

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 20 April 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 20 April 2017 is in error of law. The error of law will be outlined in more detail below. I would ask the Legally Qualified Panel Member (LQPM) of the appeal tribunal to note that the Department has accepted that certain errors in the decision-making process were not drawn to the attention of the appeal tribunal. Accordingly, the error on the part of the appeal tribunal is inadvertent.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. As will be noted below, Mr McGrath, on behalf of the Department has submitted that he does not consider that this is a case where a Commissioner is in a position to correct errors in the decision-making process and, accordingly, while it will be necessary to refer this case back to a differently constituted tribunal, that course of action will also allow the Department to correct the decision making in this case before any further hearing.
4. Although the appeal to the Social Security Commissioner has been successful, the appellant may be perplexed to know that the Department will have a further opportunity to correct errors in the decision-making process. It is the case, however, that there is no indication, at this stage, as

to whether any such rectifications will be to the advantage or disadvantage of the appellant. Further, the appellant will, in any event, also have a further hearing before an appeal tribunal. If that does arise, then the appellant is advised to seek representation in what is a somewhat complex case.

Background

5. On 1 April 2015 a decision maker of the Department decided that an overpayment of JSA amounting to £1360.36 for the period from 26 February 2014 to 27 July 2014 had occurred which was recoverable from the appellant. An appeal against the decision dated 1 April 2015 was received in the Department on 28 April 2015. The decision dated 1 April 2015 was reconsidered on 15 May 2015 but was not changed.
6. Following receipt of a request by the appellant for a further reconsideration, the decision dated 1 April 2015 was looked at again on 6 July 2015 and was revised. The revised decision was that an overpayment of JSA amounting to £1432.76 for the period from 26 February 2014 to 27 July 2014 had occurred which was recoverable from the appellant.
7. The appeal was first listed for oral hearing on 2 December 2015 and was adjourned due to the illness of the appellant. The appeal was relisted for oral hearing on 2 March 2016. The appellant was not present but had provided a written submission for consideration by the appeal tribunal. There was no Departmental Presenting Officer present. The appeal was adjourned with a direction that the Department prepare a supplementary submission addressing the further information which had been received from the appellant.
8. A further submission dated 8 March 2016 was subsequently received in the Appeals Service (TAS). The appeal was relisted for oral hearing on 6 April 2016. The appellant was not present but had provided a further written submission. There was no Departmental Presenting Officer present. The appeal was adjourned with a direction to the Department to prepare a response to various questions set out by the appeal tribunal and for a Presenting Officer to attend the oral hearing when the appeal was relisted.
9. A further submission dated 6 May 2016 was subsequently received in the Appeals Service (TAS). The appeal was relisted for oral hearing on 31 August 2016. The appellant was not present but had provided a further written submission. There was a Departmental Presenting Officer present. The appeal was adjourned as the Presenting Officer had indicated that he was not satisfied at aspects of the decision-making process.
10. On 21 December 2016 the decision dated 6 July 2015 was reconsidered and was revised. The result of the revision was to increase the amount

of the overpayment to £1451.11. The appellant was notified of the revised decision on 21 December 2016.

11. The appeal was relisted for oral hearing on 11 January 2017. The appellant was not present. There was a Departmental Presenting Officer present. The appellant was adjourned to permit the Presenting Officer to address issues raised by the appellant in correspondence dated 29 December 2016. The appeal tribunal also raised concerns that the appellant may not have received the revision decision of 21 December 2016.
12. The substantive appeal tribunal hearing took place on 20 April 2017. The appellant was not present. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 1 April 2015 as revised on 6 July 2015 and that decision itself as revised on 21 December 2016.
13. On 27 September 2017 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 25 October 2017 the application for leave to appeal was refused by the LQPM.

Proceedings before the Social Security Commissioner

14. On 27 November 2017 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 11 January 2018 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 26 February 2018, Mr McGrath, for DMS, supported the application for leave to appeal. Written observations were shared with the appellant on 27 February 2018. Written observations in reply were received from the appellant on 13 March 2018 and were shared with Mr McGrath on 14 March 2018.
15. On 2 October 2018 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that for the reasons which had been set out by the Department in written observations on the application for leave to appeal, it was arguable that the decision of the appeal tribunal was in error of law. On the same date, I directed an oral hearing of the appeal. A case Summary was received from Mr McGrath on 22 October 2018.
16. The appeal was listed for oral hearing on 30 October 2018. On 29 October 2018 e-mail correspondence was received from the appellant in which he indicated that for personal family reasons he was unable to attend the oral hearing. He enclosed a submission which he wished to be placed before me. I accepted the e-mail correspondence of 29 October 2018 as an application for a postponement of the oral hearing and granted the application.
17. On 6 November 2018, I reviewed the file and concluded that an oral hearing of the appeal was no longer required. I asked the Legal Officer to

contact the appellant indicating that I had considered all of the papers in the case, including his written submission of 29 October 2018 and did not intend to have an oral hearing. I asked the Legal Officer to confirm with the appellant that he was content with this. In further e-mail correspondence dated 19 December 2018, the appellant indicated that he was so content.

Errors of law

18. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
19. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

“(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Analysis

20. In the Case Summary prepared for the oral hearing of the appeal, Mr McGrath made the following submissions:

‘Department’s submission

(The appellant) has requested leave to appeal on the issue of how his earnings have been attributed.

The Department in its detailed observations dated 26-2-18 has outlined how the attribution of (the appellant's) earnings had been correctly dealt with concluding,

“As a result I do not support (the appellant's) assertion that there has been any miscalculation or prejudicial application of the legislation. I further submit that the tribunal was justified in concluding that the Department had correctly attributed the payments received by (the appellant) to the appropriate benefit months. Taking all of the above into consideration, I submit that the tribunal's decision does not represent an error in law and, in consequence, I do not support (the appellant's) application for leave to appeal on this particular ground.”

I would suggest therefore that,

“for the reasons which have been set out by the Department in the written observations on the application for leave to appeal it is arguable that the decision of the appeal tribunal is in error of law”

as stated by the Commissioners in the granting of leave to appeal refers to the Departments observations on the overpayment decision making in (the appellant's) case.

The Department has decided that (the appellant) failed to disclose, as instructed, the material fact that he was receipt of earnings from Queens University and as a consequence the resultant overpayment of JSA amounting to £1360.36 for the period 26-2-14 to 27-7-14 is recoverable from him.

The Social Security Administration (NI) Act 1992 states,

PART III

OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT

Misrepresentation etc.

Overpayments - general

69. (5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above or under regulations under subsection 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 (Northern Ireland) Order 1998

Therefore before an overpayment can be raised the decision that gave entitlement has to have been changed.

(The appellant) appealed the overpayment decision to the tribunal but he did not appeal the entitlement decision.

However before deciding that the overpayment decision was in order the tribunal had a duty to confirm that a correct entitlement decision had been given in order satisfy the requirements of Section 69(5A).

However I would submit the following observations on the entitlement decision dated 9-1-15.

This decision, dated 9-1-15, revised the original entitlement decision dated 18-10-13 but states that this new decision only takes effect from 26-2-14.

As this new decision takes effect from a date later than the original decision took effect this new entitlement decision should have been a supersession decision as opposed to a revision.

If I am correct regarding this "revised" entitlement decision then the overpayment decision dated 1-4-15 is also incorrect as it is founded upon an incorrect entitlement decision as such the requirements of Section 69(5A) of the Social Security Administration (NI) Act 1992 are not satisfied.

On 15-5-15 the overpayment decision dated 1-4-15 was reconsidered but was not changed.

I would continue to submit that without the entitlement decision being corrected any subsequent overpayment decision is invalid.

On 6-7-15 a decision maker revised the entitlement decision dated 18-10-13 i.e. the original entitlement decision.

This "new" revised entitlement decision however to accomplish its objective should have revised the previous revision decision dated 9-1-15 and then proceeded to supersede the original entitlement decision dated 18-10-13.

As neither of these actions have been completed I would continue to submit that the overpayment decision is invalid.

On 6-7-15 as a result of this entitlement decision dated 6-7-15 a further revised overpayment decision was given.

However for the same reasons given above regarding the requirements of Section 69(5A) I would submit that this overpayment decision is invalid.

On 31-8-16 a decision maker revised the entitlement decision dated 6-7-15.

For the reasons already explained previously I would submit that this revised entitlement decision is incorrect.

On 21-12-16 the entitlement decision dated 31-8-16 was revised.

Also on 21-12-16 the overpayment decision dated 6-7-15 was also revised.

As this entitlement decision did not correct the defects in all the previous entitlement decisions (including the decision dated 19-1-15 which itself was incorrect and has never been revised) I would submit that this latest entitlement decision is also incorrect.

For the reasons already highlighted the overpayment decision dated 21-12-16 is incorrect as it is based on an incorrect entitlement decision.

Although the tribunal disallowed the appeal and referred to various overpayments decisions undertaken by the Department I would submit that it may have been misled by the Departments submissions.

Consequently I would submit that the tribunals' decision is erroneous in law.

I would submit that I do not consider this is a case that the Commissioner is in a position to correct and therefore it will be necessary to refer this case back to a differently constituted tribunal which will allow the Department an opportunity to correct the decision making in this case before any hearing.'

21. I accept Mr McGrath's careful analysis and for the reasons which he has outlined agree that the decision of the appeal tribunal is in error of law.

22. Having accepted, for the reasons which have been outlined by Mr McGrath, that the decision of the appeal tribunal is in error of law I do not have to consider the appellant's other grounds for appealing.

(signed): K Mullan

Chief Commissioner

29 August 2019