

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Appeal by the Department to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 30 September 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is the Department's appeal from the decision of an appeal tribunal with reference CR/4708/20/51/P.
2. For the reasons I give below, I allow the Department's appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998. I make the decision that the tribunal should have made, namely that the sum of £5,296.59 overpaid in new style ESA is recoverable from the respondent.

REASONS

Background

3. The respondent claimed and was awarded contribution-based employment and support allowance (ESA) by the Department for Social Development (the Department) from 17 August 2018. This was "new style" ESA as amended by legislative changes under the Welfare Reform Order (NI) 2015. On 5 March 2020, the Department superseded the respondent's award of ESA. On 17 October 2020, the Department decided that the respondent had been overpaid ESA amounting to £5,296.59 for the period 31 January 2019 to 4 March 2020, and that this was recoverable from him on the basis that he had failed to disclose the fact that he was in receipt of a pension income. The respondent requested a reconsideration, and the decision was reconsidered but not revised. He appealed.
4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal allowed the appeal. The

Department then requested a statement of reasons for the tribunal's decision, and this was issued on 2 November 2021. The Department applied to the LQM for leave to appeal from the decision of the appeal tribunal.

5. Leave to appeal was granted by a determination of the salaried LQM issued on 25 January 2022, on the grounds of whether the tribunal had adequately considered section 69ZB of the Social Security Administration (NI) Act 1992. On 14 April 2022, the Department submitted an appeal to a Social Security Commissioner.
6. The Department's appeal was late. Mr Donnan explains the lateness in terms of DMS staff working at home during Covid-19 restrictions and delay in receiving the decision of the LQM. I accept that administrative disruption due to the pandemic is a special reason to justify the appeal being admitted late. I therefore admit the appeal under regulation 13(2) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

7. The appellant submits that the tribunal has erred in law on the basis that the tribunal did not address the correct basis of overpayment recovery – by wrongly addressing section 69 of the Social Security Administration Act (NI) 1992, as opposed to section 69ZB, which was the provision relied upon in the reconsideration decision.
8. The respondent was invited to make observations on the Department's grounds. He responded and submitted that the legislation and policy applying to "new style" ESA was unfair, and that the overpayment had arisen due to the Department's lack of action in his case.

The tribunal's decision

9. The tribunal heard evidence that the respondent had medically retired after 39 years in the civil service. He had claimed and was awarded new style ESA from 13 August 2018. It found that he was aware of his obligation to notify any changes of circumstances and accepted that he contacted the Department to notify them of his receipt of an occupational pension on 2 January 2019. The Department separately became aware of his occupational pension on 21 March 2019, based on information from HMRC. On 15 October 2019, the Department requested details of his occupational pension from the respondent's pension provider and received this on 25 October 2019. The respondent continued to be paid ESA at an unadjusted rate until 5 March 2020, when the Department superseded the award of ESA. On 17 October 2020, the Department decided that the respondent had failed to disclose the material fact that he was receiving an occupational pension and that the sum of £5,296.59 was recoverable from him for the period 31 January 2019 to 4 March 2020. The tribunal accepted that the respondent had contacted the Department as he said,

and therefore had not failed to disclose the material fact. It allowed the appeal.

Relevant legislation

10. From April 1992 a general provision has governed recovery of overpaid benefits. This is section 69(1) of the Social Security Administration Act (NI) 1992 (the 1992 Act), 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.

11. However, article 109 of the Welfare Reform Order (NI) 2015 inserted a relevant new provision from 20 June 2016. This provides for recovery of certain benefits on different grounds, namely that:

69ZB.—(1) The Department may recover any amount of the following paid in excess of entitlement—

(a) universal credit,

(b) jobseeker's allowance,

(c) employment and support allowance, and

(d) except in prescribed circumstances, housing credit (within the meaning of the State Pension Credit Act (Northern Ireland) 2002).

Submissions and Hearing

12. I held an oral hearing of the appeal. The Department was represented by Mr Donnan. The respondent appeared in person. I am grateful to each of them for their submissions.
13. Mr Donnan outlined simply that the tribunal had applied incorrect legislation to the case. Whereas the Department had initially relied upon section 69(1) of the 1992 Act in the decision of 17 October 2020, it changed its position when the respondent sought a reconsideration of the decision.

The reconsideration decision of 9 December 2020 specifically referred to section 69ZB. He placed reliance on the decision of Upper Tribunal Judge Jacobs in *LP v Secretary of State for Work and Pensions* [2018] UKUT 332, applying the Great Britain equivalent of the provision.

14. The respondent was content to rely upon his written submission. He understood the relevant law and expressed hope that the Department would waive recovery of benefit in his case.

Assessment

15. The Department submits that the tribunal has erred in law on the basis that it applied the wrong legislation to the respondent's appeal.
16. The tribunal applied section 69(1) above to the respondent's case. It accepted that the respondent had not failed to disclose a material fact. It allowed the appeal on that basis. However, the tribunal has overlooked an important aspect of the decision making in this case. Whereas the Department relied upon section 69(1) in its initial decision, following the respondent's request, it gave a reconsideration decision based upon the entirely different section, namely 69ZB(1). The recoverability decision under section 69ZB was the actual subject matter of the appeal.
17. The tribunal's decision applying section 69(1) was in error of law. This is for the reason that section 69(1) only applies to benefits listed in section 69(11). Following a repeal by Part 10 of Schedule 12 to the Welfare Reform (Northern Ireland) Order 2015 from 27 September 2017, ESA was no longer listed in section 69(11) at the material time and therefore section 69(1) could not apply to the case.
18. I understand that section 69(11)(ac) of the Act, which had the effect of including ESA in the list of benefits to which section 69 applies, remains applicable to old style ESA awards. The Department advises me, and I accept, that Article 3(3) of the Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 8 and Transitional and Transitory Provisions) Order 2017 continues the provision in such cases. However, it does not apply in the respondent's case.
19. Section 69ZB(1)(c) by contrast with section 69(1), applies to new style ESA awards. The tribunal failed to apply section 69ZB to the case. It therefore erred in law for that reason also. I must allow the appeal and set aside the decision of the appeal tribunal for that reason.

Disposal

20. Having set aside the decision of the appeal tribunal it is appropriate for me to determine the appeal myself.
21. Under section 69ZB, in order to ground recovery, it is enough for the Department to establish that the claimant was in receipt of one of the

categories of benefit to which the section applies, and that a sum of the relevant benefit was paid in excess of entitlement. The respondent was in receipt of “new style” ESA under section 69ZB(1)(c). He does not dispute that, due to the amount of occupational pension he received, he was not entitled to ESA amounting to £5,296.59. It is therefore inescapable that this sum is recoverable from him under section 69ZB.

22. It has previously been accepted that claimants are not expected to understand the rules of benefit entitlement, but simply to provide the information the Department requests (see the House of Lords decision in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16). In the present case it was accepted by the tribunal that the respondent had complied with the requirement to notify the Department of his occupational pension on 2 January 2019, and that HMRC further provided the same information on 21 March 2019. However, the Department continued to pay ESA to him erroneously until 4 March 2020. On any view, it seems that the delay in rectifying the situation and the continuation of payment to the respondent – who is not as a matter of law expected to understand the rules of entitlement to his benefit – amounts to maladministration. I have considerable sympathy for the respondent. However, I cannot rationally hold that the sum of overpaid ESA is not recoverable under section 69ZB. The Department, once it is established that an amount of benefit is recoverable, still retains discretion as to whether it should be in fact recovered. I have no influence over the Department’s exercise of discretion and no jurisdiction in that aspect of the case.

Summary

23. I must allow the Department’s appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998. I make the decision that the tribunal should have made, namely that the sum of £5,296.59 overpaid in new style ESA is recoverable from the respondent.

(signed): O Stockman

Commissioner

4 October 2022

#