MD-v-Department for Communities (JSA) [2021] NICom 40

Decision No: C2/21-22(JSA)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**JOBSEEKER'S 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 4 December 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 with reference CN/6698/17/73/L.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

## REASONS

### Background

3. This decision considers the standard of evidence of a claimant's national insurance contribution and benefit records that a tribunal must obtain in order to determine an appeal.

4. The appellant claimed jobseeker's allowance (JSA) from the Department for Communities (the Department) from 13 January 2017, including a request for backdating the claim to 13 December 2016. The Department decided on 17 February 2017 that the time limit for claiming could not be extended. The Department further decided on 21 February 2017 that the appellant did not satisfy the conditions of entitlement to JSA from and including 13 January 2017.

5. The Department's decision was made on the basis that the appellant's entitlement to contributory JSA based on the relevant tax years - said by the Department to be 2001/02 and 2002/03 - had already been exhausted. The appellant requested reconsideration and the decision

was reconsidered by the Department but not revised. The appellant appealed the entitlement decision, but not the backdating decision. His appeal was out of time, but the time limit for appealing was extended by a legally qualified member (LQM) of tribunals.

6. The appeal was considered by a tribunal consisting of a different LQM sitting alone. After a hearing on 4 December 2018 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 2 April 2019. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 16 May 2019. On 14 June 2019 the appellant applied to a Social Security Commissioner for leave to appeal.

7. I directed an oral hearing of the application. However, due to Covid-19 restrictions and the appellant's preference for an in-person hearing, the hearing did not take place until late May 2021.

**Grounds**

8. The appellant submitted that the tribunal has erred in law on the basis that:

   (i) it misconstrued the correct legal test;

   (ii) it applied the incorrect tax year to his case;

   (iii) it made irrational findings on the evidence;

   (iv) it made findings based on insufficient evidence;

   (v) it acted unfairly;

   (vi) it failed in its inquisitorial duty.

9. The Department was invited to make observations on the appellant's grounds. Mr Woods of Decision Making Services (DMS) responded on behalf of the Department. Mr Woods submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

**The tribunal's decision**

10. 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 including the Department's submission, which contained the claim form, Departmental computer screen prints, the relevant disputed decisions, medical evidence submitted by the appellant, a P60 for tax years 2004/05 and (although difficult to decipher, probably) 2003/04, a P45 dated 15 May 2007 and payslips for dates including February 2005,

March 2006 and March 2007. It also had sight of a submission from the appellant headed "Points of contention", a copy of his complaint to the Appeals Service and a further submission dated 20 July 2018 which attached a tax credits decision for 2007/08. The tribunal also had correspondence from the parties and records of tribunal directions and previous hearings. The appellant attended the hearing and gave oral evidence.

11. The tribunal found that the appellant had been paid incapacity benefit (IB) from 24 April 2004 to 26 September 2012, followed by employment and support allowance (ESA) from 27 September 2012 to 20 May 2015. It found that he was paid contribution-based JSA from 21 May 2015 to 7 August 2015, followed by a short break from 7 to 13 August 2015 when the appellant was outside the jurisdiction. It found that the JSA claim resumed from 13 August 2015 to 13 December 2016. It found that the appellant claimed ESA again from 14 December 2016, withdrawing that claim on 13 January 2017. The tribunal found that the various benefit claims linked continuously from 24 April 2004 to 13 December 2016. The tribunal found that there was no break in the contribution-based JSA claim of 12 weeks or more between 21 May 2015 and 13 December 2016.

12. Addressing relevant statutory provisions, the tribunal reasoned that the appellant's continuous claims from 24 April 2004 to 13 December 2016 had to be considered as linked claims. This meant that the base tax year was 2004/05. This in turn meant that the relevant contribution years for the current claim were 2001/02 and 2002/03. It found that no claimant is entitled to more than 182 days of contribution-based JSA in any period for which his entitlement is established by reference to the same two years. As the previous claim had been exhausted on the basis of contributions in 2001/02 and 2002/03, the tribunal found that the claimant's entitlement to contribution-based JSA was exhausted, resulting in no entitlement.

**Relevant legislation**

13. By Article 3(2)(d) of the Jobseeker's Order (NI) 1995 (the 1995 Order) a claimant will not be entitled to jobseeker's allowance unless he satisfies the conditions set out in Article 4. Article 4 provides:

**4.**—(1) The conditions referred to in Article 3(2)(d) are that the claimant—

(a) has actually paid Class 1 contributions in respect of one ("the base year") of the last two complete years before the beginning of the relevant benefit year and satisfies the additional conditions set out in paragraph (2);

(b) has, in respect of the last two complete years before the beginning of the relevant benefit year, either paid Class 1

contributions or been credited with earnings and satisfies the additional condition set out in paragraph (3);

(c) does not have earnings in excess of the prescribed amount; and

(d) is not entitled to income support.

(2) The additional conditions mentioned in paragraph (1)(a) are that—

(a) the contributions have been paid before the week for which the jobseeker's allowance is claimed;

(b) the claimant's relevant earnings for the base year upon which primary Class 1 contributions have been paid or treated as paid are not less than the base year's lower earnings limit multiplied by 26.

(2A) Regulations may make provision for the purposes of paragraph (2)(b) for determining the claimant's relevant earnings for the base year.

(2B) Regulations under paragraph (2A) may, in particular, make provision

(a) for making that determination by reference to the amount of a person's earnings for periods comprised in the base year;

(b) for determining the amount of a person's earnings for any such period by

(i) first determining the amount of the earnings for the period in accordance with regulations made for the purposes of section 3(2) of the Benefits Act, and

(ii) then disregarding so much of the amount found in accordance with head (i) as exceeded the base year's lower earnings limit (or the prescribed equivalent).

(3) The additional condition mentioned in paragraph (1)(b) is that the earnings factor derived from so much of the claimant's earnings as did not exceed the upper earnings limit and upon which primary Class 1 contributions have been paid or treated as paid or from earnings credited is not less, in each of the two complete years, than the lower earnings limit for the year multiplied by 50.

(3A) Where primary Class 1 contributions have been paid or treated as paid on any part of a person's earnings, paragraphs (2)(b) and (3) shall have effect as if such contributions had been paid or treated as paid on so much of the earnings as did not exceed the upper earnings limit.

(3B) Regulations may—

(a) provide for the first set of conditions to be taken to be satisfied in the case of persons—

(i) who have been entitled to any prescribed description of benefit during any prescribed period or at any prescribed time, or

(ii) who satisfy other prescribed conditions;

(3C) In paragraph (3B)—

"the first set of conditions" means the condition set out in paragraph (1)(a) and the additional conditions set out in paragraph (2);

"benefit" means—

(za) universal credit,

(a) any benefit within the meaning of section 121(1) of the Benefits Act,

(b) any benefit under Parts 7 to 12 of the Benefits Act,

(c) credits under regulations under section 22(5) of the Benefits Act,

(d) a jobseeker's allowance, and

(e) working tax credit.

(4) For the purposes of this Article—

(a) "benefit year" means a period which is a benefit year for the purposes of Part II of the Benefits Act or such other period as may be prescribed for the purposes of this Article;

(b) "the relevant benefit year" is the benefit year which includes—

(i) the beginning of the jobseeking period which includes the week for which a jobseeker's allowance is claimed, or

(ii) (if earlier) the beginning of any linked period; and

(c) other expressions which are used in this Article and the Benefits Act have the same meaning in this Article as they have in that Act.

14. By Article 7 of the Order:

**7.**—(1) The period for which a person is entitled to a jobseeker's allowance shall not exceed, in the aggregate, 182 days in any period for which his entitlement is established by reference (under Article 4(1)(b)) to the same two years.

(2) The fact that a person's entitlement to a jobseeker's allowance ("his previous entitlement") has ceased as a result of paragraph (1) does not prevent his being entitled to a further jobseeker's allowance if—

(a) he satisfies the contribution-based conditions; and

(b) the two years by reference to which he satisfies those conditions include at least one year which is later than the second of the two years by reference to which his previous entitlement was established.

(3) Regulations may provide that a person who would be entitled to a jobseeker's allowance but for the operation of prescribed provisions of, or made under, this Order shall be treated as if entitled to the allowance for the purposes of this Article.

15. By regulation 47(1) of the Jobseeker's Allowance Regulations (NI) 1996 (the JSA Regulations):

47.—(1) For the purposes of the Order, but subject to paragraphs (2) and (3), the "jobseeking period" means any period throughout which the claimant satisfies or is treated as satisfying the conditions specified in Article 3(2)(a) to (c) and (e) to (i) of the Order (conditions of entitlement to a jobseeker's allowance).

16. By regulation 48 of the Jobseekers Allowance Regulations (NI) 1996:

**48.**—(1) For the purposes of the Order, 2 or more jobseeking periods shall be treated as one jobseeking period where they are separated by a period comprising only—

(a) any period of not more than 12 weeks;

(b) a linked period;

(c) any period of not more than 12 weeks falling between—

(i) any 2 linked periods, or

(ii) a jobseeking period and a linked period;

(d) a period in respect of which the claimant is summoned for jury service and is required to attend court.

(2) Linked periods for the purposes of the Order are any of the following periods—

(a) to the extent specified in paragraph (3), any period throughout which the claimant is entitled to a carer's allowance under section 70 of the Benefits Act;

(b) any period throughout which the claimant is incapable of work, or is treated as incapable of work, in accordance with Part XIIA of the Benefits Act (incapacity for work);

(bb) any period throughout which the claimant has, or is treated as having, limited capability for work for the purposes of Part 1 of the Welfare Reform Act;

(c) any period throughout which the claimant was entitled to a maternity allowance under section 35 or 35B of the Benefits Act, or would have been so entitled but for a failure to satisfy the contribution conditions specified in paragraph 3 of Part I of Schedule 3 to the Benefits Act;

(d) any period throughout which the claimant was engaged in training for which a training allowance is payable;

(e) a period which includes 6th October 1996 during which the claimant attends court in response to a summons for jury service and which was immediately preceded by a period of entitlement to unemployment benefit;

(f) any period throughout which the claimant was participating—

(i) in the Self-Employed Employment Option of the New Deal as specified in regulation 75(1)(a)(i);

(ii) in the Voluntary Sector Option of the New Deal as specified in regulation 75(1)(a)(ii), in the Environmental Task Force Option of the New Deal as specified in regulation 75(1)(a)(iii) or in the Preparation for Employment Programme as specified in regulation 75(1)(a)(v) and was not entitled to a jobseeker's allowance because, as a consequence of his participation, the claimant was engaged in remunerative work or failed to satisfy the condition specified either in Article 4(1)(c) or in Article 5(1)(a) of the Order.

(2A) A period is a linked period for the purposes of Article 4(4)(b)(ii) of the Order only where it ends within 12 weeks or less of the commencement of a jobseeking period or of some other linked period.

(3) A period of entitlement to carer's allowance shall be a linked period only where it enables the claimant to satisfy contribution conditions for entitlement to a contribution-based jobseeker's allowance which he would otherwise be unable to satisfy.

**Hearing**

17. I held an oral hearing of the application. The appellant attended in person and was unrepresented. The Department was represented by Mr Woods and Mr Rush. I am grateful to all of them for their submissions.

18. At the outset, the appellant indicated that he was content, if I granted leave to appeal, to treat the application hearing as an appeal hearing. He relied principally upon a written submission prepared for the purpose of the hearing. He further raised what he considered to be factual errors in the tribunal's statement of reasons. These related to the calculation of the maximum number of days for which contributory JSA can be received.

19. The appellant referred to paragraph vi. of the statement of reasons, where the LQM had recorded the Department's finding that from 21 May 2015 to 7 August 2015 the appellant had received JSA for 79 days and for the period from 13 August 2015 to 13 December 2016 he had received JSA for a period of 103 days. While surmising that the tribunal probably intended to refer to 13 December 2015, the appellant submitted that the resulting period totalled 201 days – not 182 days – and was therefore clearly erroneous.

20. More generally, the appellant submitted that the tribunal had erred in accepting the Department's submission that the relevant contribution years in respect of his JSA claim in January 2017 were 2001/02 and 2002/03. The Department submitted that there had been no break for more than 12 weeks from the appellant's having first claimed benefit in 2004 to the date of the present JSA claim in 2017. The Department submitted that relevant linking rules connected the claim to contribution years 2001/02 and 2002/03 and meant that the appellant's relevant national insurance contributions were exhausted on the basis that he had already received the maximum of 182 days of JSA.

21. The appellant submitted that the Department had not established the relevant factual circumstances by evidence. He referred to the material advanced to the tribunal by the Department and submitted that there was insufficient evidence before the tribunal to establish the contributions position conclusively. He submitted that it was not open to the tribunal to make the findings that it had. He submitted that the tribunal hearing was an inquisitorial process and that the evidence before it was simply not sufficient to establish anything on the balance of probabilities.

22. The appellant submitted that he was not called to medical appraisal during the period from 2004 to 2007. He submitted that this was inconsistent with the Department's submissions regarding his contribution records. He submitted that there had been a break in his benefits claim. He demonstrated that evidence of his income in the form of payslips and formal income tax documents demonstrated that he received a salary in those years. He submitted that the computer records

provided by the Department were insufficient to establish the facts in his case. More generally, he submitted that governmental bodies must retain sufficient records to provide evidence for bodies such as the tribunal, and that this had not been done by the Department.

23. He further submitted that the tribunal proceedings had been unfair, on the basis that the tribunal adjourned in mid-hearing and later resumed after a break of some 30 minutes. He submitted that the adjournment had been an initiative of the LQM and that no purpose for it was established, except that it was to enable another matter to be dealt with by the tribunal. However, it gave an unfair opportunity to the Department's presenting officer to address the case made by him.

24. The appellant accepted that this issue of procedural unfairness was not his primary contention. When I asked him what unfairness had resulted, he submitted that his train of thought had been disrupted and the Department was given more time to prepare a response, whereas he wasn't afforded such additional time.

25. Mr Woods outlined the Department's evidence. In terms of the evidence he explained that the Department would only have basic computer screen print information in the form that was before the tribunal. He sought to rely on surrounding evidence provided by the appellant, noting for example, references to statutory sick pay in one payslip, which was "usually" followed by IB. He noted a letter from the appellant's GP to the effect that he left work in 2004.

26. Mr Woods submitted that if there had been no 12 week break in the appellant's claim, the reference years were 2001/02 and 2002/03. However, if the claim had been broken by more than 12 weeks, then 2013/14 and 2014/15 would be the reference years. He submitted that the appellant could not satisfy the relevant national insurance conditions in respect of that period. I asked Mr Woods if the appellant's national insurance records were available to the Department, but he indicated that he was not certain if they were.

27. In direct response to my questions, the appellant indicated that he couldn't remember if there was any disallowance of his IB claim in the period from 2004. He accepted that he had been in receipt of full pay from his employer until March 2007, but accepted that he had not returned to work for any day during the period when he was still employed on full pay.

**Assessment**

28. 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.

29. 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.

30. 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.

31. The appellant's main ground focussed on the adequacy of the evidence before the tribunal and whether it was entitled to make the finding that he was in receipt of incapacity benefit from 2004 to 2007 on the basis of it, in the face of his own evidence of paid employment. I consider that the appellant raises an arguable case on the facts and I grant leave to appeal on this ground.

*Preliminary issue*

32. As a preliminary point, the appellant was critical of the accuracy of the tribunal's decision. He had referred me to paragraph vi. of the statement of reasons, where the LQM had recorded the Department's submission that from 21 May 2015 to 7 August 2015 the appellant had received JSA for 79 days and for the period from 13 August 2015 to 13 December 2016 he had received JSA for a period of 103 days. The appellant inferred that the tribunal probably intended to refer to 13 December 2015 and contended that the resulting period totalled 201 days. Therefore the appellant's first contention was that the tribunal had applied the relevant legal test to incorrect information supplied by the Department.

33. However, having examined the position carefully, I do not accept that there was an error in this regard. It can be seen from paragraph 27 of the original Departmental submission to the tribunal that JSA was paid from 21 May 2015 to 7 August 2015 and from 13 August 2015 to 23 November 2015. For the remainder of the JSA claim (to 13 December 2016) the appellant received national insurance credits only. The appellant's JSA claim ended upon his claiming ESA on 6 January 2017. By the ESA decision of 11 January 2017 credits were awarded from 14 December 2016, meaning that the ESA decision came into effect from that date. Therefore, the inference by the appellant that the tribunal intended to refer to 13 December 2015 is not well-founded. The tribunal correctly referred to 13 December 2016 as the end date of the JSA claim.

34. It is also the case that the combined number of days in the two periods 21 May to 7 August 2015 and 13 August 2015 to 23 November 2015 amounts to 182. I accept that the tribunal might have made matters clearer by distinguishing between the period to 23 November 2015 when JSA was in payment and from 23 November 2015 to 13 December 2016 when only national insurance credits were awarded. Nevertheless, when the full picture is understood, it appears to me that the tribunal has not

made any error of fact and had not misunderstood when the 182 day JSA entitlement period had been exhausted.

*The principal issue*

35. In brief, the core issue in this case is whether the contribution years relevant to the appellant's JSA claim made on 13 January 2017 are, as the Department submits, 2001/02 and 2002/03 or whether they are different years. There is no dispute between the parties on the interpretation of the law, but rather the appeal concerns the application of the law to the evidence.

36. It is accepted by the parties that when a claim for JSA is made in a particular calendar year, the relevant contribution conditions must be met in the last two contribution years ending before the start of that calendar year (see article 4 of the 1995 Order). Thus, for a claim made in the calendar year of 2004, the relevant contribution years are 2001/02 and 2002/03. It may be useful to remember that although a calendar year runs from 1 January to 31 December, a contribution year runs from 6 April to the following 5 April.

37. Further, by regulations 47 and 48 of the JSA Regulations, provision is made for linking periods of JSA claims – or "jobseeking periods". The effect of this is that a period forms a single jobseeking period if, among other things, throughout it the claimant is incapable of work, or is treated as incapable of work, and it is not separated by more than 12 weeks from another jobseeking period. This can mean that a linking period which began in 2004 can still be ongoing many years later. This would have the effect that the contribution years relevant to a claim in a much later calendar year may have to be determined in terms of the calendar year in which the jobseeking period began. It is also accepted by the parties that the maximum entitlement to JSA based on the same two contribution years is 182 days (see article 7 of the 1995 Order).

38. The present claim resulted from an ESA claim of 6 January 2017 being withdrawn and the appellant claiming JSA on 13 January 2017 with a request for backdating to 13 December 2016. This resulted in the appealed decision that the appellant was not entitled to JSA as he had exhausted his 182 day entitlement period. This decision in turn was based on the Department's contention that the new claim "linked" to the previous claim as it was separated by a period of less than 12 weeks from the previous claim. The Department submitted that the new claim fell within the same jobseeking period and therefore had to be assessed on the same contribution years, which it held to be 2001/02 and 2002/03.

39. The appellant disputed this. He pointed to the evidence that he had submitted to the tribunal in the form of payslips and documents establishing his income tax payments for the years from 2004 to 2007. These established that he was paid his normal salary for his normal occupation during these periods. His key submission was that these

documents showed that he had been in paid employment, and that this contradicted the Department's submission that he had been in receipt of IB – and therefore within a linked period - at the relevant time. The implication would be that the relevant contribution years were 2014/15 and 2015/16, or else earlier years before the calendar year in which a single linking period commenced, possibly going back to the date when the appellant was first incapable of work.

40. The evidence submitted by the Department was far from clear. In particular, it relied on a bare screen print extracted from its own computer systems. I would characterise this as having an internal focus, in the sense of being aimed at Departmental staff with experience of their own systems, as opposed to having an external focus, in the sense of being aimed at explaining things to outsiders such as myself. The relevant record reads as follows:

CLAIM HISTORY

[National insurance number, name and date of birth] ESA LIVE F 11-530, 07431

| | | | | | |
|---|---|---|---|---|---|
| Start date: | 23/04/04 | RITY 1: | Waiting Days: | 99 | Cum Tot: 999 |
| End date: | 26/09/12 | RITY 2: | Exhaust Date: | 10/09/01 | |

| Office Of Claim | <------Period ------> From | To | Ben. Type | Cum Tot |
|---|---|---|---|---|
| | 24/04/04 | 26/09/12 | ICTY | |

41. The appellant disputed the clarity and reliability of the computer record submitted. While relating to a period some considerable time in the past, it purported to record that the appellant began a period of incapacity for work on 24 April 2004 that continued until 26 September 2012. At the earliest of those dates, IB would have been the main benefit for claimants who were incapable of work. ESA would have replaced IB in 2008 for new incapacity for work claims. Many existing IB claimants of the appellant's age would have been transferred onto ESA in subsequent years. The appellant pointed out that the record did not establish that he had actually been paid any benefit, how much and for how long.

42. The tribunal accepted, on the basis of the documentary evidence and the Departmental presenting officer's submissions, that the appellant had claimed IB from 24 April 2004 to 26 September 2012, followed by a transfer to ESA from 27 September 2012 to 20 May 2015, whereupon JSA was claimed. The tribunal found that there had been a continuous linking period from 24 April 2004 to 20 May 2015. The tribunal, having accepted that this entire period was a linked period, found that the 182 day entitlement to JSA was already exhausted when a further JSA claim was made within the same linked period. The question posed by the appellant is whether it was legally entitled to this conclusion.

43. I accept that there is some force in the submissions of the appellant. When the evidence is examined closely, it does not establish the submissions of fact advanced by the Department definitively. The height of the evidence submitted to the tribunal by the Department is contained in two screen prints from the Department's computer system dated 9 February 2017. These consist of the appellant's claim history and a linking summary. The documents appear at Tab 10 in the submission to the tribunal, and the Department's submission is that "The evidence at Tab 10 shows the first effective day of the linked period is 24-Apr-2004 as [the appellant] has had other claims to alternative linking benefits".

44. The claim history refers to a period from 24 April 2004 to 26 September 2012 and appears to show that the appellant received benefit type "ICTY". While not explained, this term would seem to embrace IB and, later, ESA. The linking summary therefore appears to show that the period from 24 April 2004 to 26 September 2012 was a period of incapacity for work. There was then a period from 27 September to 22 May 2015 which is not explained by submission, but which the tribunal accepted was a also period of incapacity for work following transfer of the appellant to ESA.

45. I do not necessarily agree with the tribunal's finding. I observe from an entry at Tab 2, page 4, a reference to an appeal against a decision that the appellant did not have limited capability for work, which was unsuccessful. I suspect that at least part of this latter period probably involved passage of time pending an appeal and that the appellant was treated as incapable of work in that period. For this reason, I consider that this period is not fully explained by the Department's submission. It was followed by a period from 22 May 2015, which appears to have been a period of jobseeking. In that period the appellant was paid contributory JSA from 21 May 2015 to 7 August 2015 and 13 August 2015 to 23 November 2015. This then led to the final period when the appellant received contribution credits from 24 November 2015 to 13 December 2016 on the basis of jobseeking.

46. The paucity of the information retained in the Department's formal records is somewhat surprising. The appellant makes the point that governments have a responsibility to maintain proper records. I entirely agree with him. However, in the absence of comprehensive records, the question is whether the tribunal was entitled to rely on the material before it in order to reach the findings that it did. The tribunal was able to assess both the documentary evidence and the actual circumstances of the applicant's JSA award.

47. The Department submits that the period of incapacity for work began in April 2004, whereas the appellant demonstrates that he was in receipt of wages for a further three years after that date. It appears to me that a relevant issue is whether there is any necessary contradiction between the appellant being paid wages throughout the 2004 to 2007 period and the Department's submission that he was in a period of incapacity for

work. Mr Woods submitted that there was no contradiction as such between these circumstances, as a claimant could have continued to receive employment income when in receipt of IB. It appears to me that the appellant clearly established that he had received full pay. However, it appears from other evidence before the tribunal that the circumstances were that he was in fact suspended on full pay. In the course of the hearing before me, the appellant candidly accepted that he did not perform any of his employment duties during the period in question and did not actually work, therefore.

48. While the fact of actually working would have brought a period of incapacity for work to an end (see regulation 16 of the Social Security (Incapacity for Work) (General) Regulations (NI) 1995)), the mere fact of having employment income would not. Aside from certain categories of exempt work below particular income thresholds, it is my understanding that the fact of having earnings during the relevant period would not necessarily have precluded a claimant from being in a period of incapacity for work. No regulation to that effect has been opened to me. I am satisfied therefore that there is not necessarily a contradiction in the appellant retaining an employment income during a period of incapacity for work.

49. The Department does not unequivocally demonstrate that the appellant received IB during the period from 24 April 2004. Mr Woods explained that the volume of historic benefits records means that it is impractical to retain them and that this has resulted in a Departmental practice whereby they are routinely weeded and destroyed. No decision records appear to be retained and no historical record of payment appears to have been retained. At least none was proffered to the tribunal. The probative value of the computer screen print is low in my view. However, that is the only evidence offered that the appellant was in a period of incapacity for work from that date, which he denies or, perhaps more accurately, doubts.

50. The tribunal had to address the case on the balance of probabilities. In other words, was it more likely than not that the Department's version of the facts was accurate. In the tribunal context, there may well be cases where there is no evidence of any probative value advanced by the Department. Ordinary legal principles will apply in such cases. Where a *prima facie* case is not established by the Department on the evidence, there will be no case for an appellant to answer. In such circumstances, the appellant will be entitled to succeed in the appeal. However, I do not consider that this is such a case. The material relied on by the Department had some probative value, however limited. The screen print from the Department's computer system demonstrated that it accepted the appellant's incapacity for work from Aril 2004.

51. For his part, the appellant did not offer direct evidence of an alternative date for commencing the period of incapacity for work. At hearing, I characterised his submissions as muddying the water and I did not

understand him to demur from that characterisation. He was entitled to make the submissions that he did. However, I consider that the tribunal was entitled to give weight to the Department's evidence in the light of its explanatory submissions as to how that evidence should be interpreted, and to make the decision that it did in the absence of any compelling submissions to the contrary from the appellant. On the evidence before it, the tribunal was entitled to accept that the relevant linked period began in April 2004.

52. Even if I am wrong about that, it seems to me that the tribunal was obliged to have regard to the actual events surrounding the case. These were that the Department had awarded entitlement to JSA from 21 May 2015 to 7 August 2015 and from 13 August 2015 to 23 November 2015 on the basis of the appellant's contributions in the period from 2001 to 2003. The appellant did not challenge the Department's decision to award JSA for 182 days on the basis of those contribution years, or submit that, for example, it should have looked at contribution years 2005/06 and 2006/07 instead. Even if it transpired that the decision was not well-founded, due to being assessed in terms of incorrect contribution years, it appears to me that the Department can point to the principle of finality established by article 17 of the Social Security (NI) Order 1998. The effect of this principle is that, after the expiry of the relevant time limit for challenge, even if wrong, the JSA award must nevertheless be given all the effects in law of a valid decision. The principle implies that the fresh JSA claim, made within the same linking period, has to be addressed with reference to the same contribution years of 2001/02 and 2002/03.

53. If that interpretation is wrong, a further question might usefully be addressed, namely whether the tribunal materially erred in law. An error of law will be material only if a different outcome would have resulted but for the possible error. The appellant's present JSA claim was made in the 2017 calendar year and would normally be assessed in terms of contribution years 2014/15 and 2015/16. The appellant cannot satisfy the contribution conditions in those years as he was not paying actual Class 1 contributions in either of those years (see Article 4 of the 1995 Order). His claim can only succeed if it links back to an earlier calendar year where, in one of the preceding two contribution years, he paid Class 1 contributions.

54. However, as has been seen above, the appellant had been claiming JSA to 13 December 2016 and claimed JSA again in January 2017. As the new claim was not separated by more than 12 weeks from the previous claim, it links to the previous claim and is based on the contribution years relevant to the previous claim. If the relevant contribution years were not 2001/02 and 2002/03, as the appellant submits, but two different contribution years, the two claims must nevertheless be based on the same contribution years. As he had received the maximum 182 days entitlement to JSA on the previous claim, the appellant's entitlement to JSA would already be exhausted on whatever contribution years properly

grounded his previous JSA award. In short, the appellant would not be able to depend on two different contribution years for the JSA claim of January 2017 to those on which the claim of May 2015 was based.

*Procedural fairness*

55. The applicant submits that the tribunal acted unfairly by adjourning the appeal hearing for 30 minutes before resuming. It appears that the LQM wished to deal with a matter arising in another case and interrupted the appeal hearing for that purpose. The appellant submitted that this was procedurally unfair. However, I see no unfairness arising in that situation.

56. The appellant suggests that the break afforded the Department extra time to prepare a response to his arguments. He submits that it disrupted his train of thought. However, the tribunal had an inquisitorial role. It was tasked with determining all the evidence that might be relevant and it was entitled to adjourn briefly to allow a party to obtain more information or to address a particular issue. It was also hearing more than one case and was entitled to address itself to the other cases in the tribunal list in order to conduct all the proceedings efficiently and in accordance with judicial resources. I do not accept that the proceedings were unfair as a result of this.

57. As I do not accept that the tribunal has materially erred in law on any of the grounds advanced, I must disallow the appeal.

(signed): O Stockman

Commissioner

15 September 2021