

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CH/2093/2016

Before Upper Tribunal Judge Poynter

DECISION

The local authority's appeal is allowed.

The decision given by the First-tier Tribunal at Newcastle-upon-Tyne on 24 March 2016 under reference SC230/15/00527 was wrong in law.

That decision is set aside.

I re-make the First-tier Tribunal's decision in the following terms.

- 1. The appeal is refused.**
- 2. The decision of the Metropolitan Borough of Gateshead issued on 1 September 2015 is confirmed.**
- 3. The claim for council tax benefit received by Gateshead in April 2015 cannot be treated as having been made on any date earlier than three months before it was received.**
- 4. Therefore, the claimant was not entitled to council tax benefit on any date between 24 February 2009 and 31 March 2013 (both dates included).**

REASONS FOR DECISION

Introduction

1 The Metropolitan Borough of Gateshead ("Gateshead") appeals to the Upper Tribunal with the permission of a District Tribunal Judge against the above decision of the First-tier Tribunal ("FTT"). Neither party has requested a hearing of the appeal and I am satisfied that a hearing is not required to enable me to deal with the matter fairly and justly. The appeal turns on a point of law to which there is a clear answer.

2 The FTT's decision was in the following terms:

"Council Tax Benefit

The housing benefit appeal is allowed.

The decision made on 01/09/2015 is set aside.

On account of his mental incapacity and erroneous information provided to him on a number of occasions by the local authority, [the Claimant] has shown continuous good cause to backdate his claim for Council Tax Benefit to June 2009. On the basis of this decision his entitlement from that date should be recalculated taking account of his final circumstances in the intervening period"

The reference to housing benefit ("HB") is an error. However, for the purposes of this decision I will assume that, had it not been necessary to set the decision aside, it was an error that could have been corrected under the slip rule.

3 At the time of Gateshead's decision, the claimant was 71 years old. His entitlement to council tax benefit ("CTB") was therefore governed by the scheme for people who have reached the qualifying age for state pension credit ("SPC") established by the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 ("the Regulations"), rather than by the scheme for people of working age established by the Council Tax Benefit Regulations 2006 ("the Working Age Regulations").

4 The background to that decision is that the claimant suffers from physical disablement and severe mental impairment as a result of military service. He receives a war pension which, under a discretionary local variation of the CTB scheme adopted by Gateshead, was disregarded when his entitlement to CTB was calculated. Until 24 February 2009, he was therefore receiving CTB at a rate that covered 100% of his liability to council tax.

5 Gateshead's records suggest that, on 24 February 2009, the claimant telephoned the council and asked them to cancel his CTB because he was selling a caravan worth more than £16,000 and would therefore be over the capital limit. Gateshead accordingly ended his award of CTB. The precise date from which they did so is not stated in the papers but Gateshead has recorded that the claimant asked for his benefit to stop from the date of the phone call and I judge it to be more probable than not that Gateshead acted on that request.

6 Whatever the date, there is no doubt that the award of CTB was brought to an end because there is a subsequent record that shows Gateshead had sent the claimant a form to re-claim CTB. Gateshead's records suggest that the claimant telephoned them on 25 June 2009 and said that he would not be returning that form because he had had a calculation done for him (it is not recorded by whom) and it had shown he would have a nil entitlement.

7 The claimant disputes this account of events. He says that he never sold the caravan, but was only thinking about doing so. He also says that he was wrongly advised and that the reason the calculation resulted in a nil entitlement was that it incorrectly took his war pension into account in full when it should have been disregarded.

8 I have no doubt that the claimant's evidence (and that of his son whose written evidence was also before the FTT) is an honest account of the events as they remember and understood them. I approach this appeal on the assumption, but without deciding, that that evidence—which is disputed by Gateshead—is correct.

9 Even on that basis, the FTT's decision is materially wrong in law because:

- (a) CTB was abolished with effect from 1 April 2013 and it has not been possible to make an effective new claim for CTB in respect of a period before that date since 1 July 2013 (for claimants who have attained the qualifying age for SPC), or 1 October 2013 (for claimants of working age).
- (b) The claimant is above the qualifying age for SPC. The rules on backdating CTB claims for such claimants have not included a "continuous good cause" test since 6 October 2004.
- (c) Even on the test that the FTT believed itself to be applying, it has never been possible to backdate a CTB claim for more than 52 weeks and, as I explain below, the relevant limit at the time the FTT was considering was 3 months: less than 5% of the six-year period for which the FTT purported to allow backdating in this case.

I have therefore exercised my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set the FTT's decision aside.

10 The FTT's written statement of reasons sets out the facts on which the judge decided that the claimant had continuous good cause. But neither that statement, nor the decision notice itself, refers even in passing to the law that the FTT was required to apply. That is the case even though Gateshead's response to the appeal included the text of the relevant regulation. It is impossible to escape the conclusion that the judge did not consult the law before deciding the appeal: had he done so, he could not have given a decision in the terms he did.

11 The relevant law is as follows.

Backdating CTB: the law before 1 April 2013

12 Under section 1(1) of the Social Security Administration Act 1992:

“... no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—

- (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations...; or
- (b) he is treated by virtue of such regulations as making a claim for it.”

There are a number of exceptions to that general rule. However, none of them applies to CTB.

13 It follows that, if a claim for CTB does not cover a particular period of time, the claimant cannot be entitled to CTB for that period.

14 Until 31 March 2013, the time for people above working age to claim CTB, and the manner in which they had to claim CTB, were prescribed by regulation 53 of the Regulations which, so far as relevant, was in the following terms:

“Time and manner in which claims are to be made

53.—(1ZA) Subject to paragraph (1ZB), the prescribed time for claiming council tax benefit is as regards any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to council tax benefit, that day and the period of three months immediately following it.

(1ZB) In any case where paragraph (5)(a) applies, paragraph (1ZA) does not entitle a claimant to claim council tax benefit in respect of any day earlier than 3 months before the date on which the claim for state pension credit is made (or treated as made by virtue of any provision of the Social Security (Claims and Payments) Regulations 1987).

...

(5) Subject to paragraph (12), the date on which a claim is made shall be—

- (a) in a case where an award of state pension credit which comprises a guarantee credit has been made to the claimant or his partner and the claim for council tax benefit is made within one month of the date on which the claim for that state pension credit which comprises a guarantee credit was received at the appropriate DWP office, the first day of entitlement to, state pension credit which comprises a guarantee credit arising from that claim; ...”

Paragraph 12 of regulation 53 covered claims by people who are not yet liable to pay council tax, but who will become liable in the near future. It therefore does not apply in this case.

15 It follows that, under the scheme for people above working age, all claims for CTB automatically covered the period three months before the date on which they were made. There was no need for the claimant to establish continuous good cause. The reason why the claim was not made sooner was irrelevant.

16 However, nothing in regulation 53 allowed entitlement to CTB to begin on any date earlier than three months before the date on which the claim was made, (*i.e.*, as specified in regulation 53(5)). That was the case even if the claimant had good cause for not claiming sooner. It was the case whatever the reason the claim was late and however sympathetic the circumstances of the case might have been.

17 The position was different for claimants under the Working Age Regulations. So far as is relevant, regulation 69 of those regulations stated:

“Time and manner in which claims are to be made

69.—(1)-(13) ...

(14) Where a claimant (“C”)—

- (a) makes a claim which includes (or which C subsequently requests should include) a period before the claim is made; and
- (b) from a day in that period, up to the date when C made the claim (or subsequently requested that the claim should include a past period), C had continuous good cause for failing to make a claim (or request that the claim should include that period),

the claim is to be treated as made on the date determined in accordance with paragraph (14A).

(14A) That date is the latest of—

- (a) the first day from which C had continuous good cause;
- (b) the day 6 months before the date the claim was made;
- (c) the day 6 months before the date when C requested that the claim should include a past period.”

Thus, claimants of working age *did* have to establish continuous good cause before their claims could be backdated and, if they were successful in doing so, the maximum backdating period was six months, not three.

18 It may be that the judge became confused between the two schemes (although that does not explain why he ignored the maximum backdating periods). In CTB and HB cases, it is always good practice to make and record findings of fact about the age of the claimant and of any partner. The reason that there were

two CTB schemes—and are still two HB schemes—was that the rules in those schemes were different. Which scheme applied turned on whether the claimant, or any partner, had reached the qualifying age for SPC. If the FTT does not first establish whether that is the case, the potential for applying the wrong scheme—and therefore the wrong law—should be obvious.

Backdating CTB: the law from 1 April 2013

19 Section 33(1) of the Welfare Reform Act 2012 ("the 2012 Act") provided that:

“Abolition of benefits

33—(1) The following benefits are abolished—

(a)-(d) ...

(e) council tax benefit under section 131 of [the Social Security Contributions and Benefits Act 1992];

(f) ...”

Further, section 147 of, and Part 1 of Schedule 14 to, the 2012 Act repealed (among other provisions) section 131 of the Social Security Contributions and Benefits Act 1992 under which CTB was paid.

20 The provisions of the 2012 Act that abolished CTB were brought into force on 1 April 2013 by Article 8 of, and Schedule 4 to, the Welfare Reform Act 2012 (Commencement No.8 and Savings and Transitional Provisions) Order 2013 (SI 2012/358) ("the Order").

21 When a section of an Act of Parliament is repealed, regulations made under powers conferred by that section cease to have effect unless they are expressly preserved: see *Watson v Winch* [1916] 1 KB 688.

22 In this case the Secretary of State had power to—and did—preserve the Regulations and the Working Age Regulations despite the repeal of section 131.

23 That power was conferred by section 150(4) of the 2012 Act. Section 150(3) authorised the Secretary of State to make commencement orders in respect of (among other provisions) sections 33 and 147 of that Act. Section 150(4) then provided:

“(4) An order under subsection (3) may—

(a)-(b) ...

(c) make such transitory or transitional provision, or savings, as the Secretary of State considers necessary or expedient.”

24 The Secretary of State used the power conferred by section 150(4)(c) to make savings provisions in Article 9 of the Order, and the transitional provisions in Article 10, which are in the following terms:

“Savings for council tax benefit

9. Notwithstanding the coming into force of Part 1 of Schedule 14 to the 2012 Act under article 8, the provisions specified in Schedule 4 to this Order and any regulations or orders made under them continue to have effect for any of the following matters arising on or after 1st April 2013 that relate to council tax benefit before 1st April 2013—

- (a) the administration of council tax benefit;
- (b) the administration of appeals against council tax benefit decisions;
- (c) the investigation and prosecution of offences relating to council tax benefit;
- (d) the recovery of excess council tax benefit;
- (e) the administration of civil and administrative penalties;
- (f) the payment of subsidy in respect of council tax benefit for years up to and including the year ending 31st March 2013.

Transitional provisions for council tax benefit

10.—(1) For the purpose of allowing a billing authority, or in Scotland a local authority, to make decisions in relation to matters in respect of council tax benefit arising before 1st April 2013 where a claim is received on or after 1st April 2013—

- (a) the Council Tax Benefit Regulations 2006 as saved by virtue of article 9 are modified in accordance with Part 1 of Schedule 5 to this Order; and
 - (b) the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 as saved by virtue of article 9 are modified in accordance with Part 2 of Schedule 5 to this Order.
- (2) In this article—

“billing authority” has the meaning given in Part 1 of the Local Government Finance Act 1992; and

“local authority” means a council constituted under section 2 of the Local Government etc.(Scotland) Act 1994.”

25 The combined effect of the provisions quoted above is that no-one can be entitled to CTB in respect of any period on or after 1 April 2013. However, the Regulations and the Working Age Regulations remain in effect in respect of periods before that date (Article 9). Article 10 of the Order expressly contemplates that a claim for a period before 1 April 2013 might be received after that date. It provides that, in those circumstances, the Regulations and the Working Age Regulations are modified as set out in Schedule 5 to the Order.

26 Paragraph 2 of Part 1 of Schedule 5 to the Order modifies regulation 69 of the Working Age Regulations and paragraph 2 of Part 2 of that Schedule modifies regulation 53 of the Regulations. However, none of those modifications affects the provisions referred to at paragraphs 12 and 17 above. It follows that the absolute three-month limit for those over state pension credit age to claim CTB, and the absolute six-month limit for good-cause backdating in the working age scheme, continue in effect after 1 April 2013.

27 In other words, although it is still technically possible to claim CTB (because the legal provisions that allow a claim are preserved by Article 9 of the Order) a claim by a person above SPC age that is made on or after 1 July 2013 must inevitably fail. Under regulation 53(1ZA), such a claim covers the day on which it is made and the preceding period of three months. From 1 July 2013, the whole of that period will inevitably fall on or after 1 April 2013 when CTB was abolished.

28 For the same reason, a claim for CTB by a person of working age that is made on or after 1 October 2013 must inevitably fail even if the claimant has continuous good cause for the delay.

Reasons for the Upper Tribunal’s decision

29 Having set aside the FTT’s decision, I may either remit the case to the FTT with directions for its reconsideration or I may re-make that decision.

30 I have decided to take the latter course. For the reasons I have given, the claimant cannot succeed. To remit the appeal to the FTT, rather than give that decision myself, would only lead to delay and the inefficient use of judicial time and resources.

31 My decision is therefore that the claim Gateshead received from the claimant in 2015 does not cover any period before CTB was abolished on 1 April 2013. As it is not possible to be entitled to CTB without claiming it, it follows that the claimant was not entitled to that benefit from 24 February 2009 (the date from which his previous award ceased: see paragraph 5 above) to 31 March 2013 (the last day on which CTB existed).

32 I regret that my decision will come as a considerable disappointment to the claimant. I accept that his CTB may have been stopped in 2009 as a result of a misunderstanding. I am also prepared to assume that he did not subsequently re-claim benefit because he was wrongly advised by someone that he would not be

entitled if he did. I have not overlooked that he is physically disabled and severely mentally impaired as a result of his military service.

33 Nevertheless, it remains the case that a decision was made in 2009 ending his previous entitlement to CTB and that, for whatever reason, no further claim was made until April 2015. The decision in 2009 was not challenged at the time and has long since become final. Moreover, the law has always limited the time for which it is possible to backdate a claim for benefit. That is the case even when claimants have compelling reasons for not having claimed sooner. The maximum backdating period for CTB claims has never been longer than 52 weeks and, more recently, has been reduced to six or three months as set out above. The claim in this case was made more than two years after the benefit claimed had been abolished.

34 In short, this was a claim that was inevitably going to be refused. It is unfortunate that the FTT's decision has caused the claimant to entertain false hopes for the past ten months that the contrary might be the case.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

24 January 2017