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**The Resistible Rise of Discretionary Housing Payments:**

**Rehoune v London Borough of Islington [2019] EWHC 371 (Admin)**

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Discretionary Financial Assistance Regulations 2001

**Cases:**

*R (on the Application of Rehoune) v London Borough of Islington* [2019] EWHC 371 (Admin)

*Samuels v Birmingham City Council* [2019] UKSC 28

The Chancellor’s purported “Spending Round”, delivered to a preoccupied Parliament on the 4th September 2019, contained £106 million of funding for the “Plan for DWP Excellence”: a package designed to “deliver reform to support the most vulnerable in society”.[[1]](#footnote-1) The largest component of this intervention – £40 million – is extra funding for the Discretionary Housing Payment (DHP) scheme. This additional cash is, according to the treasury’s supporting documentation, designed to “tackle affordability pressures in the private rented sector in England and Wales”.[[2]](#footnote-2)

Readers of this journal are likely already familiar with the DHP scheme. Underpinned by the Discretionary Financial Assistance Regulations 2001, the payment of DHPs are made at the discretion of Local Authorities to those in receipt of housing benefit who require assistance with their housing costs. This historically small fund has evolved into a £140 million per annum sticking plaster in the wake of the Welfare Reform Act 2012 and Welfare Reform and Work Act 2016 reforms. Their availability is referred to routinely by Government ministers and by their lawyers in the courts as a means of off-setting high profile cuts to housing benefit, such as the “benefit cap,” “bedroom tax” and freezes/reductions to Local Housing Allowance.

Their central role in this “Plan for DWP Excellence” demonstrates the Government’s continued faith in these payments’ “panacean” status.[[3]](#footnote-3) However, as indicated in a series of recent judgments, the administration of these payments by local authorities poses a series of problems. This article focuses on one such case, *R (on the Application of Rehoune) v London Borough of Islington* [2019] EWHC 371 (Admin), to illustrate key issues in the administration of the DHP scheme.First, the widespread expectation that applicants will contribute to a deficiency in housing benefit by diverting income from other social security payments. Second, the laborious and sometimes unwarranted administrative processes and evidential requirements tied to applications. Third, the ongoing deficit between the scale of housing benefit reductions, and available funding under the DHP scheme. After an outline of the decision in *Rehoune*, each of these broader issues stemming from the case will be dealt with in turn.

**The facts**

Ms Rehoune is a single parent of three children living in a former council house, now leased back to her by a private landlord, in central London. Her rent is £405 per week. She is affected by both the two-child limit for child-tax credit and the benefit cap, receiving £232.72 per week in non-housing benefit and – as a result of the imposition of the benefit cap through her housing benefit award – £209.51 in housing benefit.[[4]](#footnote-4) What emerges, therefore, is a familiar picture throughout many cities across the country: a very significant shortfall between housing benefit and rental liability, in this case to the tune of £195 per week.

The Local Authority considered that the majority of this shortfall could be met by way of DHPs, but they would require the claimant to meet £15 a week of herself from her other income (ostensibly, from her weekly subsistence payments of non-housing benefits). Following her initial application for DHP support and representations by the claimant’s representatives, the Local Authority’s “Income Maximisation Team” (IMAX) that handles the administration of DHPs, required the claimant to apply for any additional support by providing:

i. Receipts for a six-week period to support her expenditure of £150 per week on grocery shopping.

ii. Receipts to support the expenditure of £30 per week for clothing and footwear; and

iii. Further information about the sum of £10 per week spent on "children's expenses/childcare."

The claimant’s representatives contended that these requirements were unnecessary given that Ms Rehoune’s income consisted entirely of subsistence benefits and – as a result of the two-child limit – was even below what would ordinarily be considered the minimum floor under Universal Credit. After a substantial gap in correspondence, judicial review proceedings were then issued against the Local Authority.

**The challenge**

Ms Rehoune’s challenge was two-fold: (i) that the London Borough of Islington had an unlawful policy of requiring all DHP applicants to pay the first £15 of any shortfall and that (ii) the decision to require Ms Rehoune to pay £15 towards her shortfall is unlawful independent of the existence of any such policy. On the former, the claimant argued that imposing such a requirement would be an unlawful fetter on the operation of the DHP scheme, and failed to have regard to relevant considerations – particularly the impact of the two-child policy for Child Tax Credit under the amended s.11 Children Act 2004 on applicants’ incomes.

The court considered that the Local Authority’s policy was not, in fact, a blanket requirement to impose a £15 contribution on all DHP claimants. Rather, as indicated in paragraph 8.1 of their policy on the award of DHPs, it required a broader discretion to be exercised on a case-by-case basis that may absolve individual applicants from any contributions:

"For supplementing Housing Benefit (or its equivalent in Universal Credit), depending on the circumstances of the claimant, it may not be necessary in every case to cover the total shortfall. It could be decided to award a partial payment. Consideration will be given as to whether the claimant can afford to contribute to the shortfall including, for example, if they have a non-dependant who can afford to contribute."[[5]](#footnote-5)

The exercise of this broader discretion was evidenced in fact. Data provided by the authority indicated they met a “full” shortfall in 181 cases, with 156 paying £15 a week, and 141 paying less than £15 per week.[[6]](#footnote-6) As a result of this evidence, the court determined that there was a “genuine willingness to depart from this "starting point" when the circumstances justify [it]” and the policy did not operate as a blanket requirement. Consequently, there was no fetter on the exercise of discretion under the DHP scheme. The claimant’s arguments that using a £15 contribution as starting point was itself a fetter on the exercise of discretion were also dismissed by the court.

Having dealt with this issue, the court halted its analysis of the remaining complaints, declining to deal with arguments on the failure to have regard to material considerations (such as the two-child limit) and the lawfulness of requiring the applicant to pay the first £15 and/or the DHP policy detailed by Islington Borough Council in general. As the claimant had not completed the submission of her income and expenditure evidence and – as a result – had not exhausted her options internal to the authority, there was not “a final adverse decision made in relation to her claim for DHP that is susceptible to challenge by judicial review on the alternative grounds advanced in this claim”.[[7]](#footnote-7) Consequently, her appeal was dismissed.

**Discussion**

At the heart of Ms Rehoune’s case and her submissions to the court is the perverse default position faced by thousands of benefit recipients across the country: if you have a shortfall between your housing benefit and your rent, you are expected to resolve it using income from social security payments designed to meet your subsistence needs. For Ms Rehoune, the imposition of the two-child limit in Child Tax Credit renders this starting point even more acute. Her total benefit award – pegged to subsistence only expenditure – would have been at approximately £290 per week, but is reduced by the limit to £232.72. Put another way, she is receiving substantially *less* than subsistence level benefits yet is still expected by default to find funds from her benefit awards to resolve the insufficiency of her housing benefit award. O’Brien’s analysis of the two-child policy indicates ably the perversities of the policy;[[8]](#footnote-8) those in Ms Rehoune’s predicament indicate how its effects reach into the ambit of the DHP scheme.

In a separate context, the UK Supreme Court has recently considered this same problem in the course of an affordability assessment of accommodation to inform the determination of intentional homelessness under s.191 Housing Act 1996. In *Samuels v Birmingham City Council* [2019] UKSC 28 the Court determined that accommodation cannot be considered affordable if applicants have to draw on subsistence benefits to meet shortfalls in their rent. It is difficult to see how this same logic does not hold to the assessment of the need for assistance in meeting one’s housing costs under the DHP regime.[[9]](#footnote-9)

Ms Rehoune’s case also demonstrates ably the problems caused for applicants by overbearing application processes and evidential requirements. In this instance, notwithstanding the clear lack of affordability of a £15 contribution, she was required to provide: (i) receipts for all grocery shopping over a six-week period, (ii) receipts to substantiate expenditure on clothing and footwear, and (iii) additional information about the detailed £10 per week on “children’s expenses and child care.

There are two connected problems with these evidential requirements. First, expenditure – particularly that on food and clothing – is rarely linear, especially for households on low incomes. Such households are more likely to have higher levels of cash (rather than easier to evidence card-based) transactions and to engage in lumpy expenditure, stocking up on items one week and not the next.[[10]](#footnote-10) Receipts may not be available to substantiate all expenditure, and even where receipts are available, DHP income/expenditure based assessments will only ever capture a snap-shot of true expenditure.

Second, and more fundamentally, the requirement for detailed receipts and itemised assessments of expenditure raises the question of *how* this information can lawfully be used in determining a DHP award where a claimant has no other income. If, as is clear in this case, the claimant’s income is limited to subsistence benefits (or in the event of the two-child limit, *below* what would be considered subsistence), what function is this evidential hurdle serving? A Local Authority that queried levels of expenditure on food or other essentials would be taking a decision based on the limited evidential envelope of a DHP income/expenditure assessment, even where total expenditure is lower than subsistence benefit rates. Any assessment where the use of such welfare benefits is queried is reminiscent of drawing distinctions between the deserving and undeserving poor.

Finally, it is worth underscoring the vast deficiency between the total DHP budget provided to Local Authorities and the extent of the reductions to housing benefit. Local Authorities continue to be placed in a very difficult position under the DHP scheme. The total impact on their residents of the benefit cap, the bedroom tax, and freezes or reductions to Local Housing Allowance far outstretch the funds provided to them by the Department for Work and Pensions. The lowered benefit cap alone strips more than £190 million per annum out of the benefit system;[[11]](#footnote-11) the bedroom tax alone over £300 million per annum.[[12]](#footnote-12) With a DHP budget of £140 million per annum – even with additional funding of £40 million - these reforms taken together far outstrip the resources available to Local Authorities. Although they have the discretion to supplement the central funding from their own resources, for a local government sector facing funding shortfalls from across their budgets, this is not a viable prospect for most.

The decision in *Rehoune* is, therefore, a microcosm of the structural problems facing the DHP scheme and their implications for applicants in need of assistance with their housing costs. The default expectation that those facing a shortfall will resolve it with funds from other social security payments, the associated evidential requirements or additional means-testing, and – despite additional funding – the gulf between total reductions in housing benefit and the availability of DHPs, all point to a discretionary system that is straining under the pressure it is carrying. In taking a “cut and devolve” approach to mitigating the impact of its welfare benefit reductions, the Government has sought to push responsibility downwards to the Local Authority level. The effects of the deficiencies in the scheme are being felt keenly by applicants like Ms Rehoune who face substantial shortfalls in their housing benefit.

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 HM Treasury, *Spending Round 2019* (2019) Available at: <https://www.gov.uk/government/publications/spending-round-2019-document/spending-round-2019> Accessed 21 September 2019. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Jed Meers, “Panacean Payments: The role of Discretionary Housing Payments in the welfare reform agenda” (2015) 22(3) *Journal of Social Security Law* 115-129. [↑](#footnote-ref-3)
4. *Rehoune* [3] (per Nicklin J). [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. *Rehoune* [12] (per Nicklin J). [↑](#footnote-ref-6)
7. *Rehoune* [25] (per Nicklin J). [↑](#footnote-ref-7)
8. Charlotte O’Brien, “‘Done because we are too menny’: the two-child rule promotes poverty, invokes a narrative of welfare decadence, and abandons children's rights” (2018) 26(4) *The International Journal of Children's Rights ,* 700–739. [↑](#footnote-ref-8)
9. See Carla Reeson, ‘Intentional homelessness and affordability of accommodation’ (2019) 41(4) *Journal of Social Welfare and Family Law*; and Jed Meers, ‘The housing benefit deficit and intentional homelessness’ (2019) 22(5) *Journal of Housing Law*, 98-102. [↑](#footnote-ref-9)
10. See Glen Bramley, & Kirsten Besemer, Financial inclusion, financial stress and debt. In G. Bramley., & N. Bailey (eds), *Poverty and Social Exclusion in the UK: Volume 2 – The dimensions of disadvantage* (Policy Press, 2018), and Adam Tinson, Peter Kenway, Sabrina Bushe and Tom MacInnes, *Poverty and the cost of*

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11. House of Commons Work and Pensions Committee, ‘The benefit cap Twenty-Fourth Report of Session 2017–19’ (2019) Available at: <<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1477/1477.pdf>> accessed 21 September 2019. [↑](#footnote-ref-11)
12. Steve Wilcox, ‘Housing benefit size criteria: impacts for social sector tenants and options for reform’ (JRF, 2014) Available at: <<https://www.jrf.org.uk/report/housing-benefit-size-criteria-impacts-social-sector-tenants-and-options-reform>> accessed 21 September. [↑](#footnote-ref-12)