



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: CUC/0148/2020
[2020] UKUT 309 (AAC)**

CP v SECRETARY OF STATE FOR WORK AND PENSIONS

Decided without a hearing

Representatives

Claimant	Not represented
Secretary of State	DMA Leeds

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC263/19/00143
Decision date: 19 September 2019
Venue: Preston

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is that proposed by the Secretary of State's representative:

‘the couple’s claim from 24 September 2018 was made within the prescribed time for claiming from that date and hence satisfies section 1(1) of the Administration Act.’

REASONS FOR DECISION

1. This appeal was brought by the claimant with the permission of Tribunal Judge Roche. The representative for the Secretary of State has supported the

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appeal and invited me to re-make the decision. I have done so without further reference to the claimant as the proposed decision is the best that he can attain on this appeal.

A. History

2. The claimant was receiving tax credit and his partner was receiving employment and support allowance. South Ribble Council had awarded housing benefit in respect of their home. Their landlord gave them notice to quit and, on 24 September 2018, they moved to a new home three miles away. The relevant local authority for housing benefit was now Preston City Council. And, to complete the picture, Preston is a universal credit full service area.

3. The claimant made a claim for universal credit on 22 October 2018 and, on 4 November 2018, the Secretary of State decided that the claim could not be 'backdated' to 24 September 2018. The First-tier Tribunal dismissed the claimant's appeal.

B. The relevant legislation

4. The relevant law is contained in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI No 380):

26. Time within which a claim for universal credit is to be made

(1) Subject to the following provisions of this regulation, a claim for universal credit must be made on the first day of the period in respect of which the claim is made.

(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it, subject to a maximum extension of one month, to the date on which the claim is made, if—

(a) any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and

(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(3) The circumstances referred to in paragraph (2) are—

...

(aa) the claimant was previously in receipt of an existing benefit (as defined in the Universal Credit (Transitional Provisions) Regulations 2014) and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired;

(b) the claimant has a disability;

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(c) the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that prevented the claimant from making a claim; ...

5. Regulation 26(3)(aa) was inserted by regulation 15 of the Universal Credit (Transitional Provisions) Regulations 2014 (SI No 1230) to apply 'Where a claim for universal credit is made by a person who was previously entitled to an existing benefit'. Regulation 2(1) defines 'existing benefit' to include working tax credit and housing benefit.

6. In the interests of accuracy, the Secretary of State's documentation refers to the subject matter of regulation 26 as backdating. Strictly speaking, what the regulation does is, as it says, to extend the time for claiming. That makes no difference in this case, but it is good to be accurate and, in another case, that might affect the analysis.

C. Regulation 26(3)(c)

7. The claimant has relied on regulation 26(3)(c) and his partner's illness, but I accepted the Secretary of State's submission that that does not apply:

In my submission, the appellant's partner's illness is, for the narrow purposes of this appeal, a red herring. Regulation 26(3)(c) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 requires that 'the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that *prevented the claimant from making a claim.*' Likewise, although regulation 26(3)(b) only requires that 'the claimant has a disability,' regulation 26(2)(b) additionally requires it to be that case that, as a result, 'the claimant could not reasonably have been expected to make the claim earlier,' which in effect also raises the question of whether the disability prevented the couple from claiming earlier. In my submission, the appellant's account at page 13 of his and his partner's movements and actions when they moved to Preston show that they were both *capable* of making a claim for universal credit. The problem was that they did not *know* that they had to do so.

D. Regulation 26(3)(aa)

8. I accept the Secretary of State's submission that the relevant provision is regulation 26(3)(aa):

In my submission, the document at page 51 shows that although the couple's entitlement to tax credits ended on 21 October 2018, the notification of the decision to end the award of tax credits was not issued until 25 October 2018. Regulation 26(3)(aa) is thus satisfied. However, I submit that this delay of 4 days in October did not explain and make

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reasonable the couple's failure to claim from 24 September 2018, (a month before the delay occurred), which is the date from which the couple is seeking universal credit (page 26).

The key question, in my submission, is whether the administration of the appellant's *housing benefit* allows the time for claiming universal credit to be extended by way of regulation 26(3)(aa). In my submission, it does. Strictly speaking, the appellant's move from the area of one local authority to another involved the ending of the old award and the making of a new claim. On a narrow view, it might be argued that the appellant was entitled to housing benefit under the award by *South Ribble Council*, and therefore one must ask whether there was a delay in notification of *that* award, and whether any such delay made it reasonable for the couple not to have claimed universal credit earlier than it did. However, I submit that the language and purpose of regulation 26(3)(aa) allow a broader view to be taken. In my submission, the function of regulation 26(3)(aa) is to provide relief for claimants who have only belatedly discovered that the benefit they have been receiving has been replaced by universal credit, and therefore have been left unable to satisfy the usual requirement that a claim for universal claim be made on the very day that one wishes to claim from (regulation 26(1)). In view of this, in the instant case, I submit that, for the purposes of regulation 26(3)(aa), the 'notification of expiry of entitlement' to housing benefit should be taken to be the letter *from Preston County Council* that spelled out that the old mechanism for re-establishing entitlement to housing benefit in a new borough by way of a new claim to the new council was no longer available (and hence a claim for universal credit had to be made instead). *This* notification was sent after the claimant's last day of entitlement to housing benefit (see page 63). I submit, therefore, that regulation 26(3)(aa) is satisfied. I further submit that regulation 26(2)(b) is also met. The couple could not reasonably be expected to claim universal credit until the appellant had been made aware that he could no longer claim housing benefit, and they he did not unreasonably delay his claim for universal credit once they became aware of their position. Accordingly, the time for claiming from 24 September 2018 can be extended down to 22 October 2018, which was when the claim was made (page 3). It follows that the couple's claim satisfied the condition of entitlement in section 1(1) of the Social Security Administration Act 1992 in respect of 24 September 2018 onwards. The tribunal erred in law by not considering this angle to the case.

9. On the basis of that submission, the Secretary of State submitted that I should allow this appeal in the terms I have set out in my decision.

E. The Kerr approach

10. In my directions on the appeal, I directed the Secretary of State to answer a question posed by Judge Rocke in her grant of permission. She referred to the

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submission to the First-tier Tribunal in which the submission writer said that it was not possible to comment on the claimant's partner's employment and support allowance award. The judge asked why the Secretary of State was not applying the decision in *Kerr v Department for Social Development (Northern Ireland)* given that the Secretary of State was responsible for administering both universal credit and employment and support allowance. This is the Secretary of State's reply:

In his observations on the case (page 102) the Judge asked for an answer to First-Tier Tribunal Judge Roche's question as to why the Secretary of State is not applying the principles in *Kerr v Department for Social Development (Northern Ireland)* [2004] UKHL 23, [2004] 1 WLR 1372 to universal credit claims. The First-tier Tribunal Judge was concerned about the *submission writer's* comment at page 7 that he was not in a position to comment on the appellant's partner's ESA. However, this had nothing to do with the *claim*, the decision on the backdating of which was evidently focussed solely on the housing benefit issues (see the mandatory reconsideration at pages 42-3). The submission writer was merely raising a new matter that could in principle assist the appellant. If he did not delay making his submission in order to obtain additional evidence relating to it, that was doubtless because he, as a universal credit officer, did not have access to the ESA computer system, and he was required (like other submission writers) to complete and submit five responses to appeals each day. I would also point out that in *Kerr* it was said at [62]:

‘The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.’

Thus, the responsibility for obtaining evidence switches from the claimant to the Department only where the material in question is not available to the claimant. What is more, this principle applies to information about a Departmental benefit that the claimant is receiving (*R, on the application of Rew v Secretary of State for Work & Pensions* [2008] EWHC 2120 (Admin) at [7]-[8]. As was said in *Kerr* at [16(1)]:

‘Facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry.’

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11. I would only comment that if the Secretary of State is under a duty to obtain and provide information, it is no excuse that the officers charged with that duty are not allowed the time necessary to perform it. The individual officers are not, of course, to be blamed personally; the Secretary of State is ultimately responsible for ensuring that her officers have the necessary resources to discharge her duties.

**Signed on original
on 10 November 2020**

**Edward Jacobs
Upper Tribunal Judge**