WB-v-HMRC (HRP) [2021] NICom 47

Decision No: C1/21-22(HRP)

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**HOME RESPONSIBILITIES PROTECTION**

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 5 October 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant’s application for leave to appeal from the decision of an appeal tribunal with reference NS/4052/19/50/I.

2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.

3. For the reasons I give below, I grant leave to appeal. However, I dismiss the appeal.

**REASONS**

 **Background**

4. The applicant submitted a Home Responsibilities Protection (HRP) application form in July 2017, applying for national insurance credits on the basis of HRP for the period from 6 April 1982 to 5 April 1984 and from 6 April 2001 to 5 April 2002. On 26 September 2017 HMRC issued a decision to the applicant stated that he was not entitled to HRP as he had not been in receipt of child benefit (CB) for a child under 16 during the required periods. He requested a reconsideration of the decision, and the decision was reconsidered but not revised. He appealed.

5. The appeal was heard by a tribunal consisting of a legally qualified member (LQM) sitting alone. The appeal proceeded in February 2020 by way of an oral hearing, was then adjourned part-heard for more evidence and concluded in October 2020 following a remote hearing. The tribunal disallowed the appeal. The applicant requested a statement of reasons for the tribunal’s decision and this was issued on 8 December 2020. He requested the LQM to grant leave to appeal from the decision of the appeal tribunal to the Social Security Commissioner, but leave was refused by a determination issued on 26 February 2021. On 12 March 2021 the applicant submitted an application for leave to appeal directly to the Social Security Commissioner.

 **Grounds**

6. The applicant submits that the tribunal has erred in law on the basis that:

1. it fettered its discretion;
2. it made an irrational decision;
3. it breached his rights under the Human Rights Act 1998;

7. HMRC was invited to make observations on the applicant’s grounds. Mr Evans of HMRC indicated that it did not agree that the tribunal had erred in law and that it did not support the application for leave to appeal.

 **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 which it describes as “Case papers”. I understand this to mean the HMRC’s submission, containing the application for home responsibilities protection completed by the applicant, various decisions and correspondence. It adjourned a previous hearing in order to direct HMRC to produce material including the applicant and his wife’s CB application, related documentation and the applicant’s national insurance contribution records. A supplementary submission was received from HMRC in response to the direction. The applicant does not appear to have provided any documentary evidence to the tribunal. However, he attended the hearing and gave oral evidence. HMRC did not appear and was not represented.

9. The tribunal identified the issue in the appeal as whether the applicant, in order to benefit from HRP, had been in receipt of CB for a child under 16 in the relevant period. The tribunal accepted that for periods when their three children were aged under 16, the applicant had remained at home to look after them when his wife went out to work. However, it found, on the basis of a computer system screen print, that the applicant’s wife had been the CB claimant. The LQM, having directed production of the CB claim form, accepted that it had been destroyed under a lawful data retention policy. The tribunal accepted that the applicant’s name may have been on the benefit payment book as an alternative payee. However, the tribunal did not accept that the applicant had been the CB claimant. The tribunal further found that under relevant age rules, HRP could not be transferred to the applicant. The tribunal therefore disallowed the appeal.

 **Relevant legislation**

10. Primary legislation relevant to this application appears at paragraph 5(7)(b) of Schedule 3 to the Social Security Contributions and Benefits Act (NI) 1992. This provides for satisfaction of contribution conditions in a particular circumstance. By paragraph 5(7):

“(7) The second condition shall be taken to be satisfied notwithstanding that paragraphs (a) and (b) of sub-paragraph (3) above are not complied with as respects each of the requisite number of years if—

(a) those paragraphs are complied with as respects at least half that number of years (or at least 20 of them, if that is less than half); and

(b) in each of the other years the contributor concerned was, within the meaning of regulations, precluded from regular employment by responsibilities at home.

But nothing in this sub-paragraph applies in relation to any benefit to which section 23A above applies”.

11. Secondary legislation relevant to the application appears at regulation 2 of the Social Security Pensions (Home Responsibilities) Regulations (NI) 1994. So far as relevant, and as amended by the Social Security Pensions (Home Responsibilities) (Amendment) Regulations (Northern Ireland) 2008 from 6 April 2008, this provides:

“2. (1)For the purpose of paragraph 5(7)(b) of Schedule 3 to the Act a person shall, subject to paragraph (5) of this regulation, be taken to be precluded from regular employment by responsibilities at home in any year—

(a) throughout which he satisfies any of the conditions specified in paragraph (2) of this regulation;

…

(2) The conditions specified in this paragraph are—

(a) that child benefit awarded to him was payable in respect of a child under the age of 16;

(aa) that child benefit awarded to his partner was payable in respect of a child under the age of 16;

…

(4C) In paragraph (2)(aa), “partner” means the person with whom he was both residing and sharing responsibility for the child throughout that year.

…

(5) Except where paragraph (6) of this regulation applies, paragraph (1) of this regulation shall not apply in relation to any year—

…

(aza) if in the case of a person who satisfies the condition in paragraph (2)(aa)—

1. such information is not furnished as the Department may from time to time require which is relevant to the question of whether in that year he was precluded from regular employment by responsibilities at home within the meaning of these Regulations,
2. he attained pensionable age on or before 5th April 2008 or, in relation to a claim for a bereavement benefit in respect of his death, he died on or before that date, or
3. the aggregate of his partner’s earnings factors—

(aa) in respect of any year preceding 2002-03;

(bb) in respect of the year 2002-03 or any subsequent year, where those earnings factors are derived from so much of his earnings as do not exceed the upper earnings limit and upon which primary Class 1 contributions have been paid or treated as paid, is less than the qualifying earnings factor for the year in question.”

 **Submissions**

12. The applicant firstly submits that the tribunal fettered its discretion to award national insurance contributions to him for the period 1982-84 on the basis that he was the primary carer of a child, whereas his wife was working.

13. The applicant secondly submits that the tribunal made a *Wednesbury* irrational decision by holding on the evidence before it that his wife was the CB claimant.

14. The applicant thirdly submits that the tribunal breached human rights law, relying on Article 14 + Article 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms. He did not specify a status which generated the claimed discrimination but, in the context of subsequent submissions, it clear that it is gender.

15. HMRC was invited to comment on the grounds of application, and indicated that it did not support the application.

16. The applicant made further submissions of fact, namely that both his name and his wife’s name were on the “family allowance” claim form but that he was the claimant and collected the payment. He submitted that he did not claim unemployment benefits during the period in issue. He confirmed that the basis of his discrimination claim was a sexist assumption that his wife was the CB claimant.

 **Assessment**

17. 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.

18. 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.

19. 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.

20. The applicant first submits that the tribunal fettered its own discretion. However, it appears to me that this is a misconceived ground.

21. The tribunal is required to apply the legislation in each case. The legislation relevant to the applicant’s case gave two potential routes to entitlement to home responsibilities protection. The tribunal explored each of these. The first potential route to entitlement was that CB was actually awarded to the applicant and was payable in respect of a child under the age of 16 during the period in issue. The second potential route, introduced by amending regulations from 6 April 2008, was that CB was awarded to his partner and was payable in respect of a child under the age of 16 during the period in issue and that he had not (inter alia) attained pensionable age on or before 5th April 2008.

22. There is no discretion granted by the regulations. The tribunal was obliged to apply the relevant law. It does not have any inherent discretion to depart from the law. Therefore, it had no discretion which it might have fettered in the circumstances of this case. I refuse leave to appeal on this ground.

23. The second ground advanced by the applicant derives from the tribunal’s findings of fact. The tribunal was satisfied on the evidence that the applicant’s wife, and not the applicant, was the CB claimant. The evidence relied upon to arrive at this finding was a series of screen shots from the HMRC computer system. This tended to demonstrate that the applicant’s wife had been given a CB reference number and derived home responsibilities protection from April 1982 to February 2005, consistent with the period from the date of birth of the couple’s eldest child to the date of attainment of the age of 16 by the couple’s youngest child. For his part, the applicant submitted that the order book used to cash the CB payments had both his name and his wife’s name on it, and maintained that he was the claimant.

24. Recognising that the evidence was not the best evidence potentially available, the tribunal had previously adjourned with a direction to HMRC to locate the relevant CB application and any documentation relating to it. HMRC responded to indicate that physical CB files are destroyed after 13 months under a data retention policy and that records for the claim would have been destroyed many years ago. It was confirmed that electronic records would also have been “weeded” several years ago. On the basis of basic date information retained by the CB office computer system, namely the screen shots referred to above, it was submitted again that the CB claimant was the applicant’s wife and not him. The tribunal accepted the possibility that the applicant’s name was on the order book along with that of his wife, as an alternative payee, in order to facilitate cashing the orders in it, but held that this did not mean that he was the claimant. While acknowledging that the original evidence relating to the CB claim was no longer available, it accepted on the basis of the HMRC’s remaining records that the applicant’s wife was the CB claimant.

25. The applicant submits that the tribunal made a *Wednesbury* irrational decision – meaning that in making the decision, the tribunal took into account factors that ought not to have been taken into account, or failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable tribunal could have made it. I do not consider that the tribunal took into account irrelevant factors. I do not consider that the tribunal failed to take into account any relevant factors. In terms of unreasonableness, it seems to me, the only question is whether it based its decision on no, or insufficient, evidence, or whether the weight of evidence compelled a different conclusion.

26. The relevant question is whether the screenshots of the computer records of the CB claim of the applicant’s wife were sufficient evidence upon which to make findings. In *MD v Department for Communities* [2021] NI Com 40, I addressed a similar issue. I said in that case at paragraphs 50-51:

50. The tribunal had to address the case on the balance of probabilities. In other words, was it more likely than not that the Department’s version of the facts was accurate. In the tribunal context, there may well be cases where there is no evidence of any probative value advanced by the Department. Ordinary legal principles will apply in such cases. Where a *prima facie* case is not established by the Department on the evidence, there will be no case for an appellant to answer. In such circumstances, the appellant will be entitled to succeed in the appeal. However, I do not consider that this is such a case. The material relied on by the Department had some probative value, however limited. The screen print from the Department’s computer system demonstrated that it accepted the appellant’s incapacity for work from Aril 2004.

51. For his part, the appellant did not offer direct evidence of an alternative date for commencing the period of incapacity for work. At hearing, I characterised his submissions as muddying the water and I did not understand him to demur from that characterisation. He was entitled to make the submissions that he did. However, I consider that the tribunal was entitled to give weight to the Department’s evidence in the light of its explanatory submissions as to how that evidence should be interpreted, and to make the decision that it did in the absence of any compelling submissions to the contrary from the appellant. On the evidence before it, the tribunal was entitled to accept that the relevant linked period began in April 2004.

27. While addressing a different question, the issues are similar. The HMRC has advanced evidence in the form of screen shots from its computer system that the applicant’s wife was the CB claimant. I judge that these were enough to establish a *prima facie* case that this was the case. The applicant seeks to rebut this with a submission that his name was also on the CB order book. HMRC has explained that this could well have been the case in order to facilitate payment, but does not mean that the applicant was the claimant. I consider that the tribunal was entitled to find that the applicant’s wife was the CB claimant on the evidence before it. I do not consider that it is arguable that it has made a *Wednesbury* irrational decision. I refuse leave on this ground.

28. The applicant’s third ground is addressed to the question of discrimination on grounds of gender. This is a submission to the effect that the tribunal made a sexist assumption that the applicant’s wife, rather than the applicant, would be the CB claimant. He submits that this meant that he was not treated equally “or within the rules of natural justice”.

29. While not referred to by the HMRC, the Child Benefit Act (NI) 1975 made provision relevant to the present case. That legislation has provided for only one person being entitled, and for determining priority in cases where two or more people would be entitled to CB in respect of the same child, such as a husband and wife residing together. By section 6(2) of the 1975 Act:

“where, apart from this paragraph, two or more persons would be entitled to child benefit in respect of the same child for the same week, one of them only shall be entitled; and the question which of them is entitled shall be determined in accordance with Schedule 2”.

 and by Schedule 2, paragraph 3:

3. Subject to paragraphs 1 and 2 above, as a husband and wife residing together, the wife shall be entitled.

30. The provisions of the 1975 Act would have applied to the period in issue from 6 April 1982 to 5 April 1984. From 6 April 1992, relevant to the later period in issue from 6 April 2001 to 5 April 2002, more recent legislation applies. By section 140(3) and Schedule 10 to the Social Security Contributions and Benefits Act (NI) 1992:

“where two or more persons would be entitled to child benefit in respect of the same child or qualifying young person for the same week, one of them only shall be entitled; and the question which of them is entitled shall be determined in accordance with Schedule 10 to this Act”.

31. By paragraph 3 of Schedule 10:

Opposite-sex spouses or civil partners

3. Subject to paragraphs 1 and 2 above, as between a man and a woman who are married to, or civil partners of, each other and are residing together, the woman shall be entitled.

32. It can therefore be seen that the rule prioritising the wife within a married couple, has been in place since CB first came into existence under the 1975 Act and continued to under the 1992 legislation throughout the period of the relevant CB claim. The rule appears to have discriminatory characteristics and, unsurprisingly, it has been challenged before.

33. In the judicial review case of *Barber v Secretary of State for Work and Pensions* [2002] EWHC 1915, the Administrative Court in England and Wales addressed a challenge to the rule by a husband. It addressed submissions that there was both direct and indirect discrimination in the rule prioritising the wife’s entitlement over that of the husband. However, the application was dismissed for the reasons given by the Administrative Court, accepting the justification offered by the Secretary of State for Work and Pensions’ for the policy. Subsequently, in the context of child tax credit, the Supreme Court dealt with similar issues in the case of *Humphreys v HMRC* [2012] UKSC 18. Again the court found any indirect discrimination to be justified on policy grounds.

34. I consider that the applicant raises a case of discrimination in a slightly different context to the above cases, which are unfavourable to his arguments. Therefore I will grant leave to appeal. However, I consider that it is clear that the rule giving priority for CB entitlement to the wife within a married couple has been found to be lawful. I consider that any submission to the effect that the tribunal has discriminated by applying the relevant law in the context of HRP cannot succeed by the same principle. I therefore dismiss the appeal.

(signed): O Stockman

Commissioner

6 October 2021