

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

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 16 June 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Armagh. It is linked to the proceedings on file C2/20-21(IS).
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998.
4. I decide that the applicant's award of IS should not have been superseded, that he had an existing award at the date of conversion and should properly have been converted to ESA from 26 September 2013.

REASONS

Background

5. The applicant claimed income support (IS) from the Department for Social Development (the Department) from 2 November 2009 on the basis of incapacity for work. From and including 26 September 2013 his award of IS was converted by the Department into an award of income-related employment and support allowance (ESA).

6. On 19 August 2016, the Department made a decision that the applicant was not entitled to IS from 5 November 2009, as he held capital at that date in excess of the upper capital limit. On 19 January 2017 the Department determined that the applicant's IS claim should not have converted to an award of ESA, as "there was no existing award in place at the date of conversion". On 23 August 2017 the Department decided that the applicant had been overpaid the sum of £1,177 for the period from 26 September 2017 to 11 January 2017 and that the sum overpaid was recoverable from the applicant as he had failed to disclose the material fact that he had capital in excess of the prescribed limit. He appealed.
7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 16 June 2017. By a direction of the President of Appeal Tribunals, the appeal was determined by way of a "paper" hearing in the applicant's absence. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 10 August 2017. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was rejected by a determination issued on 3 October 2017. On 17 October 2017 the applicant applied for leave to appeal from a Social Security Commissioner.

Grounds

8. The applicant submits that the tribunal has erred in law on the basis that the tribunal misinterpreted the law, that the rules of natural justice were broken by the tribunal and that its decision was based on insufficient evidence.
9. The Department was invited to make observations on the appellant's grounds. On 9 February 2018, Mr Collins of Decision Making Services (DMS) replied on behalf of the Department. He indicated that the Department did not support the application and submitted that the tribunal had not erred in law. At a later stage in the proceedings, Mr Clements of DMS responded on behalf of the Department. He addressed the fairness of the tribunal proceeding to hear the appeal in the appellant's absence. He submitted that the tribunal had erred in law by breaching the rules of natural justice as alleged and indicated that the Department supported the application.

The tribunal's decision

10. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, a submission from the applicant and evidence from the applicant's related appeal dealing with income support (IS). The applicant attended the hearing and gave oral evidence, along with his son. Mr McMillan represented the Department.

11. The tribunal was the same tribunal that determined the appeal on file C2/20-21(IS). In that case it had found facts that justified the supersession of the appellant's IS award on the grounds that he had capital in excess of the statutory limit. As it had found that the appellant was not entitled to IS at the date of conversion it logically reasoned that his award on conversion was correctly superseded under regulation 17 of the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (NI) 2010 (the 2010 Regulations). It dismissed the appeal.

Relevant legislation

12. ESA was established under the provisions of the Welfare Reform Act (NI) 2007 (the 2007 Act). The core rules of entitlement were set out at sections 1 and 8 of the 2007 Act. These provide for an allowance to be payable if the claimant satisfies the condition that he or she has limited capability for work.
13. The Welfare Reform Act (NI) 2007 created regulation making powers to enable the conversion of existing awards of other benefits – including income support payable on the basis of incapacity for work – into awards of ESA. Such an award was known as an “existing award”. The regulations made under this power were the 2010 Regulations. Regulation 4 of the 2010 Regulations required a notice to be issued to a claimant of an existing award, subsequently known as a “notified person”. By regulation 5 of the 2010 Regulations,

“(1) In relation to the existing award or awards to which a notified person (“P”) is entitled, the Department must, ... (not relevant) ..., make a conversion decision in accordance with these Regulations.

(2) A conversion decision is—

(a) a decision that P's existing award or awards qualify for conversion into an award of an employment and support allowance in accordance with regulation 7...”

14. Unsurprisingly, provision is made for situations where changes of circumstances or other relevant events might have affected the conversion. By regulation 17,

Where, on or after the effective date of any person's conversion decision, the Department is notified of any change of circumstances or other relevant event which occurred before that date and which would have been relevant to the existing award or awards, the Department—

(a) must treat any award—

(i) converted by virtue of regulation 14(2) (conversion decision that existing award qualifies for conversion), or

(ii) terminated by virtue of regulation 14(2B)(a) (termination of an existing award of incapacity benefit or severe disablement allowance where entitlement to award of income support continues), regulation 14(3) (termination of award of an employment and support allowance where that entitlement already exists) or regulation 15(2) (termination of existing awards which do not qualify for conversion), as if that award had not been converted or terminated;

(aa) ... (not relevant);

(b) must take account of the change of circumstances or other relevant event for the purposes of determining whether to revise or supersede a decision (“the earlier decision”) relating to the award or awards in respect of which the conversion decision was made;

(c) in an appropriate case, must revise or supersede the earlier decision;

(d) if any earlier decision is revised or superseded, must determine whether to revise or supersede the conversion decision made in relation to P; and

(e) in an appropriate case, must revise or supersede that conversion decision.

Assessment

15. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
16. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
17. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

18. I had stayed this case pending my decision in the case on file C2/20-21(IS). In that case, I found that the applicant remained entitled to IS at the conversion date. This outcome is highly material to the present case and I therefore grant leave to appeal.
19. The sole issue in the present case is whether the applicant had an “existing award”. He had such an award of IS at 26 September 2013, at which date the IS award was converted into an award of ESA under regulation 7 of the 2010 Regulations.
20. In 2016 the Department obtained information that led it, on 19 August 2016, to supersede the IS award from and including 5 November 2009. This in turn led to a supersession of the appellant’s ESA award from and including 26 September 2013 by a decision of 17 January 2017. The supersession was conducted under regulation 17 of the 2010 Regulations. The decision was to the effect that, as the appellant had no entitlement to IS at the time of conversion of his claim, he was not entitled to ESA.
21. The conversion process itself was something of a novelty for social security lawyers as it brought about entitlement to a benefit without a claim – something that was otherwise universally required by section 1 of the Social Security Administration Act (NI) 1992. Instead, an existing award was akin to a precedent fact that required the Department to convert it to ESA without a claim.
22. Regulation 17 preserved some elements of regular social security adjudication, essentially allowing supersession of a conversion decision on the basis of subsequently established facts that would have been relevant to the existing award.
23. For reasons explained at length in C2/20-21(IS), I consider that the Department and a subsequent tribunal acted unlawfully in superseding the appellant’s award of IS. I overturned the decision of an appeal tribunal in that case and I made a decision to the effect that the applicant remained entitled to IS at the conversion date.
24. It follows that the basis on which the tribunal proceeded in this case was not in accordance with the law. Accordingly, I allow the appeal and I set aside the decision of the appeal tribunal.
25. I substitute the decision that the appellant’s existing award or awards qualify for conversion into an award of an employment and support allowance in accordance with regulation 7.

(signed): O Stockman

Commissioner

14 October 2020