



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CTC/2193/19

On appeal from the First-tier Tribunal (Social Security and Child Support)

Between:

HM Revenue & Customs

Appellant

- v -

AB

Respondent

Before: Upper Tribunal Judge Mitchell

Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal, taken on 27 June 2019 under case reference SC 242/19/01561, that the Respondent's entitlement to tax credits was not terminated by regulation 8(2) of the Universal Credit (Transitional) Regulations 2014, on account of the Respondent having withdrawn her claim for Universal Credit, did not involve a material error on a point of law.

REASONS FOR DECISION

Background

1. AB, the Respondent in these proceedings, had been in receipt of a single person's award of child tax credit since 2009. On 9 October 2018, HMRC, the Appellant in these proceedings, received electronic notification from the Department for Work & Pensions that AB claimed Universal Credit (UC) on 6 October 2018 and

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that a decision-maker had determined that she satisfied the basic entitlement conditions for UC. In response to that notification, HMRC ceased payment of AB's tax credit award as from 5 October 2018. The record of a 'stop notice' received by HMRC on 9 October 2018, by which the DWP communicated their determination to HMRC, appears at page 21 of the First-tier Tribunal bundle.

2. AB's notice of appeal against HMRC's decision, dated 11 February 2019, argued that the DWP incorrectly advised her to claim UC pending the outcome of her request for mandatory reconsideration of a separate decision as to her entitlement to Employment and Support Allowance (ESA). Subsequently, she successfully appealed against the ESA decision and that benefit was "in the process of being reinstated and backdated". AB did not have a live UC claim and had never received payment of that benefit. AB referred to regulation 31 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 as authority for the proposition that, as soon as the DWP received notice that her UC claim had been withdrawn, the claim was in law treated as if it had never been made. AB also wrote that she had previously made and withdrew UC claims in May 2017 and July 2018 without interruption to her tax credit award (AB provided documentary evidence in support).

Legislative framework

3. Regulation 5(1)(c) of the Universal Credit (Transitional Provisions) Regulations 2014 ("2014 Regulations") provides that, generally, a claimant is not entitled to a tax credit "in respect of any period when the claimant is entitled to universal credit".

4. Regulation 6(1) of the 2014 Regulations provides that, generally, "a universal credit claimant may not make a claim for...a tax credit". For this purpose, regulation 6(2) provides that a person is a universal credit claimant if certain circumstances apply, which include (a) "the person is entitled to universal credit"; or (b) "the person has made a claim for universal credit, a decision has not yet been made on that claim and the person has not been informed...that he or she is not entitled to claim universal credit".

5. It is also necessary to refer to certain provisions of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013:

(a) regulation 2 defines “claimant”, in relation to UC, as having “the meaning given by section 40 of the 2012 Act”. Section 40 of the Welfare Reform Act 2012 simply provides that “claimant” means “a single claimant or each of joint claimants”;

(b) regulation 31 deals with withdrawal of a claim for UC:

“(1) A person who has made a claim for benefit [*including UC: see the definition of “benefit” in regulation 2(1)*)] may withdraw it at any time before a determination has been made on it by notice in writing received at an appropriate office, by telephone call to a telephone number specified by the Secretary of State or in such other manner as the Secretary of State may decide or accept.

(2) Any notice of withdrawal given in accordance with paragraph (1) has effect when it is received.”

6. Section 8(1)(a) of the Social Security Act 1998 provides that “it shall be for the Secretary of State to decide any claim for a relevant benefit”, which includes UC (see the definition of “relevant benefit” in section 8(3)). Clearly, the Secretary of State is relieved of that duty, if before a claim is decided, the claim is duly withdrawn.

7. Returning to the 2014 Regulations, regulation 8 applies where a UC claim is made and the Secretary of State is satisfied that a claimant meets the basic conditions in section 4(1)(a) to (d) of the Welfare Reform Act 2012. Those conditions require a person to be at least 18 years old, not to have reached the qualifying age for state pension credit, to be in Great Britain and not receiving education.

8. Where regulation 8 of the 2014 Regulations applies, all awards of tax credit to which a claimant is entitled at the date of the UC claim terminate (regulation 8(2)). The termination date is either the day before the first day of entitlement to UC or, if a claimant is not entitled, the day before the first day of entitlement had the relevant conditions been met.

9. An administrative practice appears to have been developed whereby the DWP notify HMRC that, in their determination, regulation 8 of the 2014 Regulations applies to an individual. This is referred to as a ‘stop notice’, which reflects the legal fact that, when regulation 8 applies, an individual’s entitlement to a tax credit terminates.

10. In *HMRC v LH* [2018] UKUT 306 (AAC), Upper Tribunal Judge Jacobs held as follows:

“10...there is...no escaping the clear wording of regulation 8. It applies if the two conditions in regulation 8(1) are satisfied. The first condition is that a claim for universal credit is made. The claimant did make a claim...It may be – I do not have to decide this point – that the claimant could have protected herself by withdrawing her claim before the notice was issued. But that is not what happened...”

11. I have considered whether the withdrawal of the [UC] claim had retrospective effect so that there never was a claim...My reading of regulation 8(1) is that it requires the simultaneous existence of a claim and the Secretary of State’s satisfaction on the basic conditions. In this case, a claim was made and the Secretary of State was satisfied while that claim existed. That is sufficient. The subsequent withdrawal of the [claim] cannot rewrite history by pretending that the claim was never submitted in the first place.”

11. Regulation 8(5) of the 2014 Regulations provides as follows:

“where an award terminates by virtue of this regulation, any legislative provision under which the award terminates on a later date does not apply.”

First-tier Tribunal’s decision

12. AB attended and gave oral evidence at the hearing of her appeal against HMRC’s decision that, by virtue of regulation 8 of the 2014 Regulations, her entitlement to a tax credit had terminated. A Presenting Officer attended for HMRC.

13. The First-tier Tribunal found that HMRC received the DWP’s ‘stop notice’ on 9 October 2018, that notice having been given electronically. However, the tribunal also found that, on 7 October 2018, AB withdrew her UC claim after receiving advice about the implications of an award of UC on her entitlement to contributions-based ESA. The tribunal’s statement of reasons includes little fact-finding concerning the process by which AB withdrew her UC claim. However, the tribunal’s record of proceedings records the following oral evidence given by AB:

“I withdrew UC claim before TC notice issued.

I phoned tax credits after I spoke to DWP to tell them my benefits were ongoing.

They (DWP) told me I withdrew it so it was as if it never existed...I was told by CAB I should have applied for CB ESA instead...I withdrew it 6.10.18 after spoke to CAB who told me to withdraw it”.

14. The First-tier Tribunal held that, at the date on which the DWP issued their ‘stop notice’ in respect of AB’s tax credit award, she had withdrawn her UC claim. Regulation 8 of the 2014 Regulations did not apply because AB withdrew her UC claim before the Secretary of State had made a determination as to whether the regulation 8(1) conditions were satisfied.

15. The First-tier Tribunal granted HMRC permission to appeal against its decision.

The arguments

16. HMRC do not dispute the First-tier Tribunal’s finding that, on 7 October 2018, AB withdrew the UC claim made on 6 October 2018. However, they argue that, by virtue of AB having claimed UC on 6 October 2018, her tax credit award terminated on 5 October 2018. That was the unavoidable legal consequence provided for by regulation 8 of the 2014 Regulations and AB’s withdrawal of her UC claim before the DWP issued their ‘stop notice’ was irrelevant.

17. Judge Jacobs’ analysis of regulation 8, as set out in *LH*, operates, submit HMRC, “whether the withdrawal of the Universal Credit claim occurs on a day which is after the day Universal Credit was claimed, or is on the day of the claim”. HMRC rely on Judge Jacobs’ finding that withdrawal of a UC claim does not have retrospective effect and argue that this is fatal to AB’s case.

18. In response, AB argues that, for regulation 8(1) purposes, the Secretary of State could not have been satisfied that the basic UC conditions were met. At the date of the ‘stop notice’, AB was not entitled to UC because she had a pending appeal regarding an award of ESA “with severe disability premium”. Further, AB had no live claim for UC at the date of the stop notice.

Conclusion

19. Neither party requests a hearing of this appeal and I am satisfied that it may be determined without a hearing. I dismiss this appeal. On the First-tier Tribunal's findings of fact, which are not disputed by HMRC, I find that the tribunal's decision was not only free of any error on a point of law, it was also the right decision.

20. Two conditions must apply for regulation 8 of the 2014 Regulations to operate and thereby terminate entitlement to a tax credit. Firstly, an individual must make a claim for UC, which is a pure question of fact and it is not disputed that, on 6 October 2018, AB made such a claim. Secondly, the Secretary of State, acting through DWP civil servants, must turn her mind to the question whether the basic conditions for UC referred to in regulation 8(1)(b) apply and make a determination accordingly. Whether satisfaction of those conditions is undisputed or undoubtedly met is irrelevant. Some duly authorised official must formally determine the matter.

21. In the present case, it is not disputed that the Secretary of State's issue of a 'stop notice' involved a determination that the relevant UC basic conditions were met. No evidence suggests that the Secretary of State made a regulation 8 determination at some point before issuing the stop notice. It follows that the Secretary of State must be taken to have determined that the UC basic conditions were met on 9 October 2018, when the stop notice was issued. In other words, when the Secretary of State determined that the UC basic conditions were met AB had no subsisting UC claim.

22. The issue which I must resolve is whether regulation 8(1) of the 2014 Regulations requires a subsisting UC claim at the date on which the Secretary of State determines that the basic UC conditions are met. I think it can be safely assumed that, in the day-to-day application of regulation 8(1), the two relevant questions arise in sequence. It is most unlikely that DWP civil servants would go about making determinations as to whether the UC basic conditions are met before a particular individual has made a claim for UC. I proceed on the basis that the UC claim always comes first and is followed by a determination under regulation 8(1).

23. The circumstances of *LH* were materially different to the present case. In *LH*, the claimant sought to withdraw a UC claim after the Secretary of State had given a regulation 8(1) determination. Upper Tribunal Judge Jacobs refrained from offering a view as to whether withdrawal of a UC claim before a regulation 8(1) determination had been made would avoid termination of a tax credit award under regulation 8(2).

Nevertheless, his view that regulation 8(1) requires “the simultaneous existence of a claim and the Secretary of State’s satisfaction on the basic conditions” provides some support for the present claimant’s argument that regulation 8(1) requires a subsisting UC claim at the point at which the Secretary of State makes a determination as to whether the basic conditions are satisfied.

24. Leaving aside the basic conditions, regulation 8(1) enacts that it applies where “a claim for universal credit...is made”. The present tense is used which, as I understand it, is conventional legislative drafting practice. However, there is no rule that the present tense must be used in each and every enactment. What matters is the legislative intention and it is not therefore unusual for legislation to depart from the use of the present tense if that better encapsulates the legislative intention. I shall now address legislative intention.

25. Typically, a claim for benefit has no meaningful independent legal existence. Its purpose is as the first step in a process that culminates in a decision on the claim. If the claim is withdrawn, that process stops. Given the essential purpose of a claim, a withdrawn claim would normally become a nullity in decision-making terms. It would no longer have any purpose because the Secretary of State (or HMRC) would be relieved of the duty she would otherwise have to decide the claim. Like Judge Jacobs in *LH*, I am not persuaded by the proposition that, once withdrawn, a claim must be treated as if had never been made. I see no obvious legal need for that deemed state of affairs and, furthermore, it is inconsistent with regulation 31(2) of the 2013 Regulations’ which provides that “any notice of withdrawal given in accordance with paragraph (1) has effect when it is received”. My view is that, once a claim is withdrawn, it becomes a legal irrelevance so far as entitlement to benefits is concerned unless, that is, some specific legislative provision ascribes a legal consequence to the mere fact of the claim having been made.

26. In the light of the above analysis, in my judgment, HMRC’s submissions would have more force if regulation 8(1)(a) expressed itself in the past perfect (or pluperfect) tense. In other words, if the provision said “a claim for universal credit...has been made” it would provide a clearer signal that legal relevance is being ascribed to the mere fact of a claim having been made. However, I accept that this does not provide a clear-cut answer since, in practice, English tenses do not inevitably refer to mutually exclusive states of being.

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27. Regulation 8(2) of the 2014 Regulations provides for the date on which entitlement to an award of tax credit terminates. It is either “the day before the first date on which the claimant is entitled to universal credit in connection with the claim” or, if not entitled, “the day before the first date on which he or she would have been so entitled, if all of the basic and financial conditions applicable to the claimant had been met”. Since entitlement (or non-entitlement) is determined only upon a claim being decided, in my view regulation 8(2) supports AB’s argument that, absent a subsisting claim, a regulation 8(1) determination cannot be made. Without a decision on a UC claim, it is difficult to see how a tax credit termination date could ever be fixed and, if a UC claim is duly withdrawn, there is no claim to be decided.

28. It should also be remembered that, rather than a single transfer or replacement mechanism, a range of legislative methods have been adopted in order to effect the replacement of tax credits (and other income-related benefits) by UC. Some mechanisms operate by preventing new claims for a tax credit while others terminate entitlement to a tax credit:

(a) regulation 8 of the 2014 Regulations terminates entitlement to an award of a tax credit once a UC claim is made and a determination made as to a claimant’s satisfaction of the UC basic conditions. Once tax credit entitlement is terminated, a claimant clearly has little choice but to proceed with the UC claim;

(b) under regulation 5 of the 2014 Regulations, a person entitled to UC cannot be entitled to a tax credit and, under regulation 6, a UC claimant may not claim a tax credit;

(c) briefly, at the date of HMRC’s decision, article 7(1) of the Welfare Reform Act 2012 (Commencement no. 23 and Transitional and Transitory Provisions) Order 2015 provided 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. As a result of other provision, article 7(1) was effectively, implemented incrementally on a district-by-district basis (see, in particular, article 3 of the no.23 Order and article 14 of 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);

(d) Part 14 of the 2014 Regulations provides for ‘managed migration’ from tax credits to UC. This Part enacts the more typical set of legislative provisions for migration

from one benefit to its replacement, and it involve claimants being notified that, unless a claim for UC is made by a specified date, entitlement to a tax credit will cease.

29. The mechanism in (a) terminates entitlement to a tax credit upon a UC claim being made and a determination that the basic UC conditions are met. It does not inhibit claims being made for a tax credit but, if UC is awarded, the person cannot also be entitled to a tax credit, nor may a tax credit be claimed while a UC claim subsists (see (b) above). Mechanism (c) prevents a claim for a tax credit in specified postal districts if a UC claim could be made. And mechanism (d) involves enforced migration from tax credits to UC and culminates in a person ceasing to be entitled to a tax credit.

30. Since the present case would not have arisen had AB been subject to mechanism (d), it follows that she was not within that class of tax credits recipients whom the legislature have decided must immediately transfer from tax credits to UC. She retained, therefore, control over the make-up of her benefits income and was, in principle, free to decide for herself which combination of benefits would be most advantageous to her. An important part of that freedom was her right to withdraw a claim for UC before it had been determined. AB did not in theory lose that right but, if HMRC are correct, she did in practice. On HMRC's interpretation of regulation 8 of the 2014 Regulations, AB's withdrawal of her UC claim meant that, until she re-claimed UC, she could not be in receipt of any income-related benefit since, on that interpretation, her entitlement to tax credits would have ceased. The period for which AB would have been without any income-related benefit would have depended on how rapidly she reclaimed UC. However, for a person who, by definition, has very limited financial means, even a few days without any income-related benefit income could have significant implications. In my view, social security transitional legislation, especially where it concerns income-related benefits, should be construed on the basis that the legislature was unlikely to have intended to enact a scheme under which claimants might suffer a period of non-entitlement. A transferred claimant's benefit income may decrease, of course, since entitlement conditions may have been tightened-up but that is not the same thing as providing for a system under which a claimant is entirely without benefits income for a particular period.

31. I decide that the interpretation of regulation 8(1) of the 2014 Regulations advanced by HMRC is incorrect and that, in order for a valid regulation 8(1) determination to be made that a UC claimant satisfies the UC basic conditions, that is

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a determination that triggers the cessation of tax credit entitlement provided for by regulation 8(2), there must be a subsisting UC claim at time of the determination. In my judgment, that was the legislative intention, for the following reasons:

(a) HMRC's argument would have more force had regulation 8(1), rather than using the present tense 'a claim for UC is made', stated that 'a claim for UC has been made' or 'a claim for UC has been made whether or not subsequently withdrawn';

(b) the termination date provisions in regulation 8(2) anticipate a decision being made on a UC claim but, if the claim has been duly withdrawn, there is nothing to decide;

(c) an interpretation that preserves claimants' freedom to order their benefit affairs as they see fit is generally to be preferred to one that restricts that freedom. On HMRC's argument, AB's freedom to order her welfare benefits income as she saw fit was significantly curtailed once she had claimed UC even though she must have fallen outside that class of tax credits claimants subject to enforced transfer to UC;

(d) an interpretation that avoids a gap in entitlement to income-related benefits is to be preferred to one that allows such a gap to arise. On HMRC's argument, recipients of income-related benefits may, by withdrawing a UC claim, unwittingly engineer a gap in entitlement to income-related benefits.

32. This appeal is dismissed. The First-tier Tribunal's finding that AB's entitlement to tax credits did not terminate by operation of regulation 8(2) of the 2014 Regulations stands.

E Mitchell
Judge of the Upper Tribunal
Signed on original,
15 July 2021

Section 11 of the Tribunals,
Courts and Enforcement Act
2007.