

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PENSION CREDIT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 12 September 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Department for Communities (the Department) from the decision of an appeal tribunal sitting at Craigavon on 12 September 2016 under reference CN/3999/16/45/O.
2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security Order (NI) 1998 and I give the decision that the tribunal should have given. My decision is that the Department is entitled to recover the sum of £1118.84 from the respondent under section 72 of the Social Security Administration (NI) Order 1992.

REASONS

Background

3. The respondent claimed state pension credit (PC) from the Department from 29 June 2009 on behalf of himself and his partner. Both he and his partner were in receipt of state retirement pension (RP). A record of a PC review by way of a telephone call between the respondent and the Department dated 21 September 2012 indicated that the respondent was to make a choice about personal pension options, and indicated that a follow up telephone call should be made by the Department in one month. This did not take place. On 20 May 2014 a telephone call was made to the respondent by the Department. He confirmed that he was receiving a non-state pension. On 5 October 2015 the Department decided that PC amounting to £1118.84 had been overpaid to the respondent for the period from 27 August 2012 to 3 February 2013,

which would not have been paid to him if the non-state pension had been paid from the due date. The respondent appealed but elected not to exercise the right to attend the oral hearing of his appeal.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 12 September 2016. The tribunal allowed the appeal. The Department then requested a statement of reasons for the tribunal's decision and this was issued on 14 November 2016. On 9 December 2016 the Department applied to the LQM for leave to appeal from the decision of the appeal tribunal. The application for leave to appeal was granted by a determination issued on 5 January 2017. The question of law on which leave was granted was:

“1. Did the tribunal misapply the provisions of section 69 of the Social Security Administration (NI) Act 1992?

2. Did the tribunal err in law citing precedent authorities in respect of the principles relating to failure to disclose?

3. Pursuant to R(I) 2/06, is the tribunal's determination perverse or irrational?”

Grounds

5. The Department submits that the tribunal has erred in law on the basis that it applied section 69 of the Social Security Administration Act (NI) 1992 (the 1992 Act) to the case, when in fact the decision was made under section 72 of that Act. It submitted that recovery under section 72 was not subject to the question of whether the claimant had failed to disclose a material fact, but rather the late payment of prescribed income.
6. The respondent was invited to make observations on the Department's grounds. The respondent, then represented by Mr Hatton of Law Centre NI, accepted that the tribunal had erred in law on the basis submitted by the Department.

The tribunal's decision

7. The tribunal has prepared a statement of reasons for its decision. From this, I can see that the appeal proceeded by way of an oral hearing which neither of the parties attended. The tribunal had a Departmental submission setting out the argument of the Department and the evidence in the case. It is evident that the decision on entitlement to PC was not disputed but that the decision on recoverability of the overpayment was in dispute. In his letter of appeal, the respondent made the case that he had notified the Department of all his relevant circumstances.
8. The tribunal found that the central issue for the tribunal's determination was whether the respondent had been overpaid £1118.84 state pension

credit for the period 27 August 2012 to 3 February 2013, and whether this amount was recoverable. The tribunal was not assisted by the attendance of either party to the appeal. The tribunal set out the relevant law as being regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987, and section 69 of the 1992 Act. The tribunal found as a fact that the respondent informed the Department on two occasions in 2012 of his occupational pension. It found on this basis that there was no breach of section 69 of the 1992 Act.

Relevant legislation

9. The legislation which the Department relied on in its submission to the tribunal, and to me, as grounding recoverability of the benefit in question in this appeal is section 72 of the 1992 Act. This provides:

72.—(1) Where—

(a) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and

(b) it is determined that an amount which has been paid by way of income support, an income-based jobseeker's allowance, state pension credit or an income-related employment and support allowance would not have been paid if the payment had been made on the prescribed date,

the Department shall be entitled to recover that amount from the person to whom it was paid.

10. Further relevant provision appears at regulation 7 of the Social Security (Payments on account, Overpayments and Recovery Regulations (NI) 1988. As amended at the relevant time, this read:

7.—(1) For the purposes of section 72(1) of the Social Security Administration Act (NI) 1992 (income support, state pension credit, income-based jobseeker's allowance, income-related employment and support allowance and other payments), a person's prescribed income is—

(a) income required to be taken into account in accordance with Part V of the Income Support Regulations or, as the case may be, Part VIII of the Jobseeker's Allowance Regulations or Part III of the State Pension Credit Regulations or Part 10 of the Employment and Support Allowance Regulations, except for the income specified in sub-paragraph (b); and

(b) ...

(2) The prescribed date in relation to any payment of income prescribed by paragraph (1)(a) is—

(a) where it is made in respect of a specific day or period, that day or the first day of the period;

(b) where it is not so made, the day or the first day of the period to which it is fairly attributable.

...

Hearing

11. I held an oral hearing of the appeal along with a second appeal by the Department arising from the same circumstances. The Department was represented by Mr Smith of DMS.
12. The respondent was represented by Mr McGowan of counsel, attended by Mr Black of Law Centre NI. I am grateful to the representatives for their assistance.
13. Mr Smith submitted simply that the tribunal had applied the wrong legislation to the appeal. The tribunal had applied section 69 of the 1992 Act, whereas the submission and the decision under appeal clearly indicated reliance upon section 72 of that Act. Mr McGowan accepted that this was in fact the case.

Assessment

14. I sympathise with the tribunal, which did not have the benefit of oral presentations by either party. However, on a careful reading of the Departmental submission, whereas the more common route to recovery of overpaid benefit is section 69, in the particular appeal the Department's overpayment decision, regarding the sum of £1118.84 paid from 27 August 2012 to 3 February 2013, was clearly based on section 72 of the 1992 Act.

I accept the Department's submission, and the concession of the respondent, that the tribunal has erred in law by applying the wrong legislation to the appeal from this decision. I allow the Department's appeal and it follows that I must set aside the decision of the appeal tribunal.

Disposal

15. As there is no dispute of fact, and as I am as well placed to make the decision as an LQM sitting alone, I consider that I should decide the appeal.
16. I find that the applicant, who reached the age of 65 on 26 August 2012, was paid arrears of his occupational pension on 26 January 2013. This sum amounted to £1,794.21. I find that this payment of occupational

pension was a prescribed income within the terms of Part III of the State Pension Credit Regulations (NI) 2003 by virtue of regulation 7(1) of the Social Security (Payments, Overpayments and Recovery) Regulations (NI) 1988 and section 16 of the State Pension Credit Act NI 2002.

17. By virtue of regulation 7(2) of the 1988 Regulations, where a payment is made in respect of a specific period, the prescribed date is the first day of that period. The prescribed date in this case is therefore 26 August 2012. As the prescribed income was paid after the prescribed date, I conclude that section 72 is engaged.
18. I accept the calculations set out at Tab 8 of the Department's submission to the tribunal, which show that the respondent was overpaid PC at the sum of £50.65 weekly for 20 weeks from 27 August 2012 to 13 January 2013, the sum of £35.60 weekly for 1 week from 14 January 2013 to 20 January 2012 and the sum of £35.22 weekly for two weeks from 21 January 2013 to 3 February 2013, totalling £1118.84.
19. I find that the Department is entitled to recover that amount from the respondent.

(signed): O Stockman

Commissioner

28 September 2020