

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by Selby District Council ("the Council"), brought with my permission, against a decision of the York Appeal Tribunal made on 16 March 2004. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in para. 8(5)(a) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 I make the decision which the Tribunal should have made, namely:

The Claimant's appeal against the decisions of the Council made on 29 August 2003 is allowed to the extent that the following is substituted for those decisions: "the decision of the Council awarding housing benefit is superseded as from 25 August 2003 on the ground of a change of circumstances, namely that on 19 August 2003 the Claimant became a permanent resident of the care home." The Claimant therefore remained entitled to housing benefit up to and including 24 August 2003, but not thereafter.

2. On 22 July 2003 the Claimant moved into a residential home for a trial period in order to see whether that accommodation was suitable for him, and with a view to returning to the property of which he had a tenancy, and in respect of which he was in receipt of housing benefit, if it turned out not to be suitable.

3. On 25 August 2003 the Claimant's daughter-in-law wrote informing the Council that the Claimant had become a permanent resident in the home on 19 August, and that the tenancy of his property would expire on 3 September.

4. On 29 August 2003, by the decisions under appeal to the Tribunal, the Council (a) superseded and terminated the Claimant's entitlement to housing benefit with effect from 19 August 2003 and (b) decided that there was a recoverable overpayment of £28.47 in respect of the period 19 to 24 August 2003.

5. Unhappily the Claimant died on 7 September 2003. The Claimant's appointee appealed against the decisions of 29 August 2003, contending that as the Claimant had remained liable for rent on his former property until 3 September 2003, entitlement to housing benefit should have continued until then.

6. The Tribunal upheld the Claimant's contention. It held that under reg. 5(7B) and (7C) of the Housing Benefit (General) Regulations 1987 ("the 1987 Regulations") a person who enters residential accommodation for a trial period does not necessarily cease to be entitled to housing benefit in respect of the dwelling which he previously occupied when he decides to become a permanent resident and so ceases to have any intention to return to that dwelling.

7. Regulation 5 is headed "circumstances in which a person is or is not to be treated as occupying a dwelling as his home." Regulation 5(1) contains the general rule that "a person shall be treated as occupying as his home the dwelling normally occupied as his home."

8. Regulation 5(7B) and (7C) provide as follows:

“(7B) This paragraph shall apply to a person who enters residential accommodation –

- (a) for the purpose of ascertaining whether the accommodation suits his needs, and
- (b) with the intention of returning to the dwelling which is normally occupied by him as his home should, in the event, the residential accommodation prove not to suit his needs, and
- (c) while the part of the dwelling which is normally occupied by him as his home is not let, or as the case may be, sublet.

(7C) A person to whom paragraph (7B) applies shall be treated as if he is occupying the dwelling he normally occupies as his home for a period not exceeding, subject to an overall time limit of 52 weeks on the absence from that home, 13 weeks beginning from the first day he enters a residential accommodation.”

9. The Tribunal reasoned that it was clear from the language of para. (7B) that the question whether the claimant intends to return to the dwelling normally occupied by him is to be tested at the time when he enters the residential accommodation, and that provided that at that time he has the intention to return it does not matter that he subsequently becomes a permanent resident and therefore loses the intention to return: subject to the 13 week maximum, housing benefit will continue so long as his liability for rent continues and the other conditions of entitlement are satisfied.

10. In my judgment that is not correct. In my judgment it is reasonably clear that paras. (7B) and (7C) do not treat the Claimant as occupying his former dwelling once he has become a permanent resident of the residential accommodation and so has ceased to intend to return to his former home. My reasons are these.

11. First, the structure of the two provisions is that para. (7B) says who it applies to and para. (7C) says what happens where (7B) applies. I would accept the Tribunal’s point that (7B) (“a person who enters residential accommodation with the intention of returning”) appears to be looking at what the claimant’s intention was at the time of entering the care home. However, (7C) says that a person to whom (7B) applies “shall be treated as if he is occupying the dwelling he normally occupies as his home” for a period not exceeding 13 weeks. Once the claimant’s former dwelling ceases to be a dwelling which he normally occupies as his home, because he has no intention to return to it, then in my judgment para. 7C simply ceases to help him because he is no longer treated as occupying that dwelling.

12. Secondly, if the Tribunal were correct it would mean a person such as the Claimant in this case could continue to be entitled to housing benefit for up to 13 weeks after he had ceased to have any intention to occupy his former home again, thereby quite possibly giving him no incentive immediately to give notice terminating the tenancy of that former home. That would be inconsistent with the tenor of, for example, reg. 5(5)(d), which provides that, in the case where a person moves from one dwelling to another, he can be treated as occupying both dwellings, but only for a period not exceeding 4 weeks and only if he could not reasonably have avoided liability in respect of two dwellings.

13. Thirdly, reg. 5(8) and (8B) contain provisions to the effect that a person shall be treated as occupying a dwelling from which he is temporarily absent. Regulation 5(8) is a general

provision to that effect, limited to a period of 13 weeks from the first day of absence. Regulation 5(8B) applies only in a number of specified circumstances, but the period of absence can endure for up to 52 weeks. For present purposes the important point is that it is quite clear from the wording of those provisions that they cease to apply when the claimant ceases to have any intention to return to occupy the dwelling as his home. Paras. (7B) and (7C) were added by amendment in 1995 as part of a comprehensive review of the circumstances in which benefit should be paid in respect of a dwelling from which the occupier was temporarily absent: see the Report dated 22 February 1995 of the Social Security Advisory Committee (S.I. 1995 No. 625). It is clear from that report that the main reason for introducing a provision dealing specifically with trial periods in care homes was that a person who enters a residential care home for a trial period only intends to return home *if* the trial is unsuccessful, and might therefore have had difficulty showing that he fell within the general provision in reg. 5(8). There had been inconsistency in decisions of local authorities in this situation, some accepting that the claimant fell within reg. 5(8), and some not: see para. 46 of the Report, and para. 8 of the DSS Note in Appendix 2 to the Report. It cannot have been intended to treat such a person who decides to become a permanent resident in a better position, as from the time when he so decides, than he would have been in if he had undoubtedly fallen within the general provision in reg. 5 (8).

14. Finally, I do not overlook the Claimant's argument that, when a claimant decides to become a permanent resident of the care home, it will usually be necessary to give some notice terminating the tenancy, and liability for rent will therefore continue for some time. However, it is implicit in, for example, reg. 5(8) and (8B) that the legislation does not contemplate that entitlement to benefit should necessarily continue during such a period of unavoidable liability. A person who is temporarily absent from his dwelling, but who then decides to leave permanently and gives notice terminating his tenancy will cease to be treated as occupying the dwelling as from the moment when the intention not to return is formed.

15. The Council's decisions of 29 August 2003 purported to terminate the Claimant's entitlement as from 19 August 2003, the date on which he became a permanent resident in the care home. However, in my judgment the supersession should have taken effect only from 25 August 2003, the first day of the benefit week following the date on which the change of circumstances occurred: see regs. 68(1) of the 1987 Regulations and 8(2) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. The Claimant therefore remained entitled to housing benefit up to and including 24 August 2003, which was the date up to which he was in fact paid it. There was therefore no overpayment.

16. In summary, therefore, the Council was in my view right so far as the meaning and effect of reg. 5(8B) and (8C) is concerned, but it did not correctly apply the general provisions governing the date from which a supersession on the ground of a change of circumstances takes effect.

(Signed on original)

Charles Turnbull
Commissioner
14 January 2005