

Backdating for 'good cause'

Desmond Rutledge considers the lessons to be learnt from caselaw on 'good cause' when applying to backdate claims for Housing Benefit and Council Tax Benefit

This article looks at the provision for backdating claims for 'good cause' for Housing Benefit (HB) and Council Tax Benefit (CTB) in the light of case law. The article is relevant to England, Wales, Scotland and Northern Ireland.

The need for 'good cause'

In the House of Lords decision on **Kerr**, Baroness Hale observed that while the benefits system is 'necessarily enormously complex' claimants should nonetheless '*not be denied their entitlements simply because they do not understand them*'.¹ The adjudication system in social security has always contained a provision to backdate benefit, thereby ensuring that strict deadlines for making a claim have been tempered by a provision to backdate the claim where there is an underlying entitlement and a reasonable excuse for delay. Under the old regime benefit could be backdated for up to 52 weeks.² In April 1997, the traditional 'good cause' provision was replaced for all benefits apart from HB/CTB by a much more restrictive regime which limited any backdating to a maximum of three months.

In 2000, the Government proposed that the traditional 'good cause' test should also be abolished for HB/CTB to bring it in line with other benefits. The proposal was withdrawn following representations that the delays in the administration of HB/CTB and the serious social consequences of rent and council tax arrears justified retaining the more generous provision in this part of

the welfare benefit scheme.

Nevertheless, it remains something of an anomaly that the cost of backdated benefits is borne by the local authority rather than by central government. This can lead local authorities to take a restrictive approach to backdating as every backdated award produces a financial penalty for the authority. In **CH/4501/2004**, Mr Commissioner Rowland commented that this arrangement was intended to encourage local authorities not to take 'too relaxed an approach' to issues of good cause. However, it could not justify an approach which excluded claims where the circumstances satisfied the legal test for good cause. The approach should therefore be firm but fair. The Commissioner added: '*It should be recognised that claimants do not always understand the social security system and that there are circumstances in which the information given to them does not really help or in which they cannot reasonably be expected to ask for information. It must also be borne in mind that, in the context of council tax benefit, a failure to award the benefit nearly always leaves the claimant with a debt, which is not the case with all social security benefits...*' (para.25).

(Readers should note that there is provision to backdate HB/CTB claims for the over 60's for up to 12 months without having to show good cause.³)

The pre-conditions

Entitlement to HB/CTB depends on a valid claim being in place at the time benefit is claimed.⁴ The HB/CTB backdating provision gives the claimant the right to make a retrospective claim for benefit if the conditions for good cause are satisfied. The provision treats the claim as having been made at an earlier date up to a maximum of 52 weeks. However, the backdating provision will only operate if certain pre-conditions are met:

- There must be an application in writing.
- The claimant must have an underlying entitlement to benefit throughout the relevant period.⁵
- Good cause needs to be continuous throughout the period of delay.

The legislation

Reg 72(15) Housing Benefit (General) Regulations 1987

'(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 in respect of 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 date of the claim for backdating,

whichever fell later.]'

Identical wording is used in Reg 62(16) Council Tax Benefit (General) Regulations 1987.

Benefits

It should also be noted that the burden of proof is on the claimant. But the test for backdating can only be applied to the person who makes the claim. The HB/CTB regulations provide that members of a couple can elect who is to make the claim.⁶ If that person proves good cause the claim will be backdated and it does not matter that the other member of the couple cannot prove good cause.⁷

The legal test

The test for good cause is that laid down by the Tribunal of Commissioners in **R(S)2/63** and approved by the Court of Appeal in **Upton**⁸ and is binding as to the meaning of the test for 'good cause'.

The HB/CTB legislation does not specify what factors must be taken into account in determining whether the claimant has shown good cause. The question of whether the circumstances in any particular case amount to good cause is essentially a matter of judgement for the decision-maker or tribunal and the outcome will turn on those facts. Nonetheless, case law contains important guidance on both the nature of the legal test and the approach that should be adopted when applying the legal test to specific types of situations (see below).

The legal test

The test for 'good cause' approved in **R(S)2/63**:

'...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.'

A tribunal should remind itself and the parties of the key test from **R(S)2/63** and show, if asked to give its reasons, how it has applied it (**CH/2659/2002**).

See DWP HB/CTB Guidance Manual 2003, Part A2, Claims for HB Guidance on good cause Annex A at <http://www.hbinfo.org/menu3/gmparta/newa2annexa.shtml>

Objective assessment

The test involves an objective assessment with a subjective element, namely the age and experience of the actual claimant. Extenuating circumstances may be taken into account but the claimant is still required to show that s/he acted reasonably in all the circumstances. In **CH/342/2003**,⁹ the tribunal concluded that the claimant had good cause due to various domestic problems, including arranging to move in and decorate the accommodation whilst looking after a new born baby as well as two other children who were ill. The Commissioner said that these facts alone would not have prevented a reasonable person from claiming. On the other hand, **CH/0393/2003** emphasised the subjective aspect of the test. The case concerned a claimant who had a mental disability. The Commissioner held that the reference to taking into account how a reasonable person of the claimant's age would have reacted should be treated as a reference to the claimant's mental age, not her chronological age. In **CH/474/2002**, the Commissioner held that, if the claimant has a mental health problem which makes her/him act unreasonably, for example, compulsive behaviour disorder, then the terms of the legal test must be adjusted to take that unreasonableness into account.

Duty to make enquiries

While claimant have a general duty to find out whether they have any entitlement to benefit, this is tempered by the recognition that there are a variety of circumstances in which a reasonable person would not think there was anything to inquire about.¹⁰ Decision makers and tribunal cannot simply assume that the claimant has an understanding of public administration.¹¹

Knowledge of the benefit system

The claimant's previous experience of the benefit system is relevant to whether s/he has good cause. Where a claimant has experienced delays in her/his claim being processed then poor administration of HB/CTB in a particular area is potentially relevant to any assessment of good cause.¹²

Evidential issues

Backdating appeals can often involve disputes about what information or correspondence the claimant received from the local authority and whether it could be said to break the chain of continuous good cause.¹³ In **CSHC/352/2002**, the tribunal concluded that the claimant had been put on notice by receipt of a council tax demand notice. The tribunal's decision was set aside because it had not seen the demand notice and it had failed to deal with evidence that there were mail delivery problems at the claimant's address. The Deputy Commissioner directed that the new tribunal should make findings on whether the notice had in fact been received and, if necessary, whether the terms of the notice were sufficient to alert a reasonable person that there was a problem with HB or CTB which needed to be addressed. If the claimant also puts in issue whether a particular letter has been sent then the local authority will need to adduce evidence to show that its computer generated the relevant letter and evidence that the letter would have been posted. The onus would then be on the claimant to rebut the presumption that the letter would have been received in the ordinary course of post.¹⁴

Additional guidance

Case law can provide guidance on how delay in specific circumstances can amount to good cause.

Language difficulties

Difficulty with language is not in itself good cause for the delay in claiming as a reasonable person would ask someone to read or explain the documents relating to the claim. But it may amount to good cause, for example, where there was no one available who could act as an interpreter.

Illness

Health is always a consideration when looking at good cause and this includes cases where the claimant is suffering from a mental disability (**R(SB)17/83** and **CH/474/2002** mentioned above). In **CH/5135/2001** a tribunal was held to have misdirected itself when it recorded that 'severe illness which

affects the ability to claim benefit may constitute good cause but the illness must be severe'. The Commissioner held that it is not essential for the illness to be severe. The issue is whether the nature of the illness is sufficient to constitute or lead to good cause.

Claims made on behalf of the claimant

Claimants who can show good cause for their own actions or omissions will not be affected by the delay of someone else who makes a claim on their behalf. Where it is reasonable for a claimant to delegate making a claim to another person, then the claimant will not be prejudiced by the delegate's failure to submit the claim in time. But the decision maker can ask the supplementary question: could the claimant reasonably be expected to have taken any further action to ensure that the delegate was in fact dealing with her/his affairs?¹⁵ In **CH/1791/2004**, the claimant lived in supported accommodation. In the application to backdate benefit it was argued that it was reasonable for him to have left the administration of his benefit affairs in the hands of the support workers. The tribunal chairman dismissed the appeal, recording that it was the responsibility of the landlords to ensure that claims were made at the appropriate time. The Deputy Commissioner held that, by concentrating on whether the landlords had behaved properly or reasonably, it had failed to deal with the correct issue; whether the claimant had demonstrated continuous good cause for his delay in making his claim. This principle does not apply where that other person is an appointee. This is because the actions or omissions of an appointee are treated as those of the claimant, so the appointee must show good cause. **(R(A)2/81)**

Mistaken belief

Claimants will not be able to establish good cause by simply claiming to be ignorant of their entitlement or unaware of the deadline for claiming benefit. The question that needs to be addressed in this type of case is whether the claimant's ignorance or mistaken belief was reasonable. The decision-

maker must always look at the reason for the claimant's ignorance or mistaken belief and consider whether it was reasonable for the claimant not to have made any enquiries or believe there was nothing to enquire about.¹⁶ Claimants are entitled to rely on advice received from a welfare rights office, a trade union and other expert sources in addition to lawyers and the Department itself. Whether a particular person was an appropriate expert should be evaluated in the individual circumstances of the case (**CG/1195/2002**).

CH/4501/2004 provides a recent example where the Commissioner considered whether the claimant's misunderstanding could form the basis for a claim to backdate CTB. The claimant met his partner in hospital whilst recovering from a mental illness. In November 2002, they moved to a property that had been his partner's family home but was now in a state of disrepair. In 2004, they were sent bills for the whole of the period they had been living in the property and a claim form for CTB. The claimant said he did not owe any council tax as they had been in receipt of JSA since moving in. He subsequently claimed CTB but a request to backdate the claim was refused. In his appeal the claimant stated that he had forgotten to complete the CTB form at the time of the JSA claim in November 2002 as he was ill and under a lot of stress at the time. The tribunal dismissed the appeal. After reviewing the evidence the Commissioner said that the claimant's mental health problems were not the real reason he failed to claim CTB. Rather, the claimant was not paying council tax and it did not occur to him that he might have any liability for council tax. He had not received the usual letter or bill that would have prompted a person into contacting the authority because the local authority believed the house was unoccupied. The Commissioner was therefore satisfied that the claimant's belief that he did not need to claim CTB in order to escape liability for council tax was one that he could reasonably hold in the circumstances of the particular case. His

mistaken belief was not due to carelessness or any desire to obtain something to which he was not entitled and it was a firmly held misunderstanding until he received the revised council tax bills and the claim form in May 2004.

Factors to be considered cumulatively

In **CSB/813/1987** the Commissioner held that the principles derived from case law make it clear that all the factors which have a bearing on good cause must be taken account of cumulatively. The claimant had failed to claim additional means-tested benefit based on his incapacity for work. The tribunal acknowledged that the claimant had been ignorant of his rights, that he was in poor health, that he (and his wife) spoke no English and that he had completed previous claim forms with the assistance of a hospital social worker. The Commissioner held that the tribunal had erred by failing to take all of these factors together to see if the claimant's ignorance of his rights or his failure to make enquiries was in all the circumstances reasonable.

Conclusion

The effect of the ruling in **Upton** is that, so long as a tribunal has regard to the legal test for good cause, its application of the test to the facts cannot be disturbed on appeal (save where the decision is so unreasonable as to be regarded as perverse in law). But case law exposes the dangers of assuming that good cause is simply a matter of applying commonsense to the facts. The explanation put forward by the claimant may not be decisive and can even be irrelevant in terms of the legal test (see **CH/4501/2004** above). Recent decisions demonstrate that tribunals are prone to go wrong where they do not appreciate the nature of the legal test or are unaware of case law on how the test has been applied in specific areas such as mistaken belief or claims made on behalf of the claimant. Therefore anyone involved in good cause appeals in relation to claims for HB/CTB ignores the lessons from case law at their peril.

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Example

Josie receives IS as a single parent. Her father Bernard gives Josie £100 every four weeks to purchase food and new clothes for her baby. It is likely this would be classed as income for Josie's IS, as it is given regularly. The payment is for one of the listed basic needs and would therefore only attract a £20 weekly disregard. Josie would be assumed to have an income of £5 per week which would reduce her IS by the same amount. However, if Bernard bought £100 worth of food and baby clothes every four weeks and gave them to Josie, this would be a payment in kind and would not affect her IS.

To give or not to give?

Any receipt of income or capital must be reported to the relevant benefit agency even though it may ultimately be disregarded. It is therefore advisable for a person who makes a payment to be clear about the terms on which the money is given, ie, for what purpose the payment is made, and also for the recipient to ensure some record is kept of what the payment was actually used for, eg, in the form of receipts etc.

It can be seen that the treatment of charitable/voluntary payments in respect of individual benefits are complex and the way in which the rules are applied could have a significant impact on the amounts payable. It may well be advisable for those who wish to offer financial assistance to seek advice beforehand in order to minimise any negative effect on benefit entitlement.

Footnotes

1. HB & CTB (Misc Amnd) Regs 2005 (SI 2005 No.273)
2. See also R(IS) 4/94 which follows Boulton
3. IS (Gen) Reg 48(9): JSA Reg 110(9)
4. Sch 10 paras 22&64 IS (Gen) Regs: Sch 8 paras 27&57 JSA Regs
5. Sch 9 para 39 IS (Gen) Regs: Sch 7 para 41 JSA Regs
6. Sch 9 para 15 IS (Gen) Regs: Sch 7 para 15 JSA Regs
7. HB Reg 40(6) & Sch 5 para 23&66 HB (Gen) Regs 1987: CTB Reg 31(6) & Sch 5 para 23&66 CTB (Gen) Regs 1992
8. HB (Gen) Regs Sch 4 para 34: CTB (Gen)

9. HB (Gen) Regs Sch 4 para 13: CTB (Gen) Regs Sch 4, para 13
10. See 1
11. Section 15 SPCA 2002 & Reg 15 SPC Regs 2002
12. Sch V, paras 13&15, SPC Regs 2002
13. Section 7 SPCA 2002
14. Reg 25 HB (Gen) Regs as amended by Reg 8 HB&CTB (SPC) Regs 2003
Reg 17 CTB (Gen) Regs as amended by Reg 17 HB&CTB(SPC) Regs 2003
15. Reg 22 HB (Gen) Regs as amended above
Reg 14 CTB (Gen) Regs as amended above
16. Reg 23 HB (Gen) Regs as amended above
Reg 15 CTB (Gen) Regs as amended above
17. Sch 5ZA paras 14&16 HB (Gen) Regs 1987
Sch 5ZA paras 14&16 CTB (Gen) Regs 1992
18. See 14
19. See 15
20. See 16
21. Reg 3 TC (DCI) Regs 2002
22. Reg 18 as above
23. Reg 10 as above
24. Table 5, Reg 10 as above
25. SI No. 2465/2005
26. Sch 9 para 21 IS (Gen) Regs: Sch 7 para 22
JSA Regs:
Sch 4 para 21 HB (Gen) Regs: Sch 4 para
22 CTB (Gen) Regs
27. Section 15 SPCA 2002 & Reg 15 SPC Regs
2002:
Reg 3 TC (DCI) Regs 2002
28. Sch 10 para 10 IS (Gen) Regs: Sch 8 para
15 JSA Regs:
Sch 5 para 11 HB (Gen) Regs: Sch 5 para
11 CTB (Gen) Regs: Sch 5 para 8 SPC Regs:
Sch 5ZA para 8 HB (Gen) Regs: Sch 5ZA
para 8 CTB (Gen) Regs as amended by Reg
21 HB&CTB (SPC) Regs 2003

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Footnotes

1. Thomas Kerr v Department for Social Development [2004] UKHL, R 1/04 (SF)
2. For industrial injuries benefit there was no time limit. In one case benefit was backdated 33 years (CI/37/1995)
3. Reg 72BA HB (Gen) Regs 1987
4. Section 1, Social Security Administration Act 1992
5. In CH/996/2004 the claimant had no underlying entitlement after being absence abroad for 15 months
6. Reg 71(1) HB (Gen) Regs 1987
7. CH/3817/2004
8. Chief Adjudication Officer v. Upton [1997] 2 CLY 4668
9. Not circulated but available on the Rightsnet website in the toolkit section
10. R(S)2/63
11. CH/4501/2004
12. CH/1791/2004
13. Where benefit has been refused or revised following a request for further information this should be resolved by way of an appeal on entitlement rather than an application to backdate for good cause following the decision in R(H)3/05, see also Urgent Bulletin U9/2004
14. CH/3439/2004
15. A useful summary of the case law on delegation is contained in R(P)2/85 at para 17. See also R(SB)17/83, para 3 - a case involving a mother who asked for the claim made by her mentally disabled daughter to be backdated. These early decisions are not available on the Commissioners' website but can be downloaded from the Rightsnet website in the 'toolkit' section
16. The leading cases are R(S)3/79 para 3 and R(SB)6/83 para 12 also available on the Rightsnet website.

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