JFR-v-Department for Social Development (IS) [2016] NICom 21

Decision No: C6/15-16(IS)

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

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

**INCOME SUPPORT**

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 24 September 2014

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application for leave to appeal from the decision of a tribunal sitting at Bangor.

2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without a hearing.

3. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a newly constituted tribunal.

**REASONS**

 **Background**

4. The applicant claimed income support (IS) from the Department for Social Development (the Department) from 1 December 2006. He did not declare any pension income. He had previously claimed IS from 1 September 1999 to 16 May 2006. In an A2 review form completed on 1 November 2003 he had declared a war disablement pension (WDP) of £40.44 per week. Following the receipt of information from November 2008 to March 2014, on 26 March 2014 the Department decided that the applicant’s WDP had to be taken into account from 5 December 2006 to 18 December 2013, leading to entitlement to a reduced rate of IS over that period. The applicant appealed, requesting an oral hearing of the appeal and nominating Donnelly and Wall solicitors as his representatives.

5. The appeal was listed for hearing on 4 September 2014, but was postponed on the application of the applicant as his solicitor was to be on leave, stating that his solicitor had not received notice of the hearing and that he was mentally unable to represent himself. The hearing was relisted for hearing on 24 September 2014. A tribunal consisting of a legally qualified member (LQM) sitting alone proceeded to hear the case in the absence of the applicant and his representative. The applicant requested a statement of reasons for the tribunal’s decision. This was issued on 28 January 2015. The applicant applied to the LQM for leave to appeal to the Social Security Commissioner. Leave to appeal was refused by a determination issued on 3 March 2015. On 31 March 2015 the applicant applied to a Social Security Commissioner for leave to appeal.

 **Grounds**

6. The applicant, represented by Mr Higgins of Donnelly and Wall solicitors, submits that the tribunal erred in law by denying him representation at his appeal. The Department was invited to make observations on the applicant’s grounds of appeal.

7. Mr Kirk of Decision Making Services (DMS) replied on behalf of the Department. He accepted that the tribunal had erred in law by proceeding to determine the appeal in the absence of the applicant or his representative without seeking further explanation of their absence.

 **The tribunal’s decision**

8. The tribunal recorded that the case had previously been adjourned on at least one occasion. The applicant did not attend and nor did his previously nominated representative, Mr Higgins. The tribunal recorded that no adjournment was sought and no reasons explaining absence were given. It states “As no one had attended before the panel today it was decided to proceed with the appeal in the absence of any request for adjournment or explanation as to absence”.

9. The tribunal recorded that the applicant had been receiving IS on the basis of incapacity for work from 1 December 2006. In the course of that claim he had not disclosed any pension payments or a war disablement pension. He had a previous IS claim from 1 September 1999 to 16 May 2006, and in the course of that claim he declared his war disablement pension on 1 November 2003. The tribunal decided that the IS payable should have been paid at the actual weekly rate less the amount of war disablement pension, subject to a £10 disregard, and less the amount of an occupational pension received.

 **Assessment**

10. I directed the applicant’s solicitor to provide evidence of requesting an adjournment of the appeal. I was informed that a telephone request had been made to the Benefits Office on the day before the hearing. The Benefits Office is an office of the Department of Social Development – the decision maker in the case who made the decision that was under appeal. Appeals, however, are administered by the Appeals Service, which is part of the NI Courts and Tribunals Service, and appeal tribunals are an independent judicial body with no connection to the Department.

11. No attendance note relating to or recording the telephone call was available and there was no record of any response on the file. Therefore, in requesting an adjournment the solicitor had contacted the other party to the appeal, rather than the tribunal. He retained no record of a response to the request. However, the real issue here is that, as he had not contacted anyone with jurisdiction to adjourn the tribunal, he cannot have received any notice to the effect that the tribunal had been adjourned. As he had a Crown Court trial proceeding on the same day as the tribunal, it appears that the solicitor did not then attend the tribunal hearing, without knowing whether or not it had been adjourned.

12. The applicant, in his first ground, submits that he was “not permitted to attend the hearing and to challenge the decision”. In all the circumstances, this is patently a ridiculous assertion. The tribunal had sent the applicant notice of the date and place of hearing. He was aware of the date and place of hearing, and the tribunal expected the applicant to attend. No communication had been made from the applicant to the tribunal to seek an adjournment. No communication had been made from the tribunal to the applicant to indicate that the hearing was not going ahead. Therefore the tribunal cannot be accused of not permitting him to attend the hearing.

13. Yet the applicant did not attend, and he has not explained his absence. It seems to me that the only person who might have advised the applicant not to attend the hearing was his solicitor. However, as indicated above, the solicitor did not know that the tribunal was adjourned, since nobody with jurisdiction to adjourn had been contacted by him. Therefore, he cannot have received any communication to this effect and cannot have advised the applicant not to attend. Therefore, the only person responsible for the applicant failing to attend the hearing, and to challenge the decision of the Department, was the applicant himself.

14. More generally, the applicant submits that he had been denied representation in his case. The submissions of Mr Kirk for the Department are supportive. He observes that a tribunal must decide whether it should proceed in the absence of an appellant, as a separate question to the issue of adjournment.

15. As was observed by the Tribunal of Commissioners in *SG-v-Department for Social Development* (DLA)(T) [2013] NI Com 12,

“47. Irrespective of whether a postponement application has been made previously, where an appellant does not attend an appeal hearing, the LQM must make a decision on whether or not to proceed in the appellant’s absence. By regulation 49(4) this will require the LQM to have regard to all the circumstances, including any explanation offered for the absence. Where there has been a postponement application, it would appear to us that the written postponement application should be considered by the LQM as it is a relevant aspect of the circumstances which the LQM is required to consider. If the LQM decides not to proceed with the hearing, he or she may give directions with a view to the determination of the hearing”.

16. Mr Kirk points out that the applicant had previously made the tribunal aware that he would not represent himself. This was in an application for postponement made on 27 August 2014 indicating that he was represented by solicitors. The tribunal in the present case noted that neither the applicant nor his previously nominated representative had attended and that no adjournment had been sought and no reasons for their absence had been provided. It was also observed that no Departmental presenting officer was present and no adjournment was sought. In the context the tribunal simply said, “As no one had attended before the panel today it was decided to proceed with the appeal in the absence of any request for adjournment or explanation as to absence”.

17. However, Mr Kirk points out that in *ADR-v-Department for Social Development* [2011] NICom 191, Chief Commissioner Mullan stated that “a tribunal should give consideration to whether it is appropriate to proceed in the appellant’s absence and give consideration to whether an adjournment should be given in order to permit the appellant to attend”. Mr Kirk submits that it was always clear that the applicant had intended to be represented by a solicitor. He submits that the record of proceedings does not show that the tribunal gave consideration to whether to adjourn to enable the applicant to attend against this background. He submits that the decision to proceed was contrary to the requirements of natural justice.

18. I observe that one of the grounds for setting aside a decision of an appeal tribunal under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 is that a party or his representative has not been present at a hearing relating to the proceedings. The Commissioners have previously observed that there is overlap between the setting aside power and error of law for breach of the rules of natural justice or violation of Article 6 of the European Convention on Human Rights. Judge Martin QC in C5/05-06(IB) has referred to this as a “concurrent jurisdiction”.

19. Against this background, I accept that there is force in the submission of Mr Kirk, made by the Department in the applicant’s interests. It will be necessary in all cases where a claimant does not attend a hearing, having said that he will attend and be represented, for a tribunal to make a decision as to whether to proceed in his absence. All the circumstances must be taken into account, and not simply the fact of absence. In appropriate cases, efforts should be made to contact the appellant or his representative. In the absence of an indication that the applicant was no longer intending to appear or be represented, and in the absence of any effort to seek an explanation for the absence, reasons should be stated for proceeding.

20. The circumstances in this case would give grounds for setting aside under regulation 57. In the light of the jurisprudence on concurrent jurisdiction, I accept Mr Kirk’s submission that the tribunal has not acted in accordance with the principles of natural justice and has erred in law.

21. I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

21 March 2016