



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CUC/1792/2020

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

Between:

Mr F.O.

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 25 February 2022
Decided on consideration of the papers

Representation:

Appellant: In person

Respondent: Ms H. Thackray, Decision Making and Appeals, DWP

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 21 July 2020 under number SC312/20/00507 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set aside that decision and re-make the decision under appeal as follows:

“The decision-maker’s decision dated 14 April 2020 to ‘close’ the couple’s Universal Credit claim is revised and reversed. The Appellant’s partner did not fail to accept her claimant commitments. The Appellant himself had good reason not to attend a work search review meeting. It follows the UC award is reinstated with effect from 14 April 2020. The case is remitted to the Secretary of State for the necessary adjustments to be made.”

REASONS FOR DECISION

The moral of this case

1. This appeal to the Upper Tribunal is a good example of why First-tier Tribunals may sometimes need to be wary about taking at face value the Department for Work and Pensions (DWP)'s written submission in response to a claimant's appeal. This is especially so where the DWP has been economical with the photocopier.

The background to the original appeal

2. At first sight at least, this appeal appeared to be a slam-dunk 'open and shut case'. The Appellant and his partner were a couple in receipt of universal credit (UC). Their claim was then 'closed'. This was because the DWP's decision-maker took the view that the Appellant's partner had purportedly failed to accept her claimant commitments within the required timeframe.

3. At least according to the DWP's response, on 23 March 2020 (incidentally the day of the first national lockdown) the Appellant's partner had been set an on-line 'To-do' via her universal credit account. This requirement was to accept her claimant commitments by 29 March 2020. A warning was issued via her universal credit journal on 31 March 2020, extending the time for compliance to 14 April 2020. In the absence of acceptance, the couple's claim was then 'closed' on 14 April 2020. A mandatory reconsideration was carried out but no change was made to the decision.

The appeal to the First-tier Tribunal

4. The Appellant appealed to the First-tier Tribunal (FTT), which confirmed the DWP's decision of 14 April 2020, following a hearing on the papers. According to its decision notice, the FTT decided that the failure of the claimant's partner "was due to carelessness or indifference, and no good reason for this failure is made out."

5. What was the evidential basis for this finding? The FTT had heard no oral evidence. The papers before the FTT consisted of the DWP's sparse six-page response (pages A-F, with generously spaced text and plenty of empty space) and some supporting documentation that ran to a total of just 11 pages in all. The further documents consisted of the Appellant's printed notice of appeal (3 pages), and just over a page of actual evidence comprising two entries (dated 31 March 2020 and 14 April 2021) extracted from the Appellant's universal credit journal, together with the mandatory reconsideration notice and the associated letter notifying the unsuccessful outcome.

6. Putting it mildly, the DWP's written response to the FTT appeal was on the thin side. There was no copy of the original universal credit claim. The claimant commitment document was not included. Crucially, there was no sight at all of the crucial on-line 'To-do' dated 23 March 2020, although the two later follow-up journal entries were included. Instead, the Department's case relied to a great extent on assertions by the DWP appeals officer as to what they said was on the system. So, for example, page E of the response stated that "The UC system shows that the commitments of [the Appellant's partner] were created and issued on 23-Mar-2020." In short, the FTT was simply being asked to take the Department's word for it.

7. Yet this was not a brand new claim. One thing the DWP's very limited response did reveal (even if no relevant evidence about it was produced) was that the couple's

universal credit claim had been made in May 2018, nearly two years previously. There was obviously more of a back story but the response was silent.

8. This sorry state of affairs immediately raises (at least) two questions.

9. First, did the FTT not consider whether the DWP had complied with its duty under rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) Rules 2008 (SI 2008/2685) to produce “copies of all documents relevant to the case in the decision-maker’s possession”?

10. Second, how could the FTT come to a fair conclusion that the Appellant’s partner had failed to agree to her claimant commitment if it could not know for sure what had been required of her in that regard?

11. The rather unsatisfactory answer to the first question is the FTT apparently did not consider that possibility.

12. The equally if not more unsatisfactory answer to the second question is that it could not fairly come to such a conclusion.

The appeal to the Upper Tribunal

13. Upper Tribunal Judge Levenson granted the Appellant’s application for permission to appeal, observing that it was reasonably arguable that the FTT had “erred by not asking to see all of the relevant documents to see whether they support the Secretary of State’s assertion, and that it misunderstood the claimant’s case.”

14. Ms Helen Thackray, the Secretary of State’s representative in these proceedings, supports the appeal to the Upper Tribunal in two detailed and helpful submissions. Her primary reason for doing so is more of a substantive point, rather than the procedural matter highlighted in the grant of permission to appeal. She argues that the FTT erred in law in finding that entitlement to universal credit would automatically end where a claimant failed to accept a revised claimant commitment in circumstances where there was an award already in place. As she explains in her first submission:

“15 ... there is no legal basis to consider ending the award of UC for failing to accept the revised claimant commitment since the previous claimant commitment already in place still applies. Revised requirements can be set outside of the claimant commitment if it is reasonable to do so by requiring participation in an interview to set the new requirements. The requirements to participate in an interview to review commitments during an award would be under the provisions of section 23 of the WRA and could only ever result in a sanctionable failure if the claimant failed to comply with the interview requirement for no good reason.

16... any failure to comply with a requirement to participate in a commitments review interview for no good reason is a sanctionable failure under section 27 of the WRA [Welfare Reform Act 2012] and not reason to suspend or terminate an award of UC.”

15. Thus, the DWP could only end an award of UC if one of the various UC conditions of entitlement was no longer met – and in a case such as the present one, where claimant commitments were due to be reviewed, the Appellant’s partner had already accepted a claimant commitment that was in place to meet the requirements of section 4(1)(e) of the WRA 2012.

16. Ms Thackray further acknowledges that in principle at least, assuming for the moment that the facts supported such a finding, a low level sanction could have been implemented in accordance with regulation 104(1)(a) of the Universal Credit Regulations 2013 (SI 2013/376). This might have been on the basis that the Appellant's partner did not have good reason for failing to accept the revised claimant commitment at a required interview.

17. Ms Thackray therefore contends that the Appellant's award of UC was ended incorrectly on 14 April 2020 and the FTT erred in law by confirming the DWP's decision to terminate the couple's UC award.

18. Ms Thackray further reports, both very fairly and very candidly, as follows (in her second written submission):

13. On further investigation within the UC systems I can find no evidence to support what happened in this case or to show that the normal process was followed to require acceptance of new commitments. Indeed it would appear that the claim to UC, which is the subject of this appeal, has been removed or deleted and we have no evidence to support what took place in the actions up to the new commitments being placed in the journal on 23/3/20. I can only find evidence in reference to the new claim which followed in April 2020.

14. We have evidence at pages 4 and 5 of the bundle that some commitments were sent via the journal for acceptance by [the Appellant's partner] but there is no documented evidence to show a discussion took place to draw up the new commitments, the reasons why and we can provide no copies of any relevant claimant commitments either the one placed in the journal for acceptance or any previously accepted ones throughout the award from May 2018 to March 2020.

19. Ms Thackray accordingly concludes that the contention in the DWP's written response to the FTT appeal that it was "abundantly clear to the claimant what was required" is simply "without substance".

20. What then of page E of the response to the appeal, which stated that "The UC system shows that the commitments of [the Appellant's partner] were created and issued on 23-Mar-2020"? It is perfectly true that "evidence given by submission writers ... even if hearsay, is as capable of being logically probative as evidence, whether or not hearsay, given by anybody else" (*Walsall MBC v PL* [2009] UKUT 27 (AAC) *per* Upper Tribunal Judge Jacobs at paragraph 8 – see also *AS v Secretary of State for Work and Pensions (CA)* [2015] UKUT 592 (AAC); [2016] AACR 22 and *BS v Secretary of State for Work and Pensions (DLA)* [2016] UKUT 73 (AAC); [2016] AACR 32). However, the statement on page E was mere assertion lacking even the barest evidential basis.

21. Furthermore, and in any event, Ms Thackray explains that regulation 16(b) (exceptions to the claimant commitment) of the Universal Credit Regulations 2013 was applicable:

16. A person does not have to meet the basic condition to have accepted a claimant commitment if the Secretary of State considers that—

(a) the person cannot accept a claimant commitment because they lack the capacity to do so; or

(b) there are exceptional circumstances in which it would be unreasonable to expect the person to accept a claimant commitment.

22. Ms Thackray points out that for existing UC claimants as of 30 March 2020, who already had an existing accepted claimant commitment, any work search or work availability requirements were expressly lifted in response to the Covid-19 pandemic and no sanctions were imposed for failing to comply with work-related requirements. She is understandably at a loss to explain why, in the circumstances of this case and given the national lockdown, departmental staff so rigorously pursued acceptance of the purported new commitments.

23. In addition, on further interrogating the UC full service computer system, Ms Thackray reports that it appears the Appellant himself had failed to attend an appointment on 11 March 2020 for a work search review. However, as Ms Thackray rightly points out, this was just before the first national lockdown, and much of the public messaging was around advising people not to go out unless necessary. There was undisputed evidence from the claimant, for whom English is not his first language, that he had unsuccessfully tried contacting the Jobcentre by telephone. In all the circumstances, Ms Thackray rightly accepts that in any event the Appellant would have been able to show good reason for not attending at the Jobcentre.

Conclusion

24. Accordingly, the Appellant's appeal to the Upper Tribunal succeeds. The First-tier Tribunal's decision in this case involves a legal error. I therefore set aside the Tribunal's decision (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). There is no need for the case to be remitted for re-hearing by a new tribunal. Rather, it is appropriate for the original decision under appeal to be re-made.

25. The FTT ought to have decided that the Appellant's UC award should not have been ended. So far as the Appellant himself was concerned, the DWP should instead have considered whether his failure to attend the interview on 11 March 2020 was sanctionable. However, on the balance of probabilities the Appellant would have been able to show good reason for non-attendance and so no sanction would have been appropriate. So far as the Appellant's partner was concerned, there were exceptional circumstances at the relevant time within regulation 16(b). As such, she did not need to accept any new commitments in order to meet the requirements of section 4(1)(e) of the Welfare Reform Act 2012. The case is remitted to the Secretary of State to reinstate the award of universal credit for the period from when it was 'closed' on 14 April 2020 to the date when the re-claim was made.

26. I therefore re-make the First-tier Tribunal's decision in the terms as set out here:

"The decision-maker's decision dated 14 April 2020 to 'close' the couple's Universal Credit claim is revised and reversed. The Appellant's partner did not fail to accept her claimant commitments. The Appellant himself had good reason not to attend a work search review meeting. It follows the UC award is reinstated with effect from 14 April 2020. The case is remitted to the Secretary of State for the necessary adjustments to be made."

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 25 February 2022