Decision No: C5/24-25(ESA)

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 5 March 2024

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 BB/1880/23/51/P.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The appellant claimed employment and support allowance (ESA) from the Department for Communities (the Department) from 30 May 2022 following her retirement from employment on health grounds. She was awarded "new style ESA" from and including that date by a decision of 21 June 2022. In the course of her claim she had informed the Department that she was due to receive an occupational pension upon retirement. She provided a pension payslip to the Department on 30 June 2022 that set out the amount of pension she had been paid for the month of June 2022. Over seven months later, on 3 February 2023, the Department received evidence from HMRC confirming the amount of pension received by the appellant. By an undated letter, apparently sent around 13 February 2023, the Department notified the appellant that she had been overpaid ESA amounting to £1,527.99. On 8 March 2023 the Department decided that the overpayment was recoverable from her. The appellant requested a reconsideration of the decision, which was reconsidered but not revised. She appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 5 March 2024. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 23 May 2024. 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 27 June 2024. On 8 July 2024 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

5. The appellant submitted that the tribunal has erred in law on the basis that her claim was maladministered by the Department and submitted that she had a legitimate expectation that the Department would pay the correct amount of benefit on the basis of the information given to it.

6. The Department was invited to make observations on the appellant's grounds. Mr McCrumlish of Decision Making Services (DMS) responded on behalf of the Department. While expressing sympathy for the appellant's situation, he submitted that the tribunal had not erred in law and indicated that the Department did not support the application.

The tribunal's decision

7. 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 Departmental decisions, correspondence, evidence regarding the appellant's occupational pension, computer system screenprints and various specimen documents. It had the record of proceedings from an earlier hearing. The appellant attended the hearing and gave oral evidence. The Department was represented by Mr Robb.

8. The tribunal found that the appellant had claimed ESA on 30 May 2022 and had notified the Department in the claim that she was going to be in receipt of an occupational pension, giving details of the pension provider and advising that payment was due to commence on 30 June 2022. She was awarded ESA on 21 June 2022. It found that on 27 June 2022 the appellant contacted the Department by telephone and advised how much pension she would be receiving and posted a pension payslip to the Department, which was received on 30 June 2022. On 1 July 2022 the Department wrote to her confirming receipt of the pension details and advising that they would be forwarded to ESA.

9. It found that several months later, having received details of the appellant's pension from HMRC on 3 February 2023, on 13 February 2023 the Department superseded the award of ESA and raised an overpayment of £1,527.99 against the appellant. The tribunal found that any overpayment had arisen despite the candid and clear declarations of the appellant. It found that the overpayment was entirely due to the negligence and maladministration of the Department. Nevertheless, having considered the relevant case law, it found the overpayment was governed by section 69ZB(1) of the Social Security Administration (NI) Act 1992 (the Administration Act) and was therefore recoverable at the discretion of the Department. It therefore disallowed the appeal.

Relevant legislation

10. The context for the present appeal is the establishment of new benefits – including universal credit, new style jobseeker's allowance and new style ESA – from June 2016, and the introduction of new system of overpayment recovery for those benefits. This new system is distinct from the previous system which still applies in the context of "legacy" benefits existing prior to June 2016.

11. The Administration Act was amended by Article 109 of the Welfare Reform Order (NI) 2015 with effect from 20 June 2016 by the insertion of a number of sections. In this case, the Department relies upon one of those sections - section 69ZB of the Administration Act. This provides:

> *Recovery of overpayments of certain benefits*
>
> 69ZB.—(1) The Department may recover any amount of the following paid in excess of entitlement—
>
> (a) …,
>
> (b) …,
>
> (c) employment and support allowance, and
>
> (d) ….
>
> (2) An amount recoverable under this section is recoverable from—
>
> (a) the person to whom it was paid, or
>
> (b) such other person (in addition to or instead of the person to whom it was paid) as may be prescribed.
>
> (3) An amount paid in pursuance of a determination is not recoverable under this section unless the determination has been—
>
> (a) reversed or varied on an appeal, or
>
> (b) revised or superseded under Article 10 or Article 11 of the Social Security (Northern Ireland) Order 1998 (the 1998 Order), except where regulations otherwise provide.
>
> (4) Regulations may provide that amounts recoverable under this section are to be calculated or estimated in a prescribed manner.
>
> (5) …
>
> (6) …
>
> (7) An amount recoverable under this section may (without prejudice to any other means of recovery) be recovered—
>
> (a) by deduction from benefit (section 69ZC);
>
> (b) by deduction from earnings (section 69ZD);
>
> (c) through the courts etc (section 69ZE);
>
> (d) by adjustment of benefit (section 69ZF).

12. The reference at section 69ZB(3) to Article 10 and 11 of the Social Security (NI) Order 1998 (the 1998 Order) is to the adjudication provisions of general application in social security law. These provide:

> 10.—(1) Subject to Article 36(3), any decision of the Department under Article 9 or 11 may be revised by the Department—
>
> > (a) either within the prescribed period or in prescribed cases or circumstances; and
> >
> > (b) either on an application made for the purpose or on the Department's own initiative, and regulations may prescribe the procedure by which a decision of the Department may be so revised.
>
> (2) In making a decision under paragraph (1), the Department need not consider any issue that is not raised by the application or, as the case may be, did not cause the Department to act on its own initiative.
>
> (3) Subject to paragraphs (4) and (5) and Article 27, a revision under this Article shall take effect as from the date on which the original decision took (or was to take) effect.
>
> (4) Regulations may provide that, in prescribed cases or circumstances, a revision under this Article shall take effect as from such other date as may be prescribed.
>
> (5) Where a decision is revised under this Article, for the purpose of any rule as to the time allowed for bringing an appeal, the decision shall be regarded as made on the date on which it is so revised.
>
> (6) Except in prescribed circumstances, an appeal against a decision of the Department shall lapse if the decision is revised under this Article before the appeal is determined.
>
> 11.—(1) Subject to paragraph (3) and Article 36(3), the following, namely—
>
> > (a) any decision of the Department under Article 9 or this Article, whether as originally made or as revised under Article 10; and
> >
> > (b) any decision under this Chapter of an appeal tribunal or a Commissioner, may be superseded by a decision made by the Department, either on an application made for the purpose or on the Department's own initiative.
>
> (2) In making a decision under paragraph (1), the Department need not consider any issue that is not raised by the application or, as the case may be, did not cause the Department to act on its own initiative.
>
> (3) Regulations may prescribe the cases and circumstances in which, and the procedure by which, a decision may be made under this Article.
>
> (4) ...

(5) Subject to paragraph (6) and Article 27, a decision under this Article shall take effect as from the date on which it is made or, where applicable, the date on which the application was made.

(6) Regulations may provide that, in prescribed cases or circumstances, a decision under this Article shall take effect as from such other date as may be prescribed.

13. The relevant regulations for the purpose of "new style ESA" are the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016 (the Decisions and Appeals Regulations). They provide for supersession decisions as follows:

22. Subject to regulation 32 (decisions which may not be superseded), the Department may make a decision under Article 11 of the 1998 Order ("a superseding decision") in any of the cases and circumstances set out in this Chapter.

23.—(1) The Department may supersede a decision in respect of which—

(a) there has been a relevant change of circumstances since the decision to be superseded had effect or, in the case of an advance award under regulation 31, 32, or 33 of the Claims and Payments Regulations, since it was made; or

(b) it is expected that a relevant change of circumstances will occur.

(2) The fact that a person has become terminally ill is not a relevant change of circumstances for the purposes of paragraph (1) unless an application for supersession is made which contains an express statement that the person is terminally ill. Error of law, ignorance, mistake etc.

24. A decision of the Department, other than one to which regulation 25 (decisions against which no appeal lies) refers, may be superseded where—

(a) the decision was wrong in law, or was made in ignorance of, or was based on a mistake as to, some material fact; and

(b) an application for a supersession was received, or a decision was taken by the Department to act on its own initiative, more than one month after the date of notification of the decision to be superseded or after the expiry of such longer period as may have been allowed under regulation 6 (late application for a revision).

14. Further provisions in the Decisions and Appeals Regulations allow for exceptions of the provisions of Article 11(5) above as to the date when a supersession decision takes effect. Regulation 35(1) and Schedule 1 provide for effective dates of supersession decisions based on relevant change of circumstances. Generally this is from around the benefit week containing the date from which the change took place. Regulation 35(2) and (3) make relevant provision for the effective date of supersession decisions based on error of law, ignorance of material fact or mistake as to material fact. Generally, this is from around the benefit week containing the date on which the supersession decision was made.

Submissions and hearing

15. The appellant submitted that she had a legitimate expectation that the Department would decide her entitlement without maladministration. She submitted that she had declared all the information required to enable the Department to make an accurate determination of her entitlement. She submitted that to permit the Department to recover the benefit overpaid to her meant that there were no consequences for maladministration and no learning. She submitted that the tribunal erred in law by upholding the overpayment decision in all the circumstances.

16. For the Department Mr McCrumlish accepted that there were shortcomings in the procedure followed by the Department. In particular, he accepted that in circumstances such as those of the appellant the Department should have suspended payment of benefit pending a further enquiry – thus avoiding the overpayment. He indicated that guidance had been issued to Departmental staff to ensure good practice going forward, and that decision makers were advised to suspend payment immediately upon discovery that payment of an income had commenced. He offered an apology to the appellant and informed her of the measures that had been taken so that her situation would not recur in other cases in future. However, he did not accept that the decision of the tribunal was erroneous in law.

17. Mr McCrumlish referred to two previous decisions by the Commissioners in Northern Ireland – the case of *Department for Communities v SM* [2022] NI Com 23, which I decided, and an application determined by Deputy Commissioner Gray on file *A1/23-24(ESA)*. He observed that the Great Britain Upper Tribunal decision in *LP v Secretary of State for Work and Pensions* [2018] UKUT 332 had been followed in each case. He submitted that under the new statutory regime for recovery of overpaid benefit there was no viable challenge to a recoverability decision on the basis of how an overpayment was caused.

18. Whereas I had decided the case of *DfC v SM* in the manner indicated, some further aspects of the administrative requirements arising from section 69ZB(3) gave me pause. It occurred to me that it would be necessary to ensure that the statutory procedures underlying the overpayment decision had been followed and articulated correctly. Thus, in a section 69ZB case, one would expect to see evidence of the revision or supersession decision made in the case and the grounds of revision or supersession articulated and explained in terms of the effective date of the new section 69ZB(3) decision.

19. I therefore issued a direction to the Department:

> (i) to produce a copy of the supersession or revision decision made under section 69ZB(3) of the Administration Act;
> (ii) to confirm the statutory provision under which the decision was made; and
> (iii) to confirm the grounds of supersession or revision that were relied upon in the particular case; ...

20. In order to understand the context in which policy to recover overpaid benefit was applied, I further directed the Department:

> (iv) to provide a copy of any policy relating to recovery of overpaid benefit, addressing in particular the circumstances in which any waiver of the right of recovery may be applied by the Department for Communities.

21. In answer to the first part of the direction, Mr McCrumlish referred me to the original submission from the Department to the tribunal. He observed that copies of the relevant decision

were no longer available as the system generated letters are only held for a period of one month. He referred me to a generic template decision at pages 63-66 of the original submission that appeared to be based on change of circumstances as the ground of supersession.

22. In answer to the second part of the direction, Mr McCrumlish again referred to the original submission from the Department to the tribunal. He directed me to section 69ZB of the Administration Act. This was my fault for not specifying that what I had in mind here was the relevant adjudication provision. I had wanted him to confirm whether I was dealing with a revision or a supersession decision. However, in his response to my request for a copy of the actual decision, whereas he stated that it was no longer available, he had previously submitted that the section 69ZB(3) decision was a supersession decision.

23. In response to the third part of my direction, Mr McCrumlish stated that the Department's submission confirmed the "grounds of supersession to be the material fact that [the appellant] was in receipt of an occupational pension". Again, perhaps I was imprecise in my direction, but I was not offered a statement of which of the statutory grounds – i.e. relevant change of circumstances, mistake as to material fact, ignorance as to material fact, etc. – was held by the Department to apply in the circumstances of the case.

24. In answer to the fourth part of my direction, Mr McCrumlish observed that "there is a Chapter on waiver considerations, providing more comprehensive guidance, in the Department's Overpayment of Benefits and Financial Support Guide". He provided a link to this guidance. It reads as follows:

> "*Waiving recovery of an overpayment*
>
> *In exceptional circumstances recovery of all or part of an overpayment and Recoverable Hardship Payments may be waived. There needs to be very specific grounds to show that your circumstances will only improve by waiver of the overpayment.*
>
> *There are several different reasons why waiver may be considered and not all have to be met for a waiver to be granted. Waiver will take into consideration your entire circumstances, as far as they are known, including the following:*
>
> - *your financial circumstances and those of your family and household members*
> - *whether the recovery of the debt is impacting your health or the health and welfare of your family*
> - *how the overpayment arose, for example by fraud, the Department's conduct, whether you took steps to report the change of circumstances which caused the overpayment, whether you made a mistake and failed to advise of a change which caused the overpayment*
> - *whether you have relied on the overpayment to your cost such as making a financial commitment*
> - *whether it was intended you have the money such as entitlement to another benefit which wasn't paid*
> - *where you can show that you did not benefit from the money that was paid*
> - *any other reason which appears relevant or which indicates recovery would not be in the public interest*

This is not an exhaustive list and all factors which appear relevant will be considered along with the individual circumstances of your application.

Asking for a waiver should normally be made in writing by you or your representative stating the grounds for the waiver request. There is no right of appeal against a decision not to apply discretion or if you disagree with the discretion applied. You may however be able to apply for a Judicial Review if it is felt that discretion was not properly applied.

Evidence to support a waiver request

When applying for a waiver, you are responsible for providing all necessary information and evidence to explain and support your application. This may include information about the overpayment, as well as detailing your personal circumstances.

Where the waiver is asked for on the grounds of severe financial hardship, you would need to show that this has been long standing and not expected to improve soon. The hardship must be of such severity that it is not reasonable to expect you to make even reduced payments.

Recovery of an overpayment may cause some level of hardship or stress. A request for a waiver on the grounds of welfare or ill health normally requires supporting evidence detailing how recovery of the debt is the main or only cause of the ill health, or the reason for your ill health getting worse.

Evidence includes a letter from a professional such as a GP, consultant, psychiatric nurse or support worker and must clearly show the effect the overpayment recovery is having on your health and prove that your circumstances will only improve by waiver of the debt. This must be the opinion of the professional writing the letter. This evidence should not simply be a list of any medical conditions you have.

If more information is required, you will be contacted in writing and asked to provide it before any decision.

You can send your waiver request to Debt Management Northern Ireland."

25. I issued a further direction aimed at obtaining clarity on some of my earlier questions. This was replied to by Mr Donnan. I then directed an oral hearing of the application. The appellant was unable to attend due to her ill-health but was content for me to proceed in her absence. Mr Donnan attended for the Department and I am grateful to him for his helpful submissions.

26. Whereas section 69ZB(1) gave the Department a broad power of recovery, the effect of section 69ZB(3) was to require the determination giving rise to the entitlement to the overpayment to have been reversed or varied on an appeal, or revised or superseded under Article 10 or Article 11 of the 1998 Order (except where regulations otherwise provide). This is a directly parallel provision the section 69(5A) of the Administration Act that applies to the legacy system. The basic requirement is that entitlement has to be formally removed or reduced under each system.

27. In further enquiries to Mr Donnan, I observed that whereas supersession had been relied upon generally, the precise ground of supersession did not appear to have been mentioned in decisions or correspondence. The tribunal had not been furnished with the original supersession decision

removing entitlement. My purpose in making this enquiry related to the fact that the precise grounds of supersession were relevant to the effective date of any supersession decision.

28. In short, if a supersession is based on relevant change of circumstances, by regulation 35(1) and paragraph 1 of Schedule 1 to the Decisions and Appeals Regulations it takes effect from the first day of the benefit week in which the change of circumstances occurs, provided none of the exceptions in Schedule 1 apply. If a supersession is based on mistake as to or ignorance of a material fact, by regulation 35(3) of the Decisions and Appeals Regulations, the superseding decision takes effect from the first day of the benefit week in which the superseding decision was made.

29. In the present case, this would mean that if supersession was based on relevant change of circumstances, the supersession might take effect from the first day of the benefit week after 30 June 2022. On the other hand, if the grounds for supersession were ignorance or mistake as to material fact, the supersession decision might take effect from the first day of the benefit week after 13 February 2023. This in turn would have implications for the application of section 69ZB(3) and the duration of the period during which any existing entitlement could be superseded.

30. Mr Donnan maintained the submission that the ground for supersession was relevant change of circumstances. He referred to a code in a screenprint from the Department's computer system at page 62 in the bundle before the tribunal that read "COFC" in respect of a decision of 13 February 2023. This was short for change of circumstances.

31. I queried what change of circumstances had occurred. I observed that the appellant had notified the Department of her entitlement to an occupational pension and the date of a pending first payment. She did not know the amount of that prospective first payment. What occurred on 30 June 2022 was that she was paid her pension and received a payslip confirming the amount received. I asked whether any relevant change of circumstances had occurred on that date, or simply whether some information that was previously uncertain had become known.

32. Mr Donnan made careful submissions in response. He had accepted that there were some errors in the Departmental submission. In particular, it was accepted that, prior to ceasing employment and claiming ESA, the appellant had been partially retired and was in receipt of an amount of pension. It was accepted that she had provided information to clarify the position in the course of her claim and before the entitlement decision was made. Therefore she was changing from one rate of pension to another, rather than receiving pension for the first time.

33. Mr Donnan noted that within new style ESA, a payment such as had been received by the appellant on 30 June 2022 would be attributed forward in time. He observed that the appellant's first payment was higher than subsequent monthly payments. By analogy with a worker undertaking occasional overtime whose income varied, he submitted that entitlement to benefit was affected by any change in the amounts received. He essentially submitted that a relevant change of circumstances was any change than would materially affect a claimant's entitlement to benefit or the rate of benefit which they might receive. Therefore, the appellant's receipt of the first increased pension payment was a relevant change of circumstances, as was any subsequent change in the rate of her occupational pension.

34. If he was wrong about that, he submitted, there was power for the Department to proceed by way of revision instead of supersession. He referred to regulation 9 of the Decisions and Appeals Regulations. Whereas the window for carrying out a revision of a decision under regulation 5 is

normally time limited to one month from the date of notification of the original decision, regulation 8 provided for "any time" revision in certain cases. By regulation 9, such a case was where the decision,

> "(a) arose from official error; or
>
> (b) was made in ignorance of, or was based on a mistake as to, some material fact and as a result is more advantageous to a claimant that it would otherwise have been."

35. By regulation 21, where the Department decides that the date from which the original decision took effect was wrong, the revision takes effect from the date from which the original decision would have taken effect had the error not been made. Thus, a revision on grounds of official error or ignorance or mistake as to a material fact would be possible and would have the same effective date as a supersession on grounds of relevant change of circumstances.

Assessment

36. 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.

37. 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.

38. 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.

39. As indicated above, the appellant submits that the tribunal erred in law by upholding the overpayment decision on the basis that she had a legitimate expectation that the Department would make an accurate determination of her entitlement without maladministration. "Legitimate expectation" is a recognised legal concept. Such an argument has not been presented before, so far as I am aware, and I will grant leave to appeal on the basis that it is a novel issue.

40. Under the provisions governing overpayment of benefit in section 69 of the Administration Act, which continues to apply to older benefits, the Department's right to recover an overpayment of benefit was based on the behaviour of the claimant. The claimant was not expected to understand the complex rules of entitlement to the various social security benefits, but was obliged to comply with written instructions given by the Department to disclose particular facts and changes of circumstances. If a claimant failed to disclose, or misrepresented, a material fact, then they would be liable to return any overpaid benefit. The claimant in the present case did not fail to disclose or misrepresent any material fact and the Department would not have been able to recover any overpaid benefit from her under section 69.

41. The new statutory regime applying to ESA is based on section 69ZB of the Administration Act. This simply permits recovery of any amount of benefit that has been paid in excess of entitlement. On the one hand, this outcome can be justified on the basis that the claimant has received no more and no less that he or she is entitled to. On the other hand, having disclosed all relevant information and having been told the amount of his or her entitlement, a claimant may well

make budgeting choices and enter into financial commitments which are based upon a false picture of his or her entitlement. This may then lead the claimant into difficulties of debt and financial need which might not have arisen but for the Department's maladministration in the assessment of entitlement.

42. The appellant submits that she has a legitimate expectation that the Department will apply the law correctly. She submits that the Department is completely at fault and that the overpayment in this case has resulted from maladministration. She asserts that there is no culpability, no learning and no responsibility for the Department in these circumstances and complains that it is a disgrace that she can be treated this way.

43. Legitimate expectation is a legal concept that has application in public law, and is relied on relatively often in judicial review proceedings in the High Court (see, e.g. *Bhatt Murphy (a firm), R (on the application of) v The Independent Assessor* [2008] EWCA Civ 755). It is a form of promissory estoppel, whereby a decision maker can be held to a prior commitment made to an individual or group. It is essentially a branch of procedural fairness. As such, legitimate expectation based upon a practice of the Department might theoretically fall within the jurisdiction of the Commissioner in an appropriate case.

44. For example, by way of a procedural undertaking, the Department might offer an opportunity to a particular group of claimants to provide medical evidence arising from previous claims, and to have that considered as part of the evidence in their present cases. If the Department then later did not uphold that offer, an affected claimant might rely on legitimate expectation – or more generally failure to comply with requirements of procedural fairness – as part of the challenge to the Department's decision.

45. However, an appeal can consider all evidence afresh, and the remedy in such circumstances is simply to introduce the omitted evidence. Unlike the jurisdiction of the High Court in judicial review proceedings brought by an individual, an appeal on the merits is not limited to consideration of what was before the original decision maker. Therefore, it seems to me that the utility of the concept of legitimate expectation in appellate proceedings is limited.

46. Setting theoretical scenarios aside, more generally a legitimate expectation will not arise unless it is based on a representation made to an individual or group by a decision maker. The appellant here argues for a legitimate expectation that Departmental decision making to be based on reasonable standards of public administration. I accept the general premise that the Department should apply the law correctly when assessing benefit entitlement and that it should do so without maladministration. However, this is not the same as accepting that this gives rise to a legitimate expectation.

47. I consider that to give rise to a legitimate expectation as a matter of law, the appellant would have to demonstrate evidence of a clear and unambiguous representation made by the Department to her personally, or as part of a group, as to a particular standard of conduct. I do not accept that there has been any direct representation to the appellant that can be relied upon in tribunal proceedings, or the proceedings before me. I cannot accept the appellant's submission that she has a legitimate expectation, as a matter of law, that would afford her a remedy in the circumstances.

48. It seems to me that what ultimately lies behind the appellant's obvious frustration in the present case is not the misapplication of law but rather the change of policy leading to section 69ZB. Unlike the "legacy" system, the present basis for benefit recovery requires no fault on the

part of the claimant to be demonstrated. In the context of new style ESA the present system permits recovery even where an overpayment results solely from the Department's maladministration and through absolutely no fault on the part of the claimant.

49. However, one common thread remains between the legacy system and the system for the post 2016 benefits. Section 69ZB(3) in the new system is equivalent to section 69(5A) in the legacy system. In each system this means that a decision removing previous entitlement must be identified, and the date on which it should take effect must also be identified.

50. In my direction to the Department, I had indicated that I was interested in establishing whether a revision or supersession had taken place and, if a supersession, whether appropriate grounds were established in the circumstances of the case and, in turn, whether that had material consequences for the date on which the superseded decision should take effect. This was with a view to exploring whether the requirements of section 69ZB(3) of the Administration Act had been complied with in all the circumstances of the case.

51. An immediate difficulty with this course of action was the lack of evidence from Departmental computer systems as to what had actually occurred. The original decision made under section 69BZ(3) had not been retained on the system after a month had elapsed. A specimen supersession decision had been included and the tribunal had been referred to screen shots from the Department's computer system. These, as might be expected, were obscure to the uninitiated. Reliance had been placed by the Department on a single line in a list of letters issued that read:

Date Issued	User ID		Letter type	Office location No
13/02/23	91072480	M3010	COFC ENDING AWARD	107431

52. It was explained to me that the letters COFC indicated that there had been a supersession based upon relevant change of circumstances.

53. I have no doubt the introduction of information technology has an aim of achieving greater efficiency in decision making. However, I find it difficult to understand how Departmental officials providing the specification to the software technicians responsible for the Departmental computer systems would not have required the retention of the actual decisions governing entitlement for more than one month. Decisions are the core element of the benefits adjudication system and are the first thing that the decision makers in appellate system look for. In cases such as the present one, whereas the decision under appeal is technically the overpayment decision, the entitlement decision can be addressed as part of such an appeal (see, for example, *Secretary of State for Work and Pensions v IM* [2010] UKUT 428). Therefore, it would seem apt to retain such decisions until the absolute time period for bringing appeal proceedings had ended.

54. I find the documentary evidence of the supersession decision that was presented to the tribunal unsatisfactory. Nevertheless, in the absence of any suggestion of bad faith, I accept the reconstruction of the missing decision based on the clues that have been pointed out and interpreted to me. On the balance of probabilities, I accept that the Department carried out a supersession on grounds of relevant change of circumstances on 13 February 2023 for the purposes section 69ZB(3).

55. I had asked to see the entitlement decision for the purpose of assessing whether such grounds did in fact exist. The appellant had told the Department that she was entitled to an occupational pension and when she would be receiving it. My question to Mr Donnan was what relevant circumstance subsequently changed. Was this not simply a case of information about the specific amount that was to be paid becoming known against a background of a fixed set of circumstances?

56. Mr Donnan submitted that a change of circumstances was plainly present on the basis that there was a change in the rate of the occupational pension received by the appellant. This was something that would affect the rate of ESA that the appellant would be entitled to going forward. He submitted the first payment received was followed by a lower payment in the second and subsequent months, and that reduction would be a further relevant change of circumstances.

57. Whereas I have sympathy for the appellant's situation, I accept that Mr Donnan's submission is incontestable. A relevant change of circumstances is a change that would have a material impact on an earlier decision and render it incorrect. Receipt of the increased pension payment at the end of June 2022 was such a change of circumstances, as it meant that the decision of 21 June 2022 incorrect. This means that there were grounds to supersede the original decision awarding ESA, and that the resulting decision under section 69ZB(3) would have effect from the first day of the benefit week in which the relevant change of circumstances occurred. By applying the legislation to the appellant's case in the way that it did, the tribunal did not err in law.

58. I also observe that Mr Donnan is correct to the extent that, if grounds to supersede on the basis of a relevant change of circumstances were not established, an any time revision under regulation 9 and regulation 21 of the Decisions and Appeals Regulations could equally have been carried out to the same effect. Thus, the Department would arrive at the same outcome by an alternative route. This was not what happened in the present case, but I am satisfied that, even if relevant change of circumstances did not accurately describe the receipt of the pension payslip confirming the amount of pension received, the tribunal would have been obliged to arrive at the effective date for a section 69ZB(3) decision by way of revision.

59. It follows that I must disallow the appeal.

60. As highlighted by Deputy Commissioner Gray in the determination on file *A1/23-24(ESA)*, the Department retains a discretion not to exercise the right to recover. The elements that will be considered by the Department are set out in the policy highlighted above. These include matters such as whether the overpayment arose through the Department's conduct and the state of health of the claimant. The tribunals and Commissioners have no influence over the implementation of that policy. It is a matter for each individual claimant as to whether they wish to seek a waiver of recovery, but that it clearly open to the appellant even though she has been unsuccessful in the present proceedings.

(Signed):

ODHRÁN STOCKMAN
COMMISSIONER

(Dated): 13 February 2025