

in the EU and was not objectively justified. On the facts of the present case, article 21 of the Treaty on the Functioning of the European Union and Regulation (EEC) No 1408/71 require the secretary of state to take account of the claimant's child-raising period in Belgium as if that had been completed in the UK and her pre-existing award of child benefit had continued. The claimant came within the personal scope of Regulation 1408/71 as the family member of a worker, and (as the claimant had at no time become an insured person under the Belgian social security scheme) it was 'untenable' that any social security law other than that of the UK applied (para 36).

The judge was not satisfied that there was any justification for restricting HRP entitlement to those in receipt of UK child benefit. He said:

The plain fact of the matter is that receipt of child benefit is simply a convenient proxy to demonstrate prime responsibility for raising a child ... The respondents have not satisfied me that there is any objective justification for confining HRP entitlement to those in receipt of UK child benefit ... The restriction in the present case is both a restriction on the right of free movement and a fetter which fails the objective justification test (para 52).

He also accepted that from 1 May 2010 a claimant in these circumstances would be entitled to HRP by virtue of article 5 of Regulation (EC) No 883/2004, which replaced Regulation 1408/71 (para 55).

* File reference numbers are included only to assist with accessing decisions. The file number may, for instance, be used when accessing decisions on the Administrative Appeals Chamber's database. Readers should note that the file number is neither the official citation nor part of it.



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Help for council tax payers – Part 2: defending council tax defaulters



This is the second of two articles focusing on the help advisers can give to residents who are struggling to pay their council tax bill because of their low income. Adrian Berry examines the assistance that can be given to defaulters who face enforcement action as a result of non-payment or late payment. The first article was published in July/August 2013 *Legal Action* 17.

Introduction

For people of limited means the difficulties faced in meeting a council tax liability extend beyond making a claim for a reduction in liability and appealing to the Valuation Tribunal for England (VTE) or the Valuation Tribunal for Wales (VTW), as the case may be. Many such people will simply be unable to pay the amount owed, to pay the full amount or to pay on time. In such circumstances a billing authority may consider enforcement action.

The first article concerned the establishment and operation of a council tax reduction scheme by a council tax billing authority and appeals against decisions about reductions to the VTE or VTW. This article concerns the use of enforcement powers by a billing authority and the steps that a person may take when unable to meet a council tax liability.

The process of enforcement hinges on a council tax billing authority obtaining a liability order from a magistrates' court. Once obtained, a liability order enables a local authority to enforce the debt owed to it by a variety of methods.

Measures before the making of a liability order

In this article, all references to regulations are to the Council Tax (Administration and Enforcement) Regulations ('the Enforcement Regs') 1992 SI No 613 unless otherwise stated. The process for establishing liability begins when a billing authority serves a bill or 'demand notice' stating a household's liability for council tax. A bill or demand must be served on, or as soon as practicable after, the day the billing authority first sets the amount of council tax for that year (reg 19(1)). This triggers an obligation to pay the sum owed, usually by instalments throughout the year.

Where a demand notice has been served and the liable person has not paid an instalment, the billing authority must issue a

'reminder notice' requiring payment within seven days. The notice must state the instalment(s) that remain unpaid. It must also state that if the instalments due are not paid within seven days (including those instalments which fall due in that period), payment by instalments will no longer be possible and the full amount is payable after a further seven-day period (reg 23(1)).

Where a reminder notice has been served, the sums due on instalments owed have not been paid within seven days, and the whole unpaid balance of council tax has become payable after a further seven days, no final notice is required before an application is made for a liability order (reg 23(3)).

Where a payment has been made after a second reminder notice in a year and a liable person fails to pay a subsequent instalment, the full amount of unpaid council tax for that year becomes payable (reg 23(4)). A liable person must be notified of this when a reminder notice is served (reg 23(1)(c)(iv)).

Before a billing authority applies for a liability order it must serve a 'final notice' on the person against whom the application is to be made, stating every amount in respect of which the order is sought, unless a reminder notice has been served, the sums due on instalments owed have not been paid within seven days, and the whole unpaid balance of council tax has become payable after a further seven days (reg 33(1)).

Supplementary provision is made for a 'joint taxpayers' notice' to be issued, to enable recovery of unpaid council tax (that has become due) from a jointly liable person who has not been issued with a demand notice. Such a person must be notified of the method by which payment is to be made (in a single sum after a period not less than 14 days after the issue of the notice, or in specified instalments) (reg 28(6), see also reg 28A for further provision).

Liability orders

Where an amount has fallen due in the circumstances pertaining to reminder notices as set out in regulation 23(3) or 23(4) (see above) and remains partly or wholly unpaid, or where the amount stated in a final notice is partly or wholly unpaid seven days after that notice was issued, the billing authority may apply to a magistrates' court for a liability order against the person liable for the unpaid amount (reg 34(1)).

The billing authority applies to the magistrates' court by making a complaint and requesting that a summons is issued requiring a person to appear before the court to explain why the sum, which is outstanding, has not been paid (reg 34(2)). No application for an order may be made six years after the sum became due (reg 34(3)).

A summons may be served on a person by delivering it to him/her; leaving it at his/her usual or last known place of abode; sending it by post to his/her usual or last known place of abode; or leaving it or sending it by post to him/her at an address given by that person as an address at which service of the summons will be accepted (reg 35(2)).

No liability order may be made unless 14 days have elapsed since the day on which the summons was served (reg 35(2A)). No warrant may be issued to compel a person to attend (reg 34(4)).

Where a summons is issued but before the hearing the full amount due, together with costs reasonably incurred, is paid or tendered to the billing authority, the authority must not continue with the application. However, where the court is satisfied that the sum has become payable by the defendant and has not been paid, it must make the liability order. The order must be for the sum payable together with costs reasonably incurred in obtaining the order; such costs not to exceed £70 (reg 34(5)–(7)). Where the sum payable is paid after an application for a liability order but before the order is made, the billing authority may request a court to make an order solely for the costs reasonably incurred in obtaining the order. The court must make the order; such costs not to exceed £70 (reg 34(8)).

The liability order hearing

The procedure at a liability order hearing is governed by Magistrates' Courts Rules 1981 SI No 552 r14. See also Magistrates' Courts Act (MCA) 1980 Part II. Unless the defendant consents to the making of the order without hearing evidence, the order for the hearing is that:

- the billing authority calls its evidence, and before doing so may address the court;
- the defendant may then address the court (and, for example, submit that there is no

jurisdiction to make the order);

- the defendant may call evidence;
- the billing authority may call evidence to rebut the defendant's evidence;
- the defendant may address the court if s/he has not already done so;
- with permission, either party may address the court a second time; where permission is granted to one party, it may not be refused to the other. Where the defendant obtains leave to address the court for a second time, his/her second address must be made before the second address, if any, of the billing authority.

What can a defendant at a liability order hearing achieve?

As already mentioned, where the court is satisfied that the sum has become payable by the defendant and has not been paid, it must make the liability order (reg 34(6)). Thus, the scope for resisting a liability order is narrow. However, there are three ways in which a liability order may be resisted.

First, there are procedural points that may be made to resist an order:

- In order to obtain a liability order, the billing authority must have served the demand notice, reminder notices, final notice and/or joint liability notice (as the case may be) as prescribed by the Enforcement Regs. A failure to do so and/or a failure to observe any prescribed time periods for service will render the application unlawful.
- A liability order cannot be made where the payable sum has been paid in full.
- The unpaid sum due must have remained outstanding for seven days after the reminder notice or final notice (as the case may be).
- As no liability order may be made unless 14 days have elapsed since the day on which the summons was served (reg 35(2) and 35(2A)), an order made without service of the summons or within 14 days of the service of the summons will be unlawful.

■ There may also be rare circumstances where lengthy delay in serving a demand notice, causing prejudice, may render a demand notice invalid: see *North Somerset DC v (1) Honda Motor Europe Ltd (2) Chevrolet United Kingdom Ltd (3) Graham* [2010] EWHC 1505 (QB), 2 July 2010.

What cannot be advanced in order to resist a liability order is any matter that is within the jurisdiction of the VTE or VTW (as the case may be).

Second, an adjournment of the liability order hearing may be sought, either by writing to the court in advance or by making a request orally at the hearing. An adjournment is not simply a tactic to postpone the inevitable but has real advantages. Where a defendant who seeks to challenge his/her liability to pay any, or all, of the council tax demanded by the

billing authority is bringing an appeal to the VTE or VTW, on any matter within its jurisdiction, there is no automatic bar to the billing authority making an application for a liability order. In such circumstances, a defendant may make an application to adjourn the liability order hearing until final resolution of any appeal before the VTE or VTW. In making such an application, a defendant may wish to remind the court that the decision by a billing authority to seek a liability order is a discretionary one and one that must be exercised reasonably.

Third, contesting a liability order may provide an opportunity for the defendant to negotiate with the billing authority about the amount of payable council tax that the authority requires to be paid. A billing authority has the power to reduce a council tax liability to a smaller amount or to nil in the exercise of its discretion: Local Government Finance Act (LGFA) 1992 s13A(1)(c) and 13A(6). Where a person of limited means is unable to pay, the opportunity to negotiate with billing authority officials, in advance of the hearing and/or at court on the day of the hearing, should be seized.

Further administrative and judicial remedies

There are a number of further administrative and judicial remedies that may be pursued once a liability order is made but advice on the merits of so doing should be sought beforehand, as the grounds for pursuing them are narrow. Where a billing authority considers that a liability order ought not to have been made it may apply to the magistrates' court to have the order quashed. Thus, a debtor may seek to persuade a billing authority to take this step. Where the court agrees with a billing authority it must quash the order.

However, where, having quashed a liability order, the magistrates' court is satisfied that, had the original application for the liability order been made in respect of a lesser sum payable, such an order could properly have been made, it must make a liability order for that sum together with any sum included in the quashed order in respect of the costs reasonably incurred in obtaining the quashed order (reg 36A).

There is also a common law power for a magistrates' court to set aside orders made in the exercise of its civil jurisdiction: see *R (Newham LBC) v Stratford Magistrates' Court and SD (interested party)* [2008] EWHC 125 (Admin), 15 January 2008, per Andrew Nicol QC. Before a magistrates' court can set aside an order made by it in its civil jurisdiction:

- there must be a genuine and arguable dispute about the defendant's liability to the order in question;
- the order must have been made as a result

of a substantial procedural error, defect or mishap; and

■ the application to the magistrates' court for the order to be set aside must be made promptly after a defendant learns that it has been made or has notice that an order may have been made (para 11).

A person against whom a liability order has been made may appeal to the High Court. The order may be questioned on the basis that it is wrong in law or was made in excess of jurisdiction. To bring such an appeal, an application is made to the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved. An application must be made within 21 days of the liability order being made. Where the court is of the opinion that the application is frivolous, it may refuse to state a case and provide the applicant (on request) with a certificate to that effect. Where the court refuses to state a case, the High Court may, on the application of the person aggrieved, make a mandatory order requiring the court to state a case (see MCA s11.1). It is also possible to make an application for judicial review of a liability order in the High Court under Civil Procedure Rules Part 54.

Where maladministration is alleged, a complaint may be made to the billing authority and, if that is unsuccessful, thereafter to the Local Government Ombudsman (England) or the Public Services Ombudsman for Wales.* The Ombudsman cannot investigate matters falling within the jurisdiction of the courts and tribunals.

Legal aid

Legal aid is not available for help with resisting liability order applications or for representation at liability order hearings in the magistrates' court. Nor is it available for an appeal on a point of law to the High Court. Legal aid is only available for judicial review proceedings where the criteria specified in Legal Aid, Sentencing and Punishment of Offenders Act 2012 Sch 1 Part 1 are met. Otherwise, legal aid is only available where a successful exceptional case funding application has been made.

Consequences of a liability order

Once a liability order is made, a billing authority may:

- require the debtor to supply relevant information (to assist with recovery of the sums owing) (reg 36);
- make an attachment of earnings order and make deductions under that order (regs 37–43);
- make an attachment of allowances order against a local councillor against whom a liability order has been made (reg 44);
- levy the appropriate amount by way of 'distress' and sale of goods (regs 45–45A);

■ apply to the magistrates' court for a warrant for an adult debtor to be committed to prison, where sufficient goods are not seized by way of distress. Following an inquiry in the debtor's presence as to his/her means and whether the failure to pay which has led to the application is due to wilful refusal or culpable neglect, the magistrates' court may commit the debtor to prison (regs 47–48);

■ secure a charging order from a county court against the dwelling concerned (regs 50–51);

■ apply for the bankruptcy of the debtor (reg 49); or

■ seek a deduction from welfare benefits (Council Tax (Deductions from Income Support) Regulations ('the Deductions Regs') 1993 SI No 494).

The Enforcement Regs make detailed provision for each of these methods of recovery, save that deductions from welfare benefits are provided for elsewhere (see the Deductions Regs).

The use of distress to seize a debtor's goods and the possibility of imprisonment are of particular concern. Detailed consideration of these methods of recovery is beyond the scope of this article but it is to be noted that enforcement agents act within a regulatory framework (see Tribunals, Courts and Enforcement Act 2007 Part 3). Furthermore, distress may not be used to seize goods where other methods of recovery are being used (reg 52 (relationship between remedies)).

An appeal may be brought to the magistrates' court in connection with distress (reg 46). The appeal is brought by making a complaint in the magistrates' court and requesting the issue of a summons to the billing authority to appear before the court. If the court is satisfied that a levy was irregular, it may order the goods distrained to be discharged and it may by order award compensation in respect of any goods distrained and sold equal to the amount, which, in the opinion of the court, would be awarded by way of special damages. If the court is satisfied that an attempted levy was irregular, it may by order require the authority to desist from levying in the manner giving rise to the irregularity.

Where a billing authority seeks to commit an impoverished debtor to prison, vigorous attempts should be made to persuade the billing authority to exercise its power under LGFA s13A(1)(c) and 13A(6) to reduce the council tax liability to a smaller amount or to nil in the exercise of its discretion.

Where an application for committal to prison has been made and where, after inquiries have been made, no warrant is issued or term of imprisonment fixed, the court may remit all or part of the amount owed under the liability order and the charges connected with

the distress to which the application related (reg 48(2)). The result is that the debt is no longer owed.

* See: www.lgo.org.uk/ and www.ombudsman-wales.org.uk/ respectively.



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