

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

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

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 1 June 2021

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's appeal from the decision of an appeal tribunal with reference DG/4296/20/51/P.
2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998, making further findings of fact, and I give the decision that the tribunal should have given.
3. I accept that the appellant was in receipt of Incapacity Benefit (IB) prior to 6 April 2001, with the consequence that her occupational pension fell to be disregarded for the subsequent purpose of IB and Employment and Support Allowance (ESA). As her benefit entitlement was not materially altered by the fact of her occupational pension, I decide that ESA amounting to £9,780.25, paid between 12 September 2012 to 22 January 2019, is not recoverable from the appellant on the basis of failure to disclose a material fact.

**REASONS**

**Background**

4. The appellant had been in receipt of IB from the Department for Communities (the Department). Her award of IB was converted to an award of ESA from 12 September 2012, when she was awarded, contribution based ESA. On 28 January 2019, the Department was notified that the appellant was receiving an occupational pension.

5. On 2 July 2019, the Department made a decision revising the award of ESA and determined that she was not entitled to ESA from and including 12 September 2012. The Department further decided that the appellant had been overpaid ESA amounting to £10,518.90 for the period from 12 September 2012 to 25 June 2019. It was decided that an overpayment of ESA amounting to £9,780.25 for the period from 12 September 2012 to 22 January 2019 was recoverable from her on the basis that she had failed to disclose that she was in receipt of pension income. The applicant requested a reconsideration of the decision, which was reconsidered by the Department but not revised. She appealed out of time, but the late appeal was admitted by the Department for special reasons. She waived her right to an oral hearing of the appeal.
6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 1 June 2021. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision, and this was issued on 27 April 2022. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was granted by a determination of the LQM issued on 9 August 2022, on a single ground. On 7 September 2022, the applicant applied for leave to appeal from a Social Security Commissioner.

### **Grounds**

7. The ground on which leave to appeal was granted by the LQM was whether the tribunal had erred in law by proceeding to determine the appeal when the appellant had indicated that she would be forwarding her medical records to the tribunal.
8. The appellant renews her application for leave to appeal on the other grounds she had previously submitted, namely that the tribunal has erred in law on the basis that:
  - (i) it failed to address relevant case law in the form of *SK v DFC* [2020] NI Com 73 and whether the Department had adequately demonstrated that it had provided instructions to her in relation to required disclosure;
  - (ii) it failed to address the legal implications of "migration" of her benefit from IB to ESA without a claim, relying on *FMcC v DfC* [2020] NI Com 18;
  - (iii) it reached a decision unsupported by evidence, when holding that the appellant "would have" received certain forms and leaflets setting out information on the duty to disclose;
  - (iv) it made a material error of fact in relation to the first date of the appellant's receipt of her occupational pension.

9. She elaborated on the ground on which leave was granted, explaining that she had not intended to waive her right to an oral hearing, but that she was confused by having a concurrent Personal Independence Payment (PIP) appeal where she had intended to adopt that course.
10. The Department was invited to make observations on the appellant's grounds. Mr Robinson of Decision Making Services (DMS) responded on behalf of the Department. Initially, he offered support for the appeal on natural justice grounds, while disputing the remaining grounds. The appellant replied to his observations, submitting new evidence. In response, Mr Robinson accepted that the tribunal had erred in law as alleged and indicated that the Department supported the appeal on all of the grounds advanced.

### **The tribunal's decision**

11. 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 IB claim and related information booklet. It had two computer printouts relating to the migration to ESA which are illegible in the tribunal file before me, referred to as "evidence of claim (ESA)." It had a copy of the record of the appellant's disclosure of her occupational pension and a variety of related Departmental decisions. The appellant had waived her right to attend an oral hearing and there was no oral evidence. The tribunal noted that the appellant had stated that she would be forwarding medical evidence, but that this was not received despite notice being given to her that the appeal would be listed without it. It decided to proceed without this evidence.
12. The tribunal found that the appellant claimed IB in 2009. It noted the decision converting this to an ESA claim, and that she was given a letter indicating that she should notify the Department if her circumstances changed. The tribunal noted the adjudication history. It observed that the appellant submitted that she had notified the Department of her occupational pension and that she had been migrated to ESA without a claim. The tribunal found that she had been awarded an occupational pension in 1995 but had not notified this. It decided that the letter requiring notification of changes in circumstances applied to her when she was migrated on to ESA. It relied on Great Britain Upper Tribunal Judge Rowland's decision in *TM v SSWP* [2015] UKUT 109. It found on the balance of probabilities that from 1995 the appellant had failed to disclose her occupational pension and that the resulting overpayment of ESA was recoverable from her.

### **Relevant legislation**

13. The legislation governing recoverability of overpaid benefit appears principally at section 69(1) of the Social Security Administration (NI) Act 1992, 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.

14. 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).

## **Submissions**

15. The appellant firstly relied on *SK v DfC* [2020] NI Com 73, which confirmed the principle that a duty to disclose derives from clear instructions given to the claimant by the Department, requiring the Department to demonstrate that the claimant was actually advised of that duty. She secondly relied on *FMcC v DfC* [2020] NI Com 18, and submitted that the tribunal had failed to address case law where the claimant was migrated onto a new benefit without completing a claim form.
16. She further submitted that the tribunal based its decision on no evidence that she had been given certain leaflets advising her of her duty to disclose by the Department. She next submitted that the tribunal had based its decision on an evident mistake of fact, namely its assertion that she received an occupational pension from 1995.
17. More generally, she submitted that the proceedings were unfair, as they ignored her wish to submit further evidence, and because she had confused the present appeal with another appeal involving PIP when agreeing for the tribunal to proceed in her absence. She had intended to provide medical evidence to the PIP tribunal hearing, not the present one.
18. The appeal was initially contested by the Department on the substantive issues arising in the grounds. Mr Robinson for the Department did accept that there was some merit in the procedural fairness grounds and indicated a degree of support for the appeal.
19. In response, the appellant submitted evidence that she had been in receipt of IB from 1999, not 2009, including letters and a certificate of taxable benefit from May 2001. She submitted that the tribunal had made a mistake as to a material fact. This issue was material because, by virtue of Article 3 of the Welfare Reform and Pensions (1999 Order) (Commencement no.6 and Transitional and Savings Provisions) Order (NI) 2000 (the 2000 Regulations), pension payments were disregarded in full if a claimant was entitled to IB prior to 6 April 2001.
20. Mr Robinson accepted that the tribunal had been misled by the Departmental submission on the issue of the date of the appellant's IB claim and that it had erred as to a material fact. He accepted that the implication was that there was no recoverable overpayment, as the

appellant was in fact entitled to ESA throughout the period in issue. He invited me to make an entitlement decision to this effect.

### **Assessment**

21. I accept the concession of the Department in this appeal. I observe the evidence that the appellant had been in receipt of IB and consider that the tribunal was mistaken as to a material fact, namely the commencement date of the appellant's IB award. Mr Robinson is satisfied on the evidence now provided by the appellant that she was entitled to receive occupational pension under transitional provisions, without any effect on her IB or ESA entitlement.
22. The tribunal had reasoned on the basis that the IB claim was made in 2009 that the appellant would have faced a reduction in IB if she had notified the Department of her occupational pension. As there was no evidence of such a deduction, it found that she had not made disclosure. However, if she was entitled to the protection of the 2000 Regulations referred to above, there would have been no deductions despite disclosure. While its reasoning was otherwise compelling, the tribunal was operating under a misapprehension of fact.
23. The Department accepts that the appellant was entitled to ESA without any deduction for her occupational pension. As it is accepted that she was entitled to ESA without any reduction for her occupational pension, it follows that the appellant was not overpaid benefit on the basis of a failure to disclose a material fact. Therefore, I allow the appeal and I set aside the decision of the appeal tribunal.
24. I make the decision that the tribunal should have made, namely that ESA amounting to the sum of £9,780.25 paid between 12 September 2012 to 22 January 2019 is not recoverable from the appellant on the basis of failure to disclose a material fact, since the material fact of receiving an occupational pension did not affect her entitlement to ESA.
25. Whereas Mr Robinson invites me to make a decision correcting the original entitlement decision, I am not satisfied that the evidence before me is sufficient to permit me to do that. It will be a matter for the Department to rectify any decision by way of supersession on the basis of mistake as to material fact.

(signed): O Stockman

Commissioner

25 January 2023