

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Before Upper Tribunal Judge Kate Brunner QC

This appeal by the claimant succeeds.

As the decision of the First-tier Tribunal involved an error of law I **set aside** the decision of the First-tier Tribunal reference **SC309/18/02070**: that decision now has no effect.

I substitute the decision which the First-tier Tribunal should have made as follows: Appeal allowed. The claimant's entitlement to unemployment credits under 8A of the of the Social Security (Credits) Regulations 1975 did not cease on 20 June 2018.

REASONS

1. This case concerns a decision by the Secretary of State on 13 July 2018 that the claimant's entitlement to credited earnings in relation to periods of unemployment ('unemployment credits') under 8A of the Social Security (Credits) Regulations 1975 ('the Credits Regulations') would cease on 20 June 2018. The decision was made on the basis that the claimant had failed to participate in an interview at the Jobcentre on 4 July 2018, by virtue of refusing to answer questions about his identity, and that he did not contact the Jobcentre within five working days of that failure. The claimant appealed to the First-tier Tribunal ('F-tT') which heard his case on 1 October 2019. The F-tT upheld the Secretary of State's decision. The claimant appealed to the Upper Tribunal.
2. Leave to appeal the F-tT decision was given by Judge Ramshaw on 9 November 2020 on the ground that arguably the F-tT did not adequately engage with the question of what legal basis DWP had for requiring identification documents, and arguably it did not give adequate reasons.
3. The Secretary of State supports the appeal. Neither party seeks an oral hearing, and a hearing is not necessary for me to decide this appeal fairly.

Chronology

4. The claimant was awarded contribution-based Job-seeker's allowance ('JSA') on 1 April 2008. His contribution-based entitlement was exhausted on 6 September 2008, but he continued to claim and receive unemployment credits.
5. The claimant attended fortnightly work interviews at the Jobcentre. He attended a work search review on 4 July 2018. He was asked to identify himself, and sought to rely on his booklet as identification, as he had previously. It appears that there was a dispute about whether he was required to provide identification information such as his date of birth or bank card. The claimant refused to provide that information (p99-103).
6. The claimant made a complaint in writing on the same day about how he had been treated.
7. A similar incident happened on 18 July 2018 where the claimant was asked for identification, refused to provide it, and made a complaint.
8. Meanwhile, on 13 July 2018 the Secretary of State made the decision under appeal, and sent a letter to the claimant headed 'Your claim for Jobseeker's Allowance', saying 'we have looked at your claim again following a recent change. We cannot pay you an allowance from 21 June 2018. This is because: the law says we cannot pay you' (p55). This remarkably uninformative document did not tell the claimant that unemployment credits were being stopped because he had refused to provide identification. The letter was not received by the claimant until 21 July 2018. He immediately wrote on 22 July to DWP saying that there had been no change in his circumstances and asking for an explanation about why benefit had been stopped (p59).
9. In the mandatory reconsideration process the original decision was upheld (p121). The mandatory reconsideration did not take place until 26 July 2019 for reasons which do not affect this appeal.
10. The claimant then applied to the Ft-T, which upheld the Secretary of State's decision.

Application of Incorrect Regulations

11. The Jobseeker's Allowance Regulations 1996 ("the JSA Regulations") set out a framework for entitlement to jobseeker's allowance. The relevant sections are as follows:

23. *A claimant shall attend at such place and at such time as the Secretary of State may specify by a notice in writing given or sent to the claimant.*

25. (1) *Subject to regulation 27, entitlement to a jobseeker's allowance shall cease in the following circumstances—*

(a) *if the claimant fails to attend on the day specified in a notice under regulation 23, other than a notice requiring attendance under an employment programme or a training scheme;*

(b) *if—*

(i) *following a failure to attend at the time specified in a notice under regulation 23, the Secretary of State has informed the claimant in writing that a failure to attend, on the next occasion on which he is required to attend, at the time specified in such a notice may result in his entitlement to a jobseeker's allowance ceasing, and*

(ii) *he fails to attend at the time specified in such a notice on the next occasion;*

(c) *if the claimant was required to provide a signed declaration as referred to in regulation 24(6) and he fails to provide it on the day on which he ought to do so in accordance with regulation 24(10)*

....

26. *Entitlement to a jobseeker's allowance shall cease in accordance with regulation 25 on whichever is the earlier of*

(a) *the day after the last day in respect of which the claimant has provided information or evidence which establishes his entitlement to a jobseeker's allowance,*

(b) *if regulation 25(a) or (b) applies, the day on which he was required to attend, and*

(c) *if regulation 25(c) applies, the day on which he ought to have provided the signed declaration, provided that it shall not cease earlier than the day after he last attended in compliance with a notice under regulation 23.*

27. (1) *Entitlement to a jobseeker's allowance shall not cease if the claimant shows, before the end of the fifth working day after the day on which he failed to comply with a notice under regulation 23 or to provide a signed declaration in accordance with regulation 24, that he had good cause for the failure ...*

12. The Secretary of State relied on the following position in the mandatory reconsideration notice, and in its response for the F-tT:

- i. The claimant was in receipt of something which it called "Jobseeker's Allowance (credits only)".
- ii. The JSA Regulations applied.
- iii. When the claimant refused to provide identification on 4 July 2018 that amounted to a failure to participate in an interview under regulation 23 JSA Regulations. He had failed to attend interview, and so regulation 25(1)(a) JSA Regulations was engaged, and his entitlement ceased.

- iv. The claimant did not make contact within 5 days of that failed interview to provide good reason for his failure, so regulation 27 of the JSA Regulations did not apply.
 - v. It followed that the claimant's entitlement to JSA ceased (the date of 21 June being calculated in accordance with part of regulation 25 of the JSA Regulations).
13. The First-tier Tribunal ('F-tT) applied the same reasoning, and reached the same conclusion.
14. The Secretary of State, in helpful submissions to this Upper Tribunal, now submits that the JSA Regulations did not apply at all. The shorthand phrase 'Jobseeker's Allowance (Credits only)' was used in correspondence to refer to the claimant's benefit, but the claimant was not in receipt of jobseeker's allowance at the relevant time. He was credited with earnings for the purposes of entitlement to benefits as a result of being unemployed. The regulations allowing credited earnings for periods of unemployment are the Social Security (Credits) Regulations 1975 ("the Credits Regulations"). The credits are sometimes referred to as 'National Insurance credits' or 'credits for employment' or 'credited earnings'. I call them 'unemployment credits' to mirror the heading of regulation 8A of the Credits Regulations.
15. The relevant parts of regulation 8A of the Credits Regulations are as follows:

8A.— Credits for unemployment

(1) Subject to regulation 9, for the purposes of entitlement to any benefit by virtue of a person's earnings or contributions, he shall be entitled to be credited with earnings equal to the lower earnings limit then in force, in respect of each week to which this regulation applies.

(2) Subject to paragraph (5) this regulation applies to a week which, in relation to the person concerned, is—

(a) a week for the whole of which he was paid a jobseeker's allowance; or

(b) a week for the whole of which he satisfied or was treated as having satisfied the conditions set out in paragraphs (a), (c) and (e) to (h) of section 1(2) of the Jobseekers Act 1995 (conditions for entitlement to a jobseeker's allowance) and in respect of which he has satisfied the further condition specified in paragraph (3); or

(c) a week which would have been a week described in sub-paragraph (b) but for the fact that he was incapable of work for part of it.

(3) The further condition referred to in paragraph (2)(b) is that the person concerned—

(a) furnished to the Secretary of State notice in writing of the grounds on which he claims to be entitled to be credited with earnings—

(i) on the first day of the period for which he claims to be so entitled in which the week in question fell; or

(ii) within such further time as may be reasonable in the circumstances of the case; and

(b) has provided any evidence required by the Secretary of State that the conditions referred to in paragraph (2)(b) are satisfied.

(4) ...

(5) This regulation shall not apply to—

(a) a week in respect of which, in relation to the person concerned was not entitled to a jobseeker's allowance (or would not have been if he had claimed it) because of section 14 of the Jobseekers Act 1995 (trade disputes); or

(b) a week in respect of which, in relation to the person concerned, there was in force a direction under section 16 of that Act (which relates to persons who have reached the age of 16 but not the age of 18 and who are in severe hardship); or

(c) a week in respect of which, because of section 19 of that Act, a jobseeker's allowance was not payable to the person concerned even though he satisfied the conditions for entitlement to that allowance; or

(d) a week in respect of which a jobseeker's allowance was payable to the person concerned only by virtue of regulation 141 of the Jobseeker's Allowance Regulations 1996 (circumstances in which an income-based jobseeker's allowance is payable to a person in hardship); or

(e) where the person concerned is a married woman, a week in respect of any part of which an election made by her under regulations made under section 19(4) of the Contributions and Benefits Act had effect.

16. It should be noted that regulation 3 of the Credits Regulations which deals with general provisions relating to the crediting of contributions and earnings (such as setting limits on the credited earnings in a year) also applies, but is not of significance to this appeal.
17. The claimant's entitlement to unemployment credits was therefore triggered by the claimant satisfying regulation 8A(2)(b)(i), which meant satisfying section 1(2)(a), (c), and (e) to (h) of the Jobseekers Act 1985. That means that the claimant had to be available for employment, actively seeking employment, not engaged in remunerative work, did not have limited capability for work, was not receiving relevant education and was under pensionable age. The claimant also had to satisfy regulation 8A(3), by providing any evidence required by the Secretary of State that the criteria were met.
18. Once the claimant met those criteria, he was entitled to credits under regulation 8A(1), unless the regulation was disapplied. Regulation 8A(5) sets out limited bases for disapplying regulation 8A, including, for example, where the person concerned would not have been entitled to jobseeker's allowance because of section 14 of the Jobseekers Act 1995 which relates to refusal to work during trade disputes. There is no provision for disapplying regulation 8A on the basis that the person concerned would not have been entitled to jobseeker's allowance because they had failed to attend an interview.

The error of law

19. The F-tT fell into error of law by adopting the Secretary of State's erroneous application of the Jobseeker's Allowance Regulations 1996. The F-tT treated the claimant as if he was in receipt of jobseeker's allowance. The failure to apply the correct law, which was the Social Security (Credits) Regulations 1975, was a material error of law. It follows that I set that decision aside.

Substituted decision

20. In this case it is appropriate that I remake the decision of the Ft-T. The Secretary of State agrees, and suggests wording similar to that which I have adopted.

21. The Secretary of State agrees that the claimant satisfied all of the conditions required for unemployment credits under 8A of the Credits Regulations.

22. It is not in dispute that the claimant did not answer questions relating to his identity. There may well be situations where a claimant's failure to cooperate with reasonable enquiries to identify him or herself means that a claimant is no longer entitled to unemployment credits. The conditions for eligibility plainly require the Secretary of State to be satisfied of a claimant's identity and to have the claimant's personal details (to check, for example, that they are not of pensionable age). In some situations, a failure to provide adequate identification documents, or personal details when requested, could amount to a failure to provide evidence required by the Secretary of State under 8A(3)(b) of the Credits Regulations (evidence required to show that conditions for eligibility are satisfied). That could lead to a finding that a claimant had not satisfied 8A(3)(b), and as a result had not met the eligibility requirement in 8A(2)(b).

23. On the facts of this case, no issue arises in relation to 8A(3)(b) of the Credits Regulations. The Secretary of State did not purport to require evidence that the conditions in 8A(2)(b) were satisfied and so failure to provide identification is not a failure to comply with regulation 8A(3)(b) on the facts of this case. The Secretary of State does not contend that there is any lawful basis for determining that the claimant's unemployment credits ceased on 20 June 2018, and I agree.

24. I therefore substitute the F-tT's decision with this decision: the appeal is allowed. The claimant's entitlement to unemployment credits under 8A of the of the Social Security (Credits) Regulations 1975 did not cease on 20 June 2018.

Observations

25. The Secretary of State fell into error, and drew the First-tier Tribunal into error, by dealing with unemployment credits under 8A of the Credits Regulations as if they were a type of jobseeker's allowance. That error was no doubt facilitated by referring to the unemployment credits as "Jobseeker's Allowance (Credits only)". The paperwork which was generated by the Department of Work and Pensions consistently identified the benefit as jobseeker's allowance. Proforma letters referring to jobseeker's allowance were generated, and the law relating to jobseeker's allowance was applied. The Department of Work and Pensions moved through the whole process of issuing a decision notice, drafting a mandatory reconsideration notice, and writing a response for the First-tier Tribunal without identifying that it was not, in fact, dealing with jobseeker's allowance at all.
26. The Department of Work and Pensions did not just confuse itself: the confusion created for the claimant as a result of the paperwork was significant. He was not informed what benefit was being stopped, or why. Tribunals and courts have repeatedly sought to emphasise the importance of claimants being able to understand the basis for decisions which affect their benefit entitlement. In this case the claimant was told that the basis for stopping the benefit entitlement was : 'This is because: the law says we cannot pay you'. That was an entirely inadequate communication, and was part of a series of inadequate communications and gaps in communication.
27. There is no specific procedure in the Credits Regulations 1975 to follow if a claimant does not provide details required by the Secretary of State under 8A(3)(b). The Secretary of State submits to this Upper Tribunal that public law principles would require the adoption of a procedure which included notification being given to the claimant about the consequences of any further failure to provide identification. That point does not arise on appeal and so I do not determine it, but I note that the procedure adopted left the claimant in complete ignorance of what was happening, and it is to his credit that he has pursued this case to the Upper Tribunal so that the error could be identified and put right. The Secretary of State may consider it wise to

re-visit the terminology, procedure and paperwork being used to deal with unemployment credits to avoid this sort of situation recurring.

Upper Tribunal Judge Kate Brunner QC

Signed on the original on 19 July 2021