



***SSWP v PL (UC)***  
**[2023] UKUT 288 (AAC)**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2022-001685-UOTH**

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

**Between:**

**Secretary of State for Work and Pensions**

Appellant

- v -

**P.L.**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Decision date: 22 November 2023  
Decided on consideration of the papers

**Representation:**

Appellant: Mr Iqbal Hussain, Decision Making and Appeals, DWP  
Respondent: In person

## **DECISION**

**The decision of the Upper Tribunal is to allow the Secretary of State's appeal.** The decision of the First-tier Tribunal made on 24 March 2022 under file number SC322/21/00074 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and re-make the decision. The decision the First-tier Tribunal should have made is as follows:

*The Tribunal dismisses the claimant's appeal against the Secretary of State's decision of 10 May 2020.*

## **REASONS FOR DECISION**

### **The parties to this appeal to the Upper Tribunal and the Upper Tribunal Judge**

1. The Appellant in this appeal to the Upper Tribunal is the Secretary of State for Work and Pensions, while the claimant is now the Respondent. To avoid confusion, I refer to the parties in this decision as 'the Secretary of State' and 'the claimant' respectively. This appeal was previously case managed by Upper Tribunal Judge Hemingway but has been re-allocated to me as a result of that judge's recent retirement.

### **The outcome of this appeal**

2. The Secretary of State's appeal to the Upper Tribunal succeeds.

### **The factual background**

3. The claimant was entitled to income-related employment and support allowance (IRESA) from 25 October 2013 to 11 September 2019. He was disabled by a severe brain injury and lived alone, so that award of IRESA included the Severe Disability Premium (SDP). On 19 September 2019 the claimant's award of IRESA was ended with effect from 12 September 2019. This was because the claimant had been remanded in custody by the Crown Court.
4. The claimant was also entitled to housing benefit, again including the SDP, for the period from 25 April 2016 through to 23 December 2019.
5. The claimant was also entitled to Personal Independence Payment (PIP), but PIP was not paid for the period from 22 October 2019 to 8 December 2019.
6. Meanwhile, on 10 December 2019, and having just been released from custody, the claimant made a claim for Universal Credit (UC).
7. On 10 May 2020 the DWP decided that the claimant was entitled to UC in the sum of £1,126.12 per assessment period before any adjustments, comprising a standard allowance of £409.89, housing costs element of £374.31 and a LCWRA element of £341.92.
8. The claimant sought a mandatory reconsideration of the decision of 10 May 2020 in the following terms:

"I want to dispute the award amount of UC that was given to me when I was transferred to it from ESA when there was no change in my circumstances yet I was awarded £15 less a week, which is causing me financial hardship. I used to get SDP and I don't seem to be getting that either and think I should. I would like this to be looked into as part of the mandatory reconsideration and I think this should all be backdated to when I was transferred from ESA."
9. On 23 November 2020 the DWP issued a mandatory reconsideration notice, stating that the matter had been reconsidered but the decision had not been changed. The claimant then lodged an appeal with the First-tier Tribunal (FTT).

**The decision(s) of the First-tier Tribunal**

10. The First-tier Tribunal on 24 March 2022 dealt with two separate appeals by the claimant against two discrete decisions taken by decision-makers on behalf of the Secretary of State.
11. In the first case, under file reference SC322/20/01074, the Tribunal dismissed the claimant's appeal, confirming the Secretary of State's decision (dated 19 September 2019) that the claimant was not entitled to IRESA as from 12 September 2019 because he was detained in lawful custody. There has been no further effective challenge to that decision by the Tribunal.
12. In the second case, under file reference SC322/21/00074, the Tribunal allowed the claimant's appeal and set aside the Secretary of State's decision (dated 10 May 2020) on the UC claim. The Tribunal in effect ruled that the claimant's application for UC had been invalid, given the 'SDP Gateway' then in place, and the Secretary of State should now treat the claim for UC as a claim for IRESA and so re-assess the claimant for an award of IRESA. A District Tribunal Judge subsequently gave the Secretary of State permission to appeal in relation to this second decision.

**The Secretary of State's ground of appeal on the FTT's second decision**

13. The essence of the Secretary of State's ground of appeal is that it would be unlawful to implement the Tribunal's second decision. The Secretary of State's primary submission is that there is no provision for a claim for UC to be treated in the alternative as a claim for IRESA, which was what the Tribunal had directed. Certainly, regulation 9 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), when read with Schedule 1 to the same Regulations, allows for the interchange of claims for some specified benefits (but not including UC). However, the Secretary of State's representative points out there is no such equivalent provision in the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381), which govern decision-making in the UC scheme.

**Discussion**

*Was the FTT correct to find the claimant should not have been allowed to claim UC?*

14. At the material time regulation 4A(1) of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230), otherwise known as the SDP Gateway, provided as follows:

**Restriction on claims for universal credit by persons entitled to a severe disability premium**

**4A.—** (1) No claim may be made for universal credit on or after 16<sup>th</sup> January 2019 by a single claimant who, or joint claimants either of whom—

- (a) is, or has been within the past month, entitled to an award of an existing benefit that includes a severe disability premium; and
- (b) in a case where the award ended during that month, has continued to satisfy the conditions for eligibility for a severe disability premium.

15. This provision was inserted with effect from 16 January 2019 by regulation 2(3) of the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 (SI 2019/10). Regulation 4A was later repealed with effect from 27 January 2021 but evidently that date was after the period in question in this appeal. So, on the facts and as a matter of law the DWP should have applied regulation 4A.
16. Regulation 2(1) defines “existing benefit” to include the so-called legacy benefits, and so the expression includes both IRESA and housing benefit.
17. The FTT found that at the time the claimant applied for UC (on 10 December 2019) he was still entitled to an award of an existing benefit (housing benefit) which included the SDP. That finding was undoubtedly open to the FTT on the evidence before it. As such, regulation 4A(1) meant that the claimant was a person who should have been barred from making a claim for UC. As the FTT put it in its detailed and comprehensive statement of reasons, he “was prevented from making a new UC claim at that time by virtue of his entitlement to a benefit with the SDP element.”
18. The Secretary of State’s representative argues that in any event, and on the true facts at the material time, the claimant should not have been entitled to payment of the SDP as part of his housing benefit award. That may or may not be correct. However, the FTT can only decide an appeal on the basis of the evidence before it and the local authority had given clear evidence in this case that the SDP was still in payment as part of the claimant’s housing benefit award.
19. So, although the DWP was presented with what appeared to be a valid claim for UC, the FTT was correct to find that it was from a person whose circumstances were such that he should not have been allowed to claim UC.

*Was the FTT correct to direct the UC claim to be treated as one for IRESA?*

20. In the light of its conclusion on the previous question, the FTT found that the claimant “should have made an application for ESA on 10/12/2019 and therefore directs that the Secretary of State re-assesses [the claimant] for an award of ESA from 10/12/2019.” The FTT cited no further authority for this proposition.
21. This is where the FTT erred in law. It is a precondition of entitlement to benefit that a claimant makes a claim (see section 1 of the Social Security Administration Act 1992). Following his release from custody in December 2019, the claimant did not make a fresh claim for IRESA. Nor did he make an ESA claim at any time thereafter, although he tried to argue his now terminated ESA claim should be revived. Indeed, the claimant had been advised by Jobcentre staff to make a claim for UC, which is what he did. There are therefore at least two difficulties with the solution adopted by the FTT, i.e. directing the Secretary of State to treat the claimant’s UC application as a claim in the alternative for IRESA.
22. First, the fact is that by 12 December 2018 the UC regime had been ‘rolled out’ across the whole of the United Kingdom. A series of Commencement Orders made under the Welfare Reform Act 2012 in effect abolished legacy benefits in

designated geographic areas, subject to some very narrowly defined exceptions, which do not arise on the present facts. The net result is that no further new awards of legacy benefits could be made after that date. This is an illustration of what is sometimes known as the 'lobster pot principle' – once a claim for UC has been made, there is no going back to a legacy benefit.

23. Secondly, there is, moreover, no lawful basis on which the claimant's claim for UC can be transformed into a claim for IRESA. Regulation 9 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), when read with Schedule 1, allows for the interchange of certain claims for specified benefits. However, a claim for UC is not listed as being a claim which may be treated as a claim for any other benefit, let alone a claim for IRESA. The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (SI 2013/381), which govern UC decision-making, include no equivalent provisions to Schedule 1. This is hardly surprising given that UC is designed (subject to exceptions which do not matter for present purposes) to be the sole mean-tested social security benefit going forward for people of working age.

*The claimant's arguments*

24. The claimant has made multiple written submissions seeking to resist the Secretary of State's appeal and so to uphold the FTT's decision. His primary arguments are two-fold.
25. First, the claimant argues that he was mis-advised by Jobcentre staff, who he says wrongly informed him in December 2019 that he could not claim IRESA and so would have to claim UC. However, assuming that account is correct (and there is no reason to doubt it and anecdotally every reason to believe it), such misinformation does not in and of itself render the DWP's subsequent decision to make an award of UC ineffective. If the claimant can show a financial loss caused by the DWP's failure to apply the SDP Gateway, it may amount to grounds for seeking an *ex gratia* payment of compensation for maladministration. However, tribunals have no jurisdiction over such matters.
26. Secondly, the claimant submits that the doctrine of *ultra vires* applies. He argues that as the DWP acted in contravention of regulation 4A in processing his UC claim (which the Secretary of State concedes was the case), then the decision that followed was void *ab initio* and so a nullity. This argument fares no better for several reasons. First, the decision-maker was acting within their legal powers when tasked with deciding the claim for UC – the fact that they may have made a legal error in doing so does not render the decision void as such. It simply leaves it open to the possibility of revision for official error, but no such steps have been taken in this case. Secondly, the logical consequence of the claimant's argument is that the sums of UC paid under the award would arguably be recoverable from the claimant, a plainly unattractive prospect. Thirdly, the effect of the FTT's direction was to require the Secretary of State to do something for which there was indeed no statutory authority – namely to entertain a claim for, and make an award of, IRESA – on the facts as they stood.

27. It follows that the FTT erred in law when it directed the Secretary of State to treat the claimant's UC claim as a claim for IRESA.

*Disposal*

28. Mr I. Hussain, the Secretary of State's representative in these proceedings, invites the Upper Tribunal to set aside the FTT's decision and remit the case for re-hearing. I agree that the FTT's decision should be set aside as it involves, in part at least, an error of law. However, I can see no value in remitting the case for re-hearing by a fresh FTT, given that there are no further material facts to be found.
29. The most proportionate way forward is for the Upper Tribunal to re-make the FTT decision. In the absence of any proper legal basis for making a retrospective claim to IRESA, the only realistic option for the FTT was to dismiss the appeal against the Secretary of State's decision of 10 May 2020.
30. The decision the FTT should have made is as follows:  
*The Tribunal dismisses the claimant's appeal against the Secretary of State's decision of 10 May 2020.*
31. I do not pretend that this is an optimal outcome. This is the least unsatisfactory solution. It is unsatisfactory in that by implication it leaves untouched a decision that was, or may well have been, taken in breach of regulation 4A. However, no fresh claim for IRESA was made at the material time and for the reasons explained above there is no mechanism by which a claim for UC can be treated in the alternative as a claim for IRESA.

**Conclusion**

32. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the Secretary of State's appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(2)(a)). I also re-make the Tribunal's decision (TCEA 2007, section 12(2)(b)(ii)). My decision is also as set out above.

**Nicholas Wikeley**  
**Judge of the Upper Tribunal**

Authorised for issue on 22 November 2023