

**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 August 2023

**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 BE/12323/22/51/P.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998.
3. I refer the appeal to a newly constituted tribunal in accordance with the directions I have given.

**REASONS**

**Background**

4. The appellant had been in receipt of income support on the basis of incapacity for work from the Department for Communities (the Department) from 8 June 1999 to 21 June 2013. On 8 April 2013 she was notified that her claim was to be "migrated" to an award of employment and support allowance (ESA) and she was subsequently awarded ESA without having made a claim. On 9 October 2015 the appellant wrote to the Department disclosing that she had been in employment for some months and the Department sought further evidence from her employer. On 17 May 2021 the Department determined that the appellant was not entitled to ESA for the period 16 May 2015 to 23 October 2015, that she had been overpaid ESA for the period and that the sum of £3,749.88 was recoverable from her. The appellant requested a reconsideration of the decision, which was

reconsidered but not revised. She appealed but waived her right to attend an oral hearing of the appeal.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone on 16 August 2023. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 20 September 2023. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 6 October 2023. On 19 February 2024 the appellant applied for leave to appeal from a Social Security Commissioner.
6. The application was received after the expiry of the relevant statutory time limit. However, on 23 July 2024 the Chief Social Security Commissioner admitted the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

### **Grounds**

7. The appellant submits that the tribunal has erred in law on the basis that:
  - (i) It made insufficient findings of fact.
  - (ii) It adopted an unfair and biased procedure against her.
8. The Department was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law and indicated that the Department supported 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, which included a copy of the decisions in the case, specimen letters, system screen prints, various documents and correspondence. The appellant had elected to waive her right to an oral hearing and there was no oral evidence.
10. The tribunal accepted the Department's submission that the appellant had been issued with various instructions about her duties of disclosure regarding any changes in her circumstances. It accepted that she had failed to disclose the material fact that she was working from May 2015 until October 2015. It found that she had been overpaid £3,749.88 of ESA that was not payable due to the fact that she was working. It found that – by virtue of the duty to disclose under regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 - this was recoverable from her and disallowed the appeal.

## Relevant legislation

11. The principal legislation governing recoverability of overpaid benefit appears at section 69 of the Social Security Administration (NI) Act 1992 (the 1992 Act), which provides:

**69.—(1)** Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

(b) any sum recoverable by or on behalf of the Department in connection with any such payment has not been recovered,

the Department shall be entitled to recover the amount of any payment which the Department would not have made or any sum which the Department would have received but for the misrepresentation or failure to disclose.

...

(5A) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above ... unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or has been revised under article 10 or superseded under article 11 of the Social Security (NI) Order 1998.

12. The requirement to disclose derives from regulation 32 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations). In so far as relevant, this provides:

**32.—(1)** Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner as the Department may determine and within the period applicable under regulation 17(4) of the Decisions and Appeals Regulations such information or evidence as it may require for determining whether a decision on the award of benefit should be revised under Article 10 of the 1998 Order or superseded under Article 11 of that Order.

(1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Department may determine such information or evidence as it may require in connection with payment of the benefit claimed or awarded.

(1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are

receivable shall notify the Department of any change of circumstances which he might reasonably be expected to know might affect—

(a) the continuance of entitlement to benefit; or

(b) the payment of the benefit,

as soon as reasonably practicable after the change occurs by giving notice of the change to the appropriate office—

(i) in writing or by telephone (unless the Department determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case it requires written notice (unless it determines in any particular case to accept notice given otherwise than in writing).

13. Further, however, in the case of ESA migration awards, regulation 32 is modified by virtue of regulation 6 and Schedule 1 to the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (Northern Ireland) 2010. Paragraph 3 of Schedule 1 provides that:

“Regulation 32 of the Claims and Payments Regulations (information to be given and changes to be notified) is to be read as if it were modified so as to enable the Department to require from any person entitled to an existing award—

(a) under paragraph (1), information or evidence for determining whether ... an existing award should be converted into an award of an employment and support allowance; and

(b) under paragraph (1A), information or evidence in connection with payment of benefit in the event that an existing award is converted into an award of an employment and support allowance”.

### **Submissions and assessment**

14. 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.
15. 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.

16. 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.
17. The appellant sets out a number of complaints about the fairness of the tribunal proceedings. These do not articulate any specific error of law as such, but Mr Clements for the Department has offered his support to the application for the reasons I will detail below. In the circumstances where the Department's representative indicates a measure of support for an appellant's case, it appears to me that the threshold of presenting an arguable case will almost invariably be reached. In any event, I accept that it is reached in this case and I grant leave to appeal.

*More background*

18. Before turning to the argument in the case, I will set out the factual background in more detail. The appellant, who is in her late 60s became unfit for work on 8 June 1999 and claimed income support (IS) on the grounds of incapacity for work. It is recorded that she was in receipt of incapacity benefit (IB) from 8 June 1999 to 21 June 2013. In April 2013, according to Departmental records on the appeal folder, she was written to and telephoned by the Department in order to notify her that due to the abolition of IB, she would be "migrated" to ESA. It was submitted that she was subsequently given M4000 notices upon the uprating of her benefits annually, which would set out the duty to disclose material changes of circumstances. I observe that a screen print presented to the tribunal demonstrated that this was the case in March 2019 and March 2021, but did not demonstrate this in respect of any other benefit year.
19. The appellant contacted the Department by letter in October 2015 to inform that she had done some work for a computer company. In her letter she indicated that she had given the same information by letter in July 2015 but had received no reply. In November 2015 the Department issued a permitted work form to the appellant, which she returned. It then sought further information from her employer, which appeared to contradict the assertions of the appellant in some respects. In particular, the relevant earnings threshold had been exceeded. The Department decided that the appellant was not entitled to ESA for the period from 16 May 2015 to 23 October 2015 and had been overpaid £3,749.88 for the period. It further decided that the same sum was recoverable from the appellant as she had failed to disclose the material fact that she was working and receiving earnings which were in excess of the permitted limit applicable at the time.

*Departmental submission*

20. In its submission to the tribunal, the Department stated – among other things - that it could be presumed that the appellant had been issued with

instructions to disclose a relevant change in her circumstances in an M1050 letter and that it had shown that she had been sent regular M4000 uprating letters, reminding her of the requirement to disclose changes in circumstances.

21. The support offered by Mr Clements is extended on the following basis. He observes that the Department stated in its submission to the tribunal that, due to the passage of time, it no longer holds a record of a M1050 letter being issued to the appellant on the conversion of her IS award to an ESA award. Such a letter was a generic instruction that did not refer specifically to a duty to report employment or earnings to the Department. He further observed that the Department only demonstrated by evidence that M4000 letters had been issued to the appellant in 2019 and 2021. As the overpayment related to 2015, it did not confirm that she had been given relevant instructions.
22. It is settled law that the question of failure to disclose, for the purpose of section 69 of the 1992 Act, is linked to the obligations placed on a claimant by regulation 32 of the Claims and Payments Regulations. Taking into account the modifications arising from the context that no claim for ESA had been made by the appellant, but rather that she was migrated onto ESA without a claim, these include an obligation to furnish in such manner and at such times as the Department may determine information or evidence in connection with payment of benefit in the event that an existing award is converted into an award of an employment and support allowance (arising from regulation 32(1A)).
23. The duty to disclose under regulation 32(1A) relied upon in the present case derives from the instructions given to a claimant by the Department. In this case the Department had relied on the premise that the appellant had been given M1050 and M4000 letters, and pointed to the relevant instructions on a specimen leaflet. However, in order to make a case premised on the appellant's receipt of the M1050 or M4000 the Department needed to demonstrate that it had furnished the appellant with one. It did not present any evidence that it had issued an M1050. Whereas it could demonstrate that M4000 letters had been issued in 2019 and 2021, these dates were some years after the relevant events in 2015 in the present case. In short, Mr Clements accepted that there was no evidence that the appellant had received instructions from the Department.
24. The Department had relied in its submission to the tribunal on a legal principle referencing an old Great Britain Commissioner's decision on file CS/27/1987. It was asserted that the law presumes that things are done correctly unless proven otherwise. A copy of this case was not placed before the tribunal and I directed Mr Clements to provide a copy.
25. In CS/27/1987, the Great Britain Commissioner was faced with a situation where the claimant – in the context of benefit uprating - disputed that there was any adjudication officer's decision disallowing him invalidity allowance, which would normally have been offset by an additional

element of invalidity benefit. Whereas the original adjudication officer's decision could not be produced, rating sheets indicating the adjusted amounts of benefit payable were produced. Since there could not have been payments made without an adjudication officer's decision, the Commissioner was prepared to accept that such a decision had been issued. This was in accordance with the legal maxim *omnia praesumuntur rite et solemniter esse acta*, that all acts are presumed to have been done rightly and regularly. It can be seen that there was a logical reason for applying the maxim in those circumstances. Since there was evidence of payment, it could safely be presumed that a decision to authorise payment had been made.

26. I do not consider that the maxim can assist the Department more generally in the present case. There was no evidence from the appellant that she had received M1050 or M4000 letters, as she was not at the hearing. It was submitted that she had not denied receiving them, but it does not appear that it was put to her that she had received them for confirmation or denial. There was nothing at all by way of related evidence to support the Department's assertion that these letters had been issued, unlike the case in CS/27/1987. The submission at Section 3, paragraph 5, of the Department's submission to the tribunal read:

"The law presumes that where administrative processes are conducted, things are done correctly unless it is proved otherwise i.e. there must have been a claim of Employment & Support Allowance for the award of benefit to have been made. The fact that the overpayment occurred is far stronger than the possibility that the correct information was provided on the fresh claim. CS/27/1987".

27. With respect to the presenting officer, the context here was the migration of the appellant to ESA. As I understand it, the whole point of the migration exercise was that she did not have to make a claim. All that an award of ESA establishes is that the relevant legislation was applied to her migration. I do not understand or accept the reasoning of the second sentence. I do not consider that this submission is a proper statement of the law or that it flows in any way from CS/27/1987.
28. Returning to Mr Clements' submission, he conceded that the tribunal was wrong to apply regulation 32(1) as it did. Nevertheless, he submitted that it would have been entitled to apply the broader provisions of regulation 32(1B) in the alternative. He relied on that provision as a basis for recovery of the overpaid benefit. However, this would involve further exploration of questions of fact that were not resolved before the tribunal, such as whether the appellant wrote a letter to the Department in July 2015 as she claimed.

*Conclusions*

29. I accept the concession made by Mr Clements and I agree that the tribunal has erred in law on the basis that it made a decision that was unsupported by evidence. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.
30. I direct that a new submission should be prepared by the Department for the tribunal based on all the evidence available to it.

(Signed): O STOCKMAN

COMMISSIONER

21 October 2024