IN THE UPPER TRIBUNAL **Appeal No. CTC/2165/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

1 My formal decision is as follows:

(a) The appeal is allowed.

(b) The making of the decision of the First-tier Tribunal given at Doncaster on 12 May 2017 under reference SC287/17/00050 involved the making of an error on a point of law.

(c) That decision is set aside.

(d) I remake the decision in the following terms:

The proceedings before the First-tier Tribunal are struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

2 However, in the circumstances I set out below, the effective outcome of this appeal is that the claimant has won and that her award of working tax credit for the 2016/2017 tax year is to include the disability element.

REASONS FOR DECISION

Summary

1 The disability element of working tax credit ("WTC") assists people with disabilities to take up, and remain in, work. It does so by increasing the rate at which WTC is paid. This provides an incentive for those who have not been working because of disability to undertake some work, even if it is not possible for them to work to the same extent as those who are not disabled. For those who are already in work the disability element can provide an incentive to increase their hours and can also help with the additional costs incurred by people with disabilities who work.

2 To qualify for the disability element, claimants have to satisfy the normal conditions of entitlement to WTC and meet the additional conditions that (1) they

should have a physical or mental disability which puts them at a disadvantage in getting a job; and (2) that they fall within one of seven defined cases of people.

3 The people who fall within those cases may be summarised as follows:

Case A People who were entitled to a benefit or national insurance credit in respect of incapacity, or limited capability for work, at some time in the previous 182 days.

Case B: People who are entitled to the higher pensioner premium, or disability premium of income support, income-based jobseeker's allowance, housing benefit or housing benefit.

Case C: People who are entitled to disability living allowance, attendance allowance, personal independence payment, armed forces independence payment and certain payments under the industrial injuries scheme or war pensions scheme.

Case D: People who are provided with a vehicle under the Motability Scheme.

Case E: Certain people who have received occupational sick pay, or certain statutory benefits or credits for short-term sickness, who have a disability that is likely to last for at least six months, and whose gross earnings have reduced since they became disabled.

Case F People who have undertaken training for work at some time in the previous 56 days and who were receiving a benefit specified in Case A at some time in the 56 days before that training started.

Case G: People who were previously entitled under Cases A, B, E or F.

4 The claimant in this appeal qualified for the disability element under Case A. Subsequently, HM Revenue & Customs ("HMRC") withdrew the element because, by then, she had not received a Case A benefit within the previous 182 days and was not receiving a Case C benefit. The First-tier Tribunal ("FTT") upheld that decision.

5 However, I have decided that HMRC and the FTT were wrong and the claimant was right.

6 Once the disability element has been awarded under Case A, it continues in payment on an indefinite basis until the claimant either ceases to be entitled to WTC or ceases to have a disability which puts her or him at a disadvantage in getting a job. That is because, as soon as such a claimant ceases to be in Case A, she or he instead immediately falls within Case G.

7 The way in which the claimant puts the point is to say that previous receipt of the disability element is itself a qualifying benefit for the disability element. That is not how a lawyer would explain it, and it does not apply where the disability element was previously awarded under Cases C or D. However, for those in Cases A, B, E and F, it is a very good plain English summary of what I have decided.

Introduction

8 This is an appeal by the claimant against the decision of the FTT dated 12 May 2017. Permission to appeal to the Upper Tribunal was given by Upper Tribunal Judge Wright on 15 August 2017. Neither party has asked for an oral hearing of the appeal to the Upper Tribunal and as HMRC effectively support the appeal, I do not consider it necessary to hold a hearing.

Background and procedural history

9 These proceedings are about whether the claimant's award of working tax credit ("WTC") for the 2016/2017 tax year should have included the disability element.

10 It is now accepted that the factual background is as follows.

(a) The claimant, who was 62 at the date of HMRC's decision, suffers from sciatica and arthritis. These restrict the hours that she is able to work.

(b) The claimant became incapable of work in 2009. She originally claimed incapacity benefit ("IB") but, by the end of July 2012, had been migrated to employment and support allowance ("ESA").

(c) The claimant has never been entitled to either disability living allowance or personal independence payment ("PIP").

(d) On 1 August 2012, she made a joint claim for WTC with her husband. From that date she was working 16 hours a week as a self-employed person. Before that date she had been entitled to ESA. I will assume that her last day of entitlement to ESA was 31 July 2012. However, nothing in my analysis depends on the exact date.

(e) The claimant and her husband were awarded working tax credit for 2012/2013. That award included the disability element in respect of the claimant.

(f) The claimant continued to be self-employed for 16 hours a week and similar awards were made for 2013/2014, 2015/2015 and 2015/2016.

11 For 2016/2017, the claimant was initially awarded £6,315.82 in WTC, which again included the disability element.

12 However, on 28 November 2016, HMRC, having established that the claimant was not receiving PIP, amended that award under section 16 of the Tax Credits Act 2002 ("the Act") by removing the disability element with effect from 24 August 2016 and reducing the amount awarded to £4,492.48.

13 On 7 December 2016, the claimant requested mandatory reconsideration of that decision. On 23 December 2016, in response to that application, HMRC reviewed the decision dated 28 November 2016 under section 21A of the Act and

removed the disability element with effect from 6 April 2016, thereby reducing the award to £3,352.88.

14 On 6 January 2017, the claimant appealed to the FTT and on 12 May 2017, the FTT refused that appeal and confirmed the decision made by HMRC on 24 November 2016.

Jurisdiction

15 Before considering the legal issues that arise in this case, I must deal with a preliminary point about the jurisdiction of the Upper Tribunal. HMRC submit at paragraph 19 of their submission to the Upper Tribunal:

> "19. The decision under appeal was given by HMRC on 24 November 2016 under section 16 of the Act. HMRC gave a final decision under section 18 of the Act on 7 July 2017 and considering the decision given in the case of LS and RS v Commissioners for HMRC … the decision under appeal has lapsed by way of the section 18 decision. Therefore HMRC draws attention to the fact that the Upper Tribunal has no jurisdiction to hear this appeal and I respectfully invite the Upper Tribunal to set aside the decision of the tribunal."

16 I am unsure how I could properly accept the invitation to set aside the decision of the FTT if, as I am told in the same sentence, I have no jurisdiction to hear the appeal at all.

17 Fortunately, however, that problem does not arise because the procedural history of this appeal is different from that in *LS and RS v Commissioners for Her Majesty's Revenue & Customs* [2017] UKUT 257 (AAC). And, in any event, what was decided about the jurisdiction of the Upper Tribunal in *LS and RS* is the direct opposite of the proposition for which HMRC cite it.

18 The three-judge panel in *LS and RS* helpfully set out what they had decided under the heading, "What we have decided", in paragraph 1 of their decision:

> "1. As soon as the Commissioners for Her Majesty's Revenue and Customs have made a decision under section 18 of the Tax Credits Act 2002 for a tax year, any decision made under section 16 for that tax year ceases retrospectively to have any operative effect, any appeal that has been brought against that section 16 decision therefore lapses, the First-tier Tribunal ceases to have jurisdiction in relation to that appeal and that tribunal must strike out the proceedings."

19 That is not this case. The FTT's decision was given on 12 May 2017 and the section 18 decision was not given until 7 July 2017. Therefore, when the FTT gave its

decision, the section 16 decision was still operative and the FTT had jurisdiction in respect of it. The section 18 decision caused the section 16 decision and the FTT's decision upholding it cease to have operative effect. However, it did not cause the appeal to the FTT to lapse because by that time the appeal had already been brought to an end by the FTT's decision.

20 As the FTT had jurisdiction to make the decision it did, there can be no question that the Upper Tribunal has jurisdiction to hear and decide an appeal against that decision.

21 Moreover, as *LS and RS* also decided, that would also be the case even if the FTT's decision had been given without jurisdiction because the appeal had lapsed. The three-judge panel stated:

> "23. In the case of the Upper Tribunal, an appeal is governed by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, which provides for the right of appeal on any point of law arising from a decision made by the First-tier Tribunal. That decision is valid for the purposes of an appeal regardless of whether or not it was made within the tribunal's jurisdiction, whether or not it was validly made, and whether or not it involved the making of an error of law. If it were otherwise, the right of appeal would be ineffective, as the Privy Council recognised in *Calvin v Carr* [1980] AC 574 at 590:
>
> > "… where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal."
>
> The underlying principle was stated by the Court of Appeal in *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255 at [20]:
>
> > "Formal decisions of a tribunal are valid and of binding effect unless and until set aside by some order of the tribunal itself (e.g. if it comes to appreciate that it mistakenly acted without jurisdiction) or of a superior tribunal or court or on judicial review."
>
> …
>
> 33. The Upper Tribunal is subject to the same duty to strike out proceedings that are outside its jurisdiction as the First-tier Tribunal. It operates differently, though, because its jurisdiction is differently defined, as we have shown in paragraph 23 above. The Upper Tribunal is not under a duty to strike out an appeal just because the First-tier Tribunal had no jurisdiction to entertain

the proceedings; its decision has not ceased to exist. And, as the Upper Tribunal has jurisdiction, it has power to deal with an issue that might be considered academic in view of the First-tier Tribunal's lack of jurisdiction. It is at this stage that there is scope within its jurisdiction for discretion in the exercise of the Upper Tribunal's power to hear and decide an academic issue."

22 For those reasons, I reject the submission quoted at paragraph 15 above. The Upper Tribunal has jurisdiction to hear and decide this appeal.

The law

23 Entitlement to working tax credit is governed by sections 10-12 of the Act. So far as is relevant to this appeal, sections 10 and 11 are in the following terms:

"**Entitlement**

10.—(1) The entitlement of the person or persons by whom a claim for working tax credit has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work.

(2) Regulations may for the purposes of this Part make provision-

(a) as to what is, or is not, qualifying remunerative work, and

(b) as to the circumstances in which a person is, or is not, engaged in it.

(3) The circumstances prescribed under subsection (2)(b) may differ by reference to—

(a) the age of the person or either of the persons,

(b) whether the person, or either of the persons, is disabled,

(c) whether the person, or either of the persons, is responsible for one or more children or qualifying young persons, or

(d) any other factors.

(4) ….

Maximum rate

11.—(1) The maximum rate at which a person or persons may be entitled to working tax credit is to be determined in the prescribed manner.

(2) The prescribed manner of determination must involve the inclusion of an element which is to be included in the case of all persons entitled to working tax credit.

(3) The prescribed manner of determination must also involve the inclusion of an element in respect of the person, or either or both of the persons, engaged in qualifying remunerative work-

(a) having a physical or mental disability which puts him at a disadvantage in getting a job, and

(b) satisfying such other conditions as may be prescribed.

(4) The element specified in subsection (2) is to be known as the basic element of working tax credit and the element specified in subsection (3) is to be known as the disability element of working tax credit.

…"

24 The various regulation-making powers conferred by sections 10 and 11 have been exercised to make the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 ("the WTC Regulations"). Regulations 4(1) and 9 of, and Schedule 1 to, those Regulations are relevant to this appeal. To that extent, those provisions read as follows:

"**Entitlement to basic element of working tax credit: qualifying remunerative work**

4.—(1) Subject to the qualification in paragraph (2), a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies all of the following conditions (and in the case of the Second condition, one of the variations in that condition).

First condition

The person is employed or self-employed and—

(a) is working at the date of the claim; or

(b) …

Second condition

First variation:

…

Second variation:

In the case of a joint claim where neither person is responsible for a child or qualifying young person, the person—

(a) is aged at least 16 and undertakes work for not less than 16 hours per week and has a physical or mental disability which puts that person at a disadvantage in getting a job and satisfies regulation 9(1)(c);

(b) is aged at least 25 and undertakes work for not less than 30 hours per week; or

(c) is aged at least 60 and undertakes work for not less than 16 hours per week.

Third variation:

…

Third condition

…

Fourth Condition

…"

Disability element and workers who are to be treated as at a dis advantage in getting a job

9.—(1) The determination of the maximum rate must include the disability element if the claimant, or, in the case of a joint claim, one of the claimants—

(a) undertakes qualifying remunerative work for at least 16 hours per week;

(b) has any of the disabilities listed in Part I of Schedule 1, or in the case of an initial claim, satisfies the conditions in Part II of Schedule 1; and

(c) is a person who satisfies any of Cases A to G on a day for which the maximum rate is determined in accordance with these Regulations.

(2) Case A is where the person has, for at least one day in the preceding 182 days ("the qualifying day"), been in receipt of—

(a) higher rate short-term incapacity benefit;

(b) long-term incapacity benefit;

(c) severe disablement allowance; or

(d) employment and support allowance …, where entitlement to employment and support allowance … or statutory sick pay or a benefit or allowance mentioned in sub-paragraphs (a) to (c) … has existed for a period of 28 weeks immediately preceding the qualifying day comprising one continuous period or two or more periods which are linked together.

…

(4) Case C is where the person is a person to whom at least one of the following is payable—

(a) a disability living allowance;

(b) an attendance allowance;

(c) a mobility supplement or constant attendance allowance which is paid, in either case, in conjuction with a war pension or industrial injuries benefit;

(d) personal independence payment;

(e) armed forces payment;

…

(8) Case G is where the person was entitled, for at least one day in the preceding 56 days, to the disability element of working tax credit … by virtue of his having satisfied the requirements of Case A, B, E or F at some earlier time.

For the purposes of this Case a person is treated as having an entitlement to the disability element of working tax credit if that element is taken into account in determining the rate at which the person is entitled to a tax credit.

…

Regulation 9(1)

SCHEDULE 1

Disability which puts a Person at a Disadvantage in Getting a Job

PART I

1.-19 …

20. He cannot normally sustain an 8-hour working day or a 5-day working week due to a medical condition or intermittent or continuous severe pain.

PART II

21. As a result of an illness or accident he is undergoing a period of habilitation or rehabilitation."

Reasons for setting aside the FTT's decision

Summary

25 The FTT erred in law by failing to appreciate the relevance of regulation 9(8) of the WTC Regulations which establishes Case G.

26 HMRC's response to the appeal before the FTT was confusing. On the one hand, it stated that the claimant had been awarded the disability element because she had had an award of PIP and that that element had been removed from the WTC award because the PIP award had come to an end on 24 August 2016. On the other hand, it also stated that she had never been entitled to PIP and that the original award of the disability element had been made in error. The FTT decided, correctly, that the latter was the case.

27 However, the PIP issue was a red herring. The claimant had never been awarded the disability element under Case C.

28 Rather, as the FTT correctly identified at paragraphs 3 and 4 of the statement, the claimant was originally awarded the disability element because she had been on ESA immediately before she claimed WTC, *i.e.,* under Case A.

29 In those circumstances, regulation 9(1) and (8) of the WTC Regulations has the effect that the maximum rate of her WTC must continue to include the disability element unless and until she ceases to be entitled to WTC altogether or ceases to have a disability which puts her at a disadvantage in getting a job.

30 The claimant told the FTT that that was the case, although she did not, and, as a non-lawyer, could not have been expected to, refer in terms to Case G and cite regulation 9(8) of the WTC Regulations.

31 As part of the FTT's enabling role, the judge should have investigated what the claimant said and addressed her argument. Instead, he appears simply to have ignored it. His written statement of reasons does not refer to the law he had to apply, or to the existence of the different Cases. It gives the impression that the only way in which a person can be entitled to the disability element is by receipt in the previous 182 days of an benefit for incapacity, or limited capability, for work or by current receipt of a disability benefit. That is not the case. And a brief look at the commentary in the annotated volumes of social security legislation that are provided to all judges in the Social Entitlement Chamber would have been enough to alert the Judge to the fact that it is not the case.

Analysis

32 The analysis that leads to that result set out in paragraph 29 above is as follows.

At the date of claim for WTC

33 When the claimant first claimed WTC on 1 August 2012, she was over the age of 16 but below the age of 60; was a member of a couple; was not responsible (or the partner of a person who was responsible) for a child or qualifying young person; was self-employed; was working for 16 hours a week; and had a physical or mental disability which put her person at a disadvantage in getting a job, because, as HMRC accepts, her inability to work a full working week satisfied paragraph 20 of Schedule 1.

34 As the claimant had also been in receipt of ESA (or a combination of IB and ESA) for a period of over 28 weeks, and as that entitlement ended less than 182 days before the date of her claim for WTC, she fell within Case A of regulation 9(2) (by virtue of regulation 9(2)(d)) and therefore also within regulation 9(1)(c).

35 It follows that the claimant satisfied the First condition, and paragraph (a) of the Second variation of the Second condition, in regulation 4(1). There being no issue as to her satisfying the Third and Fourth conditions, that regulation required that she be treated as engaged in qualifying remunerative work. As she also satisfied regulation 9(1)(a)-(c), her maximum rate of WTC included the disability element.

On the 183rd day of entitlement to WTC

36 Next consider the claimant's position on 30 January 2013, which is the 183rd day after 31 July 2012, the last day on which she was entitled to ESA.

37 For the first time, she no longer fell within Case A because she had not been in receipt of any of the benefits listed in regulation 9(2) for at least one day in the preceding 182 days.

38 However, that did not mean that her maximum rate no longer included the disability element because falling within Case A is not the only way of satisfying regulation 9(1)(c). There are six other Cases into which she might have fallen, all of which needed to be considered before HMRC could legitimately amend the award by removing the disability element: see, by analogy, *R(IS) 10/05* at paragraphs 15-16.

39 Consideration of those other cases shows that, on 30 January 2013, the claimant moved from Case A to Case G

40 That case applies where, for at least one day in the preceding 56 days, a claimant was entitled to the disability element of working tax credit by virtue of having satisfied the requirements of Case A, B, E or F "at some earlier time": see regulation 9(8).

41 The phrase "at some earlier time" must refer back to the words "a day for which the maximum rate is determined in accordance with these Regulations" in

regulation 9(1)(c). It cannot refer back to the day (or each of the days) in the preceding 56 days that are mentioned earlier in the same paragraph.

42 Entitlement under Cases A, B, E and F for any particular day depends on the satisfaction of the requirements of those cases on that particular day, not on some previous day. If the phrase “at some earlier time” meant that the claimant had to have been entitled under one of those cases by virtue of having satisfied the requirements of that case at a time before the day of entitlement, Case G could never apply.

43 So when the claimant’s maximum rate for 30 January 2013, is determined “at some earlier time” includes any period up to and including 29 January 2013.

44 Therefore, on 30 January 2013, the claimant fell within Case G because, on the previous day and during each of the 55 days before that, she had been entitled to the disability element by virtue of her having satisfied the requirements of Case A, and that 56-day period amounted to “some earlier time” because it was before 30 January 2013.

Fifty-six days later

45 Finally, consider the claimant’s position on 26 March 2013 which was 56 days from 30 January 2013 (including that date).

46 It can no longer be said that she satisfied the requirements of Case A, B, E or F “for at least one day in the preceding 56 days”.

47 But that does not matter, because Case G does not require that the claimant fell within one of those Cases during one of the preceding 56 days. It only requires that, for one day in that period, she should have been entitled to the disability element by virtue of having satisfied the requirements of Case A, B, E or F at some earlier time.

48 Entitlement under Case G is itself entitlement to the disability element by virtue of having satisfied the requirements of Case A, B, E or F at some earlier time. If the claimant had not satisfied Case A, B, E or F at some earlier time, she would not have satisfied Case G.

49 Therefore, other things being equal, entitlement to the disability element under Case G on any particular day gives rise to entitlement under Case G on the following day and the 55 days after that, and so on indefinitely.

Conclusion

50 That is why the claimant’s submission that, in the circumstances of her case, previous receipt of the disability element is itself a qualifying benefit for the disability element (see paragraph 7 above) is basically correct.

51 It does not necessarily mean that once a claimant has been awarded the disability element she will continue to be entitled to it even if the disabling condition from which she suffers improves. That will depend on whether she continues to meet one of the criteria in Schedule 1. If she recovers to the extent that she no longer does

so, she will cease to satisfy regulation 9(1)(b) and will no longer qualify for the disability element as a result.

52 It may be helpful if I make two final points.

53 The first is that although the present appeal concerns previous entitlement under Case A by virtue of receipt of a qualifying benefit, the result is the same for previous entitlement under Cases B, D and F.

54 The second is that if a claimant whose maximum rate of WTC includes the disability element ceases to be entitled to WTC (or to meet the criteria in Schedule 1) but becomes entitled again (or meets the criteria again) within the 56 day period specified in Case G, entitlement to the disability element revives because the claimant will continue to fall within Case G.

Reasons for the Upper Tribunal's decision

55 Having established that the FTT's decision was in error of law, I have a discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set it aside. In this case there can be no doubt that I must do so. The FTT decided that the claimant is not entitled to the disability element when she is. Even though the FTT's decision has subsequently been deprived of operative effect by HMRC's subsequent decision under section 18 of the Act, it would be wrong to leave it in place.

56 Having set the decision aside, I must then consider whether to remit the case to the FTT with directions for reconsideration or remake the FTT's decision.

57 Although no decision had been made under section 18 when the FTT gave the decision I have set aside, such a decision has been made now. Were I to remit the case, the resulting proceedings before the FTT would immediately lapse by virtue of the principles set out in *LS and RS* (see paragraph 18 above) and the FTT would therefore be obliged to strike them out. Remitting the case would therefore be pointless. The overriding objective is better served by my striking out those proceedings by way of remaking the decision: see *LS and RS* at paragraph 44. I have therefore done so.

58 However, that is not the end of the matter. HMRC were alerted to the point on which I have decided the appeal by Judge Wright's decision granting permission to appeal to the UT. They accept that Case G applies and I understand that the maximum rate of the claimant's award of WTC has already been changed so as to restore the disability element for the whole of the 2016/2017 tax year.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

12 January 2018