MN-v-Department for Communities (UC) [2025] NICom 10

Decision No: C9/24-25(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 8 September 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I give leave to appeal and allow the appeal against the decision of the Appeal Tribunal sitting at Newry on 8 September 2023 under reference NW/1071/23/05/U. The appellant’s appeal against the Department’s decision dated 2 February 2023 must be heard entirely afresh by a panel of the Appeal Tribunal, which must be wholly differently constituted.

2. The appellant is a Polish national in his 60s who has for many years lived and worked in the Republic and in Northern Ireland. He appealed to the Appeal Tribunal (the tribunal) against the decision of the Department for Communities (the Department) dated 2 February 2023 that he did not have, nor could be treated as having, Limited Capability for Work (LCW).

3. His appeal came before the tribunal referenced above. The appellant presented his own case and was supported by a friend, Ms R. There was no attendance on behalf of the Department.

4. The evidence provided by the appellant included certificates in Form Med 3 signed by his GP, which consistently indicated that the GP considered him to be unfit for work due to atrial fibrillation, and translations of medical certificates from Poland to similar effect. The Med 3 certificates were initially issued monthly, covering a period from 28 June 2021 to 23 August 2021. Polish medical evidence covered the periods 29 November 2021 to 28 February 2022, 14 March to 14 May 2022 and 23 August 2022 to 23 October 2022. Monthly Med 3 certificates then resumed, continuously covering the period 24 October 2022 to 3 October 2023, thus covering the date of the Department’s decision and a significant period leading up to it (and indeed afterwards). However, when it came to his oral evidence as recorded by the tribunal (the accuracy of the tribunal’s record is disputed by the appellant and Ms R), the appellant is said to have indicated that he could work, had been applying for jobs and that work would do him good.

5. The tribunal awarded 0 points and concluded that the provisions of the Universal Credit Regulations Northern Ireland 2016 Sch 8 did not apply to him. So holding, it did not go on to consider whether the appellant had both LCW and limited capability for work related activity (LCWRA) nor whether he could be treated as having LCW and LCWRA.

6. The appellant sought leave, contending in summary that (a) the tribunal had failed to engage with the GP’s evidence and in particular had failed to provide any justification for departing from it; (b) the only legitimate conclusion on the evidence was that he was not fit for any type of work and the tribunal’s conclusion otherwise was perverse; and (c) the tribunal’s findings and reasons were inadequate to address the appellant’s arguments.

7. In the usual way, the Department’s observations were invited on the application. These were provided in a submission dated 24 January 2024 by Lisa Toner. She opposed the granting of leave, for reasons which she gave, but indicated that if the Commissioner were to grant leave to appeal, her observations could be taken under reg 18(1) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999 as being observations on the appeal.

8. In reply, the appellant and Ms R continued to dispute the Tribunal’s record of what the appellant had purportedly said.

9. By case management directions dated 30 December 2024 I formulated two matters which I considered might amount to arguable errors of law, but which had not been put quite in that way by the appellant, and invited the Department’s submission on them. The two points were:

 a. Did the Appeal Tribunal err in failing adequately to exercise its inquisitorial jurisdiction by failing to explore why, if, as the Appeal Tribunal say, he was applying for jobs at all material times, why he was at the same time obtaining sick notes from his GP? Does this apparently unexplored tension lend some credence to the appellant’s submission that his evidence was imperfectly understood and/or recorded?

 b. Did the Appeal Tribunal err in failing to address what it was about the appellant’s atrial fibrillation that might have led his GP repeatedly to sign him off work? Might that, for instance, have been relevant to the likelihood of risk under Schedules 8 and 9 of the UC Regulations?

10. At the same time, lest it were to prove necessary to attempt to resolve the conflict about what evidence the appellant actually did give, I directed the appellant to provide a witness statement by Ms R. This was duly done, not as a professional lawyer would do it, but nonetheless carefully and conscientiously and so far as necessary I waive any technical failure to comply with that Direction. However, as will be seen, I do not find it necessary to resolve the conflict of evidence as to what was said and have placed no reliance on that witness statement in reaching this decision.

11. As to the first of the two matters raised by the Directions of 30 December, Ms Toner submits that:

“it could be argued that the Tribunal had posed questions in relation to the matter of the appellant looking for work and applying for jobs and explored how this correlated with the sick notes from his GP, hence why statements were recorded in the reasons for decision regarding the lack of limitations which would affect his capability to work.”

12. Further:

“Whilst the Tribunal have not specifically recorded that they questioned [the appellant] in relation to why he was applying for jobs and seeking sick notes from his GP I cannot say with certainty that they did not.”

13. There are numerous reasons why a tribunal might record its view that a claimant lacked any limitations which would affect his capability to work; that it did so, prompted by having explored the correlation between the appellant obtaining sick notes and applying for jobs, is mere speculation.

14. Nor is it necessary to be able to say “with certainty” that the tribunal did not explore that correlation. It is for the tribunal to provide legally adequate reasons to explain its decision. Thus in *W v Leeds City Council and SENDIST* [2006] ELR 617 Wall LJ said in observations that were further endorsed by the Court of Appeal in *H v East Sussex CC* [2009] EWCA Civ 249:

“53. I do not think it necessary for this court to add to the already substantial jurisprudence on this topic. Speaking for myself, I have always regarded the judgment of Sir Thomas Bingham MR (as he then was) in this court in *Meek v Birmingham City Council* [1987] IRLR 250 (even though it substantially antedates the incorporation into English Law of ECHR) as the definitive exposition of the attitude superior courts should adopt to the reasons given by Tribunals. Whilst, of course, some aspects of the reasoning processes of different specialist tribunals are unique to the particular speciality which is engaged, I see no reason, in this context, to distinguish between Employment Tribunals and what are now SENDISTs. Sir Thomas said:

"It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises . . ."

15. In my judgment the blatant tension between the regular obtaining of sicknotes over a prolonged period (on the one hand) and what the tribunal understood (whether rightly or wrongly) the appellant to say regarding his view of his ability to work and the jobs he had applied for (on the other hand) needed to be expressly addressed in the reasons if the tribunal did ask about it. If the tribunal did not explore it with the appellant, as an inquisitorial tribunal they needed to do so. The boundary of the inquisitorial jurisdiction has sometimes been described as whether, when a point has not been taken by a party, it is “Robinson obvious” from the evidence that the point arose (*following R v Secretary of State for the Home Department, ex p Robinson* [1997] 3 WLR 1162). Another way of making the same point comes from cases such as *Hooper v Secretary of State for Work & Pensions* [2007] EWCA Civ 49 and *Mongan v Department of Social Development* [2005] NICA 16. The net result of those two Court of Appeal decisions is that, although the First-tier Tribunal is not required "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." (per *Mongan*), issues "clearly apparent from the evidence" must be considered.

16. As to the second point, Ms Toner does support the appeal. Much of her support is predicated on there not having been evidence before the tribunal of types of work-related activity available in the appellant’s local area. However, she does also submit that:

“the tribunal has acknowledged that [the Appellant] had atrial fibrillation and could become tired and drowsy however, it is not clear if the Tribunal sufficiently explored how these health issues affect [the Appellant] in order to determine what work he was capable of completing without a substantial risk to him or others.”

17. There are one or two places where I find other parts of Ms Toner’s submission hard to follow, but what I have quoted above is about work, not work-related activity, and accordingly I take it as supporting the appeal on the second point.

18. Even were the appeal not to be supported by the Department, I would allow it on the second point also. It is of course for the Department in the first instance, subject to a right of appeal to the Appeal Tribunal, to decide whether a person has (or should be treated as having) LCW or not. That is not a matter for a GP to decide, but what a GP (or other treating medical professional) has to say about their patient’s condition and their ability to work or not must clearly have potential relevance. In this case, by reason of the extended period covered by the certificates and their repeated issue, the evidence was such that the question flagged in point 2 of the Directions of 30 December cried out to be asked.

19. Accordingly, the appeal is allowed on both the points in those Directions.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

13 March 2025