THE VALUATION TRIBUNAL FOR ENGLAND

Appeal Numbers:
1. 2001M113393
2. 2001M117503

27 May 2014

Council tax – discretionary reduction – Local Government Finance Act 1992, s. 13A(1)(c) – appeal to the VTE – LGFA 1992, s.16(1)(b) – scope of appeal – powers of VTE – VTE (Procedure) Regulations 2009, reg. 38(1)

APPELLANT			**RESPONDENT (Billing Authority)**
1.	**S. C.**	*v.*	**East Riding of Yorkshire Council**
2.	**C. W.**	*v.*	**East Riding of Yorkshire Council**

Before: The President (Professor Graham Zellick QC)

At: Black Lion House, London

On: 7 May 2014

Appearances:

Mr Jan Luba QC, instructed by Mr Sarwan Singh of City Law School for Legal Action on the Council Tax, for the appellants.

Mr Thomas Spencer, Solicitor, assisted by Miss Sammi Jude, Adjudication Officer, both of East Riding of Yorkshire Council, for the respondent.

I. Background

1. A billing authority has had a power to reduce "as it thinks fit" the amount of council tax payable, beyond those reductions prescribed in legislation, since 2003 (Local Government Finance Act (LGFA) 2003, s.76, inserting s.13A into the LGFA 1992), echoing section 53 of the General Rate Act 1967 and perhaps even the Poor Relief Act 1814.

2. Until recently, section 13A was little used, since council tax payers in financial difficulties could apply for council tax benefit – a nation-wide scheme - which often reduced their liability to zero. Council tax benefit was replaced by council tax reduction under the Local Government Finance Act 2012 which requires every billing authority to have its own council tax reduction scheme. Most such schemes provide for reductions for those in financial need but rarely to nil, except in the case of those beyond working age.

3. The Act of 2012 introduced a new section 13A into the 1992 Act covering both the new council tax reduction schemes and the former discretionary power to grant relief. The relevant part of section 13A reads:

> "Reductions by billing authority
>
> (1) The amount of council tax which a person is liable to pay in respect of any chargeable dwelling and any day (as determined in accordance with sections 10 to 13) -
>
> (a) in the case of a dwelling situated in the area of a billing authority in England, is to be reduced to the extent, if any, required by the authority's council tax reduction scheme (see subsection (2));
>
> (b) . . .
>
> (c) in any case, may be reduced to such extent (or, if the amount has been reduced under paragraph (a) . . . , such further extent) as the billing authority for the area in which the dwelling is situated thinks fit.
>
> . . .
>
> (6) The power under subsection (1)(c) includes power to reduce an amount to nil.
>
> (7) The power under subsection (1)(c) may be exercised in relation to particular cases or by determining a class of case in which liability is to be reduced to an extent provided by the determination."

4. Subsection (2) requires authorities to make a scheme referred to in subsection (1)(a); and para. 2(7) of Sched. 1A to the 1992 Act (inserted by Sched. 4 to the 2012 Act) requires that a council tax reduction scheme "must state the procedure by which a person can apply to the authority for a reduction under section 13A(1)(c)".

5. Three things may be noted here:

   (i) discretionary relief is applicable both to those who have been awarded a reduction under a council tax reduction scheme and those who have not ("may be reduced to such extent (or if the amount has been reduced under paragraph (a) . . ., such further extent)": s.13A(1)(c));

   (ii) as schemes must stipulate the procedure for applying for a reduction (or further reduction) under section 13A(1)(c), it follows that authorities must consider every such application on its merits; and

   (iii) whereas there must be a formal, published scheme for council tax reduction, there is no requirement for a scheme governing discretionary relief, unless there has been a "determination" pursuant to section 13A(7) that a class of case is to be reduced in accordance with that determination.

6. Those unfamiliar with these matters may be surprised to learn that elected members play no part in these decisions (at least in East Riding of Yorkshire Council). An application for discretionary relief is first dealt with by an officer. If the applicant is dissatisfied, it will then be reconsidered by another officer (who, so far as I can tell, need not be senior to the first).

7. These two appeals, identified under Practice Statement A10 (*Points of Law and Principles of Valuation*: 1 February 2013) as involving novel points of law, are the first appeals relating to council tax discretionary relief heard by the Tribunal since the Act of 2012 and afford an opportunity to consider and define the nature and scope of such appeals.

II. Is there a right of appeal?

8. Although this point was not an issue in these appeals, it may be helpful to set out the basis of the Tribunal's jurisdiction should any billing authority wish to question it.

9. Council Tax appeals reach the Tribunal pursuant to section 16(1) of the LGFA 1992:

   "A person may appeal to a valuation tribunal if he is aggrieved by -

   (a) any decision of a billing authority that a dwelling is a chargeable dwelling, or that he is liable to pay council tax in respect of such a dwelling; or

   (b) any calculation made by such an authority of an amount which he is liable to pay to the authority in respect of council tax."

10. Mr Luba QC for the appellants did not concede that such an appeal fell outside subsection (1)(a) but argued that if (a) did not cover it, then (b) did.

11. In my view, and in the absence of full argument, para. (a) is limited to whether a dwelling is chargeable to council tax or that the appellant is liable to pay council tax and is not apt to cover the amount actually payable. That falls under para. (b) as "any calculation . . . of an amount which he is liable to pay".

12. In precisely the same way as council tax reduction scheme appeals come to the Tribunal under section 16(1)(b), so too do calculations of the amount payable as a result of an application for discretionary relief under section 13A(1)(c). It is difficult to see any basis for a contrary argument.

13. For the sake of completeness, it is worth stating that these are not matters reserved to judicial review by virtue of section 66 of the LGFA 1992. These appeals do not challenge a council tax reduction (CTR) scheme (s.66(2)(ba)) or a calculation within section 66(2)(c); and a determination under section 13A(7) is (surprisingly perhaps) not one covered by section 66(2)(b).

14. Accordingly, I cannot see any basis for questioning the Tribunal's jurisdiction to entertain appeals in respect of a billing authority's decision to refuse discretionary relief or regarding the amount of any relief granted, including its duration.

III. The Tribunal's approach to such appeals

15. Appeals in respect of council tax benefit went to the First-tier Tribunal Social Entitlement Chamber, but council tax reduction appeals automatically come to the Tribunal under section 16(1)(b) as appeals in respect of a calculation of an amount to be paid in respect of council tax. Confirmation of this, if needed, may be found in para. A18A(2)(b) of Schedule 11 to the LGFA 1988, inserted by Part 2 of Sched. 4 to the LGFA 2012, which permits a First-tier Tribunal judge to sit in this Tribunal on appeals relating to a council tax reduction scheme.

16. The introduction of this new jurisdiction led to my issuing a Practice Statement describing the procedures for dealing with such appeals (*Council Tax Reduction Appeals* (VTE/PS/A11). I took the opportunity to include a section on appeals in respect of discretionary relief, whether or not there had also been a CTR application.

17. Because appeals against a billing authority's exercise of discretion to refuse relief or grant less relief than the appellant hoped for or requested were wholly different in nature from every other kind of appeal before the Tribunal, none of which involves discretionary decisions, I concluded that the Tribunal's approach to such appeals must be different and indeed more limited and premised on ensuring that the discretion had been exercised lawfully in the public law sense. Para. 28 of the Practice Statement therefore states:

> "The Tribunal's powers on such an appeal are to apply judicial review principles to the billing authority's decision (due process, reasonableness, proportionality, legality etc.); it should not normally substitute its own view for that of the authority. Where illegality has been found, the matter should normally be remitted to the billing authority to be reconsidered."

18. This provision was widely considered in draft before it was issued; had attracted no adverse comment; and escaped criticism in a recent article by a barrister (Alan Murdie, *Insight* (IRRV), April 2014, at p.31).

19. However, having now heard Mr Luba QC's submissions on this point, it is clear to me that it is incorrect.

20. Mr Luba points out that there is nothing in the legislation to distinguish this category of appeal from any other and there is therefore no justification for adopting a different or more limited approach whether based on judicial review principles or otherwise. It is not unknown, or even unusual, for tribunals to be called to upon to act in this way in respect of the exercise of discretion by public bodies. They are appeals just like any other and, as Mr Luba variously put it, are subject to the Tribunal's "full jurisdiction", its "true appellate function" and a "full merits review". Clear statutory language would have been necessary to indicate that the Tribunal should deal with these appeals only on judicial review principles (*cf, e.g.*, Regulation of Investigatory Powers Act 2000, s.67(2)). I doubt the government gave any thought to these ramifications and may now be surprised to learn of the role which the Tribunal is inescapably required to play.

21. The respondent relies on the approach set out in the Practice Statement but made no legal arguments in its support.

22. I accept Mr Luba's argument and the Practice Statement will therefore be amended and reissued.

23. The Tribunal's approach is thus the same as in every other appeal. This is captured in para. 5 of our Model Procedure (VTE/PS/B1: 22 May 2013):

> "(1) It is for the appellant to satisfy the Tribunal that the appeal should be allowed.
>
> (2) All parties must satisfy the Tribunal in respect of any argument or evidence they advance or introduce."

24. Thus, it is for the appellant to raise doubt as to the correctness of the authority's decision and to argue what the correct decision should have been. The authority may then defend its decision and the panel will decide the appeal on the balance of probabilities. There is no inhibition on the Tribunal's substituting its view for that of the authority, but any such substitution must be soundly and solidly based.

25. The following points (which are not based on Mr Luba's submissions and with which he may or may not agree) are designed to assist billing authorities, council tax payers and Tribunal members and clerks in dealing with these appeals:

    (1) The focus of an appeal as opposed to a review is fundamentally different: full appeal reaches further and assesses the actual merits of the decision reached.

    (2) Some deference should, however, be paid to the view of the original decision-maker and an effort made to understand how that decision was arrived at, but that cannot prevent the Tribunal from substituting its view for that of the authority provided that the Tribunal can articulate cogently why it is doing so and how it has arrived at its conclusion.

(3) The authority's decision does not have to be unreasonable in the *Wednesbury* sense before it can be set aside, but the Tribunal should intervene only where there are strong grounds for doing so.

(4) It may not be an exact parallel, but the Court of Appeal will allow an appeal against sentence only where the sentence is wrong in principle. This suggests that some restraint should be exhibited by the Tribunal before disturbing a billing authority's decision.

(5) Procedural defects may recede in importance, or be completely effaced, since the Tribunal will be chiefly concerned with the actual merits of the decision. Earlier defects in process may therefore be cured or superseded by the appeal, and a decision may be adjudged correct despite defects in process.

(6) Although a scheme or policy is not required by statute, it is difficult to see how such an open-ended discretion can be satisfactorily exercised in the absence of one.

(7) Any such policy should be scrutinised by the authority's lawyers before promulgation.

(8) Compliance with a formal published policy or scheme, if there is one, cannot preclude the Tribunal from allowing an appeal.

(9) Any such scheme is not immune from challenge in the Tribunal as, for example, is a council tax reduction scheme (see para. 13 above). It is not the Tribunal's business to impugn any scheme as such but rather that its own powers cannot be inhibited or circumscribed by a scheme.

(10) Failure to comply with a substantive element of a scheme to the detriment of the applicant is likely to lead to the overturning of the decision unless there are good reasons for having departed from it.

(11) However, compliance with a scheme or policy may help in persuading the Tribunal that the original decision was correct.

(12) The Tribunal should be slow to interfere with a decision that properly flows from a determination made under section 13A(7).

(13) An authority cannot as a matter of law fetter its discretion and must therefore consider every application on its merits whatever the policy or scheme says.

(14) Suppose, for example, there is a provision that non-essential expenditure should be disregarded when calculating legitimate outgoings and determining disposable income. The Tribunal could conclude that the item was wrongly so characterised and should be included. Or that on its specific facts it should be included. Thus, mobile phones might normally be treated as a luxury but might become a necessity if the appellant is a carer who might need to be contacted urgently when not at home. Or a subscription to a satellite television service might have to be accepted if the appellant is locked into a contract that pre-dates his financial difficulties.

(15) A factor which cannot have any relevance for the Tribunal is an overall budget created by the authority for the totality of discretionary applications in a given year so that any application will be considered in relation to the available budget and once that sum is exhausted no further applications can be granted. I do not see how in law this can be a cash-limited exercise. The merits of an appeal cannot be affected by the existence of any such budget. A "budget" is in any event a somewhat artificial concept in view of the fact that the authority is forgoing income and not spending existing funds.

(16) Where the Tribunal is minded to allow the appeal and order a recalculation but is unsure of the actual amount to substitute, the appeal may either be adjourned for the parties to supply whatever further information is needed to reach a decision or it may conclude the appeal by quashing the calculation and ordering the authority to recalculate properly. The former is likely to be the better course in most cases.

26. These observations may be revised or refined in the light of experience, but it is desirable to give us as much guidance as possible at this time.

27. This analysis produces a striking anomaly. There will be council tax payers whose applications for CTR have been rejected, despite undoubted financial need, because (for example) they fall foul of some eligibility provision in the scheme, such as a two-year residency requirement in the area. No appeal can be made to the Tribunal because the residency requirement cannot be questioned except by judicial review. But if these council tax payers - offered no reduction but in clear financial need, apply for discretionary relief and are again rejected - appeal to this Tribunal, we must consider their appeals on their merits and cannot be bound by the residency requirement. This could result in a successful appeal ordering reduction of the council tax bill even to nil. Can Parliament or the Government really have intended this result?

IV. The Tribunal's powers on such appeals

28. The next question is what the Tribunal is empowered to do when allowing such an appeal.

29. For this we need to turn to the Procedure Regulations (The Valuation Tribunal for England) (Procedure) Regulations 2009, SI 2009 No 2269). Reg. 38(1) (which closely follows the language of para. 10A(1) of Sched. 11 to the LGFA 1988, inserted by the Local Government and Public Involvement in Health Act 2007, Sched. 15) provides:

> "After dealing with a section 16 appeal the VTE may by order require -
>
> . . .
>
> (c) the decision of a billing authority to be reversed; or
>
> (d) a calculation (other than an estimate) of an amount to be quashed and the amount to be re-calculated."

30. Reg. 38(10) provides:

> "An order under this regulation may require any matter ancillary to its subject matter to be attended to."

31. I pause to observe that the use of "may" in reg. 38(1) does not imply (as is commonly supposed) a discretion as that word often does when used in contradistinction to "shall". This is one of those instances where "shall" would simply be inappropriate. Para. (1) would have to open with the words "After allowing an appeal under section 16". The use of "may" is clearly not intended to imply that an appeal may be allowed and the Tribunal has a discretion as to whether to award the appropriate redress.

32. Returning to sub-paras. (c) and (d) of reg. 38(1), the question is whether they are to be read in the light of section 16(1). Does "decision" in reg. 38(1)(c) refer to a "decision" under section 16(1)(a) or to any decision of a billing authority in relation to council tax; and does "calculation" in reg. 38(1)(d) reflect section 16(1)(b)?

33. It seems to me that reg. 38 is designed to mirror section 16 and that we are therefore concerned only with reg. 38(1)(d) for the reason given in para. 11 above.

34. Section 10 of the LGFA 1992 defines how the council tax is to be calculated and it makes clear that the calculation is to have regard to a variety of provisions, including section 13A.

35. I cannot see that it makes any difference that such appeals fall only within sub-para. (d) and not (c). Sub-para. (d) is entirely apt to deal with the Tribunal's powers described in section III above. The Tribunal stipulates the decision to which the authority should have come, including its financial aspects, and orders it under reg. 38(1)(d) to quash its calculation of the council tax payable and re-calculate it in accordance with the Tribunal's decision. There is no need to be able to reverse the decision under reg. 38(1)(c); nor do I see any need to invoke the provisions of reg. 38(10) to be able to give effect to the Tribunal's conclusions. The billing authority is required to comply with the Tribunal's order (LGFA 1988, Sched. 11, para. 10A(2)(a)) and to do so within two weeks (reg. 38(9)).

V. The two appeals

1. *Mr and Mrs C.*

36. Mrs C. is severely disabled. Her husband is her full-time carer and they have a dependent child. Neither works. Their income is entirely in the form of benefits. They have no savings.

37. They receive the maximum council tax reduction totalling 75 per cent of the council tax, leaving a balance of £247.96 or £4.75 pw. Their application for relief from the residual £247.96 was rejected on the ground that their income exceeded their outgoings by £30.20 pw, sufficient to pay council tax of £4.75 pw.

38. However, in making its calculations based on figures supplied by Mr C., the authority uprated the benefits income from the 2012/13 figures used by Mr C. to the 2013/14 rates without making any corresponding adjustments to the expenditure. There were bound to be increases in expenditure at a time of high inflation, not least in energy costs. The C.s' gas and electricity bills, for example, have nearly doubled – from £23 pw to £44 pw. This increase is much greater than the increase in benefits rates. Other outgoings will also have increased, if not quite so steeply.

39. The respondent Council insists that the discretionary scheme is only for temporary assistance; it is a short-term emergency measure with a 12-week maximum unless the circumstances are exceptional. I see no warrant for this limited approach in the legislation and it strikes me as arbitrary and potentially unreasonable. The Council say there must be severe financial hardship *and* exceptional circumstances. They informed the Tribunal:

> "If the circumstances have been long standing or if a discretionary reduction is unlikely to alleviate the hardship, the decision maker may decide that a reduction should not be applied."

40. This reasoning is difficult to follow. To exclude discretionary relief merely because the circumstances are long-standing strikes me as perverse and insupportable; and I am at a loss to understand how a reduction in the bill would be unlikely to alleviate hardship once it is established that the applicant is in financial distress.

41. I accept that in the majority of cases the starting point is likely to be the difference between income and allowable expenses. This is also in most cases likely to be the dominant consideration, although due regard must be given to all other relevant factors. The obligation to pay a tax must take priority over expenditure on what may be called luxuries or life-style choices.

42. For example, the Government recently urged local authorities to use the power in favour of residents affected by the floods. There was no suggestion that help should be afforded only to those unable to meet any additional costs caused by or resulting from flood damage.

43. If in Mr and Mrs C.'s case it had been shown that there was surplus income over expenditure, the case for a discretionary reduction would be weak. Unfortunately, the Council interfered with the figures and produced a calculation which is manifestly wrong and cannot be relied upon.

44. Mr Luba wrote to the Council on 23April 2014 requesting revised figures in the hope that this hearing might thereby be avoided. Surprisingly, this elicited no response.

45. In the circumstances, I directed the parties to submit a revised schedule of income and expenditure covering the whole year 2013/14, showing whether there was surplus income from which the residual council tax could be paid.

46. No schedule was agreed but both parties submitted revised figures and representations. Mr Luba commented:

> "The reality is that the revised Schedule, and the Appellant's instructions upon it, amply show that this is a household existing at the very margins of

> viability. On the Council's own figures, the operating margin is £8.25pw from an income of £366.09pw i.e. an operating margin of less than 3%. It must be recalled that the household is a disabled woman, her carer and a dependent child with no capital and no prospect of changed circumstances.
>
> Yet the Council's position is that they should meet their remaining council liability of £3.96pw for the *full* 52 weeks of 2013/14 *and* pay the £80 costs expended on enforcing that sum."

47. Mr Luba invited me to allow the appeal and order that the liability be reduced to nil.

48. I accept that the appellant and his wife are in extremely hard-pressed financial circumstances and are being asked to pay the residual council tax from a very small surplus of income over expenditure, which allows very little latitude for contingencies or emergencies. But as there is such a surplus, which Mr Luba does not dispute, I see no basis in law for interfering with the respondent's decision to reject the application for discretionary relief and the appeal must therefore be dismissed.

2. *Mr and Mrs W.*

49. It very quickly became apparent during the course of the hearing that the authority's decision in this case was fatally and irretrievably flawed. Mr Spencer for the Council did not resist this conclusion but asked for the matter to be remitted to the Council for fresh consideration.

50. Mr and Mrs W., both unemployed and in receipt of benefits, received full council tax reduction, leaving 25 per cent of the council tax to be paid. This amounted to £289.54 or £5.55 pw. They have no savings and are deeply in debt, with arrangements with a number of creditors to make modest regular payments to clear these debts, though the rate of payment is such that it is unlikely they will be cleared in the foreseeable future. There are also arrears of council tax prior to 2013/14. The Council itself calculated a shortfall of £72.34 in their income to meet existing liabilities and outgoings.

51. Nevertheless, the Council rejected the application for discretionary relief. The officer who took the first decision explained that discretionary relief was available only where "an exceptional circumstance has caused . . . distress and/or severe financial hardship". It was acknowledged that the council tax bill "caused you some financial issues, [but] I do not consider you have exceptional circumstances". The second officer was even more explicit:

> "A discretionary council tax reduction can only be granted where the council is satisfied that an exceptional circumstance has caused you distress and/or severe financial hardship."

52. Thus, to qualify for relief, there had to be some exceptional circumstance that had *caused* severe financial hardship. Furthermore, in its submission to the Tribunal the Council observes that the appellants' hardship would not be resolved by an award, given their inability to meet their other debts, and their situation was long-standing and unlikely to be resolved in the short term.

53. I commend the Council for having a published scheme, though it would have benefited from legal scrutiny and revision before publication. It is unnecessary to set out a detailed analysis of the scheme, but suffice it to say that it offers no support to the approach taken by the two decision-makers, still less to the extraordinary statements in the submission. Mr Spencer (who was not responsible for that submission and had not at that stage been consulted) does not disagree.

54. The simple fact is that there is no surplus income to meet this bill. The respondent accepts that. It is difficult to imagine a clearer case for discretionary assistance. To deny help on the grounds that this situation owes nothing to exceptional circumstances, or that absent an exceptional circumstance relief is unavailable, or that their situation cannot be measurably improved by any relief granted strikes me as perverse, irrational and unsustainable.

55. It is, in my judgment, as clear as it may be that the appellant is entitled to discretionary relief; that there is no plausible or rational basis for limiting that relief to 12 weeks or any other period; and that only full remission of the residual council tax for the year makes any sense in view of the absence of any funds to meet their liability. I rule accordingly. No doubt the Council will revisit their scheme in the light of this decision.

VI. Acknowledgments

56. I must record my considerable gratitude to Mr Jan Luba QC who agreed to act *pro bono* for the appellants. He has not only served his clients well, but has rendered great assistance to the Tribunal in defining its approach in cases such as this. He has acted in the highest traditions of the English Bar.

57. In view of the involvement of City Law School in instructing Mr Luba, and the assistance of two of its students, I made known at the beginning of the hearing that my wife was a Professor of Law at City University Law School, London. No objection was taken to my continuing with the hearing.

58. I am also grateful to Mr Spencer and Miss Jude for agreeing to the hearing's taking place in London once it was known that the appellants did not intend to be present.

ORDER

The respondent Billing Authority is ordered, pursuant to reg. 38(1)(d) of SI 2009 No 2269, to quash its calculation in respect of the council tax liability of Mrs C. W. for 2013/14 and to recalculate that liability under section 13A(1)(c) of the LGFA 1992 so as to reduce that liability to nil.

President

Registrar
27 May 2014