



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

**UPPER TRIBUNAL CASE No: CH/2263/2019
[2022] UKUT 9 (AAC)**

**JL v CALDERDALE METROPOLITAN BOROUGH COUNCIL AND THE SECRETARY
OF STATE FOR WORK AND PENSIONS**

Decided without a hearing

Representatives

Claimant	Amanda Deakin (at first) and (later) Mark Chauasse, Calderdale CAB
Local authority	Did not take part
Secretary of State	Ben Keith of counsel

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference: SC240/18/02464
Decision date: 1 February 2019
Venue: Bradford

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A. The issue

1. This appeal is about the transition from housing benefit to universal credit. In particular, it is about an attempt by the claimant to back out – a deliberately neutral term – once he had submitted a claim online. I have decided that he could not. The submissions in this case have become linked to submissions in another case of mine: *SK v Commissioner for Her Majesty's Revenue and Customs and Secretary of*

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State for Work and Pensions [2022] UKUT 10 (AAC). There is inevitably some overlap between that decision and this. They should be read together, especially for my analysis of the transitional legislation.

B. What happened

2. The claimant submitted a claim to the local authority for housing benefit. The authority refused the claim on 21 May 2018, explaining that he was no longer entitled to housing benefit from and including 3 May 2018. That is the decision that is the subject of this appeal, but in order to understand it, we have to go back to what happened in April 2018.

3. The reason for the local authority's decision was that the claimant had made a claim for universal credit on 19 April 2018 between 12:42 and 13:05. He was receiving housing benefit from the authority at that time, but the result of the universal credit claim was to transfer him outside the scope of the housing benefit scheme.

4. The claimant quickly repented of his decision to claim universal credit. At 15:35 on the same day, 19 April, he wrote again saying that he was being supported in writing by his support worker. He explained some background, mentioning his mental health and recent treatment for alcohol withdrawal. In particular, he said:

I often make poor financial decisions ... I do have capacity, although I have moments of making poor decisions, once I make a decision I tend to carry it through, then worry about the repercussions.'

He said that any more money he received would be spent on alcohol and put him at risk. He asked to change his decision to make a claim. By that stage, the computer system had already accepted that the claimant met what the law calls the basic conditions of an award for universal credit and had notified the local authority. That was why the local authority decided that the claimant was no longer entitled to housing benefit and had to submit a claim for housing costs under universal credit.

5. Subsequently, on 21 May 2018, the Secretary of State wrote to the claimant saying: 'We have closed your Universal Credit claim from 19 April 2018. This is because you failed to attend your initial interview.'

6. So, although the result was that the claim for universal credit was unsuccessful, it nonetheless had the effect of transferring the claimant out of the housing benefit scheme and into the universal credit regime.

C. The appeal to the First-tier Tribunal

7. On appeal, the claimant told the First-tier Tribunal that he had decided to claim universal credit on the spur of the moment on the advice of person he met on the street. The evidence attributes this either to the influence of alcohol at the time or to the effects of withdrawal from alcohol. The tribunal had before it psychological and psychiatric reports on the claimant. His representative argued that, in the circumstances, the claim was not valid. On the other side, the representative for the local authority pointed out that the claimant had answered all the questions posed

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while claiming universal credit and knew what he was doing. The tribunal accepted that the claimant had the difficulties described in the reports, but found that he had made a valid claim.

D. The appeal to the Upper Tribunal

8. I gave permission to appeal, referring to my decision in *Commissioners for Her Majesty's Revenue and Customs v LH* [2018] UKUT 306 (AAC), to which the tribunal had referred.

9. The case was then transferred to Upper Tribunal Judge West, who joined the Secretary of State and gave directions. Ben Keith of counsel made submissions on behalf of the Secretary of State. He argued that, by his own admission, the claimant had capacity to claim and the tribunal had been right to decide as it did on the basis of my decision in *LH*. However, he submitted that my decision was wrong to suggest that it might be possible to withdraw a claim before notice was issued that the basic conditions for an award of universal credit were satisfied. The claimant's representative made a 'no comments' reply and the case came back to me.

10. I gave a direction for submissions on further issues. The Secretary of State's response came from a policy adviser. His evidence was that the claimant had been entitled to withdraw his claim and should have been allowed to do so, but that this did not help him because he had already made a claim. He explained the policy intention underlying regulation 8 in support of this analysis. I have explained in *SK* why reference to the policy intention is not relevant to the interpretation of regulation 8.

11. A word of explanation is in order. Why was the case passed to Judge West and then back to me? The reason is that the Upper Tribunal has received a number of appeals raising different but sometimes connected issues about the transition from existing benefits to universal credit. Judge West is responsible for coordinating those cases to ensure their efficient judicial management. The case was transferred back to me as the person most appropriate to deal with the particular issue that arises, given my decision in *LH* on a similar issue.

E. The AB case

12. By the time the case came back to me, I had become aware of the decision of Upper Tribunal Judge Mitchell in *Commissioners for Her Majesty's Revenue and Customs v AB* [2021] UKUT 209 (AAC). This led to a further directions for submissions, with the Secretary of State again represented by Ben Keith. He asked for an oral hearing in the light of *AB*. I have decided that a hearing is not necessary, given my analysis in this case and in *SK*.

13. This is a convenient place to explain why I have not held a hearing and why I am not following the analysis in *AB*. I have read that decision and examined the file. It is clear that the judge made his decision on different arguments and a different explanation of how the online universal credit system works.

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F. The effect of claiming universal credit

14. I now come to the effect of making a claim for universal credit.

15. Universal credit was established by section 1 of the Welfare Reform Act 2012. To be entitled, a person must meet the basic conditions and the financial conditions for an award: see section 3(1). The basic conditions are the ones that matter on this appeal. They are set out in section 4(1):

4 Basic conditions

- (1) For the purposes of section 3, a person meets the basic conditions who-
- (a) is at least 18 years old;
 - (b) has not reached the qualifying age of state pension credit;
 - (c) is in Great Britain;
 - (d) is not receiving education; and
 - (e) has accepted a claimant commitment.

16. Regulation 8 of the Universal Credit (Transitional Provisions) Regulations 2014 (SI No 1230) provides:

8 Termination of awards of certain existing benefits: other claimants

- (1) This regulation applies where—
- (a) a claim for universal credit (other than a claim which is treated, in accordance with regulation 9(8) of the Claims and Payments Regulations, as having been made) is made; and
 - (b) the Secretary of State is satisfied that the claimant meets the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which the claimant is not required to meet by virtue of regulations under section 4(2) of the Act).
- (2) Where this regulation applies, all awards of income support ... or a tax credit to which the claimant (or, in the case of joint claimants, either of them) is entitled on the date on which the claim is made are to terminate, by virtue of this regulation—
- (a) on the day before the first date on which the claimant is entitled to universal credit in connection with the claim; or
 - (b) if the claimant is not entitled to universal credit, on the day before the first date on which he or she would have been so entitled, if all of the basic and financial conditions applicable to the claimant had been met.

(2A) Subject to paragraph (3), where this regulation applies, an award of housing benefit to which the claimant is entitled on the day mentioned in paragraph (2)(a) or (b) terminates on the last day of the period of two weeks beginning with the day after that day (whether or not the person is also entitled to an award of income support or a tax credit).

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(3) An award of housing benefit to which a claimant is entitled in respect of specified accommodation or temporary accommodation does not terminate by virtue of this regulation.

17. The effect of regulation 8 is this. It applies when a claimant has made a claim for universal credit and met the first four basic conditions in section 4(1). It is not necessary to meet either the fifth condition that the claimant has accepted a claimant commitment or the financial conditions. The effect of the regulation, when it applies, is that any award of housing benefit comes to an end two weeks later.

18. That is what happened in this case. The claimant was over 18 but below the age for state pension credit, was in Great Britain, and was not receiving education. Accordingly, his award of housing benefit terminated two weeks later; its last day was 2 May 2018. This is its effect, despite the fact that the claimant never qualified for an award. That may seem harsh, but the effect of regulation 8 is to transfer cases from housing benefit to universal credit. It is part of the managed transition from a benefit that is being run down (housing benefit) to the one that is taking over (universal credit).

G. The claimant had capacity to make a claim

19. The claimant's case as put to the First-tier Tribunal was that his purported claim was never of any effect on account of his intoxication or mental state. This argument recognised that a claim had been submitted, but sought to deprive it of any force or effect. It amounted in legal terms to an argument that the claimant did not have capacity to make a claim in view of his mental state, whatever the cause.

20. This argument was fatally flawed by the claimant's own admission on the day of the claim. He wrote at 15:35 that he had capacity but had made a bad decision, and he wrote in those terms with the assistance of his support worker. I accept the Secretary of State's submission that this disposes of the capacity argument.

H. The attempt to withdraw the claim

21. There are two ways of analysing the effect of the attempt to withdraw the claim.

The claim could not be withdrawn

22. One analysis is that it was too late to withdraw the claim once regulation 8(1) was satisfied.

23. A claim may be withdrawn, but only before a determination has been made on it. This is governed by regulation 31(1) of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI No 380):

(1) A person who has made a claim for benefit may withdraw it at any time before a determination has been made on it ...

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The withdrawal takes effect 'when it is received': regulation 31(2). Regulation 31 repeats regulation 5(2) of the Social Security (Claims and Payments) Regulations 1987 (SI No 1968).

24. In this case, the claimant attempted to withdraw his claim at 15:35, about 2½ hours after he made the claim. The evidence in *SK* was that the universal credit online claim system checks that the basic conditions in section 4(1)(a) to (d) are met and will only allow the claim to be submitted if they are. At that moment, the Secretary of State is satisfied for the purposes of regulation 8(1)(b).

25. It does not matter that this process is computerised. As I said in *SK*, the Secretary of State is entitled to rely on a computer programme to identify cases in which the transitional condition is satisfied. Section 2 of the Social Security Act 1998 is the authority for this:

2 Use of computers

(1) Any decision, determination or assessment falling to be made or certificate falling to be issued by the Secretary of State under or by virtue of a relevant enactment, or in relation to a war pension, may be made or issued not only by an officer of his acting under his authority but also—

- (a) by a computer for whose operation such an officer is responsible; and
- (b) in the case of a decision, determination or assessment that may be made or a certificate that may be issued by a person providing services to the Secretary of State, by a computer for whose operation such a person is responsible.

(2) In this section 'relevant enactment' means any enactment contained in—

...

(k) Part 1 of the Welfare Reform Act 2012; ...

Universal credit is governed by Part 1 of the Welfare Reform Act 2012 and so within section 2. What the computer produces is not a decision or an assessment, but it is a determination. The Court of Appeal explained the difference between a decision and a determination under the 1998 Act in *Carpenter v Secretary of State for Work and Pensions* (reported as *R(IB) 6/03*). Laws LJ said:

14. ... if one looks at the whole legislative scheme there is a plain distinction between a decision (that is, a decision upon the actual question whether a claimant is entitled to a particular benefit or not) and what may conveniently be called a determination (that is, a determination of any matter along the way leading to a decision, including a determination of a procedural issue such as an application for an adjournment). ...

The conclusion that the Secretary of State must reach under regulation 8(1)(b) is aptly captured by Laws LJ's words as a 'matter along the way leading to a decision'.

26. So, on that approach to regulation 31(1), the claim could not be withdrawn because a determination had been made on it.

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27. My reasoning has so far assumed that *determination* in regulation 31(1) is not to be equated with a final decision on the claim, which is sometimes called an outcome decision. The wording of regulation 31(1) follows the wording of regulation 5(2) of the 1987 Regulations; both use the expression 'at any time before a determination has been made on it'. As far as I can discover, the power to withdraw was first set out in legislation in the 1987 Regulations. The language used differs from the language used in regulation 5A of the Supplementary Benefit (Claims and Payments) Regulations 1981 (SI No 1525), which dealt with deemed withdrawals. Contrast 'at any time before a determination has been made *on it*' (1987 and 2013) with 'before the determination *of any claim*' (1981). The language also differs from section 12(2) of the Social Security Act 1998, which refers to a claim being 'decided'.

28. What if this interpretation is wrong?

The withdrawal was not retrospective in effect

29. If it was not too late to withdraw the claim, doing so had no effect on regulation 8.

30. If I am wrong about the meaning of regulation 31(1), the claimant was entitled to withdraw his claim later the same day, because the Secretary of State had not decided the claim and did not purport to do so until 21 May 2018. Regulation 31(2) provides that 'Any notice of withdrawal ... has effect when it is received.' That raises the question: was the effect retrospective with the result that the claim had never existed? My answer is: no. In short, the withdrawal did not rewrite history. There are a number of grounds that support that conclusion.

31. First, that is the natural reading of the language of regulation 31(2).

32. Second, regulation 31(2) merely repeats the language of the 1987 Regulations. Both Regulations were made to deal with the procedure on claims for benefits. There was no need to make a withdrawal retrospective in that context. Once the claim ceased to exist, there would no longer be a claim to decide and no decision would be made. The result would be the same whether or not the effect under regulation 31(2) was retrospective. There is no need to read the legislation as providing for retrospective effect because that was not necessary to achieve its objective.

33. Third, there is some authority that a claim cannot be withdrawn retrospectively. It lends support to my conclusion, but I acknowledge that the context was different. At one time, a claim was considered to continue to exist throughout the period of an award made on it. That was the analysis of the Tribunals of Commissioners in *R(S) 1/83* and *R(S) 2/98*. It was in that context that Mr Commissioner (later Upper Tribunal Judge) Mesher decided in *CJSA/3979/1999* that it was not possible to withdraw a claim retrospectively, but said:

24. ... it does not necessarily follow ... that a claim cannot be withdrawn for a prospective period even though there is a current indefinite award.

The decisions of the Tribunals of Commissioners were subsequently reversed by section 8(2)(a) of the Social Security Act 1998:

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(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State-

(a) the claim shall not be regarded as subsisting after that time; ...

The result is that Judge Mesher's reasoning no longer applies. As I directed the tribunal in *CDLA/1589/2005* at [1]:

The reasoning in [*CJSA/3979/1999*] is no longer entirely apposite under the adjudication procedures introduced by the Social Security Act 1998, but it remains good law that a claimant may surrender an award of benefit.

As the Secretary of State did not make an award of universal credit, the issue of surrender does not arise.

Even if the withdrawal was retrospective, it did not matter to the transition to universal credit

34. A different approach is that regulation 31(2) is irrelevant. Rather, regulation 8 is freestanding and operates without regard to regulation 31. On this approach, what matters is the existence of facts, meaning that a claim has been made that meets the basic conditions (a)-(d). On my analysis in *SK*, the point of reference of regulation 8 as a transitional provision is on the moment when the claim is made and the Secretary of State is satisfied that the relevant basic conditions are met. At that moment, as a matter of fact in history, there is no doubt that the claimant had made a claim and no doubt either that he met the necessary basic conditions. As I explained in *SK*, the making of the claim and the determination under regulation 8(1)(b) take effect simultaneously through the universal credit computer system. The notification to the local authority, by the so-called stop notice, is a merely administrative act with no adjudicative effect. Accordingly, regulation 8 came into play as soon as the claim was made. Anything that happened after that is irrelevant because the transition to universal credit had been triggered.

**Signed on original
on 19 January 2022**

**Edward Jacobs
Upper Tribunal Judge**