Discretion in overpayment recovery.

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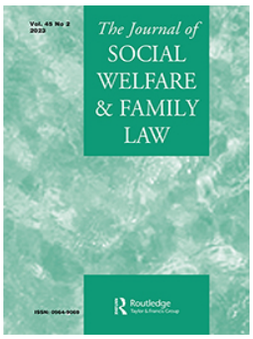

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CASES

Discretion in overpayment recovery

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KEYWORDS Overpayments; Universal credit; fettering discretion; mandatory reconsideration

R v Secretary of State for Work and Pensions [2023] EWHC 233 (Admin) calls into question at least three aspects of the long-established practice of the Department for Work and Pensions (DWP). The case concerns the DWP's discretionary power to waive the recovery of overpayments. In former times, the rules governing recovery only rendered claimants liable if they had misrepresented or failed to disclose a material fact. Tax Credits had required low income families to repay substantial amounts of money delivered in error – a process the Ombudsman condemned as 'fundamentally unsuited' to their needs (Parliamentary and Service Ombudsman 2007, p. 5). Following this example, in 2013 a general power to recover overpayments from other benefits was introduced, governing Universal Credit, Jobseekers Allowance and Employment and Support Allowance. In the present case, the DWP had 'repeatedly' miscalculated the benefit, and assured the claimant that the payments were correct. The claimant had taken 'all reasonable steps to repeatedly clarify her entitlement and provide information' (para. 1). There was no dispute that the overpayment was the result of official error. The DWP had apologised for 'this profound lapse in service'. The claimant asked the DWP in three separate applications to exercise its discretion to waive repayments, and the DWP refused at every point.

The first issue this case raises concerns the DWP's use of its discretion. For decades – at least since the 1960s – the DWP and its predecessors have limited their use of discretion by the development of national rules, intended to ensure that there is no inconsistency between judgements made in different parts of the country (Hill 1969, Spicker 2011).[1] The 'discretion' being exercised here is the discretion permitted to the Department, not the judgment of individual officers. In 2012, the then junior minister Chris Grayling explained to Parliament: 'There will be an absolutely clear code of practice that will govern the circumstances in which recovery action will or will not be taken, to ensure consistent, considered decision making' (cited at para. 122). As it turned out, the code of practice did not consider that the egregious fault of the DWP could be considered a sufficient reason for not pursuing recovery. The (unpublished) guidance (cited at para 37) states:

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> Usually, the cause of the overpayment alone would not be sufficient reason for waiver to be granted. It is more likely that the circumstances leading to the case of an overpayment, when considered in addition to other factors such as the debtor's circumstances, and claims of hardship or good faith, might provide sufficient reason for recovery not to be pursued.

A series of recent cases have emphasised a requirement on public agencies not to fetter their discretion. The longstanding principle against fettering discretion was summarised recently in the context of a different challenge to the DWP's Universal Credit deduction's policy in

R. (on the application of Blundell) v Secretary of State for Work and Pensions [2021] EWHC 608 (Admin) as follows: 'A public authority "offends against legality by failing to use its powers in the way they were intended, namely to employ and utilise the discretion conferred upon it" and "offends against procedural propriety by failing to permit affected persons to influence the use of that discretion"' (para. 51). The decision in this case hinged on the recognition in the guidance of 'exceptional' circumstances. The court accepted that 'the Secretary of State is entitled to regard as weighty and warranting a policy of only waiving recovery in "exceptional circumstances" where there are compelling grounds in the individual case' (para 126) This was not, Justice Steyn concluded, a fetter on discretion, because the possibility of a waiver in individual circumstances still existed. That conclusion is questionable. 'exceptional' in social security law has never meant 'individual', but only that exceptions must be allowed for. Provision for such circumstances – for example, in the now-defunct 'Exceptional Circumstances Additions' or 'Exceptional Needs Payments' – has always been rule-bound. The same principle applies here. The DWP's highly restrictive interpretation of the class of exceptions relating to overpayments has meant, in practice, that few waivers are applied for – 190 in three years – and hardly any (15 out of that 190) are granted (para. 97). For as long as the courts persist in the misapprehension that they are dealing with individualised exceptions, they will fail to engage with the way that the DWP actually works.

The second challenge concerns the publication of the rules. For decades, the rules by which social security operated were considered confidential; visitors to benefit offices (such as myself) were routinely required to sign the Official Secrets Act. Those secrets included, for example, the 'A code', the rules governing Supplementary Benefit; the 'A code' was superseded by an even fatter set of clandestine documents called the 'S manual'. In the present case, one document outlining relevant policies, the Benefit Overpayment Recovery Guide, was available for scrutiny by advisors, but another, the Decision Makers Guide to Waiver, was not. The judgment here cites *B v Secretary of State for Work & Pensions* |[2005] 1 WLR 3796:

> It is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer (para. 115).

The third major issue concerns appeals. The present procedure requires claimants to ask first for Mandatory Reconsideration, before appeal to a tribunal is even possible. After

that, the claimant's options have been held to be exhausted. This case makes it clear that this is not, and cannot be, the end of the road. A DWP official had written to the claimant:

> Regarding your request to have your overpayment waived, as I have stated previously the routes for you to challenge an overpayment with Universal Credit are Mandatory Reconsiderations and a tribunal following an upheld Mandatory Reconsideration. Neither myself or anyone working for Universal Credit can reconsider your overpayment as you have exhausted all appeal routes with us. The legislation you have quoted does not apply directly to the processes that we have here (para. 72).

That response is described by the Court as 'manifestly unlawful' (para. 73).

Mandatory Reconsideration was introduced explicitly to limit the number of cases being considered on appeal: the DWP claimed that it would 'reduce unnecessary demand on HMCTS by resolving more disputes internally' (DWP 2013, p. 4). In *R(UNISON) v Lord Chancellor* [2017] 51, the Supreme Court gave the government a stern lesson about access to justice: they noted that 'impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible' (para. 78) and emphasised the importance of locating the decisions in the courts, rather than administrative processes: 'Access to the courts is not ... of value only to the particular individuals involved' (para. 69). The retiring President of the Social Entitlement Chamber told the House of Commons Work and Pensions Committee that the main effect of Mandatory Reconsideration was to require claimants to go through two applications instead of one, and that the process, 'rather than leading to a justified reduction in appeals, might discourage claimants who might have had "winnable" cases from appealing, because they found the process too onerous' (Work and Pensions Committee 2014, paras. 93–4). In *Connor, R (On the Application Of) v The Secretary of State for Work And Pensions* [2020] EWHC 1999 (Admin), the judgment remarked on a series of anomalies created by the introduction of Mandatory Reconsideration (paras. 25–27] and considered that it posed 'a disproportionate interference with the right of access to court' (para. 28). Justice Swift concluded however in that case that the obstruction introduced by Mandatory Reconsideration was not of the same order as the impediment objected to by the Supreme Court (para. 18). It would be interesting to know if the Supreme Court agrees that a process that imposes a 'disproportionate interference with the right of access' can really pass under the bar.

The court in this case does not comment directly on the many hoops that the claimant was required to go through to obtain this judgment. The claimant was repeatedly misinformed, misdirected or blocked. She was subject to six previous processes, prior to judicial review: those were a complaint, mandatory reconsideration, a first appeal, and three consecutive requests for waiver. The case could have been resolved at any of those points. The judgment puts great emphasis on the DWP's conduct as a breach of the Public Sector Equality Duty, but it is worse than that. This is not just something that people with specified disadvantages should not have to put up with. No-one should.

Disclosure statement

No potential conflict of interest was reported by the authors.

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