

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

CARER'S 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 3 July 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 Banbridge.
2. For the reasons I give below, I grant leave to appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant claimed Carer's Allowance (CA) from the Department for Communities (the Department) from 3 December 2016. The Department obtained details of the applicant's earnings on 21 December 2016. On 31 January 2017 the Department decided on the basis of all the evidence that the applicant was entitled to CA for the period from 5 December 2016 to 18 December 2016, but that he did not satisfy the conditions of entitlement to CA from 19 December 2016 to 15 January 2017, as his earnings exceeded the allowable limit. The applicant sought reconsideration but the decision was not revised. The applicant appealed.
4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. After a hearing on 3 July 2017, which the applicant attended, the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was

issued on 23 October 2017. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 22 November 2017. On 12 April 2018 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. In his application to me, the applicant submits that the tribunal has erred in law on the basis that the same LQM as made the decision in his appeal also made the determination to refuse him leave to appeal.
6. The applicant enclosed a copy of his initial grounds of application for leave to appeal to the LQM, dated 24 October 2017, among the documentation he enclosed in support of the above ground. Although it is not formally relied upon before me, as the application to me constitutes a new and distinct legal proceeding, I consider that the applicant most likely also intended to rely on the statement of grounds he had advanced to the LQM. On my analysis, the grounds submitted which are capable of amounting to an arguable error of law are the submissions that:
 - (i) the tribunal took into account earnings from 2008;
 - (ii) the tribunal's reasons are not clear;
 - (iii) he had not received any wages after 2 December 2016;
 - (iv) there had been an unreasonable delay by the tribunal in issuing the statement of reasons;
 - (v) as CA is not a means-tested benefit any back pay he received should not infringe on what he is entitled to receive.
7. The Department was invited to make observations on the applicant's grounds. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. Mr Hinton submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal's decision

8. 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, including the applicant's letter of appeal. It held an oral hearing and heard evidence from the applicant. The Department was represented at the hearing by Mr McKavanagh.
9. The applicant had stated that he stopped working on 2 December 2016, but that he was paid late on 19 December 2016. This pay was taken into

account by Carers Branch in assessing his entitlement to CA. Mr McKavanagh submitted that the law required that his final four weeks salary would have been taken into account for the assessment of CA regardless of whether it had been paid on 2 December.

10. The tribunal found that regulation 8 of the Social Security (Invalid Care Allowance) Regulations (NI) 1976 and regulation 2 of the Social Security (Invalid Care Allowance) Regulations (NI) 2001 required the tribunal to hold that wages paid in respect of a benefit week affected entitlement to benefit for the following week. Therefore as the applicant was paid for four weeks from 19 November 2016 to 17 December 2016, he was not entitled to CA for the four weeks following 17 December 2016. It therefore disallowed the appeal.

Relevant legislation

11. Relevant legislation includes the Social Security (Invalid Care Allowance) Regulations (NI) 1976 (the ICA Regulations). At the relevant date these provided at regulation 8 as follows:

8.—(1) For the purposes of section 70(1)(b) of the Contributions and Benefits Act (condition of a person being entitled to a carer's allowance for any day that he is not gainfully employed) a person shall not be treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week have exceeded £110.00 and, subject to paragraph (2) of this regulation, shall be treated as gainfully employed on every day in a week if his earnings in the immediately preceding week have exceeded that amount.

(2) There shall be disregarded for the purposes of paragraph (1) above a person's earnings—

(a) for any week which under paragraph (2) of regulation 4 of these regulations is treated as a week in which that person satisfies the requirements of paragraph (1) of that regulation;

...

12. A further relevant provision appears at regulations 6 and 7 of the Social Security Benefit (Computation of Earnings) Regulations (Northern Ireland) 1996 (the Computation of Earnings Regulations). These provide:

6.—(1) Earnings derived from employment as an employed earner shall be calculated or estimated over a period determined in accordance with the following paragraphs and at a weekly amount determined in

accordance with regulation 8 (calculation of weekly amount of earnings).

(2) Subject to paragraphs (3) and (5) to (8), the period over which earnings are to be taken into account shall be—

(a) in a case where they are payable in respect of a period, a period equal to a benefit week or such number of benefit weeks as comprise the period commencing on the date on which earnings are treated as paid under regulation 7 (date on which earnings are treated as paid) and ending on the day before the date on which earnings of the same kind (excluding earnings of the kind mentioned in regulation 9(1)(a) to (j)) and from the same source would, or would if the employment was continuing, next be treated as paid under that regulation;

(b) in any other case, a period equal to such number of weeks as is equal to the number (less any fraction of a whole number) calculated in accordance with the formula—

$$\frac{P}{Q+R}$$

where—

P is the net earnings;

Q is the amount of the relevant earnings limit plus one penny; and

R is the total of the sums which would fall to be disregarded or deducted as appropriate under regulation 10(2) or (3) (calculation of net earnings of employed earners),

and that period shall begin on the date on which the earnings are treated as paid under regulation 7.

(3) Where earnings not of the same kind are derived from the same source and the periods in respect of which those earnings would, but for this paragraph, fall to be taken into account overlap, wholly or partly, those earnings shall be taken into account over a period—

(a) equal to the aggregate length of those periods; and

(b) beginning with the earliest date on which any part of those earnings would otherwise be treated as paid under regulation 7.

(4) In a case to which paragraph (3) applies, earnings under regulation 9 (earnings of employed earners) shall be taken into account in the following order of priority—

(a) earnings normally derived from the employment;

(b) any payment to which paragraph (1)(b) or (c) of that regulation applies;

(c) any payment to which paragraph (1)(i) of that regulation applies; (d) any payment to which paragraph (1)(d) of that regulation applies.

(5) Where earnings to which regulation 9(1)(b) to (d) applies are paid in respect of part of a day, those earnings shall be taken into account over a period equal to a week.

(6) Where earnings to which regulation 9(1)(i) applies are paid in respect of, or on the termination of, any employment which is not part-time employment, the period over which they are to be taken into account shall be—

(a) a period equal to such number of weeks as is equal to the number (less any fraction of a whole number) obtained by dividing the net earnings by the maximum weekly amount which, on the date on which the payment of earnings is made, is specified in Article 23(1) of the Employment Rights Order; or

(b) a period equal to the length of the specified period, whichever is the shorter, and that period shall begin on the date on which the earnings are treated as paid under regulation 7.

7. Earnings to which regulation 6 (calculation of earnings of employed earners) or 11(2) (calculation of earnings of self-employed earners) applies shall be treated as paid—

(a) (i) in the case of a payment in respect of an adult dependant of an increase of maternity allowance payable under section 82(2) of the Contributions and Benefits Act or

an increase of carer's allowance payable under paragraph 7 of Schedule 2 to the Social Security Benefit (Dependency) Regulations (Northern Ireland) 1977(a), or

(ii) in the case of a payment in respect of an adult dependant who is not residing with the claimant of an increase of Category A or Category C retirement pension payable under section 83(2)(b) or 84(1) and (2)(b) of the Contributions and Benefits Act or a disablement pension where the claimant is entitled to an unemployability supplement payable under paragraph 6(1)(a)(ii) of Schedule 7 to that Act, on the first day of the benefit week following the benefit week in which the payment is due to be made;

(b) in any other case, on the first day of the benefit week in which the payment is due to be made.

13. A further relevant provision appears at Schedule 1 of the Computation of Earnings Regulations. This is paragraph 11A:

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.

14. Sub-paragraph (2) does not apply in this case.

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. The applicant firstly submits that there was unfairness arising from the fact that the first person to determine his application for leave to appeal was the same LQM who disallowed his appeal. I do not accept this submission. An LQM is a dispassionate decision maker who can be expected to apply his or her mind to the question of whether an applicant has established an arguable case of error of law. An LQM might be persuaded to do so where an applicant, for example, highlights an ambiguity in the law whereby a different interpretation to that accepted by the tribunal is arguable. Regardless of that fact, if the LQM refuses leave to appeal, the applicant has a further route to the remedy he seeks by applying for leave to appeal from the Commissioner, who has had no previous involvement in his proceedings. I do not accept that unfairness has occurred.
19. The applicant further submits that the earnings he received in December 2016 were, in fact, back pay from 2008, when he started work with his employer. This is a submission of fact which was not advanced in the appeal before the tribunal. There was no evidence to substantiate this submission of fact in the papers before the tribunal, and no evidence to this effect is placed before me. I do not accept that the tribunal has arguably erred in law on this ground.
20. The applicant further submits that the tribunal's reasons are unclear. The tribunal found that the applicant received payment of wages for a four week period in the week ending on 17 December 2016. It found that the wages covered the period from 19 November to 17 December 2016. It found that regulation 8 of the Social Security (Invalid Care Allowance) Regulations (NI) 1976 had the effect that the payment had to be treated as paid on the first day of the benefit week in which the payment was due to be made. As the wages had been paid for the four weeks covering the period from 19 November to 17 December 2016, the tribunal found that the applicant had to be treated as possessing income in the four weeks following 17 December 2016 and that this was in excess of the £110 earnings threshold. Whether or not this is legally correct, the reasoning is abundantly clear. I therefore do not accept that the tribunal's reasons are arguably inadequate as submitted.
21. The applicant further submits that there had been an unreasonable delay by the tribunal in issuing the statement of reasons in his case. The tribunal was requested to prepare a statement of reasons on 22 July 2017. It issued this on 23 October 2017, some three months later. I do not consider that this is arguably an unreasonable delay in all the circumstances. It does not appear to me that any prejudice has been incurred by the applicant as a result. I refuse leave to appeal on this ground.
22. The applicant further submits that he had not earned any wages after 2 December 2016. The period over which earnings are to be taken into account is determined by regulation 6 of the Computation of Earnings Regulations. The applicant's evidence to the tribunal was that he received payment on 19 December which "should have been paid when he left on

2 December". The evidence of his former employer indicated that he was paid in the week ending 17 December and this was also consistent with the evidence in the applicant's claim form dated 6 December 2016 that he had last been paid in November 2016. The evidence indicated that the wages were payable for a period of four weeks. Therefore, applying regulation 6(2)(a) which is set out above, they fell to be taken into account over a number of benefit weeks as comprise the period, namely four.

23. However, the evidence of the applicant's employer was at variance with the applicant's account. Specifically, the employer stated that the employment ended on 9 December 2016. Mr Hinton initially submitted that no error of law arose on this basis. Subsequently, in response to a direction issued by me, Mr Clements for the Department submitted that the tribunal had erred in law. He submitted that the evidence of the end date of the applicant's contract of employment was in conflict but not resolved by the tribunal.
24. The significance of ascertaining the applicant's final working day arises in relation to the assessment of sums to be disregarded in the calculation of earnings for the purpose of Schedule 1 to the Computation of Earnings Regulations. By paragraph 11A, this provides that earnings due to be paid from the claimant's employment as an employed earner which ended before the date in respect of which the claimant first satisfies the conditions for entitlement to the benefit to which the claim refers are to be disregarded. Mr Clements points out that the conditions of entitlement were first satisfied on 5 December 2016. He points out that if the employment ended on 2 December 2016, the applicant would be entitled to CA for the relevant period.
25. This is clearly an arguable point and I grant leave to appeal on it. While the evidence of the applicant's employer indicates that his contract ended on 9 December 2016, he indicated that he finished work on 2 December and the tribunal made no formal finding as to the date on which his employment ended. His claim form of 6 December 2016 indicated that his employment ended on 2 December 2016.
26. I observe that the version of the Computation of Earnings Regulations furnished to the tribunal in the Departmental submission is incomplete, or out of date. Specifically, paragraph 11A did not appear in the version of the Regulations enclosed with the Department's submission. It may be that, had the full legislation been furnished to the tribunal, the issue would not have been left unresolved.
27. However, it was left unresolved and it appears to me inevitable to find that the tribunal has erred in law. If the employment ended on 9 December, the tribunal may not have made any material error, as the outcome of the appeal would be the same. If it ended on 2 December, however, I agree with the submission of the Department that the subsequent earnings should not have been taken into account and that entitlement to CA would

have flowed logically from this. Therefore, I consider that I must set aside the decision of the appeal tribunal.

Disposal

28. There is a net point to be resolved in this case, which is a matter for oral evidence. I have considered whether it would be expedient for me to deal with this. However, an oral hearing would be necessary and holding a Commissioner hearing would be inefficient for this sole purpose. Rather than determine the issue of fact myself, it appears to me that the appeal is best remitted to a newly constituted tribunal for determination.
29. The applicant has persisted patiently with this appeal, and will have to attend one further hearing in order that the matters in dispute can finally be resolved.
30. I direct that the new tribunal shall consider what is set out above and that it shall make findings of fact as necessary to determine the appeal.

(Signed): O Stockman

Commissioner

5 February 2019