

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 24 July 2018

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 Craigavon. For reasons that will be explained, it is linked to the decision on files C2/20-21(IS) and C6/20-21(ESA).
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 without making further findings of fact. I decide that the sum of £893.50 is not recoverable from the appellant.

REASONS

Background

4. The appellant claimed income support (IS) from the Department for Social Development (the Department) from 2 November 2009 on the basis of incapacity for work. From and including 26 September 2013 his award of IS was converted by the Department into an award of income-related employment and support allowance (ESA).

5. On 19 August 2016, the Department made a decision that the appellant was not entitled to IS from 5 November 2009, as he held capital at that date in excess of the upper capital limit. This led to the proceedings which concluded in A2/17-18(IS). On 17 January 2017 the Department determined that the appellant's IS claim should not have converted to an award of ESA, as "there was no existing award in place at the date of conversion". A decision to this effect was issued on 19 January 2017. This led to the proceedings that concluded in A12/17-18(ESA). Subsequently, the Department decided that the appellant had been overpaid ESA for the period from 26 September 2013 to 11 January 2017 amounting to £1,177 and that it was recoverable from him. The appellant sought reconsideration, but the decision was not revised. The appellant appealed and requested an oral hearing. However, the President of Appeal Tribunals directed that the case should be listed for determination on the papers only.
6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 24 July 2018. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 29 October 2018. The appellant 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 20 December 2018. On 2 January 2019 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

7. The appellant submits that "in every sense the case that was brought against me was illegal".
8. The Department was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law. He indicated that the Department supported the application on the basis that the appellant's right to a fair hearing had been denied by the decision to refuse him an oral hearing.

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 and a letter from the appellant dated 15 April 2018.
10. The tribunal referred to the evidence in the separate appeal dealing with ESA entitlement on 16 June 2017. It referred to the robust challenge to the original decision in the letter of 15 April 2018. It nevertheless found that the related appeal decided that the appellant was not entitled to ESA from 26 September 2013. The Department had revised its calculation of the overpaid amount on the basis of accepting that an official error had

inflated the relevant figure. The tribunal accepted the new figures and found that the sum of £893.50 had been overpaid for the period from 26 September 2013 to 7 September 2016 and that this was recoverable from the appellant.

Relevant legislation

11. The legislation governing recoverability of overpaid benefit appears principally at section 69(1) of the 1992 Act, which provides:

69.—(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

...

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above ... unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under article 10 or superseded under article 11 of the Social Security (NI) Order 1998.

12. The requirement to disclose is connected to regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

32.—(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or

evidence as it may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit; or

(b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

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 appellants 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. I have decided the related cases in C6/20-21(ESA) and C2/20-21(IS) in a way that has implications for the present application. For that reason I consider that the appellant has an arguable case and I grant leave to appeal.
17. Additionally, Mr Clements for the Department submits that the tribunal has erred in law, albeit on different grounds. His support relates to the decision to refuse the appellant an oral hearing on the basis of the use of offensive language in his correspondence. While this is an interesting issue, I mean no disrespect to Mr Clements by not pursuing it further.

The decisions in the other two cases that I have referred to, and decided previously, effectively determine the outcome of this appeal.

18. In C2/20-21(IS), I held that the Department had no lawful basis to supersede the appellant's award of IS from 2 November 2011 to 25 September 2013.
19. In C6/20-21(ESA), I held that the appellant remained entitled to ESA following conversion on 26 September 2013, as there were no grounds to supersede under regulation 17 of the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (NI) 2010.
20. As the appellant retains his entitlement to ESA because of the two decisions referred to above, it is not possible for entitlement to have been superseded under section 69(5A) of the Social Security Administration Act (NI) 1992. The appellant was lawfully entitled to ESA in the relevant period. It follows that the appellant had not been overpaid ESA. I find that the tribunal has erred in law accordingly.
21. I set aside the decision of the appeal tribunal under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 and determine the appeal myself without making further findings of fact. I decide that the sum of £893.50 is not recoverable from the appellant.

(signed): O Stockman

Commissioner

1 September 2020