

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

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

**PERSONAL INDEPENDENCE PAYMENT**

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 2 November 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. I grant leave to appeal, and deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Belfast on 2 November 2022 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

**Directions**

2. The Department for Communities (the Department) shall, within 21 days of this decision being issued to them, make a submission to the tribunal on the following issue in respect of this Personal Independence Payment (PIP) claim:
  - (i) The status of the claimant's mother in respect of this PIP claim, which is currently thought to be that of appointee.
  - (ii) The date of any appointment, and the reason for it.
  - (iii) Whether due to physical or mental disability, the view of the Department as to whether this engages any of the PIP activities, and if so, at what level.
3. The documents shall be filed with the Appeals Service (TAS). If further time is required, an application must be made to a Chairman of TAS. If there is found to be no appointee, the matter must be referred to a Chairman by TAS administration.

4. The hearing shall be before a fresh tribunal. The appointee is to notify TAS within 21 days of issue of this decision of her choice of telephone, online (video platform) or face to face hearing format.

## **REASONS**

### **Preliminary Matters**

5. The case before me concerns a young person, currently aged 26, but who had just attained 23 at the date of the PIP decision which is the subject of the appeal. She and her are their preferred pronouns, and, although I understand that no formal change of either name or gender has occurred, I will refer to her as she prefers. Whilst a matter of importance for her, that she is transgender is not of itself a feature of the appeal; nonetheless it is a factor which the tribunal conducting the re-hearing needs to know from the outset, as it is likely to affect its approach to the hearing. That is not to say that this status attracts any special treatment. A tribunal hearing an appeal against a benefit decision has in all its cases an enabling role of establishing a hearing environment in which a person might be most able to present their case or just tell their story. That is easier if it is aware of personal factors which might affect a person's ability to do that.
6. I am told that the claimant's mother is her appointee for benefit purposes. In those circumstances the appointee is the appellant. I use the term claimant to distinguish the young person for whose benefit the claim was made; I also refer to her as the appellant's daughter.
7. The application for leave to appeal was supported by the Department. I have granted it. It is for this reason that I use the term appellant, rather than applicant, throughout.

### **Background**

#### **The relevant legislation**

8. The appeal below concerned entitlement to PIP under the Personal Independence Allowance Regulations (Northern Ireland) 2016 (the PIP Regulations). Entitlement is demonstrated by scoring points under a series of activities set out in the schedule. Nothing turns on that at this stage, and I need say no more about the PIP legislation.

#### **The PIP claim**

9. An award of the daily living allowance only, at the standard rate was originally made on 7 March 2018. The points award at that time was 11 for the daily living activities and 4 for difficulties following a route under the mobility descriptors. The review process was begun in late 2020, and a review form was received by the department on 15 December 2020.

10. The claimant was assessed by a healthcare professional (HCP) on 10 February 2021, following which the Department superseded the existing award from the date of its decision, 23 February 2021. The Department awarded just 2 points under the daily living activity 9b and no mobility points.
11. There was no change to that decision on a Mandatory Reconsideration. Accordingly, an appeal was lodged with the Appeals Tribunal.
12. The Tribunal heard an appeal against that decision. It was considering whether the appellant's award of PIP should continue at any level.

### **The Tribunal hearing**

13. The appellant had requested an oral hearing. The Legally Qualified Member sat with a Medical Member (a doctor) and a Disability Member at the Belfast venue on 2 November 2022. At about 1.30 pm some forty-five minutes before the time scheduled for the hearing, the appointee phoned the venue to explain that her daughter was unable to attend owing to anxiety. The clerk spoke to the tribunal, and the tribunal chair wrote a note of what she was to say in response to the caller.
14. There was an additional complicating matter, in that the appointee said they had expected a representative that they had consulted to attend, but there was no one at the venue from the organisation. The reasons for that situation remain unclear, but it is of some relevance that there was no representative, as I explain below.
15. The Chair had asked the clerk to tell the appointee that the tribunal would allow fifteen minutes from the scheduled time for them to arrive, and encouraged attendance, because, even if the hearing couldn't go ahead it might assist for a future hearing for the claimant to have a familiarity with the venue.
16. The appointee communicated her view that the claimant's willingness to attend was unlikely to be different on another occasion, and she asked the tribunal to proceed in the absence of either her or her daughter.
17. Accordingly, the tribunal considered the paper evidence which included the claim form, the Department's Submission and the appellant's General Practitioner notes. It refused the appeal, awarding 2 points (9b) under the daily living activities and 4 points under mobility activity 1; this was insufficient for an award of either component.
18. The appointee requested a statement of reasons, and this was provided on 5 May 2023. An application for leave followed on 5 July, which was refused by the Chair on 16 August, the refusal being notified on 11 September 2023.

19. The appellant applied to the Commissioners, following the refusal of leave below. Time was extended for this purpose, and it is that application that I now consider.

### **Proceedings before me**

20. I have been considerably assisted by the written submissions from the appellant, and from Mr Clements who acts for the Department.
21. Neither party has requested an oral hearing and I am able to decide the matter fairly on the papers before me.

### **The Arguments of the Parties**

#### **The appellant**

22. The appellant asserts that the Tribunal erred in two broad respects:
- (i) There was procedural unfairness in respect of her daughter's right to a fair hearing.
  - (ii) There was an insufficiency of evidence to support its conclusions, or it misapplied the evidence to reach those conclusions.

#### **The respondent**

23. The Department is represented by Mr Clements, and it supports the appeal on the single point upon which I am allowing it, submitting that the case should be remitted to a fresh Tribunal.
24. Mr Clements deals in his submission with the matters raised by the appellant in considerable detail, but the single issue of the tribunal's treatment of the telephone notification of the claimant's difficulty with attending in person that day founds my decision to allow the appeal and direct a rehearing.
25. Since I am allowing the appeal on that single ground, I need not deal with any other elements.

#### **The error of law**

26. I agree with the appellant that the tribunal did, (I would add, unwittingly) compromise the claimant's right to a fair hearing. There are a number of factors that combine to make me form that view.
27. I see that about a year prior to the hearing that I am considering, the appointee completed a form asking for a face-to-face hearing, where, in choosing that, she effectively rejected the options of online or telephone formats.

28. During, or following, the appointee's telephone call to the venue there was a material failure on the part of the tribunal to consider, and communicate to the appointee, any alternative to the conventional oral hearing format, given her view that the claimant would not be prepared to attend the venue at a later date. This is particularly so considering that online and telephone hearings had been normalised during the pandemic. The appointee's request that the tribunal proceed in their absence must be seen as an election made while uninformed of the ambit of possibilities.

**Why was this an error of law?**

29. I see this essentially as a natural justice issue. Mr Clements' points on the appointee's submissions have force. Whilst pointing out that her reliance on the 2008 Senior President of Tribunals' Practice Direction is not of itself enough, as it has no direct effect in Northern Ireland thus there was no specific legal error in the tribunal failing to consider it, Mr Clements' observations about the reflection of the principles it expounds within Northern Ireland Commissioners jurisprudence is apt and helpful: see both the cases that he discusses in his submission, *SA v Department for Communities (DLA)* [2020] NICom 38 (*SA* hereafter) and *DJS v Department for Communities (PIP)* [2021] NICom 22. In the latter Commissioner Stockman, in considering the parameters of judicial discretion in decision making, explicitly cites the issue of whether the decision under consideration gave rise to injustice. Mr Clements argues that the failure of the tribunal to explore other forms of hearing did just that. I agree.
30. The appointee's position as an unrepresented litigant is of significance in these circumstances. As discussed in *SA*, a representative within the field of legal practitioners or welfare rights organisations would have known or been capable of asking about a different form of hearing, but the appointee would not be expected to anticipate these.
31. A further aspect is the tribunal's communication not overtly considering facilitating the participation in the hearing of the appointee herself. She, not her daughter, is the appellant as a matter of law, and the possibility might have been raised of her attending and giving oral evidence of her daughter's difficulties and/or ways of managing the various activities under consideration. In my experience tribunals tend to prefer an oral account to be from the claimant, but in some cases that is not the most useful source. Where, as here, someone lives with a claimant, or otherwise experiences their day-to-day life, they might be a more objective or more capable reporter. Neither is it an either/or position; evidence can come from both sources. Here, it seems to me that the appointee has the right to tell the tribunal what she observes, both as a party to the proceedings and as a representative: there is no prohibition in a tribunal hearing evidence from a representative: CDLA/2462/2003 at paragraph 8; *JF v Secretary of State for Work and Pensions* [2012]UKUT 335 (AAC); *SK v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 141 (AAC).

The issue of what weight to give her evidence *qua* appointee or representative is, as with all evidence, a matter for the tribunal.

### **The appointee issue**

32. I note at this point the helpful remarks of Mr Clements as to the claimant's position as a party, and I have made directions that the Department clarify aspects of the appointment, as it raises another issue.
33. The appointment made for the purposes of the administration of benefits is a matter for the Department; however, as the appointment is made when a claimant is unable of managing their own affairs it may attain relevance depending upon the benefit under consideration.
34. Mental capacity or mental health limitations in a person's ability to administrate, may raise a question within the PIP descriptors about managing budgeting or finance, as the appointment might be seen to carry with it the implication that this is problematic. That is why I have directed the Department to make a submission as to the reasons for the appointment, and for their observations on daily living activity 10 which relates to budgeting. I note that this was found to be applicable in the original award.
35. I have been assisted in relation to this issue by the decision of Commissioner Stockman's decision *JR v Department for Communities* [2023] NI Com 1. In noting that the tribunal made no reference to there being an appointee, he said (at [31]):

'In *DO'S v Department for Communities* [2021] NI Com 23, I had said

"20. Further, as addressed in *UB v Department for Communities* while I consider that the fact of appointment is not binding on a tribunal as evidence of incapacity, it seems to require some further explanation by the Department as to why-if it accepts that an adult claimant is incapable of acting on his own behalf- it has not awarded any points under the potentially related activity 10 ("Making budgeting decisions") in PIP cases.

...A finding that someone lacks capacity raises issues that need to be addressed when considering the applicability of activity 10.'

## **For the Fresh Tribunal**

### **The circumstances in this case**

36. The Department will clarify the position about the appointee available in a submission as I have directed. It may contain information or its observations as to the PIP descriptors, but, subject to the need to explain its approach, the relevance of that will be for the tribunal to determine.
37. The appellant in her submissions asserted that the tribunal had, in particular, failed in its approach to the two activities under which points were awarded, daily living activity 9, engaging with other people face to face, and mobility activity planning and following journeys. Of course she may expand on this at the hearing.
38. Activity 9 has been considered by the Supreme Court in *Secretary of State for Work and Pensions v MM* [2019] UKSC 34: see the opinion of Lady Black, with whom the other member of the Court agreed.
39. The appellant should understand that the tribunal will be looking at her daughter's condition and capabilities as of the date of the decision under appeal, 23 February 2021, despite the fact that matters may have changed over the intervening time.
40. She should understand that this tribunal is not bound by the points previously awarded, as the tribunal decision is set aside by this decision, and the appeal is against the Department's decision awarding just two points under the daily living activities.
41. Prior to engaging with the claimant, it may be of assistance for members of the tribunal to consult Chapter 12 of the Equal Treatment Bench Book (ETBB), which provides background about transpeople, including terminology, and a vocabulary for those who are unfamiliar with the subject. Whilst written by the judiciary of England and Wales, the ETBB, which is available online, has been consulted and cited with appreciation by judges from jurisdictions across the world.

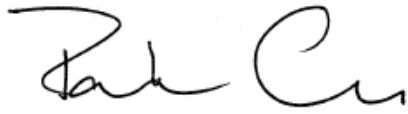
### **General points for the assistance of the tribunal**

42. As the decision under consideration was a supersession decision, there is a duty on a tribunal to give reasons where the prior award of a particular benefit is extinguished or reduced: see *TH v Department for Communities (PIP)* [2022] NICom 13 in which Chief Commissioner Mullan makes it clear that a tribunal must explain a divergence in consecutive but different determinations, citing his own words to that effect in *LO'H v Department for Communities (PIP)*, as well as *SF v Secretary of State for Work and Pensions* [2016] UKUT 0481 (AAC).
43. A helpful approach of persuasive authority is set out by Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP)* [2015] UKUT 0626 (AAC) that if a

claimant is unable to perform an activity for part of a day, that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].

**In conclusion**

44. The fresh Tribunal will consider the evidence available to it, bearing in mind the points that I make above, and make findings on the disputed issues. The appellant or a representative may re-make any points that I have not needed to consider here, at the rehearing.
45. She, and the claimant, must understand that the fact that the appeal has succeeded at this stage on an issue of law is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.

A handwritten signature in black ink, appearing to read 'P. Gray', written in a cursive style.

(Signed): P GRAY

DEPUTY COMMISSIONER (NI)

28 August 2024