Application No: A1/23-24(ESA)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Application by the Department to a Social Security Commissioner

on a question of law from a Tribunal's decision

dated 25 November 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

I refuse the application for an oral hearing of this leave application.

I refuse the claimant’s application for leave to appeal. The decision of the Appeal Tribunal sitting at Craigavon on 25 November 2022 under reference CN/6524/21/51/P is correct as a matter of law and it stands.

**REASONS**

1. This is an application by the claimant (or the applicant - I use both terms) for leave to appeal from the decision of the Appeal Tribunal made following an oral hearing at Lurgan in November 2022. The single legally qualified member upheld a decision of the Department for Communities made on 18 October 2020 that the claimant had been overpaid Employment and Support Allowance (ESA) in the sum of £2,534.60, and that the overpayment was recoverable from her.

2. In April 2023 a Statement of Reasons for the decision of the tribunal was issued, and the claimant asked for leave to appeal that decision to the Commissioners. On 29May the same legal member refused leave to appeal, and the application is renewed before me.

3. The applicant has asked for an oral hearing of her application; however, the matter relates to a discrete point about the recoverability of overpayments of benefit, and the law on the issue is clear following two decisions. The first, from Upper Tribunal Judge Jacobs in 2018, was followed by Mr Commissioner Stockman in 2021, after an oral hearing in a case the facts of which are effectively a mirror of the facts before me. The claimant has been able to comment on those cases. I have read the submissions, and an oral hearing will not add materially to that body of argument; having considered my powers in this regard under section 23 of the Social Security Commissioners (Northern Ireland) Procedure Regulations 1999, I refuse that application. Section 23 reads:

 **Requests for hearing**

 23 (1) Subject to paragraphs (2), (3) and (4), a Commissioner may determine any proceedings without a hearing.

 (2) Where a request for a hearing is made by any party, the Commissioner shall grant the request unless he is satisfied that the proceedings can properly be determined without a hearing.

4. I am so satisfied. I am grateful for the detailed written submissions of the applicant, acting for herself, and the respondent department (“the department”) through Mr Donnan. I am able, fairly, and properly, to determine the proceedings on the basis of them without a hearing.

5. It is accepted that the overpayment arose due to departmental error; my reasons explain why it was nonetheless recoverable.

 **Overview: the overpayments system in brief**

6. Overpayments of benefit do occur, and the main legislation governing them is section 69 of the Social Security Administration (NI) Act 1992 (“the Administration Act”). The complexity of those provisions generated a great deal of case law throughout the UK which, over the years, settled the major aspects. Importantly, within the main body of social security law (housing benefit being an exception) an overpayment was only recoverable, that is, only repayable, where the department could establish that a claimant had either misrepresented or failed to disclose a relevant circumstance which caused, or materially contributed to, the overpayment. That may have been the misreporting of a wrong date or figure, or the accidental omission of a relevant fact but, whether wholly innocent or downright fraudulent, if it triggered the overpayment, then the amount paid in error could be recouped. Conversely, where the overpayment was not due to claimant error, it could not be recovered.

7. The right of the Department to recover overpayments of benefit changed in 2017. Changes were made by the Welfare Reform Order (NI) 2015 to alter the Administration Act, adding section 69ZB (referred to from now on as just “section 69ZB”) which provided for the recovery of any benefit overpaid as follows:

 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).

8. The changes to the law relating to overpayments set out above have also been made in Great Britain, and below I will refer to those changes in the context of decided case law from both Great Britain and Northern Ireland.

 **The facts here**

9. The papers before me show that the applicant made her claim for a contribution-based employment and support allowance on 20 May 2019 for the period from 19 June 2019 during a period of ill-health absence from her role as a civil servant. She explained in the claim form that, from 2 August 2019, she was to retire on medical grounds, and from then she was to receive an occupational pension. The amount anticipated was stated. An award of ESA was made in a decision of 5 June 2019. In January 2020 she received a form requesting details of the pension, which she completed and returned promptly.

10. On 19 February 2020 the ESA award was found to have been made without regard to her income from an occupational pension, and the awarding decision was superseded. Later she was informed of the overpayment, and that it was to be recovered from her.

11. Following an unsuccessful mandatory reconsideration, she appealed to the Appeal Tribunal.

 **The Tribunal**

12. There was no dispute before the tribunal that she had been overpaid the sum of £2534.60, nor that ESA is one of the benefits mentioned in section 69ZB, the new, wider overpayment recovery provision. The position there, as here, is whether, as the claimant argues, the law really means that she cannot effectively challenge the principle of the overpayment before the tribunal, if it was not her fault.

 **The parties' positions before me**

13. I am indebted to both parties for their helpful and concise written submissions, which as there is no material factual disagreement, concentrate appropriately on the legal issues.

14. Whilst the department accepts that the initial claim form did disclose the potential occupational pension due from 3 August 2019, and it doesn’t shy away from its own errors in factoring in that known position in relation to the overpayment arising, it points out that there was no follow up confirmation of the pension payments by the claimant. I don’t need to say anything more about that, given my legal conclusions as to the breadth of section 69ZB.

 **The claimant**

15. The claimant has strongly held views as to the Department being able to recover payments made to her in circumstances where, she maintains, she had made full and proper disclosure of her own finances and any overpayment was caused by its own negligence. She argues vehemently that the addition of section 69ZB cannot have been intended to have the effect as found by the tribunal, contending that the use of the word ‘may’ in the context of the Department being entitled to recover, vests it with discretion, and that discretion continued to be vested in the tribunal.

 **The department**

16. In a helpful submission Mr Donnan sets out the relevant case law, explaining the concepts clearly, indeed, in terms to which I adopt in my own explanation. He also alludes to a departmental waiver scheme, something to which I will return.

 **Leave to appeal**

17. A party applying for leave to appeal must show an arguable case that the tribunal misapplied the law. Here, the claimant’s ability to do that is hampered by the legal issue being previously determined in two separate cases. The first was decided by Upper Tribunal Judge Jacobs in *LP v Secretary of State for Work and Pensions* [2018] UKUT 332, (“*LP*”) a case in which he was applying in Great Britain section 71ZB of the Social Security Administration Act 1992, the equivalent provision to section 69ZB in Northern Ireland; the second by Mr Commissioner Stockman ***Department for Communities-v-SM (ESA) [2022] NICom 22 (C1/22-23(ESA))***, applying section 69ZB following an oral hearing in a case with a quite remarkable factual similarity to this case that, but for the decision of the tribunal in favour of the claimant, it mirrors it. I deal initially with that aspect.

 Commissioner Stockman said:

“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.”

18. The factual overlap is plain, right down to both claimants being civil servants claiming for periods of ill-health prior to planned medical retirement, and the department mistakenly overlooking the evidence provided by each claimant as to their occupational pension. In both cases the department erred in ignoring that evidence with the result that the claimants were overpaid.

19. Commissioner Stockman’s interpretation of the legal question was clear. He explained the different position of what he described as “old style” ESA claims, overpayments of which are in a protected category by virtue of the transitional provisions of Article 3(3) of the Welfare Reform (Northern Ireland) Order 2015 (Commencement No. 8 and Transitional and Transitory Provisions) Order 2017 which continues the provision under which some claimant error must be established before recovery is possible. The tribunal had gone wrong by applying that provision, or failing to apply the new legislation, section 69ZB, instead using section 69(1) to overturn the overpayment decision.

20. This claim, however, like that in Commissioner Stockman’s case is for “new style” ESA, which is covered by Section 69ZB(1)(c). He explained the result thus (at paragraph 21):

“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.”

21. Earlier, in *LP*, Upper Tribunal Judge Jacobs had arrived at the same conclusion on the identically worded new provision under the social security legislation of Great Britain, section 71ZB Social Security Administration Act 1992. Whilst the factual circumstances were different, the principles about overpayment recovery and the changes the new provision wrought apply. At paragraph 10 Judge Jacobs explained the new provision,

“That means that a claimant is liable for an overpayment even if it was caused by the Secretary of State.”

 At paragraph 11

“A claimant can appeal against the amount of payment recoverable under section 71ZB, but nothing else.”

22. I add that Mr Donnan summarised this aspect well in his submission, saying, “section 69ZB does not take account of causation and simply holds that ‘any amount paid in excess of entitlement may be recovered’”.

 And at paragraph 12 of *LP*

“The cause of the overpayment is irrelevant on an appeal under section 71ZB. It may be relevant to whether the Secretary of State decides to recover overpayment, but the First-tier Tribunal and Upper Tribunal have no power to deal with that, as active recovery cannot be the subject of an appeal.”

23. That final remark is relevant to the claimant’s arguments before me as to whether the discretion in the Secretary of State as to whether an overpayment is in fact recovered vests in the tribunal.

24. These decisions are not binding on me, but they are two highly persuasive, reasoned conclusions, and I would depart from them only if I felt them to be wrong. I do not: my reading of the legislation itself and the submissions of the parties does not permit a different interpretation. Accordingly, I cannot find an arguable case on which to grant leave to appeal.

25. This application does, however, add a further dimension to the issue. Mr Donnan deals in his submission with the process that is followed by the department where it has decided to exercise its discretion to recover. He cites a document, The Overpayment Recovery Guide, which is available online and provides details of a waiver application scheme (at chapter 8 of that Guide). I do not go into specifics here, but Mr Donnan refers to the value of providing with an application, supporting evidence as to any health condition, particularly perhaps one that might be impacted by recovery of an overpayment, together with details of how the overpayment arose, for example by error or poor administrative procedures by the department. It seems to me that the existence of this scheme might be more widely known, and I thank Mr Donnan for bringing it to my attention.

 

(signed): P Gray

Deputy Commissioner (NI)

18 December 2023