

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 29 June 2021

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 LV/5642/19/51/P.
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 and I set aside the decision of the appeal tribunal under Article 15(8)((b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The appellant had been in receipt of income-related employment and support allowance (ESA) from the Department for Communities (the Department) from 28 January 2010. On 24 May 2018 she was interviewed under caution by Benefit Investigation Service officers. On 14 August 2018, the appellant informed the Department that a Mr O'N had moved in with her from 10 August 2018. On 14 February 2019, the Department considered all the evidence and determined that the appellant was not entitled to income-related ESA from 28 January 2010. The appellant requested a reconsideration. The decision was reconsidered by the Department but not revised. She appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 29 June 2021. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 26 January 2022. 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 25 May 2022. On 7 July 2022, the appellant applied for leave to appeal from a Social Security Commissioner.
6. The application was received late, as it had been sent by the appellant to the Appeals Service in Omagh, rather than to the Office of the Social Security Commissioners. However, on 16 August 2022 the Chief Social Security Commissioner admitted the late application under the provisions of Regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999.

Grounds

7. The appellant submits that the tribunal has erred in law on the ground that it based its decision on insufficient evidence relating to the question of whether she was living together "as husband and wife" with a partner.
8. 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. He submitted that the tribunal had not erred in law on the ground advanced and indicated that the Department did not support the application on that basis. However, he accepted that there were problems in relation to the tribunal's assessment of evidence relating to the alleged partner's employment and that this could amount to an error of law.

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 a copy of an interview of the appellant by Benefit Investigation Services (BIS), witness statements, bank account statements, evidence from employers, Facebook screenshots and Departmental decisions. The decision under appeal was to the effect that the appellant and a Mr O'N were living together as a couple since 28 January 2010, that Mr O'N had been working full time since that date, and that the appellant was not entitled to ESA as Mr O'N had been engaged in remunerative work. The appellant had asked the tribunal to proceed in her absence.
10. The tribunal identified the issue before it as to whether the appellant and a Mr O'N were living together as husband and wife. Having considered the evidence, the tribunal found on the balance of probabilities that they were from 28 January 2010. It found that Mr O'N was in remunerative

work for more than 24 hours per week. It therefore disallowed the appeal.

Relevant legislation

11. By section 132(1) of the Social Security Contributions and Benefits Act (NI) 1992:

132.—(1) Where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family shall, except in prescribed circumstances, be treated as the income and capital of that person.

12. By section 133 of the Social Security Contributions and Benefits Act (NI) 1992:

“family” means—

(a) a couple;

(b) a couple and a member of the same household for whom one of them is or both are responsible and who is a child or a person of a prescribed description;

(c) ...

13. Regulation 2 of the Employment and Support Allowance Regulations (NI) 2008 defines “couple” as follows:

“couple” means—

(a) a man and woman who are married to each other and are members of the same household;

(b) a man and woman who are not married to each other but are living together as husband and wife;

(c) ...

14. Regulation 42(1) of the Employment and Support Allowance Regulations (NI) 2008 provides as follows:

42.—(1) For the purposes of paragraph 6(1)(f) of Schedule 1 to the Act, (conditions of entitlement to an income-related allowance where a claimant must not be a member of a couple the other member of which is engaged in remunerative work), “remunerative work” means work in which the claimant’s partner is engaged or, where the partner’s hours of work fluctuate, the partner is engaged on average, for not less than 24 hours a week, being work for which payment is made or which is done in expectation of payment.

Assessment

15. 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.
16. 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.
17. 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.
18. The basic submission of the appellant is that the tribunal did not have sufficient basis to identify Mr O’N in the observation evidence given by Departmental officers, that the tribunal had no “actual 100% facts” and that the proceedings were unfair. Mr Robinson for the Department disputes these submissions. Mr Robinson refers me to relevant case law and submits that the tribunal only needed to be satisfied on the balance of probabilities that the appellant was living with Mr O’N as husband and wife. I accept that he is correct in these general submissions. I would also observe that an appellant who waives the right to attend an oral hearing is not well placed to complain about the fairness of proceedings determined in their absence.
19. However, Mr Robinson observes another difficulty with the evidence and makes further submissions in the appellant’s interest. As can be seen from the legislation, the issue of entitlement is not resolved solely by the question of whether or not a couple are living together as husband and wife. All that that question establishes is whether the income and capital of the two members of the couple fall to be aggregated for the purposes of calculating entitlement to ESA. The tribunal properly addressed both issues in its summary decision.
20. Nevertheless, Mr Robinson points to limitations in the evidence placed before the tribunal that related to the issue of whether and when Mr O’N was in remunerative work. He accepts that the evidence advanced by the Department only established that Mr O’N was in employment from 25 July 2016. The implication is that there was no evidence to establish whether or not Mr O’N was in remunerative work between 28 January 2010 and 24 July 2016. That part of the tribunal’s decision to the effect that the appellant had no entitlement to ESA is based on no evidence and is therefore irrational in the technical legal sense. I grant leave to appeal on this basis.

21. Mr Robinson points out that the appellant is only contesting the evidence that Mr O'N was living with her and not, formally, whether he was working in the period in issue. He submits that, should I find that an error of law has arisen, I should remit the appeal to a newly constituted tribunal, which would have the opportunity to investigate whether Mr O'N was in remunerative work between 28 January 2010 and 24 July 2016. While I accept the distinction that Mr Robinson observes in the appellant's submissions, the contested issue is that of living together as husband and wife. It would only be when that initial issue is determined that the subsequent issue of remunerative work would arise.
22. It appears to me that the submissions of Mr Robinson indicate a material error of law in the tribunal's decision. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

2 November 2022