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PLH *Commissioner's File: CH 3893/04*

SOCIAL SECURITY ACTS 1992-2000

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Appellant:	
Respondent:	*[the claimant]*
Claim for:	Housing Benefit
Appeal Tribunal:	Swansea
Tribunal Case Ref:	
Tribunal date:	29 September 2004
Reasons issued:	29 September 2004

1. This appeal by the housing benefit authority has to succeed, as in my judgment the decision of the Swansea appeal tribunal consisting of the chairman Mr E H Tiltman sitting alone on 29 September 2004 did err in law in the way it applied regulation 5 of the **Housing Benefit (General) Regulations** 1987 S.I. No. 1971 to the facts of this particular claimant's case. I wholly sympathise with the chairman's attempt to produce a reasonable solution to avoid a harsh effect, and if ever there was a case for stretching a point in a claimant's favour it was this one; however as the council has elected to pursue this appeal against his decision for the £200 or so involved, I have to confirm that his reasonable solution was outside what the housing benefit regulations provide.

2. The facts are not in dispute. The claimant is a man now aged 34, who had had his own flat as tenant of a housing association for some ten years. In November 2003 he experienced mental health difficulties following a bereavement, and was unable to cope any longer with living on his own. He was admitted as a voluntary in-patient at a psychiatric hospital, and after some months there his condition had improved to the point where he no longer needed full hospital care; though he was still not well enough to cope with independent living again on his own. As explained in the evidence of Mr P Singh, the community psychiatric nurse who has throughout been supporting the claimant and acting as his representative in his appeals, a place became available in supported living accommodation at a sheltered establishment, and after an overnight assessment to try it out the claimant agreed that it was in his best interests to go there to live. This was obviously not an easy decision for the claimant. As described in Mr Singh's evidence (e.g. the letter dated 1 July 2004 before the tribunal at pages 14-15) it meant he was

forced into giving up the flat he had been in for some ten years, which had in no way been his intention when he came into hospital. However he accepted the medical advice and agreed to move to the supported accommodation on his discharge from hospital, the date for which was set for 14 June 2004. On 13 May 2004 he wrote to his landlord in the following terms to give notice to terminate the tenancy of his flat (page 1E):

> **"Dear Sir, I am writing to inform you that I wish to give up the tenancy of my flat. I am giving four weeks notice from today 13/05/2004. I will hand the keys in before 10/06/2004. I have informed housing benefit of my decision."**

3. The claimant then spent the next four weeks clearing out and selling his household possessions. He was aware that if he changed his mind he could have returned to his flat at any time up to the last day of his notice, though it was clear from Mr Singh's evidence (pages 13, 14) that it was not really a practical proposition for him to do so at that time :

> **"It was down to the fact that there is a tremendous pressure on hospital beds that meant we were not able to keep him in until he was able to take up the tenancy of his flat once again.... As you will be aware many people who enter hospital are on housing benefit. All hope that they will return to their homes but unfortunately not all can."**

4. As Mr Singh says, it is particularly unfair if the housing benefit regulations penalise vulnerable people by operating against them in this situation. However, I have had to conclude that the regulations do have just that effect, and the tribunal chairman was wrong to overturn the authority's decision of 16-17 June 2004 that the claimant no longer qualified for housing benefit on his flat from the start of the week after he gave his notice to quit, because from then on he no longer fell within the provision protecting the entitlement of people temporarily absent from the homes they normally occupy.

5. Under section 130 **Social Security Contributions and Benefits Act 1992** it is a condition of entitlement to housing benefit that the dwelling for which it is claimed is occupied by the claimant as his home. By section 137 the Secretary of State is empowered to make regulations to prescribe when a person is or is not to be treated as "occupying a dwelling as his home" for this purpose. The regulations in point are in regulation 5 of the housing benefit regulations cited above (**"Circumstances in which a person is or is not to be treated as occupying a dwellinghouse as his home"**). As in force at the relevant time for this appeal these provided so far as material as follows:

> **"5. (1) Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home –**
>
> **(a) by himself or, if he is a member of a family, by himself and his family;...**

and shall not be treated as occupying any other dwelling as his home. ...

(8) Subject to paragraph (8C) a person shall be treated as occupying a dwelling as his home while he is temporarily absent therefrom for a period not exceeding 13 weeks ... only if –

(a) he intends to return to occupy the dwelling as his home ...

(8B) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupied as his home ("absence"), if –

(a) he intends to return to occupy the dwelling as his home; and

(b) while *[sic]* the part of the dwelling which is normally occupied by him has not been let, or as the case may be, sublet; and

(c) he is - ...

(ii) resident in a hospital or similar institution as a patient...

(d) the period of his absence is unlikely to exceed 52 weeks...

(8C) A person to whom paragraph (8B) applies shall be treated as occupying the dwelling he normally occupied as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence."

6. It is not disputed that the protection of regulation 5(8B) applied to the claimant throughout the period of six months he was living as in in-patient in the hospital, down to the time of his notice to the landlord and the housing benefit authority that he had decided to terminate his tenancy so that he would not be returning to live at the flat as his home on his discharge from hospital. But it seems to me the authority must be right as a matter of cold analysis of the wording of the regulations in taking the view that once that notice had been given, it could no longer be said that the claimant fell within the protection of paragraph (8B) as he was no longer a person under sub-paragraph (a) with a continuing intention to return to occupy his flat as his home in due course when he came out of hospital.

7. The consequence therefore had to be that he no longer qualified for housing benefit from the beginning of the week after that condition ceased to be satisfied, that is from 16 May 2004, even though he still remained liable to the landlord for the full rent for the remaining period of his notice. Of course the chairman was quite rightly concerned to give the claimant the benefit of any possible doubt on the facts, but in the light of the evidence I have outlined and the plain wording of the regulations I do not think it was open to him to conclude as he did in his statement of reasons at page 29 that:

"I take the view that the giving of the notice, as required under the terms of his tenancy, was no more than an expression of his intention not to return to the property upon the

expiration of the tenancy. From that point of view, therefore he remained temporarily absent until the cessation of the tenancy."

8. The fallacy in that approach is that the condition in regulation 5(8B) is actually the other way round: it requires the continuance in the *current* benefit week of a positive intention to return in due course to live in the dwelling as the home. Once the claimant's ability to demonstrate that continuing intention fell away, as it did on 13 May 2004 by his acceptance that he would not be able to go back to live in his flat on his discharge from hospital but instead would have to give it up and make his home elsewhere, the condition could no longer go on being satisfied even though the cessation of the tenancy and the discharge from hospital were not due to take place for another four weeks.

9. As I say, I think this is a harsh result, probably not even intended by the framers of the legislation if such facts as these had been considered at the time: compare the more favourable treatment for people who go into residential accommodation for a trial period in regulation 5(7B). However, tribunals and Commissioners are of course bound to apply the regulations approved by Parliament as they stand, not as we would like them to be; and I can only comment that if the authority is able to find some other budget or fund out of which the claimant could be given assistance with the outstanding rent liability for his notice period to avoid the risk of a relapse in his condition causing much greater demands on the social services, this is plainly an extremely deserving case.

10. The authority's appeal is therefore allowed and the tribunal's decision set aside. In accordance with paragraph 8(5)(a) **Schedule 7 Child Support Pensions and Social Security Act 2000** I give instead the decision I am satisfied the tribunal ought to have given, namely that the authority's decision of 16 (or 17) June 2004 that the claimant was no longer entitled to housing benefit from 16 May 2004 since he no longer qualified as a person temporarily absent from his dwelling but intending to return to occupy it as his home was correct, and is confirmed.

(Signed)

P L Howell
Commissioner
22 March 2005