

NORTHERN IRELAND VALUATION TRIBUNAL
THE RATES (NORTHERN IRELAND) ORDER 1977 (AS AMENDED) AND THE
VALUATION TRIBUNAL RULES (NORTHERN IRELAND) 2007

CASE REFERENCE NUMBER: 26/21

AB21 - APPELLANT

AND

DEPARTMENT OF FINANCE - RESPONDENT

Northern Ireland Valuation Tribunal

Chairman: Mr James Leonard, President

Members: Mr C Kenton FRICS and Mrs N Wright

Belfast, 25 October 2021

DECISION

The unanimous decision of the tribunal is that the appeal is successful for the reasons provided below and the appeal is accordingly upheld by the tribunal.

REASONS

Introduction

1. This is a reference under Article 12B of the Rates (Northern Ireland) Order 1977, as amended ("the 1977 Order"). In view of the nature of this appeal the tribunal has sought to redact the identity of the appellant (who is hereinafter referred to as "AB21" or "the appellant") and also of the person with the disability, who is regrettably now deceased. This person is the late spouse of the appellant. The tribunal had also redacted any identifying details of the hereditament under consideration. The appellant has in his Form of Appeal confirmed that he is content for his appeal to be determined without a hearing and on the basis of the documentary evidence placed before the tribunal. There was no objection to this course by the Department of Finance ("the Department") as respondent. The appellant appealed against the outcome of a review of a decision of the Department that the appellant was not entitled to claim Disabled Persons' Allowance ("DPA") in regard to a defined period, referred to further below. Accordingly, the tribunal's task is a discrete issue: whether the appellant is entitled to DPA in regard to that defined period or not.

The Law

2. The relevant statutory provisions are to be found in the 1977 Order. Article 31A (12B) of the 1977 Order was inserted by Article 17(8) of the Rates (Amendment) (Northern Ireland) Order 2006 ("the 2006 Order"). Article 31A (12B) enables a person to appeal to the Northern Ireland Valuation Tribunal against the result of a review by the Department (the respondent to this appeal) of a decision that a person is not entitled to a rate rebate for a premises with a special facility for a person with a disability. This is referred to as Disabled Person's Allowance ("DPA"). Of particular significance to this appeal are the provisions of Article 31A present at paragraph 8, which provide as follows:-

31A (8) No rebate shall be granted—

(a) for any period before 1st April 1979; or

(b) except in such circumstances and to such extent as the Department may determine, for any period before the beginning of the year in which the application is made.

3. Materially, therefore, the statutory provision expresses the words at Article 31A (8) (b), "*except in such circumstances and to such extent as the Department may determine*". These provisions, upon any clear reading, provide an exception to an absolute prohibition on the granting of a rebate. The provisions, correspondingly, afford to the Department - under circumstances which are expressly determinable by the Department, and, further, to the extent also determinable by the Department - an entitlement to grant a rebate extending back in time to any period before the beginning of the year in which the application is made. These statutory provisions, accordingly, afford a discretion to the Department in these two stated aspects: (a) relevant circumstances and (b) relevant extent.

The Department's Case and the Appellant's Case

4. The case made on behalf of the Department relies upon the proposition that any ratepayer is provided with adequate information to enable such a ratepayer to make an application for DPA during any current year on the basis of possession of adequate information to do so and facts which shall support such an application. For his part, the appellant seeks to advance the argument that he was ignorant of the entitlement to apply for DPA in the previous rating year and that it is not reasonable to expect that such information would have come to his attention for the reason that he paid rates by a means whereby it was not obvious to him that the entitlement arose in the relevant rating year, that is to say 2019-2020. Is the tribunal, therefore, to impugn the determination of the Department in respect of this backdating issue and to find in favour of the appellant's submission, based as it is upon the appellant's argument that he was, at the relevant time, ignorant of the entitlement position and that the Department, so he submits, did not adequately bring the entitlement to his attention? Might there be any other ground for upholding this appeal?

Matters Not in Contention

5. Some matters are agreed in this case and thus are not in contention. The Department accepts, as confirmed in writing, that the person with the qualifying disability (the late spouse of the appellant who is regrettably now deceased: “the person with disability”), at the relevant time as agreed, resided in the premises under discussion and that she met the relevant criterion as being a person who had a qualifying disability and that there were consequent qualifying adaptations to the property. The tribunal is accordingly not required to address the statutory provisions regarding whether the person with disability had, or had not, a qualifying disability, nor was residence an issue, save to confirm that these statutory criteria had been met. Further, the Department has conceded for the purposes of this appeal that at the relevant time and throughout the relevant period of time agreed, the premises met the qualifying statutory criteria. In consequence DPA was indeed awarded to the appellant in reference to that time agreed. The Department had thus confirmed, initially by letter dated 4 November 2020 to the appellant, that DPA would be awarded from April 2020 up to the date of death of the person with disability.

6. By further letter dated 11 January 2021 the Department wrote to the appellant confirming that DPA would be awarded in respect of the subject premises from 1 April 2020 until 6 July 2020 which was the date of death of the person with disability. However, the Department in this letter refused the appellant’s request for the DPA award to be backdated to include the previous year. What follows next, however, caused the tribunal considerable concern. The stated reason for such refusal was that, as the Department puts it: “*Land and Property Services is guided by legislation and under Article 31A (7),(8) of the Rates (Northern Ireland) Order 1977, Disabled Persons Allowance cannot be backdated any further than the start of the rating year when the application was received no matter when entitlement started.*” The tribunal’s concern is that the accuracy of that categorical and seemingly unqualified statement by the Department appears fully questionable, for the reasons stated below. The Department offered to the appellant an opportunity to have that determination reviewed.

7. The appellant wrote by letter dated 16 January 2021 requesting a review. The Department conducted what purported to be a review. A letter from the Department confirming the review outcome dated 15 February 2021 was sent to the appellant. That letter, somewhat worryingly, essentially repeated what had been stated before, indeed repeating verbatim the words

contained in the letter dated 11 January 2021 as referenced above. The entitlement to appeal this determination on review to the Northern Ireland Valuation Tribunal was stated in the letter's conclusion.

8. There then followed further correspondence between the appellant and the Department whereby the appellant sought certain documentation. The appellant then made his appeal to the tribunal by submitting an Appeal Form (Form 2) which was received by the Tribunal Secretary on 1 April 2021. A time extension was afforded by the tribunal. Apart from providing specific information in support of the DPA claim, the appellant has also stated in the Appeal Form, *"...had we know of the existence of the allowance in 2019/2020, we would have made claim at that time." "On the basis of the information provided I appeal for DPA to apply for the year April'19 – April'20, as well as the period already recognised, April'20 until July'20 when my wife died."*

9. The appellant has submitted with his claim all correspondence that he regards as relevant, which correspondence has been noted by the tribunal. There is also before the tribunal a "Presentation of Evidence" document, submitted on behalf of the Department as respondent to this appeal. This Presentation of Evidence is undated, in the copy seen by the tribunal. Therein the Department has set forth (it has to be said in a rather unstructured fashion without an apparent comprehension of a clear distinction between evidence, facts and submissions) certain information that is categorised under the headings "Facts of the case" (which consists effectively of a stated timeline of events) and "Evidence" (with sub-titles of "Disability", "Facility, Wheelchair" and "Backdating"), then followed by paragraphs containing what amounts to matters of submission, but which nonetheless also purports to contain some evidence. In this latter part of the Presentation of Evidence the following appears: -

"Mr [name redacted by the tribunal] has indicated that he would have applied sooner had he been aware of the relief. Each year the Department issues an information leaflet with all rates bills (see attachment 14) which provides information on help available with domestic rates. Within this leaflet is a section on entitlement to Disabled Persons Allowance, the Department feels that information has been communicated clearly too [sic] all domestic ratepayers on a yearly basis, therefore LPS feels that there are no circumstances which would allow a start prior to 1 Apr 2020 as per above legislation".

10. In response to the foregoing, by letter dated 3 August 2021, the appellant sets forth the case that the foregoing submission by the Department is unfair in that it has ignored his letter of 30 July 2021 which he contends has adequately dealt with the point by explaining his “ignoring/ignorance”, as he puts it, for the good reason that he pays rates by direct debit, encouraged by the applicable discount, which specifically avoided the need for him to “check the fine print”. He further adds, by way of argument, that the legislation quoted by LPS, the Rates (Northern Ireland) Order 1997, Article 31A, by which the Department states it is “guided” (i.e. not “governed”) in paragraph 8(b), in his argument, does allow for a backdated allowance or payment to be made, *“in such circumstances, and to such extent as the Department may determine”*.
11. Further correspondence followed, including the respective arguments of the parties. An email was received by the Tribunal Secretary on 4 August 2021 from the Department in reply to the 3 August 2021 letter from the appellant. The material content of this was sent to the appellant on 18 August 2021. That states:

“Mr [name redacted by the tribunal] has stated that his decision to pay by direct debit specifically avoids the need for him to “check the fine print”. LPS would like to highlight that the leaflet detailing available help with rates is issued on an A4 sheet, therefore LPS would not consider it to fall under the category of “fine print”. LPS is aware that Disabled Person Allowance awards can be backdated further than the start of the rating year [sic] which the application was received, however being unaware of an entitlement is not considered an adequate reason for LPS to consider backdating when all ratepayers are informed annually of help available to domestic ratepayers”.

12. The further argument advanced by the appellant in written submission, which effectively concluded the course of the submissions, was made by email of 23 August 2021 and included the following:

“The matter of how anyone is informed as to allowances available has already been comprehensively discussed - nothing new has been added by you. Indeed I am concerned at the paraphrasing of my words which were carefully chosen, and, as you will note bounded by inverted commas round the “small print” phrase. I request that in order to avoid misrepresentation (of my case) you quote my words in full i.e. giving the full context, viz.” The

point being madeanyone who pays by direct debit will adopt this approach". I further comment that to say that "ignorance is no excuse" (to paraphrase your words) to my mind does not display good faith in your dealings with citizens such as myself, who are not normally well versed in the niceties of L&PS deliberations, and cannot afford legal representation."

The Issue for Determination

13. The respective submissions have accordingly raised a discrete primary issue which requires to be determined by the tribunal. This issue relates to backdating of the relevant award prior to the date upon which a formal claim for DPA has been made by the appellant. The first point is whether or not the Department holds or, alternatively, does not hold, a discretion under the statutory provisions in any such matter to backdate any DPA award prior to the relevant year in which any claim for DPA is made. The second point, if the Department does hold such a discretionary power, is whether the discretion, in the circumstances of the particular case, has been properly exercised. All other matters, otherwise requiring determination in this case, shall flow from the tribunal's determination of this discrete primary issue.

The Tribunal's Examination of the Matter and Determination

14. Materially, the statutory provision states at Article 31A (8) (b) "*....except in such circumstances and to such extent as the Department may determine*". These provisions thus effectively provide an exception to what might otherwise have been an absolute prohibition upon the granting of such a rebate. So, these provisions, in effect, afford to the Department, under (a) circumstances which are expressly determinable by the Department, and, further, (b) to an extent also determinable by the Department, an entitlement to grant a rebate extending back in time to any period before the beginning of the year in which the application is made. However, such earlier period is not specified, limited, nor otherwise is it defined in the statute. Indeed, no mechanism is therein stated as to the manner in which the Department can exercise this power. Accordingly, an uncircumscribed discretion rests with the Department in these two stated aspects: (a) relevant circumstances and (b) relevant extent.

15. In this latter regard, the tribunal is concerned to note the unqualified and seemingly categorical assertion made in the two communications with the appellant which would tend, without doubt, to suggest quite wrongly that the Department had no discretion in the matter: *“Disabled Persons Allowance cannot be backdated any further than the start of the rating year when the application was received no matter when entitlement started.”* That phraseology is, at its very height, ambiguous as to whether the reference is intended to be absolute, thereby referring to all cases of backdating requests and suggesting that there is no discretion exercisable (which would constitute a clear mis-statement of the law), or whether the reference is intended to be made, and to be specifically confined to, the Department’s assessment of the appellant’s individual request for backdating. If it was the former, the Department then appears to resile from this seemingly absolute and unqualified position in subsequent correspondence, whereby the Department latterly states - and after this appeal had been initiated: *“LPS is aware that Disabled Person Allowance awards can be backdated further than the start of the rating year [sic] which the application was received...”*. This awareness of the correct statutory position, it has to be stated, evidently has arisen rather late in the day and after the commencement of the appeal.

16. The tribunal notes that case advanced on behalf of the Department is expressed in rather simple terms. That case relies upon the proposition that any ratepayer is provided with adequate information to enable such a ratepayer to make an application for DPA during any current rating year, upon the basis of possession by the ratepayer of adequate information. In opposition to this, the appellant’s argument is that the Department is fixed with something in the nature of a positive duty to ensure that any statutory entitlement (to apply for DPA in this instance) is brought to the attention of the ratepayer, irrespective of the means by which rates are paid. The appellant’s argument, further, is that reasonable ignorance of the DPA entitlement ought, at least in the circumstances of this case, to fix the Department with a positive obligation to exercise the statutory discretion afforded in favour of backdating. Thus, the appellant argues that, as he was ignorant of the entitlement to apply for DPA in the previous rating year and as it is not reasonable to expect that such information would have come to his attention (as he states that he paid rates by the means whereby it was not obvious to him that the entitlement arose in the relevant rating year, 2019-2020) the tribunal ought to impugn the determination of the Department in respect of this backdating issue and to find in favour of the appellant.

17. The tribunal’s initial determination, which is arrived at without any difficulty whatsoever, for the reason that the statutory provision is quite clear on the

- point, is that the Department does, without doubt, have discretion to backdate a DPA award prior to the relevant year in which the claim for DPA is made. The statutory provision includes the words, at Article 31A (8) (b), “...except in such circumstances and to such extent as the Department may determine”. These provisions, without doubt, provide an exception to any absolute prohibition upon the backdating of the granting of a rebate. The tribunal is therefore at a loss to understand the categorical (and entirely legally erroneous) statements contained in the Department’s letter dated 11 January 2020 and repeated verbatim in the 15 February 2020 review outcome letter. This mis-statement is inexplicable and, indeed, was not further explained by the Department in subsequent correspondence.
18. The second determination requiring to be made relates to the matter of whether the statutory discretion afforded to the Department, in the circumstances of this particular case, has been properly and fairly exercised. All other matters requiring determination in this case shall of course flow from the tribunal’s determination of this latter issue. How then is the Department properly to exercise such a statutory discretion in these two stated aspects: (a) relevant circumstances and (b) relevant extent?
19. In making this determination the tribunal has fully considered the submissions. As mentioned, the Department’s case relies upon the rather basic proposition of any ratepayer being provided with adequate information by the Department in order to enable such a ratepayer to make an application for DPA during any current year. There is, the tribunal notes with regret, no further information, nor any argument comprised in the Department’s case, concerning the broad or specific principles underpinning the exercise of discretion, either generally or else in regard to the particular circumstances of this case. For example, no hypothetical examples are provided of contrasting circumstances where the discretion might be positively exercised. That latter might have been helpful to inform the tribunal’s deliberation. The Department’s case thus appears to rest upon this simple argument: the Department issues an information leaflet to ratepayers and ignorance of, or inattention to the content of that, does not trigger any proper reason to exercise the discretion.
20. For his part, the appellant seeks to advance the argument that he was fully ignorant of any entitlement to apply for DPA in the previous rating year, 2019 to 2020. He argues that it is not reasonable of the Department to expect that such information would have come to his attention. This argument rests upon the fact, he contends, that he pays rates by a means whereby it was not obvious to him that the entitlement arose in the relevant

rating year under discussion, 2019 to 2020. He states that he pays rates by direct debit, encouraged by the applicable discount; this specifically avoided the need for him to “check the fine print” as he puts it. In response to this latter, the Department denies that it is a matter of “fine print” and states that there is an “A4 sheet” issued to ratepayers explaining entitlements. The Department has exhibited a copy of that information sheet in evidence. Examining that, the tribunal notes the part of this information sheet which, after detailing a number of other rating reliefs, under the title “*Disabled Persons Allowance (DPA)*” states: “*You may be able..... (website at end)*”.

21. Certain factors were considered by the tribunal as being relevant to the tribunal’s determination.
 - 21.1 Firstly, the appellant has not sought to argue, as far as the tribunal can observe from any of the arguments articulated by him, that he did not receive his rates billing for the year 2019 – 2020 together with the standard information leaflet that is normally enclosed therewith (an example copy of which is exhibited in evidence presented by the Department). A reasonable presumption must therefore be made that a copy of this information leaflet was delivered to and received by the appellant to his normal postal address.
 - 21.2 Secondly, the appellant has not advanced any argument as to how the Department might otherwise (apart from the standard information leaflet normally enclosed with the rates bill) reasonably have brought to the appellant’s attention, by some other effective means, the existence of DPA relief for the year in question.
 - 21.3 Thirdly, as mentioned, the Department has failed to bring to the tribunal’s attention any internal Departmental guidance (if any such exists) or any evidence of any real or hypothetical circumstances under which the Department in the past might have, or might in principle, positively exercise the statutory discretion afforded. Is the tribunal to assume that the exercise of the statutory discretion has never been afforded or that there is no Departmental guidance? If it has been afforded or if there exists Departmental guidance, why has this information not been provided to the tribunal?

21.4 Fourthly, the tribunal considers that it is entitled to apply, in the absence of anything else, the broad principles of review concerning the exercise of a statutory discretion afforded and to executive decision-making in the Department's decision-making in this case. Such principles are well-settled and encompass relevant areas including: illegality, irrationality (unreasonableness), procedural impropriety and legitimate expectation. Unreasonableness is afforded a technical meaning in law on account of the principles derived from ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223***. The court in ***Wednesbury*** concluded that to have the right to intervene, the court would have to conclude that: (1) in making the decision, the [public authority] took into account factors that ought not to have been taken into account, or (2) it failed to take into account factors that ought to have been taken into account, or (3) the decision was so unreasonable that no reasonable authority would ever consider imposing it.

22. A very recent and helpful commentary appears in the 2021 decision of the Valuation Tribunal in the case of ***GM & DM v Department of Finance [NIVT15/20]*** on this same point and it includes a useful reference to Lord Reid's Judgment in ***Padfield –v- Minister of Agriculture, Fisheries & Food [1968] A.C. 997 (at 1030)*** and to ***R –v- Tower Hamlets London Borough Council Ex P Chetnik Developments Ltd [1988] A.C. 858*** (at 873), per Lord Bridge where the following is cited:

“Thus, before deciding whether a discretion has been exercised for good or bad reasons, the Court must first construe the enactment by which the discretion is conferred. But if the purpose for which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to achievement of that purpose.”

23. However, the Department, as evidenced in the two letters mentioned above, has fundamentally mis-stated the statutory position. The appellant's appeal has been made against the outcome of the review, such outcome being set forth in the second of these letters (the review outcome letter dated 15 February 2021). One permissible ground upon which to review the Department's decision-making in this case relates to the ground of illegality. The question thus has to be asked: has the Department improperly and unlawfully fettered its discretion? Did the decision-maker, at the time the letters were issued, fundamentally misunderstand the applicable law and the matter of statutory discretion? This appears to be so, as it must

reasonably be presumed there was no irrational, improper or intentional mis-statement of the law with a designed intention of misleading the appellant. What is unclear, in the absence of anything more, is the extent of the misunderstanding within the Department and officials.

24. As the Department's decision-making, both at first instance and also in the review process now appealed against, is flawed, the tribunal's unanimous decision is that the appellant's appeal succeeds against the Department's decision not to award DPA in regard to the rating year under appeal.

25. In conclusion, the question is again posed: is the tribunal to assume that the exercise of the statutory discretion has never been afforded or that there is no Departmental guidance? If it has been afforded or if there exists Departmental guidance, why has this information not been provided to the tribunal? The tribunal thinks that it must, accordingly, recommend to the Department that any Departmental decision-makers shall be afforded appropriate and adequate training in the relevant statutory provisions and that the Department develops guidance for decision-makers upon the principles underpinning the proper exercise of statutory discretion, both in theoretical terms and also in real and practical terms, and that the Department takes all proper steps to prevent any risk of repetition of what the tribunal has observed in this case.

James Leonard

James Leonard, President

Northern Ireland Valuation Tribunal

Date decision recorded in register and issued to parties: 15 November 2021

