

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 20 January 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Coleraine.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The applicant claimed employment and support allowance (ESA) from the Department for Social Development, now known as the Department for Communities, (the Department) from 3 September 2011 by reason of anxiety state and depression. On 11 June 2014 the applicant was examined by a health care professional (HCP) on behalf of the Department. On the basis of the evidence, the Department found that the applicant had limited capability for work but not limited capability for work related activity. On 13 April 2015 the applicant completed and returned a questionnaire to the Department regarding her ability to perform various activities. On 14 May 2015 the Department obtained a report from the applicant's general practitioner (GP). On 5 June 2015 the applicant was examined by a health care professional (HCP) on behalf of the Department. On 25 August 2015 the Department determined that the applicant did not satisfy the limited capability for work assessment from and including 25 August 2015, and made a decision superseding and

disallowing the applicant's award of ESA. The applicant appealed, but waived her right to an oral hearing of the appeal.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 20 January 2016. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 19 April 2016. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 22 June 2016. On 19 August 2016 the applicant applied for leave to appeal from a Social Security Commissioner.
5. The application was late, but the Chief Social Security Commissioner admitted the late application on 26 January 2017.

Grounds

6. The applicant submits that the tribunal has erred in law on the basis that her health was the still the same as when she had previously satisfied the statutory test and that her mental health condition affected her ability to complete forms.
7. The Department was invited to make observations on the appellant's grounds. Mr Collins of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.
8. In view of the submissions made by the applicant about her ability to complete the forms sent to her by the Department, it appeared that the outcome of a case which was to be heard by a Tribunal of Commissioners might have been relevant to the merits of her appeal. The proceedings were stayed pending the outcome of the proceedings in *PA v Department for Communities(ESA)(T)* [2019] NI Com 29.

The tribunal's decision

9. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, which included a copy of the ESA50 self-assessment questionnaire and the ESA85 HCP report. The applicant waived the right to an oral hearing of her appeal, but an oral hearing was directed by the LQM in her own interests. Nevertheless, she submitted a letter to the tribunal asking for it to proceed in her absence. The tribunal also had sight of her similar earlier letter of 19 October 2015. The tribunal considered whether or not it should proceed in her absence and decided that further adjournment was unlikely to serve any purpose. It proceeded without the benefit of the applicant's oral evidence, and relied on the documentary evidence before it.

10. The tribunal found that the applicant disputed the activities of “Initiating and completing personal action” (activity 13), “Coping with change” (activity 14), “Getting about” (activity 15) and “Coping with social engagement” (activity 16). The tribunal found little assistance in the ESA113 report of the applicant’s general practitioner (GP), dated 8 May 2015, noting that the GP had not seen her since 23 October 2013. It placed weight on the evidence contained in the HCP report of June 2015, finding that relevant change had occurred since the time of the previous report of June 2014.
11. The tribunal addressed each of the disputed areas of activity. It found that the evidence did not satisfy it that the applicant met the descriptors in any of the disputed activities. It therefore disallowed the appeal.

Relevant legislation

12. ESA was established under the provisions of the Welfare Reform Act (NI) 2007 (the 2007 Act). The core rules of entitlement were set out at sections 1 and 8 of the 2007 Act. These provide for an allowance to be payable if the claimant satisfies the condition that he or she has limited capability for work. The Employment and Support Allowance Regulations (NI) 2008 (the ESA Regulations) provide for a specific test of limited capability for work. In particular, regulation 19(2) provides for a limited capability for work assessment as an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 of the ESA Regulations, or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

Assessment

13. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
14. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
15. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
16. The applicant submits that the tribunal erred in law by finding that she did not satisfy the LCWA when her condition had not changed from when she was accepted as satisfying it. However, the tribunal has considered the evidence in the reports of June 2014 and June 2015 and, in the

absence of any oral evidence from the applicant to gainsay the contents of the later report, found that there had been relevant change in the applicant's condition. The tribunal conducted the hearing fairly, seeking to give the applicant every chance to attend, addressed and made rational findings on the evidence before it, and gave adequate reasons for its decision. I do not accept that it has arguably erred in law on the first ground submitted by the applicant.

17. The applicant expressed difficulties with completing the Department's forms. In light of proceedings in Great Britain in the judicial review case of *MM & DM v Secretary of State for Work and Pensions* [2013] EWCA Civ 1565 and the fact that there was a case before the Northern Ireland Social Security Commissioners on file C1/16-17(ESA) which would determine the applicability of *MM & DM* in this jurisdiction, I stayed the present proceedings.
18. A decision has now been given by the Tribunal of Commissioners in the lead case under the neutral citation of *PA v Department for Communities (ESA)(T)* [2019] NI Com 29. It found that provisions of the Equality Act 2010, which does not extend to Northern Ireland, but which was relied upon in *MM & DM*, were not fully mirrored in the Disability Discrimination Act 1995 (DDA) provisions which continued to apply in Northern Ireland. In the context of a public function which involves a benefit being conferred, as opposed to a public function which involves the subjection of a person to a detriment, it distinguished *MM & DM* and declined to follow it. It also addressed the issue of whether, on the facts of the particular case, the relevant provisions were engaged. The Commissioners found that they were not shown to have been engaged.
19. In the present case, the facts are more akin to *MM & DM*. Therefore, I grant leave to appeal. This is because it appears to me that under the analysis of Elias LJ in *MM & DM* at paragraphs 72 and 73, who accepted that the supersession of an existing award of ESA could amount to a detriment, this case might arguably involve subjecting a person to a detriment. He accepted that the subjective experience of the claimant was relevant to the nature of the public decision making process. I consider that this view depends to a large extent on analysis of the language of the Equality Act 2010. I do not consider that section 21B and 21E of the DDA can bear the same analysis.
20. The decisions of the Court of Appeal of England and Wales and of the Upper Tribunal are not binding authorities in Northern Ireland. However, they are highly persuasive authorities. Nevertheless, the decisions discussed above are premised on applying the Equality Act 2010 and not the DDA. I consider that I must distinguish the analysis of the Court of Appeal and the Upper Tribunal from the legislative situation applying in Northern Ireland. I consider that, under the DDA, the matter that needs to be addressed is the nature of the public function in issue. Whether the process involves making a decision on a first time claim for a social security benefit, which is literally and legally speaking a benefit, or a

decision to reduce or remove an existing award of benefit on a revision or supersession of the claim, the ultimate public function is concerned with the conferment of a benefit. Notwithstanding that the situation involved the supersession of an existing award that led to removal of the applicant's ESA, I consider that this case was also concerned with a public function which conferred a benefit for the purposes of section 21B and 21E of the DDA. The threshold in such a case requires a claimant to show that a public authority made it impossible or unreasonably difficult for the disabled person to receive any benefit that is or may be conferred. I do not accept that this high threshold can be demonstrated on the facts of this case.

21. For this reason, I disallow the appeal.

(signed): O Stockman

Commissioner

14 August 2019