



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No: CSUC/280/2020

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

Between:

LG

Appellant

- v -

SSWP

Respondent

Before: Upper Tribunal Judge: D J MAY QC

Decision date: 29 April 2021

Decided on consideration of the papers:

Representation:

Appellant: Susan Browning, Money Matters Advice

Respondent: SSWP

DECISION

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

REASONS FOR DECISION

1. This appeal concerns the claimant's entitlement to Universal Credit during the assessment period 11 July 2019 to 10 August 2019. The decision is set out in pages 24 and 25 of the bundle and was made on 11 August 2019.
2. A mandatory reconsideration made on 10 December 2019 and concluded that for the relevant assessment period the claimant's award had been calculated correctly. She appealed to the First-tier Tribunal which in a decision recorded at page 56 confirmed the original decision.
3. The tribunal made the following findings in fact:

Findings in Fact

1. The appellant had made a claim for universal credit under her national insurance number [...].
2. The appellant had take home pay from the assessment period of £1,545.33.
3. The appellant received two payments from her employers during the assessment period.
4. The appellant is paid on a four weekly basis.
5. The assessment is a one calendar month period.
6. The appellant was working for (C)(B) Ltd during the assessment period.
7. The appellant will receive thirteen employers take home pays during a twelve month calendar period.
8. The appellant's assessment period wage payments were contained within proof of wage documentation 33 and 36. Payment dates were 9 August 2019 and 12 July 2019.

4. In giving reasons for its decision the tribunal said:

Reasons for the Decision

1. It is factually the case that the appellant received two wage payments during the assessment period. The assessment period is fixed.
2. During the year there will be twelve assessment payments and the appellant would receive 13 wage payments.
3. Her evidence was that she was paid four weekly and that her wage is fluctuated depending on the number of shifts that she works per four week period.
4. The appellant stated that she had two sets of bills to pay from any assessment period and that it was inequitable to calculate her assessment period for two wage payments made during that one period.
5. The appellant's representative invited me to consider the case of *Pantellerisco and others versus SSWP* [2020] EWHC 1944 (Admin). I did consider this together with the terms of universal credit regulations 2013 including regulation 54.
6. The appellant also asked that I consider the case of *SSWP versus Johnson and others* [2020] EWCA Civ 778 wherein, using the appellants summary, it was "found that the working pensions secretary acted irrationally and unlawfully by failing to adapt earned income assessment rules for universal credit claimants who received two month salary payments in one assessment period on account of shifts and monthly pay dates and the date of their assessment periods."

7. I considered that the case of *Johnson* can be distinguished from this circumstance as in this case the appellant received two four weekly salary payments in one assessment period rather than two monthly salary payments.
8. There is a difference here from *Johnson and others* in that this appellant will receive thirteen payments during a year and not twelve.
9. The appellant would accordingly be within the threshold for receipt of universal credit apparently on eleven out of the twelve assessment periods and she would receive benefit for those periods based on eleven of the thirteen payments that she received from her employer.
10. I did not consider that the legislation intended, nor could be read, to apply in favour of this appellant in these particular circumstances.
11. I considered the regulation 61 waiver but did not consider that section 61(3)(b)(ii) applied in this case.
12. The appellant would, appear to me, benefit on eleven out of twelve months for receiving only twenty eight days pay during various months containing 28, 29, 30 or 31 days, for eleven out of the twelve months per annum, and that for the one month where she received two pays the calculation had been correctly made having regard to the legislation, the assessment period and the appellant's earned income said assessment period.

5. **Regulation 54(1)** referred to in paragraph 5 of the reasons is in the following terms:

“The calculation of a person’s earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.”

6. The claimant’s grounds of appeal are in the following terms:

“I believe that the First Tier Tribunal has erred in law by not properly considering and applying the findings of both the *Johnson* case and the *Pantellerisco* case, with regards to the claimant who are not paid on a non-monthly basis. This is particularly evident as the Judge has made no reference to each or any of the five issues/questions identified by the Court of Appeal in *Johnson*, and which were comprehensively addressed by Mr Justice Garnham in *Pantellerisco*.

Although the claimants in the *Johnson* case were monthly paid, the court found that the DWP had incorrectly interpreted their own regulations regarding earned income (Regulation 54 of the Universal Credit Regulations 2013) and wrongly assumed that where salaries for two different months were received during the same assessment period, the combined salaries from the two pays were to be treated as earned income in respect of that assessment period.

Albeit the appellant in this case is paid four weekly, she received two pays within the one assessment period, which were clearly meant for two different periods, as these pays would cover eight weeks of work.

Given that in both of the judgements referred to above, there were clear findings of irrationality on the part of the Secretary of State for Work & Pensions, the tribunals’ decision in [the claimant’s] case appear to be discriminative against her rights.

Furthermore, legislation has now been put in place to address claimants who are paid twice in one assessment period, who are normally paid monthly. To not apply this legislation where the claimant is paid on a lunar payment cycle would be discriminatory.”

These grounds of appeal do not dispute the findings in fact made by the tribunal.

7. The grounds of appeal and the authorities referred to therein seem to be advancing the proposition that in making the regulation the Secretary of States had been irrational and that regulation 54 is open to challenge. However in the submission to the First-tier Tribunal the claimant submitted:

“Although the claimants’ pay situation is similar to but not on all fours with that of the claimants in *Johnson*, as she is paid four weekly rather than monthly, the reasoning in *Johnson* equally applies to such situations to the extent that: *‘There may however need to be an adjustment where it is clear that the amounts received in an assessment period do not, in fact, reflect, the amounts of earned income in respect of the period of time included within that assessment period (Johnson §52).*”

As such, we would respectfully submit that the Secretary of State’s decision of 11 August 2019 be set aside, and her entitlement be recalculated in line with the principles outlined above.”

In a response to the Secretary of State’s submission the claimant’s representative said in this appeal that the submission to the First-tier Tribunal stands with no amendments. Thus the submission to the First-tier Tribunal relates to the application of the regulation not its rationality.

8. The Secretary of State does not support the appeal. In her submission she said:

“4. I respectfully submit that the First Tier Tribunal have not erred in finding that the two wage payments made to the claimant on 12.7.2019 and

9.8.2019 in the assessment period 11.7.2019 to 10.8.2019, both fall to be taken into account as employed earnings in that assessment.

5. I submit that the First Tier Tribunal have correctly distinguished this case from that of *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778. *Johnson* dealt with cases of workers paid monthly who sometimes had two payments made in one assessment period because of what was described as “the non-banking day salary shift”. As a result of that the work allowance was also lost. However, the claimant in this case is not paid monthly and taking the two payments into account in the one assessment period does not impact the work allowance and as such I submit that the First Tier Tribunal were correct to determine that *Johnson* was not applicable.

6. I submit that the First Tier Tribunal have also correctly distinguished this case from *R.(Pantellerisco) v Secretary of State for Work and Pensions* [2020] EWHC 1944 (Admin). *Pantellerisco* dealt with the situation where the treatment of two lots of four-weekly paid wages in one assessment period lead to the benefit cap under regulation 82(1) being applied. No such issue arises in this case and as a result I submit that the First Tier Tribunal were correct to determine that *Pantellerisco* was not applicable.

7. Following their determination that neither *Johnson* nor *Pantellerisco* were applicable to this case I submit that the First Tier Tribunal were correct to apply regulation 54(1) and take both the payments 12.7.2019 and 9.8.2019 into account in the assessment period 11.7.2019 to 10.8.2019.”

9. I find myself in agreement with the Secretary of State in paragraphs 5 and 6 of her submission that the authorities referred to do not assist the claimant for the reasons set out by her. The circumstances in each of these cases were substantially different to the circumstances in the instant case.

10. It is apparent that in *Johnson* the Court of Appeal's decision was based on the particular circumstances of that case which do not apply here. Rose L J at paragraph 81 said:

“We are not concerned here with making an exception for people who are paid at frequencies other than monthly”.

11. In the *Pantellerisco* case the judge chose to apply the *Johnson* case to the one which he was deciding. He said in paragraph 86:

“ ... the principles the court identified, and the essential logic of the argument they accepted, apply with equal force to cases that claimants paid on the four week basis. In doing so he said at paragraph 87:

Second, in monthly payment cases the difficulty arises in a few months each year, with lunar monthly cases such as the first claimants, it arises in eleven months out of twelve. In those circumstances it seems to me that the case for the regulations making an exception for such a claimant is even stronger than it was in *Johnson*.

In these circumstances in paragraph 88 he said in those circumstances, my judgement, the claimants are entitled to a declaration to the effect that the earned income calculation is irrational and unlawful in respect of employees paid on a four week basis.”

He then indicated that he would hear Counsel on the terms of the appropriate relief.

12. However the essential pre-requisite in both these cases would appear to be that as is said by the judge in paragraph 76:

“In *Johnson*, the problem would arise in several months each year, in the claimant's case it arises in eleven out of twelve months. As in *Johnson* the problem will last throughout the year of the claimant's period of entitlement.”

In both cases the court was prepared to make a declaration of rationality and unlawfulness. In neither case is the relief granted disclosed.

13. In the instant case in the course of a year the claimant received thirteen payments, as is pointed out in the Secretary of State's submission and the tribunal's Statement of Reasons. Neither the grounds of appeal nor the submission to the First-tier Tribunal specify exactly what the claimant wishes the Upper Tribunal to do. There is no indication as to what, if any, declaration the claimant wishes me to make in respect of the lawfulness of regulation 54, nor as it is set out in the claimant's submission to the First-tier Tribunal what decision should be made if the decision on 11 August 2019 was set aside. No submission is made as to how her benefit should be recalculated. It would seem that the claimant's approach would seek to exclude one of the two thirteen payments falling within the relevant assessment period, which as the tribunal in paragraph 5 of its Findings in Fact found is one of a calendar month. That I am not prepared to do as it flies in the face of what the regulation actually says. Further, having accepted the Secretary of State's submission, I am not prepared to find the regulation either irrational or unlawful in the circumstances of this case. To do so would confer on the claimant an advantage during the relevant assessment period as one four weekly payment would be excluded from the calculation of benefit which the statutory provisions do not allow for. I do not in these circumstances consider that the tribunal erred in law in making the decision that it did and I am persuaded that the tribunal did not err in law in respect of the conclusion it made in paragraph 12 of its reasons. It follows that I accept the Secretary of State's submission at paragraph 7, which reflects the actual wording of regulation 54(1).

14. In paragraph 8 of her submission the Secretary of State said:

"8. Although the Secretary of State submits that *R.(Pantellerisco) v Secretary of State for Work and Pensions* [2020] EWHC 1944 (Admin) is not applicable to this case, the outcome of the Court of Appeal hearing (schedule for 15 and 16 June 2021 may have a bearing on the Upper Tribunal Judge's determination. As such it is respectfully requested that

a decision be delayed until *Pantellerisco* is resolved at the Court of Appeal.”

The claimant had no objections to a delay in making this determination. However as I have accepted the Secretary of State’s submission that *Pantellerisco* is not applicable in the case. I see no point in doing so and accordingly I have determined the appeal.

D J MAY QC
Judge of the Upper Tribunal
Authorised for issue on 29 April 2021