**Briefing for claimants and advisers on the effect of**

**Upper Tribunal decision [2015] UKUT 0634 (AAC)**

**UT ref CH/2391/2015**

Introduction

1. On 16 November 2015 the UT issued a decision[[1]](#footnote-1) clarifying the scope of a Housing Benefit claimant’s right to appeal when the Council makes a decision adopting a housing association’s annual rent increase.

What the UT decided

1. The UT said that the claimant has the right to appeal against the new Housing Benefit decision on any grounds: the appeal does not have to be related to the issue that prompted the Council to make the decision. Each time the Council makes a new HB decision for any reason – including something as routine and straightforward as a housing association rent increase – there is a completely fresh right to appeal against that new decision. In particular the claimant has the right to appeal against the reduction of HB under the social sector size criteria (the “bedroom tax”).

Who will benefit from this new decision?

1. There are two groups of claimants who could potentially benefit from the UT decision.

*No previous appeal against the bedroom tax*

1. If a claimant accepted that the bedroom tax applied from April 2013 and chose not to appeal against it (perhaps because they believed that the Council had no power to overrule the landlord’s description of the property) the UT decision means that the claimant has not lost his or her right to appeal against the bedroom tax forever. The claimant can appeal against any more recent decisions the Council has made (including HA rent increases and income changes) provided s/he is still within the time limit. Time limits are discussed later in this note.

*Previous unsuccessful appeal against the bedroom tax*

1. If a claimant has already lost a First-tier Tribunal appeal against the bedroom tax at any time, the Tribunal’s decision only applies to the one Council decision that was the subject of the appeal. The claimant has the right to appeal against any more recent Council decisions in which the bedroom tax applies. This is an important right because it means the claimant has another “bite of the cherry” if they did not present a very good case the first time. A better argument or skilled representation might bring about a different outcome in a new appeal.

What about the *res judicata* principle?

1. The common law principle of *res judicata* (a “judged matter”) means that the same two parties cannot launch fresh proceedings dealing with an issue that has already been decided by a court. Tribunals have sometimes used this principle to strike out bedroom tax appeals where there has already been an appeal by the same claimant about the bedroom tax in a previous year.
2. But in social security adjudication there is a self-contained set of rules which replace *res judicata*. Each benefit decision is a separate matter in its own right and neither the Council nor a Tribunal is constrained by the outcome of an appeal against an earlier decision even if the issues are identical. The UT decision is very clear about this.

Does the UT decision mean an appeal against the bedroom tax is more likely to succeed?

1. No: the decision is purely about the right to bring an appeal. It says nothing about the merits of the claimant’s argument.
2. The appellant in the UT decision was a member of a couple who slept in separate bedrooms because of ill health/disability. They are relying on the Human Rights Act. Up to now human rights challenges to the government’s welfare reforms from 2013 onwards have not been very successful in the UT or higher courts. But there is to be a final, definitive appeal in the Supreme Court in March 2016 and until the Supreme Court gives its decision no-one can say for certain that appeals of this type are hopeless and doomed to fail.

What should claimants do now?

1. If a claimant believes that they have a chance of appealing successfully against the bedroom tax (even if they are relying entirely on human rights arguments), the next step depends on the date of the Council’s most recent decision:

* If the Council has made any decision within the last calendar month there is a right to appeal to the Tribunal. The appeal should be sent to the Council making it clear that the claimant wishes to appeal to the Tribunal and setting out the reasons why the claimant believes the Council’s decision is wrong. It will help if the appeal has the claimant’s personal manuscript signature on it.
* If the Council has made any decision within the last 13 months there is a right to appeal provided the Tribunal agrees to extend the time limit. The appeal needs to say why there was a delay. You could simply say that until the UT issued the decision discussed in this note you did not realise it was possible to appeal against the bedroom tax[[2]](#footnote-2), although if there are other reasons as well (illness etc) so much the better. Just like an appeal made within a month, the appeal needs to be signed and say why the Council’s decision is wrong.
* If the Tribunal has already struck out an appeal relying on the *res judicata* principle, the claimant may appeal to the Upper Tribunal against that on the grounds that the Tribunal was wrong in law to strike out the appeal. Normally the claimant cannot appeal to the UT without first obtaining a statement of reasons for the Tribunal’s decision and there is normally a time limit of one month in which to request such a statement (unless the Tribunal proactively issued a statement when it gave its decision). These requirements can be waived, but after six months the Tribunal tends to destroy its records.

1. At the end of this briefing you can find twelve templates that can be used to instigate an appeal at different stages, including templates that deal with out-of-time applications to the Tribunal for a statement of reasons.

What if there have been no decisions at all within the last 13 months?

1. This would be unusual: most Council and Housing Association rents are reviewed at least once a year. Also, if the claimant is not getting a DWP means-tested benefit (JSA, ESA or IS), the HB award tends to change every April at the social security uprating. In my opinion, a change in the amount of HB for no reason other than the annual uprating still requires a new decision with a right of appeal.
2. Even if there have been absolutely no decisions changing HB entitlement at all in the last 13 months, the claimant can still bring new information/new arguments to the Council’s attention and ask for a “superseding decision” which changes the HB award going forward from the date of the request. If the Council refuses there is a right of appeal[[3]](#footnote-3) against that refusal as it amounts to a decision in itself. The request must raise something genuinely new that the Council was not already aware of: a fact about the claimant’s circumstances or an argument that had not previously been put to the Council.

Does the UT decision only affect bedroom tax cases?

1. No: it applies to any appealable HB issue at all. There are two quite common reasons why people often require a “second bite of the cherry” after their first appeal is unsuccessful:

* Where the Council decided that the claimant had deprived himself/herself of capital in order to obtain benefit
* Where the Council decided that a tenancy between relatives/acquaintances was not on a commercial basis

1. In both cases the claimant might lose an appeal if they are not well advised or represented when with good advice and/or representation they might have made a stronger case. Relying on the new UT decision, such people can make a new HB claim and appeal to the Tribunal if it is refused.

Is there a limit on the number of times a claimant can appeal about the same issue?

1. No – there is no specific limit. But the more times the claimant appeals about the same issue unsuccessfully, the less likely it is that s/he will have anything new to say. There will come a point when the Tribunal strikes out the appeal on the grounds that it stands no chance of success and is a waste of everyone’s time.
2. But in the particular case of bedroom tax appeals relying on human rights arguments we cannot say that such a point has been reached until the Supreme Court gives its decision after the appeal next March.

What will happen to other claimants if the Supreme Court decides in favour of the claimants involved in that appeal?

1. It is very important that anyone with a similar case already has an appeal in the system before the Supreme Court’s decision:

* Any existing appeals that have been “stayed” pending the Supreme Court’s decision will be decided in the claimant’s favour and that claimant will receive arrears of HB back to the date of the decision that s/he has appealed against
* But anyone who does not have an appeal pending and who only makes himself/herself known after the Supreme Court’s decision will only receive additional HB from the date of the Supreme Court’s decision
* This is known as the “anti-test case rule”

1. That is another reason why the UT decision discussed in this note is important: it is not too late for anyone affected by the issues in the Supreme Court’s decision to get an appeal in now so that a favourable outcome in the Supreme Court will have the maximum advantage for him/her.
2. For more details about the Supreme Court case and the arguments the appellants are relying on see Leigh Day solicitors’ website:

<https://www.leighday.co.uk/News/2015/January-2015/Bedroom-Tax-challenge-to-be-heard-by-Supreme-Court>

1. It is very likely that another case currently with the Court of Appeal will be linked to the Supreme Court appeal. This one involves a disabled child who needs a spare room for the use of an overnight carer. For more details see CPAG’s website:

<http://www.cpag.org.uk/content/bedroom-tax-rutherford>

**Disclaimer:** this briefing note contains my personal views about the significance of the UT decision discussed in it. It is offered freely in good faith and does not constitute formal legal advice. I cannot guarantee the success of any individual HB appeal relying on the commentary in this note or using the attached templates.

Peter Barker – HB Anorak

November 2015

# Appeal templates

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# Appeal against Council’s decision within the last month: no previous appeal on this issue

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

I would like to appeal to the First-tier Tribunal against your decision of *[date].*

The grounds for my appeal are as follows:

*[say what you disagree with and why]*

I am enclosing *[any supporting evidence you wish to rely on]*

I am aware that my grounds for appeal concern a matter that affects other decisions you have made on my claim in the past. But following the Upper Tribunal’s decision in [2015] UKUT 0634 (AAC) I believe that I am entitled to raise this matter in an appeal against your latest decision.

Yours sincerely

*[your signature]*

*[Your name]*

# Appeal against Council’s decision within the last month: previous appeal on this issue rejected

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

I would like to appeal to the First-tier Tribunal against your decision of *[date].*

The grounds for my appeal are as follows:

*[say what you disagree with and why]*

I am enclosing *[any supporting evidence you wish to rely on]*

I am aware that my grounds for appeal concern a matter that has previously been the subject of an appeal to the Tribunal following an earlier decision by the Council. But following the Upper Tribunal’s decision in [2015] UKUT 0634 (AAC) I believe that I am entitled to raise this matter in an appeal against your latest decision.

Yours sincerely

*[your signature]*

*[Your name]*

# Appeal against Council’s decision more than one month but less than 13 months ago: no previous appeal

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

I would like to appeal to the First-tier Tribunal against your decision of *[date].*

The grounds for my appeal are as follows:

*[say what you disagree with and why]*

I am enclosing *[any supporting evidence you wish to rely on]*

I am aware that my grounds for appeal concern a matter that affects other decisions you have made on my claim in the past. But following the Upper Tribunal’s decision in [2015] UKUT 0634 (AAC) I believe that I am entitled to raise this matter in an appeal against your latest decision.

**Out of time appeal:** I ask the Tribunal to accept my appeal out of time. The reason why I did not appeal promptly was that I was unaware until the UT gave its decision in [2015] UKUT 0634 (AAC) that I could appeal against this matter following a superseding decision by the Council on an unrelated issue. In addition I was unable to appeal promptly because *[give any other reasons for lateness – illness etc]*

Yours sincerely

*[your signature]*

*[Your name]*

# Appeal against Council’s decision more than one month but less than 13 months ago: previous appeal on this issue rejected

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

I would like to appeal to the First-tier Tribunal against your decision of *[date].*

The grounds for my appeal are as follows:

*[say what you disagree with and why]*

I am enclosing *[any supporting evidence you wish to rely on]*

I am aware that my grounds for appeal concern a matter that has previously been the subject of an appeal to the Tribunal following an earlier decision by the Council. But following the Upper Tribunal’s decision in [2015] UKUT 0634 (AAC) I believe that I am entitled to raise this matter in an appeal against your latest decision.

**Out of time appeal:** I ask the Tribunal to accept my appeal out of time. The reason why I did not appeal promptly was that I was unaware until the UT gave its decision in [2015] UKUT 0634 (AAC) that I could appeal against this matter following a superseding decision by the Council on an unrelated issue. In addition I was unable to appeal promptly because *[give any other reasons for lateness – illness etc]*

Yours sincerely

*[your signature]*

*[Your name]*

# Application for supersession of Council’s decision more than 13 months ago

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

I would like to apply for a new Housing Benefit decision superseding the one that is currently in force. My circumstances have not changed since you made your decision but there is new information that I do not think the Council took into account at the time of the decision. I realise that it may now be too late to revise the decision in my favour but I believe I am at least entitled to a superseding decision from the beginning of the current week.

I believe that the calculation of my Housing Benefit should *[say what you want changed and why].* I am enclosing *[any supporting evidence you wish to rely on]*

If the Council does not agree that a superseding decision should be made I intend to appeal to the Tribunal in accordance with the principles set out in the Court of Appeal’s decision in the case *Neil Wood v Secretary of State for Work and Pensions*.

Yours sincerely

*[your signature]*

*[Your name]*

# Appeal against Council’s refusal to supersede decision made more than 13 months ago

*[Your address]*

*[Date]*

*[Council’s address]*

Dear Sir/Madam

**Name:** *[your name]*

**HB Ref:** *[Your HB reference number]*

On *[date]* I applied for a new Housing Benefit decision superseding the one that is currently in force. I said that my circumstances had not changed since you made your decision but there was new information that I did not think the Council took into account at the time of the decision. On *[date]* you wrote to me to say that you were refusing my application for a superseding decision. I now wish to appeal to the First-tier Tribunal against your refusal to make a superseding decision. If you are not convinced that I have a right to appeal in this situation please refer to the Court of Appeal’s decision in the case *Neil Wood v Secretary of State for Work and Pensions*.

I believe that the calculation of my Housing Benefit should *[say what you want changed and why].* I am enclosing *[any supporting evidence you wish to rely on]*

Yours sincerely

*[your signature]*

*[Your name]*

# Application for statement of reasons for Tribunal’s decision to strike out appeal – within one month of Tribunal’s decision

Send off in envelope addressed to Tribunal office: no covering letter required

**Application for statement of reasons**

**First-tier Tribunal (FtT) reference:** *[insert your appeal reference number]*

**Name:** *[insert your name]*

**Address:** *[insert your address]*

**Date of decision**: *[insert the date of the Tribunal’s decision]*

1. The Tribunal decided on *[date]* that it did not have jurisdiction to hear my appeal against the Council’s decision of *[date]*.

1. I hereby request a statement of reasons for the Tribunal’s decision.

*[signature]*

*[insert your name]*

*[date]*

# Application for statement of reasons for Tribunal’s decision to strike out appeal – late application

Send off in envelope addressed to Tribunal office: no covering letter required

**Application for statement of reasons**

**First-tier Tribunal (FtT) reference:** *[insert your appeal reference number]*

**Name:** *[insert your name]*

**Address:** *[insert your address]*

**Date of decision**: *[insert the date of the Tribunal’s decision]*

1. The Tribunal decided on *[date]* that it did not have jurisdiction to hear my appeal against the Council’s decision of *[date]*.

1. I hereby request a statement of reasons for the Tribunal’s decision.
2. Although my application is out of time I would ask the Tribunal to extend the time limit for issuing a statement of reasons. I did not realise until I saw the Upper Tribunal’s decision in [2015] UKUT 0634 (AAC) that I can in fact appeal against a superseding decision by the Council on grounds that are unrelated to the issue that prompted the decision. In addition I was unable to appeal promptly because *[give any other reasons for lateness – illness etc]*

*[signature]*

*[insert your name]*

*[date]*

# Application for permission to appeal against Tribunal’s decision to strike out appeal: statement of reasons issued, appeal in time

Send off in envelope addressed to Tribunal office: no covering letter required

**Application for permission to appeal to Upper Tribunal**

**First-tier Tribunal (FtT) reference:** *[insert your appeal reference number]*

**Name:** *[insert your name]*

**Address:** *[insert your address]*

**Date of decision:** *[insert the date of the Tribunal’s decision]*

**Date SOR issued:** *[insert date of statement of reasons]*

1. The Tribunal decided on *[date]* that it did not have jurisdiction to hear my appeal against the Council’s decision of *[date]*.

1. I would like permission to appeal against the Tribunal’s decision.

How the Tribunal erred in law

1. The Tribunal appears to have believed that the matter of *[subject of your appeal]* is *res judicata*  because it has been the subject of a previous decision by the Council/Tribunal\*
2. As the UT says in [2015] UKUT 0634 (AAC), this is not the case: each time the Council makes a superseding decision I have the right to appeal against it on any grounds even if my appeal does not concern the issue that prompted the Council to make the latest decision and even if the matter has been the subject of a previous appeal concerning an earlier decision.

Disposal

1. I ask the UT to set aside the decision and remit the case to the First-tier Tribunal for a substantive hearing.

*[signature]*

*[insert your name]*

*[date]*

\*Delete whichever is not applicable

# Application for permission to appeal against Tribunal’s decision to strike out appeal: statement of reasons issued, appeal out of time

Send off in envelope addressed to Tribunal office: no covering letter required

**Application for permission to appeal to Upper Tribunal**

**First-tier Tribunal (FtT) reference:** *[insert your appeal reference number]*

**Name:** *[insert your name]*

**Address:** *[insert your address]*

**Date of decision:** *[insert the date of the Tribunal’s decision]*

**Date SOR issued:** *[insert date of statement of reasons]*

1. The Tribunal decided on *[date]* that it did not have jurisdiction to hear my appeal against the Council’s decision of *[date]*.

1. I would like permission to appeal against the Tribunal’s decision.

How the Tribunal erred in law

1. The Tribunal appears to have believed that the matter of *[subject of your appeal]* is *res judicata*  because it has been the subject of a previous decision by the Council/Tribunal\*
2. As the UT says in [2015] UKUT 0634 (AAC), this is not the case: each time the Council makes a superseding decision I have the right to appeal against it on any grounds even if my appeal does not concern the issue that prompted the Council to make the latest decision and even if the matter has been the subject of a previous appeal concerning an earlier decision.
3. Although my application is out of time I would ask the Tribunal to extend the time limit. I did not realise until I saw the UT’s decision in [2015] UKUT 0634 (AAC) that I can in fact appeal against a superseding decision by the Council on grounds that are unrelated to the issue that prompted the decision. In addition I was unable to appeal promptly because *[give any other reasons for lateness – illness etc]*

Disposal

1. I ask the UT to set aside the decision and remit the case to the First-tier Tribunal for a substantive hearing.

*[signature]*

*[insert your name]*

*[date]*

\*Delete whichever is not applicable

# Application for permission to appeal against Tribunal’s decision to strike out appeal: statement of reasons refused as requested out of time

Send off in envelope addressed to Tribunal office: no covering letter required

**Application for permission to appeal to Upper Tribunal**

**First-tier Tribunal (FtT) reference:** *[insert your appeal reference number]*

**Name:** *[insert your name]*

**Address:** *[insert your address]*

**Date of decision:** *[insert the date of the Tribunal’s decision]*

**Date SOR refused:** *[insert date statement of reasons request was rejected]*

1. The Tribunal decided on *[date]* that it did not have jurisdiction to hear my appeal against the Council’s decision of *[date]*.

1. I would like permission to appeal against the Tribunal’s decision.

How the Tribunal erred in law

1. The Tribunal appears to have believed that the matter of *[subject of your appeal]* is *res judicata*  because it has been the subject of a previous decision by the Council/Tribunal\*
2. As the UT says in [2015] UKUT 0634 (AAC), this is not the case: each time the Council makes a superseding decision I have the right to appeal against it on any grounds even if my appeal does not concern the issue that prompted the Council to make the latest decision and even if the matter has been the subject of a previous appeal concerning an earlier decision.

Appeal without statement of reasons

1. Although my application for a statement of reasons was made out of time I would ask the Tribunal to grant permission to appeal under Rule 38(7)(c). I did not realise until I saw the UT’s decision in [2015] UKUT 0634 (AAC) that I can in fact appeal against a superseding decision by the Council on grounds that are unrelated to the issue that prompted the decision. In addition I was unable to appeal promptly because *[give any other reasons for lateness – illness etc]*. In these circumstances I believe it is in the interests of justice to grant permission to appeal without a statement of reasons.

Disposal

1. I ask the UT to set aside the decision and remit the case to the First-tier Tribunal for a substantive hearing.

*[signature]*

*[insert your name]*

*[date]*

\*Delete whichever is not applicable

1. [CH/2391/2015](http://www.hbanorak.co.uk/downloads/CH_2391_2015.pdf) [↑](#footnote-ref-1)
2. In this situation the Tribunal is not bound by what are sometimes referred to as the “anti-test case rules” which prevent a new UT decision from having a retrospective effect on other cases. The Tribunal has discretion to accept a late appeal for any reason and the new UT decision seems to me to be a very good reason. [↑](#footnote-ref-2)
3. See the 2003 case Neil Wood v Secretary of State for Work and Pensions

   <http://www.bailii.org/ew/cases/EWCA/Civ/2003/53.html> [↑](#footnote-ref-3)