

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 23 August 2017

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 Belfast.
2. An oral hearing of the application has been requested. However, I am satisfied 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 and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998.
4. I refer the appeal to a newly constituted tribunal for determination. I direct that the tribunal shall have particular regard to the requirements of the legislation in the light of *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42.

REASONS

Background

5. The appellant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from 6 June 2014 by reason of neck pain, work-related stress and acid reflux. She had been found not to have limited capability for work by the

Department but an appeal tribunal on 13 January 2015 overturned that decision. On 24 November 2016 the appellant completed and returned an ESA50 questionnaire to the Department regarding her ability to perform various activities. On 14 November 2016 the Department received evidence from the appellant's general practitioner (GP). However, the appellant subsequently asked for that evidence to be removed from the tribunal papers as it was given by her GP without her consent. On 24 April 2017 a health care professional (HCP) examined the appellant on behalf of the Department. On 16 May 2017 the Department considered the evidence and determined that the appellant did not have limited capability for work. It gave a decision superseding and disallowing the appellant's award of ESA from and including 16 May 2017. The appellant sought a reconsideration of this decision and the decision was reconsidered but not revised. The appellant appealed.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 23 August 2017. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 20 February 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 21 May 2018. On 21 June 2018 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

7. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) it misapplied the law in relation to regulation 29 of the ESA Regulations;
 - (ii) it failed to have regard to ongoing employment proceedings involving her employer;
 - (iii) it failed to apply the decision in *Charlton v Department for Work and Pensions* correctly.
8. 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.

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 the previous HCP assessment dated 1 April 2014, a copy of the decision of the

previous tribunal's decision, a copy of the ESA50 self-assessment questionnaire, an ESA113 from the appellant's general practitioner (GP) and the ESA85 HCP report dated 24 April 2017. There was also material relating to the appellant's successful appeal from a disallowance for failure to attend a HCP examination in December 2016. The appellant attended the hearing of her appeal and gave oral evidence, represented by Ms McKeith. The Department was represented by Mr O'Neill. It appeared that there had been an unauthorised disclosure of elements of the appellant's medical records, which was removed from the appeal file prior to the hearing, but this played no part in the proceedings.

10. The appellant's representative relied on mental health descriptors 13 and 16, and on regulations 29(2)(b) and 35(2)(b) of the ESA Regulations. The appellant gave evidence relating to a history of work related stress following a failure on the part of her employer to address workplace bullying. She was offered cognitive behavioural therapy and treated by the prescription of propranolol for palpitations, but had no referral to psychiatry or community mental health services and no anti-depressant medication was prescribed. The tribunal heard evidence of the appellant's daily activities, that she was still employed and engaging in legal proceedings against her employer, that she had been advised not to leave her employment when proceedings were ongoing, that some steps had been made to help her return to work that had not succeeded, and that she had anxiety about returning to her particular workplace.
11. The tribunal noted that the appellant denied indicating that she had any mental health problem, but accepted that she did have a mental health problem "if that encompassed work related stress". However, on the evidence of her personal action and social interactions, the tribunal did not accept that the appellant satisfied descriptors in activity 13 (Initiating and completing personal action) or activity 16 (Coping with social situations). The tribunal noted that the appellant had previously worked as an administrator and that there was a range of work she was capable of undertaking. It took the view that she did not satisfy the requirements of regulation 29(2)(b), noting her treatment and symptoms, and finding that there would not be a substantial risk to her or anyone else's health if she was found capable of work.

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.

13. Regulation 29 provides for treating someone who does not satisfy the limited capability for work assessment as having limited capability for work in particular circumstances. It reads:

29.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3) this paragraph applies if—

(a) the claimant is suffering from a life threatening disease in relation to which—

(i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or

(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—

(a) reasonable adjustments being made in the claimant's workplace, or

(b) the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

(4) In this regulation "medical evidence" means—

(a) evidence from a health care professional approved by the Department; and

(b) evidence (if any) from any health care professional or a hospital or similar institution, or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

Submissions

14. The grounds initially advanced by the appellant were addressed to the application of regulation 29 of the ESA Regulations in her case. In particular, she submitted that it erred by its failure to have regard to ongoing employment proceedings involving her employer. She submitted more generally that it failed to apply the decision in *Charlton v Department for Work and Pensions* correctly.
15. In her submissions she further alluded to recognising “the doctor who worked for Atos possibly employed by Capita on the Appeal hearing”.
16. Mr Collins responded on behalf of the Department, submitting that the tribunal had not erred in law on the grounds advanced. He was directed by the Legal Officer to the Commissioners to address a further issue, namely the link between the appellant’s employer and the medically qualified member of the panel (MQM). Mr Collins in turn suggested that the matter should be explored with the Office of the President of the Appeals Service (OPAT).
17. Further enquiry was then made by the Legal Officer directly to the OPAT. OPAT in turn directed an enquiry to the particular MQM. The MQM confirmed that she had not been employed by the appellant’s employer, AMT-Sybex (NI) Ltd, or its parent company, Capita. She indicated that she had previously worked for Medical Support Services (MSS) from about October 2008, which included undertaking medical examinations for incapacity benefit. The functions of MSS were transferred by the Department to Atos in about June 2011. She had attended Atos training in about June 2011 and had undertaken some medical examinations for Atos in September 2011, but none thereafter. The MQM stated that she had no knowledge or recollection of the appellant or of any issue that would cause her to be biased against the appellant or biased in favour of her employer.
18. Whereas her application was received in June 2018, the appellant’s case was first passed to a Commissioner for attention in May 2020. I regard this delay as unjustifiable and observe that an apology was properly issued to the appellant.

19. As I did not propose to hold an oral hearing of the application, I gave a further opportunity to the appellant to make written submissions. She asked for further time to prepare these. She subsequently advanced a further 69-pages of submission and evidence. This material is wide-ranging and gives an account of various problems with past employers and legal advisers in the appellant's past. However, it does not address the issues that are before me for determination and is not of assistance in that sense.

Assessment

20. 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.
21. 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.
22. 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.
23. There are two principal issues in this application. The first of these is the issue of the appellant's perception of bias on the part of the tribunal that decided the ESA appeal. The second is whether that tribunal's application of regulation 29 of the ESA Regulations was in accordance with the law. I shall deal with the two issues in that order.

Perception of bias

24. Where a decision maker on a tribunal is a party to a matter or has a direct interest in the outcome, there will be a presumption of bias. Similarly, where actual bias on the part of a tribunal is demonstrable on the facts, a tribunal's decision may be vitiated. However, it is plain to me that the members of the tribunal had no direct interest in the outcome of the appeal. I also consider that it is not arguable that there is evidence of actual bias on the part of the tribunal.
25. There is a third category of bias – perceived bias – that relates to the principle that justice has to be done, but also to be seen to be done. It represents a lower hurdle for the appellant since, for a tribunal decision to be challenged under this category, actual bias does not have to be shown. Instead, following the decision of the House of Lords in *Magill v Porter* [2001] UKHL 67 the question is whether a fair-minded and

informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased.

26. The issue raised by the appellant is whether there is a perception of bias arising from the possible connection of the medical member to the appellant's employer or, in addition and in the alternative, to conducting previous medical examinations of the appellant on behalf of the Department. It seems clear that the appellant felt that she recognised the medical member of the tribunal but lacked certainty as to the basis for that recognition.
27. As indicated above, the Legal Officer made enquiries in the present case and established some relevant facts. As the appellant had been engaged in legal proceedings against her employer, which had Capita Plc as its parent company, she firstly submitted that there was a real possibility of bias as the medical member of the tribunal possibly worked for Capita. However, the medical member confirmed that she was not and had not been employed by either the appellant's employer or Capita. As the medical member was not connected to the appellant's employer as submitted, a fair-minded and informed observer could not conclude that the tribunal was biased on that basis.
28. The medical member confirmed that she had been employed by Medical Support Services which, prior to June 2011, conducted medical examinations on behalf of the Department. She indicated that she had done a small amount of work for Atos in September 2011 when the medical examination function was sub-contracted to Atos by the Department, but not after that month. The appellant had referred to the medical member as an "Atos doctor". It appears to me to be likely that the appellant has correctly recognised the medical member from a medical examination with Atos in 2011, probably in the context of incapacity benefit (IB). The medical member on the other hand indicated that she had no knowledge or recognition of the appellant.
29. The system of medical examination for IB assessed functional limitations arising from physical and mental disability, as does the system for ESA. However, the activities and descriptors for the purpose of IB were materially different from those relevant to ESA. ESA came into operation in October 2008 with amendments in March 2011 and January and October 2013. While there was some degree of overlap between some of the activities and descriptors relevant to the two benefits, the rules differed significantly.
30. The tribunal was concerned with the factual position as it was in May 2017. If the medical member had examined the appellant, then the examination would have been based on how she was prior to 2011. Any medical examination addresses how the appellant is in the present. Therefore, even if the medical member had some recollection of the appellant from the past, it would have been out of date and irrelevant. In

order to assess how she was in 2017, for reasons of professional practice and common sense, the medical examination would have been conducted entirely afresh.

31. Further, while the appellant may have a recollection of the medical member, that is not necessarily surprising, since her attendance at a medical examination for benefit purposes would have been a relatively unusual event. On the other hand, a medical member may examine dozens, if not hundreds of claimants over time. This makes specific recollection of all or any of the claimants involved much more unlikely. The particular medical member had no recollection of the appellant.
32. Finally, the medical member's previous involvement in examining people from the perspective of IB on behalf of the Department does not suggest any particular interest in the outcome of such examinations. A professional detachment and objectivity is to be expected. The experience adds to the relevant specialist expertise that a medical member brings to the tribunal. However, it does not suggest to the fair-minded and well informed observer that there would be a real possibility of bias.
33. I accept that the point is arguable and I grant leave to appeal on this basis. However, I do not accept that an error of law is made out on this ground.

Regulation 29(2)(b)

34. The main ground brought by the appellant is addressed to regulation 29 of the ESA Regulations. A tribunal in January 2015 had accepted that regulation 29 applied to her. The Department subsequently superseded the tribunal's decision in May 2017, leading to the present appeal. In deciding that regulation 29(2)(b) did not apply, the appellant submits that the tribunal that I am concerned with:
 - a) did not apply the law correctly;
 - b) did not take proper account of her ongoing employment and employment dispute;
 - c) did not apply the decision in *Charlton v SSWP* correctly.
35. The appellant maintained to the tribunal that she did not have a mental health problem unless "that encompassed work related stress". However, I consider, from the submissions I have received, that there are deficits in the appellant's self-awareness of her own mental health. In the context of her employment litigation, it is plain that considerable stressors have arisen. I am not medically qualified and I do not seek to diagnose

the appellant, but it is easy to see why the previous tribunal might have taken the view that it did in allowing the appeal under regulation 29.

36. Nevertheless, a tribunal determines all the issues before it on the evidence as it sees it, and it is not bound by the decision of an earlier tribunal. Two differently constituted tribunals might take opposite views on the same issue, yet neither be in error of law.
37. The tribunal in the present case has based its decision on the stable level of treatment being given to the appellant, the lack of referral to the community mental health team, the lack of any history of self-harm and the lack of thoughts that life is not worth living. As indicated, this is not an irrational finding. However, the appellant submits that it fails correctly to address regulation 29 and the *Charlton* decision in particular.
38. The appellant specifically submits that the tribunal has not addressed the risk to her within the context of the range of work that she would be capable of undertaking. In particular, as she remained technically employed, the first issue that the tribunal should have addressed was whether she would be at risk of her mental health worsening by returning to the workplace where she was alleging bullying and harassment. Alternatively, it was submitted, the tribunal decision meant that she had to leave her employment and claim jobseeker's allowance, while in the course of employment proceedings against her present employer, with further stressful consequences. She submits that the tribunal did not adduce any evidence about the likely effect of either scenario on her.
39. In *AH -v- Department for Communities* [\[2017\] NI Com 13](#), at paragraph 25, following the Court of Appeal in England and Wales in *Charlton*, I had approved the words of Deputy Commissioner Paines QC in *CIB/360/2007* at paragraph 17 of that decision, when he said,

“A tribunal will have enough general knowledge about work, and can elicit enough information about a claimant's background, to form a view on the range or types of work for which he is both suited as a matter of training or aptitude and which his disabilities do not render him capable of performing. They will then need to consider whether, within that range, there is work he could do without the degree of risk to health envisaged by regulation 27(b)”.
40. While the present tribunal had focussed on the past medical treatment of the appellant, with particular reference to the risk of self-harm, this was not a period when she was in the workplace, but claiming ESA. It is clear that *Charlton* requires the question of substantial risk to the mental or physical health of the claimant to be addressed in the hypothetical situation where she or he is found not to have limited capability for work.

41. This requires an examination of the sort of work she can be reasonably expected to undertake. I observe that the tribunal found that she had worked in administrative work previously and that there was therefore a range of work that she would be capable of undertaking. However, the appellant has criticised the tribunal for not addressing the circumstances particular to her. It is evident that being engaged in employment proceedings against her present employer has a bearing on the range of work that she might be reasonably expected to do. It is also evident that the experiences in the appellant's past or present employment - where she has complained of bullying, harassment and stress – have the potential to affect her health if required to obtain new employment.

42. I am not saying that the evidence compels a conclusion that the appellant's health would suffer if she were found not to have limited capability for work. However, I accept the submission of the appellant that the tribunal did not investigate the likely effect of such a finding on her in the particular context of her own work experience. On this narrow basis, I consider that the appellant makes out her case that the tribunal has erred in law.

43. I allow the appeal. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

21 October 2020