

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKERS 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 9 November 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference DG/3847/19/73/L.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The issue arising in this case is whether it was unlawful for the Department to attribute earnings for work done in 7 discrete weeks within a four month period in such a manner as to disentitle the appellant to Jobseeker's Allowance (JSA) for the entire period.
4. The appellant had been awarded jobseeker's allowance (JSA) from 11 October 2013 by the Department for Communities (the Department). On 1 April 2015 the Department, on the basis of statements by the appellant that he had undertaken some work while receiving JSA, decided that he had been overpaid JSA amounting to £1,360.36 in the period from 26 February 2014 to 27 July 2014 and that this was recoverable from him. The figure was later revised to £1,432.76 in respect of the same period and later again to £1,451.11 in respect of the same period.
5. The appellant appealed. A tribunal decision of 20 April 2017 confirmed the recoverability of the overpayment. However, following the proceedings

before the Chief Commissioner with neutral citation *SS v Department for Communities* [2019] NI Com 26, the decision of the tribunal was set aside on 24 April 2019, with the support of the Department, and referred to a newly constituted tribunal for determination. The reason for this, in brief, was that the original decision on JSA entitlement had not been validly superseded as required by section 69(5A) of the Social Security Administration (NI) Act 1992.

6. The appeal was determined again by a tribunal, consisting of a legally qualified member (LQM) sitting alone, on 1 November 2019. It upheld the recoverability of JSA amounting to £1,451.11 for the period 26 February 2014 to 29 July 2014. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 22 June 2020. The appellant applied to the LQM of the tribunal for leave to appeal to the Social Security Commissioner. On 29 September 2020 the LQM refused leave to appeal. The appellant then made an application to a Social Security Commissioner for leave to appeal on 29 October 2020.

Grounds

7. The appellant submits that the tribunal has erred in law by:
 - (i) applying the JSA regulations inconsistently and disproportionately;
 - (ii) irrationally attributing payments to weekly periods when no work was undertaken.
8. The Department was invited to make observations on the appellant's grounds. Mr Donnan of Decision Making Services (DMS) responded on behalf of the Department. Mr Donnan submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

The tribunal's decision

9. 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, containing the appellant's JSA claim form, a JS40 information booklet, copies of decisions, correspondence and evidence of income as a part-time tutor and poll clerk. It had copies of the previous proceedings and a further submission from the Department dated 2 September 2019, dealing with the previous error identified by the Chief Commissioner by way of new Departmental entitlement and overpayment decisions dated 14 June 2019 and 17 June 2019 respectively. The appellant did not attend the tribunal hearing. The Department was represented by Ms Ginesi.
10. The tribunal observed that a new entitlement decision had been made to correct the error identified by the Chief Commissioner, along with a new overpayment decision which found that JSA in the sum of £1,451.11 had

been overpaid and was recoverable from the appellant for the period 26 February 2014 to 29 July 2014. Having considered the papers before it, the tribunal was satisfied that the appellant had claimed JSA between 11 October 2013 and 31 August 2014. It found that he had worked on a part-time basis for a university during this period and as a poll clerk in the European elections in May 2014. It was further satisfied that he had been informed on his responsibility to make disclosure of earnings by way of a JS40 booklet. He had not reported his employment to the Department. The tribunal addressed the attribution of the earnings received by the appellant in the period. In particular, it was satisfied that he was paid monthly and that the actual pay should be attributed forwards to the next month's pay, so that although he ended work in June 2014, the period of calculation of the overpayment ended on 29 July 2014.

Relevant legislation

11. The relevant legislative provisions are contained in the Jobseeker's Order (NI) 1995 (the Order) and the Jobseeker's Regulations (NI) 1996 (the Regulations). By Article 5 of the Order:

5.—(1) The conditions referred to in Article 3(2A)(b) are that the claimant—

(a) has an income which does not exceed the applicable amount (determined in accordance with regulations under Article 6 or has no income;

...

Provisions governing the calculation of income for the above purpose appear at Chapter II of the Regulations. Regulation 93 provides, as relevant:

“93. —(1) For the purposes of Articles 5(1) (the income-based conditions) ... the income of a claimant shall be calculated on a weekly basis—

(a) by determining in accordance with this Part, other than Chapter VI (capital), the weekly amount of his income, ...”

Provisions governing the period over which income is to be assessed is addressed at regulation 94, which provides, as relevant:

“94. —(1) Earnings derived from employment as an employed earner and income which does not consist of earnings shall be taken into account over a period determined in accordance with the following paragraphs and at a weekly amount determined in accordance with regulation 97 (calculation of weekly amount of income).

(2) Subject to the following provisions of this regulation, the period over which a payment is to be taken into account shall be—

(a) where the payment is monthly, a period equal to the number of weeks from the date on which the payment is treated as paid immediately before the date on which the next monthly payment would have been so treated as paid whether or not the next monthly payment is actually paid;

(aa) where the payment is in respect of a period which is not monthly, a period equal to the length of the period for which payment is made;

(b) in any other case, ...”

Assessment

12. 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.
13. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
14. 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.

The appellant's submissions

15. The appellant relied on the submissions he had previously made to the Commissioner in November 2017 and to the tribunal in October 2020 about the treatment of earnings under the JSA Regulations. The gist of these was that in the period from February 2014 to July 2014 he had only worked sporadically and was normally unemployed. He had undertaken work for between 4.5 hours and 8.5 hours in 7 weeks in total over the period of 23 weeks. However, because he was paid monthly, the earnings had been attributed over weekly periods when he had done no work and was unemployed and available for work. On the other hand, had he been paid weekly, he would have retained entitlement to JSA despite having been paid the exact same amount in the same period.
16. He submitted that the fact that he was paid monthly as opposed to weekly had a disproportionate and unfair effect on him compared to a person paid

weekly. He estimated that the resulting overpayment was three times that of a person paid weekly. In consequence, he submitted that I should set aside the relevant JSA legislation as it did not provide for equality under the law. He submitted that the law was excessively punitive and “not fit for purpose”.

17. He attached a further submission that had been before the Commissioner in the earlier iteration of this case, where he challenged the process by which he accepted an administrative penalty under threat of prosecution. An administrative penalty can be offered by the Department when the circumstances in s.109A of the Social Security Administration Act (NI) 1992 apply. However, the appellant accepted the Department’s offer of an administrative penalty and I do not understand this to be the subject of any appeal. It follows that I am concerned only with an appeal on whether the appellant was entitled to JSA in the relevant period and whether, if not, any overpaid benefit was recoverable from him.

The application of the relevant legislation to the present case

18. The relevant legislation governing JSA is set out above. I do not understand the appellant to dispute that the legislation was correctly applied in its own terms. Regulation 94(2) governed the method of assessment employed by the Department, namely that his monthly payments were attributed over the number of weeks running from the date on which a payment was treated as paid to the date on which the next monthly payment would have been due. The appellant seeks to rely on overriding principles of justice to submit that the legislation itself was legally flawed.
19. The evidence before the tribunal indicated that the appellant worked as a teaching assistant for a university at an hourly rate of £35. He worked 8.5 hours per month. Additionally, I understand, he had worked one day in the period from September 2013 to January 2014, being paid £75 for this in February 2014. He was paid monthly between February and June 2014 inclusive. He received a payment of £375 in respect of February 2014 and further payments of £300 each in respect of March, April, May and June 2014. He also received payment of £186 for a single day’s work on the European Parliamentary election on 22 May 2014, lasting 15.5 hours. This affected the Department’s calculation of his entitlement to JSA as follows.
20. Firstly, I observe that the applicable weekly rate of JSA payable in his case for 2013/14 was £71.70 and for 2014/15 it was £72.40 and that a standard income disregard of £5 applied in each benefit year. Secondly, as the total of hours worked by the appellant in the week including the European election of 22 May 2014 exceeded 16 hours, he was not entitled to JSA in that week (21-27 May 2014). Thirdly, his income was calculated on a weekly basis by a method of multiplying his monthly income by 12 and dividing by 52. This process generated a weekly income figure of £86.53 for 26 February to 25 March 2014, £69.23 from 26 March to 8 April 2014 and £69.23 from 9 April to June 2014.

21. The fact that his assessed income of £81.53 (£86.53 less the £5 disregard) exceeded the relevant applicable amount meant that the appellant had no entitlement to JSA from 26 February to 25 March 2014. His income of £64.23 (£69.23 less the £5 disregard) was below the 2013/2014 applicable amount of £71.70. This meant that the appellant retained a residual JSA entitlement of £7.47 per week for the period from 26 March to 8 April 2014. The same assessed income for the period from 9 April to 24 June 2014 was below the 2014/15 applicable amount of £72.40. This left the appellant with a residual JSA entitlement of £8.17 for that period. However, the inclusion of his income of £186 from the European elections meant that he had no entitlement from 25 June 2014. The total of JSA overpaid for the period has been accurately calculated as £1451.11.
22. The appellant submits that his income should have been attributed to the weeks on which he worked, rather than on the basis of the months for which he was paid, submitting that he only worked in 7 weeks in the 22 week period of the overpayment. That is not what the relevant legislation provides. However, the appellant submits that the consequences are unfair and overly punitive. He submits that the legislation should be set aside.

Case law on social security assessment periods

23. The submission of the appellant might appear somewhat Quixotic at first sight. However it is evident that similar arguments have been addressed by recent decisions of the courts, particularly in relation to universal credit (UC). For example, in *R(Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778 the Court of Appeal in England and Wales addressed a situation where a claimant who was paid monthly received two monthly payments in the same one month assessment period, due to pay day falling on a weekend or bank holiday. This had disruptive effects to the ongoing UC award and on linked benefits such as council tax benefit. The Court held that the rule that required both payments to be taken into account in the one assessment period was so irrational as to be unlawful.
24. This decision was made in the context of an Explanatory Memorandum to the relevant provisions which stated that the key difference between UC and legacy benefits was that it was assessed and paid monthly, saying:

“This approach is intended to reflect the world of work where around 75% of people receive their wages monthly. Paying in this manner will encourage and support claimants to budget on a monthly basis, which will help smooth the transition into monthly paid work.”
25. The Court held that it would not be inconsistent with the overall UC scheme to devise an exception to solve the problem and observed that a properly drafted narrow exception would have avoided such significant, predictable but arbitrary effects as had arisen. While confirming that the threshold for

establishing irrationality is very high, the particular case was one of the rare instances where the refusal to put in place a solution for a specific problem was so irrational that the threshold was met.

26. Subsequently, in *R(Pantellerisco) v Secretary of State for Work and Pensions* [2020] EWHC 1944, the High Court in England and Wales addressed the position of a claimant who was paid four-weekly. The situation resulting was that, as the year has thirteen 4-week periods in it, but twelve monthly assessment periods, the claimant's entitlement was assessed on the basis of eleven UC assessment periods in which she received one thirteenth of her annual salary and one UC assessment period in which she received two thirteenths of her salary. This in turn affected how she was affected by the "benefit cap".
27. The benefit cap is a limit on the total amount of benefit payable. It does not apply in cases where the income from working a 16 hour week in an assessment period exceeds certain thresholds. However, in the case of the particular claimant, the effect of taking only her 4-weekly payment into account was that the benefit cap applied, as she fell below the relevant income threshold, when it would not have had her income been calculated on a monthly basis. Similarly to the approach of the Court of Appeal in *Johnson*, Garnham J held that the failure to provide the claimant with an exception to the benefit cap in her situation was irrational and unlawful.
28. Another case was *R(Caine) v Department for Work and Pensions* [2020] EWHC 2482. In that case the claimant had a weekly liability to pay housing costs. She challenged the formula for converting weekly costs in monthly costs, based on a 52 week assessment, as each year consists of 52 weeks and one day or 52 weeks and 2 days, meaning that she lost one of two days entitlement to housing costs annually. Knowles J held that the regulations could not be said to have produced such stark and arbitrary effects as they did in the two earlier cases. He declined to accept that they were irrational, saying:

"216. The question is *not* whether there was a better solution than that chosen by the Government and approved by Parliament. During the hearing I raised with counsel the mathematical concept of 'best fit', whereby the mathematical modeller attempts to devise an equation or a graph which most closely, but perhaps not perfectly, replicates a data set, usually gathered by empirical observation. Whilst the analogy is not perfect, in a sense, that is what the Government was trying to do when it devised this aspect of the UC Regulations. It was attempting to construct a mathematically based system in the Regulations (the equation) which would achieve, perhaps imperfectly, its policy goals in relation to housing costs (the data set). The question for me is whether, in light of that data set, the equation it chose is irrational. In my judgment, given the diverse range of views on what is

obviously a difficult problem, it is impossible to characterise the choice which the Secretary of State ... as irrational. I respectfully consider that the same idea was being conveyed by Rose LJ in *Johnson*, supra, when she referred to a policy maker being able to choose '... a broader measure ... even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs.' The way in which monthly equivalent housing costs can be calculated is an issue on which reasonable minds can, and plainly do, differ and there is more than one permissible approach."

The present case

29. The above UC cases arise from the change in UK government policy which led to a monthly assessment period and monthly payment cycle. That marked a change from the position obtaining in the present case. In the circumstances that I am concerned with, JSA was paid fortnightly in arrears, based upon an assessment period of one week. The issue raised by the appellant concerns the basis of calculation of wages in that weekly assessment period. He submits that each week's earnings should have been assessed in their own right for that week, rather than be assessed on the basis of attributing the payments he received at the end of the relevant month over each week in that month.
30. The appellant has submitted that his working hours for the university were as follows:

3-7 Feb	4.5 hours	£157.50
17-21 Feb	4.5 hours	£157.50
3-7 Mar	4 hours	£140.00
10-14 Mar	4.5 hours	£157.50
28 Apr – 2 May	8.5 hours	£297.50
12-16 May	8.5 hours	£297.50
2-6 June	8.5 hours	£297.50

Additionally he worked as a polling clerk as follows:

21-27 May 15.5 hours £186.00

His total gross income from earnings between February and June 2014 inclusive was £1,691 by my calculation, of which £40 would have been disregarded under JSA income rules. In the same period he also received £1567.91 in JSA. In consequence of having received his (undeclared) earnings, the appellant was not entitled to £1,451.11 that he received by way of JSA. The Department proceeded to seek to recover the overpaid JSA on the basis that he had failed to disclose that he was working. It is also evident, from the fortnightly signed declarations to the effect that he had done no work since his claim or last declaration, that the appellant has actively misrepresented his position to the Department from February to August 2014.

31. JSA is a means-tested benefit payable where income does not exceed the set applicable amount for a claimant. It permits a small amount of earnings in his circumstances - £5 – which is as low as to be almost meaningless. However, that figure is consistent with a policy intention that JSA is not a benefit designed to supplement low income generally but to provide a basic safety net for unemployed people.
32. The JSA Regulations provide for income to be assessed on a weekly basis. However, where a claimant receives a monthly payment, that payment has to be taken into account over a period from the date of that payment to the date on which the next monthly payment would be due. This would most commonly be applied, I suspect, where a claimant has received a final payment of wages before claiming JSA as unemployed. I see nothing inherently irrational about a monthly payment being calculated on a weekly basis for the purposes of a claim to a weekly benefit such as JSA.
33. The appellant submits that his income should have been assessed weekly. However, addressing matters more practically, it appears to me that this argument is something of a double-edged sword. Had the appellant declared his work and his income for the week of 3-7 February 2014, if he was assessed on weekly income of £157.50, for example, his entitlement to JSA would have ceased on the basis that his income exceeded his applicable amount. His residual entitlement to JSA would not have continued without a fresh claim.
34. The applicant has submitted that the effects of the policy of attributing monthly income over all the weeks in the month are unfair in his case and unduly punitive. However, even if monthly income was assessed on a weekly basis, this would not permit him to fail to disclose his work. The submission of the appellant is a hypothetical submission of course, but it is premised on continued entitlement to JSA throughout the period from February to June 2019. However, but for the calculation of his earnings being based on monthly income, his entitlement to JSA would have ceased

altogether on the basis of his weekly income in February 2014. I find therefore that this argument cannot be sustained.

35. I will accept that the appellant has established an arguable case, and I grant leave to appeal. However, I disallow the appeal.

(signed): O Stockman

Commissioner

21 June 2021