IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000044-UOTH**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Secretary of State for Work and Pensions

Appellant

- v –

LM

Respondent

Before: Upper Tribunal Judge Church

Decision date: 20 March 2023
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal.
The decision of the First-tier Tribunal made on 5 March 2021 under reference SC287/20/00412 was made in error 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 **remade** in the following terms:

> "**The appeal is refused and the Secretary of State's decision dated 18 October 2020 is confirmed**.
> The claimant's net entitlement to Universal Credit for the period from 18 September 2020 to 17 October 2020 is £529.13."

REASONS FOR DECISION

Introduction

1. In this decision I refer to the Appellant as the Secretary of State and to the Respondent as the Claimant.

   This appeal relates to a decision made by the First-tier Tribunal on 5 March 2021 which decided, applying the Court of Appeal's decision in R (Johnson) v Secretary of State for Work and Pensions [2020] EWCA Civ 778 (**"Johnson"**) and the High Court's decision in R (Pantellerisco) v SSWP [2020] EWHC 1944 (**"Pantellerisco HC"**), that the calculation of earned income required under the Universal Credit

Regulations 2013 was irrational and unlawful insofar as employees who were paid on a fortnightly basis were treated as having earned six weeks' pay in one month, and so should be not be applied by it. It revised the Secretary of State's decision on her entitlement on the basis that the calculation of the Claimant's income for the purposes of calculating her entitlement should comprise the payments made on 18 September 2020 and 02 October 2020 only (and not 16 October 2020) (the **"FtT Decision"**).

2. My decision is that the First-tier Tribunal erred in law in failing to distinguish the Court of Appeal decision in Johnson, in the light of the Court of Appeal's subsequent decision in Pantellerisco v Secretary of State for Work and Pensions [2021] EWCA Civ 1454 (**"Pantellerisco CA"**), which allowed the appeal against Pantellerisco HC.
3. I have decided that its FtT Decision should be set aside, and I have remade the decision as it should have been made.

Why I have proceeded with this appeal without submissions from the Claimant

4. The Claimant has been given the opportunity to make submissions, including two reminders and a significant extension of time for the purposes of seeking to engage a representative, she has failed to do so.

5. I decided that the overriding objective of enabling the Upper Tribunal to deal with cases fairly and justly, which includes avoiding delay, so far as compatible with proper consideration of the issues, would be furthered by my proceeding to decide this appeal. It was not proportionate to allow further extensions for the Claimant to make submissions. The appeal turns on the law, not on the facts, and there has already been significant delay.

Why there has been no oral hearing

6. The Secretary of State did not ask for an oral hearing. Given the opportunities provided to the Claimant to respond, and the lack of response from the Claimant, I decided that no oral hearing was necessary, and it was in the interests of justice to determine the appeal on the papers, particularly given that the appeal turns purely on legal arguments.

Relevant background

7. The Claimant made a successful claim for Universal Credit (**"UC"**) on 18 October 2018. Her assessment period runs from the 18th of the month to the 17th of the month.

8. On 21 July 2020 the Claimant reported a change in her employment to the effect that she had started a new job from 13 July 2020. On 18 October 2020 the Secretary of State received information from HMRC showing that in the assessment period 18 September 2020 to 17 October 2020 the Claimant had received the following amounts on the following dates:

18 September 2020 - £705.93
2 October 2020 - £705.93
16 October 2020 - £841.93

9. The receipt of these payments is not in issue.

10. A decision maker for the Secretary of State decided on 18 October 2020 that £1235.93 should be deducted from the Claimant's UC award for the assessment period 18 September 2020 to 17 October 2020 to reflect the payments set out above. The decision was not revised on mandatory reconsideration.

11. The Claimant appealed the decision to the First-tier Tribunal.

12. The FtT Decision revised the Secretary of State's decision to the effect that the calculation of the Claimant's income was to be treated as comprising the payments made on 18 September and 2 October only.

13. The Secretary of State applied for a statement of reasons and sought permission to appeal to the Upper Tribunal.

The decision to give the Appellant permission to appeal

14. Tribunal Judge Atkinson refused permission to appeal on 31 July 2021 on the basis that the Secretary of State had failed to cogently or adequately explain why the general principles to be abstracted from the case law should not apply in the present case and therefore why the First-tier Tribunal is said to have erred in law.

15. The Appellant renewed his application to the Upper Tribunal. The matter came before me and I gave permission to appeal on 16 November 2021 on the basis that I was persuaded that the Secretary of State's grounds were arguable and, if such errors had been made, they would have been material in the sense that the outcome would have been different.

Relevant law

16. Regulation 21 of the Universal Credit Regulations 2013 (the **"2013 Regulations"**) is headed "Assessment periods". Paragraph (1) reads**:**

> "An assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists."

17. Schedule 1 to the Interpretation Act 1978 defines "month" as "calendar month" and it is clear in any event from the other provisions of regulation 21 that a calendar month is intended.

18. Regulation 54 is headed "Calculation of earned income - general principles". Paragraph (1) reads:

> "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."

19. The Court of Appeal in Johnson considered a challenge to the 2013 Regulations by claimants who were entitled to be paid by the calendar month, which is the assessment period prescribed by the Regulations, but who periodically received salary in the 'wrong' month because of the mechanics of bank payment.

20. The effect of the Court of Appeal decision in Johnson, is that the earned income calculation method in Chapter 2 of Part 6 of the Universal Credit Regulations 2013 was declared to be irrational and unlawful to the extent that they applied to employees paid their salary on a monthly basis, whose UC claim began on or around their normal pay day, and who are treated as having variable earned income in different assessment periods when pay dates for two (consecutive) months fall in the same assessment period.

21. The Court of Appeal in Pantellerisco CA considered a challenge by a claimant who was paid by reference to a period which did not correspond to the assessment period prescribed by the 2013 Regulations. The Court of Appeal concluded that it was not irrational for the Secretary of State not to have introduced some solution to the problem that, compared with a claimant in identical circumstances who was paid monthly, Ms Pantellerisco was worse off because she was excepted from the benefit cap in only one assessment period in the year.

Decision

22. Under regulation 21 of the 2013 Regulations, UC is calculated (subject to some immaterial exceptions) by reference to monthly "assessment periods", running from the date that the claimant makes their first claim. The month in question is a calendar month.

23. Entitlement in respect of any assessment period is established by taking a "maximum amount", calculated by reference to the claimant's particular circumstances, and then deducting any unearned income and a prescribed proportion of any earned income.

24. The general rule under the Regulations is that "earned income" is "based on the actual amounts received in the period" (Regulation 54).

25. Although most employees are paid on the basis of a calendar month, some are paid instead on a 28 day or 14 day cycle. Where a UC claimant is paid on a 14 day cycle, as in the present case, in some assessment periods in any given year they may receive as much as six weeks' pay, while in others they may receive as little as two weeks' pay.

26. The consequence of this for the Claimant is that she experiences artificial fluctuations in her UC payment, causing difficulties with budgeting. It has not been argued that it leads to any lower overall annual entitlement to UC.

27. The First-tier Tribunal set out its conclusions in relation to the applicability of the authorities at paragraphs 9-11 of its statement of reasons. The references to "Pantellerisco" are to Pantellerisco HC, as the Court of Appeal had not yet decided Pantellerisco CA:

> "9. In the case of Johnson, the Court of Appeal found the system to be irrational and unlawful in respect of employees paid monthly salary, where two monthly pay dates fall within the same assessment period. In the case of Pantellerisco, the court found that the principle identified in the Johnson case, as a matter of logic applied also in cases where a claimant is paid on a four weekly basis.
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> 10. In the present case, the appellant is paid on a fortnightly basis. As a matter of logic there is no good ground for distinguishing the principles in Johnson and Pantellerisco to claimants who receive fortnightly payments.
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> 11. The calculation required under the regulations is irrational and unlawful insofar as employees who are paid on a fortnightly basis are treated as having earned six weeks pay in one month."

28. The Secretary of State argues that Johnson and Pantellerisco HC were distinguishable on the basis that they apply to claimants who are paid monthly or four weekly, and Pantellerisco HC has since been overturned by Pantellerisco CA.

29. Upper Tribunal Judge Wright's decision in JN v SSWP (UC) UTAAC 49 (AAC) confirms that the effect of Johnson is that the relevant regulations were irrational and unlawful, as a matter of law, for claimants in the same position as those in Johnson.

30. The Claimant in this appeal is not in the same position as those in Johnson. She is not paid monthly. She is not, as Upper Tribunal Judge Wright puts it at paragraph 50 of JN v SSWP (UC), a 'Johnson lookalike claimant'. In my judgment the First-tier Tribunal erred in concluding that the Claimant should be treated in the same way as the claimants in Johnson**.**

31. The Court of Appeal's decision in Pantellerisco CA makes clear that Johnson has no application on the facts of the current case. Regulation 54 is only unlawful in so far as it affects monthly paid claimants, whose universal credit claim began on or around their normal pay day, and whose pay dates for two (consecutive) months on occasion fall in the same assessment period. It has no wider application.

32. Following the Court of Appeal's judgment in Pantellerisco CA, which is binding on me, it cannot be said that it was irrational for the Secretary of State not to have introduced some solution to the problem that, compared with a claimant in identical circumstances who was paid monthly, the claimant was worse off because she experienced artificial fluctuations in her UC payment, causing difficulties with budgeting.

33. The following factors highlighted by the Court of Appeal in Pantellerisco CA at paragraph 77 apply equally in this case:

> "(1) The threshold of irrationality in this case is high. …In the present case, the features of the scheme which result in the pay cycle effect reflect important policy decisions made by the Secretary of State. Those choices are explicit on the face of the Regulations, which were approved by both Houses of Parliament.
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> (2) …it is often necessary in a complex scheme of this kind to apply general rules or principles which will sometimes produce harsh results in particular cases ("bright lines", in the jargon): both Rose LJ and I made this point in Johnson – see paras. 72-73 and 113. However the threshold is defined, there will inevitably be UC claimants who miss out by a narrow margin."

34. Further, the following reasons given by the Court of Appeal apply equally to this case:

> "79. …There is a real risk that any departure from the "actual receipts principle" will seriously impair the workability and reliability of the assessment of entitlement for this group of claimants. That being so, I do not think that it is open to the Court to hold that it is irrational for the Secretary of State not to have modified the effect of regulation 54 so as to eliminate or mitigate the pay cycle effect.
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> 80. … deciding whether or to what extent to derogate from a general principle of this kind in order to address the interests of a particular group is quintessentially a question for the Secretary of State (with the assistance, of course, of her civil servants) and not the Court. It requires a detailed understanding of a highly complex scheme, and the technicalities of its administration, which the Court does not have, so as to be able to assess the advantages and disadvantages of implementing any particular solution. It will also ultimately require the striking of a balance between those advantages and disadvantages, which is an exercise of judgment that is the province of the legislator. If it were established that there was a straightforward solution which it was irrational for the Secretary of State not to have pursued the Court could and should nevertheless intervene; but that is not the case.
> …
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> 82. It should be clear from the foregoing that the similarity between this case and Johnson is superficial. In the first place, the claimants' challenge in Johnson was not directed at any fundamental feature of the scheme of the Regulations. They were entitled to be paid by the calendar month, which is the assessment period prescribed by the Regulations and which it is the policy of the Secretary of State to encourage. The problem only arose because of the quirk of their periodically, as I put it at para. 114 of my judgment, "[receiving] salary in the 'wrong' month because of the mechanics of bank payment". That was, in Rose LJ's words, a "a very specific problem"

> (see para. 107. It is true that in a strictly literal sense the solution (i.e. treating the payment as received on the date that it would have been received if it was a banking day) involved a departure from the principle of assessment by reference to actual receipts. But that could fairly be described, as Rose LJ put it at para. 50 of her judgment, as "fine-tuning", which allowed payments to be treated in accordance with the common-sense reality. The problem in the present case, by contrast, arises from the fact the Claimant is paid by reference to a period which does not correspond to the assessment period which is a cornerstone of the Regulations. That is a real and fundamental mismatch.
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> 83. Two further points about Johnson arise from that distinction:
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> (1) At para. 46 of her judgment Rose LJ said that the claimants were losing a benefit "which the Regulations clearly intend to confer on them". That was a fair observation in the circumstances of Johnson but it has no application here. The Regulations clearly do not intend that the disapplication of the benefit cap should be calculated by reference to sums received in a period other than the calendar month. The Claimant's argument has to be that that is, as a matter of rationality, what they should have intended; but that is another matter.
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> (2) A central part of the Secretary of State's case in Johnson was that the non banking-day salary shift problem could only be solved by manual intervention on a case-by-case basis, which was contrary to the important principle that the calculation of entitlement should be automated. The Court rejected that contention not because it did not recognise the importance of automation but because it found as a matter of fact that the necessary adjustments could (at least in due course) be incorporated in the relevant software, given that the only relevant variable, i.e. the incidence of non-banking days, was wholly predictable – see paras. 81 and 82 of Rose LJ's judgment. Any revisions to the software to address the pay-cycle effect would have to be of a different character and would almost certainly be a good deal less straightforward. But the real point is that the problems identified by Ms Krahé go beyond difficulty of automation and are ultimately based on the difficulties of departing from the straightforward and fundamental principle of working on the basis of actual receipts."

35. For all those reasons, Johnson can and should be distinguished. It does not apply in the Claimant's circumstances. I find that the First-tier Tribunal erred in law in concluding that the calculation required under the 2013 Regulations is irrational and unlawful insofar as employees who are paid on a fortnightly basis are treated as having earned six weeks' pay in one month.

Disposal

36. Having identified an error of law in the tribunal's decision, I set it aside.

37. Under s12(2) the Upper Tribunal has power to remit the case or remake the decision.

38. As there is no dispute as to the facts, and having regard to the overriding objective which includes avoiding delay, so far as compatible with proper consideration of the issues, I have decided to remake the decision as it should have been made.

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on 20 March 2023