NG -v- Department for Communities (ESA) [2025] NICom 12

Decision No: C3/24-25(ESA)

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

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

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner

on a question of law from a Tribunal's decision

dated 14 December 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I allow the appeal against the decision of the Appeal Tribunal (the tribunal) sitting at Newtownards on 14 December 2023 under reference NS/12463/22/51/P. That decision is set aside and the appeal is remitted to a fresh panel of the tribunal, which must be wholly differently constituted. The new panel will consider the matter entirely afresh; the fact that the appeal before me has been allowed on a point of law should not be understood as indicating the eventual outcome, one way or the other.

2. The appellant had been entitled to Employment and Support Allowance (ESA) since 5 December 2017 on the ground of anxiety and stress. Following an assessment by a Healthcare Professional (HCP) on 17 May 2021 the Department for Communities (the Department) decided that he had Limited Capability for Work (LCW) but not Limited Capability for Work Related Activity (LCWRA).

3. Following a further assessment by an HCP, the Department decided on 30 August 2022 that the appellant did not have LCW. That was the decision under appeal to the tribunal, where the appellant was represented by Ms Nicky Roberts from Community Advice Ards and North Down. The appeal was dismissed.

4. The appellant now appeals to the Social Security Commissioners with leave given by the Legally Qualified Member of the tribunal. His appeal was made late, but was accepted by the then Chief Commissioner. The appeal is solely concerned with the tribunal’s approach to regulation 29 of the Employment and Support Allowance Regulations (Northern Ireland) 2008 which provides so far as relevant:

“(1)  A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2)  Subject to paragraph (3) this paragraph applies if—

…

(b)  the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

(3)  Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—

(a)  reasonable adjustments being made in the claimant's workplace, or

(b)  the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.”

5. His grounds of appeal to the tribunal, prepared with advice, indicated (among other things) that “we plead regulation 29 as we feel [the appellant’s] mental health would be made worse if he were to be found fit for work.” A letter was supplied from the appellant’s GP confirming that the appellant suffers from anxiety and that “he contacted his GP on 16/9/22 reporting that his symptoms have worsened. He feels unable to work at present. He has been referred again to the Mental Health services for further management.”

6. In a written submission to the tribunal the representative “question[ed] what work a man with his condition could perform considering that the pressure of work or looking for work could negatively impact his present health condition”. She referred, albeit indirectly, to *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, the lead authority on the equivalent provisions in the predecessor legislation.

7. The submission on behalf of the Department to the tribunal had in fact attempted to address question of what type of work might be suitable suggesting (at para 16) “non-manual employment such as clerical work”.

8. With regard to regulation 29, the tribunal held:

“The panel are asked to consider regulation 29. The representative argued that [the appellant’s] mental health would be made worse if he were to be found fit for work. The panel did not accept that there would be a substantial risk to the mental or physical health of any person if the [appellant] were found not to have limited capability for work.”

9. The grounds of appeal to the Commissioners are in summary:

 a. that the tribunal failed to engage adequately with the submission and evidence as to the consequences for the appellant of losing entitlement to ESA, failing to apply authorities such as *GS v SSWP (ESA)* [2014] UKUT 0016 (AAC); and

 b. that the tribunal failed to provide adequate reasons as to why the test in reg 29(2)(b) was not met, because the panel

 (i) failed to investigate fully the type of work the appellant could be expected to do; and

 (ii) failed to ask questions about any work or work experience the appellant might have done and whether he had experienced any deterioration in his mental health as a result of doing so.

10. For the Department, a submission by Mr Noel Fitzpatrick appears to have been prepared on the misunderstanding that it was addressing an application for leave to appeal rather than an appeal, but as his submission includes the confirmation – customary in submissions on applications for leave – that if leave were to be granted, the submission could be treated as observations on the appeal, I proceed to do so.

11. Mr Fitzpatrick supports the appeal on the ground that it is clear that regulation 29 was raised as an issue and that the tribunal was under a duty to give adequate reasons for its conclusions on that issue but failed to do so.

12. I agree. The possible application of reg 29 had been raised by the grounds of appeal and the subsequent submission to the tribunal. The Department had attempted to address the issue. It was thus plainly before the tribunal (as indeed the tribunal acknowledged). Whilst the extent that reasons must be given in a case under reg 29(2)(b) depends on the circumstances of the case and there was little evidence going expressly to the impact that a finding that the appellant did not have LCW would have, in this case the matter had been raised and there was plentiful evidence of the impact of his conditions upon the appellant more generally. The tribunal’s reasons, though, were brief to the point of inadequacy, amounting to a bare statement of a conclusion. There was no consideration of what range or type of work the appellant could be expected to do without the adverse consequences which would bring the case within reg 29(2)(b) – in effect there was a failure to apply *Charlton* (or to show that it had been applied).

13. In *GS*, Judge Mark had followed his earlier decision in *IJ v SSWP (IB)* [2010] UKUT 408 where he observed in relation to the equivalent provisions for incapacity benefit:

“The test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker’s allowance. That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker’s allowance. (at para 10).”

14. That passage has been applied in a number of decisions, among them the reported decision of *NS v SSWP (ESA)* [2014] UKUT 115 (AAC) [2014] AACR 33. Although *IJ* was criticised in *MW v SSWP* [2015] UKUT 665, *MW* makes no reference to the reported decision in *NS* and, as a reported decision, it would generally be the latter which would determine the position. In *ET v SSWP (UC)* [2021] UKUT 47 [2021] AACR 6 (so a further reported decision), Judge Wright followed *IJ* and *NS,* concluding that the Court of Appeal’s decision in *Charlton* did not require him to hold otherwise. I am, accordingly, satisfied that the passage quoted above correctly states the law. Cases covered by this line of authority may well be exceptional, but the matter had been raised and the tribunal needed to address it and show that it had addressed it.

15. I do not have the evidence which will enable me to make the necessary further findings of fact and so the case must be remitted to a fresh panel of the tribunal, will need to apply the authorities correctly cited by the appellant’s representative.

16. The new panel will need to apply the wording of reg 29(2)(b) as it stands: I emphasise that (as the tribunal correctly identified) the test is one of “substantial risk” to mental or physical health. That a person’s health may (as submitted) be “made worse” or that the risk is “significant” are not, of themselves, the statutory test.

17. The Department is entitled to supersede a previous decision following receipt of a report by a HCP: see reg 6(2)(q) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 SI 1999/162. However, that does not absolve a tribunal of the duty to give adequate reasons to explain why on the facts it is reaching a different conclusion from that previously reached.

18. Finally, I note that criticism is made of the panel’s failure to ask questions about the appellant’s previous experience of work and its impact upon him (see para 9.b.(ii) above). It may sometimes be possible to identify, after the event, a further line of questioning a tribunal *might* have put. That does not necessarily mean that it was in error of law for failing to do so. In the present case, the appellant was and is represented and it was open to the representative to have asked those questions had she thought them relevant. She will have a further opportunity to do so at the rehearing of the remitted case.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

1 April 2025