

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000:

I SET ASIDE the decision of the Stockport appeal tribunal, held on under 12 December 2005 reference U/06/938/2005/01368, because it is erroneous in point of law.

I give the decision that the appeal tribunal should have given, without making fresh or further findings of fact.

My DECISION is the same as the tribunal's save that the landlord is not entitled to receive payment of housing benefit in respect of any period for which benefit has already been paid to the claimant.

I direct that a copy of my decision in CH/3629/2006 be sent to the parties to this appeal along with this decision.

REASONS

2. This is an appeal brought by a local authority with the leave of Mr Commissioner Turnbull against the decision of the appeal tribunal. The other parties are the claimant, his landlord and the Secretary of State. I held an oral hearing in London on 27 March 2007. The local authority was represented by Mr Howard Mason and the Secretary of State by Miss Marie Demetriou, of counsel. I am grateful to the both for their clear, helpful and succinct submissions. The landlord wrote to say that it would not be a profitable use of time to attend. The tenant took no part in the proceedings.
3. The case was heard together with CH/3629/2006, as they shared an issue.

The issues

4. The local authority's grounds of appeal raised four issues. Mr Mason abandoned one at the oral hearing. The 'double payment issue', as it was called, was common to both appeals and, by agreement at the hearing, is dealt with in CH/3629/2006. In this case, I have decided the other two issues.
5. First, I have decided that an appeal to an appeal tribunal against a decision not to pay housing benefit to a landlord is a full rehearing and is not limited to scrutiny of the local authority's decision on judicial review grounds. I call this 'the scope of the appeal issue'.
6. Second, I have decided that a local authority has power to suspend payment of housing benefit when considering whether benefit should be paid to the claimant or the landlord. I call this 'the suspension issue'.

7. Finally, I have commented on the confidentiality of information given to the local authority by the claimant.

The legislation

8. When the decision under appeal in this case was made, it was governed by the Housing Benefit (General) Regulations 1987. Since then, the relevant provisions have been consolidated in the Housing Benefit Regulations 2006. For convenience, I will refer to and quote from the new Regulations. The substance of the law is the same.

The scope of the appeal issue

9. I can state the facts and circumstances that raise this issue shortly.

10. These are the background facts. The claimant became a tenant of the landlord's property in October 2004 and left on 27 June 2005. He claimed and was awarded housing benefit. The benefit was paid to the claimant from the start of his claim until 10 July 2005, when the local authority discovered that he had moved. Payment was suspended from 4 April 2005 to 5 July 2005 for reasons that do not concern this case.

11. This appeal is concerned with the claimant's arrears of rent to the landlord. The landlord wrote to the local authority on 30 March 2005 about arrears of rent that had accumulated since December 2004. That raised the issue whether the local authority should pay housing benefit direct to the landlord. This is governed by regulation 95(1)(b) of the 2006 Regulations:

'Circumstances in which payment is to be made to a landlord

95.-(1) Subject to paragraph (2) and paragraph 8(4) of Schedule A1 (treatment of claims for housing benefit by refugees), a payment of rent allowance shall be made to a landlord (and in this regulation the "landlord" includes a person to whom rent is payable by the person entitled to that allowance)—

...

(b) where sub-paragraph (a) does not apply and the person is in arrears of an amount equivalent to 8 weeks or more of the amount he is liable to pay his landlord as rent, except where it is in the overriding interest of the claimant not to make direct payments to the landlord.'

12. There was no doubt that the rent was in arrears by 'an amount equivalent to 8 weeks or more', so the issue for the local authority was whether it was 'in the overriding interests of the claimant not to make direct payments to the landlord.' The local authority wrote to the claimant and he asked for payments to continue to be made to him because the landlord was failing to do repairs. He later particularised those repairs. He asked that this should not be discussed with his landlord. The local authority decided, without reference to the landlord, that it was in the overriding interests of the claimant to continue to pay the housing benefit to him. This was notified to the landlord by a letter of 4 July 2005. The landlord replied by a letter of 11 July 2005 setting out the history of dealings with the tenant and denied that the claimant had reported any faults.

13. The landlord appealed against the local authority's decision. There is no dispute, following the decision of Mr Commissioner Williams in *CH/2986/2005*, that this was a decision given on an application for supersession and that it was subject to the right of appeal. The presenting officer for the local authority told the tribunal that it was the authority's practice not to divulge details of a claimant's case to a landlord. (I comment on this later.) She also told the tribunal that, if the authority had known the contents of the landlord's letter of 11 July at the time, it would have decided to make direct payments to the landlord. The tribunal allowed the appeal. It took account of the evidence now available. Having done so, it decided that the payment of benefit to the claimant was not in his overriding interests and that the local authority should have decided to make payment direct to the landlord.

14. Mr Mason argued that the local authority's decision under regulation 95(1)(b) was discretionary and that the tribunal had been wrong in law to substitute its own judgment for that of the authority. It should, he argued, have limited itself to considering whether the decision under appeal was defective on judicial review grounds. He relied on the decision of Mrs Commissioner Jupp in *CH/4108/2005*. She wrote:

'6. The tribunal went into considerable detail as to whether it was in the overriding interest of the claimant/tenant not to make direct payments to the landlord. Regulation 93 deals with whether it is in the overriding interest of the claimant for the Authority not to make direct payments to the landlord, as for example where a tenant wishes to withhold rent to try to put pressure on a landlord to do essential repairs. The question of the tenant's overriding interest as set out in Regulation 93 [now regulation 95] must be a question for the Authority's discretion, and thus appealable only on judicial review grounds such as impropriety or illegality. The decision of the tribunal in *R(H) 3/04* on that point has been reinforced by the recent decision of a Tribunal of Commissioners in *CH/4234/2004* (paragraph 39).'

CH/4234/2004 is reported as *R(H) 6/06*.

15. With respect to Mrs Jupp, the passage she cites does not support her reasoning. It is the conclusion of a detailed discussion on the scope of an appeal against a decision whether to recover an overpayment from a claimant or a landlord and reads:

'39. ... a right of appeal against an exercise of discretion that is non-justiciable because the relevant considerations cannot be discerned must be limited to points of law.'

I accept Miss Demetriou's argument that regulation 95 does not confer a discretion on the local authority and that, even if it did, it was one that was justiciable.

16. As to discretion, regulation 95(1) is worded as a duty: 'a payment of rent allowance **shall** be made to a landlord'. That duty does not arise if 'it is in the overriding interests of the claimant not to make direct payments'. That exception may, and usually does, involve issues of fact. It always involves an exercise of judgment. I accept, as Mr Mason argued, that different decision-makers and different local authorities might legitimately exercise their judgment differently on the same facts. But that does not make the judgment a discretion. The essential feature of a discretion is choice, albeit one that may be circumscribed. There is no choice involved in regulation 95. There is the potential for a difference of opinion, but that is a different matter. From the point of view of any particular decision-maker, there is only one

conclusion that can be made and that is determined by the assessment of where the claimant's overriding interests lie. The Tribunal of Commissioners' reasoning on which Mrs Jupp relied did not apply. The tribunal was right to consider afresh where the claimant's overriding interests lay and, given the local authority's concession at the hearing, right to decide as it did.

17. As to the justiciability of any discretion (if there were one), the Tribunal of Commissioners was concerned with the choice of whether to recover an overpayment from a claimant or from a landlord. The legislation did not stipulate any criteria on which that choice was to be based and none was discernible. In those circumstances, an appeal to an appeal tribunal against the local authority's exercise of the discretion could only succeed on judicial review grounds. This case is different. The focus is on the overriding interests of the claimant. That provides both a test for the relevance of the factors taken into account and a touchstone for the exercise of the judgment on those factors. Together those points allow a tribunal to undertake an independent reconsideration of whether the exception applies rather than merely a consideration of whether the decision-maker approached the issue properly in judicial review terms. They allow the tribunal to undertake afresh the assessment that the local authority undertook or should have undertaken. It was not so personal and undefined that it lacked the objective possibility of being repeated by the tribunal. In the language of the Tribunal of Commissioners, the issue is justiciable. Different people might exercise their judgment differently on the same facts. And it would not be possible to draw up an exhaustive list of the factors that could be relevant. But in an individual case, the tribunal will be able to exercise its normal power (*R(IB) 2/04*, paragraph 25) on the evidence available to substitute its judgment for that of the local authority.

18. This does not mean that the way that the local authority exercised its judgment is irrelevant. It is evidence, though not conclusive evidence, that the tribunal is entitled to consider when it exercises that judgment afresh. In practice, its significance will vary according to the facts and the quality of the reasoning on which it was based. In this case, the fact that the local authority's judgment was in the claimant's favour was for naught because of the presenting officer's concession that it could not survive the evidence produced by the landlord.

The suspension issue

19. This issue arises because of a remark made by the tribunal's chairman in his decision notice and repeated in the course of giving his tribunal's reasons. He wrote that the local authority should have made enquiries of the landlord and added: 'They could also, in my view, have suspended payment of Housing Benefit pending their enquiries.'

20. Mr Mason argued that that was incorrect in law. He referred me to the pre-2001 legislation, the legislation that applied from 2001, and to the Circular on the effect of the 2001 legislative changes (HB/CTB A28/2001). Before 2001, the Housing Benefit (General) Regulations 1987 dealt with the withholding of payment (regulation 95) and the suspension of payment (regulation 96A). These regulations were revoked with effect from 2 July 2001, the date when the new adjudication arrangements for housing benefit came into force. Thereafter, Part III of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 applied. Annex B of the Circular states that 'Benefit can no longer be withheld' if 'Rent allowance is withheld pending a determination of whether it is appropriate to make direct payment to a landlord.' Mr Mason had read that as meaning that it is not possible to suspend

payment while considering whether payment should be made to the claimant or the landlord. (I assume that this is how local authorities generally have interpreted the Circular.)

21. The current provisions are in regulation 11 and 12 of the 2001 Regulations:

‘Cases where a relevant authority may suspend

11.-(1) A relevant authority may suspend, in whole or in part-

- (a) any payment of housing benefit or council tax benefit;
- (b) any reduction (by way of council tax benefit) in the amount that a person is or will become liable to pay in respect of council tax,

in the circumstances prescribed in paragraph (2).

(2) The prescribed circumstances are where-

- (a) it appears to the relevant authority that an issue arises whether-
 - (i) the conditions for entitlement to housing benefit or council tax benefit are or were fulfilled; or
 - (ii) a decision as to an award of such a benefit should be revised under paragraph 3 of Schedule 7 to the Act or superseded under paragraph 4 of that Schedule;

(b) an appeal is pending against-

- (i) a decision of an appeal tribunal, a Commissioner or a court; or
- (ii) a decision given by a Commissioner or a court in a different case,

and it appears to the relevant authority that if the appeal were to be determined in a particular way an issue would arise whether the award of housing benefit or council tax benefit in the case itself ought to be revised or superseded; or

(c) an issue arises whether-

- (i) an amount of housing benefit is recoverable under section 75 (overpayments) of the Administration Act or regulations made under that section; or
- (ii) an excess payment of council tax benefit under section 76 of the Administration Act or regulations made under that section has occurred.

Making or restoring of payments or reductions suspended

12.-(1) Subject to paragraph (2), the prescribed circumstances for the purposes of paragraph 13(1)(c) of Schedule 7 to the Act (the subsequent making, or restoring, of any or all of the payments or reductions so suspended) are-

- (a) in a case to which regulation 11(2)(a) applies, where the relevant authority is satisfied that the benefit so suspended is properly payable and no outstanding issues remain to be resolved;
- (b) in a case to which regulation 11(2)(b) applies, an appeal is no longer pending and the benefit suspended remains payable following the determination of that appeal.

(2) Where any of the circumstances in paragraph (1) is satisfied, the relevant authority shall, so far as practicable, make the payment, or as the case may be, restore the reduction within 14 days of the decision to make or restore that payment or reduction.'

22. The enabling authority for those provisions is paragraph 13 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. A comparison shows that the drafting of the regulations closely follows the enabling powers:

'Suspension in prescribed circumstances

13.-(1) Regulations may provide for-

- (a) suspending, in whole or in part, any payments of housing benefit or council tax benefit;
- (b) suspending, in whole or in part, any reduction (by way of council tax benefit) in the amount that a person is or will become liable to pay in respect of council tax;
- (c) the subsequent making, or restoring, in prescribed circumstances of any or all of the payments, or reductions, so suspended.

(2) Regulations made under sub-paragraph (1) may, in particular, make provision for any case where, in relation to a claim for housing benefit or council tax benefit-

- (a) it appears to the relevant authority that an issue arises whether the conditions for entitlement to such a benefit are or were fulfilled;
- (b) it appears to the relevant authority that an issue arises whether a decision as to an award of such a benefit should be revised (under paragraph 3) or superseded (under paragraph 4);
- (c) an appeal is pending against a decision of an appeal tribunal, a Commissioner or a court; or
- (d) it appears to the relevant authority, where an appeal is pending against the decision given by a Commissioner or a court in a different case, that if the

appeal were to be determined in a particular way an issue would arise whether the award of housing benefit or council tax benefit in the case itself ought to be revised or superseded.'

23. It is convenient to begin by putting to one side a fascinating, if somewhat metaphysical, discussion that we had at the oral hearing on the difference between 'making' and 'restoring'. On re-reading the enabling provisions and the regulations, it is clear that 'making' refers to payments of housing benefit and 'restoring' refers to deductions by way of council tax benefit. That is particularly clear in regulation 11(1) and applies throughout the provisions.

24. More difficult is the distinction drawn between regulation 11(2)(a)(i) and (ii), which mirrors the distinction drawn between paragraph 13(2)(a) and (b). What does regulation 11(2)(a)(i) cover that regulation 11(2)(a)(ii) does not? This question may be generated by the way that the regulations have mirrored the enabling provision. The latter gave a menu of possible provisions, which might differ in their scope and even overlap. By adopting all of, rather than from among, the options available, the regulations have created the issue of how (i) and (ii) relate to each other. However the issue has arisen, the only answer can be that there appears to be some overlap and that (i) alone applies in circumstances in which there is no award.

25. We discussed one possible instance at the oral hearing. The local authority might wish to suspend after a claim had been made but before deciding it. An authority may always take up to 14 days to decide a claim: regulation 89(2) of the 2006 Regulations. This time can be extended under the 'or as soon as reasonably practicable thereafter' qualification. When this occurs, the local authority may be required to make a payment on account of housing benefit under regulation 93, so long as the delay is not attributable to failure by the claimant. Regulation 11(2)(a)(i) authorises that payment to be suspended. If the delay is attributable to failure by the claimant, suspension is authorised under regulation 13 of the 2001 Regulations, which I have not set out.

26. At the hearing, Miss Demetriou argued that in this instance it would be the claim or decision-making process that would be suspended rather than the payment of benefit. However, that was without considering regulations 89 and 93. What would be suspended is payment of the payment on account. Since the oral hearing, I have considered a further instance of when (i) would apply but not (ii). This is where a claim has been refused or terminated, and the issue then arises whether that decision should be changed. In that instance, there is no award and only (i) can apply. There is equivalent to regulations 89 and 93 for deciding applications for revision and supersession. For those applications, Miss Demetriou's analysis would apply. The language of both the enabling power and the regulations is not entirely apt for that purpose. However, the use of 'any payment(s)' in regulation 11(1)(a) and in paragraph 13(1)(a) may be sufficient to cover both payments that fall to be made under an award and payments that might fall to be made if the local authority awarded benefit. After all, the local authority could always make a decision and immediately suspend payment. Why should it not be able to take the more sensible course of suspending pending a decision?

27. The argument on the scope of (i) arose as part of the attempt to understand the suspension provisions as a whole. I do not have to decide the precise scope of (i) in this case, as there is no issue whether the conditions of entitlement were fulfilled. That means that suspension can only be authorised under (ii). That raises the question whether the identity of

the payee is part of the award or a separate matter. I put this to Miss Demetriou at the start of her argument in *CH/3629/2006*, because it was an issue not covered by Mr Commissioner Williams in *CH/2986/2005*. She submitted that the payee was identified in the award. I accept that argument, subject to one qualification. The identity of the payee is an essential element of the award. An award does not exist in the abstract. It envisages payment and payment is not possible unless and until the payee is identified. That person's identify is essential if the award is to be effective. The qualification is that it is not necessary to name the payee if it is the person entitled to benefit. In that case, it is unnecessary to identify the payee as this is determined by regulation 94.

28. It follows that a change in payee involves the revision or supersession of an award for the purposes of regulation 11(2)(a)(ii). See further my analysis in *CH/3629/2006* at paragraphs 30 to 40. Accordingly, it is permissible to suspend payment of housing benefit while enquiries are made concerning the person to whom the benefit should be paid.

29. I now come back to the Circular. Like all Circulars, it only seeks to provide guidance. That guidance is valuable in ensuring consistency and understanding in decision-making. It sought to provide the decision-makers in local authorities with a clear statement of the law and how it operated. However, valuable as guidance can be, it cannot override the meaning of the legislation. On my interpretation of the legislation, the Circular was wrong if it means what Mr Mason has taken it to mean. However, it is possible that it is not wrong, but only misleading. Read literally, it is correct. There is no longer any power to **withhold** payment of housing benefit. That concept was abandoned in July 2001. Suspension is now used to cover the work previously done by withholding and suspension. In the circumstances where benefit would have been withheld, it is now suspended. The Circular does not say that benefit cannot be suspended if there is an issue whether payment should be made direct to the landlord. It may be that that is what the author meant. If it is, I can only say that it could have been made clearer and that I sympathise with local authorities who have not understood its subtlety.

Confidentiality

30. I said that I would come back to the issue of confidentiality. Remember that the local authority had not disclosed to the landlord that the claimant considered it to be in his overriding interests to continue to receive payments of housing benefit because of outstanding repairs. I anticipated a lively discussion with Mr Mason on the scope of confidentiality. In this, I was disappointed. As soon as I raised the issue, he admitted that his staff could be over zealous in relying on confidentiality in a way that prevented landlords from effectively exercising their rights. That accords with my experience of local authorities in respect of both confidentiality and data protection.

31. There may be cases in which genuine issues of confidentiality arise and it will be difficult to allow the landlords to exercise their rights effectively without disclosure. I leave that issue to an appropriate case. This one is not appropriate. If A reports an ongoing dispute with B, I do not understand how it can ever be appropriate to keep that confidential from B who is said to be party to it. The tribunal was right to criticise the local authority's approach and reasoning, which was entirely self-fulfilling. Having said that, however, I do understand the difficulties which the staff of local authorities feel when they contemplate the possible consequences to the person seeking confidentiality, or the potential liability to which the authorities, or even themselves, may become liable, if disclosure is wrongly made.

Disposal

32. So far I have decided that the tribunal was entitled to substitute its judgment for that of the local authority on where the overriding interests of the claimant lay and that the chairman was right to say that the local authority could have suspended payment while it made enquiries of the landlord. The actual disposal of the case depends on my decision on the double payment issue. I have decided in *CH/3629/2006* that it is not possible to make payment of housing benefit in respect of the same entitlement for the same period to both the claimant and the landlord. It follows that the tribunal should have decided that the effect of the offset provision in regulation 98 of the 2006 Regulations was to prevent payment being made to the landlord once it had been made to the tenant. I have substituted a decision to that effect for the decision given by the tribunal. The practical effect is that the landlord derives no benefit from the appeal to the tribunal having succeeded.

**Signed on original
on 03 April 2007**

**Edward Jacobs
Commissioner**