

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

UNIVERSAL CREDIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 6 October 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal and an application for leave to appeal from the decision of a tribunal with reference NS/13315/22/05/U.
2. For the reasons I give below, 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 in accordance with the directions I have given below.

REASONS

3. The issue in this case is whether the tribunal erred in law when considering the questions of whether the appellant had – or was to be treated as having – limited capability for work and work-related activity.

Background

4. The appellant had been awarded universal credit (UC) by the Department for Communities (the Department) from 2 October 2019. On 8 August 2022 he returned a UC50 questionnaire to the Department answering questions about his capacity to perform certain activities. The appellant attended a medical examination with a healthcare professional (HCP) and the Department received a copy of the HCP's report on 2 September 2022. On 13 September 2022 the Department decided on the basis of all the evidence that the appellant did not have limited capability for work. The appellant requested a reconsideration, submitting further information. On 3 November 2022 the decision was reconsidered by the Department but not revised. The appellant appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member. The tribunal allowed the appeal, finding that the appellant had limited capability for work. However, it decided that he did not have limited capability for work-related activity. The appellant's representative applied for the tribunal's decision to be set aside, but on 10 January 2024 the LQM refused to set the decision aside. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 12 January 2024. The appellant then applied to the LQM for leave to appeal to the Social Security Commissioner. The LQM granted the application for leave to appeal by a determination issued on 27 February 2024. On 20 March 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The ground on which leave to appeal was granted by the LQM is whether the tribunal should have had regard to specific employment in the appellant's local area when considering whether he had limited capability for work and work-related activity.
7. The appellant, represented by Nicky Roberts of Community Advice Ards and North Down, submits that the tribunal has erred in law on the basis that:
 - (i) It failed to consider and take account of evidence regarding types of work-related activity in the area whether the appellant lived.
 - (ii) It failed to address the issue of whether there would be substantial risk to the appellant from being found not to have limited capability for work-related activity.
8. Whereas the LQM has granted leave to appeal on the first ground advanced, he has not granted leave to appeal on the second ground. I will therefore treat the second ground advanced as an application for leave to appeal on that ground.
9. The Department was invited to make observations on the appellant's grounds. Ms Toner of Decision Making Services (DMS) responded on behalf of the Department. She submitted that the tribunal had erred in law as alleged and indicated that the Department supported both the appeal and the application for leave to appeal.

The tribunal's decision

10. The LQM of the tribunal has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material and evidence before it consisting of the Department's submission – including the UC50 self-assessment form and UC85 report from a HCP – and the appellant's medical records. It also had a written submission

from Community Advice Ards and North Down. The appellant attended and gave oral evidence, accompanied by his wife. The Department was not represented.

11. The tribunal noted that the appellant had a number of health complaints, including epilepsy, sleep apnoea, an umbilical hernia, hip pain and alcohol abuse. It found that he had no mental health difficulties beyond his alcohol abuse. It accepted that he would have restrictions in mobilising and with standing within the terms of Schedule 6 of the Universal Credit Regulations (NI) 2016 (the UC Regulations), awarding 9 points for physical health activity 1.(c)(ii) and 6 points for physical activity 2.(c)(iii). This totalled 15 points for physical activity and the tribunal allowed the appeal on the basis that the appellant had limited capability for work.
12. In relation to limited capability for work-related activity, the tribunal found that the appellant did not have limited capability for work-related activity on the basis that he did not score points under the requirements of Schedule 7 of the UC Regulations.

Relevant legislation

13. UC was established under the provisions of the Welfare Reform Order (NI) 2015 (the Order). The core rules provide for awards to include an amount in respect of the fact that a person has limited capability for work and work related activity (article 17(2)(b) of the Order). They also amend work-related requirements where a claimant has limited capability for work (article 24(1) of the Order). By article 43 of the Order:

43—(1) For the purposes of this Part a claimant has limited capability for work if—

- (a) the claimant's capability for work is limited by his or her physical or mental condition, and
- (b) the limitation is such that it is not reasonable to require the claimant to work.

(2) For the purposes of this Part a claimant has limited capability for work-related activity if—

- (a) the claimant's capability for work-related activity is limited by his or her physical or mental condition, and
- (b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity.

(2) The question whether a claimant has limited capability for work or work-related activity for the purposes of this Part is to be determined in accordance with regulations.

...

14. The UC Regulations further provide at Part V and Schedules 6 to 9 for determining if a claimant has limited capability for work and limited capability for work-related activity.
15. Regulation 40 provides for a specific test of limited capability for work. Within Schedule 6 there are ten physical activities (including functions such as mobilising) and seven mental activities (including functions such as learning tasks). Each activity is subdivided into a set of scoring descriptors that lead to an award of points. However, as the issue of limited capability for work is not in dispute in the present case, I will omit the relevant text.
16. Regulation 41 provides for a specific test of limited capability for work and work-related activity. Within Schedule 7 are 16 activities, many of which equate to the highest scoring descriptors that apply in the Schedule 6 activities, and some of which are different. It is sufficient to satisfy the requirement of one of the descriptors. Provision is also made for treating a claimant as having limited capability for work and work-related activity in the circumstances prescribed in Schedule 9. So far as is relevant for present purposes, Regulation 41 and Schedule 9 provide:

41.—(1) A claimant has limited capability for work and work-related activity if—

(a) it has been determined that—

(i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or

(ii) the claimant has limited capability for work-related activity on the basis of an assessment under Part 5 of the ESA Regulations, or

(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).

(2) A claimant has limited capability for work and work-related activity on the basis of an assessment under this Part if, by reason of the claimant's physical or mental condition—

(a) at least one of the descriptors set out in Schedule 7 applies to the claimant,

(b) the claimant's capability for work and work-related activity is limited, and

(c) the limitation is such that it is not reasonable to require that claimant to undertake such activity.

(3) ...

(5) Subject to paragraph (6), a claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies.

(6) Where the circumstances set out in paragraph 4 of Schedule 9 apply, a claimant may only be treated as having limited capability for work and work-related activity if the claimant does not have limited capability for work and work-related activity as determined in accordance with an assessment under this Part.

17. By Schedule 9, provision is made for the circumstances in which a claimant is to be treated as having limited capability for work and work-related activity. The relevant paragraph for present purposes is paragraph 4, which provides:

Risk to self or others

4. The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.

Submissions and assessment

18. There are essentially two grounds before me. The first is that the tribunal has failed to address any information about the types of work-related activity that are available in the area where the appellant lives. Leave to appeal was granted by the LQM on this first ground.
19. The second ground is that the tribunal failed to address the question of whether there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity. This second ground is technically still at the stage of an application for leave to appeal.
20. I will deal with the latter ground - the application - first. As I normally explain in my decisions, 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. Ms Toner for the Department offers her support to the appellant's ground of application for leave to appeal. As I have explained in other decisions, where the Department's representative indicates a measure of support for an applicant's case, the threshold of presenting an arguable case will almost invariably be reached. In any event, I accept that it is reached in this case on the basis of the Department's support and I grant leave to appeal on the second ground.

Submissions on appeal ground 1

24. The first ground of appeal relies on a series of cases decided by the Great Britain Upper Tribunal on equivalent legislation to that applied by the tribunal in Northern Ireland. On behalf of the appellant it is submitted that the tribunal failed to take into account the test set out by the three-judge panel of the Upper Tribunal in *IM v Secretary of State for Work and Pensions* [2014] UKUT 412. There it was held that the tribunal "ought to be provided with information about all types of work-related activity in the area where the claimant lived, and this is so even if the Secretary of State considered that the claimant did not have limited capability for work, since the question of whether the claimant had limited capability for work-related activity was bound to arise if the [tribunal] was minded to allow the claimant's appeal".
25. I observe that the decision of the Upper Tribunal in *IM* was approved by Chief Commissioner Mullan in *AH-v-Department for Communities* [2017] NI Com 4. The Great Britain Upper Tribunal in the case of *MD v Secretary of State for Work and Pensions* [2020] UKUT 215 subsequently decided that similar principles are to be applied in UC cases as had been applied in *IM* and in *AH*, both of which concerned employment and support allowance. I also consider that *IM* should be followed in Northern Ireland. I further accept that in the context of substantial risk for the purpose of paragraph 4 of Schedule 9 in UC cases, the legislation is so similar that the same principles as have been applied in the Employment and Support Allowance (ESA) cases should be followed.
26. In support of the appeal, the appellant's representative further placed reliance on the Great Britain Upper Tribunal decision in *KS v Secretary of State for Work and Pensions* [2021] UKUT 132 and referred to the Great Britain Secretary of State's guidance in DMG Memo 01/18.
27. Ms Toner for the Department has responded to the grounds of appeal by expressing support. Whereas the guidance referred to by the appellant's representative is operational only in Great Britain, she pointed out the equivalent guidance in Northern Ireland. This is DMG Memo 8/90 which relates to ESA and ADM Memo 10/18 which relates to UC. She agreed with the appellant's representative that there was an obligation on the

tribunal to consider what specific type of work-related activity the appellant would be required to or be capable of undertaking in the area he resides.

28. Ms Toner cited the requirements set out by the three-judge panel of the Upper Tribunal in *IM* upon the Secretary of State at paragraphs 104-108 of that decision, which I reproduce below:

“104. It will be apparent from what we have said above that, at least while the legislation is administered in the current fashion, the First-tier Tribunal needs to know not only what the least demanding types of work-related activity are but also what the most demanding types are in the area where the claimant lives. As Judge Jacobs pointed out in *AH*, that information can come only from the Secretary of State.

105. As indicated above, we accept the Secretary of State’s submission that, on an appeal in which regulation 35(2) is in issue, he cannot be expected to anticipate exactly what work-related activity a particular claimant would in fact be required to do. This is axiomatic

106. But what the Secretary of State can and should provide is evidence of the types of work-related activity available in each area and by reference thereto what the particular claimant may be required to undertake and those which he considers it would be reasonable for the provider to require the claimant to undertake. The First-tier Tribunal would then be in a position to assess the relevant risks.

107. We understand that the types of work-related activity available may vary from provider to provider, but it should not be beyond the wit of the Department and providers to produce and maintain a list, perhaps for each of the regions into which the First-tier Tribunal is organised, of what is available in each area within the region. The relevant information could then be included in submissions in individual cases. The First-tier Tribunal would be able to assess the evidential force of such a submission.

108. We do not accept the Secretary of State’s submission that it would be disproportionate to provide such evidence where there is an appeal against a decision to the effect that the claimant does not even have limited capability for work. As is acknowledged, if such an appeal is allowed, it will inevitably be necessary to consider whether the claimant has limited capability for work-related activity...”

29. Ms Toner accepted that the tribunal should have ensured that it had necessary information regarding the types of work-related activities

available to the appellant in his local area. In its absence she accepted that the tribunal had erred in law.

Submissions on appeal ground 2

30. The second ground advanced on behalf of the appellant was that the tribunal had not fully or correctly addressed the issue of “substantial risk” in the context of paragraph 4 of Schedule 9 or given adequate reasons for its decision. In particular it was submitted that the issue of alcohol dependence syndrome had been raised in submissions to the tribunal but was not addressed by it. Reliance was placed on the decision of Deputy Commissioner Gray in *NS v Department for Communities* [2023] NI Com 29. This decision was addressed to the issue of adequacy of reasons in the equivalent ESA provisions regarding substantial risk.
31. Ms Toner referred to the Great Britain Upper Tribunal decision of *CT v Secretary of State for Work and Pensions* [2021] UKUT 131. There, Judge West had referred to the need for the tribunal to properly assess the claimant’s level of drinking. She submitted that it was not clear if the tribunal adequately examined pattern of the appellant’s daily drinking, with associated depression and memory loss issues, and whether this was sufficient to meet the requirements under paragraph 4 of Schedule 9. She accepted that the tribunal had erred in law on this point also.

Conclusions

32. Both of the appellant’s grounds of appeal are supported by the Department. I consider that the support is well judged. The appellant’s representative has set out a clear case based upon the relevant case law.
33. In addressing the issue of substantial risk in the context of paragraph 4 of Schedule 9, the tribunal was required to address the types of work-related activity that were available to the appellant in his local area. The Department did not provide any evidence of that. However, the tribunal did not then direct production by the Department of relevant evidence.
34. I observe that examples of work related programmes in Northern Ireland appear in an Appendix to DMG Memo 8/90 in the context of ESA and as an Appendix to ADM Memo 10/18 in the context of ESA and UC. It is not clear from the documents whether all or any of those programmes were available in the appellant’s local area. Therefore, bare reference to these Departmental guidance memos would appear to be insufficient. I consider that a summary of locally available programmes and what was entailed in them was necessary in order for the tribunal to assess the question arising under paragraph 4 of Schedule 9. In the absence of such evidence, it was not possible for the tribunal to arrive at a rational conclusion on the issue before it. I conclude that it has erred in law for deciding the question in the absence of sufficient evidence.

35. I observe that a three-judge panel of the Upper Tribunal considered alcohol dependence and its relevance to a person's capability for work in *JG v Secretary of State for Work and Pensions* [2013] UKUT 37. It found that alcohol misuse must rank as "alcohol dependency" by reference to the conclusions of the Great Britain Tribunal of Commissioners in R(DLA)6/06 in order to constitute a "disablement" for the purposes of the ESA Regulations. I accept that the same considerations must apply in the context of UC.
36. On the question of the issue of substantial risk in light of the appellant's health issues in the present case, it appears to me that there is merit in the appeal. I do not consider that the tribunal asked the right questions to establish whether the claimant's drinking amounted to alcohol dependency and whether it was sufficient to bring him within the scope of paragraph 4 of Schedule 9.
37. For these reasons, I allow the appeal. I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

Directions

38. I direct the new tribunal to determine all questions afresh, namely the questions of whether the appellant has limited capability for work, and whether he has limited capability for work and work-related activity.
39. I direct that the Department shall provide the new tribunal with evidence of work-related activities available to the appellant in his local area.
40. The new tribunal in particular shall have regard to whether the appellant's drinking amounts to alcohol dependency – and is therefore a relevant disablement for the purposes of paragraph 4 of Schedule 9.

(Signed): O STOCKMAN

COMMISSIONER

28 October 2024