

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, with the permission of a legally qualified panel member, against the decision of the appeal tribunal sitting at Wakefield on 28 May 2004 ("the appeal tribunal"). The first respondent to the appeal is Kirklees Metropolitan Borough Council ("The Council"). The second respondent is the Secretary of State for Work and Pensions. He appears for the following reason. On 23 August 2004, on the basis that the appeal involved a point of law of some generality, I invited him to apply to be joined as a party. The Secretary of State accepted that invitation. I am grateful to him for doing so and for his submissions which I have found of considerable assistance.

2. This appeal is concerned with the construction of the word "parent" for the purposes of a particular provision in the legislation relating to housing benefit and the corresponding provisions relating to council tax benefit. For the purposes of this decision, and only for such purposes, I assume that the construction of the word "parent" adopted by the appeal tribunal is wrong. On the basis of that assumption, which I stress is only an assumption, the decision of the appeal tribunal is erroneous in point of law. If that is the correct way of looking at the matter, then I give a final decision which is to the same effect as that of the appeal tribunal. Namely, that the claimant's appeal against the decision of the Council dated 2 October 2003, that he had been overpaid housing benefit and council tax benefit amounting in total to £3,652.90 is dismissed. If the assumption I make is incorrect, then the decision of the appeal tribunal is not erroneous in point of law and it must stand. Either way, the claimant's appeal to a Commissioner does not, in practical terms, assist him.

3. The basic facts are as follows. The claimant was born on 23 April 1935. He was 64 in April 2000. He lives by himself at a property in Huddersfield. He has been in receipt of housing benefit and council tax benefit since 23 August 2000. The amount which he received was calculated on the basis that the only income he declared when he first applied for benefit, and when he made renewal claims in July 2001 and August 2002, was the state pension. Subsequently, towards the end of 2002, it came to light that he was receiving a small pension from the Post Office. As I understand matters, it was about £45 a week. Small though it was, it had an effect

on the calculations. The Council recalculated the figures and arrived at the conclusion that from the start of his claim until the beginning of April 2002, the claimant had been overpaid £2,750.32 housing benefit and £902.58 council tax benefit. The figures are set out on page 1H of the case papers. I understand that there is no dispute about them. The claimant's appeal to the appeal tribunal was based on a legal argument which I shall explain in a moment. On 2 October 2002, the Council gave a decision by which it sought to recover these amounts under regulations 98 to 101 of the Housing Benefit (General) Regulations 1987 (SI 1987/1971) ("the Housing Benefit Regulations") and the corresponding provisions of the Council Tax (General) Regulations 1992 (SI 1992/1814). The relevant regulations are in substance the same and, as is common in such a case, I shall discuss the matter in terms of the Housing Benefit Regulations.

4. The claimant's initial grounds of appeal, dated 7 November 2002, were as follows:

"I wish to appeal against your decision of 3.10.02 to recover the overpayment of HB and CTB. I do not believe that I failed to disclose information relevant to my claim. Please accept this late appeal. Because I am unfamiliar with the benefits system I believe that my appeal against an income support decision would serve as an appeal against this decision. I also had to wait for an appointment with Citizens Advice Bureau."

5. The claimant subsequently wrote a further letter which is not with the papers but which was referred to by the Council's Appeals Officer in the following terms in her letter to the claimant of 31 July 2003 (page 27 of the papers).

"You state that in your letter of appeal that you pay £54 per week for "a daughter's education aged 22 on a doctors course in Gainesville Florida" and will do so "for another 7 years". Please provide details of your daughter, confirming her name, date of birth, place of study and confirmation of the course of study she is undertaking.

Does your daughter receive a grant (from any body or establishment) to assist in her studies? Have you been assessed by a grant-awarding body as being able to make this contribution to your daughter's grant? Where does the rest of your daughter's money come from to enable her to live and study in Florida."

6. Those paragraphs make it clear that the claimant was now seeking to rely on paragraph 18 of schedule 4 to the Housing Benefit Regulations. Schedule 4 is headed "Sums to be disregarded in the calculation of income other than earnings" and paragraph 18 is in the following terms.

(1) Where the claimant is the parent of a student aged under 25 in advanced education who either –

- (a) is not in receipt of any award or grant in respect of that education; or
- (b) is in receipt of an award under section 2 of the Education Act 1962 (discretionary awards) or a bursary, scholarship or other allowance under section 49(1) of the Education (Scotland) Act 1980, or a payment under section 73 of that Act of 1980;

and the claimant makes payments by way of a contribution towards the student's maintenance, other than a parental contribution falling within paragraph 17, an amount specified in sub-paragraph (2) in respect of each week during the student's term.

(2) For the purposes of sub-paragraph (1), the amount shall be equal to -

- (a) the weekly amount of the payments; or
- (b) the amount by way of a personal allowance for a single claimant under 25 less the weekly amount of any award, bursary, scholarship, allowance or payment referred to in sub-paragraph (1)(b),

whichever is the less.

For completeness, the corresponding provision in the Council Tax Benefit (General) Regulations 1992 is paragraph 18 of schedule 4.

7. The claimant's case is, and was, that although he has been living on his own in Huddersfield since the summer of 2000, he has a partner who lives in America. That partner has a daughter by a previous relationship. In the interests of confidentiality, I shall call the claimant's partner "J" and her daughter "N". I do not know how old N is but the letter I am about to quote suggests that she was born about 1980. If that is right, then during the period of the overpayment – that is from August 2000 until April 2002 – she was aged between 20 and 22. At that time she was attending the University of Florida's College of Medicine – with a view, I think, to qualifying as a doctor. The claimant says that he makes payments by way of

contribution towards N's maintenance. These payments are in fact the small private pension of about £45 per week.

8. A number of difficulties become apparent immediately. First, at the relevant time, which I stress was August 2000 to April 2002, the claimant was living on his own in England while J was living in America and N was also living there and are attending medical school at the University of Florida. Secondly, the claimant and J were not married. Thirdly, N is neither the claimant's natural daughter nor is she his adopted daughter.

9. The claimant sought to deal with these difficulties in a statement which he signed on 21 August 2003. I set it out in full because it was the only one of two pieces of written evidence which the appeal tribunal had before it as to these matters.

"Met mother [J] Oct 92 in Florida – along with daughter [N] aged twelve. Lived in U.K. for six months. They could not settle here & returned to U.S.A. I followed started buying & 'doing up' apartments. [J] changed name to mine & we are a family unit. Then and since. We owned apartments & homes in & around the Gulf of Mexico. Worth 1 – 1½ millions minus mortgages.

The agent we used was unknown to us was fiddling the 'books' – while on holiday in Yorkshire July/Aug 2000 found out that the agent had forced us into receivership – [J] went back to take care of [N] & I remained here. Being a diabetic I could not afford the medicine I required over there.

Took the man to court – awarded damages. Since the man's gone into receivership himself & we are chasing for the money. When & if it sorts itself out – I will be out of [illegible].

The pension is been going over there for about 8/9 years – so small at the time – it did not even count.

We have been a family for over ten years. I regard [N] as my daughter. For ten years she has been and remains my responsibility."

10. The only other item of written information dealing with these matters is the following written note or record produced by one of the Council's officers on or about 8 October 2002.

"30/9/02 [the claimant] at counter at Civic Centre. He stated that he was in receipt of a pension from the Post Office. He said that he was not declared the pension as it gets paid directly into a bank account in America. He explained that the reason for this was that he had previously been living in America. He had owned some properties but he claimed he had been conned by his agent and had lost the properties. He said that there was currently a claim going through court in America to try and resolve this. He said that his partner and his daughter still lived in America. His daughter is disabled and at college. The money that is paid directly in the bank account he claims shouldn't be classed as his income as he never sees the money. He is not sure of the amount. He has declared pension to DWP. They have used a figure of £54 pw so took statement from [the claimant] confirming he is in receipt of pension Benefit reassessment form sent to HB team."

11. The claimant's appeal was heard on 28 May 2004. According to the chairman's notes of the evidence, the claimant gave the following relevant evidence.

"I admit receipt of private pension from 1995 or 1996 paid by the Post Office. I confirm the statement of 30.5.02.

I declared it to Social Security in August 2000 I thought they were all the same doo-dah – and as I had not received it anyway I had not to put it on the form.

Had been in UK for 2/52.

[Illegible] come from USA had been there 8 years. They sent me to Housing I was given a hotel room and then an apartment. Not entitled to any more from Soc. Sec. P4 Pt 4 is my income RP 78-65. Did not include PP in Sec 3. Had told Benefit Agency. Told [illegible] not see the need to tell HB again. It did not exist for me –

[Illegible]

It was paid (£45 pw) to my partner's account in USA

For first 6/12 it was paid into my account from then on into my partner's account and she now pays it into daughter's account."

The claimant's representative then made a number of submissions to the appeal tribunal which included the following.

"She is 23.

Student Gainesville Florida

Medical [illegible] - 2 years to go to qualify

He has taken on responsibility of parenthood.

He satisfies the [illegible] of Parent

She has some scholarship payments

In UK since May 2000

Partner changes name to mine in 1994.

I am divorced

Partner is also divorced

Not been back to USA since May 2000

Got [illegible] I owe 95 k tax

Problem I did not receive the money.

I am diabetic and [illegible – possibly costs] are £130 pm

No adoption order (confirmed)."

12. The appeal tribunal, which consisted of a single legally qualified chairman sitting alone, dismissed the appeal. The relevant part of its statement of reasons reads as follows:

"[The claimant] has lived in America for several years. He is involved in a property business. He returned to the United Kingdom in May 2000. He claimed Income Support which was refused and he also claimed Housing Benefit and Council Tax Benefit. He has been in receipt of a private pension payable by the Post Office since 1995 or 1996 and he admits that in his claims for Housing Benefit and Council Tax Benefit he failed to declare receipt of the private pension which presently is in the sum of about £45 per week. He said he did not disclose the private pension because he had already disclosed it to Income Support and in any event it was paid directly to his partner's account in America who in turn paid it to her daughter [N] who is now 23 years old and who is a student at University of Florida.

On behalf of [the claimant, his representative] says that he is entitled to the disregard in paragraph 18 of the Housing Benefit (General) Regulations 1987 which provides "where the Claimant is the parent of a student aged under 25 in advanced education who either is (a) not in receipt of any award or grant or (b) is in receipt of a discretionary award, bursary, scholarship or other

allowance under the Education Act and the Claimant makes payments by way of contribution towards the student's maintenance, an allowance shall be made as provided in paragraph 2". [The representative] says that the word "parent" is not defined in the regulations and she appears to be right, but she says that the dictionary definition as well as including the father or mother or a person by extension includes a person in the position of a parent such as a protector or guardian.

[The claimant] has not adopted [N] and I take the view that the word "parent" used in Regulation 18 is restricted to persons who are the natural parents or who are parents by adoption. Therefore I find that [the claimant] is not entitled to benefit of Regulation 18. It follows that there has been an overpayment of Housing Benefit because [he] failed to disclose the receipt of his private pension. No question of official error arises and so the amount of overpaid benefit is recoverable from him".

13. Significantly, the appeal tribunal made no findings at all as to whether the claimant pursued any sort of parental responsibility towards N. It short circuited the matter, and avoided the need to make such findings, by deciding the appeal on a point of construction. Namely, "... I take the view that the word "parent" used in Regulation 18 is restricted to persons who are natural parents or who are parents by adoption". That has been described in the debate before me as "the narrower definition". Permission to appeal was granted on the basis that a wider definition should apply. The claimant's grounds of appeal put the matter in the following way.

"The question that has arisen is the definition of "PARENT" this is not given in the Housing Benefit or Council Tax Benefit Regulations, nor does it appear in Income Support Regulations.

The local authority (Kirklees M.C.) appeals section and the tribunal chair have opted for the narrow definition of a natural or adopted parent.

It is held by the representative that the wider dictionary definition of "a person acting in the role of a parent" should be used. [The claimant] has been in the parental role for some 14 years. It is only by force of circumstances that he is separated from those he considers to be his family.

Account needs to be taken of the changes in society. There are increasingly situations where a partner of a child's parent is not married to that parent and where there is no intention to take up the possibility of adoption.

The Commissioner is therefore being requested for a ruling on the meaning of parent as set out in paragraph 18 of Schedule 4 of the Housing Benefit (General) Regulations 1987.

It is accepted that the tribunal has a right to take its view on the meaning of parent as opposed to any other. It is felt however that this is against natural justice and creates an artificial barrier to those who take on the parental role.

The Commissioner is also requested to rule on whether the scholarship payment received by [N] should fall to be treated as an award under para 18(1)(a), Sch 4 HB(Gen) Regs 87."

14. Pausing there, it appeared to me when the matter came before me for directions that those grounds raised a point of statutory construction of general application. There must be many "families", involving married or unmarried partners, where some of the children are not the biological children of one of the partners and have not been adopted by that partner. Nevertheless, that partner is regarded as a parent by the children and has brought them up as his or her own. He or she has assumed full responsibility for them both financially and in all other respects. He or she may continue to support those children when they enter higher education. It appears to me, without in any way deciding the point, that it would be unfair to such "parents" to treat them differently from natural or adopted parents in the context of this particular housing benefit and council tax benefit rule. If the legislation requires them to be treated differently, then so be it. However, it is a conclusion which I would reach, if I had to, with caution and some reluctance. It was because of the importance of the point that I invited the Secretary of State to be joined as a party. I am grateful to him for accepting that invitation and also grateful to all the parties for their submissions. However, and with embarrassment, I have come to the conclusion that it would be entirely inappropriate for me to decide the point or attempt to give any general guidance.

15. Let me explain. There is a salutary rule which is well embedded in the general law that points of law, however interesting, which do not arise in a particular case or appeal or which can only be decided on hypothetical facts should not be decided. Instead, they should be left until it is necessary to decide them and this can be done in the context of a case or an appeal which involves appropriate facts. If a point is decided on an occasion when it does not arise, or upon hypothetical facts, the decision is without precedent value and is not binding. At the very least, a question mark will hang over its authority. Having read the evidence very carefully I have come to the conclusion that, apart from the factual situation being unusual, the claimant simply has not made out a case that he assumed responsibility for N – let alone full parental responsibility. He has, I accept, asserted that he did so but these assertions are, in my judgment, vague, lacking in particularity and unsupported by any examples. I am satisfied, and certainly satisfied on the balance of probability, that the claimant has not made out the case which he seeks to make. Furthermore, he faces additional problems. I explain these difficulties below but begin as follows.

16. Let us assume that the appeal tribunal erred in law by adopting the narrower construction which it did adopt when it should have adopted a definition which included someone who assumes parental responsibility towards a child. In that event, I must allow the appeal. However, when I do that I find that the claimant faces the three formidable difficulties already referred to. First, as indicated, it appears to me that there is virtually no evidence that the claimant had in fact assumed parental responsibility for N. I have quoted the relevant evidence before the appeal tribunal. It appears to me to fall far short of what is needed although I accept that the claimant, his partner and N lived together from sometime in 1992 until the summer of 2000. However, a good deal more is needed to establish an assumption of parental responsibility than merely living together. How, for example, did this assumption of responsibility manifest itself? What financial matters relating to N did the claimant make himself responsible for? How did she view the matter? What about her natural father? Was he dead or totally absent or did N spend periods of time with him? If so, how much time did she spend with him? Did he contribute towards her care and, if so, to what extent? No evidence was offered on any of these matters or any similar ones.

17. Assume, however, that I must accept what the claimant says, little though it is. That then brings me to the further problem that at the relevant time the claimant

was living in England while J and N were living in America. On the assumption that she was about 20 at the start of the relevant period, N was now a young adult and two or three years into a course at medical school. The only contribution which the claimant was making was the £45 pension which was paid not to N but into J's bank account. If the parental responsibility can be de facto assumed it can also, presumably, be de facto lost. Indeed, in almost all cases there will come a point where any parent, even a natural one, is no longer regarded as responsible for his or her children. If the claimant did assume parental responsibility for N, then I have some difficulty in accepting that it continued during the relevant period. I add that, through no fault of their own, the claimant and N had reached an impasse. She does not wish to live in England and he cannot afford to live in America because of cost of treating his diabetes and any other health problems associated with his diabetes – a difficulty which is likely to become more acute with the passing of time. Whatever the wishes of the parties, the chances of their getting back together were somewhat problematical at the end of 2002, when the claimant was awarded housing benefit and council tax benefit.

18. Further, if I assume in the claimant's favour (a) that he assumed parental responsibility for N and (b) that such responsibility it was not lost at the relevant time, then that still leaves two very considerable problems.

19. He must show that he "makes payment by way of contribution towards the student's maintenance". In my judgment the evidence discloses nothing of the sort. The evidence is that this pension became payable in 1995 when the claimant was 65, and that for the first six months it was paid into his own account. Thereafter it was paid into his partner's account. Payment into J's account would have started at the end of 1995, or shortly thereafter. At that time N would be 15 or 16 and would not have started to attend university. Thereafter, the arrangement whereby this pension has been paid into J's account has simply continued. Nothing has been produced which says that J is either legally or morally required to pay the money over to N. I am not surprised that nothing has been produced. The simplest way for the claimant to proceed would have been for him to change his instructions to the payer so that the money was paid direct to N. Such a change would be easy to demonstrate. What he told the appeal tribunal was "For the first [6 months] it was paid into my account from then on into my partner's account and she now pays it into daughter's account". The amount involved is small. If there was any sort of

requirement that J paid the money over to N, or if any sort of regular arrangement had been set out, I am sure that the claimant would have referred to it in his evidence. Nothing along these lines has been suggested. That being so, my understanding of the arrangement is this. The money is paid into J's account and she is free to do whatever she wants with it. The amount is small but is, I am sure, nevertheless welcome. It assists the general budget and enables her to support N at the university. I am prepared to accept that the claimant is making an indirect contribution towards N's university education. Nevertheless, it is indirect. In my judgment the circumstances are such that it is too remote to fall within the words "makes payments by way of contribution towards the student's maintenance". It is simply a contribution towards J's family budget which enables her to assist N. Something more directly related is required to satisfy paragraph 18.

20. If I am wrong about that, there still remains one final hurdle to force the claimant has to overcome. Namely, the requirement that N is "not in receipt of any award or grant". In the course of the appeal to a Commissioner, a certain amount of material has been produced, which was not before the appeal tribunal, which indicates that at the relevant time the total cost of N's tuition fees and accommodation at the University of Florida was largely funded by grants and loans. In particular, a substantial sum in the 1999 – 2000 and 2000 – 2001 academic years which is called a "Emory college grant". This makes up 50% to 60% of the total cost in those two years. In each of those two years what is described as "Family share of expenses" is less than 20%. There are references to other loans and grants. What exactly the "Emory college grant" is somewhat obscure. In the absence of some explanation to the contrary, I take it that it is an award or grant made to N on the basis that she is a deserving or meritorious student. In answer to the question raised in the grounds of appeal I hold that it is an award for the purposes of paragraph 18(a).

21. That brings me to my dilemma. If the appeal tribunal's construction at paragraph 18 is wrong, then I must set aside its decision. However, when I do that the state of the evidence forces me to give a decision to the same effect – although for different reasons. If its construction is correct then the appeal must fail. In the circumstances, I give the decision which I do in paragraph 2 above. This means that I have decided the appeal without dealing with the extremely interesting legal arguments about the meaning of "parent" with which I have been supplied. I am

grateful for those arguments and apologise to their makers for not dealing with them. I do not do so for the reasons already expressed and because, in relation to an important, sensitive and difficult point, it does not see right to attempt to construe the relevant regulations in the context of an extremely unusual factual situation and on the basis of such limited evidence.

(Signed) J.P. Powell
Commissioner

Dated: 24th May 2005