

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INCOME SUPPORT AND JOBSEEKERS ALLOWANCE

Appeals to a Social Security Commissioner
on a question of law from a Tribunal's decisions
dated 5 June 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This decision is in respect of four separate appeals which are before the Social Security Commissioner with the Office of the Social Security Commissioners (OSSC) references C3/17-18(IS), C4/17-18(IS), C7/17-18(JSA) and C8/17-18(JSA).
2. My decision is that the decisions of the appeal tribunal dated 5 June 2017 with the Appeals Service (TAS) references BE/21536/13/61/L, BE/21513/13/61/L, BE/21548/13/73/L and BE/21530/13/73/L are in error of law.
3. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decisions appealed against.
4. 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 decisions 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 cases to a differently constituted appeal tribunal for re-determination.
5. In referring the cases to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

6. It is imperative that the appellant notes that while the decisions of the appeal tribunal have been set aside, the issue of her entitlement to Income Support (IS) and Jobseeker's Allowance (JSA), for particular periods, and whether there have been overpayments of IS and JSA, the periods during which IS and JSA were overpaid, the amounts of overpaid IS and JSA and whether any overpayments of IS and JSA are recoverable from her, remain 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 appeals.

Background

7. In his very helpful and detailed written observations on the appeals, Mr Smith for the Decision Making Services (DMS) unit within the Department, set out the following background to the appeals:

'(The appellant) claimed and was awarded Income Support (IS) from and including 29.10.01 as she satisfied the conditions of entitlement as a lone parent. The award of IS ended on 09.03.05 when she could no longer be treated as a lone parent and did not satisfy any of the other conditions of entitlement.

(The appellant) then claimed and was awarded Jobseeker's Allowance (Income Related) (JSA) from and including 10.03.05.

On 16.02.08, following an investigation by the Benefit Investigations Service (BIS) into (the appellant's) finances, the Department determined that she had capital in excess of the prescribed amount of £16,000.

On 26.02.08, as a consequence of the determination made on 16.02.08, the Department superseded the decision awarding IS and decided that (the appellant) was not entitled to IS from and including 25.03.04.

On 04.03.08, also as a consequence of the determination made on 16.02.08, the Department revised the decision awarding JSA and decided that (the appellant) was not entitled to JSA from and including 10.03.05. (The Department later acknowledged that this decision was incorrect and subsequently asked the tribunal sitting on 05.06.17 to amend same).

On 02.06.08, as a consequence of the JSA entitlement decision dated 04.03.08, the Department decided that an overpayment of £7,810.26 in respect of the period 10.03.05 to 17.12.07 had occurred and was recoverable

from (the appellant). (As a result of the variation in the JSA entitlement decision noted in the previous paragraph the tribunal was also asked to make a new determination on the recoverability issue which would reduce the amount overpaid to £3,334.23).

On 04.06.08, as a consequence of the IS entitlement decision dated 26.02.08, the Department decided that an overpayment of £4,695.28 in respect of the period 25.03.04 to 09.03.05 had occurred and was recoverable from (the appellant).

(The appellant) appealed against all four decisions and these were heard by a tribunal sitting on 10.10.11. The tribunal dismissed all four appeals and upheld the decisions of the Department.

On 04.07.13 a Commissioner set aside the decisions of the tribunal dated 10.10.11 and referred the appeals back to a newly constituted tribunal pursuant to Article 15(7) of the Social Security (NI) Order 1998. In so doing the Commissioner directed (the appellant) to communicate an acceptable method of notice to the Appeals Service within 21 days of the decision. In default of such communication, he recommended that consideration should be given to the exercise of the power to strike out an appeal under regulation 46 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999.

On 19.11.13 the President of the Appeals Tribunal struck out (the claimant's) four appeals having been advised by the clerk to the Appeal Service that (the appellant) had not replied to correspondence sent to her seeking the required information and had therefore failed to comply with the direction of the Commissioner.

On 22.11.13 (the appellant) emailed the Appeals Service requesting that her appeals be reinstated as she had responded on 18.07.13 to the correspondence sent to her on 08.07.13. Furthermore, she had been advised in a letter from the Appeal Service dated 23.09.13 that her appeals were to be relisted and she would receive "*formal notice of the date and time of the hearing in due course.*" This would certainly appear to confirm that TAS had received her letter.

On 25.06.14 the President of the Appeals Tribunal reconsidered his decision of 19.11.13 to strike out (the appellant's) appeals. The President determined that the

appeals could be reinstated subject to certain conditions, namely, (the appellant) notified TAS of the dates she would not be available to attend a hearing; she provided contact details; she discussed a date for a hearing with the tribunal clerk and if she attended the hearing the strike out orders would be set aside and the appeal would proceed. However, if she failed to attend the strike out orders would stand.

The appeal hearing was arranged for 05.06.17. A Departmental Official was present but (the appellant) failed to attend.

...

The tribunal proceeded to hear the appeals in (the appellant's) absence and went on to consider the evidence adduced by (the appellant) and the Department as well as the oral evidence of the Presenting Officer. In brief statements of Reasons for the Decisions, the tribunal upheld the Department's decisions and dismissed (the appellant's) appeals in respect of the entitlement and the overpayment of IS. However, on instruction from the Department, the appeals against the JSA decisions were varied to the extent that (the appellant) was entitled to JSA for the period from 03.05.06 to 17.12.07 and as a consequence the overpayment of JSA was reduced to £3,334.23.'

8. On 8 August 2017 an application to have the four decisions of the appeal tribunal set aside and an application for leave to appeal to the Social Security Commissioner against the four decisions of the appeal tribunal was received in TAS.
9. Following the receipt of responses from the appellant and the Department, pursuant to a Direction, the application to have the four decisions of the appeal tribunal set aside was refused by the Legally Qualified Panel Member (LQPM) on 9 November 2017.
10. On 9 November 2017 the application for leave to appeal to the Social Security Commissioner against the four decisions of the appeal tribunal was granted by the LQPM. When granting leave to appeal the LQPM identified the following point of law:

'Having reconsidered the papers in detail the following question is posed: did the tribunal make an error of law/procedure in proceeding to list and determine all 4 appeals as opposed to consideration of striking them out further to the directions and decisions made on 25 June 14 by ... LQM/President of the Appeals Tribunals

regarding the application for re-instatement of the appeals?’

Proceedings before the Social Security Commissioner

11. On 20 December 2017 the appeals were received in the Office of the Social Security Commissioners.
12. On 18 January 2018, the Legal Officer to the Commissioners wrote to the appellant in the following terms:

‘We are led to believe that following further information, the Chair of your Tribunal is prepared to set-aside your cases which would be re-listed in front of a new panel.

If that meets with your approval we can facilitate this and dismiss the current appeals with this office and without making any ruling on the issues raised.

This would allow a more rapid resolution of your cases.

If however you wish the Commissioner to continue to make a ruling on your appeals, the appeals will proceed in the normal way.

Please contact us within 21 days to let our office know your preferred option. Please feel free to call to discuss if you wish.’

13. On 1 February 2018 the following response was received from the appellant:

‘I have received a letter dated 18th January 2018 from (the Legal Officer) in this office in relation to the above appeals to the Social Security Commissioner which I submitted on 20th December 2017.

This letter states "*we are led to believe that, following further information, the Chair of your Tribunal is prepared to set-aside your cases which would be re-listed in front of a new panel*". It points out that if this route is acceptable to me it would speed matters up by avoiding the necessity for any ruling by the Commissioner.

In order to reach a decision on the matter, I would greatly appreciate it if you would provide me with a copy of the information you have received which leads you to believe the Chair of my Tribunal would agree to such a course of action, as he was previously against this prior to my making these appeals.’

14. On 9 March 2018 a copy of a further determination by the LQPM was received in the Office from TAS. The determination was signed by the LQPM on 8 January 2018. The determination was to the following effect:

‘Application to set aside granted in all 4 appeals. I have reconsidered and reversed my previous decisions of 9 November 2017 refusing the application to set aside.’

15. The reasons given for the determination were as follows:

‘On the information available to me I am now satisfied that the appeal submissions were not available to the appellant in advance of the hearing when the decisions were made on 5th June 17.’

16. The determination was forwarded to the appellant on 9 March 2018 as an attachment to e-mail correspondence. As the appellant indicated that she was having difficulty in opening the attachment it was forwarded to her by post on 22 March 2018.

17. Further e-mail correspondence was forwarded to the appellant by the Legal Officer on 23 April 2018 to the following effect:

‘I refer to previous correspondence and wonder if you have had the opportunity to consider how you wish to proceed in this matter?’

I am happy to discuss your options if you wish to telephone the office.’

18. There was no reply to the e-mail correspondence of 23 April 2018. On 4 June 2018 the following was forwarded to the appellant both by e-mail and by post:

‘Please see attached letter dated 18 January 2018.

We don’t appear to have received any communication from you regarding how you wish to proceed in this matter?’

I am happy to discuss options if you wish to telephone the office.

Please can you contact our office within three weeks from the date of this email.’

19. On 27 September 2018 written observations on the application for leave to appeal were requested from DMS. Written observations were

received on 25 October 2018 and were shared with the appellant on 30 October 2018. There has been no further response from the appellant.

Analysis

20. As has been noted in some detail above, the LQPM has been prepared to set aside the decisions of the appeal tribunal dated 7 June 2017 and, indeed, prepared a determination to that effect. As was also noted above, the appellant was advised of that determination and was given a copy of it. She was also informed that the outcome of the determination would be that the decisions of the appeal tribunal dated 7 June 2017 would be set aside, as requested by her, and that the appeals would be remitted to a differently constituted appeal tribunal for re-determination.
21. The appellant has not engaged with the office of the Social Security Commissioners in connection with the perusal of the 'set-aside' procedure as a method of resolving her dissatisfaction with the decisions of the appeal tribunal. In those circumstances, I have decided to make decisions on her appeals to the Social Security Commissioner. As was noted in the first section of this decision, my decision is that the decisions of the appeal tribunal dated 7 June 2017 are in error of law and I have set them aside. Further, I have remitted the appeals for re-determination by a differently constituted appeal tribunal. In that regard the outcome is effectively the same as that which would have been achieved had the appellant decided to choose the 'set aside' procedure as a method of resolution.
22. In his comprehensive written observations on the appeals, Mr Smith set out two grounds on which submitted that the decisions of the appeal tribunal were in error of law. The first centred on the effect of the case management direction which had been formulated by the former President of Appeal Tribunals on 25 June 2014. With respect to that submission I do not agree with it. Nothing turns on that, however, as I do accept the second ground advanced by Mr Smith which was in the following terms:

'That said, should the Commissioner disagree with my analysis of the facts, then I would respectfully ask him to consider the following: the tribunal proceeded to hear the 4 appeals in (the appellant's) absence.

In the Reasons For Decision in respect of the IS entitlement appeal it is recorded that (the LQPM) was satisfied that (the appellant) was properly notified of the hearings by letter dated 15 May 2017 which was sent to her home address at ... Belfast by recorded delivery. At the time of the hearing (the LQPM) was unaware that (the appellant) had not received the letter.

Attached to the letter notifying (the appellant) of the hearing date was a pro-forma relating to her attendance at the hearing. By completing the appropriate box or boxes on the pro-forma (the appellant) could indicate whether she would be attending the hearing or, in her absence, someone else would be representing her or whether she intended to withdraw her appeal. It is my understanding that this pro-forma is the equivalent to Form Reg2(i)d. In any event, the pro-forma was not returned completed because it was not received by (the appellant).

I am conscious of a case where the Appellant did not receive notification of the hearing date and only became aware of the hearing upon receipt of the tribunal's decision. The notification letter would have included Form Reg2(i)d which is the form on which the appellant notifies TAS whether or not they want an oral hearing. The tribunal determined the appeal on a paper basis due to the Appellant's failure to return the Form Reg2(i)d. There are similarities in that case with the instant appeal in that (the appellant) did not receive notification of the hearing listed for 05.06.17 and was therefore unaware of the hearing until she received copies of the decisions. For this reason I would direct the Commissioner to the Tribunal of Northern Ireland Commissioners' decision, *C12/14-15(ESA)(T)*. The Tribunal of Commissioners held that the tribunal erred in law in proceeding to determine the appeal because it denied the Appellant the opportunity to put forward his contentions. At paragraph 27 the Commissioners noted:

27. The appellant stated that he was unaware of the tribunal hearing until he received the tribunal's decision. He described particular difficulties in his household arising from the fact that his mother suffered from Alzheimer's Disease and would put away his post "for safe-keeping" without telling him. It is not in dispute that the appellant was sent a Reg2(i)d form by TAS. It is not in dispute that the appellant did not return it to TAS within the period specified on the form. For the purpose of our decision, the actual circumstances in which the form was not returned are not material. It is enough that it was not received by TAS. The focus of our decision is directed to the procedural

requirements around the holding of tribunal hearings where a form is not returned.

And at paragraphs 46 to 48 the Commissioners held:

46. Looking at the matter in terms of the requirements of natural justice, or procedural fairness, we note that a similar situation to the present case arose, prior to the commencement of the Human Rights Act 1998, in the case of CIB/5227/1999 before a Great Britain Social Security Commissioner. That case was concerned with the Social Security (Adjudication) Regulations 1995 and the requirement to indicate a choice for an oral hearing, against a similar background of the appropriate form not being delivered to the claimant. Commissioner Rowland said at paragraph 7:

“The claimant in the present case was entitled to an opportunity to require there to be an oral hearing at which he could put forward his contentions. He did not have that opportunity and the consequence was that the tribunal was unable to listen to those contentions. Regulation 1(3) of the 1995 Regulations provided that where “any notice or other document is required to be given or sent to him in person, that notice or document shall, if sent by post to that person’s last known or notified address, be treated as having been given or sent on the day it was posted”. That may have the effect that the claimant is deemed to have received the clerk’s direction but such deemed receipt is not the same as actual receipt. The claimant is unable to reply to a document that he is merely deemed to have received. The effect of regulation 1(3) is that neither the tribunal nor the regional chairman can be criticised for the approaches they took on the evidence before them. However, had the tribunal been made aware that the claimant had not actually received the clerk’s direction, it would have been wholly wrong for him to proceed with the appeal at a paper hearing”.

47. This approach was endorsed recently by the Chief Commissioner in SD-v-Department for Social Development (ESA) [2015] NI Com 32.

48. In applying the principles to the present case, we agree with Commissioner Rowland's statement of the law in CIB/5227/1999. Regardless of the position under Article 6(1) of the ECHR, we consider that the appellant had a right to an oral hearing as a matter of natural justice in the absence of receiving the Reg2(i)d. We are therefore further confirmed in our view that the decision of the tribunal in the present case was given in circumstances which were procedurally unfair.

As I said above the circumstances in the instant appeal are similar to those in the case determined by the Tribunal of Commissioners and in that respect the principles expressed in *C12/14-15(ESA)(T)* would also apply here. They are, (the appellant) had a right to an oral hearing as a matter of natural justice and in the absence of receipt of notification of the hearing date the decisions of the tribunal were given in circumstances which were procedurally unfair.

While no blame could be attributed to (the LQPM) in proceeding with the hearing in the particular circumstances of the instant case, the Department submits, in light of the principles expressed in *C12/14-15(ESA)(T)*, that the tribunal erred in law in proceeding with the hearing in (the appellant's) absence.'

23. As noted above, I accept these submissions and agree that the appeal tribunal, in proceeding with the hearing in the appellant's absence erred in law. As Mr Smith accepts, and I agree, no blame may be attributed to the LQPM.

Disposal

24. My decision is that the decisions of the appeal tribunal dated 5 June 2017 with the Appeals Service (TAS) references BE/21536/13/61/L, BE/21513/13/61/L, BE/21548/13/73/L and BE/21530/13/73/L are in error of law.
25. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decisions appealed against.

26. 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 decisions which the appeal tribunal should have given. Accordingly, I refer the cases to a differently constituted appeal tribunal for re-determination.
27. In the first instance, these remitted appeals are to be referred to the President of Appeal Tribunals for Northern Ireland or the Full-time Chairman of Appeal Tribunals for Northern Ireland for consideration of the making of further case management directions which he/she considers to be appropriate.
28. It is likely that the former President of Appeal Tribunals formulated his case management direction of 25 June 2014 in light of the comments of Commissioner Stockman in paragraph 24 of his decision in *KF-v-Department for Social Development (IS)(JSA)*([2013] NICom 51). That paragraph was in the following terms:
- ‘In relisting the appeal, I direct that the Appeals Service and the applicant should agree a mutually acceptable method of notifying date and place of hearing prior to that notice being issued, such as by ordinary first class post to a named address with a copy of the letter being issued to the applicant as an e-mail attachment. To this end I direct that the applicant should communicate an acceptable method of notice to the Appeals Service within 21 days of this decision. In default of such communication, I recommend that consideration should be given to the exercise of the power to strike out an appeal under regulation 46 of the Decisions and Appeals Regulations.’
29. It remains the case that the issue of communication of the date, time and place of hearing of appeal tribunal proceedings to the appellant by TAS has been, at the very least, problematic and it was in an effort to ensure that the appellant received notice of proposed appeal tribunal hearings that Commissioner Stockman made his comments. These appeals have been outstanding for a considerable length of time. It is not in the appellant’s interests to have these proceedings delayed for any further length of time. The appellant must provide the Appeals Service with an acceptable method of notice and on receipt of any communication concerning the re-listing of these remitted appeals, must respond to the Appeals Service, signifying her intentions with respect to attendance at, and participation in the oral hearing of her appeals.
30. Given the history of these proceedings and the guidance and directions which have been issued to the appellant, it is highly unlikely that any further application for leave to appeal/appeal to the Social Security Commissioner will succeed on the basis of a failure to notify the appellant of the date, time and place of the oral hearing of her appeals.

(signed): K Mullan
Chief Commissioner

3 January 2019