

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Upper Tribunal case No. CTC/1221/2019**

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** Under section 11 of the Tribunals, Courts and Enforcement Act 2007, this appeal is **DISMISSED**. The decision of the First-tier Tribunal (14 November 2008, file reference SC 327/17/01568) did not involve the making of a material error on a point of law.

**REASONS FOR DECISION**

**The issue**

1. This appeal concerns article 7 of the 23<sup>rd</sup> Commencement Order to be made under the Welfare Reform Act 2012, which is one of a series of orders that implements, in stages, Universal Credit (UC). Article 7 includes exceptions to the general rule that, where UC has been implemented in a postal district, a person residing in that district cannot make a claim for a tax credit. This appeal concerns the exception for certain claimants who re-claim tax credits.

2. The Appellant Mr W, together with his late wife, used to be entitled to a joint tax credit award. Mr W's entitlement under that joint award ceased upon the death of his wife. After about four months, Mr W tried to claim a tax credit as a single person. His claim was refused on the ground that he lived in an area in which UC had been fully implemented (known as a UC Full Service Area) so that, in HMRC's view, he was by law prevented from claiming a tax credit. The First-tier Tribunal dismissed Mr W's appeal against HMRC's decision.

3. The complex set of inter-connected transitional legislative provisions that operate to prevent certain individuals from claiming a tax credit was described in the Upper Tribunal's determination granting the Appellant Mr W permission to appeal against the First-tier Tribunal's decision. The permission determination read as follows:

**“B. Background**

2. At the start of 2017, Mr [W] and his wife were jointly entitled to an award of tax credits, that award having been made to them as a couple. Sadly, Mrs [W] then passed away. Having learnt of Mrs [W's] death, HMRC decided on 12 July 2017 that, with effect from 21 July 2017, Mr [W's] couple's tax credits award would come to an end. HMRC's written submission to the First-tier Tribunal states that Mr [W] had until 19

July 2017 to make a claim for tax credits as a single person (the relevance of that date is explained below).

3. On 2 October 2017, HMRC arranged for Mr [W] to be sent a tax credits claim pack. Before the First-tier Tribunal, HMRC stated that this should not have happened and Mr [W] should instead have been directed to make a claim for Universal Credit (UC).

4. On 18 October 2017, HMRC received Mr [W's] notification of a tax credits change of circumstances, which HMRC treated as an attempt to claim tax credits. The claim was refused on the basis that, as a person living in a 'UC Full Service Area', Mr [W] was unable to make a claim for tax credits and should have claimed UC instead.

5. Mr [W's] notice of appeal against HMRC's decision stated:

- he was not on UC, he was on ESA and 'Universal Credit told me I should apply for tax credit';
- he remained his granddaughter's primary carer and, if he was entitled to tax credits previously, should remain so;
- he was in desperate financial need.

### **C. Legislative framework**

6. Before the First-tier Tribunal, HMRC argued that Mr [W] was precluded from claiming child or working tax credit by the Welfare Reform Act 2012 (Commencement No. 29 and Commencement No. 17, 19, 22, 23 and 24 and Transitional and Transitory Provisions (Modification)) Order 2017. I shall refer to this as the No. 29 Order.

7. The No. 29 Order must, first of all, be read with the Welfare Reform Act 2012 (Commencement no. 23 and Transitional and Transitory Provisions) Order 2015, which I shall refer to as the No. 23 Order.

8. Article 7(1) of the No.23 Order provides that, subject to the exceptions in articles 7(2) to (6), a person may not make a claim for a tax credit on any date if, on that date, the person could have made a claim for UC in relation to which the provisions of the Welfare Reform Act 2012 listed in Schedule 2 to the No. 9 Welfare Reform Act 2012 Commencement Order would have been in force by virtue of article 3(1) and (2) (a) to (c) of the No.23 Order:

- (a) Schedule 2 to the No. 9 Order refers to the main provisions of the 2012 Act that create UC. For present purposes, the commencement of these provisions may be understood as bringing UC into force;

- (b) Article 3(1) of the No. 23 Order provides that the day appointed for the coming into force of the Schedule 2 listed provisions, in relation to a claim referred to in article 3(2), is the day appointed in accordance with article 3(3) of the No. 23 Order;
- (c) in summary article 3(2)(a) refers to a claim made on or after 18 March 2015 where the claimant resides in one of certain specified postal districts, as well as claims made on or after 10 June 2015 or 4 November 2015 in respect of other specified districts;
- (d) for article 3(2) purposes, article 3(3) provides that the appointed day is the first day 'in respect of which the claim is made'.

9. To summarise, article 3 of the No.23 Order provides for a district-by-district implementation of UC Credit, and article 7(1) prevents a claim for a tax credit by a person residing in a district in which UC has been implemented. That is the general position but, as mentioned above, is subject to the exceptions in article 7(2) to (6) of the No. 23 Order. Of these articles, only three apply to a claim for tax credit:

- (a) the first case, in article 7(2), refers to a person who is prevented from making a claim for UC by virtue of certain determinations or provisions namely:
  - a determination by the Secretary of State under regulation 4 of the Universal Credit (Transitional Provisions) Regulations 2014 that claims for UC may not be made in a particular area. There is no evidence of an applicable determination in Mr [W's] case;
  - regulation 4A of the 2014 Regulations provides, in summary, that, [for a limited period] after 16 January 2019, no claim for UC may be made by a person who is, or has been within the past month, entitled to an award of an existing benefit that includes a severe disability premium. While the existing benefits include income-related ESA (and the papers refer to Mr [W] being entitled to ESA), regulation 4A could not have assisted Mr [W] because it had not been enacted when Mr [W] sought to claim tax credits on 18 October 2017
- (b) the second case, in article 7(5), refers to a person who makes a claim for a tax credit and, at the date of claim, had an award of a tax credit. On the evidence before the First-tier Tribunal, article 7(5) could not have applied to Mr [W] since he did not have an award of tax credit when he sought to claim tax credits on 18 October 2017. His (joint) award ended in July 2017;
- (c) I shall set out the third case, in article 7(6), in full:

“(6) Paragraph (1) does not apply to a claim for a tax credit where a person has or had, or persons have or had, an award of child tax credit or working tax credit in respect of a tax year and that person or those persons makes or make (or is or are treated as making) a claim for that tax credit for the next tax year.”

10. Next, we come to the No. 29 Order. Briefly, article 14 of the No. 29 Order modifies article 7(1) of the No. 23 Order [*which prevents tax credits from being claimed where UC could have been claimed*] so that it has effect in relation to various UC implementing provisions. It does this by providing that article 7(1) applies as if references to article 3(1) and (2)(a) to (c) of the No. 23 Order included references to those provisions.

11. At this point, I need to mention Mr [W’s] postal district. It is not disputed that, at the relevant time, he resided in the postal district comprised of streets whose postcodes began CT11 0. This district is specified in Part 28 of the Schedule to the No. 29 Order.

12. Returning now to article 14 of the No. 29 Order, omitting irrelevant references, this provides:

“Article 7 of the No. 23 Order applies as though the reference in paragraph (1) of that article to article 3(1) and 3(2)(a) to (c) of that Order included:

...(f) a reference to paragraph (1) and sub-paragraphs (a), (d), (h), (l), (p), (q) and (aa) of paragraph 2 of article 3 of the No. 24 Order in respect of claims in relation to which those sub-paragraphs are modified respectively by...articles 5(2)(g)...of this Order”.

13. To start completing the legislative story, I must now deal with article 5 of the No. 29 Order:

- (a) article 5(1) applies to a claim for UC made on or after 19 July 2017 [*which is why that date was of relevance in Mr W’s case*];
- (b) where article 5 applies, certain specified provisions have effect, with respect to a claimant residing in designated postal districts, as if “the reference in those provisions to meeting the gateway conditions were omitted”;
- (c) in the case of designated postal districts referred to in Part 28 of the Schedule to the No. 29 Order, the provisions modified – so as to omit the gateway conditions – include article 3(2)(d) of the No. 24 Order.

14. The No. 24 Order is the Welfare Reform Act 2012 (Commencement No 24 and Transitional and Transitory Provisions and Commencement No 9 and Transitional and Transitory Provisions (Amendment)) Order 2015. Article 3 of the No. 24 Order provides for commencement of UC legislative provisions. It does so by reference to

both postcode districts and the requirement that a claim “meets the gateway conditions”. Under article 3(2), if the gateway conditions are not met on a particular claim, the UC provisions are not commenced in relation to that claim. For present purposes I need not deal with the gateway conditions. As modified, however, article 2(3)(d) refers to:

“(d) a claim for universal credit that is made on or after 12th October 2015 in respect of a period that begins on or after 12th October 2015 where, on the date on which the claim is made, the claimant resides in one of the [*Part 28 postcode districts*].”

15. I appreciate that all that technical legislation is hardly easy to follow so I will attempt to summarise it as follows:

- the general rule is that a person may not make a claim for tax credit where, had the person claimed UC on that date, the main UC legislation would have applied to the UC claim (article 7(1), No. 23 Order);
- the general rule is subject to exceptions, the only one of which appears potentially relevant in this case concerns a person who had an award of a tax credit and makes a claim for that tax credit for the next tax year (as described in article 7(6), No. 23 Order);
- originally, Mr [W’s] postal district was not one in which UC had generally been implemented;
- Mr [W’s] postal district was brought within article 7(1) of the No. 23 Order from 19 July 2017 (i.e. so as to apply the prohibition on claiming a tax credit if UC could have been claimed) (article 5, No. 27 Order);
- in Mr [W’s] postal district, the previous requirement in the No. 24 Order that, in order for a UC claim to be made, the gateway conditions had to be met, no longer applied (article 5, No. 27 Order).

#### **D. Determination of application**

16. I understand that the following facts are undisputed:

- the award of tax credits made jointly to Mr [W] and his late wife came to an end with effect from 21 July 2017, which was during the 2017/18 tax year;
- Mr and Mrs [W] also had a joint tax credits award for the previous tax year 2016/17.
- Mr [W] attempted to claim child and working tax credit, as a single claimant, on 18 October 2017.

17. I should say that any possible maladministration or other service failure, on the part of HMRC or the DWP in their dealings with Mr [W], is not something on which I can comment. I stress I am not making any finding about how Mr [W] was dealt with. The Upper Tribunal's role is restricted by law to considering whether the First-tier Tribunal's decision involved an error on a point of law.

18. I am satisfied that, at the date of Mr [W's] attempted claim for tax credits, his postal district was one in which UC had generally been implemented. It seems therefore that he was unable to make a claim for tax credits unless one of the exceptions in article 7 of the No. 23 Order applied to him, and the only potentially applicable exception seems to have been that in article 7(6).

19. In my judgment that was an issue that arguably the First-tier Tribunal should have dealt with, namely whether article 7(6) of the No. 23 Order excepted Mr [W] from the general rule in article 7(1) which, briefly, is that a person who can claim UC cannot claim a tax credit. I think it is undisputed that Mr [W] had a (joint) tax credits award for the tax year 2016/17. Arguably, the First-tier Tribunal erred in law by failing to address the question whether Mr [W's] 2016/17 award meant that, for article 7(6) purposes, he was a person who had an award of tax credits for one tax year (2016/17) and was claiming for the next tax year (2017/18) albeit in the capacity on the latter occasion as a single claimant. I do not think Mr [W] could reasonably have been expected to identify this issue for himself given that the submissions made to the First-tier Tribunal did not tell the full legislative story.

20. I grant Mr [W] permission to appeal on the ground that the First-tier Tribunal arguably erred in law by failing to address whether he might fall within the article 7(6) exception. It would be in Mr [W's] interests to seek some kind of specialist assistance with his appeal. He may wish to contact those advice agencies in his region who have a Legal Aid Agency contract for assistance in bringing welfare benefits cases before the Upper Tribunal [*which were listed in the permission determination*].”

### **The submissions**

4. HMRC do not support this appeal. In their response to the appeal, they submit:

- (a) a claimant who is a member of a couple may only make a joint claim for a tax credit, and a single claimant may only make a sole claim (section 3(3), Tax Credits Act 2002);
- (b) by operation of law, entitlement under a joint tax credit award ceases if the persons by whom the joint claim was made are unable to make a joint claim (section 3(4));

(c) upon the death of Mr W's wife, he was no longer entitled to tax credits under the previous joint award, and he was also prevented from making a fresh joint claim (see the decision of Social Security Commissioner May QC in *R(TC) 1/07*). Under section 3 of the Tax Credits Act 2002, Mr W could only claim as a single claimant;

(d) by the time of Mr W's attempted sole claim for a tax credit, his area had become a 'UC Full Service Area' in which, as a general rule, persons may not make tax credits claims;

(e) article 7(6) of the No.23 Order could not have excepted Mr W from article 7(1)'s general prohibition on claiming a tax credit. Mr W made a joint tax credit claim for tax year 2016/17, and on 6 April 2017, Mr and Mrs W were treated as if they had made a joint claim for tax year 2017/18 under which they were jointly re-awarded tax credits. However, entitlement under the joint claim ceased on 21 July 2017 (two days after Mr W's postal district became subject to the general prohibition on claiming tax credits). Mr W, during that same tax year, tried to claim a tax credit as a single person. He could not rely on his terminated joint claim to avoid article 7(1). Article 7(6) of the No.23 Order could not have applied because Mr W sought to make a new claim in the 2017/18 tax year in a different capacity and "therefore the 'persons' referred to in article 7(6) were unable to make or be treated as making a claim for the next tax year". This is because joint and single tax credits claims are "mutually exclusive" concepts.

5. Unfortunately, Mr W has not obtained legal assistance, as I suggested would be in his interests when granting permission to appeal. I do not know why.

6. Mr W's written reply to HMRC's response argues that UC is irrelevant because he has never claimed it. After his wife's death, he was first advised by the DWP to claim ESA, which he did, and then informed that, to include his granddaughter on a claim, he needed to re-claim tax credits. HMRC subsequently confirmed that advice. How, asks Mr W, can nobody be liable for giving him flawed advice?

7. Mr W's reply was received by the Upper Tribunal on 11 March 2020. At the end of that month, I began an extended period of sickness absence. I am sorry that, as result, there has been a delay in deciding this appeal.

### **Determination of appeal**

8. I do not consider it necessary to hold a hearing before deciding this appeal. I do not believe that, at a hearing, oral submissions would improve on the submissions made in writing.

9. Mr W's reply to HMRC's response does not engage with the precise legal issue that arises on this appeal. That is not intended as a criticism. The complex UC/tax credits transitional legislation is hardly accessible to a specialist legal representative let alone a lay person. It would have assisted me had Mr W obtained specialist representation, but he has not and, as a result, I do not have any reasoned argument in opposition to that advanced by HMRC.

10. To recap, article 7(6) of the No. 23 Order provides as follows:

“(6) Paragraph (1) [*the general prohibition on claiming tax credits*] does not apply to a claim for a tax credit where a person has or had, or persons have or had, an award of child tax credit or working tax credit in respect of a tax year and that person or those persons makes or make (or is or are treated as making) a claim for that tax credit for the next tax year.”

11. I agree with HMRC's interpretation of article 7(6). After the introductory injunction (“paragraph (1) does not apply to a claim for a tax credit”, Article 7(6) contains two components whose purpose is to identify the class of individuals benefit from that injunction:

(a) the first component identifies a wide class comprised of two groups: (i) a person who has or had an award of a tax credit; and (ii) persons who have or had an award of tax credit;

(b) the second component narrows down that wide class. In doing so, it maintains, and operates on, the distinction drawn by the first component between sole and joint claimants, as is shown by its use of the referential pronouns ‘that’ and ‘those’. For a person within group (i) under what I have described as the first component, ‘that person’ must make a claim for tax credit for the next tax year to avoid being filtered out of article 7(6). For persons within group (ii), ‘those persons’ must make a claim.

12. A person in Mr W's position, that is a person residing in a UC ‘Full Service Area’ who jointly claimed a tax credit in the previous tax year, will only benefit from article 7(6) if he re-claims together with the previous year's partner. On this case's undisputed facts, Mr W could not have made such a claim. The First-tier Tribunal arrived at the right decision in dismissing his appeal. This appeal is dismissed.

E Mitchell  
**Judge of the Upper Tribunal**  
**Authorised for issue on**  
**23 July 2020**