

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCAPACITY BENEFIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 29 September 2017

FINAL DECISION OF THE SOCIAL SECURITY COMMISSIONER

Background

1. By a decision of 8 April 2019, I set aside the decision of the appeal tribunal of 1 October 2017 and I gave the decision that the tribunal should have given, under Article 15(8)(a)(i) of the Social Security (NI) Order 1998.
2. I decided that, whereas the tribunal had accepted that the appellant had disclosed the existence of his occupational pension, but not any subsequent increases in the amount of the occupational pension, it had wrongly proceeded to calculate the recoverable overpayment on the basis of a continuing obligation to disclose the existence of the occupational pension.
3. I decided that, under the relevant law, the Department was entitled to recover only that element of the IB that was overpaid because the appellant had failed to disclose subsequent increases in the annual rate of his occupational pension between 6 April 2005 and 17 October 2013. I directed the Department to provide a calculation of the consequent overpayment.
4. I accepted the Department's calculation and determined that a sum of £8,956.35 paid to the appellant by way of incapacity benefit (IB) was recoverable from him. However, as the proceedings before me had not involved an opportunity to examine the figure in detail, I granted the appellant liberty to apply for adjustment of the figure.

5. He submitted an application for adjustment of the amount of recoverable overpayment on 15 April 2019. On 7 May 2019 the Department responded, setting out a fuller explanation of its calculation. The appellant duly replied in two separate communications on 23 May 2019.
6. The appellant's submission of 15 April 2019 is somewhat rhetorical. I consider that there are aspects of the necessary calculation that he has not understood, and that I must therefore set that out more clearly. Two points on which he appears to be confused concern the process of what he terms "abatement" and the position regarding the treatment of tax.
7. To the extent that he seeks to reargue matters settled in the substantive proceedings, such as whether he has made disclosure by declarations in the course of Legal Aid claims, I will ignore his submissions.
8. I will not engage with his particular submissions, which I find imprecise and vague. However, in an attempt to enable the appellant to understand my reasoning better, I will set out the basis of the calculation of overpayment from first principles.

Relevant law

9. The provisions relating to the reduction of IB for pension payments were introduced from 6 April 2001, by the insertion of section 30DD of the Social Security Contributions and Benefits Act (NI) 1992. These only apply to claimants whose period of incapacity began after 6 April 2001 and, as the appellant's period of incapacity began on 23 September 2002, it applies to him. In so far as is relevant, section 30DD provides:

30DD.—(1) Where—

(a) a person is entitled to incapacity benefit in respect of any period of a week or part of a week;

(b) there is—

(i) a pension payment;

(ii) a PPF periodic payment; or

(iii) any combination of the payments specified in subparagraphs (i) and (ii) above, payable to him in respect of that period (or a period which forms part of that period or includes that period or part of it); and

(c) the amount of the payment or payments (or, as the case may be, the amount which in accordance with regulations is to be taken as payable to him by way of pension payments or PPF periodic payments in respect of that period), when taken together exceeds

the threshold, the amount of that benefit shall be reduced by an amount equal to 50 per cent. of that excess.

(2) In subsection (1) above “the threshold” means—

(a) if the period in question is a week, £85 or such greater amount as may be prescribed; or

(b) if that period is not a week, such proportion of the amount mentioned in paragraph (a) as falls to be calculated in accordance with regulations on such basis as may be prescribed.

(3) ...

(5) In this section “pension payment” means—

(a) a periodical payment made in relation to a person under a personal pension scheme or, in connection with the coming to an end of an employment of his, under an occupational pension scheme or a public service pension scheme;

(b) a payment of any specified description, being a payment made under an insurance policy providing benefits in connection with physical or mental illness, disability, infirmity or defect; or

(c) a payment of any other specified description; and “specified” means prescribed by or determined in accordance with regulations under this section.

(6) For the purposes of subsection (5) above “occupational pension scheme”, “personal pension scheme” and “public service pension scheme” each has the meaning given by section 1 of the Pension Schemes (Northern Ireland) Act 1993, except that “personal pension scheme” includes an annuity contract or trust scheme approved under section 620 or 621 of the Income and Corporation Taxes Act 1988, or a substituted contract within the meaning of section 622(3) of that Act, which is treated as having become a registered pension scheme by virtue of paragraph 1(1)(f) of Schedule 36 to the Finance Act 2004.

10. There was ambiguity on the face of the legislation as to whether the “pension payment” for the purposes of section 30DD was to be assessed gross or net of tax. This was considered by a Great Britain Social Security Commissioner in R(IB)3/05, a reported decision. For the reasons given, the Commissioner found that the section referred to the gross pension payment. The position adopted in Great Britain has not been challenged or addressed differently in Northern Ireland since then. For avoidance of doubt, the rate of the threshold in subsection (2) did not change in the relevant period and remained at £85 throughout.

11. The evidence of pension payments that I have accepted was given in a letter dated 7 December 2016 from the Department of Finance, which is appended to Mr Smith's submission of 9 January 2019. A table setting out the Department's calculation appears in Mr Smith's submission of the same date and is headed "Overpayment assuming pension declared, but not any increases". This was a key document in enabling my decision.
12. The effect of section 30DD is to reduce a claimant's weekly entitlement to IB by a sum equal to half of the difference between his gross weekly pension payment and the £85 threshold.
13. For example, in mid-April 2005, the weekly amount of pension payment would be calculated by multiplying the £902.73 payment for that month by 12 and dividing by 52. The weekly pension payment would therefore have been £208.32. After deduction of £85, this would amount to £123.32. This figure would then be divided by 2 to produce £61.66. In mid-April 2005, therefore, the weekly amount of the appellant's IB should have been reduced by £61.66. The appellant was receiving £84.50 IB in 2005-06, which was the appropriate rate at this date, whereas he should have been receiving £22.84. The original Departmental decision was made on the premise that the appellant was not entitled to £61.66 for that week, and on the basis of similar calculations for each week in the period in issue.
14. Following my decision, the total amount of the overpayment was significantly reduced. The new calculation begins on the premise that the appellant notified the Department of the amount of his occupational pension in or around May 2004. His initial pension payment was £281.96 (gross) covering the ten day period from 22 May 2004 to 31 May 2004 (see Tab 6 to the tribunal papers). This produces a seven day weekly pension payment figure of £197.37 (being $£281.96 \times 7/10$). After deduction of £85, this would amount to £112.37. This figure would then be divided by 2 to produce £56.18. In May 2004, therefore, the weekly amount of the appellant's IB should have been reduced by £56.18. The applicable rate in 2004 was £81.95 and he would have retained entitlement to £25.77 in May 2004.
15. The premise on which I have accepted the Department's figures is that the appellant has to be accepted as having notified the Department that he was receiving a pension payment that would reduce his IB entitlement by £56.18, but that he has failed to disclose the increase in his pension payments in subsequent years. He can only be liable to recovery of overpaid benefit that is a consequence of the failure to disclose the increases.
16. Returning to the example of mid-April 2005, it can be seen that the IB should have been reduced by £61.66. However, it was accepted that the appellant had disclosed a pension income that would have produced a reduction of £56.18. Therefore, he was only liable to have recovery of the overpayment arising from the failure to disclose the increase, being

£61.66 minus £56.18 = £5.48. Looking at the Department's table headed "Overpayment assuming pension declared, but not any increases" for the weeks from 24 April to 28 May 2005, it can be seen that the Department assessed the overpayment at £5.48 per week for those 5 weeks. The same principle can be applied across every week in the entire period. However, I do not propose to perform detailed calculations. I am grateful to the Department for having done so. I am mindful that these are inquisitorial, not adversarial, proceedings and trust the figures I have been given.

17. Nevertheless, a simple cross-check can be conducted. The initial overpayment - assessed on the basis that there had been failure to disclose the existence of the occupational pension - had been calculated at £33,972.51. The period in issue was 445 weeks and two days long. The effect of my decision was, in essence, to give the appellant credit for disclosing the existence of the occupational pension at the initial rate, but to hold that the Department was entitled to recover benefit that was not properly paid as a consequence of any increases in the occupational pension. The amount of IB that would not have been properly paid on the basis of the initial rate was £56.18. My decision effectively wrote off that element of the overpayment for the entire 445 week 2 day period. Assuming that 2 days represents 0.28 of a week, the appellant would be entitled to be credited with £56.18 multiplied by 445.28, or £25,015.83.
18. £33,972.51 less £25,015.83 equals £8,956.68. The figure that I had accepted as the amount of recoverable overpayment is £8,956.35. The difference of 33 pence is negligible. I consider that this cross-check verifies, and justifies my reliance on, the Department's figures.
19. I do not accept the appellant's submissions that the overpayment figure has not been calculated correctly. I maintain my decision that the sum of £8,956.35, representing IB overpaid to the appellant from 6 April 2005 to 17 October 2013 is recoverable from the appellant.

(signed): O Stockman

Commissioner

8 July 2019