



Neutral Citation Number: [2024] UKUT 392 (AAC)

Appeal No. UA-2023-000701-USTA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

KL

Appellant

by

MR

Appointee

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decided on consideration of the papers

Representation:

Appellant: Mr D Wall and Mr J Cunningham, Durham Welfare Rights

Respondent: Mr S O'Regan, Decision Making and Appeals, DWP

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC224/22/00010

Digital Case No.: 1642001873091201

Tribunal Venue: Darlington County Court

Decision Date: 9 November 2022

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.]

SUMMARY OF DECISION

KEYWORD NAME (Keyword Number)

6.10 Claims and Payments - other

32.4 Students – other

45.3 Universal Credit – Limited Capability for Work

Judicial summary

This appeal concerns the circumstances in which a claimant may qualify for Universal Credit (UC), notwithstanding the general requirement that they are “not receiving education”. It relates to the exception in regulation 14(1)(b) of the Universal Credit Regulations 2013 (SI 2013/376). The claimant, who was entitled to personal independence payment (PIP), made a claim for UC before they started a university course. They had also been referred for a work capability assessment (WCA) but due to a Covid backlog this had not taken place by the time they started their course of study. It followed that no limited capability for work determination (LCW) had taken place before they started education. The First-tier Tribunal accordingly ruled that the exception in regulation 14(1)(b) did not apply. The Upper Tribunal dismissed the claimant’s appeal.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal did not involve an error of law.

REASONS FOR DECISION

Introduction

1. This appeal is about the circumstances in which a person may qualify for Universal Credit (UC) notwithstanding the general requirement that a claimant “is not receiving education”. It relates to the exception in regulation 14(1)(b) of the Universal Credit Regulations 2013 (SI 2013/376).

Factual background

2. The basic facts and chronology of this case are not in dispute. The Appellant is an autistic young man who at all relevant times was entitled to the enhanced rate of the daily living component of personal independence payment (PIP).
3. On 2 June 2021 the Appellant made a claim for UC.
4. On 1 July 2021 the Appellant was referred for a work capability assessment (WCA), i.e. an assessment to see if he had limited capability for work (LCW) and limited capability for work-related activity (LCWRA).
5. On 20 September 2021 the Appellant began (or possibly more accurately restarted) a full-time university course of education.
6. On 15 December 2021 (by which date a WCA had still not taken place, apparently due to a backlog of such examinations due to the Covid pandemic) a decision-maker refused the Appellant’s UC claim with effect from 2 June 2021. This decision was made on the basis that the claimant was engaged in full-time education and so did not meet the UC eligibility criteria. Once the claim had been rejected, the referral for a health care professional (HCP) assessment was withdrawn and so no WCA appointment was ever booked.
7. On 7 January 2022, and in response to a request for mandatory reconsideration, the decision of 15 December 2021 was revised. The new decision was that the Appellant was not entitled to UC from 2 September 2021, being the first day of

the assessment period in which his university course began, rather than from 2 June 2021.

8. The Appellant's mother and appointee then lodged an appeal with the First-tier Tribunal (FTT), giving the following reasons (the Appellant is referred to here as 'K'):

I disagree with K being refused UC from September 2021 due to returning to university on 20/09/21. He claimed UC on 02/06/2021 as he had left Uni in February 2021. We completed a UC50 form - one sent in by post and 1 emailed in - K gets PIP ERDL [enhanced rate daily living]. He is disabled due to his autism. Between June and September 2021 we had a discussion with a work coach who advised K did not have to engage in any WRA and indeed recommended we claim for LCW which we did. We were then told K's LCW had not been completed due to delays caused by Covid. I submit K is a student who is also disabled, the LCW assessment should have been completed by the 13th week of his claim i.e. by the 01/09/2021, and he is being penalised for this and the lack of capacity of staff at the DWP to complete their jobs when required.

The nub of the issue

9. One of the basic conditions of entitlement to UC is that the claimant "is not receiving education" (Welfare Reform Act 2012, section 4(1)(d)). Regulation 12(2) of the Universal Credit Regulations 2013 (SI 2013/376) defines "receiving education" as meaning (amongst other things) "undertaking a full-time course of advanced education". However, there are various exceptions to the general rule in section 4(1)(d). These exceptions are set out in regulation 14 of the Universal Credit Regulations 2013. These include a person who is entitled to PIP (or one of a number of other disability benefits) and who has LCW (regulation 14(1)(b)). However, it is not sufficient that the individual is entitled to a designated benefit and has LCW. In the version of regulation 14(1)(b) in force at the material time, it was also necessary that the LCW determination had been made on or before "the date on which the person starts receiving education, where the person starts receiving education after the date of claim to universal credit".

10.

Earlier versions of regulation 14(1)(b) had been the subject of both successful and unsuccessful legal challenges, the details of which are not relevant for present purposes (see notably *R (Kays v Secretary of State for Work and Pensions)* [2022] EWCA Civ 1593). Regulation 14(1)(b) was then subject to further amendment on 15 December 2021 (coincidentally the same date as the Appellant’s UC claim was decided). This amendment was designed to put beyond any doubt that a person who is entitled to one of the designated disability benefits must have been determined to have LCW *before* the person started undertaking a course of education. This amendment was intended finally to close off a “workaround”, whereby an existing disabled student, who did not have a pre-existing LCW determination, could make a claim to new-style (contributory) employment and support allowance in order to be referred for a WCA so that, if the person was subsequently determined to have LCW, they could then claim and be entitled to UC — an outcome regarded by the DWP as contrary to the policy intent. We therefore need to consider the legal framework in more detail.

Legal framework

11. It is accordingly important to chart the various amendments made to regulation 14 of the Universal Credit Regulations 2013 during the course of the latter half of 2021, namely the period with which this appeal is concerned.
12. As at the date that the Appellant made his claim for UC (2 June 2021), regulation 14 read as follows (this was the version in force as from 5 August 2020 as a result of the amendments made by the Universal Credit (Exceptions to the requirement not to be receiving education) (Amendment) Regulations 2020 (SI 2020/827)):

Exceptions to the requirement not to be receiving education

14.— (1) A person does not have to meet the basic condition in section 4(1)(d) of the Act (not receiving education) if—

(a) the person—

(i) is undertaking a full-time course of study or training which is not a course of advanced education,

(ii) is under the age of 21, or is 21 and reached that age whilst undertaking the course, and

(iii) is without parental support (as defined in regulation 8(3));

(b) the person is entitled to attendance allowance, disability living allowance or personal independence payment and it has been determined—

- (i) that the person has limited capability for work or limited capability for work and work-related activity on the basis of an assessment under Part 5 of these Regulations or Part 4 or 5 of the ESA Regulations;
- (ii) that the person is to be treated as having limited capability for work under Schedule 8 or limited capability for work and work-related activity under Schedule 9;
- (iii) that the person is to be treated as having limited capability for work or limited capability for work and work-related activity under regulation 19(2)(b) or (4)(b) of the Universal Credit (Transitional Provisions) Regulations 2014,

and that determination was made on or before the date of claim to universal credit, where the person is receiving education on the date the claim is made, or the date on which the person starts receiving education, where the person starts receiving education after the date of claim to universal credit;

(c) the person is responsible for a child or a qualifying young person;

(d) the person is a single person and a foster parent with whom a child is placed;

(e) the person is a member of a couple, both of whom are receiving education, and the other member is—

- (i) responsible for a child or qualifying young person, or
- (ii) a foster parent with whom a child is placed; or

(f) the person—

- (i) has reached the qualifying age for state pension credit, and
- (ii) is a member of a couple the other member of which has not reached that age.

(2) Where regulation 9(6)(a) or 9(10) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (award of universal credit without a claim) applies to a person who is receiving education, paragraph (1)(b) is to be read as if each reference to “date of claim” was a reference to “date of award”.

13. So far as was material, and so far as the Appellant was concerned, this was also the relevant version in force at the date that the Appellant’s UC claim was decided on 15 December 2021.
14. It is true that regulation 14(1)(b) was amended with effect from 26 July 2021 by the inclusion of the (Scots) child disability payment in the list of designated benefits to which a person is entitled for the purposes of the opening words of the sub-paragraph (Social Security (Scotland) Act 2018 (Disability Assistance for Children and Young People) (Consequential Modifications) Order 2021 (SI 2021/786) art.1(2) and Sch.11 para.3). This minor consequential amendment evidently had no material effect in the present case.
15. Regulation 14(1)(b) was further amended with effect from 15 December 2021 by the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2021 (SI 2021/1224, reg.2(a)). With effect from that date, and subject now only to some additional immaterial amendments consequential on the introduction of further Scots disability payments (and so which are omitted from the text below), regulation 14(1)(b) then read as follows:

(b) the person is entitled to attendance allowance, disability living allowance, child disability payment or personal independence payment and, on a date before the date on which the person starts receiving education—

(i) it has been determined that the person has limited capability for work or limited capability for work and work-related activity on the basis of an assessment under Part 5 or under Part 4 or 5 of the ESA Regulations; or

(ii) the person is treated as having limited capability for work under Schedule 8 or limited capability for work and work-related activity under Schedule 9.

16.

This version of regulation 14(1)(b) only affected cases where the UC claim in question had made on or after 15 December 2021 (see regulation 1(2) of SI 2021/1224). As such, it did not apply to the present case. However, the requirement that the claimant be determined as having (or be treated as having) LCW (or LCW and LCWRA) “on a date before the date on which the person starts receiving education” was not new. It was simply expressed more clearly post-15 December 2021 (at least by comparison with the earlier version of regulation 14(1)(b) set out at paragraph 12 above).

17. The problem for the Appellant in the present case was that he had started his university course on 20 September 2021, by which date, and through no fault of his own, he had not yet had a WCA – and so by the date he started at university he had not been determined as having LCW.

The First-tier Tribunal’s decision

18. The essence of the Appellant’s case was summed up by the FTT in paragraph 21 of its statement of reasons:

[The Appellant’s representative] submitted that his client had made a legitimate application for Universal Credit on 2nd June 2021. As part of his claim [the Appellant] had been referred for a Work Capability Assessment on 1st July 2021. By 20th September 2021 when he started on his course that assessment had not been done. It still had not been done by the time of the Decision Maker’s decision some 5 months later, on 15th December 2021. The assessment was never completed. [The Appellant] was in no way responsible for causing the delay in undertaking the assessment, yet he was being penalised for the fact that the Respondent failed to have the assessment done.

19. The FTT identified the central issue in the appeal in the following terms in its decision notice:

This case revolves around Regulation 14 Universal Credit Regulations 2013 and whether [the Appellant] was caught by the changes to Regulation 14(1)(b) introduced by the Universal Credit (Exceptions to the Requirement not to be receiving education) (Amendment) Regulations 2020 and the later amendment Regulations laid in 2021, on

his return to University on 2nd September 2021. The tribunal found that he was.

20. The FTT subsequently summarised its decision refusing the Appellant's appeal as follows in its statement of reasons (which has been suitably anonymised):

29. The tribunal finds that the Respondent's interpretation of the law is supported by its reading of regulation 14(1)(b). The regulation clearly states that in [the Appellant's] case 3 requirements must be satisfied for him to come within the exemption contained in regulation 14(1)(b). They are:

30. (1) that [the Appellant] is in receipt of PIP;

31. (2) that it has been determined that he has limited capability for work,

32. and (3) that the decision he has limited capability for work was made on or before the date he started receiving education (because he had started to receive education after the date he claimed Universal Credit).

33. [The Appellant] does not satisfy the 3rd requirement.

34. The tribunal did not consider ordering that the Work Capability Assessment be completed, or find that [the Appellant] had limited capability for work, because such actions would not change the fact that no determination that [the Appellant] had limited capability for work had been made on or before the date he started receiving education.

35. The decision of the Respondent (as amended by the Mandatory Reconsideration) is therefore upheld. The appeal is dismissed.

36. The tribunal recognises that circumstances surrounding [the Appellant's] Universal Credit claim and the failure to complete the Work Capability Assessment prior to him receiving education, have resulted

in him experiencing a potential financial loss and disadvantage through no fault of his own. The particular facts of the case do not sit comfortably with Parliament's desire not to discourage students with a disability from entering into education. However, the tribunal is bound to follow the rules and regulations that have been lawfully laid down by Parliament. Any remedy must lie elsewhere.

21. A district tribunal judge subsequently granted permission to appeal to the Upper Tribunal.

The grounds of appeal and the parties' submissions

22. The Appellant's representative summed up the claimant's grounds of appeal to the Upper Tribunal in these terms:

4. The basis of the appeal is one of reasonableness to the extent that demonstrably the Department for Work and Pensions waited until the 15th of December before rejecting the claim as they had not carried out a work capability assessment within a reasonable period of time.

5. It is surely to be expected that when an application is made it will be processed diligently and within a reasonable period of time. In the circumstances of this case there is no known reason for the delay in undertaking a work capability assessment and yet the delay that the appellant says is unreasonable is what has caused the application to fail.

23. The Secretary of State's representative does not support the appeal. Mr O'Regan makes the following principal submissions:

9. The Secretary of State for Work and Pensions ("SSWP") does not support this appeal. It is my submission that the FtT did not err in law in deciding that the claimant was not entitled to UC from 2 September 2021 on the basis that they were receiving education within the meaning of regulation 12 of the UC Regulations 2013, and contrary to section 4(1)(d) of the WRA 2012. In addition, I also submit that the FtT

did not err in law in finding that the claimant could not benefit from the provisions of regulation 14(1)(b) of the UC Regulations 2013.

10. It is my respectful submission that the assertion by the claimant's representative's in their grounds of appeal that the DWP has acted unreasonably, and/or had delayed to the detriment of the claimant by making their decision of 15 December 2021 is without merit.

11. In particular, I respectfully submit that whilst the claimant was referred for a WCA on 1 July 2021, the claimant commenced a full-time course of advanced education on 20 September 2021. Accordingly, as there had been no determination that the claimant had limited capability for work- or work-related activity ("LCW/LCWRA") prior to the claimant commencing their course of full-time course advanced education – meaning that they were also receiving education within the meaning of regulation 12 of the UC Regulations 2013, the claimant ceased to be entitled to an award of UC at this point, as they ceased to meet a basic condition of entitlement to UC, as provided by section 4(1) (d) of the WRA 2012. I submit that it is irrelevant that the DWP did not make an outcome decision on behalf of the SSWP until 15 September 2021. For the claimant to fall within regulation 14(1)(b) of the UC Regulations 2013, the WCA would have had to have been completed within a period of less than three months and, in addition, for there to have then been a determination that the claimant had LCW/LCWRA. I can respectfully confirm that there is no provision that specifically stipulates that a WCA must be carried out in a timeframe shorter than the above period. Moreover, and notwithstanding the application of regulation 14(1)(b) to the claimant's circumstances, the claimant's circumstances also did not engage any other ground under regulation 14 of the UC Regulations 2013 that would except them from the requirement to not be receiving education, as per section 4(1)(d) of the WRA 2012.

24.

Just for the avoidance of any confusion, the underlined reference to '15 September 2021' in paragraph 11 of this extract is a misprint for '15 December 2021'.

Analysis

25. The bottom line is that there is no explicit statutory duty on the Secretary of State to decide a UC claim, or more specifically to make a determination as to whether a claimant has LCW, by any specific date. To that extent the position is the same as for the determination of claims for PIP. In *RS v Secretary of State for Work and Pensions* [2016] UKUT 85 (AAC) Upper Tribunal Judge Mitchell observed as follows:

28. The Secretary of State does not have an express duty to carry out a PIP assessment, in response to a PIP claim, although such a duty is clearly implied because, without an assessment, almost no one apart from the terminally ill would ever become entitled to PIP. There is also no express statutory requirement for a PIP assessment or consultation to be carried out, or a PIP claim decided, by any specified date.

26. Judge Mitchell went on to note:

29. Mr S's representative draws my attention to the High Court's decision in *R (C & Another) v Secretary of State for Work And Pensions & Another* [2015] EWHC 1607 (Admin). On that claim for judicial review, the Secretary of State conceded that delays in carrying out PIP assessment consultations, and deciding PIP claims, were "unacceptable". The parties agreed that "in domestic law ... the Secretary of State is under a public law duty to determine the PIP applications within a reasonable time". The High Court (Patterson J) went on to hold that delays of 10 and 13 months in determining the claimants' PIP claims were unlawful. In the light of the claimant's personal circumstances, their PIP claims were not decided within a reasonable time. However, Patterson J declined to rule generally on what would be a reasonable time for deciding a PIP claim. This would vary according to the circumstances of individual claimants.

27. In holding as much, Patterson J had applied the following test in *R (C & Another) v Secretary of State for Work And Pensions & Another* [2015] EWHC 1607 (Admin):

92. It seems to me that in considering whether the delays which are agreed to have occurred in the claimants' cases are unlawful I have to

disregard what may be regarded as desirable to reach the best standards. I have to consider whether there has been a breach of duty on the part of the Secretary of State to act without unreasonable delay in determination of the claimants' claims for PIP in all of the circumstances.

28. There are, of course, no judicial review proceedings currently before the Upper Tribunal in the present matter. In any event, and in so far as it may be relevant, and given the impact of the Covid pandemic, it seems unlikely that any court would find the Department's delay in mid-2021 in arranging a WCA to have been unreasonable.
29. I recognise that there may well be operational targets or official advice that a WCA should take place within a certain period of time following such a referral. However, even if such targets or advice might in theory be capable of giving rise to a legitimate expectation in public law terms, they cannot prevent the lawful operation of the statutory scheme. As Upper Tribunal Judge Wright put it in *PS v Secretary of State for Work and Pensions and LM (CSM)* [2016] UKUT 437 (AAC) at paragraph 57, there are numerous authorities holding
- ... that estoppel cannot prevent a statutory duty from being carried out: see *R(CS)2/97*, *R(P)1/80*, *R(SB)1/83*, *R(SB) 4/91* and *R(JSA)4/04*. Both estoppel and legitimate expectation are based fundamentally on fairness (in the latter as a counter to abuse of power), whether that is procedural fairness or substantive fairness. But neither legal test can, in my judgment, enable fairness to require the Secretary of State to act contrary to duties entrusted to him under an Act of Parliament.
30. There is, therefore, no way round the problem that the Appellant did not have a LCW determination before he started at university. As such, he did not meet the all the requirements of regulation 14(1)(b) so as to benefit from the exception to the requirement that a UC claimant "is not receiving education".

Conclusion

31. I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law. I dismiss the appeal.

KL by MR -v- SSWP (UC)

Appeal no. UA-2023-000701-USTA
NCN [2024] UKUT 392 (AAC)

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 2 December 2024