

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

JOBSEEKER'S ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 25 February 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 25 February 2019 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is evidence relevant to the issues arising in the appeal, including the appellant's own evidence, to which I have not had access. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Jobseeker's Allowance (JSA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. I have been greatly assisted by the written observations on the application for leave to appeal which were prepared by Mr Clements of the Decision Making Services (DMS) unit within the Department. In those observations Mr Clements set out the following background to the appeal:

'The applicant had been in receipt of Jobseeker's Allowance (JSA) from 25 July 2011. He was selected to participate in a scheme for assisting persons to obtain employment called the "Steps 2 Success" (S2S) scheme from 9 April 2015.

The applicant was required to participate in this scheme for 52 weeks. Due to an administrative error, the applicant was registered to participate for 78 weeks. The Department became aware of the error on 12 May 2016 and notified the lead contractor for the S2S scheme, Network Personnel, on 13 May 2016. However, Network Personnel continued to issue appointment letters to the applicant and did not take the appropriate action to remove him from the scheme until 6 October 2016. Network Personnel have recorded that the applicant did not attend any S2S appointments after 4 May 2016.

The applicant was selected to participate in the S2S scheme again in July 2018. He attended a S2S interview at ... Jobs and Benefits Office on 16 August 2018. During the interview he stated that he refused to participate in the S2S scheme for the required 52 weeks. A decision maker determined on 6 September 2018 that the applicant had not shown good reason for the failure to participate in the scheme and that consequently a sanction should be imposed for the period 31 August 2018 to 27 September 2018. A decision was subsequently made on 7 September 2018 to reduce the applicant's award of JSA by 100% of the allowance payable to him for the period 31 August 2018 to 27 September 2018. The applicant was notified of the decision on 7 September 2018.

The applicant applied for a revision on 11 September 2018. A decision maker looked at the decision again on 7 November 2018 and decided not to revise the decision. Notification was issued on 7 November 2018.

The applicant's appeal against the 7 September 2018 decision was received on 5 December 2018. An appeal

tribunal sitting on 25 February 2019 disallowed the appeal. The decision notice states that the applicant “is not entitled to [JSA] for the period 31st August 2018 – 27th September 2018 as he without good cause failed to participate in the [S2S] scheme by not accepting a place on the [S2S] provision.”

The applicant applied for a statement of the reasons for the tribunal’s decision via email on 12 March 2019. The Appeals Service issued a letter to the applicant on 13 March 2019 which explained that the application must bear a handwritten signature. The applicant was asked to return the application, properly signed, within 14 days of the date that the letter was issued (13 March 2019). The applicant’s signed application was received on 2 April 2019. The Legally Qualified Panel Member (LQPM) of the tribunal decided to treat this as an application for an extension of time within which to apply for a statement of reasons. The LQPM refused to grant an extension of time for applying for a statement of reasons on 5 June 2019. The applicant was notified of the LQPM’s determination on 11 June 2019.

The applicant applied to the LQPM on 2 July 2019 for leave to appeal to the Social Security Commissioner against the tribunal’s decision. The LQPM refused to grant leave to appeal on 23 July 2019. The applicant was notified on 29 July 2019.’

Proceedings before the Social Security Commissioner

6. On 27 August 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 7 October 2019 observations on the application for leave to appeal were requested from DMS. In well-reasoned written observations dated 25 October 2019, Mr Clements opposed the application for leave to appeal on the grounds advanced by the appellant but supported the application on another identified ground. The written observations were shared with the appellant on 29 October 2019. On 28 November 2019 further correspondence was received from the appellant which was shared with Mr Clements on 2 December 2019. On 16 January 2020 further correspondence was received from the appellant to which was attached a copy of the record of proceedings for the appeal tribunal hearing.
7. On 27 April 2020 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings has been committed. On the same dated I determined that an oral hearing of the appeal would not be required.

Errors of law

8. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
9. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
 - “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
 - (ii) failing to give reasons or any adequate reasons for findings on material matters;
 - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
 - (iv) giving weight to immaterial matters;
 - (v) making a material misdirection of law on any material matter;
 - (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

The relevant legislative provisions

10. Regulation 54(4), 54 and 58(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended, (‘the 1999 Regulations’) are as follows:

53 (4) Subject to paragraph (4A), a party to the proceedings may apply in writing to the clerk to the appeal tribunal for a statement of the reasons for the tribunal’s decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman or, in the case of a tribunal which has only one member, that member, shall record a statement of the reasons and a

copy of that statement shall be sent or given to every party to the proceedings as soon as may be practicable.

54 (1) The time for making an application for the statement of the reasons for an appeal tribunal's decision may be extended where the conditions specified in paragraphs (2) to (8) are satisfied, but subject to regulation 53(4A), no application shall in any event be made more than three months after the date of the sending or giving of the notice of the decision of the appeal tribunal.

(2) An application for an extension of time under this regulation shall be made in writing and shall be determined by a legally qualified panel member.

(3) An application under this regulation shall contain particulars of the grounds on which the extension of time is sought, including details of any relevant special circumstances for the purposes of paragraph (4).

(4) The application for an extension of time shall not be granted unless the legally qualified panel member is satisfied that it is in the interests of justice for the application to be granted.

(5) For the purposes of paragraph (4), it is not in the interests of justice to grant the application unless the legally qualified panel member is satisfied that—

- (a) the special circumstances specified in paragraph (6) are relevant to the application; or
- (b) some other special circumstances exist which are wholly exceptional and relevant to the application, and as a result of those special circumstances it was not practicable for the application to be made within the time limit specified in regulation 53(4).

(6) For the purposes of paragraph (5)(a), the special circumstances are that—

- (a) the applicant or a partner or dependant of the applicant has died or suffered serious illness;
- (b) the applicant is not resident in the United Kingdom; or
- (c) normal postal services were disrupted.

(7) In determining whether it is in the interests of justice to grant the application, the legally qualified panel member shall have regard to the principle that the greater the amount of time that has elapsed between the expiry of the time within which the application for a copy of the statement of reasons for an appeal tribunal's decision is to be made and the making of

the application for an extension of time, the more compelling should be the special circumstances on which the application is based.

(8) In determining whether it is in the interests of justice to grant the application, no account shall be taken of the following—

- (a) that the applicant or any person acting for him was unaware of, or misunderstood, the law applicable to his case (including ignorance or misunderstanding of the time limits imposed by these Regulations); or
- (b) that a Commissioner or a court has taken a different view of the law from that previously understood and applied.

(9) An application under this regulation for an extension of time which has been refused may not be renewed.

(10) The legally qualified panel member who determines an application under this regulation shall record a summary of his determination in such written form as has been approved by the President.

(11) As soon as practicable after the determination is made notice of the determination shall be sent or given to every party to the proceedings.

(12) Any person who, under paragraph (11), receives notice of the determination may, within one month of the determination being sent to him, apply in writing for a copy of the reasons for that determination and a copy shall be supplied to him.

(13) In this regulation “Commissioner” includes—

- (a) a Commissioner within the meaning of section 39(1) of the Social Security Act 1998(a); and
- (b) a Child Support Commissioner appointed under section 22 or 23 of the Child Support Act 1991.

58 (1) Subject to paragraph (1A), an application for leave to appeal to a Commissioner from a decision of an appeal tribunal under Article 15 of the Recovery of Benefits Order or under Article 13 or 14 shall—

- (a) ...
- (b) be in writing and signed by the applicant or, where he has provided written authority to a representative to make the application on his behalf, by that representative;'

Practice and procedure within the Appeals Service ('TAS')

11. Mr Clements has been forensic in identifying aspects of the practice and procedure within TAS with respect to applications for a statement of reasons for the appeal tribunal's decisions.
12. Firstly, Mr Clements has drawn to my attention an 'Administrative Direction' signed by the President of Appeal Tribunals for Northern Ireland ('the President') on 22 June 2015. The 'Administrative Direction' sets out the wording of Regulation 53(4) of the 1999 Regulations and adds:

'For the avoidance of doubt any application of the type referred to above must bear the signature of the person making it.'

13. Secondly, Mr Clements sets out details of an exchange of emails between the Office of the President and the Department. The impetus behind the email exchange was a query from an officer in a benefit branch of the Department for clarification as to whether a request for a statement of reasons for an appeal tribunal's decision, made by the Department as a party to the proceedings, could be made by email. The officer noted that she had been advised that such an email request had been returned to the requester by TAS on the basis that the email had not been signed. She had raised the issue with TAS as she observed that there did not appear to be any legislative requirement requiring an application for a statement of reasons to be signed. She stated that she had been advised by TAS that as a result of an administrative direction issued by the President all requests for statements of reasons had to be signed. The officer noted that where signed applications are required in the decision-making and appeals legislative provisions, the relevant provision is usually clear in that regard. The officer asked for clarification as to whether an application for a statement of reasons made by email from the Department was valid.
14. I observe, at this point, that the administrative direction referred to by the officer is likely to be the direction of 22 June 2015.
15. The officer, after some delay, eventually received a reply to her query from another officer in the Office of the President to the following effect:

'I am pleased to say that (the President) has considered this issue and he has agreed to accept email requests for the ROP/SORs and a typed signature is acceptable. TAS will process these in the usual way.'
16. Thirdly, Mr Clements has noted that when a decision notice for an appeal tribunal's decision is issued to the parties to the proceedings, guidance notes are routinely attached which contain the following:

'STATEMENT OF REASONS FOR THE DECISION

This can be provided if a written request is made to the Clerk to the Tribunal within 1 month of the date of this notification, and is required by you if you decide to apply for leave to appeal to the Commissioner. (Regulation 53(4) and 58(1)(b) of The Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999). If a Statement of Reasons is sent to you, a Record of Proceedings will also be included.'

17. Mr Clements observes that the notes do not inform the applicant of a requirement for the application to bear an original signature.

The correspondence of 13 March 2019 from TAS to the appellant

18. As was noted by Mr Clements in his narrative of the background to the appeal, the appellant had sent an email to TAS on 12 March 2019 in which he made a request for a statement of reasons for the appeal tribunal's decision. In correspondence dated 13 March 2019 a clerk in TAS replied to the appellant in the following terms:

'Your application for a copy of the Record of Proceedings/Statement of reasons of the Appeal Tribunal held on 15/02/2019 was received in the office on 12/03/19, unfortunately the application does not have a handwritten signature.

Please return the latter, properly signed to the Appeals service within 14 days from the date at the top of this letter. Please note that a printed or typed signature is not acceptable.'

Further administrative and judicial action

19. As was also noted by Mr Clements in his narrative of the background to the appeal, the appellant, in response to the correspondence of 13 March 2019, prepared and signed a further application and forwarded this to TAS where it was received on 2 April 2019. This was then placed before the Legally Qualified Panel Member (LQPM) of the tribunal who determined that it should be treated as an application for an extension of time within which to apply for a statement of reasons. Accordingly, TAS then asked the appellant to submit reasons why his application was late. The appellant's response was subsequently received in TAS and was placed before the LQPM. The LQPM refused to grant an extension of time for applying for a statement of reasons on 5 June 2019. The applicant was notified of the LQPM's determination on 11 June 2019.
20. Finally an application for leave to appeal to the Social Security Commissioner was received in TAS and was placed before the LQPM.

On 23 July 2019 the LQPM rejected the application for leave to appeal, giving the following as a reason:

'Reasons for decision were not requested by the applicant under Regulation 53(4) and therefore regulation 58(1)(a) is not satisfied in connection with an application for leave to appeal.'

Analysis

21. I agree with Mr Clements that regulation 53(4) of the 1999 Regulations does not impose a requirement that an application for a statement of reasons for an appeal tribunal's decision has to be signed. As Mr Clements has observed if the legislators had wished to impose such a requirement then that could have been added to the relevant legislative provision. That is what happened in regulation 58(1)(b) of the 1999 Regulations which deals with applications for leave to appeal to the Social Security Commissioner and which imposes the dual requirement that the application must be in writing and be signed by the applicant.
22. The absence of a requirement that an application for a statement of reasons for an appeal tribunal's decision has to be signed by the applicant may be the reason why the President of Appeal Tribunals for Northern Ireland responded in a positive manner to the request for clarification of the ambit of regulation 53(4) and affirming that applications sent by email with a typed signature were sufficient to satisfy regulation 53(4). That had the effect of negating the President's earlier 'Administrative Direction' of 23 June 2015 which had mandated that any regulation 53(4) application had '... to bear the signature of the person making it.'
23. It is clear that something has gone awry in how the President's instruction that applications for a statement of reasons sent by email with a typed signature were acceptable and satisfied regulation 53(4) was communicated to the administrative staff in TAS. The advice which the appellant in the instant case was given about the regulation 53(4) requirement and the absence of a signature reflects what was said in the 'Administrative Direction'. It is clear that this advice was erroneous and that the application for a statement of reasons for the decision of the appeal tribunal was valid. Further, as it was received within one month of the date of the sending or giving of the decision to the appellant, it should not have been treated as having been received outside of the prescribed time limits for making such an application. Finally, and most importantly, the application should have been actioned by the LQPM as a valid, in-time application. On that basis, I am satisfied that there has been a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings.

Disposal

24. The decision of the appeal tribunal dated 25 February 2019 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
25. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
 - (i) The decision under appeal is a decision of the Department, dated 7 September 2018, which decided that JSA was not payable to the appellant for the period from 31 August 2018 to 27 September 2018;
 - (ii) It will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
 - (iii) It will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

19 August 2020