Bulletin 162
[Start]

Commissioner's file: CH 3009 2002

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1 I allow the appeal. The claimant and appellant (W) is appealing with permission of a chairman against the decision of the London appeal tribunal on 18 April 2002 under reference U 45 161 2002 00221. The decision of the tribunal was to confirm the decision of the respondent, Camden London Borough Council (the Council), refusing to backdate her claim for housing benefit and council tax benefit from 21 October 2001 to 18 June 2001.

2 I set aside the decision of the tribunal. The appeal is referred to a new tribunal for rehearing.

DIRECTIONS FOR REHEARING

3 A The rehearing will be by way of oral hearing

B The tribunal is to consist of members who were not members of any previous tribunal involved in this appeal.

C If either party wishes to submit any further documentary evidence to the new tribunal, that is to be done within four weeks of issue of this decision.

REASONS FOR THE DECISION

4 This appeal has in effect both changed direction and changed parties since the chairman granted permission to appeal. When I first saw the case I suggested that the decision of the tribunal was in error of law and should be set aside because the tribunal had not dealt with one aspect of the facts properly. The Council did not agree. As a result, I reconsidered the case and issued a direction suggesting that, following decisions of other Commissioners, the answer lay in treating this claim not as a backdated new claim but as an application to revise an earlier decision. The Council raised issues about that also, and sought the advice of counsel on it.

5 In the light of those submissions, I invited the Secretary of State to become a party. The Secretary of State did so and submitted that I did not have the power to follow the course I had suggested. This raised jurisdictional issues being considered by a Tribunal of Commissioners. The secretary of state's representative was of the view that my initial approach to the case was the proper approach and supported the appeal to that extent. At that point the Council indicated that it wished to take no further active role in the case as "the matters raised therein are mainly for the Secretary of State and not for an individual local authority." Meanwhile the claimant, who had previously been represented by her local Citizens Advice Bureau, became represented by the Public Law Project which put forward other issues for consideration. None of the parties asked for an oral hearing. The case was then held, along with other cases, for a year while issues of principle about revisions and supersessions were decided by the Tribunal of Commissioners. Those decisions have now been taken as decisions CIB 4751 2002 and linked cases, and CIS 4 2003.

The claims and follow-up

6 W was living with her children and had been receiving both housing benefit and council tax benefit from the Council. She made a renewal claim on 29 May 2001 to start from 18 June 2001. The claim form appears to have been filled in rapidly by someone other than the claimant. At the place where W should have put her children's names there are three random lines that might suggest that there are no children. W stated that she was receiving income support and no other benefit. Other parts of the form have been left blank, including the details of the tenancy.

7 The papers then contain:
- a copy letter of 8 June asking W to confirm if "all three children are still resident with you as you omitted them from your claim form", and asking for a reply within 4 weeks;
- a copy notice dated 11 June 2001 stating that W had been awarded benefit from 18 June 2001 to 9 December 2001 at £220 a week and a notice of the same date awarding council tax benefit;
- a copy letter dated 9 July 2001 asking for a reply to a letter of 8 June 2001;
- a copy notice of nil award of benefit dated 30 Jul 2001 "because you have not replied to our recent correspondence" stating that W owed the Council £1100 in overpaid benefit and a copy letter of the same date showing nil council tax awarded for the same reason;
- and a copy final reminder of 8/10/2001.

The papers also contain some partly cryptic computer screen dumps which appear to show that a council tax demand was generated on 3 August 2001 and a reminder on 24 September 2001 and that other council tax documents were sent to W on 30 July. The papers do not make it entirely clear which of these documents was sent, or was said to have been sent, or were not sent, to the claimant.

8 The council received another claim form from W on 17 October 2001. Again it was filled in by someone else. It lists four children living with W (born in 1996, 1997, 1998 and 2001). W again stated that she was receiving income support and no other benefit (and someone put a line through the space for child benefit to be stated). The other parts of the form have been completed. W made that new claim while visiting the Council offices that day. She did so because she had received a summons issued against her on 10 October for non-payment of council tax, along with a final reminder that £1100 overpayment of housing benefit was repayable and that the repayment was overdue. She made a signed statement that:

> "I don't remember getting the letters you said you sent in June & July. I do not think I received the letter to say my claim had stopped or I would have come to see you straight away. I have received the o/p letter & summon for CTAX and that is why I have come to see you. Please backdate my HB to 18/6/01. I have four young children and do not want to lose my accommodation."

Was W notified?

9 The Council awarded W housing benefit from 23 October, but refused to backdate the claim to June. This was because:

> "I cannot accept that W did not receive any of our three letters. She was also issued with a pre-summons reminder for outstanding council tax on 24/9/2001 but still did not come to our office until 17/10/01."

10 The letter of 8 June does not contain W's full address (part of the postcode is missing), but all subsequent letters and forms do contain W's full address. I record that point because the tribunal failed to note it, finding "there is no evidence of any difficulty with her post" without checking which documents were alleged to have been sent and if they were fully and properly addressed.

11 The Citizens Advice Bureau acting for W asked for proof that the above were sent to W but none was produced. The Council's submission to the tribunal asserted that letters had been sent but did not deal with this point. In its submission on this appeal, the submission commented that the Council benefits service "issues over a quarter of a million letters every year. It cannot prove or disprove that a particular letter has been posted some months or years earlier ...". The Council then commented that it would welcome guidance on how it was to deal with this issue if the point was challenged.

12 The Public Law Project noted that the Secretary of State's representative had accepted that the decision of the tribunal was inadequate in dealing with the questions of receipt of the letters. In the Project's view the tribunal had both failed to consider the matter properly and also considered it in a way that was in breach of natural justice as it had decided the matter on a basis not raised by anyone at the oral hearing. I agree with the submission of the Public Law Project that the answer is now in regulation 2(1) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 providing:

> "that notice or document shall, if sent by post to that person's last known address, be treated as having been so ... sent on the day it was posted."

This applies from 2 July 2001. Before that, the rule was in regulation 78(2) of the Housing Benefit (General) Regulations 1987 to the same effect. Elsewhere the Regulations usually require that a notice be sent or given, not that it be received. That is a presumption that a letter that has been posted with the correct address on it has been delivered. But there is no matching presumption that a document that it was intended should be posted was in fact posted.

13 The tribunal confused the two points, assuming that the Council posted the documents without considering the point while considering on the evidence if, once posted, they were delivered. That is the wrong way round. If the assumption of posting is challenged for good reason, as it was in this case, it requires some evidence at least of office practice to show that on the balance of probabilities a document was posted, for example by indicating the standard arrangements for posting documents of that kind. And in this case some thought should have been given to whether the faulty address on the letter of 8 June is sufficient to be W's "last known address" for the presumption on delivery to operate.

14 In the specific context of showing good cause, the presumptions are of less value. The question is whether on the facts the individual claimant had good cause for delay. If she satisfies the tribunal that, on the balance of probabilities, she did not receive a letter, then that is relevant to good cause even if for other purposes the tribunal may assume that the letter was received. In my view, the tribunal took the wrong approach on this issue also. Leaving aside the obvious accidental error in the key sentence of the statement, the tribunal asked the claimant to show, in effect, *why* she had not received

the missing letters. How can she - or anyone - show that? She can only seek to show the tribunal that in fact they did not arrive.

What was the nature of the claim on 17 October 2001?

15 The Council awarded the claim received on 17 October 2001 from 22 October. What had happened to the claim received on 29 May 2001? The papers conflict. The letter of 8 June suggests (with good reason) that more information was needed before it could be decided. The forms dated 11 June 2001 suggest that the claim was decided in W's favour from 18 June 2001. There is nothing in the copy in the papers to suggest that the decision was provision or conditional in any way. As benefit was paid from 18 June to 22 July and then reclaimed, that seems the appropriate analysis. If that is so, the letter of 30 July stopping the award was a revision of the decision of 11 June. It is a revision not a supersession because it operates back to the original date from which the award was made. The consequence is that the suggestion by counsel that the Council did not need to decide the claim of 17 May 2001 does not arise on the facts.

16 If the last operative decision is the revision of 30 July, the question arises whether the claim on 17 October should also be treated as a request for a further revision.

Arguments of the parties

17 It is now clear law that an appeal tribunal can step into the shoes of the individual or authority whose decision is under appeal. It can consider and decide any issue that the original decision maker could consider or decide. Following from that, Counsel for the Council did not dispute that the claim in October could be treated as an application for revision of the decision on the claim in May. Nor did the secretary of state's representative. Counsel accepted that this reasoning would apply to decisions under the 1998 Act as much as to decisions under the 1992 and previous Acts. But he pointed out that an application for a revision made more than one month after the decision would need to be considered in the light of regulation 5 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. He also raised points about a decision about a late application for revision and the extent to which it can be appealed.

18 In a submission after the decisions of the Tribunal of Commissioners, the Secretary of State's representative submitted that the tribunal had given no consideration in this case to treating the claim as an application for revision, and that the appeal against the refusal of the late claim cannot simply be considered as an appeal against the earlier decision in the absence of any late appeal admitted. It was also submitted that the Tribunal of Commissioners had not dealt with the question whether a tribunal could direct the Secretary of State or a local authority to make a determination, rather than making the determination itself, and that there was no primary legislation providing for an appeal tribunal to exercise such a function. The Secretary of State's representative also submitted that it followed from the decision of the Tribunal of Commissioners in CIS 4 2003 that as there was no right of appeal against a decision of the Secretary of State not to revise for official error that there is no other appeal from a decision of the Secretary of State not to revise. That would also apply to housing benefit.

19 The Public Law Project took issue with most of these points. Dealing with the issue of treating the October claim as a revision of the June decision, its view is that the effect

of CIB 4751 2002 is to give the tribunal power to make any decision that the Council could have made. The question was whether the October claim was in substance an application for a late revision. If it was, and it was inadequate, the Council and tribunal had power to seek further information. This applied as much to the application for the revision to be considered late as to an application in time. But the Project accepted that there was no right of appeal from a refusal to extend the time limit for requesting a revision. The Project did not accept the submission of the Secretary of State's representative that the tribunal could not direct a decision to be made.

My decision

20 The tribunal did not deal adequately with the question of the receipt of the various letters when considering whether good cause for lateness existed. The decision of the tribunal must be set aside. I must therefore direct the new tribunal about the rehearing, in the light of the varying submissions put to me.

21 First, the tribunal should consider if the claim on 17 October 2001 should be considered as a late application further to revise the decision of 11 June 2001, or whether it should direct the Council to do so. That comes first because of the natural order of decision making. In the light of the decisions of the Tribunal of Commissioners, an appeal tribunal undoubtedly has power to take any decision that the initial decision maker could have taken. As it stated at paragraph 25 of CIB 4752 2002:

> "Taking the simple case of an appeal against a decision on an initial claim, in our view the appellant tribunal has power to consider any issue and make any decision on the claim which the decision maker could have considered and made. The appeal tribunal in effect stands in the shows of the decision maker for the purposes of making a decision on the claim."

As all parties accepted, that includes considering in appropriate cases whether a claim should be considered as a request for revision or supersession of a decision on a previous claim, subject to time limits and other specific statutory provisions. If I may say so, the reasoning in cases such as R(I) 11/62 about claimants not being conversant with the niceties of the adjudication system now applies with considerably more force than even when those decisions were taken. The general limit to this, reflecting the comments of the Tribunal of Commissioners in CIB 4751 at paragraph 32, is that this must either be raised by the appeal or be a matter that, in its investigatory role, the tribunal acting judicially decides it should consider.

22 The new tribunal will need to consider these issues. If it proposes to consider the matter as a late application for revision, it must give appropriate notice to both parties that it will be doing so. However, this decision itself alerts the parties to the issue so disposing of the need for further notice.

23 The tribunal will also need to consider time limits. Taking the claim as an application for revision must, on the facts of this case, involve taking it also as an application for a late revision. I say that because W asked for the decision to operate from the first day of the then current benefit period when she made the claim. So if the claim is an application, it is an application for revision. It was obviously a late claim and was discussed in precisely those terms at the time the claim was made, with W's views

being recorded in writing signed by her. I fail to see what else is needed to bring it within the requirements for an application in writing or for it to be considered as a late application.

24 While I accept the submission that the intention behind some of the new rules is to tighten up the system, I do not accept that this applies to the form of an application of this sort beyond the express provisions. In particular, I do not accept that an application for a late revision has to recite the *precise* provisions of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. Nor do I accept that it has to mention in *precise* detail the decision that the claimant wants revised. That would require the claimant to deal with the matter in greater detail than is required, following the decisions of the Tribunal of Commissioners, by an appeal tribunal from a decision maker. The Tribunal of Commissioners stated at paragraph 192 of its decision on CIB 4751 2002 that:

> "(2) whilst there may be some such decisions that have so little coherence or connection to legal powers that they do not amount to decisions under section 9 or section 10 at all (paragraph 72):
> (a) a decision should generally be regarded as having been made under section 9 if (however defectively expressed) it alters the original decision as from the date of the original decision, and
> (b) a decision should generally be regarded as having been made under section 10 if (however defectively expressed) it alters the original decision as from some date later than the effective date of that original decision.
>
> (3) the tribunal will not err in law if in its decision notice it does not set aside and reformulate the decision under appeal unless either (i) the decision as expressed is actually wrong in some material respect or (ii) there would be some benefit to the claimant or to the adjudication process in reformulating the decision."

If that is the standard against which decisions are to be judged on an appeal, then the standard to which claims and applications are to be judged by an original decision maker cannot in my view be higher. Accordingly I reject both the specific submissions of the Council and its objections about practical difficulties in handling such applications.

25 That involves the tribunal deciding the issues set out in regulation 5 of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. If the matter is considered unfettered by statutory limitation, it would in my view be more practicable for a tribunal which reaches that point to refer the matter to the Council for decision, putting the claimant on notice as it does so. The Secretary of State contends that a tribunal and Commissioner have no power to do that. This is based on a broad statement that there is no express statutory power for the tribunal to do so. The argument about the absence of statutory powers was looked at in some detail by the Tribunal of Commissioners in CIB 4751 2002, where it found little sympathy. At paragraph 12 it stated:

> "**all** the powers of an appeal tribunal – including even the most basic – must be implied. They must be derived from the fact that the statute gives a right of appeal, and from the nature of such an appeal in the context of the statutory scheme."

It has long been a practice of tribunals to refer undecided matters to the Secretary of State for decision, sometimes during an appeal hearing itself. I see nothing in the scheme of the legislation or in any express provision preventing a tribunal referring an appropriate issue to the Secretary of State or a council for decision rather than dealing with the matter itself. That will be for the tribunal to decide. Again, it is a matter of judicial discretion. The Public Law Project accepts that if the tribunal does refer the question to the Council, and the Council refuses to accept that the late application within regulation 5, then there can be no appeal from that to a tribunal.

26 Given those discretions and problems, the tribunal may prefer to start with consideration of the backdating claim. If that is successful, then no question of treating the claim as an application need arise. A successful backdating claim will on the facts of this case cover the whole of the period for which W claims and not, as suggested in the submissions, only part of it. This is because the operative decision is that of 11 June 2001 as revised in July. As the Tribunal of Commissioners explained (at paragraph 38 of CIB 4751 2002), "an appeal against a decision under Section 9 (revision) is an appeal against the original decision (as either revised or not revised), not against the section 9 decision itself."

27 On this approach it is for the tribunal to consider the question of fact whether W has shown continuous good cause for her late claim. I am tempted, given the delays, to make my own decision but I do not because W must show *continuous* good cause *throughout* the period- and not necessarily the same cause. Several factual issues are still undecided. Which letters should she have received and what did she receive? When did she first know that she had a problem with her rent and council tax? Did she act as soon as she reasonably could when she did find out? So far neither the Council nor the tribunal has looked at the matter properly, and I must now ask another tribunal to do that, while recognising that that is now much harder after a delay of three years.

David Williams
Commissioner
03 June 2004