Bulletin 190

CH/4081/2004

reported as R(H) 10/05

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by Cherwell District Council ("the Council"), brought with my permission, against a decision of the Oxford Appeal Tribunal made on 13 July 2004. For the reasons set out below that decision was in my judgment erroneous in law. I allow the appeal, set aside the Tribunal's decision and remit the matter for redetermination by a differently constituted appeal tribunal.

2. On 29 November 2002 the Claimant, a woman now aged 28 who has 2 young daughters, signed an application form for housing and council tax benefit in respect of her intended occupation (as from 14 December 2002) of a 3 bedroomed terraced house ("the Property"). She stated that the landlord would be a Mr. W, that she was not related to either the landlord or his partner, and that the rent would be £995 every 4 weeks.

3. On an unspecified date in November 2002 the Claimant signed a tenancy agreement of the Property for a term of 12 months from 13 December 2002 at a rent of £1077.92 per month (which is equivalent to £995 every 4 weeks). The landlord was stated to be Mr. W.

4. By a decision made on 27 January 2003 a rent officer decided that housing benefit should be based on a rent of £623 per 4 weeks, and housing benefit was awarded on that basis.

5. On 3 November 2003 the Claimant signed a renewal application form for housing benefit in respect of the Property. She again stated that the landlord would be Mr. W and that she was not related to either the landlord or his partner. With that form she submitted a copy of a further tenancy agreement, which had apparently also been signed on an unspecified date in November 2002, for a term of 24 months beginning on 13 December 2003, at a rent of £1100 per month. The landlord was again stated to be Mr. W.

6. Following a further reference to and decision by a rent officer housing benefit was awarded on the basis of a rent of £650 per calendar month.

7. As a result of anonymous information received the Council did a search at the Land Registry and discovered that the registered proprietors of the Property were in fact Mr. W and Miss W. Miss W is Mr. W's partner (although they are not married), and is the mother of the Claimant. The Council interviewed both the Claimant and Mr. W. They both stated that the Claimant had not paid the difference between the contractual rent and the amount paid by way of housing benefit. Mr. W stated that he had not asked her to do so and had not evicted her by reason of the rent arrears due to the fact that she was his partner's daughter.

8. On 24 March 2004 the Council wrote to the Claimant stating that it considered that her tenancy was not on a commercial basis and had been contrived to take advantage of the housing benefit scheme and that as a result "housing benefit cannot be paid in respect of your occupation of [the Property]. If the correct circumstances regarding your tenancy had been known from the commencement of your occupation, housing benefit would not have been paid at all. Therefore, all the housing benefit that has been paid has been overpaid."

9. By a separate letter of the same date the Claimant was notified that she had been overpaid by £8696.76 in respect of the period 16 December 2002 to 11 January 2004. The letter continued: "the overpayment arose because the Council considers that your tenancy is not on a commercial basis, and that it has been contrived to take advantage of the housing benefit scheme. The amount is recoverable from you."

10. At the hearing of the Claimant's appeal the Council's representative stated that the Council did not wish to continue to contend that the Claimant's liability was created in order to take advantage of the housing benefit scheme, within the meaning of reg. 7(1)(l) of the Housing Benefit (General) Regulations 1987.

11. Further, the Tribunal decided that the Council had not established that the tenancy was not on a commercial basis within reg. 7(1)(a), and so allowed the Claimant's appeal.

12. In para. 6 of its Statement of Reasons the Tribunal said:

> "To reach a decision on whether or not a tenancy is commercial I must ascertain whether the agreement, as against any payments made, was other than on a commercial basis. The agreement itself is properly drawn up in this instance and that is important because in CH/3008/2002 the Commissioner observed that it would be hard to imagine that a tenancy created by law was not commercial: its existence indicates a degree of formality between the parties, an understanding that there is something enforceable between them."

13. The Statement of Reasons then went on to consider the factors which the Council contended indicated that the tenancy was not on a commercial basis, and gave reasons for taking the contrary view, concluding that "there are sensible and convincing responses to each of the factors I was expected to consider."

14. One of the grounds of appeal to me is that in para. 6 of its Statement of Reasons the Tribunal misunderstood what the Commissioner was saying in CH/3008/2002. In that case the tenant remained in occupation of the property after the expiry of a contractual term of 12 months. During the contractual term the reversion had been transferred to the claimant's sister. One possibility considered by the Commissioner was that the claimant had not surrendered or taken other action to terminate that contractual assured tenancy prior to its expiry, in which case, under s.5(2) of the Housing Act 1988, the tenant was entitled to remain in possession of the property "under a periodic tenancy arising by virtue of this section." The Commissioner said (in para. 11):

> "If this is what happened, the claimant's tenancy became a statutory periodic tenancy. *I cannot understand how a tenancy that is created by law cannot be on a commercial basis.* However, the failure by the claimant's sister to take advantage of the provisions allowing for an increase in rent under the tenancy or for recovery of possession for failure to pay rent may be relevant. The landlord has power to seek increases in rent under section 13 of the 1988 Act. It is possible that the failure by the landlord to avail herself of this possibility had the effect that the tenancy ceased to be on a commercial basis. Also, the landlord could seek possession for failure to pay rent or for persistent delay in paying rent under section 7(3) and (4) of, and Grounds 10 and 11 in Schedule

2 to, the 1988 Act. Again, the failure to make use of these provisions may have had the effect that the tenancy ceased to be on a commercial basis."

15. It seems to me that the words which I have emphasised may be capable of misleading. It may be that it was clear in that case that the contractual tenancy (granted by someone other than the claimant' sister) had been on a commercial basis, and that in reality questions as to non-commerciality only arose after the claimant's sister had become the landlord and at some time after the tenancy had become statutory. However, the italicised words would appear to mean that a statutory tenancy cannot, at the point when it arises, be non-commercial, and that it can only become so by virtue of factors subsequently occurring (e.g. the sorts of events which the Commissioner went on to mention). That is my view plainly not correct. The statutory periodic tenancy arising under the 1988 Act has essentially the same terms as those of the preceding fixed term tenancy (s.5(3)(e) of the 1988 Act). Further, it arises simply by reason of the termination of the previous contractual tenancy. If that contractual tenancy was not on a commercial basis, then it is likely that the statutory one will also not be so. For example, if, by reason of the relationship between the parties, the terms of the contractual tenancy are very unusual, those terms will be carried over into the statutory tenancy. It is true that either the landlord or the tenant can under s.6 of the 1988 Act serve a notice proposing different terms, in which case in the event of dispute a rent assessment committee is to fix such terms "as might reasonably be expected to be found in an assured tenancy." A failure to use those provisions might be an additional factor pointing to non-commerciality, but the mere fact that the tenancy had arisen by force of the statute would not mean that it would be necessary to point to such a failure, or to some other matter arising subsequent to the arising of the statutory tenancy, in order to demonstrate non-commerciality.

16. Be that as it may, the Tribunal in the case before me on any view clearly misunderstood what was said in CH/3008/2002. When referring to a "tenancy created by law" the Commissioner there was referring to a statutory periodic tenancy arising under s.5(2) of the 1988 Act, but the Tribunal appears to have taken the reference to be to any tenancy contained in a formal agreement. At no stage in the present case was the tenancy a statutory one. What the Commissioner said in that case was clearly not applicable in the present case.

17. The question is then whether that error affected, or may have affected, the actual outcome. Although, as I have said, the Tribunal did go on to discuss the factors said to point in favour of non-commerciality, it is in my judgment impossible to be sufficiently confident that the error which I have identified did not influence the result. This is particularly so in view of the way in which the Statement of Reasons is structured. The essence of the actual reasoning began with para. 6, and the subsequent discussion was introduced by the words "there are other factors." In the circumstances I must hold the Tribunal's decision to have been erroneous in law.

18. No copy of a decision revising the Claimant's then current, or the previous, award of housing benefit was in evidence before the Tribunal. All that was in evidence was the letters written to the Claimant on 24 March 2004. However, I consider that there is sufficient evidence that a decision was made which in substance revised the previous awards of housing benefit on the ground of ignorance as to a material fact (namely that the Claimant was related to the landlord, which was relevant to commerciality). The new tribunal should proceed on that footing. It cannot therefore be argued (and the Claimant has not sought to argue) that the

overpayment is not recoverable because the awarding decisions have not been properly revised (or superseded).

(signed on the original) **Charles Turnbull**
Commissioner
22 February 2005