement is in dispute. Those guarantees are usually met within the social security system by the claimant having recourse to

Continued on p.22

Benefits

authority can apply this provision where it is decided that the landlord has used the agreement to take advantage of the scheme, even where the tenants have no intention to abuse the scheme.[20]

Conclusion

It is clear from the discussion above that Reg 7 does operate unfairly in the way that it penalises everyone within a group rather than those who are abusing the scheme. Whilst it is clear that there has been abuse to the scheme caused by, for example, agreements between parents or former partners, it appears unfair (although the courts so far have not agreed) to prevent every tenant in the same situation from claiming benefit.

Although the Government's stated intention was that the new rules would not generally affect claimants who were not already refused benefit pre-1999 (see above and HB/CTB A1/99), the true effect has been to remove benefit from claimants who previously claimed without a problem. In the case of **Tucker** (see above) the claimant had been in receipt of benefit for nine years, presumably without suspicion that the arrangement took advantage of the scheme.

People are being affected by the rules despite the Governments stated intention that very few 'legitimate' claimants would lose out and the courts have, so far, appeared reluctant to interfere. One way that advisers can challenge the unfairness of the rules is through social policy work.

Footnotes

1. The letter is referred to and discussed in Murphy (R on the application of) v Westminster City Council, 4.5.01
2. Reg 7(1)(a) HB (Gen) Regs 1987
3. R v Sutton LBC ex p Partridge (1994)
4. HB/CTB Guidance Manual A3.66i
5. R v Poole BC ex p Ross (1995) 28 HLR 351 accepted that the authority could take into account the nature of the parties relationship when determining whether the agreement was commercial.
6. Reg 7(1A)
7. R v Poole BC ex p Ross (see above) and HB/CTB Guidance Manual A3.66ii
8. GM A3.66
9. Reg 7(1)(b) HB (Gen) Regs 1987
10. see Housing and Council Tax Benefit: The Legislation (2002/2003), p.235
11. Murphy (R on the application of) v Westminster City Council & Others and Painter v Carmarthanshire County Council Housing Benefit Review Board, 4.5.01
12. See footnote 10
13. Reg 7(1)(d)
14. R (on application of Tucker) v Secretary of State for Social Security, 6.4.01
15. Circular HB/CTB A46/99
16. Reg 7(1)(1)
17. R v Solihull MBC HBRB ex p Simpson (1995) 1 FLR 140
18. R v Greenwich LBC HBRB ex p Dhadly (1999) unreported
19. see footnote 17
20. R v Manchester City Council ex p Baragrove Properties

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Continued from p.18

an appeal tribunal, which can then reconsider both the legal and factual basis of the decision made by, or on behalf of, the Secretary of State.

However, disputes over the 'common law' recovery of overpayments are not within the jurisdiction of an appeal tribunal and the claimant's only remedy is by way of a claim for judicial review. It may be questionable whether judicial review does provide the necessary Article 6 guarantees, because the court undertaking the process of review concerns itself with the resolution of legal, and not factual, disputes.

It is impossible to advise with much certainty in this fast developing area of the law, but the way in which current case law is developing would suggest that there is a difference between a situation involving a dispute in relation to law or policy, on the one hand, and disputed questions of fact, on the other. Judicial review provides the required guarantees in respect of the former,[6] but not the latter.[7] A failure on the part of the State to provide the claimant with recourse to a court or tribunal which could then resolve any disputed questions of fact might lead to a breach of Article 6 and render 'common law' recovery unlawful. Whether there will be such disputes of fact will depend on the circumstances of the case.

Time limits

Advisers should remember that the only way a legal challenge can be brought against common law recovery is by way of judicial review. Therefore, it is vital to remember that legal proceedings must be commenced as soon as possible and in any event within three months of the date the grounds first arose. This will normally mean that the client is referred on to a legal practitioner able to bring proceedings on her/his behalf at the earliest opportunity. If in doubt, telephone the Public Law Project (the Project specialises in public law and advises agencies with a Legal Services Commission contract on 0808 808 4546 and those which do not on 0207 269 0574).

Footnotes

1. see s.71 Social Security Administration Act 1992
2. see para 11 Sch 9A Social Security (Claims and Payments) Regs 1987
3. Auckland Harbour Board v R [1924] AC 318
4. See Lipkin Gorman v Karpnale [1991] 2 AC 548
5. Schuler-Zgraggen v Switzerland (1993) 16 EHRR 405
6. see Begum v London Borough of Tower Hamlets, unreported, Court of Appeal, 6 March 2002
7. see Bewry v Norwich City Council, unreported, 31 July 2001, Administrative Court and Hussain v Asylum Support Adjudicator, unreported, 5 October 2001, Administrative Court

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