[2021] UKUT 310 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CTC/1514/2020**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

The Commissioners of Her Majesty's Revenue & Customs

Appellants

-v-

RS

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 3 December 2021
Decided on consideration of the papers

Representation
Appellant: Haffner Hoff Ltd, Accountants
Respondents DWP Decision-Making and Appeals, Leeds

DECISION

1 The decision made by a District Tribunal Judge on 15 September 2020 in the proceedings before the First-tier Tribunal, is treated as giving the Commissioners of Her Majesty's Revenue & Customs permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the claimant's appeal (ref. SC946/19/02369) which was made at Stockport North on 27 April 2020.

2 To the extent that the District Tribunal Judge's decision of 15 September 2020 also purported to refer this matter to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007, it is of no effect.

3 The appeal is allowed.

4 The First-tier Tribunal's decision dated 27 April 2020 involved making a legal mistake.

5 I set that decision aside and re-make it as follows.

> **Tax credits are not awarded to the claimant in respect of any period after 25 June 2019.**

REASONS

Introduction

1. This appeal raises a short legal point about the circumstances in which a claimant who has been awarded tax credits in the past may continue to claim them.

2. There are also subsidiary issues about whether the claimant had a right of appeal to the First-tier Tribunal in the first place, and about the power of the First-tier Tribunal to refer an issue to the Upper Tribunal under section 9(5) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

Factual background and procedural history

3. Those issues arise from facts that are not in dispute. The following chronology is a re-statement of the facts that were accepted by the First-tier Tribunal, interspersed with the dates of relevant developments in the law.

4. Before the events that gave rise to these proceedings, the claimant had an award of tax credits for the tax year from 6 April 2018 to 5 April 2019.

5. By 12 December 2018 (and therefore during the 2018/2019 tax year) universal credit had been brought fully into force for the whole of the United Kingdom.[1] As universal credit is intended to replace tax credits, the effect was that—as a general rule—it was no longer possible to make a claim for tax credits: prospective claimants are now normally obliged to claim universal credit instead.

6. However, that general rule was subject to a number of exceptions, one of which applied (and, for the moment, I paraphrase) to those with tax credit awards for one year who claim tax credits for the next year.

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1 See Article 3 of, and the final line of the Schedule to, the Welfare Reform Act 2012 (Commencement No. 17, 19, 22, 23 and 24 and Transitional and Transitory Provisions (Modification) (No. 2)) Order 2018 (SI 2018/881).

7. On 1 February 2019, tax credits were abolished by s.33(1)(f) of the Welfare Reform Act 2012 by article 2 of the Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019 (SI 2019/167) ("the No.32 Order").

8. But the abolition was subject to the savings set out in that Order. One of those savings applied (and, again, I paraphrase) to some people who had had awards of tax credits in the past.

9. It is not in dispute that, when the 2018/2019 tax year came to an end, the claimant fell within the exceptions and savings described in paragraphs 6 and 8 above. As a result, tax credits continued to exist in his case and he continued to be able to claim them.

10. In those circumstances, the claimant's award for 2018/2019 took effect as a claim for the 2019/2020 tax year in the usual way.

11. On 1 July 2019, HM Revenue & Customs ("HMRC") made an initial decision on the claim for 2019/2020 under section 14 of the Tax Credits Act 2002 ("the Act"). They awarded the claimant tax credits of nil for the period from 6 April 2019 to 25 June 2019.

12. That award did not last for the full 2019/2020 tax year because the claimant had applied for childcare payments under the Childcare Payments Act 2014 and section 30(3) of that Act had the effect of terminating the tax credits award.

13. That initial decision was not challenged at the time and, as I understand matters, has not been challenged subsequently.

14. For reasons that are unclear from the papers, the claimant's application for child care payments appears to have been unsuccessful and, at some point between 27 June and 1 August 2019, he decided not to pursue it further.

15. In those circumstances, he attempted to make a claim for tax credits by telephone on 1 August 2019. HMRC took the view that no claim could be made because tax credits had been abolished for him and, even if they had not, it was no longer possible for him to claim them.

16. Following a review under s.21A of the Act, the claimant then appealed to the First-tier Tribunal. HMRC resisted the appeal on for the reasons set out in the previous paragraph and further asserted that the claimant had no right of appeal against a decision not to accept a claim.

17. On 27 April 2020, the First-tier Tribunal allowed the claimant's appeal. It held that it did have jurisdiction over it and that the claimant fell within the exception referred to in paragraph 6 above.

18. On 15 September 2020, a District Tribunal Judge (not the Judge who made the decision on 27 April 2020), whose signature is illegible and who is not otherwise identified, made a decision that—for the reasons given in paragraphs 49 to 59 below—I have treated as giving HMRC permission to appeal to the Upper Tribunal.

Abolition of tax credits

19. So far as is relevant to this appeal, section 33 of the Welfare Reform Act 2012 provides as follows:

> "**Abolition of benefits**
>
> **33.**—(1) The following benefits are abolished—
>
> (a)-(e) …
>
> (f) child tax credit and working tax credit under the Tax Credits Act 2002."

As noted in paragraph 7 above, subsection (1)(f) was brought into force on 1 February 2019 by the No.32 Order.

20. Pausing there, it is worth making the point that as tax credits were abolished on 1 February 2019, it cannot have been possible for the claimant to have made a valid claim for them on 1 August 2019 unless some saving or transitional provision applied that meant the abolition did not apply to him.

21. In other words, HMRC must succeed in this appeal unless the claimant can show that a saving or transitional provision allowed him to make a claim for tax credits six months after they were abolished.

22. However, the claimant *can* show that.

23. Article 3(1)-(4) of the No.32 Order states:

"**Savings**

3.—(1) Section 33(1)(f) of the Act, and the repeal of Part 1 of the 2002 Act (but not Schedule 1 or 3) by Part 1 of Schedule 14 to the Act, shall be treated as though they had not come into force, in relation to a case as referred to in paragraph (2), (3), (4), (5) or (9).

(2) The case referred to is the case of an award of a tax credit that has effect for a period that includes 31st January 2019.

(3) The case referred to is the case of an award of a tax credit where the period for which it has effect begins on or after 1st February 2019 and where the claim for the award is made by—

(a) a single claimant who is, or a couple both members of which are, aged under the qualifying age on the day that the claim is made;

(b) a mixed-age couple which is also a UC couple on that day; or

(c) a polygamous unit which on that day consists wholly of persons who, ignoring any restrictions on claiming universal credit in the UC transitional provisions, could claim universal credit, and meet the UC age condition, as—

(i) UC joint claimants and one or more UC single claimants; or

(ii) a number of UC single claimants.

(4) [*Omitted as applying to "mixed-age couples" and polygamous family units*]

(5) The case referred to is a case, not falling within paragraph (3) or (4), of—

(a) an award of child tax credit where the period for which it has effect begins on or after 1st February 2019 and where, on the day on which the claimant or claimants of the award makes or make the claim for it, he or she (or they) has or have an award of working tax credit;

(b) an award of working tax credit where the period for which it has effect begins on or after 1st February 2019 and where, on the day on which the claimant or claimants of the award

> makes or make the claim for it, he or she (or they) has or have an award of child tax credit;
>
> (c) an award of child tax credit or working tax credit where the period for which it has effect begins on or after 1st February 2019 and where the claimant or claimants who makes or make the claim for the award had an award of the same type of tax credit for the previous tax year to the tax year for which the award is made."

24. HMRC now concedes that the claimant fell within the exception in article 3(5)(c). However, I tend towards the view for which the claimant's representatives contend, namely, that he falls within article 3(3)(a). Article 3(5) only applies to cases "not falling within paragraph (3) or (4)" so, if that view is correct, article 3(5)(c) has no application. Ultimately, however, that is no longer an issue I need to decide. Both parties agree, and I accept, that the abolition of tax credits did not take effect in relation to the claimant.

New claims for tax credits

25. But the fact that tax credits continue to exist in the claimant's case, does not necessarily mean that he continues to be eligible to claim them.

26. The relevant law is set out in Article 7 of the Welfare Reform Act 2012 (Commencement No.23 and Transitional and Transitory Provisions) Order 2015 (SI 2015/634) ("the No.23 Order").

27. Immediately before the abolition of tax credits, article 7 was in the following terms:

> "**Transitional provision: claims for housing benefit, income support or a tax credit**
>
> **7.**—(1) Except as provided by paragraphs (2) to (6), a person may not make a claim for housing benefit, income support or a tax credit (in the latter case, whether or not as part of a Tax Credits Act couple) on any date where, if that person made a claim for universal credit on that date (in the capacity, whether as a single person or as part of a couple, in which he or she is permitted to claim universal credit under the Universal Credit Regulations 2013), the provisions of the Act listed in Schedule 2 to the No. 9 Order would come into force under article 3(1) and (2)(a) to (c) of this Order in relation to that claim for universal credit.
>
> (2) Paragraph (1) does not apply to a claim for housing benefit, income support or a tax credit where, by virtue of a determination made under regulation 4, or by virtue of regulation 4A of the Universal Credit (Transitional Provisions) Regulations 2014, or by virtue of article 4(11)

> of the Welfare Reform Act 2012 (Commencement No. 32 and Savings and Transitional Provisions) Order 2019, the person in question would be prevented from making a claim for universal credit as referred to in that paragraph.
>
> (3)-(4) [*Omitted as applying only to housing benefit*]
>
> (5) Paragraph (1) does not apply to a claim for a tax credit where a person or persons makes or make a claim for child tax credit or working tax credit and on the date on which he or she (or they) makes or make the claim he or she (or they) has or have an award of working tax credit or child tax credit respectively.
>
> (6) Paragraph (1) does not apply to a claim for a tax credit where a person has or had, or persons have or had, an award of child tax credit or working tax credit in respect of a tax year and that person or those persons makes or make (or is or are treated as making) a claim for that tax credit for the next tax year.
>
> (7) In paragraph (5), the reference to a person having an award of a tax credit includes where the person is "treated as being entitled to a tax credit" in the circumstances referred to in regulation 11(1) and (2)(a) to (ca) of the Universal Credit (Transitional Provisions) Regulations 2014 but as if, in regulation 11(1), for "For the purposes of regulations 7(7) and 8(4)" there were substituted "For the purposes of article 7(5) of the Welfare Reform Act 2012 (Commencement No 23 and Transitional and Transitory Provisions) Order 2015"."

28. Those provisions require some explanation.

29. The effect of article 7(1) is that anyone who lives in an area in which universal credit has been brought into force cannot claim a tax credit unless he falls within one of the exceptions in paragraphs (2)-(6) of the article.

30. The first relevant exception is in article 7(2). Regulation 4 of the Universal Credit (Transitional Provisions) Regulations 2013 ("the 2013 Regulations") empowers the Secretary of State to decide that in certain cases no claim for universal credit could be made. At the relevant time, regulation 4A prevented claims for universal credit by those who were entitled to the severe disability premium as part of their income support, housing benefit, income-based jobseeker's allowance or income-related employment and support allowance. And article 14(11) of SI 2019/167 prohibits claims for universal credit by frontier workers.

31. The claimant in this appeal is not affected by any of those provisions and therefore does not fall within the first exception.

32. The second relevant exception is in article 7(5). It allows someone with an award of child tax credit to make a claim for working tax credit and *vice versa*.

33. On 1 August 2019, the claimant did not have an award of either child tax credit or working tax credit because that award had been terminated with effect from 26 June 2019. Therefore the second exception does not apply to him either.

34. The third relevant exception is in article 7(6). It applies if someone has or had an award of a tax credit in respect of a tax year and makes a claim (or is treated as making) for that tax credit "for the next tax year".

35. The claimant had an award of tax credits "in respect of" the 2018/19 tax year so "the next tax year" was 2019/2020. The claim made on 1 August 2019 was made *during* 2019/2020 but was it *for* that year?

36. I have come to the conclusion that it was not and that the First-tier Tribunal mistook the law when it decided that it was.

37. As a matter of statutory interpretation, the analysis that leads me to that conclusion is brief:

(a) Tax years run from 6 April in one year to 5 April in the next (both dates inclusive);

(b) Article 7(6) draws a distinction between the award, which must have been made "in respect of a tax year", and the subsequent claim, which must have been "for the next tax year";

(c) It may be—it is unnecessary for me to decide—that the phrase "in respect of a tax year" is apt to include awards for periods that include only part of the period between 6 April and the following 5 April.[2] But, in my judgment, the phrase "for the next tax year" refers to the next tax year *as a whole*;

(d) In the present case, the claim for 2019/2020 that the claimant was treated as making by virtue of having an award for 2018/2019 was therefore "for the next tax year". It makes no difference that the claim led to a nil award for a period of less than three months. The claim was for the 2019/2020 tax year as a whole and the award would have lasted for the whole year, had there not been grounds on which to terminate it sooner.

[2] Although I note that where tax credits legislation means "the whole or a part of, a tax year", it often says so: see, *e.g.*, sections 3(1) and 17(1) of the 2002 Act.

(e) By contrast, the claim made on 1 August 2019 may—again I do not have to decide—have been made "in respect of the next tax year" but it was not "for the next tax year". It was not made for the full period from 6 April 2019 to 5 April 2020, but for the period from 1 August 2019[3] to 5 April 2020.

(f) It follows that, the claimant did not fall within the third exception to article 7(1) and was therefore barred from claiming tax credits when he purported to do so on 1 August 2019.

38. That reasoning is not capable of further elaboration, but I draw support, first, from the fact that the savings in the No.32 Order do not match the exceptions in Article 7 of the No.23 Order and, second, from the description of article 7 (in the heading) as a "transitional provision".

39. The lack of congruence between the two Orders cannot be an accident. It would have been a simple matter for the legislator to have aligned the classes of those for whom tax credits were not abolished and those who were entitled to continue to claim them. The decision not to do so must have been deliberate and indicates a legislative intention that even in those cases in which tax credits were not abolished on 1 February 2019, a claimant might subsequently lose entitlement to them by being unable to make a further or fresh claim.

40. Those considerations correspond with the transitional nature of article 7. Its purpose is not to sustain existing rights to tax credits indefinitely—that could hardly be the case when the overt policy behind the Welfare Reform Act 2012 is that tax credits are ultimately to be replaced by universal credit—but to manage the transition from the former to the latter.

41. How any transitional provision operates depends on the words used by the legislator. But in the analogous field of social security benefits, they often have the effect that entitlement continues until the claimant ceases to satisfy the conditions of entitlement to the benefit in question, following which transitional protection ceases and entitlement cannot be regained. It is therefore not surprising to find that a transitional provision relating to tax credits should have the effect (at least in some circumstances) that transitional protection ended on the termination of an award.

42. I would add one thing. HMRC's submissions to the First-tier Tribunal and Upper Tribunal both assert that the policy is that article 7(6) applies to renewal claims only. But those submissions are short on analysis as to how that result is to be derived from the words used. I therefore stress that I have **not** decided that the article only applies to

[3] Or, if applicable, from any date up to 31 days earlier prescribed by regulation 7 of the Tax Credits (Claims and Notifications) Regulations 2002.

renewal claims: I have only decided that it does not apply in this case, for the reasons given.

43. In particular, the phrase "an award of …tax credit in respect of a tax year" seems to present problems.

44. If "in respect of a tax year" means "in respect of a whole tax year", then a claimant with an award from 7 April in one year to 5 April in the next would not be covered by it and could not make a further claim even though that further claim would normally be regarded as a renewal.

45. If, on the other hand, the phrase also covers awards for part of a tax year, someone with an award of nil for the first day only of one tax year would seem to be eligible to make a fresh claim on the first day of the next, even though that would not be a renewal claim.

46. As I have said, I do not need to decide these issues (which may turn on a closer analysis of the No.32 Order), and I prefer to wait for a case that turns on them. However, it would be helpful if HMRC's future submissions to both tribunals were to explain why, article 7(6) is said only to reply to renewal claims (if, indeed, that remains HMRC's position).

Did the First-tier Tribunal have jurisdiction

47. Given what I have decided on the substantive issue, it is unnecessary for me to decide the issue of jurisdiction and I decline to do so. If, which I doubt, the point has not already been decided by the various Upper Tribunal authorities cited by the learned judge, then it is, again, better decided in a case which turns on it.

48. Even if the First-tier Tribunal did not have jurisdiction, the Upper Tribunal does: see *LS and RS v Commissioners for Her Majesty's Revenue & Customs* [2017] UKUT 257 (AAC) at [23]. As the practical effect of my decision is the same as would have obtained had the First-tier Tribunal declined jurisdiction, I see no point in embarking on a detailed legal analysis of whether it was right to accept it.

Section 9(5) of the 2007 Act

49. In paragraph 18 above, I refer to the fact that I have "treated" the decision made by the District Tribunal Judge on 15 September 2020, as giving HMRC permission to appeal. The full decision notice reads as follows:

> "The Appellant has applied for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal issued on 27 April 2020.
>
> Permission to appeal is granted because the grounds of appeal are arguable.
>
> The matter shall be referred to the Upper Tribunal in accordance with Section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007."

50. I can understand why the District Tribunal Judge who gave that decision apparently wished to remain anonymous:

(a) It was the *respondent* who made the application for permission to appeal, not the appellant;

(b) The respondent is incorrectly identified as the Secretary of State for Work and Pensions rather than as HMRC;

(c) The decision notice fails to record whether a review was carried out under section 9 of the 2007 Act and rule 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules") before the application for permission to appeal was considered (*i.e.*, as required by rule 39(1) of the SEC Rules);

(d) Despite that, the notes on the decision notice contain the standard boilerplate that:

  (i) explains what a party who has not been given an opportunity to make representations before a review may do where a review has taken place and action taken following it; and

  (ii) states that either party is entitled to apply for permission to appeal against the decision (which would be appropriate if the substantive decision had been re-made on review, but is not appropriate where the decision on review is to refer a matter to the Upper Tribunal—see section 11(5)(d)(iv) of the 2007 Act—or to grant permission to appeal).

(e) Further, the decision notice contains the standard boilerplate about a party's right to challenge any direction given, when no directions have in fact been given; and

(f) Finally, the briefest consideration of section 9(5) of the 2007 Act would have revealed that the First-tier Tribunal has no power to do what the learned judge purported to do.

51. However, the judge in this appeal is not alone in making the last of those errors. On the contrary, I find myself wondering how many times the Upper Tribunal will have to explain that the First-tier Tribunal cannot both grant permission to appeal and, at the same time, refer the matter to the Upper Tribunal under section 9(5)(b), before the penny finally drops.

52. So far as is relevant, section 9 of the 2007 Act is in the following terms:

> "**Review of decision of First-tier Tribunal**
>
> **9.**—(1) The First-tier Tribunal may review a decision made by it on a matter in a case …
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> (6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter."

53. The 2007 Act and the procedural rules made under the authority of that Act can give rise to difficult points of statutory interpretation. However, the meaning of section 9(5) is not among them. The opening words of the section provide that the powers conferred on the First-tier Tribunal arise where it has *set aside* its earlier decision under subsection (4)(c). In other words, the power to refer a matter to the Upper Tribunal under section 9(5)(b) exists if—and only if—the Tribunal's substantive decision has been set aside.

54. At the risk of labouring a point that should be obvious, it is not possible to give permission to appeal against a decision that has been set aside, because setting aside

a decision has the effect that it ceases to exist: there is no longer anything to give permission to appeal against. If that were not sufficient, a decision by the First-tier Tribunal to set aside an earlier decision following a section 9 review is an "excluded decision"—see section 11(5)(e) of the 2007 Act—with the effect that there is no right of appeal against it.

55. A simultaneous grant of permission to appeal and a reference under section 9(5)(b) is therefore an impossibility.

56. I suspect that District Tribunal Judges nevertheless continue to issue decisions saying that this is what they have done, because they hope that section 9(6) will tie the hands of the Upper Tribunal Judge who deals with the matter and force him or her to re-make the First-tier Tribunal's decision under section 12(2)(b)(i) of the 2007 Act rather than to remit it under section 12(2)(b)(ii).

57. If those suspicions are correct, then I doubt it is proper to seek to restrict the exercise of statutory powers conferred on a higher court or tribunal. But even if those doubts are misplaced, the tactic simply does not work. Granting permission to appeal will mean that proceedings in the Upper Tribunal will be dealt with in accordance with section 12 and that section includes a power to remit, irrespective of whether the decision granting permission invokes section 9(5)(b).

58. Moreover, even if subsection (5) were capable of another interpretation (which it is not) the First-tier Tribunal is bound by Upper Tribunal authority to interpret it as I have explained it above: see, *e.g.*, the decisions of Judge Markus QC in *GA v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 416 (AAC), and of Judge Wright in *LM v HM Revenue and Customs (CHB)* [2016] UKUT 389 (AAC).

59. Taking all those factors into account, I have to decide the effect of the decision dated 15 September 2020: it cannot be both a decision granting permission to appeal to the Upper Tribunal and a decision to refer a matter to the Upper Tribunal under section 9(5). As appears from my decision on page 1, I have decided to treat it as the former, rather than the latter. The First-tier Tribunal was considering an application for permission to appeal and had power to grant or refuse that application. Unless and until it set aside its earlier decision, it had no power to make a section 9(5) reference. My decision therefore treats the District Tribunal Judge as having done what he or she had power to do and as not having done what he or she had no power to do.

60. Taken on its face, the District Tribunal Judge's decision also gives permission to appeal to the claimant (who had not asked for it) rather than HMRC (who had). I have therefore taken the opportunity to correct that error.

61. Although it does not excuse the District Tribunal Judge in this case, I suspect that the fact the Upper Tribunal continues to receive decisions in this form reflects the continuing use of a defective precedent, particularly in the Northeast and Northwest Regions of the Social Entitlement Chamber. I hope that the use of that precedent will now cease and that whatever is put in its place will require District Tribunal Judges to identify themselves when deciding applications for permission to appeal.

62. As with other groups of people who have to sign many documents as part of their work, judges' signatures can sometimes develop idiosyncrasies over time. There is nothing wrong with that.

63. What is wrong, however, is for the parties to be left guessing as to who has made a decision about their case. That is information that they are entitled to know and transparent justice requires that the information be provided without the parties having to ask for it. The decision notice should therefore always include the judge's name in typed text, whether or not the judge's signature is—or might be thought to be—illegible.

Authorised for issue
on 3 December 2021

Richard Poynter
Judge of the Upper Tribunal