PLH *Commissioner's File: CH 1450/04*

# SOCIAL SECURITY ACTS 1992-2000

## APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

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| *Appellant:* | London Borough of Lambeth |
| *Respondents:* | (1) *[the claimant]* |
| | (2) Secretary of State |
| *Claim for:* | Housing Benefit |
| *Appeal Tribunal:* | Sutton |
| *Tribunal Case Ref:* | |
| *Tribunal date:* | 8 July 2003 |
| *Reasons issued:* | 16 October 2003 |

**[ORAL HEARING]**

1. This appeal by the housing benefit authority is allowed, as in my judgment the Sutton appeal tribunal consisting of the chairman Mr J P Singh sitting alone on 8 July 2003 was in error in law in treating the question of revising a decision by the authority on 4 June 1998 to terminate the claimant's housing and council tax benefits as within the tribunal's jurisdiction under paragraph 6 of Schedule 7, **Child Support Pensions and Social Security Act 2000**. I set the tribunal's decision aside and in accordance with paragraph 8(5)(a) of Schedule 7 substitute the decision I am satisfied it ought to have given, namely that the authority's decision of 8 May 2002 refusing to carry out such a revision was not one that could be appealed to an appeal tribunal under the Act. However as suggested in the very helpful written submission of Ms F Gigg on behalf of the Secretary of State dated 17 June 2004 at pages 141-142 I refer the case again to the authority for it to consider making such a revision, as for the reasons given below I consider that is a course it can and should adopt.

2. I held an oral hearing of this appeal which had been directed at the request of the claimant. The authority appeared by two members of its housing department, Mr M Iyekekpolor and Mr C Danvers, each of whom addressed me in support of its appeal. The claimant appeared by Mr L Carr of the North Lambeth Law Centre who has been acting as her representative throughout. The Secretary of State had elected to be joined as an additional respondent in accordance with a direction given by the legal officer, and appeared by Andrew Sharland of Counsel, instructed by the Solicitor to the Department for Work and Pensions.

3. This is another case in which the complex and interlocking provisions for reassessing housing and council tax benefit wrongly overpaid to a person as an income support claimant, coupled with the procedural changes wrought by the 2000 Act, have given rise to confusion for claimants, local authorities and appeal tribunals alike. The brief history as it is now known to be, which is not disputed, is that the claimant, a lady now aged 37, had been claiming and was awarded income support over a continuous period since 4 June 1993 down to middle or late February 1998. Such an income support award is an automatic passport to housing and council tax benefits as well, and over the same period the claimant had been awarded and paid those benefits pursuant to successive claims she made as an income support recipient on 3 June 1993, 1 September 1994, 15 November 1995, 8 October 1996, and 9 June 1997: see the witness statement dated 12 August 1998 at pages 18 to 21.

4. In March 1998 the benefits agency discovered that for a substantial part of the time the claimant had been drawing income support she had also been doing paid work in a laundry without notifying them. This had the result that her income support entitlement was reassessed and redetermined at nil for the two periods from 9 July 1993 to 9 June 1994, and 1 October 1994 to 17 February 1998, though she still kept a reduced entitlement for the intervening period of 10 June to 30 September 1994 when she was off work having a baby: see the benefits agency recalculation with the redetermination of her income support entitlement issued to her on 17 March 1998 (pages 22-26).

5. When an income support entitlement has to be reassessed retrospectively in that way the relevant local authority also needs to be notified so the effect on any housing or council tax benefit entitlement over the corresponding period can be reconsidered as well. In the present case the department sent the authority a notification on 23 March 1998 (page 48) but unfortunately what it said was factually incorrect. It wrongly informed the authority that the claimant had had *no* entitlement to income support whatever for the entire period from 9 July 1993 to 17 February 1998, omitting to mention the retained entitlement from 10 June to 30 September 1994 which, though reduced, was still sufficient to qualify her for housing and council tax benefits for those weeks. The authority was not sent a copy of the actual recalculation and based its subsequent actions on the unqualified statement that the claimant had been entitled to no income support at all for any part of the period from 9 July 1993 to 17 February 1998. On that basis, and in accordance with the housing benefit regulations as then in force, it carried out a review of her housing and council tax benefit entitlement and revised them both retrospectively to nil for the entire period 12 July 1993 to 22 February 1998. It issued a determination letter to that effect dated 4 June 1998, which told the claimant her

benefits for that period had been revised to nil and £2,386.91 council tax and £11,160.98 housing benefit were legally recoverable from her: see the copy produced at the tribunal at pages 91 to 95.

6. Although the letter of 4 June 1998 notified the claimant of her right to request a further review of that determination she does not appear to have done so: at any rate it was not changed under any of the review or appeal procedures in force at the time. Fraud proceedings were instituted against the claimant in respect of her working while claiming income support but it transpired that the family credit due to her in any event while working would have been greater than the income support she drew, so there was no net overpayment of benefit and she was not required to repay any of the £12,000-odd income support received incorrectly: see the calculation on page 53.

7. No further action seems to have been taken about her housing benefit or council tax benefit until after the new provisions of the 2000 Act came into force on 2 July 2001. Then on 17 April 2002 Mr Carr wrote on the claimant's behalf to the authority (page 27), requesting in terms

> **"revision on the ground of "official error" of the decision dated 3rd June 1998 which determined she was overpaid Housing Benefit and Council Tax Benefit for the period 12th July 1993 to 22nd February 1998."**

Mr Carr's letter enclosed a copy of the income support overpayment schedule of 17 March 1998, and pointed out that this confirmed she had remained entitled to income support, albeit at a reduced rate, from 10 June 1994 to 30 September 1994, so the assumption that she had not been entitled to income support at all over the period covered by the decision of June 1998 was erroneous. On that ground he requested that the decision be revised and the amount of the overpaid benefit recalculated accordingly.

8. On 8 May 2002 the authority issued a decision letter refusing to carry out such a revision. It denied the existence of any official error, and also denied there had been any valid claim for the relevant period as none of the five claim forms covering the period June 1993 to June 1998 inclusive had disclosed the fact that the claimant was working: consequently in the authority's view all had to be treated as defective (pages 28-29). That was the decision against which the claimant sought to appeal. The letter of appeal dated 31 May 2002 at page 30, submitted on her behalf by Mr Carr, reiterated the ground that she had been entitled to income support from 10 June to 30 September 1994, so the decision to take away the whole of her benefits for 12 July 1993 to 22 February 1998 on the basis that she was not entitled to income support for any part of that period was clearly based on an official error and ought to be revised.

9. The case finally came before the tribunal for effective hearing on 8 July 2003, after two adjournments to clarify the position of the parties on the jurisdiction point. In the meantime it appears to have been agreed that the claimant's continuing entitlement to income support from 10 June 2004 extended beyond 30 September 1994 and continued down to 16 March 1995: page 81. At the effective tribunal hearing the arguments for the claimant were accepted and the chairman proceeded on the basis that he did have jurisdiction to deal with the appeal despite the authority's contentions to the contrary. He held the decision of 4 June 1998 should be revised so that housing and council tax benefit had been overpaid to the claimant only for the two periods 12 July 1993 to 9 June 1994 and 17 March 1995 to 22 February 1998; her housing and council tax benefits for the intervening period from 10 June 1994 to 16 March 1995 had been wrongly taken away in June 1998 and the authority in May 2002 ought to have revised that, after the official error about the income support entitlement had been pointed out.

10. By the time of the hearing before me of the authority's appeal against that decision, all parties were agreed that the chairman had been shown by later authority to have misdirected himself about his jurisdiction, and on that ground his decision had to be set aside as erroneous in law. I have to accept those submissions. As is now clear from the decision of the Tribunal of Commissioners in **R(IS) 15/04** paragraphs 65-73, affirmed by the Court of Appeal in ***Beltekian v Westminster City Council and Secretary of State*** [2004] EWCA Civ 1784, 8 December 2004, there is no right of appeal to an appeal tribunal under schedule 7 of the 2000 Act against the refusal of an authority to exercise its powers of revision under regulation 4(2) **Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations** 2001 SI No. 1002. The only legal remedy against an authority which wrongly declines to exercise, or consider exercising, its powers of revision for "official error" under regulation 4(2) (where, as here, it is too late to apply for a revision under regulation 4(1)) is by way of application for judicial review; which currently requires proceedings in the High Court and is outside the jurisdiction of tribunals and Commissioners. It was therefore wrong as a matter of law for the tribunal chairman to purport to determine in a binding way whether the 1998 decision on the claimant's benefit entitlement should be revised for official error; even though, as Ms Gigg's submission very fairly points out, the substance of what he actually said on the question was sound, and as the Secretary of State agrees this was in fact a case requiring such a revision.

11. I must therefore set aside the tribunal's decision for excess of jurisdiction; but I will nevertheless go on to record my own conclusions on the questions of official error and revision on the facts of this case, as they were fully argued before me and both

the claimant's and the local authority representatives expressed the wish that I should do so, in the hope that some (necessarily informal) guidance can save the same matters having to be relitigated much more expensively on a judicial review application.

12. To recapitulate briefly, the awards of housing and council tax benefit made successively to the claimant over the five years from the beginning of June 1993 on the basis of her claims as an income support recipient were all reviewed and revised down to nil by the authority's decision of 4 June 1998. That was done in exercise of its powers in regulation 79 of the housing benefit regulations as they then stood, the ground being that the original determinations had been based on the authority's mistaken belief that the claimant was at the time properly entitled to income support. By regulation 79(3)(b) the decision of 4 June 1998 therefore had effect in place of each of the original determinations on the claims for housing and council tax benefit.

13. For the purposes of the new decision and appeal procedure which came into force under the 2000 Act from 2 July 2001 that substituted decision on the original benefit claims was thus a "relevant decision" under paragraph 1(2) of Schedule 7, and an "original decision" within the scope of the authority's powers to revise such decisions under regulation 4 of the 2001 regulations cited above. It is common ground that there can be no question of any such revision under regulation 4(1), because no application for that was made to the authority within the prescribed time under regulation 4(1) or any possible extension of it under regulation 5. (For the sake of completeness, as this was raised as a possibility by the chairman on one of the tribunal adjournments though not argued before me, I confirm that there can also be no question of the time limit for revision under regulation 4(1) being extended under regulation 2 of the **Decisions and Appeals (Transitional and Savings) Regulations** 2001 SI No. 1624. Although the application by Mr Carr on the claimant's behalf of 17 April 2002 preceded the cut-off date under transitional regulation 2(5), the remaining conditions for extension of time under regulation 2(7) cannot be met: there is nothing to show it was "impracticable" to have applied under the review board procedure within six weeks of the original decision.)There having been no valid application for a revision under regulation 4(1) within the time allowed, it follows that this case must fall outside the special provision in regulation 18(3)(b) of the D&A regulatioans enabling an appeal to be brought against an earlier original decision on the refusal of an application to revise it, which is the reason the case also falls outside the jurisdiction of the appeal tribunal: **R(IS) 15/04**.

14. However as that case and the ***Beltekian*** decision in the Court of Appeal approving it also made clear, that does not preclude the authority as a responsible public

authority having a duty to consider a revision for "official error" under the alternative power in regulation 4(2) which is without time limit, in any case where facts showing the need for such a revision are brought to its attention, quite apart from the application procedure under regulation 4(1). If after such facts had been brought to its attention a public authority wrongly refused to consider exercising the power available to it under regulation 4(2) so as to put the matter right and correct an earlier official error that would be a ground for judicial review; and by the same token, it would in my view be acting improperly if it nevertheless sought to proceed to enforce recovery of allegedly overpaid benefit under an original decision made on a basis now shown to be incorrect.

15. For these purposes the existence of an "official error", and thus the correctness or otherwise of the decision of 4 June 1998, and any recovery action taken in pursuance of it, must be judged in accordance with the facts and the law as they are *presently* known to be, not as they may have mistakenly been thought at the time. Therefore it is sufficient to make this a case for revision, as in my view the Secretary of State correctly suggests in the written submission of 17 June 2004, that the decision of 4 June 1998 was based on the statement of 23 March 1998, which is now known to have been factually incorrect in saying that the claimant had no income support entitlement at all for any part of the period 9 July 2003 to 17 February 1998. That statement was given by an officer acting on behalf of the Secretary of State so the factual error it contained was thus clearly an "official error" in terms of regulation 1(2) of the decisions and appeals regulations.

16. Moreover whatever might have been thought at the time about how much difference that error made to the claimant's housing benefit or council tax benefit, there is now no doubt that the consequence of correcting it ought to have been that the recalculation of her entitlement (and of any amount recoverable from her in consequence) should have reflected the *true* fact of her continuing entitlement to income support as now understood and agreed for the period 10 July 1994 to 16 March 1995. That applies even to periods before 2 October 2000 when the old version of regulation 104 of the housing benefit regulations was in force, and whether or not any additional or corrected claim would have been required to secure such an entitlement at the time. It is immaterial that if the authority had sought advice at the time it might have been given a different answer: in now considering any exercise of its revision powers it is bound to apply, even as regards the past, the law as stated by the Court of Appeal in **R(H) 5/04** ***Adan v London Borough of Hounslow*** [2004] EWCA Civ 101, where an earlier decision to the contrary in ***ex parte Lord*** was held to have been wrong in law.

17. The appeal is allowed and the case remitted to the authority to reconsider the use of its revision powers accordingly.

*(Signed)*

**P L Howell**
**Commissioner**
**15 April 2005**