IN THE UPPER TRIBUNAL **Appeal No. CTC/903/2020**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Her Majesty's Revenue and Customs

Appellant

- v –

ED

Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decision date: 27 July 2021
Decided on consideration of the papers

DECISION

This appeal is allowed to a limited extent. I set aside the decision of the First-tier Tribunal dated 16 July 2020 and substitute a decision that HMRC still have to decide whether to accept that information provided by the claimant on or about 16 October 2018 amounted to a joint claim by her and her partner for child tax credit.

REASONS FOR DECISION

1. This is an appeal, brought by HMRC with permission granted by the First-tier Tribunal, against a decision made by the First-tier Tribunal on 16 July 2020 to the effect that "HMRC have still to determine the joint claim [for Child Tax Credit] made by [the claimant] with her partner for the period from October 2018".

2. The precise technical nature of the claimant's appeal before the First-tier Tribunal, and therefore of the First-tier Tribunal's decision, can be understood only by looking at the facts of the case against the background of the procedural provisions of the Tax Credits Act 2002. A less suitable method for administering what is in effect a weekly benefit than the annual assessments and process of finalisation required by the 2002 Act is hard to imagine, although part of the problem in this case is arguably the way in which HMRC operates the legislation.

3. The basic facts of the case are fairly straightforward and were not in dispute before the First-tier Tribunal save on one important point. However, the procedural history is, of course, complicated. At the beginning of the tax year 2018-19, the claimant was a single parent with two children and was in receipt of both income

support awarded by the Secretary of State for Work and Pensions and child tax credit administered by HMRC. On or about 12 or 15 October 2018, she moved into new accommodation with her partner (with whom she had previously not been living) and so she became a member of a couple for benefit and tax credit purposes.

4. She duly notified the Department for Work and Pensions and her entitlement to income support was ended. She says, and the First-tier Tribunal accepted, that she also notified HMRC of her change of address and her partner's details. However, HMRC say that they have no record of any such notification.

5. Nonetheless, On 10 January 2019, HMRC sent the claimant a document headed "Tax Credits award for 06/04/2018 to 05/04/2019". Not only was that notice sent to the claimant's new address, but it also thanked her "for the information you gave us recently to renew your tax credits claim" and said that it had been sent "to confirm the details you supplied" as well as to notify her of the award. (The notice appears to be of an initial award made under section 14 of the 2002 Act on a renewal claim – a separate claim being required in respect of each tax year, although there are provisions for treating a person as having made a claim when he or she has not actually done so (see regulations 11 and 12 of the Tax Credits (Claims and Notifications) Regulations 2002 (SI 2002/2014))). On the other hand, although it had been sent to the claimant's new address, the notice showed that the award had been made on the basis that she was still in receipt of income support and claiming child tax credit as a single person and instructed her to contact them if that information was wrong.

6. The claimant therefore telephoned HMRC on 18 January 2019. She told them that her partner had moved in with her on 15 October 2018 and that she had already informed them of that fact by telephone and through the jobcentre. The officer to whom she spoke considered treating the claimant as having made a new claim for child tax credit as a member of a couple, but correctly decided that the claimant was not entitled to make a new claim in January 2019 for child tax credit because tax credits were being replaced by universal credit and any new claim by the claimant had to be made for universal credit rather than child tax credit. Accordingly, the Appellant was issued on 22 January 2019 with a document headed "Amended tax credits award for 06/04/2018 to 15/10/2018", which effectively ended her award of child tax credit with effect from 15 October 2018 and told her that she would be informed after the end of the tax year 6 April 2018 to 5 April 2019 whether she had been overpaid tax credits during that tax year. However, it also told her that, if nothing else changed, she would have been overpaid £1,672.88, which was the amount of child tax credit that had been paid from 16 October 2018.

7. The claimant then purported to appeal, but her letter dated 5 February 2019 was correctly treated as an application for "mandatory reconsideration". In it, she in effect argued that her entitlement to child tax credit should not have been affected by her becoming a member of a couple and that the postcode area to which she had moved did not "go live with universal credit" until November 2018. This latter point has not been challenged and appears to be correct, the date for the removal of the "gateway conditions" in her new postcode area being 14 November 2018 (see the Schedule to the Welfare Reform Act 2012 (Commencement No. 17, 19, 22, 23 and 24 and Transitional and Transitory Provisions (Modification) (No. 2)) Order 2018 (SI

2018/881)). On 25 February 2019. a "mandatory reconsideration notice for the tax year 2018 to 2019" was sent to her, telling her that the decision remained unchanged. Meanwhile, on 10 February 2019, she and her partner had claimed universal credit.

8. On 8 March 2019, her appeal was received by the First-tier Tribunal. In her grounds, she said that she had informed HMRC in writing on 15 October 2018 of both her new address and her partner's details. HMRC said that it had "checked their system for earlier notification of the change to [the claimant's] circumstances and found nothing", producing screen prints from their computer system that they said in paragraph 6 of their submission to the First-tier Tribunal showed no contact from the claimant between 8 May 2017 and 18 January 2019. However, HMRC's main argument was that the appeal had "lapsed" and should be struck out because HMRC had "automatically finalised" the claimant's tax credit award for the tax year 2018-19 by a decision under section 18 of the 2002 Act made on 12 February 2019. It was suggested that, rather than issuing a mandatory reconsideration notice on 25 February 2019, HMRC should have invited the claimant to apply for mandatory reconsideration of the decision of 12 February 2019. (It is difficult to see how an appeal can have lapsed before it was brought; it would have been more accurate to regard the application for mandatory reconsideration as having lapsed.)

9. When the appeal came before the First-tier Tribunal, HMRC were not represented. However, the claimant appeared with a folder of documents, including the notices of 10 January 2019, 22 January 2019, 12 February 2019 and 25 February 2019. No copies of those notices had been in the documents submitted by HMRC because, as I understand it, it has a system that does not keep copies of such documents – not even electronically – and so it relies on screenshots of the scanty records its computer does keep. Having seen the notice actually issued to the claimant on 12 February 2019, the judge was not satisfied that any section 18 decision had ever been made and so held that the appeal was "valid". He then held that the claimant's original award of child tax credit had inevitably come to an end when she became a member of a couple and that the key issue was whether the claimant had made a new claim as a member of a couple in October 2018 and, on the evidence, found that she had but that that claim had not been determined. He therefore referred the matter back to HMRC to determine the claim.

10. HMRC now appeals against that decision. Unfortunately, there have been delays, partly caused by the Covid-19 pandemic. HMRC's notice of appeal was dated 29 April 2020 but appears not to have been received by a member of staff at the Upper Tribunal until 6 July 2020. On 29 September 2020, a judge issued case management directions but it was not until 21 December 2020 that the bundle of documents was issued to the parties so that the claimant could respond and HMRC reply. It is also unfortunate that it appears that HMRC unnecessarily provided a copy of the bundle of documents with the appeal, whereas the Administrative Appeals Chamber obtains those directly from the First-tier Tribunal, and in this case the bundle sent by HMRC has been added by the Upper Tribunal to the bundle obtained from the First-tier Tribunal so that pages 105 to 180 are duplicates of HMRC's response to the appeal to the First-tier Tribunal and the documents that were before the First-tier Tribunal, up to page 61. The parties provided their submissions promptly and then there has been further delay within the Upper Tribunal since then.

Neither party has asked for an oral hearing. I have considered whether one should nonetheless be directed – it could take place by video or telephone if not in person – but I have decided that nothing substantial would be gained. The only possibly relevant dispute of fact has been determined by the First-tier Tribunal and what remains are issues of law.

11. Paragraph 5 of the grounds of appeal says "[i]t is still the position of HMRC that an auto in year finalisation section 18 decision was taken on 14 March 2019 following the claim to Universal Credit on 10 February 2019, and that section 18 decision has not been through the Mandatory Reconsideration process as set out in section 21A of the Tax Credits Act 2002", but it appears to be accepted that HMRC cannot challenge the First-tier Tribunal's finding on that issue before the Upper Tribunal because it was an error of fact, rather than an error of law. Despite the use of the word "still", HMRC's position is not what it argued before the First-tier Tribunal, which was that the section 18 decision had been made on 12 February 2019.

12. The reason for the change of position is obvious. The notice actually issued to the Appellant on 12 February 2019 was clearly issued under section 17 of the 2002 Act, rather than section 18. It was headed "Tax credits – Award Review for period ended 15/10/2018".and invited the claimant to give HMRC any further information that she considered they might need before a final decision was made on 14 March 2019. Such a final decision would have been made under section 18. However, the claimant says on this appeal that she has never received any final decision and there is no evidence that one was ever issued to her. Even the screen prints dated 24 May 2019 provided to the First-tier Tribunal do not help HMRC because (as HMRC appear to have thought at the time they were printed), while they suggest that the award had indeed been finalised by then, they also appear at first sight to show that that was done by an award on 12 February 2019. It is clear that there was no award on that date and, in the absence of any further relevant screen print or other suggested interpretation of those screen prints, their implication seems to be that there has been in fact been no subsequent final award.

13. There are instances where an error of fact is caused by, or amounts in itself to, an error of law. However, this is not a case where a failure by one party to produce relevant information has given rise to a breach of the rules of natural justice or where an erroneous finding has been based on erroneous reasoning by the First-tier Tribunal. If it were incontrovertible that the First-tier Tribunal made an error of fact when finding that there had been no section 18 decision, that error would amount to an error of law (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044), but there is no clear evidence contradicting the First-tier Tribunal's finding. Accordingly, I accept that this case must be decided in accordance with the finding that no section 18 decision had been made and that the First-tier Tribunal therefore had jurisdiction to hear all aspects of the claimant's appeal. (It has not been suggested that there has been any section 18 decision between 24 May 2019 and now that might have removed either the First-tier Tribunal's jurisdiction or the Upper Tribunal's.)

14. I would, however, add that, even if HMRC had purportedly made a section 18 decision, I would have been inclined to regard it as ineffective. I note that in *LS v HMRC (TC)* [2017] UKUT 257 (AAC); [2018] AACR 2, it was recorded as HMRC's

practice to defer making a section 18 decision while an appeal was pending but that the Upper Tribunal considered it preferable for the HMRC to make a decision as soon as possible. It seems to me to be arguable that it is improper for HMRC to make a section 18 decision in circumstances where a properly-made challenge to an earlier decision is under active consideration and the effect of making a section 18 decision is to force the claimant to go back to square one. If everything that had been done in relation to the earlier decision, including any application for mandatory reconsideration or any decision on mandatory reconsideration, were to be treated as having been done in relation to the section 18 decision, that would be one thing, but for the process to have be repeated in its entirety is likely to be unfair to the claimant and a waste of HMRC's resources in any case where the section 18 decision is to the same effect as the decision that is being challenged. Section 18 decisions appear often to be made by a computer without a clear overview of the case and I can see no substantial objection to finding them to be ineffective when they are premature and therefore unhelpful.

15. HMRC's main contention on this appeal is that "HMRC did have reasonable grounds to believe the respondent's award should terminate" and that the First-tier Tribunal exceeded its jurisdiction in finding that the claimant had made a new claim as a member of a couple. Meanwhile, the case has been referred to the Disputed Overpayment Team for further consideration. I do not know the outcome.

16. The First-tier Tribunal was clearly correct in finding that the claimant's entitlement to child tax credit as a single claimant came to an end when she became a member of a couple (see section 3(4)(b) of the 2002 Act). Even the claimant would, I think, accept that that is so.

17. The First-tier Tribunal was equally clearly correct in finding that there then arose the question whether she and her partner had made a claim for child tax credit as a couple on 15 October 2018. HMRC had plainly made a decision to the effect that they had not made a claim and therefore were not entitled to child tax credit as a couple and the issue had been addressed in the mandatory reconsideration notice, even if no other formal notice of the decision had been issued. Moreover, the claimant had clearly raised the issue in her grounds of appeal.

18. It is a condition of entitlement of a couple to child tax credit that a claim has been made by them as a couple (see section 3 of the 2002 Act). Regulation 5(2) of the 2002 Regulations provides –

> "(2) A claim must be made to a relevant authority at an appropriate office—
> (a) in writing on a form approved or authorised by the Board for the purpose of the claim, or
> (b) in such other manner as the Board may decide having regard to all the circumstances."

The claimant does not assert that she and her partner made a claim on a proper claim form, but she does, in effect, assert that she provided information about her partner and had stated that they had become a couple and that, as she had been entitled to child tax credit as a single person, that information should have been treated as a claim by her and her partner as a couple.

19. HMRC have effectively raised two arguments. First, they argue that the First-tier Tribunal "erred in law in finding that the respondent had submitted a new claim in a joint capacity which had yet to be determined" on the ground that the "only contact with HMRC from the respondent, following the breakdown of the household in October 2018, was via the Contact Centre on 18 January 2019". Secondly, they point out that it has been held in *CTC/31/2006* and *MK v HMRC (TC)* [2018] UKUT 238 (AAC), that there is no right of appeal against decisions made by HMRC under regulation 5(2)(b) of the 2002 Regulations.

20. The first of HMRC's arguments amounts to a disagreement with the First-tier Tribunal's finding of fact, but it does not reveal an error of law. It seems to me that, given that HMRC were not represented at the hearing before the First-tier Tribunal with the result that, not only was there no cross-examination of the claimant, but also there was no evidence before the First-tier Tribunal that the Department of Work and Pensions had informed HMRC of her change of address (which is what the Upper Tribunal has been told) or as to the reliability of HMRC's records or of their searches of those records, the First-tier Tribunal was entitled to accept, for the reasons it gave, the claimant's oral and written evidence that she had provided relevant evidence to HMRC. There was a possible discrepancy between what the Appellant is recorded as having said in the telephone call on 18 January 2019, which was that she had telephoned HMRC in October 2018, and what she said in her letter dated 5 February 2019 and in her subsequent grounds of appeal, which is that she provided the information in writing. That might have been pursued had HMRC been represented at the hearing but there may be an explanation for it and I do not consider that the First-tier Tribunal erred in law in not pursuing the point itself. Also, the First-tier Tribunal did not record in its reasons for its decision the information that it found the claimant to have provided, but the judge recorded in his note of evidence that it had included her "partner's details, NINO, benefits claiming" as well as her new address and I infer that he accepted that evidence.

21. As to the second of HMRC's arguments, I accept that the First-tier Tribunal had no jurisdiction to decide that, in the absence of a proper claim form, there had been a valid appeal. However, there is arguably a distinction to be drawn between the question whether, if it was provided, the provision of information should be treated as a claim and whether the information was in fact provided at all. It is arguable that a tribunal has jurisdiction in the event of an appeal on the question whether information has been provided – or, indeed, whether an approved or authorised claim form has been received by a relevant authority at an appropriate office – even though there is no jurisdiction on the question whether the provision of information otherwise than on a proper claim form should be accepted as a claim. That is because the former is a question of fact, rather than a matter of discretion, and so it is arguable that it would be a breach of the European Convention on Human Rights for there not to be a right of appeal (see *ZM and AB v HMRC (TC)* [2013] UKUT 547 (AAC); [2014] AACR 17).

22. I have not received full argument on this issue. However, given that it is still a matter for HMRC to decide whether the information provided should be accepted as having been a claim and given also the delay in deciding this appeal and the wider circumstances of the case, I do not consider it to be proportionate to seek further

argument. Accordingly, I accept that the First-tier Tribunal was entitled to decide that the Appellant had provided the information that she said that she had provided to HMRC and I give the decision set out above.

23. As to the wider circumstances of the case, it is not obvious that the claimant and her partner would have been entitled to any less child tax credit after they had started to live together than she had been receiving before then. Therefore, regard to the underlying purpose of the 2002 Act may suggest that it would be inappropriate to take too strict an approach against the claimant and her partner.

24. If HMRC are nonetheless not minded to accept that a joint claim was made in or about 16 October 2018, there will still have been what was technically an overpayment between then and January 2019. I do not know whether the question whether that overpayment should be recovered has already been resolved. In case it has not, I observe that the amount of the overpayment appears at first sight to be no more than the claimant and her partner would have been paid during that period if an approved or authorised claim form had been provided in October 2018. Moreover, if there was a gap, they will have been out of pocket from the end of that period until the date from which universal credit was awarded. It therefore appears to me that the public purse may well not really have lost anything despite there having been a technical overpayment, and it seems to me that that would be a powerful argument for not requiring the overpayment to be repaid. However, that issue remains one for HMRC rather than me because, as they submit, there is no right of appeal against a decision to recover a sum that has technically been overpaid.

MARK ROWLAND
Deputy Judge of the Upper Tribunal

Signed on the original on 27 July 2021