

Discretionary payment scheme is no answer to bedroom tax discrimination

The availability of discretionary housing payments by local authorities is being cited by courts as grounds for dismissing challenges over the discriminatory impact of the bedroom tax, says Richard Machin.



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Stoke-on-Trent returned £103,928 of underspent DHP budget to central government and was much criticised for evicting 25 tenants affected by the bedroom tax in the same year.

Local authority discretionary housing payments (DHPs) are playing a vital role in keeping tenants who have been hit by the bedroom tax in their homes, according to research by Staffordshire University. The small-scale, qualitative study of housing association tenants affected by the bedroom tax in north Staffordshire was conducted by the university's social welfare law, policy and advice practice team.

DHPs in the courts

DHPs have featured in several important cases over the past few years. *Burnip v Birmingham City Council and another and other appeals* [2012] EWCA Civ 629, 15 May 2012 considered the discriminatory impact of local housing allowance (LHA) rules on disabled children who cannot share a bedroom. Henderson J held that DHPs 'cannot in my judgment be regarded as a complete or satisfactory answer to the problem. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon ...' This judgment afforded some protection to tenants in the private rented sector that has not, however, been extended to those in the social sector.

In *R (MA and others) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, 21 February 2014, 10 judicial review applications were brought against the SSWP. The similarities to the *Burnip* case are clear: the claimants were all in receipt of a reduced level of housing benefit (this time under Housing Benefit Regulations 2006 SI No 213 (HB Regs) reg B13) and argued that the reduction was discriminatory as each needed an extra bedroom as a member of their household was disabled. However, the claims were dismissed for the following reasons: the availability of DHPs justified the discrimination; the DHP scheme is now better funded; and clearer guidance has been issued to local authorities. Furthermore, local authorities can choose to top up DHP budgets and the responsibility lies

with them to avoid disability discrimination.

Rutherford and others v Secretary of State for Work and Pensions [2014] EWHC 1631 (Admin), 30 May 2014 followed similar principles. It was argued that the HB Regs were discriminatory as they did not allow an extra bedroom for the carer of a disabled child in the household. The role of DHPs was again pivotal. It was judged that DHPs could plug the gap left by the regulations and it was the responsibility of local authorities to ensure that gap was plugged on an ongoing basis.

R (Cotton and others) v Secretary of State for Work and Pensions [2014] EWHC 3437 (Admin), 22 October 2014 dealt with parents with shared care of children. Separated parents with secondary responsibility for a child often feel they should maintain a bedroom in their household for the child although it is only used for part of the week. Under the bedroom tax rules, housing benefit is not paid for such a room. Males J dismissed these claims for judicial review as the claimants were in receipt of DHP and, even if this was withdrawn, they would not suffer an interference with family life that breached European Convention on Human Rights (ECHR) art 8.

Two mothers in temporary accommodation who had fled domestic violence brought their case in *R (SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16, 18 March 2015. Their benefit entitlement had been reduced as a result of the benefit cap. It was held (at para 62) that 'that problem, which is inherently of a temporary nature, is capable of being addressed under the DHP Regulations by the use of discretionary housing payments; and the funding made available by Government for such payments has been increased for that very purpose ... Whether problems are avoided in practice will depend upon how the discretionary payments scheme is operated by local authorities in individual cases.' Again, the responsibility was passed down to local authorities with DHPs seen as the solution.

In *Burnip*, Henderson J held that 'housing, by its very nature, is likely to be a long term commitment'; the discretionary and short-term nature of DHPs was found to be incompatible with such a long-term undertaking. However, subsequent cases have found DHPs to be a reasonable means to provide ongoing financial support. The fact that the 2015 summer budget has increased DHP funding, alongside the clearer guidance now available to local authorities, means DHPs are likely to remain at the heart of legal challenges to housing benefit decisions.

A postcode lottery

Despite their importance for those in extremely difficult circumstances, the Staffordshire University bedroom tax research highlighted regional variations in the administration and award of DHPs. Two neighbouring local authorities, Stoke-on-Trent City Council and Newcastle-under-Lyme Borough Council, were perceived by both tenants and housing association staff as having very different approaches. Newcastle-under-Lyme appeared to be more flexible, awarding payments more easily and on a repeated basis. Tenants said Stoke-on-Trent was less willing to make payments and where they received awards, these were often for short periods of time. Quantitative data from 2013/14 backs this up: Stoke-on-Trent returned £103,928 of underspent DHP budget to central government and was much criticised for evicting 25 tenants

affected by the bedroom tax in the same financial year (Richard Ault, 'DWP hits out at city council for failing to spend £103K to stop bedroom tax victims being evicted', *The Sentinel*, 16 October 2014).

Perhaps we should not be surprised at these differences: a discretionary scheme is hardly likely to produce uniform results. It also needs to be remembered that Stoke is a city with a population of 249,000, compared to a population of 123,900 in Newcastle-under-Lyme, and has considerably more poverty-related problems.

However, it is also worth looking at the formula used to allocate the DHP budget, which has been subject to considerable variation over the last few years. Funds have been awarded on the basis of the estimated regional impact of the bedroom tax, the benefit cap and reductions in LHA. Additional funds have been awarded to local authorities in sparsely populated rural areas, to councils

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judged to have managed their schemes in an appropriate way and on the basis of regional rent levels (Wendy Wilson, *Discretionary Housing Payments*, House of Commons Library briefing paper SN06899, 20 July 2015, p6).

The postcode lottery issue is further complicated by the fact that, in broad terms, more people in the south of England are affected by reductions in LHA and the benefit cap, while in the north more people are affected by the bedroom tax.

Inconsistencies are also present in dispute procedures adopted by local authorities. Decisions do not carry a right of appeal to a social security appeal tribunal although complaints to the Local Government Ombudsman and judicial review remain potential options. Before a claimant reaches this stage, they will have exhausted an internal review system that can vary from an e-request that must be made in 21 days (Derby City Council) to a decision made by a panel of councillors who make a recommendation to the cabinet member for finances and resources (Westminster City Council).

It is hard to see how regional variations in DHP spending will not persist in the coming years. An increasing number of local authorities are overspending their budgets, while examples remain of underspends. Fast-changing national and local political priorities will continue to dictate the administration of schemes. Ultimately, schemes based on discretion and devolved administration will not produce uniform outcomes for applicants. ■

The history of discretionary housing payments

The Child Support, Pensions and Social Security Act 2000 provided arrangements to allow local authorities to award DHPs and they were introduced in July 2001 through the Discretionary Financial Assistance Regulations 2001 SI No 1167. The guidance issued by central government on DHPs reflects the significant changes made to housing benefit over the last 15 years.

The original 2001 guidance (*Guidance for Local Authorities on the Operation of Discretionary Housing Payments*) gave local authorities much freedom to decide how to administer DHPs: 'There are no prescribed tests of either exceptional hardship or exceptional circumstances – authorities simply have to be satisfied that the person concerned is in need of further financial assistance for housing costs.'

By 2008, the DHP best practice guide had become much more prescriptive, complicated and onerous. The opening paragraphs emphasised that decisions must be made 'with ordinary principles about good decision making, ie administrative law', that to award DHPs over the government's prescribed limits was breaking the law, and that data protection law and ECHR art 8 must be adhered to. It also warned local authorities not to adopt policies that were too rigid as these may be vulnerable to challenge by judicial review.

The examples given of the types of shortfall that DHPs could cover illustrate the increasingly restrictive nature of the rules governing housing benefit for private sector tenants. Local authorities were directed to consider awarding DHPs to claimants affected by the single room rent size criteria or where LHA did not meet the rent.

The latest guidance (*Discretionary Housing Payments Guidance Manual Including Local Authority Good Practice Guide*) emphasises (at para 1.4) that 'LAs have overall responsibility for how DHPs are administered and paid, taking into account the impact of the welfare reforms and any other relevant factors'.

Local authorities are now advised that DHPs should be prioritised for those affected by the bedroom tax who are unlikely to be able to move to smaller properties (in 2013/14, around 60 per cent of all DHP spend in England was on bedroom tax cases).

DHP guidance continues to advise that the scheme's objectives include alleviating poverty and homelessness prevention. However, there are strong arguments that the (understandable) move away from DHP support for private rented tenants, at a time when the ending of a private tenancy is increasingly the cause of statutory homelessness, will do little to achieve these objectives.