

Bullch, 190
E.H. n. 5

CH 1791 2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision

1 I allow this appeal. For the reasons given below, the decision of Liverpool appeal tribunal given on 10 February 2004 is erroneous in law. I set it aside and, under paragraph 8(5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, I refer the case to a differently constituted tribunal for determination in accordance with the law as I explain it in paragraphs 24 to 30 below and the directions which I give at paragraph 31 below. **Those directions are addressed to the parties as well as to the tribunal and I draw the attention of the parties to the time limits that I have imposed.**

Background to the appeal.

2 This is an appeal by the claimant. The respondent is Liverpool City Council ("Liverpool"). The tribunal's decision confirmed an earlier decision, given by the respondent on 17 June 2003, that the appellant did not have continuous good cause for his failure to claim housing benefit during the period between 12 January 2003 and 30 March 2003. In reaching that decision, the tribunal also refused an application by the appellant's representative for an adjournment. I consider the circumstances surrounding that application in more detail below.

3 Leave to appeal to the Commissioner was given by a District Chairman on 30 April 2004.

4 Neither party has requested an oral hearing of the appeal to the Commissioner and I am in any event satisfied that those proceedings can properly be determined without such a hearing.

The Facts.

5 The appellant is a man who, at the date of the local authority's original decision, was 30 years old. He is in receipt of long-term incapacity benefit. On 6 May 2002, he moved into supported accommodation run by an organisation to which I will refer as "the Landlords". I infer from this that the appellant is a person who would be vulnerable if he were to live in the community on his own. Such an inference is required because the papers do not contain any evidence as to the nature of the appellant's illness or disability or as to the reasons why he moved into supported accommodation or as to the support that he receives there.

6 The appellant's new accommodation was within Liverpool's administrative area and it appears that at some point, either before or shortly after he moved to his new home, the appellant claimed housing benefit from Liverpool and was awarded that benefit for a benefit period that expired on 12 January 2003. Again, I have had to reconstruct this sequence of events by inference from references in other documents because no copy of the original claim form, or of the letters notifying the appellant and/or the Landlords of the award which was made, appear in the papers.

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7 Liverpool says that on 18 October 2002, in anticipation of the forthcoming end of the appellant's benefit period, it issued him with a renewal claim form in the normal way. Although Liverpool did not highlight the point in its written submission to the tribunal, it would appear that it is also the council's case that, on 7 December 2002, computer-generated notices warning of the impending expiry of the benefit period were sent both to the appellant and to the Landlords (see the annotated computer print-out which appears at page 26 of the appeal papers).

8 The appellant did not make a renewal claim to housing benefit either before the expiry of his benefit period on 12 January 2003 or within the period of 4 weeks after the end of that period which, under regulation 72(13) of the Housing Benefit (General) Regulations 1987 ("the Housing Benefit Regulations") would have entitled him to backdating without having to prove good cause. He did make a further claim for benefit—it appears from the papers that this was on 31 March 2003—and requested that that claim should be backdated so as to reinstate his benefit "from the date it was stopped". No reason was given for the delay in claiming other than that he had lived at the same address since 6 May 2002.

9 On 9 June 2003, Liverpool notified the appellant that it had decided not to backdate his claim. The stated reasons for that decision were as follows:

"The reasons for not backdating are that although your claim expired on 12/1/03 we did not receive an application until 31/3/03 despite a renewal application being sent to you on 18/10/02.

Another factor involved in making this decision is that a considerable amount of your rent covers "support costs". We therefore regret that backdating cannot be awarded as no contact was made by those paid to support you despite rent arrears building up."

10 On 19 June 2003, the appellant, through his solicitors, appealed against that decision. The stated grounds for appeal were in very general terms—effectively alleging that no reasonable local authority could properly have refused backdating on the facts of this case. Except as stated in paragraph 8 above, the appellant had given no reason for his delay in claiming, so at that stage those grounds had no possible hope of success.

11 On receipt of the appeal, Liverpool made further enquiries into the background and it became clear that the appellant's case was that he had not received the renewal claim form that, according to Liverpool's case, was sent to him on 18 October 2002. By implication, it was also the appellant's case that neither he nor the Landlords had received the computer-generated letters that Liverpool alleged were sent on 7 December 2002. The appellant's solicitors explained that the problem with the appellant's benefit was discovered when the Landlords, noticing that payments of benefit had stopped and that the appellant's rent arrears were rising, delivered a rent schedule to Liverpool on 2 February 2003 and queried why payments had ceased. The appellant's solicitors went on to say that:

“It would appear that in the latter part of February the landlord was contacted by the authority who confirmed that while they did hold the rent schedule provided the client’s claim to benefit had expired, the client having subsequently submitted a renewal application in early March 2003.”

The last clause of that passage may have been factually incorrect. The renewal claim appears from the papers to have been submitted not “in early March 2003” but on the very last day of that month.

12 On 11 September 2003, Liverpool wrote to the solicitors and informed them that, having considered the further evidence and submissions made on behalf of the appellant, it was not prepared to change the decision of 9 June 2003 and was therefore arranging for the matter to be sent to the Appeals Service.

13 The appeal was actually submitted to the Appeals Service on 24 December 2003. At the same time, a copy of the appeal submission was issued to the solicitors (see their letter dated 9 January 2004).

14 On 8 January 2004, the appellant completed a TAS 1 Appeals Service enquiry form. He stated that he did not want to withdraw his appeal and named the solicitors as his representatives. However, he did not say whether he wanted an oral hearing or a hearing on the papers.

15 The Appeals Service received the TAS 1 on 12 January 2004. As the appellant had not elected to have an oral hearing, it would have been entirely proper for the appeal to have been listed before a tribunal for consideration on the papers. However, that course was not taken. Instead, on 13 January 2004, the appeal was listed for an oral hearing on 10 February 2004 and the parties were notified of that hearing date on the same day.

16 On 6 February 2004 the solicitors wrote to the Appeals Service requesting an adjournment of the hearing. The Appeals Service received that letter on 9 February 2004. Despite the urgency of the application, it does not appear that a copy of the letter was sent by fax. The stated grounds for the application were as follows:

“The decision maker’s submission places particular emphasis on the fact that the claimant occupies supported accommodation, contending that it is widely accepted that support services include the monitoring of incoming housing benefit payments. It is also said that as a consequence of the scheme not having identified the cessation of payment of housing benefit it should not seek to recover rent liability for the relevant period. Having undertaken discussions with the supported accommodation provider they have confirmed that they are willing to provide a witness who can from their own knowledge give evidence as to what responsibilities are encompassed within our client’s support service package, and can provide evidence as to the local authority routinely permitting delays of 3 to 5 months in the making of payments of benefit, as a consequence of which the

scheme had presumed that the non-payment in the instant case was merely a further example of the delay that routinely occurred. However, their witness cannot be available on the appointed date of hearing and we therefore request that the hearing be adjourned, and the matter be re-listed for hearing on a date which would permit the witness to attend and give evidence which is material to the issue to be determined.”

The proceedings before the tribunal

17 That application was put before the tribunal on 10 February 2004. Although no decision granting a postponement had been made, nobody from the solicitors attended the hearing. Neither did the appellant (although it may be that his illness, disability or vulnerability prevented him from doing so). Liverpool was represented by a presenting officer. The tribunal considered the application to adjourn and the submissions on that application by the presenting officer. It decided to refuse the adjournment and to proceed with the appeal. The reasons given in the decision notice for that refusal were that:

“the reasons for the request related to matters other than the decision under appeal”.

In the tribunal’s statement of reasons, that refusal is explained in more detail on the basis that:

“the tribunal decided that an adjournment to enable a witness to attend to explain the difficulties experienced by [the Landlords] would not further the matter. This evidence could only relate to the administration of benefit rather than entitlement or the period of the award.”

18 Having decided not to adjourn, the tribunal then proceeded to consider and dismiss the appeal. It found that “there is no cause why the claim should be backdated”. On the decision notice, the tribunal’s reasons were summarised as being that:

“[The Landlords] had provided professional support to the appellant in connection with his application for HB. They were notified of the expiry date and warning letters were sent.”

In the statement of reasons the following further explanation is given:

“1. The appellant was told in October 2003 [*which is clearly a typographical error for October 2002*] that his award was due to expire in January 2003 and that he should complete an application form.... He was also given a reminder on 7 December 2002 and a letter was also sent to ... [the Landlords] who received the payments of housing benefit direct from the local authority. [The Landlords are] a professional organisation that provides support and care to clients. [The Landlords] also helped the ... [*at this point all the copies of the full statement both on the Appeals Service file and in the Commissioners’ bundle have been*

photocopied so that no more of paragraph 1 can be read. A line—or perhaps two lines—has been omitted].

2. A claim may be backdated if the appellant can show that he had continuous good cause for his failure to make the claim at the appropriate time. Regulation 65(1) Housing Benefits (General) Regulations 1987. The tribunal accepts that the appellant relied on [the Landlords] to assist him with his application for benefit. However it is the responsibility for [the Landlords], as a professional organisation providing care and support for vulnerable people, to ensure that claims are made at the appropriate time. The council had sent a renewal application form and a reminder to both parties. Any allegations of mal-administration by the council in connection with payment of benefit, referred to by the appellant's solicitors in their letter dated 6 February 2004 are not within the scope of the tribunal.

3. The tribunal therefore determined that the appellant and his agent had been given sufficient reminders of the date of expiry of the award and that the appellant had not shown continuous good cause for the failure to apply for renewal until March 2004. The claim could not be backdated.”

The application to adjourn.

19 In the grounds for appeal, the appellant's solicitors alleged that the tribunal erred in law by refusing to adjourn. In particular, the appellant complains that the alleged responsibilities of the Landlords formed a central reason for the disallowance of the appeal but that by refusing the adjournment, the tribunal had unfairly put it beyond its power to receive evidence as to the true extent of those responsibilities from the person best placed to give that evidence. The solicitors contend that, even having made an initial decision to refuse the adjournment, the tribunal should have reconsidered that question once the thrust of the local authority's submissions had become clear and the tribunal realised that the alleged responsibilities of the Landlords were to form their main ground for the dismissal of the appeal.

20 Regulation 51(4) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 confers a wide discretion on a tribunal to grant or refuse an adjournment. How that discretion should be exercised in any given case is a matter for the tribunal to decide, provided that the discretion is exercised judicially. A refusal of an adjournment will only amount to an error of law—and the Commissioner will therefore only set aside a tribunal's decision on the basis of such a refusal—if the tribunal took into account an irrelevant matter, failed to take into account a relevant matter, or came to a conclusion which was perverse (see the decision of Mr Commissioner Bano in *CIS/2292/2000* at paragraph 9).

21 In this appeal, the tribunal refused the adjournment because it considered that the evidence of the Landlords employees “related to matters other than the decision under appeal”. In my judgment, that was not correct and therefore involved taking into account an irrelevant

matter. As the solicitors point out, a major—if not the main—factor in the tribunal’s decision was its finding that the Landlords had not carried out their professional responsibilities to support the appellant in his application for benefit. If that is to be a ground for the decision, then I do not see how it can also be said that evidence from the Landlords’ employees was not relevant. The proposed evidence did not relate merely to “the administration of benefit” but also to the precise package of support given to the appellant. It may perhaps be that the Landlords’ employees would have said it was no part of their responsibilities to this particular client to help him with benefit matters. The tribunal would not necessarily have been obliged to accept such evidence had it been given, but it cannot be said that it would not have been relevant.

22 Moreover, even if the evidence had related solely to administrative matters, it is not necessarily the case—for the reasons which I give at paragraph 29 below—that it would have been irrelevant to what the tribunal had to decide.

23 If the tribunal’s reasons for refusing the adjournment had been the only error in its decision, I might—at least in the circumstances of this appeal where other factors were present on 10 February 2004 which might have justified the tribunal in refusing an adjournment—have dealt with it by substituting my own decision to the same effect. However, that is not the only error. The tribunal has also erred in the application of the substantive law governing the appeal.

Continuous good cause

24 The provision that requires the local authority to backdate a claim if there is continuous good cause for the delay in claiming is regulation 72(15) of the Housing Benefit Regulations (and not regulation 65(1) of those regulations as stated by the tribunal). The test of good cause is that laid down by the Tribunal of Commissioners in *R(S) 2/63* and approved by the Court of Appeal in *Chief Adjudication Officer v. Upton* [1997] 2 CLY 4668, namely:

“...some fact which, having regard to all the circumstances (including the appellant’s state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did.”

That test was developed in the context of other social security benefits but there is now ample authority that it also applies to housing benefit. I refer in particular to the decision of Mr Commissioner Williams in *CH/2659/2002*. In that decision, the Commissioner stated (at paragraph 24) that:

“it may be necessary, and it will always be best practice, for a tribunal to remind itself and the parties of the key test from *R(S) 2/63* and to show, if asked to give its reasons, how it has applied it.”

In this appeal, whilst Liverpool’s submission quoted the text of regulation 72(15), it made no reference to the test in *R(S) 2/63*: the documents originating from the solicitors are similarly silent. Neither the tribunal’s decision notice nor its Statement of Reasons refers expressly to that

test and the reasons given by the tribunal for its conclusions strongly suggest that it did not apply it correctly.

25 In my judgment, this appeal was one of those referred to by Mr Commissioner Williams in *CH/2659/2002* in which express reference to the test from *R(SB) 2/63* was necessary. The tribunal's failure to remind itself of the *R(SB) 2/63* test led to its misapplying the law by concentrating on the issue of whether *the Landlords* had behaved properly or reasonably, rather than on the correct issue of whether or not the *appellant* had demonstrated continuous good cause for his delay in making his claim. It may be—I do not know—that the appellant's state of health or vulnerability was such that it was reasonable for him to have left the administration of his benefit affairs in the hands of the support workers at the accommodation where he lived. That possibility is, if anything, strengthened by Liverpool's repeated assertion that an element of the rent that he pays is intended to reimburse the Landlords for providing precisely such support. If that is what happened, and if it was reasonable for the appellant to have placed his affairs in the hands of the Landlords, then he may have established good cause even if—and I have no reason to suppose that this is the case—the Landlords subsequently failed in their obligations to him. That is because the test is whether he has behaved reasonably in all the circumstances, not whether the Landlords have done so.

26 If, on the facts, there has been a delegation to the Landlords, the existence of good cause will also depend (among other things) on what (if any) action it would have been reasonable for the appellant to have taken to ensure that the Landlords were in fact dealing with his affairs in the manner which he expected. A claimant is:

“not entitled to leave to others the making of the claim, and take no further interest in the matter. It is [his] duty to follow up the matter for [him]self, so far as [he] can reasonably be expected to do so, having regard to [his] condition and circumstances” (see *CG/207/49* paragraph 5, approved in *R(G) 9/52* paragraph 11)

Of course, whether or not it was reasonable for the appellant to have acted as he did is a matter of fact that will depend on his precise state of health and vulnerability and the nature of the arrangements that he has with the Landlords. The failure by the appellant, or those acting for him, to adduce evidence of his state of health, of his experience of the benefits system and of the reasons why it was necessary for him to live in supported accommodation means that the tribunal cannot be criticised for failing to make detailed findings of fact on those issues, but its focus should nevertheless have been on the appellant, not his landlords.

27 At one point in the statement of reasons, the tribunal refers to the Landlords as the appellant's “agent”. The reasoning behind that characterisation is not stated and, in my judgment, the evidential basis to demonstrate that the Landlords were the appellant's agent as opposed to his advisers or helpers is entirely lacking. Given the terms of regulation 71 of the Housing Benefit Regulations, and in particular, the absence of any formal appointment under regulation 71(3), it is not clear to me how considerations of agency would have been relevant to what the tribunal had to decide even if the existence of an agency had been established on the facts.

28 I need also to deal with the tribunal's assertion that the evidence which the appellant's solicitors wished to adduce of past problems with the administration and payment of housing benefit by Liverpool was not relevant because it dealt with matters pertaining to "the administration of benefit".

29 As explained at paragraph 24 above, the test of good cause involves consideration of whether a claimant has behaved as a reasonable person. His previous experience of the benefit system, including the way in which housing benefit or council tax benefit has historically been administered in the area in which he lives, is potentially relevant to that assessment of reasonableness. In some local authority areas, the administration of housing benefit has sometimes been less quick and efficient than those involved would have preferred—and, indeed than was required by the Regulations. The experience of some claimants in those areas was one of long delays—which were often unexplained by any communication from the authorities concerned—followed by large payments of arrears when the claim was eventually assessed. It is possible that a reasonable claimant with that experience of the benefits system would behave differently from an equally reasonable claimant in a different area whose experience was one of prompt and accurate decision-making and payment. If the appellant's previous experience of claiming housing benefit from Liverpool reasonably led him to believe that the cessation of payment in his case was, as his solicitors allege, "merely a further example of the delay which routinely occurred" rather than a circumstance which should have alerted him to the need to make a further claim, that may be a relevant factor in establishing whether or not he has good cause for his delay in claiming.

30 I would only add that it is the particular experience of the individual claimant—or of those known personally to him or her—which is potentially relevant to the issue of backdating. An assertion of previous delays in the administration of an individual's benefit will be more persuasive if it is supported by documentary evidence such as letters to and from the authority during the period in question. General evidence of overall delays or maladministration by a local authority will not normally be relevant because the legal test for good cause goes to the reasonableness of the claimant's behaviour, not the authority's.

Directions.

31 I therefore refer the appeal to a differently constituted tribunal with the following directions:

- (a) Liverpool is to file a further submission enclosing copies of:
 - (i) The appellant's original claim for housing benefit in 2002;
 - (ii) Copies of any letters which it says were sent to the appellant and/or the Landlords at the time of the first award of housing benefit and notifying them of the date on which the benefit period was to end

- (iii) A copy of the letter that is said to have been sent to the appellant in October 2003 enclosing a renewal claim form.
 - (iv) Copies of the letters that it is alleged were sent to the appellant and the Landlords on 7 December 2002.
- (b) That submission is to be received by the Appeals Service no later than **one month** from the date on which this decision is sent to the parties by the Commissioners' Office. If it is not possible for Liverpool to produce copies of the actual letters then they should provide specimen copies of the type of letter that would have been generated by their computer system together with a printout of the relevant part of their database showing when those letters would have been sent and what information they would have contained. Any computer printout submitted must be annotated or otherwise explained so as to enable it to be understood by people who do not have a detailed understanding of the particular computer system operated by Liverpool or of the housing benefit system in general.
- (c) The evidence to be put before the tribunal on behalf of the appellant is a matter for him and for his representatives. However, I would strongly suggest that, given the terms of the test in *R(S) 2/63*, it may be in the appellant's interests for the tribunal to have some evidence of the nature of his incapacity, of the nature of the vulnerability which has led him to be taken into supported accommodation and of the precise package of support which is given by the Landlords. Even if officers employed by the Landlords are not free to attend any oral hearing, such evidence could be provided in the form of a copy of the appellant's tenancy agreement and/or any service agreement between him and the Landlords. If such written evidence is to be produced, the Appeals Service should receive it no later than **two months** from the date on which this decision is sent to the parties.
- (d) The appeal should then be listed for an oral hearing at which the tribunal must consider and apply the test in *R(S) 2/63*, making findings of fact in relation to all relevant issues, so far as the evidence permits it to do so. The description of the facts that I give at paragraphs 5 to 16 above is not binding on the tribunal and may be contradicted by other evidence that subsequently becomes available. The weight to be attached to the evidence and the application of the test in *R(S) 2/63* to the facts that it finds are matters for the tribunal. However, the tribunal may find it helpful, so far as the evidence permits, to consider the following specific matters:
- (i) What were the precise nature and extent of the arrangements between the Landlords and the appellant? If it is decided that the Landlords were acting as the appellant's agent, the reasons for that conclusion and the facts on which it is based should be set out in the tribunal's statement of reasons (if such a statement is requested) and the relevance of that conclusion to the tribunal's decision should be explained.

- (ii) If the appellant did delegate the making of his claim to the Landlords, what (if any) steps did he take to ensure that the Landlords had acted in accordance with his instructions? What (if any) steps would a reasonable person of the appellant's age and experience have taken in the same circumstances?
- (iii) When the appellant was first awarded housing benefit, did Liverpool send him and/or the Landlords a letter telling him that that award would expire on 12 January 2003? If so, did he and/or the Landlords receive that letter?
- (iv) Did Liverpool send the appellant a renewal claim form on 18 October 2002? If so:
- What was said in the covering letter?
 - Did the appellant receive it?
 - If so, what did he do with the letter and form?
- (v) Did Liverpool send the appellant and/or the Landlords a computer-generated letter on or about 7 December 2002 notifying them that the appellant's entitlement to benefit was shortly to expire? If so:
- Did the appellant and/or the Landlords receive those letters?
 - If so, what action did they take as a result?
- (vi) If the situation is that (at any relevant time) the appellant and/or the Landlords did not know that appellant's benefit would expire—or had expired—on 12 January 2004, when did they discover that fact and what action was taken in consequence?
- (vii) On what date was the claim for benefit (including the claim for backdating as that phrase is defined in regulation 72(15) of the Housing Benefit Regulations) ultimately made?
- (viii) If—as is maintained by the appellant's solicitors—the Landlords were informed by Liverpool “in the latter part of February” that the appellant had no extant claim for benefit, and if—as appears from the papers—no claim for benefit was made until the last day of March, what was the reason for that delay? Did the Landlords inform the appellant of the position? What action did he take in consequence? What action would a reasonable person of the appellant's age and experience have taken in the same circumstances? The tribunal is reminded that before the appellant's claim for backdating can be allowed *continuous* good cause must be shown.
- (e) Throughout its deliberations, the tribunal is to bear in mind that the issue for it to decide is whether the appellant has behaved reasonably in accordance with the *R(S) 2/63* test and

not whether the Landlords have done so. The Landlords' actions and/or omissions are only indirectly relevant to that question, i.e. as a factor to be taken into account when assessing the reasonableness of the appellant's behaviour.

- (f) These directions are subject to any subsequent directions that may be given by a District or Regional Chairman of appeal tribunals or by the chairman of any tribunal that conducts the rehearing directed at paragraph 31(d) above.

(Signed on the original)

Richard Poynter
Deputy Commissioner

9 December 2004