CASE LAW IN NORTHERN IRELAND

JUNE TO SEPTEMBER 2020

- SA v. Department for Communities (DLA) [2020] NI Com 038

NORTHERN IRELAND COURT OF APPEAL

Michael O'Donnell v. Department for Communities [2020] NICA 36

Bereavement Support Payment: Eligibility of Deceased who was unable to work due to disability

BACKGROUND

Mr O'Donnell's wife was unable to work during her working life due to disability. She did not pay any Class 1 or 2 national insurance contributions. She was, however, credited with contributions due to her incapacity for work. Following her death in July 2017, Mr. O'Donnell applied for Bereavement Support Payment (BSP). The Department for Communities declined Mr O'Donnell's application because his wife had not paid national insurance contributions.

The Department based its decision on s29 and 30(1)-(3) of the Pensions Act (Northern Ireland) 2015 (the 2015 Act) which require *actual* payment of contributions. Mrs. O'Donnell's credited contributions did not satisfy the eligibility requirements.

Mr. O'Donnell appealed the Department's decision to an Appeal Tribunal.

LEGAL ISSUES

Represented by Law Centre NI, Mr. O'Donnell argued that the effect of s29 and 30(1)-(3) of the 2015 Act was unfair and discriminatory. He argued that it breached his human rights under the European Convention on Human Rights (ECHR).

Specifically, Mr O'Donnell argued that his Article 14 right (prohibition on discrimination) read with his Article 8 (right to a private and family life) and Article 1, Protocol 1 to the Convention (protection of property) rights had been breached.

The Tribunal referred the following question to the Court of Appeal:

'Are the provisions of Sections 29 and 30(1)-(3) of the Pensions Act (NI) 2015 incompatible with Articles 8, 14 and Protocol 1 Article 1 of the European Convention on Human Rights, as provided by the First Schedule to the Human Rights Act 1998?'

DECISION

The Court of Appeal found that s29-30(1)-(3) of the 2015 Act had the effect of treating the family of a deceased person, who was never able to work, the same as the family of a deceased person who chose not to work.

This similarity in treatment was discriminatory and could not be justified.

The Court of Appeal held that s29 and 30(1)-(3) of the 2015 Act were therefore incompatible with Article 14 read with Article 8 and Article 1, Protocol 1.

The Court concluded that s29(1) of the 2015 Act should be read and given effect so that the national insurance contribution condition is treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability.

The Court referred the case back to the Tribunal for a decision on the award. Subsequently, the Department revised its decision and awarded Mr. O'Donnell BSP.

For a full copy of the Judgment click here.

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HIGH COURT DECISION

In the matter of an application by Lorraine Cox for leave to apply for Judicial Review [2020] NIQB 53

Terminal illness: 'six month rule' in breach of ECHR

BACKROUND

Ms. Cox applied for Personal Independence Payment (PIP) in March 2018 while under investigation for neurological symptoms. She was awarded the standard rate of the daily living component with the assistance of Community Advice Fermanagh. In September 2018, Ms. Cox was diagnosed with Motor Neurone Disease (MND). In April 2019, Ms. Cox applied for a supersession of the March 2018 decision on the basis of her diagnosis. She was again awarded the standard rate of the daily living component. Ms Cox asked for a mandatory reconsideration, the outcome of which was an award of enhanced daily living component backdated to April 2019.

Ms Cox also applied for Universal Credit (UC) in March 2019 under the Special Rules for Terminal Illness (SRTI). The Department for Communities decided that she did not meet the requirements for SRTI and required her to look for work even though she had left a job due to her deteriorating condition. Her work capability assessment was delayed and she was required to search for work for six months before a determination that she had limited capability for work related activity.

In January 2020, Ms Cox's neurologist completed a DS1500 confirming her diagnosis of MND. Her neurologist felt unable to say that Ms Cox's death could reasonably be expected within six months.

The Department decided that Ms Cox did not meet the definition of 'terminal illness' and was not eligible for PIP or UC on the grounds of terminal illness.

THE SIX MONTH RULE

Article 87(4) Welfare Reform (Northern Ireland) Order 2015 (Welfare Reform Order) provides:

> *'For the purposes of this Article a person is 'terminally ill' at any time if at that time the person suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 6 months.'*

Regulation 2 and Schedule 9, paragraph 1 of the Universal Credit Regulations (Northern Ireland) 2016 (UC Regulations) provide:

> *''terminally ill' means suffering from a progressive disease where death in consequence of that disease can reasonably be expected within 6 months.'*

Any claimant who satisfies the *'six month rule'*, will automatically be entitled to the enhanced rate of the PIP daily living component and is treated as having limited capability for work related activity for UC. A claimant who is deemed to satisfy the rule, but who survives beyond six months, will not have their award retrospectively revised.

LEGAL ISSUES

Represented by Law Centre NI and with assistance from the PILS Project, Ms. Cox sought judicial review of the requirement that her death must be reasonably expected within six months. She argued that the *'six month rule'* was incompatible with Article 14 (prohibition on discrimination) read with Article 8 (right to private and family life) and Article 1, Protocol 1 (protection of property).

DECISION

Mr. Justice McAlinden found that the *'six month rule'* resulted in a difference in treatment between a claimant who has a terminal illness but who is not expected to die within six months, like Ms Cox, and a claimant who has a terminal diagnosis and is reasonably expected to die within six months but survives for longer. He could see no justification for this difference in treatment. He concluded that the difference in treatment resulting from the *'six month rule'* was unlawful and in breach of Article 14 read with Article 8 and Article 1, Protocol 1.

For a full copy of the Judgment click here.

UPDATE

On 22 October 2020, the High Court awarded Ms. Cox £5,000 damages under the ECHR for the *'upset, distress, annoyance, inconvenience, worry and humiliation'* caused as a result of unlawful discrimination due to the *'six month rule'*. You can read Law Centre NI's press release on the court's decision here. The Department for Communities has now sought permission to appeal this decision.

On 6 October 2020, the Northern Ireland Assembly agreed a motion calling for the removal of the *six-month rule* from the special rules for terminal illness.

On 19 October 2020, the Department for Work and Pensions announced that rule will be changed on completion of its review of special rules for the terminally ill.

For more information on how Law Centre NI is campaigning against the *'six month rule'*, read our Policy Update in the Winter 2020 Bulletin.

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SOCIAL SECURITY COMMISSIONER DECISIONS

Personal Independence Payment (PIP)

Activity 9: Engaging with other people face to face

PD v. Department for Communities (PIP) [2020] NI Com 53 (C011/20-21 PIP)

BACKGROUND

The claimant suffered from depression and anxiety as a result of childhood trauma. Prior to his application for PIP, he was employed as a security guard for over 30 years. The Department for Communities refused his application for PIP and he was unsuccessful before the Appeal Tribunal. He appealed to the Social Security Commissioner.

LEGAL ISSUE

The claimant argued that the Appeal Tribunal had erred in law in its assessment of whether Activity 9 applied to his case. The Tribunal relied on evidence of the claimant's work as a security guard and his ability to drive as part of his employment to apply descriptor 9a to his case:

> *Descriptor 9a: 'Can engage with other people unaided – 0 points'*

DECISION

The Commissioner decided the Tribunal had erred in law, holding that where Activity 9 is in issue, the Tribunal should apply the definition of *'engage socially'* in Schedule 1 of the Personal Independence Payment Regulations (Northern Ireland) 2016 which states:

> *'engage socially means –*
>
> *(a) interact with others in a contextually and socially appropriate manner;*
> *(b) understand body language; and,*
> *(c) ability to establish relationships in a social context.'*

The Tribunal must consider the claimant's ability to do these three things. In the claimant's case, the Tribunal relied on evidence of his work to decide that he was able to engage with others unaided. The Commissioner rejected this approach. The Commissioner decided that Activity 9 **concerned engagement with others face to face**. In the claimant's case, his working environment was a solitary one with little interaction with others.

On the issue of driving, the Commissioner referred to the decision of Commissioner Stockman in *JMcD v. Department for Communities (PIP) [2019] NICom 4* where he stated that it is legitimate for a Tribunal to consider how the actions in driving a car may read across into other activities. However, this general principle is qualified. The activity in question should be **genuinely comparable to driving and done at the same level or regularity.**

In the claimant's case, the Commissioner noted that there was no evidence that he was accompanied when driving. The Commissioner concluded that the claimant's ability to drive as part of employment could not be read across to Activity 9.

The Commissioner set aside the decision of the Appeal Tribunal and referred the case to a new Tribunal.

For a full copy of the Judgment: Click here

TMcG v. Department for Communities (PIP) [2020] NI Com 60 (C019/20-21 PIP)

BACKGROUND

The claimant's application for PIP was refused and her appeal was unsuccessful. She appealed to the Social Security Commissioner, claiming the Appeal Tribunal had erred in law.

LEGAL ISSUE

The claimant argued that the Tribunal had erred in law in its assessment of whether Activity 9 applied to her case. The Tribunal relied on evidence that the claimant holidayed with family and attended her GP to decide that she was able to engage with others face to face and applied descriptor 9a to her case.

Descriptor 9a: 'Can engage with other people unaided – 0 points'

DECISION

The Commissioner agreed that the Tribunal had erred in law. He confirmed that the term ***'engage socially'*** **is not limited to engagement with people a claimant knows.** The Commissioner referred to the decision of the Judge of the Upper Tribunal *in HJ v. SSWP [2016] UKUT 0487 (AAC)* which states:

> *'There is no indication in the regulations that the term 'engage socially' is limited to engagement with people who a claimant knows. Indeed, the use of the word 'others' in the definition of 'engage socially', which is unqualified, strongly suggests that it is not so limited.'*

The Judge goes on to the consider the PIP Assessment Guide published by the Department of Work and Pensions which states:

> *'When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well'.*

In the claimant's case, the Commissioner stated that the Tribunal had wrongly focused on engagement with people she knows (her GP, family and friends etc) to deny her points under Activity 9.

The Commissioner set aside the Tribunal's decision and referred the case to a new Tribunal for determination.

FK v. Department for Communities (PIP) [2020] NI Com 059 (C007/20-21 PIP)

BACKGROUND

The claimant's application for PIP was declined and her appeal was unsuccessful. Law Centre NI represented the claimant before the Social Security Commissioner.

LEGAL ISSUE

It was argued that the Appeal Tribunal erred in law in refusing to award the claimant points for Descriptor 9(c):

> *Descriptor 9(c): 'Needs social support to be able to engage with other people – 4 points'*

The Tribunal's reasoning had been as follows:

> *"26. There is also reference in the submission on her behalf to a need for social support to engage with others. Again, we find this to be misguided. Social support means help from someone trained or experienced with assisting people. There is no evidence of any such need.'*

Law Centre NI argued that social support can be provided by a friend or relative.

DECISION

The Commissioner accepted Law Centre NI's argument that the Tribunal had erred in law. Referring to the decisions in *CD v. Department for Communities* (PIP) [2018] *NI Com 30* and the Supreme Court in *Secretary of State for Work and Pensions v.* MM *[2019] UKSC 34*, the Commissioner held that a **family member or friend can provide social support** for the purpose of Activity 9(c) as long as their support amounts to more than mere prompting. In the claimant's case, the Tribunal should have considered the help provided by the claimant's daughter and whether this amounted to help provided by *'someone trained or experienced'* with assisting people.

The Commissioner set aside the Tribunal's decision and referred the case to a new Tribunal.

For a full copy of the Judgment click here

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Activity 10: Making Budgeting Decisions

UB v. Department for Communities (PIP) [2020] NICom 55 (C022/20-21 PIP)

BACKGROUND

The claimant was awarded DLA as a minor. He was invited to claim PIP and did so in August 2017, aged 17. His claim was based on needs arising from depression, anxiety, self-harm, acid stomach, hay fever, dyslexia and irritable bowel syndrome. His claim was refused. He appealed following an unsuccessful mandatory reconsideration. His mother acted as his appointee.

Before the Appeal Tribunal, the claimant's appointee gave evidence that he attended college, used a phone and had his own bank account and bank card that he used himself. However, she stated that if he received his own benefit into his own account, he would spend it on useless things like computer games. As a result, his mother received his payments and used it to pay his bills.

The Tribunal disallowed the claimant's appeal and he appealed to the Social Security Commissioner.

LEGAL ISSUE

The claimant argued that the Appeal Tribunal had failed to take into account the appointment of his mother as his appointee when considering his entitlement under Activity 10 - Making budgeting decisions.

He argued that the Tribunal should have applied descriptor 10(d) to his case, and awarded him six points:

Descriptor 10(d): 'Cannot make any budgeting decisions at all – 6 points'

DECISION

Power to appoint an appointee

The Commissioner considered the relevant law on the appointment of an appointee.

Regulation 33 of the Social Security (Claims and Payments) Regulations (NI) 1987 provides a general power of appointment for a person to act on behalf of a claimant who is personally unable to act:

> *'Regulation 33 –*
>
> *(1) Where –*
>
> *(a) a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf;*
> *(b) that person is unable for the time being to act; and*
> *(c) no controller has been appointed by the High Court with power to claim or, as the case may be, receive benefit on his behalf*
>
> *the Department may, upon written application made to it by a person who, if an individual, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that latter person may be entitled and to receive and deal on his behalf with any sums payable to him.'*

Further provision is made by Regulation 52 Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations (NI) 2016.

The Commissioner was unable to find a statutory definition of *'unable for the time being to act'*. However, he noted the references in Regulation 33 and Regulation 52 to the appointment of a controller under the Mental Health (NI) Order 1986 and reference to enduring powers of attorney which operate during periods of mental incapacity.

He concluded that the threshold for *'unable for the time being to act'* was a high one. The Commissioner decided that the Tribunal was not bound by the Department for Communities' decision to make an appointment and it was entitled to take the view that the Department's decision had been made in error.

Activity 10

On the application of Activity 10, the Commissioner referred to the decision of Upper Tribunal Judge Hemingway in *DP v. Secretary of State for Work and Pensions [2017]*

UKUT 156, which states that **assessment of Activity 10 is primarily concerned with a person's cognitive ability and intellectual capacity**.

As Judge Hemingway stated:

> *'Thus, mere immaturity of itself will not avail a claimant. That is true though of anyone be they under or over the age of 18. Nor will the lack of any actual experience of making budgeting decisions avail a claimant since it is what a claimant is capable of rather than what he/she has done which is relevant.'*

The Commissioner noted that according to the appointee, she sought appointment because she held different views as to how the claimant should spend his money, rather than because he was unable to act.

In light of this and given that Article 10 is concerned with cognitive and intellectual ability rather than maturity, the Commissioner decided that the claimant was able to make budgeting decisions. The Commissioner set aside the Tribunal's decision on a different ground and referred the case to a new Tribunal.

For a full copy of the Judgment click here

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Activity 12 Moving around

RG v. Department for Communities (PIP) [2020] NICom 46 (C017/20-21 PIP)

BACKGROUND

The claimant had been awarded DLA since 2002. His most recent award included high rate mobility. In May 2018, the claimant claimed PIP on the basis of needs arising from acute gouty arthritis, osteoarthritis, bursitis in his knees, tennis elbow, frozen shoulder, plantar fasciitis, vertigo, sciatica, chronic obstructive airways disease, type 2 diabetes and diverticular recti. His claim was turned down and his appeal disallowed.

He appealed to the Social Security Commissioner.

LEGAL ISSUE

Represented by Law Centre NI, the claimant argued that the Appeal Tribunal had erred in law in failing to explain why he was not awarded the mobility component of PIP despite receiving DLA high rate mobility for several years.

DECISION

Referring to his previous decisions in *JF v. Department for Communities [2019] NI Com 72* and *LMcC v. Department for Communities [2020] NI Com 19*, the Commissioner held that there is **no automatic requirement for a Tribunal to explain a refusal of PIP mobility in the context of a previous DLA high rate mobility award**.

In *JF*, it is stated:

> *'From the above discussion, it follows that I do not accept the proposition that, in cases where claimants previously enjoyed an award of DLA high rate mobility component, there is a heightened requirement of tribunals generally to give reasons for not finding that descriptors 1(c) – (f) are satisfied. The conditions of entitlement to PIP mobility component do not neatly equate to the DLA conditions of entitlement. Many claimants who would previously have been awarded DLA at the rate of the high rate mobility component will be excluded*

> *from the equivalent PIP rate simply because the conditions of entitlement are different.'*

In the Commissioner's view, only if the case involved some **obvious inconsistency, requiring particular clarification, was an explanation required**.

In *LMcC,* it is indicated that it is for the Tribunal to judge if such an obvious inconsistency exists.

In the claimant's case, he gave evidence that he could walk 200 metres most of the time and sometimes he could manage 400 metres. He also gave evidence that he played golf once a fortnight. In light of this evidence, the Commissioner decided it was 'self-evident' why the claimant did not qualify for PIP mobility component. He disallowed the appeal.

For a full copy of the Judgment click here

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How should a Tribunal assess *'safely'* under Regulation 4 Personal Independence Payment Regulations (NI) 2016?

AR v. Department for Communities (PIP) [2020] NI Com 048 (C017/19-20 PIP)

BACKGROUND

The claimant applied for PIP on the basis of needs arising from profound deafness and eczema and was awarded the standard rate daily living component. Following an unsuccessful request for mandatory reconsideration, he appealed. His appeal was disallowed and he appealed to the Social Security Commissioner.

LEGAL ISSUE

Regulation 4 Personal Independence Payment Regulations (NI) 2016 provides that a claimant will only be considered to satisfy a descriptor if they can do so *'safely'*.

'Safely' is defined as:

> *'in a manner unlikely to cause harm to C [the claimant] or to another person, either during or after completion of the activity'*.

In *RJ, GMcL and CS v. Secretary of State for Work and Pensions [2017] AACR 32,* the Upper Tribunal, sitting as a three-judge panel considered Regulation 4 of The Social Security (Personal Independence Payment) Regulations 2013 (GB equivalent). The Upper Tribunal decided that when addressing whether a claimant can carry out a task *'safely',* it is necessary to consider **both the likelihood of the harm occurring and the severity of the consequences**.

Represented by Law Centre NI, the claimant argued that the Appeal Tribunal had erred in law in failing to give adequate reasons for its decision in respect of Activity 4 - Washing and Bathing.

The claimant's case was that he could not shower or bathe safely because he would not be able to use the vibrating pager that he normally used as a smoke or fire alarm (and doorbell). Law Centre NI argued that the claimant's case was analogous to that in *RJ, GMcL and CS*.

The Department for Communities agreed that the Tribunal had erred in law.

Whereas the Tribunal had correctly pointed to the fact that the claimant's deafness did not make the risk of a fire occurring more likely, his deafness was clearly relevant to the potential consequences of the risk.

The Tribunal had failed to address the severity of the consequences to the claimant, if the harm did occur.

DECISION

The Commissioner accepted the submissions of Law Centre NI and the Department, He set aside the decision of the Appeal Tribunal and referred the case to a new Tribunal for determination.

For a full copy of the Judgment click here

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Employment Support Allowance (ESA)

When should a Tribunal consider 'exceptional circumstances'?: Regulation 29 Employment and Support Allowance Regulations (NI) 2008

PB v. Department for Communities (ESA) [2020] NI Com 36 (C001/20-21 ESA)

BACKGROUND

The claimant suffered from depression, anxiety and mild brain atrophy. On a supersession of his previous award, the Department for Communities determined that the claimant was no longer entitled to ESA.

Following an unsuccessful request for a mandatory reconsideration, the claimant appealed. His appeal was turned down by an Appeal Tribunal and the claimant appealed to the Social Security Commissioner.

LEGAL ISSUE

The claimant argued that the Tribunal had erred in law in failing to consider the potential application of Regulation 29 of the Employment and Support Allowance Regulations (NI) 2008 to his case. Regulation 29 (1)-(2)(b) state:

> *'Exceptional circumstances*
>
> *29 (1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.*
>
> *(2) This paragraph applies if –*
>
> *(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons 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'.*

In *HA v. Department for Social Development (ESA) [2011] NI Com 213*, the Commissioner said:

> *29 '...where the potential applicability of Regulation 29 is clearly evident in the appeal, either because there has been a specific submission to that fact or, in the absence of a specific submission, the evidence which is before the appeal compels the appeal tribunal to consider the issues as part of its inquisitorial role, then an appeal tribunal will err in law in failing to deal with regulation 29 and/or demonstrating through the statement of reasons for its decision that it has dealt with it'.*

The Department, agreeing that there had been an error of law, stated that the Tribunal should have considered the application of Regulation 29 in light of the claimant's health conditions.

DECISION

The Commissioner agreed with the claimant and Department. He set aside the decision of the Appeal Tribunal and referred the case to a new Tribunal.

For a full copy of the Judgment click here

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What constitutes 'good cause' for failing to attend a medical examination? Regulation 23 ESA Regulations (NI) 2008

JB v. Department for Communities (ESA) [2020] NI Com 69 (C005/20-21 ESA)

BACKGROUND

The claimant was in receipt of ESA as a result of shortness of breath and joint/muscle pain. He was called to attend a medical examination by a health care professional but did not attend. His reason for not attending was that he had an ongoing appeal to the Social Security Commissioner in respect of an earlier decision.

The Department for Communities decided that the claimant had not shown '*good cause'* for failing to attend his examination. He was treated as not having limited capability for work and refused ESA.

Following an unsuccessful request for mandatory reconsideration, the claimant appealed to the Appeal Tribunal. His appeal was refused and he appealed to the Social Security Commissioner.

Regulation 23 of the Employment and Support Allowance Regulations (NI) 2008 states:

> *'23 – (1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Department to attend for a medical examination.*
>
> *(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.*
>
> *(3) Paragraph (2) does not apply unless –*
>
> *(a) written notice of the date, time and place for the examination was sent to the claimant at least 7 days in advance; or*
>
> *(b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise'.*

Regulation 24 states:

> *'24 – The matters to be taken into account in determining whether a claimant has good cause under regulation 22 or 23 include –*
>
> *(a) whether the claimant was outside Northern Ireland at the relevant time;*
> *(b) the claimant's state of health at the relevant time; and*
> *(c) the nature of any disability the claimant has'.*

LEGAL ISSUE

The claimant argued that the Appeal Tribunal had erred in law in disregarding his ongoing appeal to the Social Security Commissioner. His ongoing appeal concerned a previous failure by him to attend a medical examination. In that case, he argued that financial difficulties prevented him travelling to and from the assessment centre. Those financial difficulties, he said, constituted good cause under Regulations 23 and 24.

The claimant argued that the Commissioner's decision on his outstanding appeal was relevant to the Tribunal's determination of '*good cause'* in the present appeal.

DECISION

The Commissioner decided that the Tribunal's failure to wait for the outcome of the claimant's ongoing appeal was procedurally unfair.

The main points of the Commissioner's decision are:

- The present appeal had similarities to the claimant's ongoing appeal.
- Appeals to the Commissioner are addressed to possible errors of law by Tribunals and they are binding on Tribunals to the extent that they offer an interpretation of the law.
- It is entirely possible that a principle of law addressed in the ongoing appeal might have been relevant in the claimant's present appeal.
- The Commissioner eventually found in favour of the claimant in his ongoing appeal (C10/18-19 (ESA)), determining that his difficult financial circumstances could amount to *'good cause'*.

- A Tribunal informed by C10/18-19 (ESA) would have found it necessary to determine the claimant's financial circumstances and to address the issue of whether the Department had offered him an advance travel voucher.
- The Tribunal should have addressed the question of what sort of journey the claimant would have to take in terms of expense and difficulty due to, and the impact on, his health.
- There is no over-riding objective that would have required the Tribunal to have regard to avoiding delay as a factor in dealing with the appeal.

The Commissioner set aside the Tribunal's decision. He referred the case to a new Tribunal and directed the new Tribunal to take into account his decision in C10/18-19 (ESA). He further directed the Tribunal, when assessing *'good cause'*, to investigate the location of the medical examination, the cost of attendance, the financial means of the claimant and the availability or otherwise of advance payment for the costs of travel by the Department.

For a full copy of the Judgment click here

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Procedure at Appeal Tribunal

How does a Tribunal ensure effective claimant participation?

SA v. Department for Communities (DLA) [2020] NI Com 038 (C006/18-19 DLA)

BACKGROUND

The claimant claimed DLA on the basis of needs arising from fibromyalgia, depression and anxiety. Her claim was refused and she appealed.

The claimant's appeal was disallowed after a hearing. She applied for the appeal to be set aside on the basis that while she was present in the building, she was unable to enter the hearing room. The appeal decision was set aside and her case referred to a new Tribunal.

The claimant did not attend the subsequent appeal but was represented by Law Centre NI. Her appeal was disallowed in respect of the care component, but she was awarded the standard rate of the mobility component.

She appealed to the Social Security Commissioner. The Commissioner directed that the appeal should be determined by a Tribunal of Commissioners, consisting of two members under Article 16(7) of the Social Security (NI) Order 1998.

LEGAL ISSUE

Represented by Law Centre NI, the claimant argued that the Appeal Tribunal had erred in law. She argued that the hearing was procedurally unfair because it did not consider how procedures might be tailored to suit her particular mental health problems. The claimant relied on the case of *Galo v. Bombardier* [2016] NICA 25.

The Tribunal of Commissioners decided that it was arguable that the Tribunal ought to have made adjustments to its procedures to enable the claimant to participate in the hearing.

The Tribunal of Commissioners invited the President of Appeal Tribunals to become a party to the proceedings and asked him to make written submissions.

THE PRESIDENT'S SUBMISSIONS

The President's submissions are summarised as follows:

- Courts and Tribunals are not under a statutory duty to make reasonable adjustments under the Disability Discrimination Act 1995.
- The principles set out in *Galo* have a direct application to Tribunals determining social security appeals in Northern Ireland.
- The starting point is the statement by Gillen LJ in *Galo*:

  'It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.'

- If it becomes apparent that a claimant has a disability that may affect their participation in the hearing, it can be addressed by:
  - Referring the matter to the President for specific direction;
  - Consideration by an experienced legally qualified member in an interlocutory session; or,
  - Consideration by the entire Tribunal prior to the commencement of the hearing or by way of direction during the hearing.
- The President has informed all Tribunal members that it may be necessary to adjust their approach to ensure *'effective participation'*. This might involve the Tribunal considering whether:
  - A claimant should be expected to provide direct oral evidence;
  - A member of the claimant's family and/or a friend might give written or oral evidence on their behalf;
  - A Tribunal should prepare a list of questions to be answered by the claimant/representative/friend etc.
- The Equal Treatment Bench Book (ETBB) has been adopted by the President for use by the judiciary within appeal hearings.
- Training has been provided to all Tribunal members on the *Galo* decision and Equal Treatment Bench Book.
- The overall obligation to secure effective participation rests with Tribunal members.

- The Tribunal may seek submissions from representatives on any adjustments that may be required to ensure the claimant's effective participation.

DECISION

The Tribunal of Commissioners stated that the ETBB, while not binding, is illustrative of good practice and Tribunals should consider it in ensuring that proceedings are fair.

The Commissioners stated that *Galo* does not require a Tribunal in every case of a disabled or vulnerable witness to hold a ground rules hearing. Fairness will depend on the circumstances of the particular case.

The Commissioners regarded the procedures outlined by the President as a model which addresses the risk of unfairness through pragmatic and proportionate steps.

The Commissioners considered that **where a disability affects the ability of a claimant to participate in a hearing, a heightened level of attention to fairness may be required. Such attention is required where a claimant cannot deal with the stress of attending a hearing or has difficulty articulating or presenting evidence.**

The Commissioners stated that the process of identifying obstacles to effective participation is a judicial task and the responsibility of the Tribunal.

Importantly for advisers, the Commissioners recognised that if a claimant is represented, there is an expectation that the representative will raise issues of fairness on the claimant's behalf. However, it is ultimately the Tribunal's task to ensure the fairness of the hearing.

The Commissioners stated that where a claimant waives the right to a hearing or chooses not to attend, *Galo* does not place an onus on the Tribunal to pursue the reasons for the claimant's choices.

However, there will be an onus on the Tribunal where it is plain from the evidence that anxiety, stress or some other factor beyond the claimant's control prevents their attendance and participation. In such cases, it may be necessary for the Tribunal to explore other ways of enabling participation such as*:*

- *by directing written witness statements to address aspects of evidence normally adduced orally;*
- *by enabling telephone or video connection by the claimant to the tribunal hearing; or,*
- *by hearing evidence from a family member or carer in place of the claimant.*

In the claimant's case, the Commissioners decided that the Tribunal had addressed her particular circumstances and there was nothing more that could be done to ensure the fairness of the proceedings.

The Commissioners did not accept that the Tribunal had erred in law and disallowed the appeal.

For a full copy of the Judgment click here

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