IN THE UPPER TRIBUNAL **Case No. CH/2008/2011**
ADMINISTRATIVE APPEALS CHAMBER

Before Judge Mark

Decision: The appeal is dismissed.

REASONS FOR DECISION

1. The claimant had been in receipt of housing benefit since November 2006. With effect from 7 April 2008, new rules were introduced for the purpose of calculating housing benefit. The new methods of calculation sometimes produce a higher rate of benefit than under the old rules and sometimes a lesser rate. So far as the present claimant is concerned, they would apply only in respect of a claim made by him on or after 7 April 2008 (Housing Benefit Regulations 2006, reg.13C(2)(a)). As the claimant considered that he could obtain a larger award by making a fresh application for benefit after 7 April 2008, he wished to give up his existing award and make a fresh claim. Guidance from the Secretary of State for Work and Pensions was to the effect that a claimant could do this but would lose a week's benefit between the end of the old award and the start of the new one.

2. In this case the claimant sought to take advantage of the increased award of benefit by making a claim by email on Friday 7 November 2008, requesting that the new award should begin on Monday 15 September 2008 and that his current award should be withdrawn from Sunday 14 September 2008. The council, following the advice of the Secretary of State, made the new award with effect from 22 September 2008. The claimant appealed, contending that as a matter of law he was entitled to the award from 15 September, as his claim had been submitted the previous week. The appeal was heard by the First-tier Tribunal (Judge Poynter) on 7 February 2011 together with another appeal on the same point of law in another case. Judge Poynter dismissed both appeals but gave permission to appeal in both as his understanding was that the same point was being considered by the Upper Tribunal in a third case, CH/999/2010.

3. Hearing of this and the other appeal from Judge Poynter (CH/2008/2011) was deferred pending the outcome of CH/999/2010. A decision was made in that case on 25 August 2011, and submissions were then sought from the parties on it. Both claimants were represented by the same representative and have been dealt with together in the Upper Tribunal.

4. It is clear, from the relevant Commissioners' decisions (CJSA/3979/1999, CJSA/1332/2001 and CDLA/1589/2005) that a claimant cannot unilaterally terminate the award, but that his clear expressed wish to terminate it is a change of circumstances which should result in a supersession decision. Thus at paragraph 25 of CJSA/3979/1999, Mr. Commissioner Mesher, as he then was, stated as follows:

> "The nature of an existing award on an indefinite basis (or a definite award extending into the future) and the finality of the decision making that award have importance at the

next stage. In my judgment, under the Social Security Administration Act 1992 regime, such an award could not be brought to an end automatically by a prospective withdrawal of the claim. There is too much danger of abuse for such an approach to be adopted. There had to be some formal and proper mechanism to bring the existing award to an end. The only mechanism available was that of review. However, it seems to me that a withdrawal of a claim for the future (once that is accepted as legally permissible) is a relevant change of circumstances within section 25(1)(b) of the Social Security Administration Act 1992, because the basis on which any award of benefit could rest has been removed. I reject the submission to the contrary for the Secretary of State. And if that ground of review is made out, revision of the decision making the award has to follow. The particular advantages of requiring a revision on review to bring the existing award of benefit to an end are that there had to be a decision of an adjudication officer against which the claimant had a right of appeal and that on such an appeal the question of whether there had in fact been a genuine withdrawal of the claim could be examined."

5. As Judge Poynter explained in his decision under appeal, in relation to housing benefit, a claim ceases to exist once it has been determined (see paragraph 2 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act")) but the requirement that the award be terminated is still a change of circumstances under regulation 7(2)(a) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (the 2001 Regulations). This gives grounds for a supersession decision terminating the award under paragraph 4 of Schedule 7 to that Act, just as in the case of disability living allowance and other social security benefits, awards are now superseded on grounds of change of circumstances, including the wish by the claimant to have an award terminated (CDLA/1589/2005).

6. It is further the case that a purported fresh claim made during the currency of an existing award takes effect as an application to supersede that award at least where the claimant is simply applying for increased benefit (R(IB) 2/04, at paragraphs 146 and 197).

7. The claimant's representative has contended, however, that there is nothing to preclude a claimant surrendering an award by giving notice and then later making a new claim for benefit in the same week. That is not a strictly accurate way of looking at what happens, as I have already indicated. The giving of notice does not operate as a surrender, as Judge Mesher made clear in the passage cited above. A supersession decision is still needed. Under regulation 8(2) of the 2001 Regulations, with certain exceptions which are not material to this case, where the supersession decision is in respect of housing benefit and is made on the basis of a change of circumstances, the superseding decision is to take effect, again ignoring provisions which are not material here, in accordance with regulation 79 of the Housing Benefit Regulations 2006. Under regulation 79(1) of those regulations, a change of circumstances which affects entitlement to, or the amount of, housing benefit "shall take effect from the first day of the benefit week following the date on which the change of circumstances actually occurs, and where that change is cessation of entitlement to any benefit under the benefit Acts, the date on which the change actually occurs shall be the day immediately following the last day of entitlement to that benefit.

8. Judge Poynter went on to conclude that if a claimant notified the local authority that he no longer wished to receive benefit after the Sunday at the end of that week, the superseding decision giving effect to that anticipated change "takes effect at the very beginning of the following Monday and not the very end of the Sunday in question." He further held that if the same claimant subsequently purported to re-claim benefit during the same benefit week, his purported claim could not take effect as a claim (because it was made at a time when there was still an existing award. It therefore took effect as a further change of circumstances or anticipated change of circumstances. However, he concluded, it then contradicted the previous anticipated change of circumstances in that it amounted to an assertion that the claimant did want to receive benefit after the Sunday in question, so that there was no ground on which to base a supersession decision bringing the earlier claim to an end. The earlier change of circumstances previously anticipated – that the claimant no longer wanted housing benefit - was no longer anticipated. There was no change in circumstances to justify terminating the award.

9. On that basis, Judge Poynter concluded that there had to be a gap of at least a week between the old award and the new one for there to have been a change of circumstances which would entitle the decision maker to terminate the old award and make the new one possible.

10. On this appeal, the claimant's representative first contended that the tribunal had taken no account of paragraphs 4(1) and (3) of Schedule 7 to the 2000 Act. Paragraph 4(1) confers the power to supersede a decision and paragraph 4(3) provides that "In making a decision under sub-paragraph (1), the relevant authority need not consider any issue that is not raised by the application or, as the case may be, did not cause them to act on their own initiative." It is said therefore that the legislation does not place a duty on an authority to take a claim for benefit made subsequently to a request for a subsisting award to be withdrawn as somehow removing the grounds for acting on that request.

11. In my judgment this argument fails in the present case for three reasons. Firstly, the issue raised by the application is that the claimant does not wish to claim benefit any more. The subsequent claim to benefit is a relevant fact in considering that issue. A claimant cannot at the same time want his benefit to terminate and at the same time to continue. As Judge Poynter explained, there is no change of circumstances if the claimant wants to continue to receive housing benefit without any break in continuity. Secondly, a provision that the authority does not have to consider a fact does not preclude it from doing so. Thirdly in the present case the application to terminate benefit and the claim for a new benefit immediately to follow were in the same fax – the claim for new benefit was not subsequent to the application to terminate the existing award but contemporaneous with it.

12. Reliance has been placed in this appeal on dicta of Arden LJ in *Wood v Secretary of State*, R(DLA) 1/03, where she was dealing with the construction of regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, which are in terms similar to regulation 7 of the 2001 Regulations. Regulation 6(2) of the 1999 Regulations sets out the basis on which

the Secretary of State could supersede an earlier decision. At paragraph 57(ii) Arden LJ stated that regulation 6(2) "set out threshold criteria but not outcome criteria. Applications which do not meet these criteria do not have to be actioned under section 10 and give rise to no right of appeal."

13. I do not see how this assists the claimant. Firstly, Arden LJ was in a minority in taking this view, disagreeing with the contrary approach of Rix and Dyson LJJ both of whom held that a failure to take action would lead to a right of appeal – the same approach as that standardly adopted by the Upper Tribunal. Secondly, the claimant's representative relies on this dictum to suggest that the tribunal conflated thresholds and outcomes "in that it considered that a fresh claim for benefit would in all probability lead to an award of benefit, and this would lead to a result that would suggest that there had been no relevant change of circumstances which could have resulted in the withdrawal of the previous award." The question whether the new claim would lead to an award is not the issue. The point is that by claiming benefit again without a break the claimant was making it plain that he had not decided that he did not want the benefit – the change of circumstances that would enable the decision maker to make the superseding decision – but rather that he did want to remain on housing benefit.

14. I note that in CH/999/2010, the claimant's appeal also failed. As the claimant's representative has observed in relation to that case, it was not on all fours with the present case in that the claimant did not, as Judge Ramsay put it in that case, "explicitly withdraw her existing claim and make a new claim." The reason was said by the Judge to be that this would involve the loss of at least one week's benefit. I accept the submissions of the claimant's representative that I am not bound to follow Judge Ramsay in her interpretation of the regulations. Her references to the "existing claim" are plainly inexact and should have been to the existing award for the reasons already given. So too, she appears to proceed on the basis that an express withdrawal of a claim is sufficient without more to bring entitlement to an end, whereas for the reasons I have given, which are essentially the same as those given by Judge Poynter, the withdrawal was only effective as a ground for the existing award to be superseded.

15. As Judge Ramsay points out, under regulation 76(1) of the 2006 Regulations, a person who makes a claim for housing benefit and is otherwise entitled to it shall be entitled to that benefit from the benefit week following the date on which his claim is or is treated as made. It is unnecessary for this purpose to consider whether Judge Poynter was right in treating the previous award as ending at the very beginning of Monday rather than the very end of Sunday, a distinction that I have some difficulty with. The claim cannot be treated as made before the Monday because, if it was, then the ground for supersession would go as the claimant would not want to stop receiving housing benefit. Once it is only made or treated as made on the Monday then entitlement only begins the following benefit week.

(signed on the original) **Michael Mark**
Judge of the Upper Tribunal
6 December 2012