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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PETER McCONALOGUE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Terence McCleave (instructed by the Departmental Solicitor's Office) for the Proposed Respondent
Mr McConalogue appeared as a Litigant in Person

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COLTON J

Introduction

[1] I am obliged to the applicant and to Mr McCleave for their helpful written and oral submissions.

[2] By these proceedings the applicant seeks leave to challenge a decision of the Social Security Commissioner dated 23 September 2021 whereby the Commissioner refused the applicant leave to appeal on a point of law from a decision of the Social Security Appeal Tribunal dated 30 December 2020 which found that the applicant did not have limited capability for work.

[3] The factual background is un-controversially set out in the impugned decision itself in the following way:

> "**Background**
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> 4. The applicant had claimed and had been awarded Universal Credit (UC) by the Department for Communities ("the Department") from and including 31 July 2019 on the basis of incapacity for work. On 14 October 2019 the applicant completed and

returned a UC50 questionnaire issued to him by the department regarding his ability to perform various activities. On 29 November 2019 a Health Care Professional (HCP) examined him on behalf of the department and received further evidence from the applicant. On 8 January 2020 the department notified the applicant of its decision that he did not have limited capability for work from and including 8 January 2020. The applicant requested a reconsideration and the decision was reconsidered by the department but not revised. The applicant appealed, but waived his right to an oral hearing of the appeal.

5. The appeal was considered by a Tribunal consisting of a legally qualified member (LQM) and a medically qualified member. The Tribunal disallowed the appeal. The applicant requested a statement of Reasons for the Tribunal's decision and this was issued on 17 February 2021. The applicant applied to the LQM of Tribunal for leave to apply to the Social Security Commissioner. The LQM refused the application by a determination issued on 26 April 2021. On 24 May 2021 the applicant applied to the Social Security Commissioner for leave to appeal."

The grounds for leave

[4] The grounds set out in the Order 53 Statement are many. A particular feature of the grounds relate to purported criticisms of the decision of the appeal Tribunal as opposed to the decision of the Commissioner refusing leave to appeal which is the impugned decision.

[5] Again, in general terms, a particular focus of the applicant's challenge relates to the way the department and, subsequently, the appeal Tribunal dealt with allegations made by the applicant's former employer concerning claims of work incapability. Indeed, in the applicant's application to the LQM of the appeal Tribunal for leave to appeal to the Commissioner on a point of law he states:

> "The WCA process of which I am now appealing however, does not rebut the past employer's assertions nor tries to do so, hence evades the central purpose of why I invoked the WCA procedure in the first place."

This is a revealing paragraph in terms of the applicant's motivation in these proceedings.

[6] Turning to the specific grounds of challenge these can be summarised as follows:

- Illegality on the basis of the failure of the WCA Tribunal to indicate the start and end times followed by a failure of the Commissioner to document the decision on the lawfulness or otherwise of this.

- Immaterial considerations were taken into account by the proposed respondent due to an "undue emphasis" in the medical answers contained in his UC50 application.

- The proposed respondent failed to take into account material considerations including:

    - Allegations re his alleged work incapability attributes from his previous employer.

    - A failure of the assessor and Tribunal to come to a formal decision on the admissibility of such evidence.

    - A claim in the proposed respondent's legal submissions that such evidence was irrelevant.

    - A failure of the work capability assessor to come to a jurisdictional decision as to whether the incapability allegations were within the remit of the process.

    - It is not entirely clear but the applicant seems to be arguing that references to the employment allegations suggest that work incapacity points were being sought by the applicant seeking to self-certify work incapability, which was not the case.

- The applicant contends that the impugned decision was procedurally unfair in that the Tribunal avoided investigating the employer's allegations and converted the claim "into a straightforward easy to investigate strawman claim that could be disposed of as it were."

- The applicant also relies on Wednesbury unreasonableness/irrationality as it failed to provide sufficient reasons and which did not address the truthfulness of the former employer's allegations. Should such allegations have been found not to be true that would have counted as a "win" for the applicant.

[7] By way of additional complaint the applicant complains that the Social Security Commissioner failed to set aside his decision after it was made to accommodate a request by the applicant to consult a solicitor. The refusal to set

aside the decision was made on 4 November 2021. In refusing to set aside the decision the Commissioner states:

> "7. I consider that the applicant had ample opportunity to consult a solicitor prior to making his submissions, but had elected not to do so. In addition, his request to consult a solicitor in the absence of further departmental submissions was paradoxical, since a solicitor would have had no outstanding departmental submissions to respond to and since the pleadings were closed in terms of receiving further submissions."

Consideration

Delay

[8] An initial issue arises in relation to delay. The applicant is challenging a decision which was made on 23 September 2021. The proceedings were initiated on 2 February 2022.

[9] Order 53 Rule 4(1) of the Rules of Court provide that:

> "4-(1) An application for leave to apply for judicial review shall be made within three months of the date when the grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[10] In this case the grounds for the application first arose on 23 September 2021 which means that proceedings should have been brought by 23 December 2021. In order to grant leave the court needs to be satisfied that there is a good reason for extending the period within which the application should have been made. The applicant has not put forward any such reasons in his written application or supporting material.

[11] In submissions he relies upon the fact that he did seek to have the decision of 23 September 2021 set aside. The decision to refuse to set aside was communicated on 4 November 2021. It could be argued on his behalf that time began to run at that point. Having been made aware on 4 November 2021 that the decision on 23 September 2021 would not be set aside it seems to the court that judicial review proceedings should have been initiated within the three month period commencing on 23 September 2021 that is 23 December 2021. Had the time limit expired whilst he was awaiting a decision on the request to set aside the ruling then things might have been different. The court also notes that it appears from the Order 53 Statement that the applicant did in fact consult a solicitor but it is not clear what impact this had on the delay in issuing these proceedings. It is also clear from the history of this case

that the applicant did engage with the proposed respondent on 27 October 2021 and also with the judicial review office on Thursday 23 December 2021. In essence the applicant was seeking legal advice from the proposed respondent and the judicial review office about potential consequences of failed judicial review proceedings. He also sought extensions of time for further PAP correspondence. The court is conscious that the applicant is a litigant in person. The court has available to it all the relevant papers culminating in the decision which is under challenge and is in a position to deal with the substance of the case in any event.

The Legal Test

[12] The legal test for the granting of leave in judicial review proceedings is well-established. The court should refuse leave to apply for judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to discretionary bars such as delay or an alternative remedy. Leaving aside for the moment the question of delay the court is in a position to assess the issue of arguability and prospects of success.

[13] In applying the test the court reminds itself that whilst a decision of a Social Security Commissioner refusing leave to appeal from the decision of an appeal Tribunal may be subject to judicial review, the court should approach any such challenge with caution bearing in mind both the specialised area of law under consideration and the fact that the legislature has provided for an independent statutory appeal mechanism constituted with expert practitioners, in this situation legally qualified members and medical practitioners.

Is the test for leave to apply for judicial review met?

[14] What is being challenged here is a decision of the Commissioner. Under the applicable statutory scheme the Commissioner is solely concerned with errors of law and not issues of fact. The Commissioner is tasked with determining whether there is an arguable point of law arising from the appeal Tribunal's proceedings.

[15] In his reasoned decision the Commissioner, after setting out the background to the appeal Tribunal decision, sets out the grounds of the appeal. He accurately summarises the Tribunal decision, he sets out the relevant legislation and then turns to his assessment which is worth quoting in full.

> "**Assessment**
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> 14. 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.

15. 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.

16. 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.

17. The applicant refers to his application for leave to appeal to the LQM dated 10 March 2021. In this he submits that the Tribunal's reasons do not inform him why he won or lost the appeal. He takes issue with the decision engaging with matters that are not problematic for him, such as crossing a road. He refers to issues that arose in the course of former employment. He complained about the reliability of the HCP's report. He disputed the statement that he had not received prescriptions in respect of stress, recounting an episode where his GP prescribed sleeping tablets in the past. In his OSSC1 application form, he recounts past employment and industrial Tribunal experiences.

18. It is a requirement of procedural fairness that the Tribunal should give reasons for its decision. The standard of those should be at the level that enables the appellant to understand why he or she won or lost. Typically, when an appellant attends an appeal, the Tribunal may give a brief explanation of its process at the start of the hearing. Where an appellant elects not to attend the hearing, however, a certain amount of independent reading of the Tribunal papers must be undertaken in order to understand the Tribunal's role. The department's submission in the present case set out the scoring system that requires 15 points to win an appeal, and appended the relevant evidence and legislation. The system is entirely statutory and the Tribunal does not have discretion to depart from the legislative test as the applicant appeared to suggest in his submissions.

> 19. The applicant did not indicate significant limitations on physical or mental health activities in his UC50 questionnaire that would score points for relevant activities. The HCP independently did not find any significant limitations in physical or mental health activities into her UC85 Report. The applicant did not attend the hearing to dispute any aspect of the HCP's report or take issue with it in writing in advance of the hearing. The written submissions of the applicant at the Tribunal raised various matters of dispute in respect of his past employment with two different government bodies. However, none of these submissions engaged with the subject matter of the appeal, namely whether the applicant should score points under the activities in schedule 6 of the UC Regulations. It is clear why the applicant lost the appeal. Simply put, there was consistent or sufficient evidence to decide that he scored no points under the limited capability for work assessment. The matters that he sought to raise were not relevant to that assessment and did not affect the outcome.
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> 20. The applicant does not raise any arguable point of law in his application. Therefore, I must refuse leave to appeal."

[16] In general terms the court considers that the Commissioner's decision is reasoned and rational. It properly concludes that the applicant does not raise any arguable point of law in his application.

[17] Turning to the specific matters raised in the Order 53 Application the court can quickly dispose of the issue about the recording of the timing of the appeal Tribunal hearing. The applicant relies on a practice statement which has been issued in England and Wales and does not apply in Northern Ireland. Under regulation 55(1) of the Social Security Child Support (Decisions on Appeal) Regulations (Northern Ireland) 1999 the LQM is only required to make a record which is sufficient to indicate the evidence taken.

[18] In relation to access to a solicitor the applicant only sought to do so after the decision of the Commissioner on 23 September 2021. It was open to him to obtain legal representation between 8 January 2020 and 23 September 2021. The failure to do so does not in any way vitiate the determination of the Commissioner (or his subsequent refusal to set aside that determination of 4 November 2021).

[19] In short, neither of these points raise any arguable point that the Commissioner has erred in law.

[20] In relation to material/immaterial considerations, these focus on workplace allegations concerning the applicant's alleged working incapability. It is alleged that these allegations have been "downplayed" or "ignored."

[21] Again, it is noted that the challenge before this court is to the decision of the Commissioner and not to the decision of the Tribunal. In any event, the court has had the benefit of reading the Tribunal's Statement of Reasons from which it is clear that the tribunal properly focussed on the assessment process provided for in the statutory scheme, namely the Welfare Reform Order (Northern Ireland) 2015 and, in particular, Article 17(2)(b); Article 24(1) and Article 43 of the Order and the Universal Credit Regulations (Northern Ireland) 2016 and, in particular, regulation 40 and Part V and Schedules 6-9 thereof.

[22] It is also clear from the Tribunal's decision that the work issues were considered by the Tribunal and referred to in their reasons for the decision. The assessment of evidence was a matter to be determined by the Tribunal. These matters are inherently factual in nature and the weight to be placed on individual factors is plainly a matter for the Tribunal.

[23] It is not the role of the Tribunal to carry out some form of investigation into the truth or otherwise of claims made in the workplace. The focus of the Tribunal is to carry out the assessment process in accordance with the statutory provisions referred to above. The Tribunal is entitled to consider other evidence put before it and it is clear from their decision that the issues concerning the previous workplace allegations were raised and taken into account.

[24] In particular, in para 14 of the decision the Tribunal state:

> "Having considered all the evidence provided including the application, the assessment, the various emails provided, together with further correspondence from the appellant, the Tribunal concluded, whilst the appellant may suffer from gastritis, skin rash and stress he is not receiving any ongoing treatment or specialist input and he did not report any associated restrictions.
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> 15. The Tribunal confirm the decision to award the applicant no points on the physical descriptions and no points on mental descriptors was correct. The decision dated 8 January 2020 that he does not have limited capability for work is correct and is upheld."

[25] In any event, it must be remembered that the role of the Commissioner was to establish whether or not the applicant had raised any point of law in considering whether to grant leave to appeal on the Tribunal's decision.

[26] I turn now to the issue of reasons. The obligation on the proposed respondent in public law terms is to provide reasons which are "intelligible and adequate." The decision of the Commissioner plainly meets this test.

[27] Whilst the court is concerned with the decision of the Commissioner, for the avoidance of doubt, it is also satisfied that the Tribunal has also complied with its public law obligation to provide adequate and intelligible reasons for its decision. It is clear from both decisions that the central feature of the applicant's case was an assessment of the evidence and the concomitant conclusion that the applicant did not have limited capability for work in the context of the applicable statutory scheme.

[28] In reaching that decision the Tribunal took into account all relevant information including the previous employment history and came to a conclusion on the weight of evidence before it in accordance with its statutory role.

[29] At the hearing the applicant came across as a softly spoken and thoughtful individual. As per para [5] above it seems to me that his real grievance relates to the fact that his previous employer made allegations about his incapability. On one level he is understandably unhappy about that assessment. It was he who drew this allegation to the attention of the decision maker. His issue now is that the decision makers have not been clear in coming to a decision on the validity or otherwise of the employer's allegations. He describes this as an important "developing area of law" which should justify the granting of leave. As should be clear from this judgment I do not consider that there is any such "developing area of law" which requires consideration by this court. The specialist Tribunal came to a rational and justified decision on the basis of the evidence before it, applying the appropriate statutory test. In coming to that conclusion it had regard to all the evidence before it including the allegations from the employer. It was not the function of the Tribunal, and the subsequent role of the Commissioner, to make an assessment on the validity or otherwise of the employer's allegations. I am glad to note that Mr McConalogue is now re-employed and clearly regarded as capable by his current employer.

[30] Insofar as the Order 53 Statement could be construed as a challenge to the Commissioner to refuse to set aside his decision there is simply no legal basis to criticise or challenge that decision. The request was based on the applicant's wish to consult a solicitor. This was dealt with in the Commissioner's decision as set out in para [7] above. There is simply no public law basis for challenging this decision.

Conclusion

[31] The court concludes that the applicant has not established any arguable grounds or any reasonable prospect of success in relation to his purported challenge to the decision of the Commissioner, leaving aside any question of delay.

[32] Therefore, leave to apply for judicial review is refused. Given that this is a leave application the court makes no order in relation to costs.