Bulch 182

CF **CH/996/04** Estate

1. This appeal, brought with my leave, succeeds. The decision of the tribunal on 4 12 03 was erroneous in law, as explained below, and I set it aside. However I think it expedient to make any necessary further findings of fact and give the decision I consider appropriate in the light of them. The claimant has not been responding to communications from his representative, who therefore does not request an oral hearing. The decision I give is that the claimant had no underlying entitlement to housing benefit after the date on which he cancelled his return flight booked for 7 1 02. By "underlying entitlement" I mean were the benefit conditions, except for the making of a claim, satisfied? Therefore, apart from the period from 5 6 02 to 12 6 02 for which I accept it, good cause does not arise. But lack of good cause does also preclude a backdated claim for council tax benefit.

2. Council tax benefit does raise different questions. I decided in CH/2111/03 that since it depends on residence rather than occupying a dwelling as the home, absence does not necessarily affect entitlement, unless it amounts to abandonment by a claimant of the home as his sole or main residence. The purported amendments to the Council Tax Benefit (General) Regulations by SI 1995 No 625, which introduced regulation 4C in similar terms to regulation 5 of the Housing Benefit (General) Regulations, were of no effect. Council tax benefit will still require the making of a claim, but underlying entitlement can continue. I am not sufficiently aware of the council's claim practices, and pages 9 and 10 relate only to housing benefit, so I cannot usefully say anything more. But in the light of my findings on good cause, this does not matter.

3. The appeal arises out of a request to backdate to 9 7 01 a housing benefit (HB) and council tax benefit (CTB) claim made on 5 6 02. The 9 7 01 date was the one asked for (page 22), but I assume, as did the tribunal, that the actual date sought was 25 6 01, the day after the previous award ceased. Backdating was not claimed until 12 6 02, but I agree with the tribunal that this further delay was adequately explained. Regulation 72(15) of the Housing Benefit (General) Regulations (HBGR) and regulation 62(16) of the Council Tax Benefit (General) Regulations provide that a backdating claim shall succeed where a claimant shows he had continuous good cause for failing to claim from the first date on which he can show this, or from 52 weeks before the date of the backdating claim, whichever is the later. "Good cause" in this context means "some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did": R(S)2/63(T). But provided an authority or a tribunal has regard to this test, the decision on whether good cause exists is one of fact: *CAO v Upton* [1997] 2 CLY 4668. To

determine the appeal, it was also crucial to consider whether there was during this period underlying entitlement to benefit.

Factual background

4. The claimant, born on 3 1 53, was in receipt of benefit when on 28 2 01 he and his wife left for Bangladesh. He did not, in breach of regulation 75(1) HBGR, inform the local authority that he was going. The purpose of the trip was said to be to visit his wife's parents who were both unwell (in one version, see page 34), or to visit her mother who was unwell and the claimant's wife had missed her father's death and did not want to risk missing her mother's (page 53). The stay abroad was expected to last 4-6 weeks (page 22) or 6-8 weeks (pages 27, 53) or 2-3 months (page 34). At some point the first return flight was booked for 11 6 01 (page 70). I note that shortly after he left the claimant was made bankrupt on 7 3 01 in respect of a restaurant.

5. The existing award of benefit expired on 24 6 01, income support having been terminated on 19 6 01. The local authority took the view that there would have been an overpayment for at least part of this award, but that it was exercising its discretion not to recover it.

6. The claimant, who suffers from Parkinson's disease, had taken medication with him which he had hoped would be sufficient, but at some point this ran out and he contacted his daughters in Cambridge who arranged for him to have repeat prescriptions which were taken out to him by people from Cambridge. At some point also he fell ill with viral hepatitis. A doctor's certificate at page 28, dated 18 10 01, said he had been ill with this "since last few months" and advised bedrest for a further 6 weeks.

7. The claimant believes he fell ill during April/May 2001. He did not take the flight booked for 11 6 01, but booked a further flight for 7 8 01. He did not take this either. He says he had to wait 6-8 weeks (5-6 weeks at page 23) for a flight each time he booked one.

8. He booked a further flight for 7 1 02, but relinquished this to be able to attend the 9 1 02 funeral in Bangladesh of his cousin (page 67) or brother (pages 22, 31, 34), who died in Cambridge on 4 1 02. He says another flight was booked for 25 2 02, but this does not figure on the list at page 70.

9. There was a boating accident. The claimant originally said (less than four months afterwards) that it was in May 2002, he thought on 1 May. Later he revised this estimate to February, and a further doctor's letter of 18 1 04 at page 99 (which was not before the tribunal) gave the date as 19 2 02, requiring 6-8 weeks treatment. 6 weeks would take him up to 2 4 02, 8 weeks to 16 4 02. (I

have not been able to find a doctor's statement of 20 4 02, as suggested at page 68. The certificate at page 69 clearly refers to someone else.)

10. Another flight was booked for 9 4 02, but the claimant says he was too ill to take it. His daughter said on 18 4 02 (page 59) that he had a flight booked on 27 4 02. He finally flew back on 28 5 02.

11. The council's Revenue Services sent out an HB claim form on 30 4 01 and a reminder letter on 11 6 01. The daughters opened these but did nothing about them. They say they kept thinking their father would be back soon. It seems that the landlords (City Homes) are part of the council's Housing Services, but a separate department from Revenue Services (page 24). There was contact between the claimant's daughters and the landlords (as set out at pages 60-60A, see also pages 36-36A) in August 2001, when it was made clear that the claimant was in Bangladesh and too ill to fly home, and that an older daughter wanted to claim on her father's behalf. She was told she could not. Now, regulation 71(3) of HBGR permits (though does not require) the local authority to appoint a person over 18 to act for the person liable to pay rent. It is also possible for the person liable for rent himself to appoint another person as his agent. Part of the "good cause" alleged in this case is the failure to advise the daughters that there *were* ways in which they could have claimed HB on their father's behalf. This advice does not seem to have been given by Revenue Services but by the landlords, though it may still be considered as part of good cause. There was a prospective HB claim by Nasmin in April 2002, for which the claimant provided written authority to the council to discuss rent details and stated he was too ill to travel (page 59A). But this was not proceeded with because the claimant came back the following month.

12. There are elegantly assembled submissions at pages 53-55 and 66-68, the latter accepting that there were or may have been some periods of non-entitlement. The submissions smooth out the undoubted errors and inconsistencies in the claimant's original account(s).

13. The tribunal conducted a careful hearing with the aid of an interpreter, the claimant's representative Mr Flick and a council presenting officer, and made findings on good cause, though the last period it allowed, from 25 3 02, does not have its start date explained, and the council has not been able to help me on it. The tribunal also made some findings on underlying entitlement, but did not cover the whole of the period. So I must set its decision aside.

"Underlying entitlement"

14. There can only be backdating over a period where there was, subject only to making a claim, an entitlement to benefit. The relevant regulations are in

HBGR regulation 5. The general test of HB entitlement is whether a person is occupying as his home the dwelling on which he is liable to pay rent. There are exceptions. The claimant's initial absence from 28 2 01 could have fallen within regulation 5(8): where a claimant intends to return to occupy the dwelling as his home and no part of it was let or sublet, he may be treated as continuing to occupy it where the period of absence is unlikely to exceed 13 weeks. The tribunal decided that once it became, within that 13-week period, apparent that the claimant would not be able to return, that exception no longer applied; but in any case the council had decided not to try to recover any of the undoubted overpayment before the end of the then current HB award.

15. The exception argued to be relevant here is a subparagraph of regulation 5(8B), coupled with regulation (8C):

> (8B) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence") if –
> (a) he intends to return to occupy the dwelling as his home; and
> (b) while 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 –
> (iii) undergoing...in the United Kingdom or elsewhere, medical treatment, or medically approved convalescence, in accommodation other than residential accommodation; and
> (d) the period of his absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period.
> (8C) A person to whom paragraph (8B) applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence.

This appears to provide that although a period longer than 52 weeks will not, in exceptional circumstances, prevent the exception applying, benefit can only be paid for 52 weeks.

16. Under regulation 5(9), "medically approved" means certified by a medical practitioner. It has not been suggested that this is a term of art, and I see no reason, since the subparagraph contemplates treatment or convalescence abroad, why it should require the certifying medical practitioner to be in the UK.

17. The council contends that these exceptions cannot apply unless the claimant has fulfilled his regulation 75(1) duty and notified the council in writing of his intention temporarily to leave the dwelling. Since this claimant did not, that should be the end of the matter. But although failure to comply with regulation 75(1) may be highly significant as to causation in overpayment cases, I see nothing in the statutory materials to indicate that this attractively simple solution should be adopted. I note also that by not seeking to recover the

overpayment for the balance of the award subsisting when the claimant went abroad, the council has effectively waived the breach of this duty where, for whatever reason, the DWP did not terminate the income support until well after the four weeks for which entitlement, at the most optimistic, could have continued under regulation 4(2) of the Income Support (General) Regulations. The claimant would have saved everybody, not least himself and his daughters, an immense amount of trouble and worry if he had reported what his plans were, but I cannot find against him simply because he did not do so.

18. Mr Flick has pieced together the claimant's evidence about the period of his absence to try and persuade the tribunal, and now me, that he had underlying entitlement, subject only to making a claim, for the whole of that period (regulation 5(8B) and (8C)), and that he had good cause throughout it for failing to make a claim (regulation 72(15)).

19. For the sake of completeness, I deal first with the initial period of absence and regulation 5(8). The claimant left for Bangladesh on 28 2 01. Mr Flick submitted that once the claimant booked the return flight for 11 6 01, outside the 13-week period, it stopped being "unlikely" that his absence would exceed 13 weeks and became clear that it would. The tribunal put this at 30 4 01. Thereafter his underlying entitlement to benefit ceased, because he was not occupying the dwelling as his home and could not be treated under regulation 5(8) as doing so. His subsisting award of benefit ran until 24 6 01, and the council decided not to recover any overpayment for this period.

20. If and in so far as the claimant can then bring his absence within regulation 5(8B), he can however show underlying entitlement. He was being medically treated or convalescing in Bangladesh, within (c)(iii), from a few months before 18 10 01 to around the end of November 2001, and during this time his absence was "unlikely" to exceed 52 weeks and he was making efforts to catch a return flight. But from 1 12 01 to 18 2 02 he was not within (c)(iii). And even if some further extended period of "convalescence" is allowed, once the claimant cancelled, albeit for understandable reasons, his return flight on 7 1 02, his absence became "likely", because of the time it took to obtain flight bookings, to exceed 52 weeks and his underlying entitlement ceased. The fact that thereafter he became ill again within (c)(iii), and that in the end he returned within 15 months of his originally leaving (regulation 5(8B)(d)), does not, it seems to me, revive entitlement once it has lapsed.

Good cause

21. The structure of regulation 72(15) (and CTB regulation 62(16)) is that any good cause period must immediately precede the date of the claim sought to be backdated:

> 72(15) Where the claimant makes a claim in respect of a past period (a "claim for backdating") and, from a day in that period up to the date of the claim for backdating, he had continuous good cause for his failure to make a claim, his claim for that period shall be treated as made on –
>
> (a) the first day from which he had continuous good cause; or
>
> (b) the day 52 weeks before the claim for backdating,
>
> whichever fell later.

But there must be underlying entitlement. Where, as here in relation to HB, that entitlement ended well before the date of the backdating claim, good cause cannot extend the period.

22. The tribunal considered good cause and accepted it (for a variety of reasons - ill-health, misleading advice to the daughters) from 25 6 01 to 1 12 01, and again from 25 3 02 (the date is unexplained) to the date of the backdating request. It did not accept it for the period 2 12 01 to 24 3 02. This decision has been criticised by Mr Flick, who says the question is not whether it was possible for the claimant to make a claim but whether it was reasonable to expect him to do so.

23. The real criticism for HB is that good cause does not avail you if there is no underlying entitlement requiring no more than the making of a claim to "activate" it. The tribunal did not properly consider this. I have, and my conclusion is that from the date the claimant cancelled his 7 1 02 flight, any regulation 5(8B) and (C) entitlement ceased, and since this happened several months before the backdating request, good cause cannot apply.

24. CTB is, as I said above, different. As long as the home remains the claimant's sole or main residence, there *is* underlying entitlement subject only to making a claim. The backdating provisions are the same. Mr Flick's submissions point to illness, lack of, or misleading, advice, lack of education, and overall the claimant's belief that he could not validly make a claim from outside the country, all of which should have added up to a finding that he could not reasonably be expected to have made a claim.

25. I am not convinced that, on this test, there was continuous good cause for the whole period up to the reclaim on 12 6 02 for failing to claim CTB. The claimant knew that HB and CTB had to be claimed at intervals, he had repeatedly done this, probably since 1989 but at least since 1995. His daughters may not have told him about the renewal form on the assumption that he would be back soon, but by the time of the reminder letter the claimant had missed his original flight back, and he missed another in August. This did seem to prompt the daughters to visit the landlords with a view to claiming themselves, and they

were then given misleading advice. It is said in Mr Flick's first submission that this confirmed advice previously given to them by Revenue Services, but Mr Frost says at page 61A that no advice was sought from them between February 2001 and May 2002. Mr Flick also said the daughters said the misleading advice was confirmed on a number of occasions by Ms Swann, but likewise there is no evidence of this in Paul Derry's letter at page 60A. The claimant had told his daughters to speak to Heather Williams, who had always helped him to make his claims, but they did not do this.

26. There was clearly quite close contact between the claimant and his daughters, not only because of the medication regularly supplied but because he was advising them about what to do and who to see. Even if I accept that the misleading advice given by the landlords to the daughters in August 2001 did have some effect on him, it amounted to no more than that they could not claim on his behalf. He was never given express advice that he could not claim from outside the country; the most he can say is that he was not told he could do so. He is not particularly old. He may be illiterate and poorly educated, but he agreed in evidence that he could have got help from someone in Bangladesh to complete a claim form. He knew arrears were building up. Making all allowances for his illness, and his various expectations of coming home soon, I do not see that I can accept that it was not reasonable to expect him to make a claim once he cancelled his 7 1 02 return flight. About 6 weeks elapsed before he again became ill, and a further 6 weeks after he got over this illness before he finally returned home.

27. By April 2002 Nasmin was drafting and sending to her father for his signature a letter giving leave for rent and other details to be discussed in connection with the claim that *she* was proposing to make. It cannot have helped matters that he said at this point that he had a return flight for 27 4 02. I do not think I can accept that this letter should have been treated as a claim on the claimant's behalf. It clearly was not.

28. My allowing this appeal does not therefore bring any advantage to the claimant. His underlying entitlement to HB ceased in early January 2002. His underlying entitlement to CTB probably continued, but my findings on good cause preclude the new claim being backdated.

(signed on original) Christine Fellner
Commissioner

27 August 2004

Bulletin IFL

CH/0939/2004

[Stitt]

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is given under paragraph 8(4) and (5)(c) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. It is:

I SET ASIDE the decision of the Preston appeal tribunal, held on 26 August 2003 under reference U/06/075/2003/00447, because it is erroneous in point of law.

I REMIT the case to a differently constituted appeal tribunal and DIRECT as follows.

The appeal tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under paragraph 6(9)(a) of Schedule 7 to the 2000 Act, any other issues that merit consideration.

The appeal tribunal must investigate and determine whether the overpayment of housing benefit is recoverable from the claimant.

The appeal to the Commissioner

2. This is an appeal by a claimant, brought with my leave. The other party to the appeal is the claimant's local authority.

The issue

3. The issue in this case is whether an overpayment of housing benefit is recoverable. The housing benefit was paid to the claimant's landlord, but the local authority has sought recovery from the claimant himself. There is no doubt that there was an overpayment; the claimant has never challenged this.

Could the claimant reasonably have been expected to know that housing benefit was being overpaid?

4. I set aside the tribunal's decision, because it did not deal adequately with this issue.

5. In dealing with this issue the tribunal should have considered the question: should the claimant have known that the landlord was continuing to receive housing benefit for him? The tribunal did not deal with the information available to him that might have shown whether the landlord was continuing to receive payments.

6. There are in evidence some receipts purporting to show payments into a bank. In view of the letter from the Bank of Scotland, it is surely beyond doubt that the receipts were not from one of their branches. Anyway, they were for the wrong amount and there seems to me to be no possibility of doubt, on the evidence, that at least the February 2002 payment did not reach the landlord's account. As I told the claimant when granting leave, at the least that raises the suspicion that he had later concocted the receipts to make the appearance of payment.

7. But concocting evidence does not necessarily show that the claimant should have known *at the time* that housing benefit was still being paid to the landlord. That would require further findings of fact, perhaps drawn by inference from the evidence available.

8. I have directed a rehearing, because further investigation into the facts is needed. It would not be safe for me to substitute a decision on the information before me. The factual enquiry is better undertaken before a local appeal tribunal than before a Commissioner.

9. In view of the evidence of the concocted receipts, the claimant's credibility will be in issue before the tribunal and I warn him to attend the hearing prepared to convince the tribunal that he should be believed.

Other issues

10. The tribunal did not deal with two other issues:

- was the whole of the overpayment caused by the official error of the officer of the Department for Work and Pensions who failed to notify the local authority, as promised, that the claimant was no longer receiving a jobseeker's allowance?

- did the claimant cause or contribute to the mistake that led to the overpayment?

11. Those issues did not arise on the way that the tribunal dealt with the case. They may or may not arise at the rehearing. I have read what the local authority has to say on these matters in its observations on pages 74 and 75. I note what those observations say about the duty of the Department for Work and Pensions/Benefits Agency. However, it is surely possible for an individual officer to undertake to a claimant that information will be passed on. If that undertaking is not honoured, that would be an official error.

Disposal

12. I allow the appeal and direct a rehearing.

Signed on original
on 14 May 2004

Edward Jacobs
Commissioner

Bulch 150

CH/0296/2004

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is as follows. It is given under paragraph 8(4) and (5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

1.1. The decision of the Worcester appeal tribunal under reference U/04/055/2003/00469, held on 10 November 2003, is erroneous in point of law.

1.2. I set it aside, make findings of fact and give the decision appropriate in the light of them.

1.3. I find as fact that the tenancy and related arrangements under which the claimant occupies his dwelling are on a commercial basis.

1.4. My decision is the claimant is not barred from entitlement to housing benefit under regulation 6 or 7 of the Housing Benefit (General) Regulations 1987. The local authority will now decide his claim for housing benefit on that basis.

The appeal to the Commissioner

2. This is an appeal to a Commissioner against the decision of the appeal tribunal brought by a housing benefit claimant with the leave of the district chairman who chaired the tribunal. The claimant's local authority does not support the appeal.

3. In view of the issue raised by this appeal, I directed an oral hearing. It was held before me in London on 17 March 2004. The claimant was represented by his father. The local authority was represented by its solicitor, Mr Mitton. The appeal was heard at the same time as that in another case that raised similar issues: *CH/0215/2004*. Inevitably, the arguments on the two appeals overlapped. I am grateful to all those involved for their submissions in both cases.

4. The Secretary of State was invited to join as a party to the proceedings, but declined.

The issue

5. The claimant made a claim for housing benefit on 20 December 2002. The local authority refused the claim. It was refused on the basis of regulation 7(1)(a) of the Housing Benefit (General) Regulations 1987, which provides:

> '(1) A person who is liable to make payments in respect of a dwelling shall be treated as if he were not so liable where-
>
> (a) the tenancy or other arrangement pursuant to which he occupies the dwelling is not on a commercial basis'.

6. As the case was presented at the oral hearing before me, no other bar to entitlement in regulation 6 or 7 applied. Specifically, the local authority accepted that the arrangement was

not a sham, that the claimant had sufficient mental capacity to make the arrangement, and that it was not created to take advantage of the scheme.

7. The tribunal confirmed the local authority's decision. The issue for me is whether the tribunal went wrong in law in making that decision.

The approach for tribunals

8. Whether or not an arrangement is on a commercial basis is a matter of judgment. The tribunal has to find the relevant facts and then decide whether or not their combined significance is that the arrangement was on a commercial basis.

The approach for a Commissioner

9. The nature of the issue for the tribunal affects the nature of the issue for the Commissioner. The error of law may be found in the deficiency of the chairman's explanation of the tribunal's findings and reasoning. But that argument is not open in this case, and was not put to me. The chairman has given a clear and comprehensive account of her reasoning. Alternatively, it may be found in the substance of the tribunal's reasoning. I cannot set aside the tribunal's decision simply because I would have assessed the combined significance of the facts differently from the tribunal. I can only do this if the tribunal came to a conclusion that 'exceeded the generous ambit within which a reasonable disagreement is possible', to use Lord Fraser's formulation of the test in *G v G* [1985] 2 All England Law Reports 225 at page 229. Another way of expressing this is to say that the tribunal went wrong in what Lord Bridge called 'the balancing exercise' (quoted by Lord Fraser on page 229). My conclusion is that the tribunal went wrong in law on either of those formulations.

The facts

10. The facts are largely not in dispute.

11. The claimant is disabled. His condition was described by an independent consultant in Autism and Aspergers Syndrome as follows:

> '[The claimant] is a 23-year-old male with severe difficulties in social interaction, some unusual preoccupations and some abnormalities in communication but no delay in development of verbal skills. These difficulties are causing severe difficulties and have halted [his] academic progress.
>
> 'Although there was not sufficient evidence to fulfil the criteria for Asperger Syndrome using the ADI instrument, there is sufficient evidence to confirm a Pervasive Developmental Disorder (NOS) with Aspergers Syndrome suggested as a differential diagnosis and working diagnosis (using ICD 10 criteria).
>
> 'It is possible that [he] has an anxiety disorder co-occurring with his P.D.D. He is also subject to low moods and depression.'

12. The claimant's father experienced financial difficulties and decided to move into a new house with a self-contained flat for his son. They entered into a tenancy agreement. The

claimant is able to function independently, but requires support in order to achieve that independence. His parents are able to provide support from their dwelling.

13. It is convenient to quote from evidence in the related appeal, which also applies to this case. In the related case, the claimant has autism, similar to the diagnosis in this case. The evidence referred to the policy for the care and support for claimants with that disability:

> 'Standards six to ten, as laid down by the Care Standard Commission, start from the premise that service users should be enabled to take control of their own lives and those with intellectual impairments and/or limited communication skills should be supported to make their own decisions whenever possible.'

14. The claimant receives council tax benefit, disability living allowance (mobility component at the lower rate and care component at the lowest rate), incapacity benefit, and wages from permitted work on a database for young people. He is unable to pay the full contractual rent, but is paying £200 a month. The contractual rent was set at £520, which is high, but was set with a view to a more realistic figure being fixed by the rent officer. That officer's assessment was £350, but a copy was apparently not received by the claimant. His father has evidence of comparable rents ranging from £425 to £495 a month.

15. I asked the claimant's father whether he would evict his son. This was obviously a difficult question for him and his answer appeared to be to be plainly honest. He did not go as far as to say that he would or would not evict him for breach of covenant in the lease. He said that frankly there were times when he would gladly evict him and referred to his son's behaviour. But that related to personal matters, not to landlord and tenant issues. He also referred to his own financial need for income. I suggested to him that he might be willing to accept a lower rent and he acknowledged that as possible. I have more to say about this evidence later.

16. Some issues were raised relating to planning permission, housing lists, and the availability of accommodation. Those factors cannot affect the nature of the arrangement between the claimant and his father as landlord and tenant, either individually or collectively.

Analysis

17. It is convenient to begin with a question posed by the claimant's father at the oral hearing: 'Would there be any doubt that this was arrangement was on a commercial basis if I were not the landlord?' In support he referred to similar arrangements set up in other local authority areas in which housing benefit had been paid in respect of similar arrangements.

18. I do not know the circumstances of the cases to which the claimant's father referred. I can only deal with the circumstances of this case. But the answer to the question posed is that I would have expected a local authority to accept the arrangement as on a commercial basis if the landlord were someone other than the claimant's father. The only feature of the case that might cause concern is the amount of support that is given to the claimant. But there is nothing necessarily incompatible between a commercial arrangement and a caring or support arrangement between the landlord and the tenant. That is shown by paragraph 1 of Schedule 1 to the Housing Benefit (General) Regulations 1987. This contains a list of ineligible service charges. Paragraph 1(f) lists

'charges in respect of general counselling or of any other support services regardless whoever provides those services'.

If the charge is ineligible, no housing benefit is payable in respect of it. But the claimant is not otherwise automatically barred from entitlement to housing benefit. That shows that the provision of support in any form is potentially compatible with an arrangement for occupation being on a commercial basis. The point is made even clearer by the exception to paragraph 1(f) which provides that service charges are eligible if they are for services provided to a tenant in supported accommodation by the landlord personally or someone on the landlord's behalf.

19. On that basis, what is the significance of the fact that the landlord is the tenant's father?

20. The first difference is that there is a personal, family relationship between the landlord and tenant. But there is nothing necessarily incompatible in a commercial arrangement being made between parent and adult child. Mr Mitton referred me to the decision of the Tribunal of Commissioners in *R(IS) 11/98* at paragraph 8, where the Tribunal quoted with approval from *CIS/195/1991* in which the Commissioner had commented on the likelihood of an arrangement between close family members being on a commercial basis. The claimant's father pointed to the wider context of the passage. There is, though, a more fundamental answer to Mr Mitton's point. The Commissioner was only commenting on likelihood. That is a factor that is relevant to evaluating the evidence. But it has no precedent value. It leaves open the possibility that in any particular case the unlikely may have occurred. The Commissioner's comment implicitly recognises that possibility. See also *R(H) 1/03, paragraph 18(5).*

21. A family relationship may be indicative that an arrangement is not on a commercial basis. It is a factor to be taken into account. But it is not decisive. In this case, there is evidence that the claimant's father needed additional income and that the best method of helping the claimant is to allow him to function as independently as possible with appropriate support. Those two factors point towards a commercial arrangement rather than one that is not.

22. The claimant's father told me that he needed to maximise his income. That suggests that he would seek to let the accommodation to someone else if his son was not there. On that evidence, the claimant is not a unique tenant for the accommodation. But it would not make any difference if the claimant were the only person to whom his father would let the accommodation. An arrangement may be commercial even if the landlord would not let to anyone other than the tenant. Assume that I am sent abroad by my employer. I do not want my home damaged while I am away. But I know and trust a friend who is looking for temporary accommodation. I let the house to my friend. That arrangement could be commercial, even though I would not let my home to anyone else.

23. The second difference is that the nature of the care and support provided to the claimant by his father will naturally by reason of their relationship be of a different quality from that which a stranger could provide. But, as I have explained, that is not incompatible with a commercial relationship. The service charge provisions recognise that.

24. The third difference is that the motivation will be different. The claimant's father told me that he was motivated by financial considerations to arrange his accommodation as he did.

I have no reason to doubt that. But I am sure that he also was concerned to ensure that his son was properly housed and supported. Even if that was his sole motivation and purpose, it would not necessarily prevent the arrangement being on a commercial basis. Quite the opposite, the evidence shows that supported independent living is the preferred way of enabling someone with the claimant's disabilities to live as full a life as possible.

25. The fourth difference is that the dynamics of the relationship between landlord and tenant are different as a result of their personal relationship. This is most likely to be reflected in decisions about the mount and payment of rent, and about the enforcement of obligations and eviction. More leeway is naturally to be expected than would be tolerated by a landlord whose sole concern was profit.

26. The tribunal expressly made no finding on eviction. I can understand why. I was impressed by the evidence from the claimant's father when I asked him if he would evict his son. The difficulty of the choice was immediately apparent from his demeanour and what he had to say. Clearly, he does not want to evict his son. I can understand that he does not want to consider this possibility or acknowledge it, even to himself. I can understand that he would want to postpone thinking about it until the appeal process is complete. In the end, I suspect that the question of eviction is an artificial one. The claimant has income from benefits and from wages. He can afford to pay, and is paying, something towards rent and that amount is significant. His father may decide that reducing the contractual rent to the amount his son can afford is preferable to evicting his son. That would be bowing to reality. It would not mean that the arrangement was not commercial. Rackman is not the only model of a commercial landlord. There are many landlords who are prepared to accept the rent that can be obtained rather than insist on the full contractual rent and others who are prepared to be patient while the claim and appeal process is in process.

27. Left to my own devices, I would have decided that the arrangement between the claimant and his father was on a commercial basis. However, I have to remind myself that that is not enough to show that the tribunal, which came to the opposite conclusion, went wrong in law. I have re-read the tribunal's decision with that in mind. It emphasised the intimate and personal aspects of the arrangement. I have come to the conclusion that in doing so, the tribunal overemphasised the care and support aspects of the arrangement. It did not refer to, and as far as I can see was not referred to, the service charge provisions which show that that aspect of an arrangement is not necessarily incompatible with it being on a commercial basis.

28. Mr Mitton argued that the appeal tribunal was entitled to come to the decision that it did. For the reasons I have explained, I disagree with that argument.

Conclusion

29. The claimant's father invited me to allow the appeal and to substitute a decision without a rehearing. I am satisfied that no further investigation of the facts is needed. I can, and do, deal with the case on the basis of the evidence available to me. My decision is that the claimant is not barred from entitlement to housing benefit under regulation 7(1)(a). Given the concessions made by the local authority, there is no bar to entitlement under regulation 6 or any other provision of regulation 7. The local authority must now decide the claim for housing benefit on that basis. Its decision on the claim will carry a right of appeal to an appeal tribunal, if the claimant is dissatisfied.

Signed on original

Edward Jacobs
Commissioner
18 March 2004

1. This appeal, brought with my leave, succeeds. The decision of the tribunal on 4 12 03 was erroneous in law, as explained below, and I set it aside. However I think it expedient to make any necessary further findings of fact and give the decision I consider appropriate in the light of them. The claimant has not been responding to communications from his representative, who therefore does not request an oral hearing. The decision I give is that the claimant had no underlying entitlement to housing benefit after the date on which he cancelled his return flight booked for 7 1 02. By "underlying entitlement" I mean were the benefit conditions, except for the making of a claim, satisfied? Therefore, apart from the period from 5 6 02 to 12 6 02 for which I accept it, good cause does not arise. But lack of good cause does also preclude a backdated claim for council tax benefit.

2. Council tax benefit does raise different questions. I decided in CH/2111/03 that since it depends on residence rather than occupying a dwelling as the home, absence does not necessarily affect entitlement, unless it amounts to abandonment by a claimant of the home as his sole or main residence. The purported amendments to the Council Tax Benefit (General) Regulations by SI 1995 No 625, which introduced regulation 4C in similar terms to regulation 5 of the Housing Benefit (General) Regulations, were of no effect. Council tax benefit will still require the making of a claim, but underlying entitlement can continue. I am not sufficiently aware of the council's claim practices, and pages 9 and 10 relate only to housing benefit, so I cannot usefully say anything more. But in the light of my findings on good cause, this does not matter.

3. The appeal arises out of a request to backdate to 9 7 01 a housing benefit (HB) and council tax benefit (CTB) claim made on 5 6 02. The 9 7 01 date was the one asked for (page 22), but I assume, as did the tribunal, that the actual date sought was 25 6 01, the day after the previous award ceased. Backdating was not claimed until 12 6 02, but I agree with the tribunal that this further delay was adequately explained. Regulation 72(15) of the Housing Benefit (General) Regulations (HBGR) and regulation 62(16) of the Council Tax Benefit (General) Regulations provide that a backdating claim shall succeed where a claimant shows he had continuous good cause for failing to claim from the first date on which he can show this, or from 52 weeks before the date of the backdating claim, whichever is the later. "Good cause" in this context means "some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did": R(S)2/63(T). But provided an authority or a tribunal has regard to this test, the decision on whether good cause exists is one of fact: *CAO v Upton* [1997] 2 CLY 4668. To

determine the appeal, it was also crucial to consider whether there was during this period underlying entitlement to benefit.

Factual background

4. The claimant, born on 3 1 53, was in receipt of benefit when on 28 2 01 he and his wife left for Bangladesh. He did not, in breach of regulation 75(1) HBGR, inform the local authority that he was going. The purpose of the trip was said to be to visit his wife's parents who were both unwell (in one version, see page 34), or to visit her mother who was unwell and the claimant's wife had missed her father's death and did not want to risk missing her mother's (page 53). The stay abroad was expected to last 4-6 weeks (page 22) or 6-8 weeks (pages 27, 53) or 2-3 months (page 34). At some point the first return flight was booked for 11 6 01 (page 70). I note that shortly after he left the claimant was made bankrupt on 7 3 01 in respect of a restaurant.

5. The existing award of benefit expired on 24 6 01, income support having been terminated on 19 6 01. The local authority took the view that there would have been an overpayment for at least part of this award, but that it was exercising its discretion not to recover it.

6. The claimant, who suffers from Parkinson's disease, had taken medication with him which he had hoped would be sufficient, but at some point this ran out and he contacted his daughters in Cambridge who arranged for him to have repeat prescriptions which were taken out to him by people from Cambridge. At some point also he fell ill with viral hepatitis. A doctor's certificate at page 28, dated 18 10 01, said he had been ill with this "since last few months" and advised bedrest for a further 6 weeks.

7. The claimant believes he fell ill during April/May 2001. He did not take the flight booked for 11 6 01, but booked a further flight for 7 8 01. He did not take this either. He says he had to wait 6-8 weeks (5-6 weeks at page 23) for a flight each time he booked one.

8. He booked a further flight for 7 1 02, but relinquished this to be able to attend the 9 1 02 funeral in Bangladesh of his cousin (page 67) or brother (pages 22, 31, 34), who died in Cambridge on 4 1 02. He says another flight was booked for 25 2 02, but this does not figure on the list at page 70.

9. There was a boating accident. The claimant originally said (less than four months afterwards) that it was in May 2002, he thought on 1 May. Later he revised this estimate to February, and a further doctor's letter of 18 1 04 at page 99 (which was not before the tribunal) gave the date as 19 2 02, requiring 6-8 weeks treatment. 6 weeks would take him up to 2 4 02, 8 weeks to 16 4 02. (I

have not been able to find a doctor's statement of 20 4 02, as suggested at page 68. The certificate at page 69 clearly refers to someone else.)

10. Another flight was booked for 9 4 02, but the claimant says he was too ill to take it. His daughter said on 18 4 02 (page 59) that he had a flight booked on 27 4 02. He finally flew back on 28 5 02.

11. The council's Revenue Services sent out an HB claim form on 30 4 01 and a reminder letter on 11 6 01. The daughters opened these but did nothing about them. They say they kept thinking their father would be back soon. It seems that the landlords (City Homes) are part of the council's Housing Services, but a separate department from Revenue Services (page 24). There was contact between the claimant's daughters and the landlords (as set out at pages 60-60A, see also pages 36-36A) in August 2001, when it was made clear that the claimant was in Bangladesh and too ill to fly home, and that an older daughter wanted to claim on her father's behalf. She was told she could not. Now, regulation 71(3) of HBGR permits (though does not require) the local authority to appoint a person over 18 to act for the person liable to pay rent. It is also possible for the person liable for rent himself to appoint another person as his agent. Part of the "good cause" alleged in this case is the failure to advise the daughters that there *were* ways in which they could have claimed HB on their father's behalf. This advice does not seem to have been given by Revenue Services but by the landlords, though it may still be considered as part of good cause. There was a prospective HB claim by Nasmin in April 2002, for which the claimant provided written authority to the council to discuss rent details and stated he was too ill to travel (page 59A). But this was not proceeded with because the claimant came back the following month.

12. There are elegantly assembled submissions at pages 53-55 and 66-68, the latter accepting that there were or may have been some periods of non-entitlement. The submissions smooth out the undoubted errors and inconsistencies in the claimant's original account(s).

13. The tribunal conducted a careful hearing with the aid of an interpreter, the claimant's representative Mr Flick and a council presenting officer, and made findings on good cause, though the last period it allowed, from 25 3 02, does not have its start date explained, and the council has not been able to help me on it. The tribunal also made some findings on underlying entitlement, but did not cover the whole of the period. So I must set its decision aside.

"Underlying entitlement"

14. There can only be backdating over a period where there was, subject only to making a claim, an entitlement to benefit. The relevant regulations are in

HBGR regulation 5. The general test of HB entitlement is whether a person is occupying as his home the dwelling on which he is liable to pay rent. There are exceptions. The claimant's initial absence from 28 2 01 could have fallen within regulation 5(8): where a claimant intends to return to occupy the dwelling as his home and no part of it was let or sublet, he may be treated as continuing to occupy it where the period of absence is unlikely to exceed 13 weeks. The tribunal decided that once it became, within that 13-week period, apparent that the claimant would not be able to return, that exception no longer applied; but in any case the council had decided not to try to recover any of the undoubted overpayment before the end of the then current HB award.

15. The exception argued to be relevant here is a subparagraph of regulation 5(8B), coupled with regulation (8C):

> (8B) This paragraph shall apply to a person who is temporarily absent from the dwelling he normally occupies as his home ("absence") if –
> (a) he intends to return to occupy the dwelling as his home; and
> (b) while 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 –
> (iii) undergoing...in the United Kingdom or elsewhere, medical treatment, or medically approved convalescence, in accommodation other than residential accommodation; and
> (d) the period of his absence is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period.
> (8C) A person to whom paragraph (8B) applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks beginning from the first day of that absence.

This appears to provide that although a period longer than 52 weeks will not, in exceptional circumstances, prevent the exception applying, benefit can only be paid for 52 weeks.

16. Under regulation 5(9), "medically approved" means certified by a medical practitioner. It has not been suggested that this is a term of art, and I see no reason, since the subparagraph contemplates treatment or convalescence abroad, why it should require the certifying medical practitioner to be in the UK.

17. The council contends that these exceptions cannot apply unless the claimant has fulfilled his regulation 75(1) duty and notified the council in writing of his intention temporarily to leave the dwelling. Since this claimant did not, that should be the end of the matter. But although failure to comply with regulation 75(1) may be highly significant as to causation in overpayment cases, I see nothing in the statutory materials to indicate that this attractively simple solution should be adopted. I note also that by not seeking to recover the

overpayment for the balance of the award subsisting when the claimant went abroad, the council has effectively waived the breach of this duty where, for whatever reason, the DWP did not terminate the income support until well after the four weeks for which entitlement, at the most optimistic, could have continued under regulation 4(2) of the Income Support (General) Regulations. The claimant would have saved everybody, not least himself and his daughters, an immense amount of trouble and worry if he had reported what his plans were, but I cannot find against him simply because he did not do so.

18. Mr Flick has pieced together the claimant's evidence about the period of his absence to try and persuade the tribunal, and now me, that he had underlying entitlement, subject only to making a claim, for the whole of that period (regulation 5(8B) and (8C)), and that he had good cause throughout it for failing to make a claim (regulation 72(15)).

19. For the sake of completeness, I deal first with the initial period of absence and regulation 5(8). The claimant left for Bangladesh on 28 2 01. Mr Flick submitted that once the claimant booked the return flight for 11 6 01, outside the 13-week period, it stopped being "unlikely" that his absence would exceed 13 weeks and became clear that it would. The tribunal put this at 30 4 01. Thereafter his underlying entitlement to benefit ceased, because he was not occupying the dwelling as his home and could not be treated under regulation 5(8) as doing so. His subsisting award of benefit ran until 24 6 01, and the council decided not to recover any overpayment for this period.

20. If and in so far as the claimant can then bring his absence within regulation 5(8B), he can however show underlying entitlement. He was being medically treated or convalescing in Bangladesh, within (c)(iii), from a few months before 18 10 01 to around the end of November 2001, and during this time his absence was "unlikely" to exceed 52 weeks and he was making efforts to catch a return flight. But from 1 12 01 to 18 2 02 he was not within (c)(iii). And even if some further extended period of "convalescence" is allowed, once the claimant cancelled, albeit for understandable reasons, his return flight on 7 1 02, his absence became "likely", because of the time it took to obtain flight bookings, to exceed 52 weeks and his underlying entitlement ceased. The fact that thereafter he became ill again within (c)(iii), and that in the end he returned within 15 months of his originally leaving (regulation 5(8B)(d)), does not, it seems to me, revive entitlement once it has lapsed.

Good cause

21. The structure of regulation 72(15) (and CTB regulation 62(16)) is that any good cause period must immediately precede the date of the claim sought to be backdated:

> 72(15) Where the claimant makes a claim in respect of a past period (a "claim for backdating") and, from a day in that period up to the date of the claim for backdating, he had continuous good cause for his failure to make a claim, his claim for that period shall be treated as made on –
>
> (a) the first day from which he had continuous good cause; or
>
> (b) the day 52 weeks before the claim for backdating,
>
> whichever fell later.

But there must be underlying entitlement. Where, as here in relation to HB, that entitlement ended well before the date of the backdating claim, good cause cannot extend the period.

22. The tribunal considered good cause and accepted it (for a variety of reasons - ill-health, misleading advice to the daughters) from 25 6 01 to 1 12 01, and again from 25 3 02 (the date is unexplained) to the date of the backdating request. It did not accept it for the period 2 12 01 to 24 3 02. This decision has been criticised by Mr Flick, who says the question is not whether it was possible for the claimant to make a claim but whether it was reasonable to expect him to do so.

23. The real criticism for HB is that good cause does not avail you if there is no underlying entitlement requiring no more than the making of a claim to "activate" it. The tribunal did not properly consider this. I have, and my conclusion is that from the date the claimant cancelled his 7 1 02 flight, any regulation 5(8B) and (C) entitlement ceased, and since this happened several months before the backdating request, good cause cannot apply.

24. CTB is, as I said above, different. As long as the home remains the claimant's sole or main residence, there *is* underlying entitlement subject only to making a claim. The backdating provisions are the same. Mr Flick's submissions point to illness, lack of, or misleading, advice, lack of education, and overall the claimant's belief that he could not validly make a claim from outside the country, all of which should have added up to a finding that he could not reasonably be expected to have made a claim.

25. I am not convinced that, on this test, there was continuous good cause for the whole period up to the reclaim on 12 6 02 for failing to claim CTB. The claimant knew that HB and CTB had to be claimed at intervals, he had repeatedly done this, probably since 1989 but at least since 1995. His daughters may not have told him about the renewal form on the assumption that he would be back soon, but by the time of the reminder letter the claimant had missed his original flight back, and he missed another in August. This did seem to prompt the daughters to visit the landlords with a view to claiming themselves, and they

were then given misleading advice. It is said in Mr Flick's first submission that this confirmed advice previously given to them by Revenue Services, but Mr Frost says at page 61A that no advice was sought from them between February 2001 and May 2002. Mr Flick also said the daughters said the misleading advice was confirmed on a number of occasions by Ms Swann, but likewise there is no evidence of this in Paul Derry's letter at page 60A. The claimant had told his daughters to speak to Heather Williams, who had always helped him to make his claims, but they did not do this.

26. There was clearly quite close contact between the claimant and his daughters, not only because of the medication regularly supplied but because he was advising them about what to do and who to see. Even if I accept that the misleading advice given by the landlords to the daughters in August 2001 did have some effect on him, it amounted to no more than that they could not claim on his behalf. He was never given express advice that he could not claim from outside the country; the most he can say is that he was not told he could do so. He is not particularly old. He may be illiterate and poorly educated, but he agreed in evidence that he could have got help from someone in Bangladesh to complete a claim form. He knew arrears were building up. Making all allowances for his illness, and his various expectations of coming home soon, I do not see that I can accept that it was not reasonable to expect him to make a claim once he cancelled his 7 1 02 return flight. About 6 weeks elapsed before he again became ill, and a further 6 weeks after he got over this illness before he finally returned home.

27. By April 2002 Nasmin was drafting and sending to her father for his signature a letter giving leave for rent and other details to be discussed in connection with the claim that *she* was proposing to make. It cannot have helped matters that he said at this point that he had a return flight for 27 4 02. I do not think I can accept that this letter should have been treated as a claim on the claimant's behalf. It clearly was not.

28. My allowing this appeal does not therefore bring any advantage to the claimant. His underlying entitlement to HB ceased in early January 2002. His underlying entitlement to CTB probably continued, but my findings on good cause preclude the new claim being backdated.

(signed on original) Christine Fellner
Commissioner

27 August 2004