

Bulluh, 187

Esther

CH/3817/2004

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the Scarborough appeal tribunal dated 12 August 2004 is erroneous in point of law, for the reasons given below, and I set it aside. It is expedient for me to substitute the decision that the appeal tribunal should have given on its findings of fact (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 8(5)(a)). The decision is that the appeal tribunal had no jurisdiction to hear the appeal purportedly before it, as no decision capable of appeal had been made, and I declare that no decision has as yet been made on the claim for housing benefit and council tax benefit made by the appellant on 7 March 2003. I deal in paragraph 21 below with where that leaves the case.

2. For many years, Miss S T, the appellant before the Commissioner, and her partner, Mr D E, had been entitled to housing benefit (HB) and council tax benefit (CTB) from the local authority. For the purposes of this decision, I shall call Miss S T the appellant and Mr D E her partner. In all the past claims, although it looks as though the appellant may have filled in the forms, her partner was named as the claimant and she was named as his partner. The most recent award was for a benefit period ending on 5 January 2003. A renewal claim form was sent to the appellant's partner at the end of October 2002. He did not fill it in and send it back. On 6 January 2003, Scarborough Borough Council (the Council) sent the partner a letter, addressed to him alone, saying that his claims for HB and CTB had expired on 5 January 2003 and that if he wished to re-apply he had to do so within four weeks.

3. On 7 March 2003 the appellant delivered to the Council by hand the renewal claim form that had been sent to her partner. She had filled it in. She put her name and details in the boxes for "you" and her partner's name and details in the boxes for "partner". In section 10, where a claimant could authorise the disclosure of information to someone else, she signed as the claimant. She signed the declaration in section 12 as the claimant and her partner signed it as her partner. The form had written on the front page "backdate follows". A form signed by the appellant on 7 March 2003 asking for backdating to 6 January 2003 is in the papers. It has date-stamps of 14 March 2003 and what looks like 11 March 2003 on it, but I accept, as the appeal tribunal expressly did after careful consideration, that that form was also completed and handed over on 7 March 2003.

4. On 26 April 2003, after correspondence addressed to the partner alone asking for information, the Council notified the partner of an award of HB and CTB from 10 March 2003 and giving details of his entitlement. In a separate letter of the same date to the partner, but sent to the wrong address, what was described as his request for backdating was refused because he had not shown continuous good cause. The appellant appealed against the decision on the date on which entitlement started.

5. In the written submission to the appeal tribunal, the Council submitted that, despite the medical and other evidence that the appellant had produced, she had not proved good cause for the failure to claim before 7 March 2003. It was also said that, as the partner was the original

claimant and was still living in the property at the time, correspondence continued to be sent in his name.

6. The appellant attended the hearing on 12 August 2004 with her representative, Ms Sarah Grantham of Advocacy Alliance, after an earlier hearing had been adjourned for further submissions and information. The appeal tribunal decided that the claim made on 7 March 2003 could not be treated as having been made on any earlier date. It concluded, after a thorough evaluation of the evidence, that the appellant had shown continuous good cause from the actual date of claim to 6 January 2003 for the delay in claiming, but that her partner had not. That, it said, was fatal to the claim. The question the appeal tribunal posed for itself was whether an application to backdate a claim for HB and CTB can validly be made by only one party to a joint claim and, if so, whether good cause shown by only one person is sufficient. Its answer to the second part of that question was as follows:

"The Tribunal has been unable to find any authority which would support the notion that good cause shown by one party only to a joint claim is sufficient to found a claim for backdating under either the Housing Benefit or Council Tax Benefit Regulations. It seems to the Tribunal that where a claim is made by both parties (as undoubtedly was the case here) it must be shown that both parties have continuous good cause for the delay in claiming."

7. The appellant now appeals against that decision with the leave of the chairman of the appeal tribunal. The Secretary of State was joined as a party to the appeal. I held an oral hearing, and for the avoidance of doubt gave leave under regulation 24(6)(g) of the Social Security Commissioners (Procedure) Regulations 1999 for the appellant and her representative to attend. Ms Grantham attended on behalf of the appellant and the Secretary of State was represented by Miss Lester of counsel, instructed by the Office of the Solicitor to the Department for Work and Pensions. The Council was not represented, but had put in an additional written submission.

8. It was first a matter of agreement among all parties that the appeal tribunal was wrong to regard the claim in the present case as a joint claim. There is no such thing in the HB and CTB legislation. A claim in respect of a married or unmarried couple can only be made under regulation 71(1) of the Housing Benefit (General) Regulations 1987 (and regulation 61(1) of the Council Tax Benefit (General) Regulations 1992; I shall not refer to the CTB equivalents again) by one member of the couple. Regulation 71(1) provides:

"(1) In the case of a married or unmarried couple or members of a polygamous marriage a claim shall be made by whichever one of them they agree should so claim or, in default of agreement, by such one of them as the relevant authority shall determine."

It is then, I think, plain that the test for backdating for good cause under regulation 72(15) is to be applied to whoever it is who has made the claim in accordance with regulation 71(1). If that person proves good cause the claim is to be backdated and it does not matter that the other member of the couple cannot prove good cause. Thus the ground on which the appeal tribunal rested its decision against the appellant was wrong in law.

9. However, both the Council and the Secretary of State submitted that the appeal tribunal had no jurisdiction to hear the appeal purportedly made by the appellant against the Council's decision issued on 26 April 2003. The Secretary of State submitted, in the submission dated 12 January 2005, that although the Council had been wrong to treat the appellant's partner as the claimant and make decisions in his name, the result was that the appellant herself was not a "person affected by a relevant decision" and therefore had no right to appeal to an appeal tribunal under paragraph 6(3) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. The Council had initially submitted that it had had authority under regulation 71(1) to treat the appellant's partner as the claimant and had done so until he eventually left the premises in September 2003. In the submission dated 22 March 2005, it argued that, by virtue of regulation 16(1) of and paragraphs 1 and 2 of the Schedule to the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, no appeal could be made against a decision in accordance with regulation 71(1). It accepted that it had erred in accepting the appellant's request for backdating and her appeal against the decision of 26 April 2003, and agreed with the Secretary of State that she had no right of appeal as a person affected. I agree that the appeal tribunal had no jurisdiction, but not for the reasons put forward in either of the written submissions for the Secretary of State and the Council. There is a more fundamental reason.

10. I agree with the Council to this extent, that the terms of the Schedule to the Decisions and Appeals Regulations raise problems. Paragraph 1 provides (and paragraph 2 makes identical provision for CTB):

"1. No appeal shall lie against a decision made by virtue of, or in consequence of, any of the provisions in Part X (claims), Part XII (payments) and Part XIII (overpayments) of the Housing Benefit Regulations except a decision under:

- (a) regulations 72(5), (11), (15), 72A(1), 72B(1) and (4) (date of claim);
- [(b) to (h) relate to payments and overpayments]."

Regulation 71(1) is absent from the list in paragraph 1(a), as is regulation 72(1) on the manner of claiming.

11. Now, in a sense, any decision made by a local authority to allow or disallow a claim in respect of a couple is made in consequence of regulation 71(1). That provision must have operated before the local authority knows which member of the couple is the claimant, whether that is through the couple's agreement or through the exercise of the local authority's discretion. Similarly, in the same sense, every decision on every claim is made in consequence of regulation 72(1), as that provision (as to claims being made on the authorised form or in such written form as is accepted by the local authority as sufficient) must have operated before the local authority has a claim to determine. The Schedule cannot possibly have been intended to exclude all decisions on claims or all decisions in cases of couples from the scope of the right of appeal, quite apart from any problems of compliance with Article 6 of the European Convention on Human Rights. Therefore, the concept of decision being given in consequence of a provision as to claims that is not specified in paragraph 1(a) must be given a narrower meaning. I do not

need to determine exactly what that meaning is. There are plainly difficulties stemming from the fact that, under paragraphs 1(2) and 6(1)(a) of Schedule 7 to the 2000 Act, an appeal only lies against a decision of a local authority on a claim or against a superseding decision. That suggests, to adopt the principles applied in social security cases, that there can only be an appeal against an "outcome decision", a decision that determines whether a claimant is entitled to benefit on any day, and that there is not a right of appeal against the determination of particular questions that when put together lead to the outcome decision (see CIB/2338/2000 and R(IB) 2/04, paragraph 55(1)). However, for the purposes of the present case I am prepared to work on the assumption (no more) that paragraph 1 of the Schedule to the Decisions and Appeals Regulations has the effect that in an appeal against an outcome decision there cannot be a challenge to the exercise of a local authority's discretion under regulation 71(1) of the Housing Benefit Regulations.

12. However, either on the assumption that the Council is right that it had unchallengeably chosen the appellant's partner as the claimant in March 2003 or on the Secretary of State's view that the actual decision was made (albeit wrongly) on the appellant's partner's entitlement to HB and CTB, I do not agree that the appellant herself had no right of appeal. In my judgment she was a person affected by that decision.

13. The chain of provisions runs from paragraph 6(3) of Schedule 7 to the 2000 Act:

"(3) In the case of a decision to which this paragraph applies, any person affected by the decision shall have a right of appeal to an appeal tribunal."

Paragraph 23(1) provides that "affected" is to be construed subject to any regulations under sub-paragraph (2), which provides:

"(2) Regulations may make provision specifying the circumstances in which a person is or is not to be treated for the purposes of this Schedule as a person who is affected by any decision of a relevant authority."

The regulation made under paragraph 23(2) is regulation 3 of the Decisions and Appeals Regulations:

"3.-(1) For the purposes of Schedule 7 to the Act and subject to paragraph (2), a person is to be treated as a person affected by a relevant decision of a relevant authority where that person is--

- (a) a claimant;
- (b) in the case of a person who is liable to make payments in respect of a dwelling and is unable for the time being to act--  
[a receiver appointed by the Court of Protection, the Scottish equivalent or a person with a power of attorney];
- (c) a person appointed by the relevant authority under regulation 71(3) of the Housing Benefit Regulations or regulation 6(3) of the Council Tax Benefit Regulations (appointments for person unable to act);

- (d) a person from whom the relevant authority determines that an overpayment is recoverable in accordance with Part XIII of the Housing Benefit Regulations or excess benefit is recoverable in accordance with Part XI of the Council Tax Benefit Regulations;
  - (e) a landlord or agent acting on behalf of that landlord and that decision is made under regulation 93 (circumstances in which payment is to be made to a landlord) or 94 (circumstances in which payment may be made to a landlord) of the Housing Benefit Regulations.
- (2) Paragraph (1) only applies in relation to a person referred to in paragraph (1) where the rights, duties or obligations of that person are affected by a relevant decision."

Under regulation 1(2), "claimant" means a person claiming HB or CTB or both.

14. I think that the Council and the Secretary of State are right in saying that "a claimant" in regulation 3(1)(a) must mean the claimant on whose claim the decision in question was given. Plainly, by virtue of regulation 3(2), it does not mean any person who has made any claim for HB or CTB. Nor do I think that it can mean a person who has made such a claim and can show an effect on her rights, duties and obligations. But where the Council and the Secretary of State go wrong is in arguing that regulation 3(2) provides an exhaustive specification of who can be a "person affected by a relevant decision". Paragraph 23(2) of Schedule 7 to the 2000 Act allows regulations to specify who is to be treated as a person affected and who is not to be so treated. Regulation 3 only gives effect to the first part of that power. There is no express specification of persons who are not to be treated as persons affected and regulation 3(1) is not in the form of "a person is to be treated as a person affected ... only where". Thus, while regulation 3 conveniently puts the status of certain categories of person beyond argument, in my judgment it is still open to a person to argue that she is a person affected by a relevant decision for the purposes of paragraph 6(3) of Schedule 7 to the 2000 Act in the ordinary meaning to be given to that term.

15. Here, the appellant and her partner appear to have been joint tenants of the property in which they lived, so that she would be jointly and severally liable for the rent, and they were jointly liable for council tax, as the Council has submitted that on 8 January 2003 it sent a bill to both of them after the expiry of the award of CTB. On any ordinary meaning of the word, she was affected by the Council's decision of 26 April 2003 in relation to her partner. That decision had a direct effect on the extent of her liability to pay rent and council tax from 6 January 2003. Therefore, the appellant did have a right of appeal if that decision fell within paragraph 6(1) of Schedule 7 to the 2000 Act and the appeal tribunal's lack of jurisdiction cannot rest on the grounds put forward by the Council and the Secretary of State.

16. However, in my judgment, the Council's decision did not fall within paragraph 6(1). I have no doubt that the Secretary of State is right that the claim for HB and CTB made on 7 March 2003 for the period from 6 January 2003 was made by the appellant. The way in which the claim form was completed and its signature by both the appellant and her partner as claimant and partner respectively cannot be interpreted as anything other than an agreement between them that the appellant was to be the claimant. Accordingly, the circumstances simply did not

arise in which the Council had any discretion to exercise under regulation 71(1) of the Housing Benefit Regulations. The appellant and her partner had agreed who was to be the claimant in respect of the March 2003 claim and the Council's discretion only arose in default of agreement. It is irrelevant that the appellant's partner had, by agreement between them, made earlier claims. At the date in question, awards of HB and CTB were still made for defined benefit periods. On the expiry of the period of an award a new claim had to be made. Regulation 71(1) clearly applies to each claim as it is made. Accordingly, the Council were wrong in law in treating the appellant's partner as the claimant and the claim as his. The result is that the decision of 26 April 2003 was not made on a claim and was not a relevant decision within the definition in paragraph 1(2) of Schedule 7 to the 2000 Act. It was a decision that purported to be given on a claim that had not actually been made. No decision was made on the claim that had actually been made by the appellant.

17. At the oral hearing, Miss Lester agreed that the logic of the Secretary of State's view of the proper application of regulation 71(1) led to the conclusions expressed above. She agreed that on that basis the appeal tribunal of 12 August 2004 had no jurisdiction. There is only a right of appeal under paragraph 6(1) of Schedule 7 to the 2000 against a decision on a claim or on an award and here there was no such decision. She also submitted that all that the appeal tribunal could properly have done in the circumstances was to declare that it had no jurisdiction for that reason and to leave it to the Council to make a decision on the appellant's claim that had been made on 7 March 2003 and never determined.

18. The Council might in reply have referred to paragraph 1(a) of the Schedule to the Decisions and Appeals Regulations and submitted that the conclusion above was inconsistent with the denial of any right of appeal against a decision made by virtue of or consequent on regulation 71(1). There are two answers to that. First, having rejected an excessively wide meaning of regulation 71(1) in paragraph 11 above, the position on the reasoning in paragraph 16 above is that the Council had no legal power or jurisdiction to exercise any discretion or choice. It could in law do nothing other than accept that the appellant had made the claim. Second, it is an inherent part of the task of any judicial or quasi-judicial body, like an appeal tribunal, to establish that it has jurisdiction to deal with any case that is put before it (see Commissioner's decision CI/78/1990). In the course of doing so it may be necessary to determine questions, such as whether a previous decision is invalid for lack of jurisdiction, that could not be raised directly by way of appeal (Tribunal of Commissioners' decision R(I) 7/94). In the present case it is necessary, for the purposes of establishing whether the appeal tribunal of 12 August 2004 had jurisdiction to hear the appellant's appeal, to consider the effect of regulation 71(1). I do not consider that that is in any way inconsistent with paragraph 1(a) of the Schedule to the Decisions and Appeals Regulations.

19. On behalf of the appellant, Ms Grantham asked why, if the view set out in paragraph 16 above was accepted, the appeal tribunal of 12 August 2004 could not, standing in the shoes of the Council on its receipt of the claim of 7 March 2003, have decided that the claim was made by the appellant and gone on to give the proper decision on that claim. She submitted, of course, that I should substitute a decision to that effect, accepting the appeal tribunal's finding that the appellant had proved good cause for failing to claim before 7 March 2003, and award her HB

and CTB with effect from 6 January 2003.

20. There is obviously force in the reasoning behind that question. The Tribunal of Commissioners (of which I was a member) in R(IB) 2/04 emphasised the nature of an appeal to an appeal tribunal against a decision on an initial claim as, subject only to express legislative limitations, a rehearing on which the appeal tribunal has power to consider any issue and make any decision on the claim that the decision maker could have considered and made (paragraph 25). However, in paragraph 72 of the decision it was recognised that there might be some decisions that have so little coherence or connection to legal powers that they do not amount to decisions at all, so that the defects in the purported decision cannot be corrected by an appeal tribunal carrying out its function of conducting a complete rehearing. An example of such a purported decision was identified by another Tribunal of Commissioners, of which I was also a member, in R(IB) 7/04. The decision in question there was given on a claim for an increase of benefit for the claimant's wife for a period in respect of which he already had a decision that he was entitled to the increase (although it had previously not been payable to him because of the rules on overlapping benefits). The Tribunal held in paragraph 18 that there was no valid claim on which there was power to give a decision, so that the purported decision was fundamentally flawed and was to be regarded as no decision at all. In my judgment, the position is essentially the same in the present case. Ms Grantham would say that there is a difference, in that here there was a valid claim made by the appellant. However, there was no valid claim by the appellant's partner on which the decision actually given by the Council on 26 April 2003 could have been given. It would be going too far to say that that decision could be corrected by deciding a claim made by a different person. The only result in law can be a conclusion that there was no decision at all given on a claim.

21. Accordingly, the appeal tribunal's decision must be set aside as having been given without jurisdiction and, although I understand why the outcome will be a disappointment to the appellant and to Ms Grantham, the only decision that I can substitute as the decision that should have given is that set out in paragraph 1 above. That leaves the position as set out at the end of paragraph 17 above, that the Council must now make a decision on the appellant's claim made on 7 March 2003, including the claim for backdating to 6 January 2003. I have no power to give any directions to the Council about that decision. However, it seems to me that any local authority in similar circumstances would have to give very serious thought to the findings of fact made and conclusions reached by an appeal tribunal that had carried out a careful and thorough hearing and had had the benefit of seeing and hearing from the appellant and asking her questions directly.

**(Signed)** J Mesher  
Commissioner

**Date:** 25 April 2005