

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

**UPPER TRIBUNAL CASE No: CUC/0761/2019  
[2021] UKUT 46 (AAC)**

**NM v SECRETARY OF STATE FOR WORK AND PENSIONS**

Decided without a hearing

**Representatives**

Claimant	Tower Hamlets CAB and then Chris Parsons of Tower Hamlets Law Centre
Secretary of State	DMA Leeds

**DECISION OF UPPER TRIBUNAL JUDGE JACOBS**

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

Reference: SC242/18/06661  
Decision date: 6 November 2018  
Venue: Fox Court

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the Secretary of State's decisions of 13 December 2017 and 13 February 2018 are confirmed, save only that the amount of the deposit on the claimant's uniform is to be removed from the amount of his employed earnings.

**REASONS FOR DECISION**

1. I am sorry that it has taken so long to decide this appeal. It was first held back to await the outcome of the appeal to the Court of Appeal against the decision of the Administrative Court in *R (Johnson, Woods, Barrett and Stewart) v Secretary of State for Work and Pensions* [2019] EWHC 23 (Admin). It was then held back to decide whether it raised issues under the Court of Appeal's decision: *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

**A. The issues**

2. There are two issues in this universal credit appeal. One is whether the Secretary of State and the First-tier Tribunal were correct to treat the return by an employer of the deposit paid by the claimant on his uniform counted as earned income. The other is how late payments of earnings should be treated. The answers to those issues involve delving into the complexities of the Welfare Reform Act 2012 and the Universal Credit Regulations 2013 (SI No 376).

**B. What happened**

3. The claimant was a security guard, who last worked on 19 September 2017. He claimed and was awarded universal credit. His assessment period ran from 13<sup>th</sup> of one month to 12<sup>th</sup> of the next month, both dates included. In the assessment periods for October-November 2017 and January-February 2018, the claimant received payments from his former employer, which led to nil assessments. Those payments were made late and represented unpaid wages, holiday pay and the return of a deposit that the claimant had paid on his uniform at the start of his employment. The October-November payment was made after negotiation by the Whitechapel Legal Advice Centre; the payment in January-February was agreed during ACAS Conciliation.

4. The former employer was a Real Time Information Employer for the purposes of the legislation.

**C. The legislation**

*The Welfare Reform Act 2012*

5. Section 3 of this Act provides that a single claimant is only entitled to universal credit if both the basic conditions and the financial conditions are met. Section 5 deals with the financial conditions:

**5 Financial conditions**

(1) For the purposes of section 3, the financial conditions for a single claimant are-

...

(b) the claimant's income is such that, if the claimant were entitled to universal credit, the amount payable would not be less than any prescribed minimum.

Section 8 then deals with the calculation of awards. The basic structure of the calculation is that there is a maximum amount from which specified amounts are to be deducted. One deduction is for earned income:

(3) The amounts to be deducted are-

(a) an amount in respect of earned income calculated in the prescribed manner ...

*The Universal Credit Regulations 2013*

6. Chapter 2 of Part 6 of these Regulations deals with earned income.

**51 Introduction**

This Chapter provides for the calculation or estimation of a person's earned income for the purposes of section 8 of the Act (calculation of awards).

**52 Meaning of 'earned income'**

'Earned income' means-

- (a) the remuneration or profits derived from-
  - (i) employment under a contract of service or in an office, including elective office,
  - (ii) a trade, profession or vocation, or
  - (iii) any other paid work.
- (b) any income treated as earned income in accordance with this Chapter.

**54 Calculation of earned income – general principles**

(1) 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.

...

**55 Employed earnings**

(1) This regulation applies for the purpose of calculating earned income from employment under a contract of service or in an office, including elective office ('employed earnings').

(2) Employed earnings comprise any amounts that are general earnings, as defined in section 7(3) of ITEPA ...

Section 55(3) then provides for deductions to be made, including:

- (b) any amounts paid by the person in that period in respect of the employment by way of income tax or primary Class 1 contributions ...

**61 Information for calculating earned income - real time information etc**

(1) Unless paragraph (2) applies, a person must provide such information for the purposes of calculating their earned income at such times as the Secretary of State may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

- (a) the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations and is received by the Secretary of State from HMRC in that assessment period ; and

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- (b) for an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil.
  - (3) The Secretary of State may determine that paragraph (2) does not apply—
    - (a) in respect of a particular employment, where the Secretary of State considers that the information from the employer is unlikely to be sufficiently accurate or timely; or
    - (b) in respect of a particular assessment period where—
      - (i) no information is received from HMRC and the Secretary of State considers that this is likely to be because of a failure to report information (which includes the failure of a computer system operated by HMRC, the employer or any other person); or
      - (ii) the Secretary of State considers that the information received from HMRC is incorrect, or fails to reflect the definition of employed earnings in regulation 55, in some material respect.
  - (4) Where the Secretary of State determines that paragraph (2) does not apply, the Secretary of State must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as the Secretary of State thinks fit.
  - (5) When the Secretary of State makes a decision in accordance with paragraph (4) the Secretary of State may—
    - (a) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Secretary of State has received the information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period); or
    - (b) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC.
  - (6) Paragraph (5) also applies where the Secretary of State makes a decision under regulation 41(3) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 in a case where the person disputes the information provided by HMRC.
  - (7) In this regulation 'Real Time Information Employer' has the meaning in regulation 2A(1) of the PAYE Regulations.
7. In order to understand and apply those provisions, it is necessary to take account of two definitions: assessment period (used in regulation 54(1)) and ITEPA (used in regulation 55(2)). Regulation 2 defines what is meant by ITEPA:

## **2 Interpretation**

In these Regulations-

...

'ITEPA' means the Income Tax (Earnings and Pensions) Act 2003; ...

Regulation 21 defines what is meant by assessment periods:

**21 Assessment periods**

(1) An assessment period is, subject to paragraph (5), a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

*The Income Tax (Earnings and Pensions) Act 2003*

8. It is also necessary to take account of what general earnings means. Section 7 of this Act provides:

**7 Meaning of 'employment income', 'general earnings' and 'specific employment income'**

(1) This section gives the meaning for the purposes of the Tax Acts of 'employment income', 'general earnings' and 'specific employment income'.

...

(3) 'General earnings' means-

(a) earnings within Chapter 1 of Part 3 ...

Chapter 1 of Part 3 contains only one section: section 62. It is sufficient to quote the first two subsections:

**62 Earnings**

(1) This section explains what is meant by 'earnings' in the employment income Parts.

(2) In those Parts 'earnings', in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

**D. How the legislation applies – returned deposit**

9. The Secretary of State's representative has conceded that the First-tier Tribunal made an error of law by treating the amount of this deposit as earned income. This ultimately comes down, via regulation 55, to the application of section 62 of ITEPA. As the representative succinctly submitted: 'a refund of money previously paid by an employee to their employer does not, I submit, fall within that section and is not employed earnings.' I accept that.

10. The consequences were also conceded. It follows that regulation 61(3)(b)(ii) applies because 'the information received from HMRC ... fails to reflect the definition of employed earnings in regulation 55'. That, in turn, triggers the discretion in regulation 61(4). Given that the money received by the claimant was not employed

earnings, there is only one way that that discretion could properly be exercised – the amount must be removed from the calculation of the claimant’s entitlement. I have re-made the tribunal’s decision to that effect.

**E. How the legislation applies – late payment**

11. This issue is in dispute.

12. It is important to have regard both to the structure and to the language of regulation 61. Regulation 61(2) provides that the calculation of earned income is to be based on the information reported by the employer to HMRC and passed on to the Secretary of State. Regulation 61(3) provides three exceptions to that rule. One – regulation 61(3)(b)(i) – cannot arise on the facts here and can be ignored. That leaves regulation 61(3)(a) and (b)(ii).

13. The claimant’s representative has argued that regulation 61(3)(a) applies, because the payments made by the employer were not timely. I accept that the payments were made later than they should properly have been paid and that the timing suggests that they were made reluctantly. But that is not relevant. It is not the payment that has to be timely. It is the *information* from the employer that must be ‘unlikely to be ... timely’. The information is the amount of the employed earnings for each assessment period. That does not mean that the earnings had to be earned in the period. As the claimant’s representative accepted, earnings almost always relate to past periods. The fact that the payments were only made as a result of negotiation and conciliation does not alter their character as earnings. The employer correctly reported the amount that was paid. The *information* reported to HMRC and passed to the Secretary of State was correct. This was done timeously. Regulation 61(3)(a) does not apply.

14. The argument that regulation 61(3)(b)(ii) applies fails for the same reasons. The information was correct. It may be that ‘incorrect’ can be interpreted broadly, as the claimant’s representative has submitted, but it cannot make something incorrect that was correct. Again, the important word is *information*. The information is the amount that the claimant was paid and it was correctly reported. Matters relating to the timing of the payment, and the willingness or lack of it with which it was paid, are irrelevant to this provision.

15. The claimant’s representative has argued in favour of fairness and equity in interpreting the regulations. He has submitted that they should be interpreted ‘to avoid the “double jeopardy” of claimants having no legal entitlement to be paid either wages or benefit for a specific month.’ There may be merit in an argument that a claimant should not be left without either wages or benefit. But I see no reason why the claimant’s ‘legal entitlement to be paid ... wages ... for a specific month’ should matter. What matters to claimants is that they should have money to meet their immediate needs. In this case, the claimant had money but no benefit. He even had a legal entitlement to the money, albeit one that had to be enforced in order to be effective. The representative has also cited regulation 29(1)(b) of the Housing Benefit Regulations 2006 as evidence for a discretion to average variable earnings. That is one approach, but it is not the approach taken in the universal credit regulations.

16. In a final submission following *Johnson* in the Court of Appeal, the claimant’s representative has submitted that it would be irrational for the regulations to operate

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in a way that is inflexible, with an arbitrary and detrimental effect on some claimants. I do not accept that that approach would help the claimant in this case. To repeat a point I have already made, universal credit is a benefit to meet immediate need. The claimant received a late payment of wages in two assessment periods and had that money available to meet that need. When he received no wages, he was paid universal credit. That shows a system that is flexible in responding to changing circumstances and paying out public money when it is needed, but only then.

17. For completeness, I have considered whether the mistake over the returned deposit was sufficient to trigger the discretion in respect of all aspects of the calculation of earned income. I gave a direction in which I remarked that neither regulation 61(4) nor (5) 'seems to help the claimant in this case'. The claimant's representative replied: 'We do not disagree with that observation.' I accept that. Regulation 61(4) gives the Secretary of State power to calculate the claimant's employed earnings 'using such information or evidence as the Secretary of State thinks fit.' There could not be a wider discretion. It would be surprising to say the least if that power could be triggered by any mistake, however minor in nature and however limited in its effects. At the least, the discretion must be limited to correcting the consequences of what has gone wrong. That will certainly cover the direct consequences and may extend to the indirect consequences, but no further. Its natural reading in its context does not extend beyond that.

**Signed on original**  
**on 22 February 2021**

**Edward Jacobs**  
**Upper Tribunal Judge**