NS-v-Department for Communities (ESA) [2023] NICom 29

Decision No: C5/23-24(ESA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application to a Social Security Commissioner
for leave to appeal on a question of law
from the decision of a Tribunal
dated 29 March 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I grant leave to appeal. I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Omagh on 29 March 2022 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

Directions

1. The fresh appeal will be listed before a new tribunal with none of the same members as previously. It will be listed as an oral hearing, and it is in the claimant's interests to attend, either in person, by phone or virtually, as will be preferential or practical.

2. The claimant is to state his preference for the hearing in writing (post or email as is usual) to the Appeals Service within 14 days of the issue of this decision.

3. The Department is to consider filing a more focussed submission as to the question of substantial risk to the appellant's mental health condition in not being found incapable to undertake work related activities, or in undertaking them, in light of the points scored under schedule 2. Any further submission must be filed within 28 days of the issue of this decision.

4. A Chairman of the Appeals Service may extend time or make any further necessary listing directions.

REASONS

Background

1. The appeal below concerned entitlement to an Employment and Support Allowance under the Regulations (Northern Ireland) 2008 and 2016 (hereafter "the ESA Regulations", or "the regulations"). The central issue was whether the appellant had Limited Capability for Work Related Activities (LCWRA), under schedule 3, or, if not, whether the exceptional provision set out in regulation 31(2), ESA Regulations (NI) 2016 applied to him.

2. He completed a form ESA 50 on 3 June 2021, citing the conditions of depression, anxiety, and fatigue.

3. Accordingly, following him completing a fresh ESA 50 form on 11 December 2021, the claimant underwent an assessment over the telephone due to the COVID 19 restrictions then in place. That assessment was on 23 July 2021. The healthcare professional (HCP) was of the view that he had limited capability for work (LCW) but not for work related activities (LCWRA). On 3 August 2021, the decision maker accepted that recommendation and awarded 18 points under descriptors 13, 14 and 15 of schedule 2: 6 points for coping with change, 6 points for getting about, and 6 points for coping socially. He would therefore be expected to engage in work related activities.

4. Following the mandatory reconsideration procedure which didn't change the decision, the claimant appealed; the appeal was heard on 29 March 2022.

5. The tribunal might have investigated all aspects of the decision, but, quite properly, it appears not to have done so: under Article 13(8)(a) of the Social Security (Northern Ireland) Order 1998, it need not investigate matters not raised by the appeal: the appeal was clearly claiming entry into the Support Group, and the Department had awarded the 18 points under schedule 2 referred to above. The tribunal decision adopted the conclusion of the decision maker, that the claimant did have limited capacity for work, but could engage in work related activities. The application for leave to appeal to the Appeals Tribunal was refused.

Proceedings before the Commissioners

Representation before me

6. The appellant has acted in person, and Mr Rush for the Department. I have considered whether I should have an oral hearing to rehearse the arguments, but neither party has requested that. I do not think one is necessary in the interests of justice; I am able to decide the matter fairly on the papers before me, and, by common consent, at the same time as I determine the application for leave.

The arguments of the parties

The appellant

7. The application to the Commissioners has identified areas in which it is said that the tribunal fell into error of law which I paraphrase below.

    (i) the telephone assessment focussed on what he was able to do on good days;

    (ii) he takes issue with the GP report, observing that Dr Gallagher had not seen him in some time, and the report failed to capture his condition over the period;

    (iii) he was walking for 2 miles each week for only a short time;

    (iv) he can communicate and engage with others, but avoids doing so as part of his condition;

    (v) he struggles with essential tasks such as personal care;

    (vi) the process of assessment and decision making has worsened his anxiety;

    (vii) the result of the above has been unfair and inaccurate findings of fact by the tribunal;

The respondent

8. The respondent Department does not support the appeal; however, Mr Rush has helpfully explained the background, and set out the various arguments.

My conclusions on the appellant's arguments

9. As I am allowing the appeal on a different basis to those put forward, I need say little about the detailed points made.

10. Overall, I agree with the view taken by Mr Rush that the appellant's arguments are, understandably, concerned as to the factual picture, his disagreement with that, and how and why it has come about. I should say that this is common for unrepresented claimants in this point of law arena, and it is why the jurisdiction is inquisitorial, and I am allowing the appeal, on a different basis to those put forward that I find to be a legal error by the tribunal.

The relevant legislation

11. I need say only that the Tribunal was considering whether the appellant had limited capability for work or for work related activities, commonly abbreviated to LCW/LCWRA, under section 8(2) Welfare Reform Act (NI) 2007, regulation 15 Employment Support Allowance Regulations (NI) 2016, and the relevant regulations in relation to LCWRA. I set out the provisions of the relevant regulation:

Regulation 31(2) ESA Regulation Regulations (NI) 2016

A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 30(1) is to be treated as having limited capability for work related activity if-

(a) the claimant suffers from some specific disease or bodily or mental disablement, and

(b) by reason of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

Regulation 31(2): a "safety net" provision

12. Regulation 31(2) acts to identify cases where limitations are established in capability for work under schedule 2, and there are concerns that, although the schedule 3 descriptors are not satisfied, there may yet be a risk to the health of the claimant, or, less usually, to the health of others, if the claimant is found not to have limited capability for work related activity.

13. This is an area which has exercised judicial minds in both this jurisdiction and in Great Britain over some years. I hope, shortly, to be able to pull together the main strands.

14. The tribunal must consider, and show that it has considered, regulation 31(2) when dealing with an appeal where it might apply. This is clearly such a case, given the schedule 2 descriptors based upon mental health problems that were found to apply to the claimant, and the tribunal does deal with the regulation in its statement of reasons, as follows:

> "A claimant who does not have Limited Capability for Work Related Activity can in certain circumstances be treated as having Limited Capability for Work Related Activity if they satisfy regulation 31(2) of the Employment and Support Allowance Regulations. To be treated as having Limited Capability for Work Related Activity a Claimant must show that there would be a substantial risk to the mental or physical health of any person if the Claimant were found not to have Limited Capability for Work Related Activity. Having reviewed the evidence in this matter the Tribunal finds that the evidence does not suggest that there would

> be a substantial risk to the mental or physical health of any person of the Claimant were found capable of Work Related Activity. The Claimant does not take non-prescription drugs or does not drink alcohol. He has had no thoughts of life not worth living or suicidal thoughts or plans or intent. There is no incidents of self-harm. Consequently, the Tribunal have decided that would not be a substantial risk to the Claimant's health or of any other person if he were found to be capable of Limited Capability for Work Related Activity."

15. I ignore the probable typing errors or mistakes in the wording: it is obvious that the tribunal is trying to set out and explain the regulation; however, it has done so by merely stating the statutory test and saying that the appellant doesn't satisfy it. This is not enough. The reasons only have real meaning if they explain why, on the facts of the case the test is not satisfied. The brief reference to there not being a risk to the appellant's health because he has no history of self-harm does not fully answer the question posed by the regulation, because it concentrates on one narrow (albeit important) area of potential risk. The remit of the provision is wider, encompassing other aspects of risk to health, such as a marked exacerbation of existing physical or mental health conditions.

"Risk to the… health of any person"

16. It is settled law since the days of Incapacity Benefit that this reference is to the health of the claimant or others, for example co-workers. In this case the question of harm to others is not a feature, so it is potential for harm to the appellant that is being examined. Whilst, of course, active self-harm may be important, there is no doubt that other facets are relevant. In *JT v SSWP* ESA) ([2018] UKUT 124 (AAC) Upper Tribunal Judge Bano held that "in the case of claimants with fragile mental health the possible effects on the claimant of any compulsion to perform a particular type of work may have to be taken into account when considering regulation 29(2)(b)". This applies also to the compulsion to undertake work related activities.

17. The Decision Maker did briefly mention one other matter in the decision under the paragraph "Exceptional Circumstances": following on directly from remarks about a lack of risk to others or to himself from his own behaviour, is the comment that "it would be reasonable for [the appellant] to undertake work-related activity without any substantial risk to his own health in relation to the journey to and from the provider (listed in the appendix) or whilst there."

Charlton

18. The inclusion of the journey is a reference to *Charlton* v *Secretary of State for Work and Pensions* [2009] EWCA Civ 42, a case in the Court of Appeal of England and Wales, which defines the legal position regarding

regulation 29, applying to the test of limited capability for work, and its applicability has been extended to work-related activity (under regulation 35(2)(b) in the 2008 ESA regulations, which is regulation 31(2)(b) in the NI regulations I am considering) by Upper Tribunal Judge Jacobs in *AH v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 118 (AAC); [2013] AACR 32. The Court in *Charlton* explained that, under regulation 29 the task of the tribunal is to look at the likely work environment given the skill set of the claimant, and there to examine the nature of the risk to the claimant within that work environment, and the journey to and from it. It is about assessing "the range of work which the claimant is capable of for the purposes of assessing risk to health" (at paragraph 47); this becomes a similar exercise with work-related activity using knowledge of the types of such activity that may be expected, together with the journey to and from that.

19. The appendix referred to by the Healthcare Professional is a Department of Communities leaflet in the Department's submission to the tribunal which explains about the ESA Work Related Activity Group, mentioning some of the activities. I presume this is the list which is produced following the leading case on the regulation governing limited capability for work-related activity, *IM v SSWP (ESA)* [2014] UKUT 412 (AAC), the decision of a Great Britain (GB) three judge panel.

IM

20. The discussion in the case law prior to *IM* centred around the difficulties in calibrating the extent to which participating in work related activity might result in substantial risk to heath, where there was little indication of what work-related activities might amount to in a particular case.

21. *IM* mandated this information so the tribunal would know the sort of activities that might be expected, including the most demanding, and consider the issue of risk given the particular appellant's health and difficulties within the descriptors already assessed, and the likely activities; paragraph 65 of the decision helpfully sets out the meaning of "substantial risk" in this context, explaining that it means a risk "that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

22. *IM* also confirms the application of the *Charlton* approach to this test, in addition to the similarly worded regulation with which that case was dealing. There was a difference in the application to a test involving work related activity rather than the type of work able to be anticipated on the evidence; it was for the Secretary of State to inform the tribunal "not only what the least demanding types of work-related activity are, but also what the most demanding types are where the claimant lives." The three-judge panel also observed that where (as here) the decision under appeal to the tribunal accepts that the claimant has limited capability for work, then there might be a more focussed departmental submission as to why, given the claimant's disability, the regulation does not apply: I have allowed time for

the Department to make such submissions in this case. They are particularly desirable in light of the points scored under schedule 2. These are under descriptors reflecting problems from mental health or cognitive issues, one of those being that the appellant is unable to get to a specified place with which he is unfamiliar without being accompanied by another person, hence the importance of the "journey point."

23. The case also highlighted aspects of the approach at the departmental decision-making level, in particular the fact that the results of work capability assessments, for example points scored that suggest or illustrate problems in particular areas of activity, are not passed on to those who determine the work- related activity that is to be provided. I identified this as 'the knowledge gap' in *XT v SSWP (ESA)* [2015] UKUT 581 (AAC), and that case emphasised its importance in cases where fragile mental health is the significant factor: the tribunal had erroneously assumed that its observations about the claimant's limitations as to any work placement would be communicated to the activity provider.

24. The above are factors to be borne in mind in the exercise of the assessment under regulation 31(2)(b).

The error of law here

25. The paragraph in the tribunal's statement of reasons as to whether regulation 31(2) should be applied was merely a recitation of the statutory test, and not an explanation as to why this claimant didn't fall within it: the evidence of the lack of likelihood of active self-harm given the history is from the Decision under appeal to the tribunal. That also goes on to deal with other pertinent issues which are not mentioned, leaving me with the distinct impression that the tribunal considered only the likelihood of active self-harm as being of relevance to the test of substantial risk to the health of the appellant, which was a further material error; that is to say, it was a mistake which mattered at the end of the day.

Before the new tribunal

26. The fresh tribunal will look at the appendix already included in the case papers and assess the information about the activities the appellant might be required to perform. If, in the intervening period he has been required to attend work related activities there may be evidence as to how that has progressed, and, if so, it should be filed and disclosed to the claimant. Of course, such evidence will be from a time after the date of decision, but it might shed evidence on the likely position at that time. That will be for the tribunal to decide.

27. I would encourage the appellant to appear before the tribunal either in person, by phone or on a screen. I do understand that he feels anxious about this; however, he can be accompanied by someone to give him some moral support, and his arguments may have more force of he is there in person to answer questions; indeed, he may be the only person who

can assist about what, if anything, he has been required to do in the interim, and, if he has not been asked to compete any work related activities, what has been discussed with him as to why that is. This is likely to assist the tribunal; I note a comment from the Decision under appeal to the tribunal (at page 82, paragraph 14) that "The Department contacted the appellant's local benefit office on 17/08/21 to obtain any personal, action plan which had been put in place. The local benefit office did not reply."

28. As always, I caution the claimant that success before me on a point of law is no indication of what the result will be at the fresh tribunal, which is examining the facts.

(signed): P Gray

Deputy Commissioner (NI)

18 September 2023