Application No: A2/24-25 (ESA)

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

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

**EMPLOYMENT SUPPORT ALLOWANCE**

Application by the above-named claimant for

leave to appeal to a Social Security Commissioner

on a question of law from a tribunal's decision

dated 14 December 2023

DETERMINATION OF THE SOCIAL SECURITY COMMISSIONER

I refuse permission to appeal.

**REASONS**

1. This is absolutely no reflection on the appellant, who seems to have done all he possibly could to inform the Department of the occupational pension he had started to receive, but who nonetheless is faced with a recoverable overpayment.

2. An appeal to the Social Security Commissioner is only available where the decision of the Appeal Tribunal (the Tribunal) was in error of law. Here, however it correctly applied the law. If the appellant feels it has operated unfairly in his case, that is a consequence of choices made by the legislator; both the Tribunal and Commissioners are powerless to do differently.

3. The Tribunal in its decision made on 14 December 2023, following its paper hearing held the previous day, ruled that:

“New style Employment and Support Allowance (Contributory) in the sum of £1,251.25 for the period 24 February 2021 to 11 May 2021 has been overpaid to the Appellant and may be recoverable from him.”

4. There is no dispute about the amount involved: The appellant’s objection is to the principle, when he had done all that was required of him.

5. Section 69ZB of the Social Security Administration Act (Northern Ireland) 1992 provides so far as material:

“(1)  The Department may recover any amount of the following paid in excess of entitlement—

…

(c)  employment and support allowance

…

(2)  An amount recoverable under this section is recoverable from—

(a)  the person to whom it was paid,

… .

(3)  An amount paid in pursuance of a determination is not recoverable under this section unless the determination has been—

…

(b)  revised or superseded under Article 10 or Article 11 of the Social Security (Northern Ireland) Order 1998,

 except where regulations otherwise provide.

…”

6. In his submission on behalf of the Department, Michael Donnan refers to three decisions which have considered the effect of s.69ZB (or its equivalent in Great Britain, Social Security Administration Act 1992, s.71). The submission, with copies of all three decisions, was sent to the appellant, who has not taken up the invitation to respond.

7. The three cases are:

*LP v Secretary of State for Work and Pen*sions [2018] UKUT 332 (AAC)

*Department for Communities v SM (ESA)* [2022] NI Com 22 (C1/22-13 (ESA)); and

*A1/23-24(ESA)*

8. It is clear from each of those decisions, extracts from which were highlighted by Mr Donnan in his submissions, that the calculation of the overpayment is justiciable on an appeal against a decision under s.69ZB but there is no dispute about that in the present case. It is equally clear from the decisions that the Department does not have to point to a misrepresentation or failure to disclose a material fact before a sum can be held to be recoverable. It follows that the fact that the appellant did all he was required to do does not call into question the recoverability of the amount in question.

9. Section 69(ZB)(3) requires the original decision to have been revised or superseded. In the present case the Tribunal was satisfied that it had been, on 20 September 2021. No challenge is made to that finding and, notwithstanding the evident shortcomings in the Department’s provision of documentation in the Tribunal proceedings, it was a finding that was open to the Tribunal to make, based in particular on the screen print in evidence at page 80 “20/09/21…COFC ENDING AWARD”. (“COFC” indicates “Change of Circumstances”.)

10. There is, however, a difference between being “recoverable” (which is all the Tribunal is permitted to be concerned with) and whether it actually is recovered, which is dealt with by the Department’s Debt Management office, over which neither the Tribunal nor the Social Security Commissioners have any jurisdiction. (The Tribunal’s ruling that the sum “may be recoverable” slightly unhelpfully blurs this distinction, but the legal position is clear.)

11. At paras 31 to 33 of his submission, Mr Donnan helpfully provides suggestions as to the sort of points which could usefully be made in an application for recovery of the sum to be waived, together with a link to the *Benefit Overpayment Recovery: Staff Guide.*

12. I have to refuse leave to appeal. It is for the appellant to decide whether to make an application as described above to the Department’s Debt Management office.

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(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

30 September 2024