MC-v-Department for Communities (CA) [2021] NICom 19

Decision No: C1/20-21 (CA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

CARER'S ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 18 June 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is the claimant's appeal from the decision of an appeal tribunal sitting at Banbridge on 18 June 2019 under reference BB/993/19/70/O.

2. For the reasons I give below, I allow the appeal. Under Article 15(8)(a) of the Social Security (NI) Order 1998 I set aside and re-make the decision of the appeal tribunal. I make findings of fact and decide that claimant is entitled to Carer's Allowance for the period from 19 December 2016 to 15 January 2017 (both dates included).

REASONS

Introduction

3. This appeal has an unfortunately protracted history, as I observed when granting leave to appeal. I can understand the claimant's frustration at how long this has taken to resolve and how his account has not been accepted (at least until now). At the heart of the case is an apparently simple factual question – did the claimant's contract of employment with Tesco end on 2 December 2016 or a week later on 9 December 2016? The resolution of this factual question will determine the outcome of the underlying appeal about the claimant's entitlement to Carer's Allowance (CA) for a four-week period. It is not in dispute that his claim to CA itself was made with effect from 5 December 2016.

4. In short, if the claimant's contract of employment ended on 2 December 2016, before he claimed CA, then a later final payment of wages made by Tesco on 19 December 2016 should not be taken into account. The disregard rule in question is found in paragraph 11A of Schedule 1 to the Social Security Benefit (Computation of Earnings) Regulations (Northern Ireland) 1996 (1996 No.520)

(as applied by regulation 10(2)(a)). Paragraph 11A was inserted with effect from 1 October 2007 by regulation 2(4)(b) of the Social Security Benefit (Computation of Earnings) (Amendment) Regulations (Northern Ireland) 2007 (2007 No.2614). Paragraph 11A makes provision for the following disregard (and sub-paragraph (2) is inapplicable on the facts of the present case):

> 11A.—(1) Any earnings, other than items to which sub-paragraph (2) applies, paid or due to be paid from the claimant's employment as an employed earner which ended before the day in respect of which the claimant first satisfies the conditions for entitlement to the benefit, pension or allowance to which the claim relates.

5. If, on the other hand, the claimant's contract of employment with Tesco ended on 9 December 2016, after he had claimed CA, then the final payment of wages on 19 December 2016 should be taken into account. In that situation the claimant would not have the benefit of the disregard in paragraph 11A. The effect of the CA earnings rules in these circumstances would be that he would have had no entitlement to CA for the four-week period in issue from 19 December 2016.

A potted chronology

6. I can summarise the essential dates in the chronology of this case as follows:

31 January 2017 The Department's decision-maker decided that the claimant's employment ended on 9 December 2016 and as such he was not entitled to CA from 19 December 2016 to 15 January 2017 as his earnings exceeded the limit.

3 July 2017 The (first) appeal tribunal at Banbridge dismissed the claimant's appeal.

5 February 2019 The Social Security Commissioner granted leave to appeal and allowed the claimant's appeal (C1/18-19 (CA), a decision with the neutral citation *MC v Department for Communities (CA)* [2019] NI Com 3). In doing so, the Commissioner referred the appeal back to a fresh appeal tribunal for re-hearing.

18 June 2019 The (second) appeal tribunal at Banbridge again dismissed the claimant's appeal. This is now the decision under appeal to the Commissioner.

4 November 2020 The Commissioner refused leave to appeal (A1/19-20 (CA)) from the decision of the second appeal tribunal.

10 December 2020 The Commissioner set aside his determination of 4 November 2020 because of a procedural irregularity (SA 1/19-20 (CA)).

27 January 2021 The Deputy Commissioner granted leave to appeal from the decision of the second appeal tribunal (A1/20-21 (CA)).

The decision under appeal to the appeal tribunal

7. The Department's decision dated 31 January 2017, which was under appeal to the appeal tribunal, was that the claimant was entitled to CA from 5 December 2016 to 18 December 2016 and then again from and including 16 January 2017. However, the Department disallowed the CA claim for the period from 19 December 2016 to 15 January 2017 because of the effect of the earnings rule. The first appeal tribunal confirmed that decision.

The reason why the first appeal to the Commissioner succeeded

8. As noted above, the date that the claimant's employment with Tesco ended was crucial to the outcome of the appeal. However, in his decision allowing the claimant's appeal against the first appeal tribunal's decision, the Commissioner held that the earlier tribunal had erred in law in failing to make a finding as to the specific date on which the claimant's contract had ended (see *MC v Department for Communities* at paragraphs 23-28). The conflict of evidence that had not been resolved by the tribunal was stark.

9. The claimant's case was that his contract had terminated on 2 December 2016. On his CA claim form (signed on 6 December 2016), in answer to the question "When did you last work", he stated "02/12/2016". Furthermore, in answer to the next question on the claim form, "What is the leaving date on your P45, if you have one?", he had again stated "02/12/2016".

10. The Department's case was that the claimant's contract had terminated on 9 December 2016. This submission was based on the reply from Tesco's payroll department on the earnings enquiry form (Form DS1008 (CUST)). The payroll clerk, in answer to the question "on what date did their contract end?" had replied "9/12/16". In fact, for reasons that are unclear, the employer returned two Forms DS1008 (CUST), competed on different dates by different payroll clerks. However, both forms had stated that the claimant's contractual end date was 9 December 2016.

The second appeal tribunal's decision

11. The second appeal tribunal arrived at the same conclusion as the first tribunal and so dismissed the claimant's appeal. In its decision the new appeal tribunal expressly noted the evidence from the Tesco payroll clerk about the contractual termination date. It also referred to the claimant's application for CA, but not to the specific information he had provided on his claim form. The tribunal then quoted extensively from regulation 8 of the Social Security (Invalid Care Allowance) Regulations (NI) 1976 (1976 No.99) and the Social Security Benefit (Computation of Earnings) Regulations (NI) 1996 before returning to the facts of the case. Its findings about the dates and amounts of the various payments of wages are not in dispute. The appeal tribunal went on to acknowledge "the significance of ascertaining the Appellant's final working day in relation to the assessment of sums to be disregarded in the calculation of earnings for the purposes of Schedule 1 to the Computation of Earnings Regulations". In the

crucial paragraph at the end of its statement of reasons, the appeal tribunal concluded as follows:

> "In oral evidence the Appellant was adamant that his contract of employment ended on 2 December 2016. He indicated that he had actually stopped working in October but was in dispute with Tesco. His contract was however finally terminated on 2 December 2016. He was unable to produce a P45 to confirm this fact since he indicated that this had already been provided to the Job Market. He produced no documentation or further evidence to corroborate the termination of his contract on 2 December 2016. For this reason the Tribunal accepted the evidence from his employer as set out at Tabs 3 and 4 of the appeal submission. This confirmed that his contract ended on 9 December 2016. The Tribunal preferred this independent written evidence to the oral evidence of the Appellant. Accordingly the Tribunal accepted that the relevant legislation had been correctly applied by the Department and upheld the decision dated 31 January 2017."

The reason for the Commissioner's procedural set aside ruling

12. The claimant did not give up. He sought further information from the benefits office he had been dealing with. The claimant then supplied, in connection with his application to the Commissioner for leave to appeal from the second tribunal's decision, a letter from the Department's Banbridge Jobs & Benefits Office ('the Banbridge office') to the claimant (dated 13 December 2019). The letter confirmed from computer records that the claimant had visited the Banbridge office on 2 December 2016, when he had arranged to return for a JSA appointment on 6 December 2016. The letter continued: "You attended this appointment with a claims assessor, during this interview you decided to claim Carers Allowance". Owing to an unfortunate administrative oversight, a copy of this letter (which had been attached as a jpg file to an e-mail) was not on the paper file before the Commissioner when he refused leave to appeal on 4 November 2020. This omission was the procedural irregularity which understandably led the Commissioner very fairly to set aside his refusal of leave determination.

The reasons for the second grant of permission to appeal to the Commissioner

13. I subsequently granted the claimant leave to appeal against the second appeal tribunal's decision. I gave leave to appeal as I considered there were at least two ways in which it was arguable the tribunal had erred in law in its decision and, in particular, in its concluding paragraph (see paragraph 11 above). In my grant of leave I explained those two reasons as follows:

> "24. First, as the LQM noted in the course of the hearing, "A P45 would have settled the matter". I take judicial notice of the fact that a P45 has a space for the "leaving date" (box 4) to be inserted and that, as is common knowledge, if a person no longer

has a P45 they cannot get a replacement. I also understand that a person leaving a job who has a P45 is required to give it to the social security authorities if they claim jobseeker's allowance (JSA). It was clear from the Commissioner's decision of 5 February 2019 that the precise contractual end date was critical to the appeal. In those circumstances, it is arguable it was incumbent on the Department to produce a copy of the P45 to the second appeal tribunal as relevant evidence on the appeal. It was information that was in its possession. Accordingly, under the principle in *Kerr v Department for Social Development* [2004] UKHL 23; [2004] N.I. 397, the onus was arguably on the Department to provide a copy. By definition, the applicant himself could not produce a copy as (a) he had handed it in and (b) he could not get a replacement either from his former employer or HMRC. In all those circumstances it is arguable that the appeal tribunal's failure to consider adjourning for this purpose amounted to an error of law.

25. Second, the appeal tribunal framed the conflict of evidence as a conflict between the written (and independent) evidence of the employer and the oral (and perhaps by inference the partial or self-serving) evidence of the applicant. Put that way, it may well be reasonable for the tribunal to attach greater weight to the written evidence. However, whether or not that is right, this is to disregard the applicant's own written evidence. As already noted above, his CA claim form stated his contractual end date was 2 December 2016. That was a contemporaneous written document and moreover a document that was completed long before the applicant would have known that paragraph 11A made the distinction between 2 and 9 December 2016 critical to the success or otherwise of his claim and appeal. Furthermore, the CA claim form did not simply say the end date was 2 December 2016. It also stated that the P45 referred to the very same date. The tribunal made no mention of this written evidence in its reasons nor gave any explanation for why it was not considered. This is a further arguable error of law.

26. It follows that the questions of law on which I grant leave to appeal are whether the second appeal tribunal has erred in law by:
i) failing to consider adjourning for the purpose of directing the Department to produce a copy of the applicant's P45; and/or
ii) failing to make any finding of fact or give any reasons for apparently disregarding the written information contained in the applicant's CA claim form."

14. I further directed that the Department's response to the claimant's appeal should:

A) include a copy of the claimant's P45 as handed to the Banbridge office on or about 2 December 2016 (and which may have been forwarded to the Newry office); and

B) in the event that the claimant's P45 cannot be located, include an explanation as to both:

(i) the Department's policies and procedures in 2016 and since on the retention of documents relating to CA and JSA claims; and

(ii) the nature of the search undertaken in the Department's offices for the claimant's P45; and

C) in any event, include a complete copy of the computer records (e.g. by way of a screen-shot or otherwise) relating to the claimant's visits to the Banbridge office on 2 December 2016 and 6 December 2016, together with copies of any associated clerical records.

The Department's revised response

15. The Department's original position had been to resist the application for leave to appeal against the decision of the second appeal tribunal. However, the Department very properly reviewed its position in the light of the grant of leave and the reasons I gave for that determination. Ms Laura Patterson has now provided a very helpful submission on behalf of the Department and (in part at least) supporting the claimant's appeal (second time around) to the Commissioner.

16. On the first point on which leave had been granted, Ms Patterson rightly observes that the question as to whether a tribunal should adjourn for further evidence is always context-dependant and fact-specific: see *MA v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 351 (AAC) and *BV v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 444 (AAC). However, in the circumstances of this case, she now concludes as follows:

> "I would now contend that the tribunal should have adjourned the hearing. I agree that the Legally Qualified Member's statement of 'A P45 would have settled the matter' is problematic – it demonstrates how vital the P45 was to the outcome decision on [the claimant's] appeal. However [the claimant's] response to this was that the Job Market had held this. That being the case, it would not have been possible for him to have submitted it to the tribunal. I would also agree with Deputy Commissioner Wikeley's comment that it would not be possible for [the claimant] to obtain a copy of the P45. The tribunal could indeed have adjourned in order to ask the Department to provide the P45 and thereby the tribunal could have made secure findings of fact as to what was written on it. It would have been in the interest of natural justice

to do so. In view of these considerations, I am now persuaded that the tribunal erred in law."

17. I agree with that analysis, which is sufficient to allow this appeal.

18. As to the second reason why I gave leave, Ms Patterson does not support that aspect of the appeal. She observes that a tribunal is not obliged to discuss every piece of evidence before it. She adds that, while it might have been helpful for the tribunal to provide "more robust reasons", she believes it is implicit in its decision that it did consider all the evidence put forward by the claimant. In the circumstances I do not need to resolve this point.

19. The second appeal tribunal erred in law by failing to consider whether to adjourn for sight of the claimant's P45. Therefore, I set aside the decision of that appeal tribunal. Given the history of the case, I propose to dispose of this appeal under Article 15(8)(a) of the Social Security (NI) Order 1998 rather than remit to a new appeal tribunal for yet another hearing.

Disposal

20. Ms Patterson has provided detailed information in accordance with the directions I gave when giving leave to appeal. The fruits of her enquiries (suitably anonymised) are as follows:

> **"A, include a copy of [the claimant's] P45 handed to the Banbridge office on or about 2 December 2016 (and which may have been forwarded to the Newry office)**
>
> A, I have been unable to obtain this.
>
> **B, in the event that [the claimant's] P45 cannot be located, include an explanation as to both:**
>
> **(i) The Department's policies and procedures in 2016 and since on the retention of documents relating to CA and JSA claims**
>
> The Document Retention guidance has been the same since 27/4/16, and applies to all benefits. For a Jobseeker's Allowance fresh claim, a P45 would be considered a 'Supporting' document as the tax details would be required to be input to Jobseekers Allowance Payment System (JSAPS) during the registration of the fresh claim. The action to take would depend on the current status of the claim. If the claim is 'live', the P45 remains a relevant 'supporting' document as the information contained on it will remain relevant throughout the life of the claim however if the claim is 'dormant' a revised P45 would be issued at the termination stage and will now include the taxable benefit received while the claimant was receiving JSA. The original P45 then becomes a 'non-supporting' document as it no longer

provides the most up to date information and will be destroyed after 14 months in the 'PA' (filing system).

(ii) The nature of the search undertaken in the Department's offices for the claimant's P45

The acting manager of the Banbridge office checked their computer records and confirmed [the claimant's] attendance at the office on 2nd and 6th December 2016. She indicated that whilst any documentation handed in at the time would have been forwarded to Newry, since then the processing of JSA claims has transferred to Holywood Road Benefit Processing Centre. The query was referred to Jobseekers Allowance in Holywood Road, who advised that their system shows no Jobseeker's Allowance claim. They stated they hold no case papers for [the claimant], evidenced by the fact [the claimant] had no JSA claim. The nature of the search conducted has been computer-based only, as there is no indication that any clerical evidence was ever held, and on the basis of the document retention guidance above, it would not exist at this time if evidence was handed in.

C, in any event, include a complete copy of the computer records (e.g. by way of a screen-shot or otherwise) relating to the applicant's visits to the Banbridge office on 2 December 2016 and 6 December 2016, together with copies of any associated clerical records.

I attach screen shots with this submission, obtained from Banbridge Jobs and Benefits office. These indicate that [the claimant] attended on 2/12/16 and stated his employment had ended on 1/12/16. There is no record of a P45 being received. The record for 6/12/16 indicates [the claimant] stated he did not wish to continue with a claim to JSA but wished to claim Carers Allowance instead. I would suggest that the screen shots do not confirm that any paperwork was received from [the claimant] on either date, but only that forms were issued to him. The claim of 2/12/16 did not go ahead. Consequently the claim would not have been built onto JSAPS – the usual working target for a fresh claim to be built onto JSAPS and put into payment is 10 working days."

21. Having recommended that a successful appeal to the Commissioner should not result in a further remittal to a new appeal tribunal, Ms Patterson submitted as follows:

> "Although I now contend that the tribunal erred in law due to failure to consider adjourning as discussed above, following investigation there is no new evidence to point to an employment end date of 2/12/16 and the Commissioner may decide to disallow the original appeal. However, should the Commissioner accept that [the claimant's] leaving date was 2/12/16 and allow his

original appeal, the case should be remitted back to the Department to calculate payment that may be due."

22. I am satisfied I now have sufficient information to decide the underlying appeal fairly. That said, no P45 has been forthcoming, notwithstanding Ms Patterson's valiant efforts. The claimant's oral evidence to the second appeal tribunal was that he had visited the Banbridge Job Market on 2 December 2016 and handed in his P45. As he was recorded as saying near the end of the hearing, "he has never been asked to provide any evidence and he handed in his P45 to the Job Market". The claimant subsequently stated (in an e-mail dated 18 November 2020) that his P45 was sent to Newry Job Market on 2 December 2016. However, in his earlier e-mail dated 11 July 2020 he had simply stated: "I was told my P45 was sent to Newry Office", without clarifying whether he had been told this on 2 December 2016 or on some later date e.g. when he made further enquiries of the Banbridge office. Be all that as it may, I consider on the balance of probabilities that the most likely explanation is that the claimant handed it in when he first made contact with the Banbridge office, that the P45 was subsequently forwarded to the Newry office and at some stage since has been destroyed in accordance with the Department's normal document retention and destruction policy as not being relevant to any live claim for JSA. I do not consider the absence of any mention on the computer records of the P45 being handed in to the benefits office to be determinative. Such records do not necessarily capture every piece of information which may subsequently become relevant.

23. In the event I also do not consider that the letter to the claimant from the Banbridge office takes the matter very far forward. It certainly confirms that the claimant attended the Banbridge office on 2 December 2016 and then again for a follow-up appointment on 6 December 2016 (as do the screen prints produced by Ms Patterson). It does not in terms confirm that the claimant handed in his P45 at the office on either date. More importantly, it has nothing to say about the crucial issue of the date the claimant's employment ended. So, this takes us back to the central conflict in the evidence about when precisely the claimant's job ended.

24. The Department's case is the employment terminated on 9 December 2016. This contention is based on the employer's payroll record (or at least on the information recorded on the earnings enquiry form). There is no other evidence to the same effect. The fact that the employer had provided the same information twice does not make it any more persuasive. Errors are made from time to time on such forms (for example, the first such earnings form was signed and dated 16/11/16 by the payroll clerk, which cannot be correct, as the enquiry form was not issued by the Department until 12 December 2016).

25. The claimant's case is that his job ended on 2 December 2016. This was the date he cited on his contemporaneous CA claim form and in correspondence. It is the date he has consistently referred to in his oral evidence to both appeal tribunals. In addition, and as Ms Patterson very fairly notes, the claimant's original (and by definition broadly contemporaneous) letter of appeal (dated 20 February 2017) stated as follows:

> "I rang the office again to inquire why I had been blocked for a total of 4 weeks and was told that I had earned over the maximum amount from my previous employer Tesco Plc during that period and I pointed out that wage slip was for back pay that should have been paid by Tesco when my contract was terminated by mutual consent on the 2nd December 2016 … I am being penalised because Tesco failed to pay me my wages at the proper time."

26. Weighing all the evidence in the round, I consider it more likely than not that the claimant's employment ended on 2 December 2016. In doing so I attach some weight to the consistency of the claimant's account throughout this saga, and that he made contemporaneous statements to this effect in writing when he would not have been aware of the significance of paragraph 11A on his entitlement to CA. I also note that in his letter of appeal he specifically referred to his contract being "terminated by mutual consent on the 2nd December 2016". I recognise it is common in the workplace for parties to agree an early termination of employment, irrespective of contractual notice entitlements, in circumstances where it suits both sides. I therefore re-make the appeal tribunal's decision in the following terms:

> The Appellant's appeal is allowed. He is entitled to Carer's Allowance for the period from 19 December 2016 to 15 January 2017 (both dates included). The maximum earnings limit rule does not apply to him in respect of the payment received from his former employer on 19 December 2016 as his employment had ended before he made his claim for Carer's Allowance and first satisfied the conditions of entitlement to that allowance. The Appellant therefore benefits from the relevant disregard applied by regulation 10(2)(a) of, and paragraph 11A(1) of Schedule 1 to, the Social Security Benefit (Computation of Earnings) Regulations (NI) 1996. The matter is remitted to the Department to make the necessary calculations.

Conclusion

27. I therefore allow the claimant's appeal, set aside the appeal tribunal's decision and re-make the decision under appeal in the terms as set out above.

(Signed): N WIKELEY

DEPUTY COMMISSIONER (NI)

(Dated): 30 April 2021