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| **Decision Maker’s response to an**  **appeal to the First-tier Tribunal**  *Rule 24 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008* |
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| **Respondent: Anytown District Council** |
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| **Benefits Service, Town Hall, Any Street, Any Town, AT1 1AT**  *This is also the address for service of documents in accordance with Rule 24(2)(c)* |
| **Appeal by:** Deborah Barker, 99 Acacia Lane, Anytown. Ref AA112233A |
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| **Brief details of the case**  The Council has decided that there has been a Housing Benefit (HB) overpayment of £16,093.61 and that it is recoverable from Mrs Barker. The overpayment was caused by an official error: the Council accidentally based Mrs Barker’s weekly HB award on her monthly rent. But the Council believes that Mrs Barker should have known she was not entitled to the money. There are no other parties: the Council has decided that the overpayment is recoverable from Mrs Barker alone as she was both the claimant and the person to whom the HB was paid.  Mrs Barker now appeals. She relies mainly on a conversation with a Council officer in October 2005: as a result of that conversation, Mrs Barker believes that she could not reasonably have been expected to know that she was being overpaid. |
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| **Please refer to the detailed response and relevant documents attached** |

##### Appeal response – ANYTOWN BOROUGH COUNCIL

# Personal details

**Appellant**

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| --- | --- | --- |
| **Surname** |  | **Address** |
| **BARKER** |  | **99 Acacia Lane, Anytown, AT1 6LP** |

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| --- | --- | --- | --- | --- | --- | --- |
| **Other Names** |  | **NINO** | | | | |
| **DEBORAH** |  | **XX** | **12** | **34** | **56** | **X** |

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| **Benefit appealed**  **against** |  | **Other reference or date of birth** |
| **Housing Benefit** |  | **Council reference 123456789** |

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| **Date of decision** |  | **Date notified** |  | **Date of appeal** |
| **26 May 2006** |  | **26 May 2006** |  | **5 August 2006** |

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| **Date of reconsideration** |
| **10 September 2007** |

**LATE APPEAL (SUPPORTED): The Council has no objection to this appeal being admitted outside the normal time limit of one calendar month. In accordance with Rule 23(4) of the Tribunal Procedure Rules, the Council suggests that the appeal should be treated as if it was made in time.**

# Schedule of Evidence

| ***Document number*** | *Pages* | ***Date of document*** | ***Date of receipt*** | ***Brief description of document*** |
| --- | --- | --- | --- | --- |
| [1](#App01) | 10 – 20 | 26 May 2006 | N/a | Overpayment decision notice |
| [2](#App02) | 21 – 25 | 5 Aug 2006 | 14 Aug 2006 | Mrs Barker’s appeal |
| [3](#App03) | 26 – 35 | 30 Nov 2004 | 7 Mar 2005 | Tenancy agreement |
| [4](#App04) | 36 – 64 | 7 Mar 2005 | 7 Mar 2005 | Mrs Barker’s claim for HB |
| [5](#App05) | 65 – 95 | 31 Mar 2005 | 31 Mar 2005 | Sarah Barker’s claim for HB |
| [6](#App06) | 96 – 97 | 2 Apr 2004 | 31 Mar 2005 | Evidence of Sarah Barker’s DLA |
| [7](#App07) | 98 – 103 | 11 Apr 2005 | N/a | Decision on Sarah Barker’s claim |
| [8](#App08) | 104 – 109 | N/a | N/a | List of HB payments made to Sarah Barker |
| [9](#App09) | 110 – 117 | 5 Aug 2005 | N/a | Decision on Mrs Barker’s claim for HB |
| [10](#App10) | 118 – 119 | N/a | N/a | Statement of calculation of Mrs Barker’s HB from March 2005 |
| [11](#App11) | 120 – 122 | N/a | N/a | List of HB payments made to Mrs Barker |
| [12](#App12) | 123 – 129 | 9 Nov 2005 | N/a | Notice to Mrs Barker of superseding decision from 31 October 2005 |
| [13](#App13) | 130 – 131 | N/a | N/a | Statement of calculation of Mrs Barker’s HB from October 2005 |
| [14](#App14) | 132 – 136 | 23 Feb 2006 | N/a | Decision notice to Mrs Barker – uoprating from April 2006 |
| [15](#App15) | 137 – 140 | various | N/a | Notes recorded on Mrs Barker’s case file |
| [16](#App16) | 141 – 142 | 6 Jul 2006 | 6 Jul 2006 | Mrs Barker’s application for revision |
| [17](#App17) | 143 – 145 | 22 Jul 2006 | N/a | Council’s response to Mrs Barker’s application for revision |
| [18](#App18) | 146 – 148 | 25 Aug 2006 | N/a | Letter informing Mrs Barker that her appeal has been accepted out of time |
| [19](#App19) | 149 – 150 | N/a | N/a | Section 75 of the Social Security Administration Act 1992 |
| [20](#App20) | 151 – 152 | N/a | N/a | Regulations 98 and 99 of the HB (General) Regs 1987 |
| [21](#App21) | 153 – 154 | N/a | N/a | Regulation 81 of the HB (persons who ...) Regs 2006, as amended from 10 April 2006 |
| [22](#App22) | 155 – 159 | N/a | N/a | Transcript of CH/3439/2004 |
| [23](#App23) | 160 – 161 | N/a | N/a | Extract from Regulation 4 of the HB & CTB (D&A) Regs 2001 |
| [24](#Top) | 162 - 163 | N/a | N/a | Extract from Regulation 1 of the HB & CTB (D&A) Regs 2001 |

# Decision

* 1. The Council has decided that original decisions awarding Housing Benefit to Mrs Barker from 14 March 2005 onwards should be revised because she is entitled to less HB than the amount originally awarded for some periods and she is not entitled to any HB at all for other periods. As a result, the Council has decided that Mrs Barker was overpaid Housing Benefit (HB) of £16,093.61 between 14 March 2005 and 14 May 2006.

* 1. The Council concedes that the overpayment was caused by an official error on its part: Mrs Barker’s **weekly** benefit was calculated by reference to her **monthly** rent. She was not in any way responsible for the error. Nevertheless, the Council has decided that the overpayment is recoverable from Mrs Barker because, in the Council’s view, she could reasonably have been expected to know that she was not entitled to the money.
  2. The decision notice informing Mrs Barker of the overpayment is attached as Appendix 1 (pages 10 - 20)

# Appeal

* 1. Mrs Barker’s appeal is attached as Appendix 2 (pages 21 – 25).

# Summary of facts

**Mrs Barker’s household and tenancy**

* 1. Mrs Barker was aged 60 at the time of her claim for Housing Benefit (HB) in 2005. She lives with her daughter, Miss Sarah Barker (aged 21 at the time), who has Down’s Syndrome and is cared for by Mrs Barker.
  2. Mrs Barker and her daughter were are joint tenants of a two-bedroom flat at 99, Acacia Lane, Anytown AT1. At the time of Mrs Barker’s HB claim, there was an assured shorthold tenancy agreement in force for the period from 30 November 2004 to 29 April 2005 inclusive: see Appendix 3, pages 26 - 35. The rent payable under the tenancy was £736 a **month** – for the avoidance of doubt, £736 was the **full rent** payable by both tenants (and **not** the individual share contributed by either of them).
  3. A second daughter, Charlotte Barker, lived with Mrs Barker during 2006, but her presence did not affect the decision under appeal.

**Housing Benefit claims by Mrs Barker and her daughter**

* 1. On 7 March 2005, Mrs Barker claimed Housing Benefit (see claim form at Appendix 4, pages 36 - 64). The Tribunal will note in particular Sheet 7 of the form (page 45) where Mrs Barker has correctly declared the monthly rent of £736. Somewhat misleadingly, she has also declared on that page that no one else shares the rent with her but the joint tenancy agreement (see page 26) was submitted with the form.
  2. On 31 March 2005 the Council received a claim for HB from Mrs Barker’s daughter, Sarah. The form is attached as Appendix 5 (pages 65 - 95), but the Tribunal’s attention is drawn in particular to the following sheets:
* Miss Barker was receiving Income Support and Disability Living Allowance – see sheet 14, page 83
* The form asked for HB payments to be sent to a joint bank account held by Miss Barker and her mother – see sheet 18, page 87
* In the space provided on the claim form for the applicant to provide any other relevant information, there is a comment that appears to have been written by Mrs Deborah Barker explaining that Sarah was unable to handle her affairs because of her disability – see Sheet 19, page 88
* There is an application for Sarah’s benefit to be backdated the same date on which Deborah Barker made her own claim, again apparently written by Deborah Barker in the first person – see Sheet 21, page 90
* The declaration has been signed by Deborah Barker as “guardian” – see Sheet 22, page 91 (the Tribunal will note in particular that the signature here matches Deborah Barker’s signature on sheet 22 of her own claim – page 60)
  1. Evidence accompanying Miss Barker’s claim shows that she was entitled to the highest rate of the care component of Disability Living Allowance as well as the lowest rate of the mobility component (Appendix 6, page 96). The form was also accompanied by a copy of the same tenancy agreement that Mrs Barker had provided with her own claim – see page 26.

**Decisions on the two claims**

* 1. Miss Sarah Barker’s claim was decided first. On 11 April 2005 she was awarded Housing Benefit of £62.50 a week from 28 March 2005 (see decision letter, Appendix 7, page 98) and regular payments of that entitlement began immediately (see list of payments, Appendix 8, page 104).
  2. On 4 May 2005 Sarah Barker’s entitlement was increased to £72.30 a week with effect from 28 March 2005; a payment of £49 arrears was made immediately and regular fortnightly payments of £144.60 followed (see page 109). These payments were paid into NatWest account number 12345678 – the joint account held by Sarah and Deborah Barker and nominated by Deborah Barker as appointee for her daughter (see page 87). The Council’s policy on access to sensitive information means that Benefits decision makers and Appeals Officers do not have access to the part of the system where bank account details are held and so the author of this submission is unable to attach a document showing the destination of the payments made to Sarah Barker. However, the author of this submission has spoken to the payment control officers who have access to bank account details and can assure the Tribunal that Miss Barker’s HB was paid into that account (and still is to the present day).
  3. Mrs Deborah Barker’s own HB claim was decided on 8 August 2005 (see decision letter, Appendix 9, page 110). A summary of the calculation of Mrs Barker’s award is attached as Appendix 10 (page 118). The Tribunal will see that the calculation contains an error: Mrs Barker’s rent has been correctly apportioned to take account of the fact that she is a joint tenant, but the **weekly** eligible rent used to calculate the award is her half share of the full **monthly** rent. This was a mistake by the Council.
  4. As a result of the mistake described in the above paragraph, Mrs Barker was awarded £342.67 a week from 14 March 2005, increasing to £346.69 a week from 1 April 2005. A payment of £7270.15 was made on 8 August 2005, followed by regular fortnightly payments of £693.38 (see list of payments, Appendix 11, page 120).

**Interview of 3 October**

* 1. In her appeal, Mrs Barker says that she discussed her HB award with a Council officer on 3 October 2005. A brief file note made on that date confirms that Mrs Barker contacted the Council, although the note does not set out in detail what was discussed. See list of claim notes, Appendix 15, page 137.

**Further adjustments to Mrs Barker’s entitlement**

* 1. On 9 November 2005 the Council made a superseding decision following a change in Mrs Barker’s earnings. Her HB award was reduced to £240.23 a week from 31 October 2005 (see decision letter, Appendix 12, page 123). A summary of this calculation (Appendix 13, page 130) shows that the error of using half of Mrs Barker’s monthly rent to calculate her weekly award was repeated in this decision.
  2. Mrs Barker’s Housing Benefit award was adjusted slightly in line with the general uprating of state benefits from 3 April 2006 (see decision letter at Appendix 14, page 132). She was awarded £243.22 a week.
  3. The list of HB payments made to Mrs Barker (pages 120 - 122) shows that she received fortnightly payments of £480.46 from October 2005 until April 2006, and of £486.44 from April 2006 until May 2006.

**Discovery of mistake and end of Mrs Barker’s HB award**

* 1. On 24 May 2006 an officer noticed that Mrs Barker was receiving HB in excess of her full rent – it appears that the discovery was prompted by a regular Rent Officer’s valuation. See diary notes recorded at the time, Appendix 15, page 139.
  2. On 26 May 2005 the Council revised all of its decisions awarding HB to Mrs Barker. She remained entitled to £59.36 a week before April 2005 and £63.38 a week from April to October2005, but from 31 October 2005 (when her earnings increased) Mrs Barker was no longer entitled to any HB. She has not so far become entitled to HB again at any time since.
  3. As a result of the revision of all awarding decisions from March 2005 onwards, the Council decided that Mrs Barker had been overpaid £16,093.61 and that the money was recoverable from her. A single notice informing Mrs Barker of both the revised entitlement decisions and the overpayment arising from them was issued on 26 May 2006 (see page 10).

**Mrs Barker disputes the overpayment decision**

* 1. On 6 July 2006 Mrs Barker submitted an application for revision of the overpayment decision (Appendix 16, page 141). The Council declined to entertain the application as it was made more than one month after the date of the decision being disputed and was not supported by any reasons why it should be accepted out of time (see reply of 22 July 2006, Appendix 17, page 143).
  2. Mrs Barker appealed against the overpayment decision on 5 August 2006 (see page 21), explaining that she had attended the Council’s offices within a month of the overpayment decision and orally indicated her intention to appeal. Notes made on 23 June (see page 139) confirm this. Mrs Barker had been waiting for an appeal form from the Council, which it did not issue to her until 6 July. The Council therefore decided that Mrs Barker had made out grounds for her appeal to be accepted out of time. The Council wrote to Mrs Barker on 25 August 2006 (Appendix 18, page 146) to say that her appeal had been accepted out of time and, since the Council was not prepared to change the substantive decision under appeal, that it would be submitted to the Tribunals Service.
  3. It is very much regretted that there has been a considerable delay in submitting the case to the Tribunals Service. In some cases, such a delay might prejudice the appellant’s right to a fair hearing. In this case, however, the Council would suggest that the documentary evidence is very clear and that the Tribunal should be in a position to establish the relevant facts sufficiently well to reach a properly informed decision.
  4. Meanwhile, Mrs Barker offered to repay the overpayment with an initial payment of £2000 in the summer of 2006 followed by monthly payments of £100. She has kept to that arrangement and there was an outstanding balance of £11993.61 at the date on which this submission was issued in April 2008.

# Relevant legislation and case law

**Recovery of overpayments**

**Social Security Administration Act 1992**

* 1. Section 75(1) of the Social Security Administration Act 1992 provides that a properly determined overpayment of HB is recoverable except where Regulations prescribe otherwise (see Appendix 19, p149).
  2. 75(3) provides that an overpayment is recoverable from the person who received it except in prescribed circumstances; and that Regulations may prescribe others from whom the overpayment is recoverable as well or instead.
  3. Housing Benefit was paid in this case to the claimant, Mrs Barker, and so the Council suggests that the Tribunal need not concern itself with the question from whom any amount is recoverable; the key issue in this case is whether the overpayment falls within the prescribed exceptions to s75(1) so as not to be recoverable at all. If the Tribunal finds that the overpayment is indeed recoverable, the Council suggests that there is no other person from whom it may be recovered as well as or instead of Mrs Barker: if the overpayment is recoverable *per se*, it is recoverable from Mrs Barker alone, the Council would suggest.

**The Housing Benefit (persons who have attained the qualifying age for state pension credit) Regulations 2006**

* 1. HB Reg 80 defines an overpayment as any amount that has been paid by way of HB to which there was no entitlement upon revision or further revision of the decision(s) awarding benefit.
  2. HB Reg 81 prescribes the circumstances in which, in accordance with s75(1) of the Administration Act, an overpayment is not recoverable. By virtue of Reg 91(2), an overpayment is not recoverable if it was caused by official error and neither the claimant nor the person who received the money could reasonably have been expected to know that it was an overpayment. Reg 91(3) defines “official error” as, *inter alia*, an act or omission by the Council to which the claimant did not contribute. See Appendix 20, p151.

**Case law on Reg 81**

* 1. Regulation 81 operates as an exception to the general rule that overpayments are recoverable. In order to displace the default status of an overpayment as one that is recoverable, there is an evidential burden on the appellant to show both that the overpayment was caused by an official error and that the appellant could not have been expected to know that an overpayment was occurring. In CH/3439/2004, commenting on whether a claimant should have known that he was being overpaid from the content of decision letters, Commissioner (as he then was ) Jacobs said at Paragraph 19 *et seq:*

:

*“The tribunal commented that there was no evidence as to the claimant’s capacity to understand the letters, including what previous knowledge he had of the benefit system, or of whether he felt that maternity pay had been properly excluded from the calculation. In the absence of that evidence, the local authority had not discharged the burden of proof.*

*“This analysis misplaced the legal burden of proof. For convenience I will explain why by reference to regulation 99(1) and (2) of the Housing Benefit (General) Regulations 1987 [equivalent of Reg 100 in the 2006 Regs].*

*“Regulation 99 provides:*

*‘(1) Any overpayment, except one to which paragraph (2) applies, shall be recoverable.*

*‘(2) Subject to paragraph (4), this paragraph applies to an overpayment caused by official error where the claimant or the person acting on his behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or of any notice relating to that overpayment, reasonably have been expected to realise that it was an overpayment.’*

*“The tribunal was correct that the local authority had the legal burden of proving that there was an overpayment and that the decision had been properly made on revision or supersession. However, regulation 99(2) operates as an exception, for which the burden of proof is on the claimant. That is clear from the terms of regulation 99(1), from the structure of regulation 99 as a whole, and from the practical consideration of who is in a position to produce the relevant evidence.”*

[The Judge is referring to Regulation 99 of the Housing Benefit (General) Regulations 1987, which ceased to apply from March 2006 – Reg 81 of the HB (persons who ...) Regs is identical and the aboive passage remains relevant].

* 1. The full transcript of the decision is attached as Appendix 22 at page 155

**Revision and supersession**

* 1. Regulation 4(2)(a) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (see Appendix 23, page 160) says that a decision awarding Housing Benefit may be revised at any time if it was based on an official error. An official error is defined in Regulation 1(2) (Appendix 24, page 162); the definition is broadly similar to that in Reg 99 of the 1987 Regulations (see 6.8 above).

# The Council’s submission in support of its decision

* 1. The Council submits that the original decisions of 14 March 2005, 1 April 2005, 31 October 2005 and 3 April 2006 have been properly revised. The ground supporting revision is official error: see Regulation 4(2)(a) of the Decisions and Appeals Regulations. As a result of those revisions, it has been properly demonstrated that Mrs Barker has received Housing Benefit in excess of her entitlement for the period 14 March 2005 to 14 May 2006 - she has therefore been overpaid.
  2. The Council further submits that Mrs Barker has been properly notified of the overpayment described at paragraph 7.1 above. All that remains to be established is that the overpayment is recoverable from her.
  3. The Council acknowledges that the overpayment was caused by an official error to which Mrs Barker did not contribute. However, in the Council’s view she should have known that she was not entitled to the amount she received.
  4. Mrs Barker is a joint tenant with her daughter Sarah. Sarah has her own Housing Benefit claim and was receiving payments in respect of her half share of the rent throughout the overpayment period. Sarah has a learning disability and Mrs Barker provides her with care and support; that includes acting as appointee to sign Housing Benefit claims on her daughter’s behalf. Sarah’s Housing Benefit has at all times been paid into a joint account held with her mother – it appears that this arrangement is intended to facilitate Mrs Barker’s use of money in the account on her daughter’s behalf. Throughout most of the overpayment period, that account was credited with HB of £72.30 a week towards Sarah’s half of the joint rent liability. The Council submits that Mrs Barker must have known that her daughter was receiving HB.
  5. The full rent payable under the joint tenancy was £736 a month, equivalent to just under £170 a week. Mrs Barker’s personal share of that rent was therefore just under £85 a week.
  6. Mrs Barker’s own HB award exceeded her share of the rent by about £260 a week until October 2005, and by about £160 a week from October 2005 to May 2006.
  7. The combined HB awards of Mrs Barker and her daughter exceeded their joint rent liability by about £240 a week before October 2005 and by about £140 thereafter.
  8. The Council submits that Mrs Barker quite clearly should have known that such a huge excess could not possibly be correct.
  9. Mrs Barker draws the Tribunal’s attention to her interview with a Council officer on 3 October 2005. The Council considers it highly improbable that Mrs Barker would have been told she was correctly receiving HB in excess of her rent by such a large amount. Certainly there is nothing in the record of the interview to suggest that any such impression was given (see p137). The Tribunal’s attention is drawn to the record on the following day (also p137), recording that Mrs Barker had supplied her bank account details. The Council suggests that this evidence points to the interview of 3 October having been concerned with the **method** of payment and not the **amount**.
  10. Moreover, even if Mrs Barker had been told that the award was correct (perhaps because the officer who spoke to her did not notice that the monthly rent had been entered on the computer as a weekly amount), the Council would suggest that the mistake was so obvious that Mrs Barker should still have realised she was not entitled to the money.
  11. Mrs Barker might argue that the reduction in her HB by way of a superseding decision from 31 October 2005 reflected the fact that the error had been corrected following the interview of 3 October, and that she was therefore entitled to assume that the reduced award from 31 October onwards was correct. The Council would reject such an argument for three reasons:
* The notice of the superseding decision clearly shows that the decision was made in consequence of a change of earnings
* The amount of rent used to calculate HB from 31 October 2005 remained unchanged from the previous decision
* The resulting award was still not only higher than Mrs Barker’s half share of the rent, it was higher than the full weekly rent by some £70 a week
  1. The Tribunal is reminded of the evidential burden borne by Mrs Barker: the overpayment is recoverable by default unless the evidence is strong enough to displace that default status. The evidence must show not only that the overpayment was caused by official error, but also that Mrs Barker could not have been expected to know she was being overpaid. The Council submits that the evidence comes nowehere near to satisfying the second of those requirements:
* The overpayment obviously was caused by an official error, but
* The claimant obviously should have known she was not entitled to it
  1. There is no other person, apart from Mrs Barker, who falls within the scope of s75(3) of the Administration Act: she is both the claimant and the person who received the overpayment. The money is therefore recoverable from her.