MD-v-Department for Communities (CA) [2017] NICom 48

Decision No: C1/17-18(CA)

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

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

**CARERS ALLOWANCE**

Appeal to a Social Security Commissioner

on a question of law from a Tribunal's decision

dated 4 February 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 4 February 2016 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

2. For further reasons set out below, I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal to which I have not had access. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of whether an overpayment of Carer’s Allowance (CA), the period over which any such overpayment has occurred, the amount of any such overpayment and whether any such overpayment is recoverable from him remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

 **Background**

5. On 2 September 2014 a decision maker of the Department superseded an earlier decision of the Department dated 9 May 1994 and decided that the appellant was not entitled to CA for the periods from 4 July 2005 to 31 July 2005, 31 July 2006 to 1 October 2006, 30 October 2006 to 4 February 2007 and 2 April 2007 to 5 August 2007.

6. On 31 January 2015 a decision maker of the Department decided that an overpayment of CA amounting to £2136.65, for the period from 4 July 2005 to 5 August 2007, had occurred, which was recoverable from the appellant.

7. An appeal was received in the Department on 10 April 2015. On 28 July 2015 another decision maker superseded and changed the decision dated 2 September 2014 and decided that the appellant was gainfully employed with earnings in excess of the stipulated earnings limit from 30 April 2007 to 5 August 2007 but not for other periods previously stated.

8. On 6 August 2015 a decision maker decided that an overpayment of CA, amounting to £681.10 for the period from 30 April 2007 to 5 August 2007, had occurred which was recoverable from the appellant.

9. An appeal against the decision dated 6 August 2015 was received in the Department on 8 October 2015.

10. The appeal tribunal hearing took place on 4 February 2016. The appellant was present and was represented by Mr O’Farrell of the Citizens’ Advice organisation. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 6 August 2015.

11. On 17 May 2016 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 31 May 2016 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

 **Proceedings before the Social Security Commissioner**

12. On 17 June 2016 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 29 June 2016 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 18 August 2016, Mr Smith, for DMS, supported the application for leave to appeal. Written observations were shared with the appellant and Mr O’Farrell on 21 August 2016. Written observations in reply were received from Mr O’Farrell on 5 September 2016 which were shared with Mr Smith on 8 September 2016. A further submission was received from Mr Smith on 15 September 2016. This was, in turn, shared with the appellant and Mr O’Farrell on 19 September 2016.

13. On 13 April 2017 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that an arguable issue arose as to whether the appeal tribunal had applied the principles set out in *C6/08-09 (IB)*. On the same date I directed an oral hearing of the appeal. The oral hearing was listed for 1 June 2017. In advance of that date, and after reviewing the contents of the file, including the detailed and helpful Case Summaries prepared by Mr O’Farrell and Mr Smith, I determined that an oral hearing would not be required. Both parties were in agreement with that determination.

 **Errors of law**

14. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

15. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

“(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

 **The error of law in the instant case**

16. In his constructive and analytical written observations on the application for leave to appeal, Mr Smith made the following submissions:

‘(The appellant’s) appeal against the recoverability decision was combined with his appeal against the entitlement decision to remove entitlement to CA for the period 30.04.05 to 05.08.07. His letter of appeal concentrated on the entitlement appeal in the belief that should he win that appeal he would also win his appeal against the recoverability decision. As a consequence (the appellant) has not identified any error of law in the Tribunal’s decision on the recoverability appeal and for this reason I would not support his application for leave to appeal.

**Further observations**

Pursuant to the Northern Ireland Commissioner’s decision *C6/08-09(IB)* it is incumbent on Tribunals when considering an overpayment appeal to consider where the obligation to provide the relevant information came from. At paragraphs 21 to 24 of that decision Commissioner Mullan (now Chief Commissioner Mullan) summarised previous jurisdictions on overpayment appeals such as *B v Secretary of State for Work & Pensions* (reported as *R(IS)9/06*); *Hinchy v Secretary of State for Work & Pensions* ([2005] UKHL 16) and *R(A)2/06.* At paragraphs 25 and 26 Chief Commissioner Mullan gave his analysis of those decisions when he held:

*25. In my view, these decisions mean that an appeal tribunal, when determining whether an overpayment of a social security benefit is recoverable on the basis of a failure to disclose, will have to consider where the requirement to provide the relevant information came from. This will necessitate identifying whether the case comes within the first or second duty in regulation 32.*

*26. In the case of the first duty, it will also require the provision of proof by the Department that the requirement to provide information was made to the claimant. That proof may be in the form of receipt of an information leaflet such as Form INF4 or instructions in an order book. It will not be enough, however, for the information leaflet or order book to be produced. The wording of the relevant instructions will have to be looked at in close detail to ensure that the instructions to disclose were clear and unambiguous.*

Regulation 32 provides:

***32.****— (1) Except in the case of a jobseeker’s allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.*

*(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.*

*(1B) Except in the case of a jobseeker’s allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—*

*(a) the continuance of entitlement to benefit; or*

*(b) the payment of the benefit,*

*as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—*

*(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or*

*(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).*

In light of NI Commissioner’s decision *C6/08-09(IB)* the Tribunal was obliged to identify where the duty on (the appellant) to report that he had commenced work arose i.e. did the duty arise from the first duty which originates from paragraph (1A) of Regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 or the second duty contained within paragraph (1B)?

The Department’s submission to the Tribunal asserted that (the appellant) was supplied with clear and unambiguous instructions by way of Form 2207/4291 advising him of changes in his circumstances which he must report and where and when he should report such changes. On page 2 of the form under the heading ‘**Important changes you must tell us about’**, (the appellant) was instructed to “...tell us **straight away** if anything changes about yourself or the disabled person you are looking after.” He was further instructed:

*In particular, you must tell us about any of these changes:*

* You start work as an employee or self-employed person, either full-time or part-time, temporary or casual, whatever your earnings.

The duty on (the appellant) to report that he had commenced employment with … in 2005 therefore arises from the first duty within Regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 or more precisely paragraph 1A of Regulation 32.

There is no indication in the Reasons for Decision that the Tribunal considered where (the appellant’s) duty to disclose that he had commenced employment came from. There is nothing to suggest that the Tribunal considered Regulation 32 of the Claims and Payments Regulations or identified which of the duties (the appellant) was under to report that he had commenced work with … in 2005. For this reason I submit that the Tribunal has erred in law in failing to adhere to the principles in the NI Commissioner’s decision *C6/08-09(IB)*.’

17. I am in agreement with Mr Smith’s observations and for the reasons which have been outlined by him agree that the decision of the appeal tribunal is in error of law. I would add to that analysis paragraph 53 of my decision in *DJ-v-Department for Social Development (IB)*([2010] NICom 100, C17/10-11(IB)) in which I supplemented what I had said in *C6/08-09 (IB)*, as follows:

 ‘My comments reflect those of Upper Tribunal Judge Lane in *DG v Secretary of State for Work & Pensions* ([2009] UKUT 120 (AAC)). At paragraphs 13 to 18 of her decision, she summarised the most recent case-law on the source of the duty to disclose:

‘13. Section 71(1) of the Social Security Administration Act 1992 clearly entitles the Secretary of State to recover an overpayment which arises as a consequence of a failure to disclose a material fact, however innocent. The appellant’s return to work was undoubtedly a material fact.

14. In *R(IS)9/06* a Tribunal of Commissioners reconfirmed the established principle that the failure to disclose a material fact under section 71(1) presupposed the existence of a duty to disclose. However, it rejected the proposition laid down in previous cases, including *R(SB)21/82 and R(SB)54/83*,that the duty derived from section 71(1) and its breach established by showing that the claimant failed to disclose a material fact where such disclosure was reasonably to be expected.

15. The Tribunal of Commissioners held instead that the source of the duty was regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987, as then formulated, which imposed various obligations to furnish information and notify changes of circumstances. Regulation 32(1) was amended into its current form from 5 May 2003 by the Social Security and Child Support (Miscellaneous Amendments) Regulations 2003 (SI 2003/1050). Though the regulation is now laid out in three paragraphs, 32(1), (1A) and (1B), the duties remain essentially similar to those in the previous formulation. Unsurprisingly, the Tribunal of Commissioners confirmed that their reasoning was equally applicable to the amended form of the regulation. The reasoning of the Tribunal of Commissioners in *R(IS)9/06* was upheld in full by the Court of Appeal in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929. Paragraphs (‘§’) 23, 27, 29 and 42; and also §11 of *B v Secretary of State)* refer.

16. It is clear from *R(IS)9/06* (§54) and *B v Secretary of State for Work and Pensions* (§ 36 and 40) that section 71(1) does *not* include a test that a claimant must reasonably be expected to disclose a material fact (‘the reasonable expectation’ test) before the Secretary of State can recover an overpayment. The Court of Appeal went so far as to refer to the importation of that test into section 71(1) as incoherent. *R(SB) 21/82* and subsequent cases purporting to impose this test*,* including *R(SB)54/83* upon which decision makers frequently rely, were considered to be wrong.

17. Although the Tribunal of Commissioners and Court of Appeal in *R(IS)9/06* and *B v Secretary of State for Work and Pensions* were dealing specifically with the scope of what is now regulation 32(1)/(1A), their reasoning is equally applicable to the relationship between section 71(1) and regulation 32(1B). The test of reasonable expectation is as legally incoherent for regulation 32(1B) as it is for regulations 32(1) and (1A). Indeed, the implication of this test into section 71(1) overpayments by reference to a breach of the duty in regulation 32(1B) would, in effect, impose a double hurdle on the Secretary of State, who would first have to establish what the claimant might reasonably be expected to know might affect his benefit, and then whether he could reasonably be expected to make a disclosure. I note that the learned authors of Sweet and Maxwell’s Volume III, Administration, Adjudication and the European Dimension of Social Security Legislation 2008/09 still refer to the reasonable expectation test in their commentary on regulation 32(1B) (§2.187), but they may have overlooked the need consequent on the change in relation to section 71(1) when amending the commentary for regulation 32 of the Claims and Payments Regulations.

18. I therefore conclude that the gateway duties to recovery are as defined in regulation 32, and it is to those duties that the tribunal must look when deciding if a case for recovery is made out.’

18. I would also add that although concessions were made at the oral hearing of the appeal about the periods during which an overpayment of CA had occurred, the appeal tribunal has made an express finding that the appellant had failed to disclose the material fact that he was gainfully employed from 4 July 2005 and utilised this finding to decide that an overpayment of CA, for the period from 30 April 2007 to 5 August 2007, had occurred, and that the overpayment was recoverable from the appellant, without undertaking an analysis of the source of the appellant’s duty to disclose.

 **Disposal**

19. The decision of the appeal tribunal dated 4 February 2016 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against and refer the case to a differently constituted appeal tribunal for re-determination.

20. In his further submission of 15 September 2016, Mr Smith made the following observations:

‘ … should the Commissioner accept, in relation to the entitlement issue, that the decision dated 28.07.15 does not satisfy Section 69(5A) of the Social Security Administration (NI) Act 1992 and as a consequence the recoverability decision dated 06.08.15 is not a valid decision and sets the decisions of the Tribunal aside, I submit the decisions in force would be the entitlement decision of the Department dated 02.09.14 and the recoverability decision dated 31.01.15.

Subsequently, the Department will have the opportunity to make the decisions it should have made in the first instance i.e. revise the decision dated 02.09.14 to take account of expenses to which (the appellant) is entitled and reinstate entitlement to CA for the relevant periods and then make a recoverability decision seeking recovery of overpaid CA as appropriate.’

21. In C2/17-18(CA) I have set aside the decision of the appeal tribunal by determining that the Departmental decision of 28 July 2015 does not satisfy section 69(5A) of the Social Security Administration (Northern Ireland) Act 1992. Accordingly the Department is provided with the opportunity to undertake the further decision-making outlined by Mr Smith above.

(signed) **K Mullan**

**Chief Commissioner**

**3 October 2017**