

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the claimant's appeal. I set aside the decision of the York appeal tribunal dated 13 May 2003. The claimant's entitlement to housing benefit from 1 April 1996 is to be recalculated in accordance with my decision. If, which I doubt, there has been any overpayment between 1 April 1996 and 21 October 2001, it is recoverable from the claimant. In any event, it is likely that entitlement continued after 21 October 2001. If there is any dispute as to the amount of the entitlement, the case should be referred back to me or another Commissioner.

REASONS

2. I held an oral hearing of this appeal in Darlington. The claimant appeared in person. The local authority was represented by Mrs D. E. Calvert, the authority's benefit manager. I announced my decision at the end of the hearing and I now give my full reasons.

3. From 1 April 1996 to 21 October 2001, the claimant received housing benefit calculated on the basis that his income consisted only of his retirement pension and his Army pension. However, following the production of bank statements in connection with the completion of a review form, the local authority observed that he had been receiving regular payments of £280 per month from another source. The local authority naturally made enquiries and in a letter dated 9 November 2001, the claimant explained:

"The credits you mention are gifts whereby [the relevant bank account] can exist at all, to cope with a variety of domestic expenses as well as telephone accounts, car and house maintenance as they arise, BT account, RAC, pet insurance, Yorkshire Water, and comprise varying family assistance which my eldest son in Australia is so kind as to send me to keep me going."

In a further letter dated 12 December 2001, he explained that, in order to finance a divorce settlement, he had commuted half of his service pension when he retired from the Army in 1959 but he had been able to supplement his income by writing until 1992.

"When he could, my son in Australia has helped to keep me afloat. My old age pension I have used for day-to-day expenses, but I would have had no means of coping with such indispensables as telephone, water, heating, RAC cover, etc. were it not for his kindness."

He also explained that he had not disclosed the payments from his son because it had not occurred to him that the payments might amount to income and might have some bearing on his entitlement to housing benefit.

4. The local authority recalculated the claimant's entitlement to housing benefit, disregarding £20 pw of the payments but taking the rest into account as income. They concluded that the claimant had not been entitled to any housing benefit from 1 April 2001 and that £7,770.15 had been overpaid and was recoverable from him. The claimant appealed, making the additional point that his accountant had advised him that the payments did not have to be declared to the Inland Revenue. The tribunal dismissed his appeal, finding that the payments were income, that there was no provision in Schedule 4 to the Housing Benefit (General) Regulations 1987 for disregarding that income and that accordingly he had been overpaid benefit as claimed by the local authority. The tribunal further held that, under

section 75 of the Social Security Administration Act 1992 and regulation 99 of the 1987 Regulations, overpayments were recoverable unless caused by official error and that, there having been no official error in this case, the overpayment to the claimant was recoverable.

5. The claimant now appeals against the tribunal's decision with the leave of Mr Commissioner Levenson. He now concedes that the payments from his son were income but argues that he could not have been expected to declare those payments because he reasonably considered that they did not fall within the scope of "Payments from a Charity", "Charitable/Voluntary Income" or "Any other income", which were the categories mentioned on the various forms he had completed. He submits that it would have been much clearer if the form had used the expression used by the Department for Work and Pensions on income support claim forms, which is "money coming in", rather than "income" with its connotation of taxable income. There is some force in that submission and those responsible for designing the local authority's forms may like to bear it in mind. However, while I accept that the payments were not "charitable" and that the term "Voluntary Income" is obscure, the payments were in fact income in the form of voluntary payments and, while his mistake may be understandable, the claimant nonetheless did make a mistake in not at least disclosing the payments as "other income". Even if not as helpful as they might have been, the claim forms were not actually inaccurate and so there was no "official error" that might have made the overpayment of benefit irrecoverable. The tribunal was right in holding that overpayments are recoverable unless caused by "official error". Accordingly, I do not accept the claimant's ground of appeal.

6. However, the tribunal erred in holding that there was no provision in Schedule 4 to the 1987 Regulations permitting voluntary payments to be disregarded. Although there was a letter in the bundle of evidence before the tribunal which stated that £20 pw had been disregarded by the local authority, the submission to the tribunal did not mention that the payments had not been taken into account in full and there was no reference to the relevant paragraph of Schedule 4. Mrs Calvert confirmed at the hearing before me that the local authority had had paragraph 13(1) in mind. Had that been drawn to the tribunal's attention, the tribunal might have considered whether paragraph 13(2) was more applicable. On the evidence before the tribunal, that issue certainly should have been considered. The tribunal's decision is therefore erroneous in point of law and it must be set aside. I can substitute my own decision.

7. At the material time, paragraph 13 of Schedule 4 to the Housing Benefit (General) Regulations 1987 was in the following terms:

"(1) Except where sub-paragraph (2) applies and subject to sub-paragraph (3) and paragraphs 33 and 23, £20 of any charitable payment or of any voluntary payment made or due to be made at regular intervals.

(2) Subject to sub-paragraph (3) and paragraph 34, any charitable payment or voluntary payment made or due to be made at regular intervals which is intended and used for an item other than food, household fuel or, subject to paragraph (5), rent or ordinary clothing or footwear, of a single claimant or, as the case may be, of the claimant or any other member of his family or is used for any council tax or water charges for which that claimant or member is liable.

(3) Sub-paragraphs (1) and (2) shall not apply to a payment which is made or due to be made by –

(a) a former partner of the claimant, or a former partner of any member of the claimant's family; or

- (b) the parent of a child or young person where that child or young person is member of the claimant's family.
- (4) For the purposes of sub-paragraph (1) where a number of charitable or voluntary payments fall to be taken into account in any one week they shall be treated as though they were one such payment.
- (5) In subparagraph (2) –
 - (a) "rent" means eligible rent less any deductions in respect of non-dependants which fall to be made under regulation 63 (non-dependant deductions);
 - (b) the expression "ordinary clothing or footwear" means clothing or footwear for normal daily use, but does not include school uniforms, or clothing or footwear used solely for sporting activities.

Subsequent amendments, extending the paragraph to certain payments made by way of compensation for personal injuries, are not relevant to the issues arising in this case.

8. Paragraph 13 is not the clearest of statutory provisions. The first two sub-paragraphs are not sentences but are merely items in the list falling under the schedule's heading, "sums to be disregarded in the calculation of income other than earnings". The remaining sub-paragraphs are not items in that list but are supplementary provisions. The current paragraph was substituted in 1990 for an undivided paragraph which was more or less in the terms of the current sub-paragraphs (1), (3) and (4). It might have been better if sub-paragraph (2) had been made a new paragraph 13A. As it is, the overall effect of this odd drafting is that sub-paragraph (2) is liable to be overlooked. Paragraphs 23, 33 and 34, mentioned in sub-paragraphs (1) and (2), have no direct bearing on this case. Sub-paragraph (4) appears redundant because paragraph 33, which is also a supplementary provision rather than an item on the list and which was originally the last paragraph in the schedule, provides that the total amount of income to be disregarded under a number of provisions including paragraph 13(1) is £20. Perhaps paragraph 33 was added at a late stage in the drafting of the original schedule. I note too that "paragraph 13(1)" was not substituted for the reference to "paragraph 13" in paragraph 33 until 1998 so that the introduction of paragraph 13(2) would have been of no effect until then if the defect had not so clearly been due to an oversight. Finally, the reference to "paragraph (5)" in sub-paragraph (2) is plainly intended to be a reference to *sub*-paragraph (5).

9. In the present case, the payments received by the claimant from his son were voluntary payments. If one disentangles sub-paragraphs (1) and (2), one can see that only £20 pw of voluntary payments is disregarded where either (a) the payments are intended to be used for food, household fuel, rent or ordinary clothing or footwear or (b) the payments are actually used for food, household fuel, rent or ordinary clothing or footwear, whatever the intention behind the payments. The whole of any payments is disregarded if either (a) the payments are both intended and used for a purpose other than paying for food, household fuel, rent or ordinary clothing or footwear or (b) whatever the intention behind the payments, the payments are actually used for council tax or water charges. This calls for some investigation of the intention behind, and the use of, voluntary payments.

10. The payments from the claimant's son were paid into a different account from the one into which his pensions were paid. He explained to me that that was because they replaced his earnings and he had originally had the second account in order to keep his earnings separate from his pensions. His bank statements show direct debits on both accounts. In particular, as his correspondence with the local authority had suggested, his telephone bills,

RAC subscription, and water charges were paid out of the account into which his son's payments were made and rent payments were paid out of the other account. There are card purchases on both accounts. No electricity bill was paid during the period to which the statements before me relate but the claimant had said that household fuel was paid using his son's payments.

11. The local authority's position has been, I think, that, as there is no evidence that the payments were made for any particular purpose and as they were at least partly used for household fuel, only £20 falls to be disregarded, although I dare say that they would accept that the amount used to pay water charges should also be disregarded. On a literal approach, there is something to be said for that position, because it is arguable that my analysis above of the effect of paragraph 13 is incomplete and that, in addition to the circumstances I have mentioned, only £20 pw of voluntary payments is disregarded in any case where there is no specific intention behind the payments, unless the payments are actually used to pay council tax or water charges. However, that seems to me to be inconsistent with the broad policy behind the introduction of paragraph 13(2).

12. I cannot believe that the legislation is intended to treat two claimants differently merely because one has a single bank account and another has two accounts, or because one receives payments expressed – either through chance or through a knowledge of paragraph 13 – to be for purposes other than for food, household fuel, rent or ordinary clothing or footwear and carefully uses the payments only for those items whereas another puts them into a general household fund, or because one receives single large voluntary payments and another receives an equal sum by way of several small voluntary payments. The purpose behind the legislation is readily ascertainable and it can be fully achieved without creating anomalies between claimants or engaging in complicated analyses of claimants' financial arrangements and expenditure.

13. Paragraph 13 of Schedule 4 to the Housing Benefit (General) Regulations 1987 has counterparts in paragraph 15 of Schedule 9 to the Income Support (General) Regulations 1987 and paragraph 13 of Schedule 4 to the Council Tax Benefit (General) Regulations 1992. The provisions are not identical but the differences are not significant. Income support, housing benefit and council tax benefit are all calculated by reference to an "applicable amount", consisting of personal allowances and premiums which are substantially the same for all three benefits and, in the case of income support only, "eligible housing costs" in respect of housing costs other than rent and council tax. In broad terms, a person whose income from other sources is less than the "applicable amount" is entitled to income support to make up the difference and, where appropriate, housing benefit to meet the whole of his "eligible rent" and his liability for council tax is reduced to nil because he receives a rebate through council tax benefit. If his income exceeds the "applicable amount", he will not be eligible for income support but may receive some housing benefit or council tax benefit, depending on the amount of the excess.

14. Food, household fuel, and ordinary clothing and footwear is a list of items reminiscent of the rather more comprehensive list contained in regulation 4(1) of the Supplementary Benefit (Requirements) Regulations 1983, relating to "normal requirements". Those items are plainly basic essentials that a claimant in receipt of no income other than income support is expected to be able to buy or meet out of that income support. Such a claimant is also expected to pay his housing costs out of either income support or housing benefit, depending on whether he has a mortgage or pays rent, and to pay his council tax out of council tax benefit.

15. The purpose of paragraph 13(2) and its counterparts therefore becomes clear (although the rationale for treating payments used for water charges and council tax in the way the provisions do is not as clear as it was in the days of community charge when a person in receipt of income support was still liable for a proportion of the community charge). It is to enable charitable or voluntary payments to be made to a claimant for items other than basic essentials and housing costs without there being any effect on entitlement to an income-related benefit payable to meet those basic essentials and housing costs.

16. The problem that arises in cases like the present is that the precise purpose for which the payments are made is not expressed and it is difficult to anticipate how they will be used or to trace how they have been used. However, it does not, in my view, follow that the purpose and use cannot be determined from the surrounding circumstances. It seems to me to be reasonable to make three assumptions in such cases. Firstly, a claimant will give priority to paying for basic essentials and housing costs over less important items. Secondly, the "applicable amount" (not counting any "eligible housing costs" in an income support case) is sufficient to meet the basic essentials. Thirdly, a person making a voluntary payment to a claimant intends the payments to supplement other income – ignoring for this purpose possible entitlement to an income-related benefit – and that the claimant receives it on that basis and so pays for the basic essentials and housing costs using the other income first and then using the voluntary payment.

17. On that basis, a voluntary payment may be presumed to be used for basic essentials and housing costs to the extent that the "applicable amount" plus any "eligible rent" exceeds the amount of other income, unless it can be shown that the voluntary payment was earmarked in some way for another purpose and was used for that other purpose. Equally, however, it seems to me that a voluntary payment must be presumed to be intended, and used, for other purposes to the extent to which it represents income in excess of the "applicable amount" plus any "eligible rent".

18. In the present case, Mrs Calvert told me, the whole of the claimant's rent has been "eligible rent". The amount of his pensions at 1 April 1996 just exceeded his "applicable amount" plus his rent and, as the pensions and the "applicable amount" are all index-linked, that is likely to have continued to be the case throughout the relevant period. It seems absurd to hold that the voluntary payments were intended or used to pay for the basic essentials and the rent, in circumstances where the claimant's other resources were sufficient. In my view, during any period when the claimant's pensions exceeded his "applicable amount" plus his rent, the voluntary payments were intended and used for items other than food, household fuel, rent or ordinary clothing or footwear and so they fell to be disregarded under paragraph 13(2).

19. If the whole of the voluntary payments fell to be disregarded under paragraph 13, there was no overpayment during the relevant period and the claimant's award of housing benefit should not have been terminated. The claimant may have been wrong in assuming that the payments for his son were not "income", but, by chance in the light of the facts of his particular case, he was substantially right in assuming that they should not affect his entitlement to housing benefit. However, Mrs Calvert very properly says that she wishes to check the figures and so I give my decision in the form set out in paragraph 1 above.

(Signed) **MARK ROWLAND**
Commissioner
21 January 2004