AI -v- Department for Communities (UC) [2025] NICom4

Decision No: C8/24-25(UC)

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

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

**UNIVERSAL CREDIT**

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 27 March 2024

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I give leave to appeal and allow the appeal. I direct that the Appellant’s appeal against the Department’s decision of 8 July 2022 be remitted to the Appeal Tribunal (the tribunal) to be considered entirely afresh by a wholly differently constituted panel.

2. By the above decision, the Department for Communities (the Department) had determined that the Appellant had Limited Capability for Work (LCW) but did not have, nor could be treated as having, Limited Capability for Work Related Activity (LCWRA).

3. A further decision, taken on 23 January 2024, reached a similar conclusion. The present appeal now concerns a “closed period” from 10 May 2022 to 22 January 2024 (inclusive).

4. On 27 March 2024 the Appellant’s appeal against the decision of 8 July 2022 came before the tribunal in a telephone hearing. The appeal was dismissed.

5. With the assistance of her representative, Katie MacCabe of Law Centre NI, the Appellant has sought leave to appeal to the Commissioners. The ground of appeal, which has four sub-grounds, was that the tribunal, in finding that the Appellant would be able to take part in work-related activity, failed adequately to consider risk in the light of its own earlier findings.

6. In the usual way, the comments of the Department were invited on the application. These were provided by Matthew Woods, who by a submission dated 16 October 2024 supported the application on three of the four sub-grounds advanced. He indicated that his submissions on the application for leave could be treated as observations on the appeal under regulation 18(1) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999.

7. The Appellant had scored 27 points, but without meeting any of the descriptors in Schedule 7 of the Universal Credit Regulations (Northern Ireland) 2016/216 which would have resulted in her being found to have LCWRA.

8. Accordingly, the issue was whether she could meet Schedule 9, para 4 of the Regulations, which provides that a claimant may be treated as having LCWRA where:

“The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.”

9. The tribunal found, among other things, that:

a. engagement in social contact with someone unfamiliar to the Appellant was not possible for the majority of the time;

b. the Appellant would be affected by unplanned changes to her routine; and

c. accepted the Department’s position that she could not go to somewhere unfamiliar on her own.

10. These conclusions were reflected in the corresponding points awarded to the Appellant.

11. When it came to Schedule 9, para 4, the tribunal reasoned:

“The HCP had considered this aspect of the claim and had come to the conclusion that there was no substantial risk having considered the Appellant’s mental and physical illnesses. We know that the work-related activities will be things like writing a diary, checking what jobs are available in the area, learning how to write a CV, if appropriate attending training courses to learn new skills, if appropriate taking part in activities aimed at helping claimants to feel better. The tribunal believes that the Appellant would be able to partake in work related activity without substantial risk to the Appellant or any other person. We find that the Appellant could have undertaken this type of work *(sic)* safely and without substantial risk…”

12. As a preliminary, it appears that the tribunal may have been using its own knowledge about what constitutes “work-related activity”. There was however evidence on this in the tribunal bundle (page 96) which included elements such as “participating in an employment programme” which, although detail was lacking as to what that might actually entail, might be thought more onerous than the examples picked out by the tribunal from their own knowledge. That is not a point relied upon in the grounds of appeal, but the grounds are at least as valid in the face of the evidence at page 96.

13. Essentially, the ground is that the tribunal failed to consider the impact on risk to the Appellant of the forms of work-related activity it was relying on, given its findings on a, b and c above. Thus, attending training courses, taking part in activities to make her feel better and engaging face to face with a work coach who is unfamiliar to her were at odds with finding a. Attending training courses might require the appellant to attend unaccompanied and the risk to her in the light of finding c should have been considered. There would always be a risk of a last- minute change in work-related activity and if that were to happen, she would be at risk of panic attacks and anxiety – see finding b.

14. Mr Woods supports the appeal on these grounds and in my view he is right to do so. Effectively the tribunal simply lists what sorts of work-related activity it has in mind then proceeds to a conclusion that the Appellant could undertake them without the sort of risk which Schedule 9 para 4 envisages. There is no indication that it addressed its mind to the interplay with findings a to c above. Alternatively, if it did, but did not state how it reconciled the findings and its conclusions on risk, its reasons are inadequate.

15. There is a fourth sub-ground to the appeal, which Mr Woods does not support, but Ms MacCabe maintains. She submits that the ongoing risk of sanction if the Appellant could not adhere to commitments could cause a deterioration in her conditions.

16. Mr Woods relies on *IM v SSWP (ESA)* [2014] UKUT 412 (AAC) [2015] AACR 10. At para 110 the panel said:

“The issue under regulation 35(2) is not whether the claimant could carry out all forms of work-related activity or even whether he or she might inappropriately be sanctioned. Satisfaction of regulation 35(2) requires a substantial risk to health to be identified (in the sense of a risk that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case). Being unable to carry out an activity does not necessarily imply that there will be a substantial risk to anyone’s health if the claimant is required to engage in the activity. Nor does the risk of being sanctioned. Therefore, it may be fairly obvious in most cases that the claimant does not have any realistic argument under regulation 35 and indeed, if made aware of the issues, the claimant may often accept that that is so. But where there turns out to be a serious argument in relation to regulation 35, the provision of the basic information about the more demanding types of work-related activity would enable the First-tier Tribunal to make the necessary predictions by reference to possible outcomes for the particular claimant.”

17. Mr Woods submits that the risk of a sanction for being unable to carry out an activity does not imply that there would be a substantial risk to anyone’s health. I agree to the extent that, reading the paragraph as a whole, the risk of being sanctioned does not “necessarily imply” that there will be a substantial risk to anyone’s health. However, it does not say that if a substantial risk to health could be shown to arise as a result of being sanctioned, that would be irrelevant. Indeed, it would be odd if it were to do so, as it would result in a significantly different approach to rulings on reg.29 of the Employment and Support Allowance Regulations 2008, which was similarly structured and concerned the conditions for treating someone as having LCW under “old-style” employment and support allowance. However, while not impossible, it would be an unusual case and would require compelling and specific evidence going to the fear of being sanctioned and its consequences. I have not been taken to (nor can find) such evidence in this case and so refuse leave to appeal on this sub-ground.

18. I therefore give leave to appeal on the first three sub-grounds and allow the appeal, setting the decision of the tribunal aside.

19. This is not a case in which I consider it expedient to remake the decision myself. As further findings of fact are required, it will best be made by a panel of the tribunal, which will contain a Medically Qualified Member as well as a Legally Qualified Member.

20. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the Appellant’s appeal against the Department’s decision, which is a matter for the new panel.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

5 February 2025