

DECISION OF DEPUTY SOCIAL SECURITY COMMISSIONER**Commissioner's Reference: CSHC 352 2002****Decision**

1. I hold that the tribunal erred in law. I accordingly reverse the decision of the appeal tribunal and remit the appeal for re-consideration by a differently constituted tribunal in accordance with the directions given below.

Background

2. The claimant was in receipt of housing and council tax benefit. As she did not return a benefit review form said to have been sent out by the Council, the benefit ceased. The claimant renewed her claim and asked for backdating from 12th March 2001 to 16th July 2001. The claimant's position was that she was having problems with her mail and did not receive the benefit review form or reminder. She only discovered that her benefit was not continuing when her landlord informed her in July that her rent had not been paid.

3. The decision-maker refused her application for backdating on the ground that good cause had not been shown under Regulation 72(15) of the Housing Benefit (General) Regulations 1987.

Appeal to tribunal

4. The claimant appealed to the tribunal. The basis of her appeal was:

"I have been having trouble with my post, I have received mail for other people not only in my stair but for other entry's as well. I have reported this more than once to Royal Mail as I have had family letters go missing. I can only assume the same has happened and someone else has my mail, and on the basis of this I would be grateful if you could reconsider my benefit."

5. Shelter, who acted for the claimant submitted a written submission, in which they gave further details regarding the mail delivery problems. They cited the case of another neighbouring claimant who had similar mail delivery problems in the same block and had her backdated claim accepted because of the mail delivery problems. They also referred to the obligation on the authority to invite a renewal under regulation 72(14). They submitted that this amounted to "continuous good cause" for the purpose of regulation 72(15).

6. The decision maker submitted the following "Summary of Facts" to the tribunal:

"Section 5. Summary of Facts"

1. Miss White was sent a benefit review form on 3/1/01
2. By 22/2/01 the review form had not been returned so a reminder letter was sent
3. On 22/2/01 Housing Benefit & Council Tax Benefit expired eff 11/3/01 because the review form had still not been returned
4. On 22/2/01 a Council Tax demand notice for 2000-2001 and payment book were sent as a result of review expiry

5. On 9/7/01 a Benefit application form was received with appeal for backdating
6. On 16/7/01 HB & CTB were reopened with effect from 16/7/01 and Miss White was advised her appeal was being considered
7. On 24/7/01 Miss White was advised her appeal was unsuccessful. An appeal form was sent
8. On 4/8/01 appeal form was received
9. On 19/9/01 the decision was reconsidered. The decision maker could find no reason to change the decision of 16/7/01"

and submitted that good cause had not been shown.

7. On 13 November 2001 the tribunal refused the appeal and later issued a Statement of Reasons in the following terms:

"FINDINGS OF FACT

I adopt the facts contained in paragraphs 1 to 11 (sic) of the Decision-Maker's submission. Section 5, as the facts found in this case, with additional facts noted.

The appellant had problems with her mail deliveries, and she asked some of her friends to send personal mail to another address. She has not put in any formal mail re-direction request. On specific questioning, she was unable to remember whether she had not received, or had received and put aside, the notice referred to in paragraph 4 of the Summary of Facts.

REASONS

I have noted the whole schedule documentation, and the oral submission given today. The appellant argues that she is entitled to backdating of HB and CTB, on the basis that the mail problems she had, regarding receipt of her mail, show that she acted reasonably. The terms of the Submission lodged on her behalf are noted and referred to for their terms.

I am of the view that the appellant on balance received the notification of the Council Tax Demand notice, sent out in the week following 22.2.01. It was said that this might have taken 14 days. This should have put the appellant on notice of the problem regarding the renewal, or rather non-renewal, of CTB and HB. In my view, a reasonable person would have taken action at that time to ensure that the matter was attended to. On this basis, the appellant has not made out good cause.

For these reason the appeal fails."

Appeal to Commissioner

8. The tribunal refused leave to appeal to the commissioner, but on 12 February 2003, Mr Commissioner Walker granted leave to appeal. Shelter, acting on behalf of the claimant, submitted Grounds of Appeal, which may be summarised as follows:

- the statement of reasons was inadequate
- the tribunal asked the wrong question, in that it concentrated on whether forms had been delivered rather than whether they had been sent;
- that the burden of proof was on the council to show that the renewal forms and the council tax form were sent out, before consideration could be given to whether or not they were received;

- that the issue of whether or not the council tax demand notice had or had not been received was not a relevant consideration as it did not amount to an invitation to renew the housing benefit

9. The City of Edinburgh responded to the grounds of appeal. In summary their position was:

- that the Statement of Reasons was adequate as the findings in fact of the decision maker had been adopted;
- that the council fulfilled its obligations by issuing the form to the claimant's last known address and that "the council are not required to ensure that documents it issues are delivered";
- that Shelter could not raise the issue of whether or not the renewal forms were sent out, as this was not raised at the appeal.

The Council asked that if the Commissioner found that whether or not the forms were sent out was an issue, that guidance should be given on the evidential requirements on a council to show compliance with the regulations.

Reasons for decision

10. I uphold this appeal, in the first instance, because I consider that the appeal tribunal erred in law by merely adopting the findings in fact in the submission by the decision-maker. Such an approach is an error in law, because it does not adequately explain why the facts were accepted, nor does it deal with why the submissions of the claimant in relation to that factual submission were rejected. See CSSB/18/1985; at paragraph 3; R(IS) 3/93 at paragraph 5 and R(A) 1/72 at paragraph 8.

11. In note that the findings by the decision maker purport to find that the review form, a reminder and council tax demand were sent out, but makes no finding in relation to the claimant's contention that "I have been having trouble with my post" and therefore that they were not delivered. In adopting those findings, the tribunal, equally has made no finding in relation to the claimant's position, both before the decision-maker and the tribunal that she was having trouble with her mail not being delivered. Evidence had been submitted from other members of her family and from the neighbouring claimant about mail delivery problems in the block. There is no finding about this evidence or whether or not on a balance of probabilities any of these forms were delivered.

12. Against that background it is difficult to understand on what basis the tribunal reached the conclusion that the claimant "on balance received notification of the Council Tax Demand", when the claimant's evidence on this issue was only that "she was unable to remember whether she had not received, or had received and put aside, the notice", in circumstances where the main issue was the reliability of the postal delivery. The Statement of Reasons refers to "specific questioning" on this issue, but the Record of Proceedings is illegible, so it is not possible to discern what was the questioning on this issue – an illegible record can amount to an error of law; see CDLA/1389/97 at paragraph 18. The tribunal then hold that the claimant should have been put on notice by the receipt of the council tax demand of the problem in relation to housing and council tax benefit. The tribunal did not have a copy of that demand before them so I find it difficult to see how they could have drawn this inference from the receipt of the demand; see CH/5221/2001 at paragraph 5. In any event there is no reasoning given to support this inference.

13. I consider that whether or not the claimant received the invitation to make a further claim under Regulation 72(14) is such a material factor that requires to be considered in the balancing exercise to be conducted under regulation 72(15) [good cause], that the tribunal erred in not making any findings on this issue.

14. Regulation 72(14) provides that "The relevant authority shall invite a person to whom housing benefit has been granted to make a claim for a further grant of that benefit ...". The regulation goes on to provide that "any claim received following that invitation, if made within 4 weeks of the end of the current benefit period, shall have effect immediately after the end of the benefit period ...". The word "shall invite" is mandatory. Therefore the council are required to make that invitation. There is nothing in the regulation as to how the invitation is to be issued, but it is mandatory that the claimant should be invited. It could therefore be issued personally by a member of staff visiting the claimant or it could be issued by post.

15. If issued by post, it is my opinion that the claimant can only be said to have been invited to make a claim, if it can be shown that the invitation was received. I therefore disagree with the council's contention that "the council are not required to ensure that documents it issues are delivered". If the document is not delivered then the claimant has not been invited to make a claim. I consider that the word "invite", which means "to ask" [Concise OED], shows that the invitation has to be received by the claimant in such a manner that they are able to respond to the invitation. It is of note that the regulation does not require the authority to "send an invitation" to the claimant. Had such wording been used, mere dispatch, might well have satisfied the requirement; see eg: *R v London Quarter Session ex. p. Rossi* [1956] 1 All ER 670, Parker LJ at 681E.

16. The council have asked that I give guidance "on the evidential requirements on Local Authorities to show compliance with the requirements of the regulations". I do not consider that there is any obligation on a local authority to prove in every case that the claimant was invited to make another claim. If a claimant maintains that they have not received an invitation, then the evidence required to establish that position or to rebut it will depend on the case made by the claimant. In this case, before the decision-maker the claimant only raised the issue of postal problems at her house. She did not suggest that the invitation was not sent out. It is not clear from Shelter's submissions to the tribunal that they were raising the issue of whether or not the invitation had been sent out. This is only clearly raised in the appeal to the commissioner, but appears to have been raised as a matter of law. If the issue of whether or not a form was sent out is clearly raised in any proceedings, then the evidence is a matter for a local authority. It is not evidence that the form was sent alone that is relevant, but that on a balance of probabilities it was sent and received. An authority could chose to send out all forms by recorded or registered mail and receipt or otherwise could be proved by the postal records. If a local authority chooses to rely on the ordinary mail, which may well be reasonable having regard to economy, then evidence of their in house practice in relation to sending out forms by post, may be enough to prove, in the absence of evidence to the contrary, that on a balance of probabilities that it was posted delivery was effected. However, each case will depend on its own facts and circumstances.

17. I do not consider that section 7 of the Interpretation Act 1978 applies to the word "invite". Section 7 provides that where an Act authorises a document to be served by post, whether the expression serve, give, send "or any other expression is used" then proof of posting is deemed to have been effected "unless the contrary is proved" – see

CJSA/3523/2002. The word "invite" does not, in my opinion, authorise service by post of the invitation so as to allow the presumption in section 7 to apply. In any event in this case the claimant was offering to prove that the form was not received.

18. As the claimant requires to make a claim "following that invitation" within 4 weeks of the end of the benefit period, it must be implied that the obligation upon the authority is to issue the invitation in time to give the claimant the opportunity to make the claim following the invitation within that four week period; see regulation 72(14)(b) which refers to eight weeks.

19. However, regulation 72(14) makes no provision for what is to happen if the relevant authority do not issue the invitation. The four week period in which to make the application following the invitation is the same four week period allowed in regulation 72 (13); ie within four weeks of the end of the former benefit period. Therefore, whether or not an invitation is issued, a claimant has four weeks from the end of the benefit period to make another claim, if the claim is to be automatically backdated to the end of the former period. I therefore do not consider that a failure to obtemper the duty to invite, alters the position that if a claim is not made within 4 weeks of the end of the previous benefit, that continuous good cause has to be shown under regulation 72(15). That said, I am of the opinion that if it is proved on a balance of probabilities that an authority did not invite the claimant to make a claim, that that fact is a material fact to be weighed in the balance in determining whether or not a continuous good cause has been shown.

20. It is not within my jurisdiction to consider whether or not a claimant who has not been invited in terms of regulation 72(14) and thereby suffers loss, has a direct claim against the authority for failing to issue the invitation. Such a claim raises difficult issues in relation to liability for breach of a statutory duty and whether the statute gives rise to a right to make such a claim.

21. I direct that the tribunal rehearing this appeal should make findings in fact regarding the question of whether or not there were mail delivery problems at the claimant's address at the material time; the extent of those problems and whether or not on a balance of probabilities, the claimant did or did not receive the invitation required to be given by regulation 72(14). The tribunal will also have to make finding in fact as to whether or not the council tax demand was in fact received. This may involve the tribunal in making findings of fact in relation to whether or not the relevant forms and tax demand were, on a balance of probabilities, sent out, if this is put in issue by the claimant.

22. If the tribunal find that the invitation was not received, but the council tax demand was received, then the tribunal will have to make findings in fact as to what the claimant, and a reasonable person would have, understood by that demand in the context of the claimant's then knowledge about whether or not the housing benefit was still being paid in relation to her rent. Would this have alerted a reasonable person that housing and council tax benefit had ceased. I note that the landlord did not inform her that her rent was not being paid until July, because he thought the delay was caused by a backlog. It may be that the claimant should have known when her benefit was likely to have come to an end. If they find that the council tax demand was received it will be relevant for them to have regard to its terms in determining what inferences can be drawn from the receipt of the demand. A copy should be produced by the Council.

23. It will be for the tribunal to determine whether or not the receipt of the council tax demand was a break in the chain of "continuous good cause". However, I am of the opinion, that the mere receipt of that demand is not of itself such a break, unless the evidence shows that a reasonable person would have understood that there was a problem about housing and CT benefit, which required to be addressed. If neither the invitation, nor the council tax demand were received, then the issue of "continuous good cause" is at large in all the circumstances. I draw the tribunal's attention to the passage cited by the City of Edinburgh in their submission from Mr Commissioner Jacobs decision in CH/2191/2002 at paragraph 6, which requires regard to all the circumstances and whether those circumstances would cause a reasonable person of the claimant's age and experience to act.

24. For all these reasons I remit the appeal to another tribunal to reconsider the appeal in accordance with these directions.

(Signed)
Sir Crispin Agnew of Lochnaw Bt QC
Deputy Commissioner
Date: 9 May 2003