



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**UA-2023-001084-USTA
[2024] UKUT 32 (AAC)**

Tribunal: First tier Tribunal (Social Entitlement Chamber)
Tribunal venue: Fox Court, London
Tribunal Case No: SC242/22/05264
Tribunal decision date: 7 February 2023

Between:

CU

Appellant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Jones

UPPER TRIBUNAL

Grant of permission to appeal: 4 September 2023

Respondent's submissions: 31 October 2023

Appellant's submissions: 2 August 2023 & 29 December 2023

Decided on consideration of the papers: 31 January 2024

Representation:

Appellant: Mark Hall, North West London Law Centres in writing

Respondent: Lauren Foody, on behalf of the Secretary of State in writing

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 7 February 2023 under number SC242/22/05264 was made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh First-tier Tribunal in accordance with the following directions.

Directions

- 1. This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing whether the Appellant is entitled to Universal Credit from before 25 February 2022.**
- 2. The fresh decision will follow an oral re-hearing. The form of that hearing (whether by phone, video or in person) will be a matter for the First-tier Tribunal to direct.**
- 3. The Appellant is reminded that the tribunal can only deal with his situation as it was as of 25 February 2022 when the Secretary of State made the decision regarding entitlement to the benefit and not any changes after that date.**
- 4. If the Appellant has any further evidence that he wishes to put before the tribunal that is relevant to his health condition, his language ability, knowledge of the benefits system and all relevant circumstances relating whether he could reasonably have been expected to make his claim to UC before 25 February 2022, this should be sent to the First-tier Tribunal's office within one month of the date that this decision is issued.**
- 5. The FTT should consider all the areas of evidence and issues and make findings of fact as directed by this decision before applying the test in law under Regulation 26(2)(b) of the Universal Credit (Claims and Payments) Regulations 2013 as interpreted in this decision.**

REASONS

Background

1. The Appellant made a successful claim to Universal Credit ('UC') on 25/02/2022.
2. A decision was made by the Secretary of State ('the Respondent') on 25/03/2022 to award the Appellant UC from the date of his claim (25/02/2022).
3. On 17/05/2022 the Appellant requested that the claim was extended (backdated) to 01/11/2021 which was the date from which he was unemployed. This request was rejected as the request was received late.
4. On 26/07/22 the Appellant requested a mandatory reconsideration for the Respondent's decision dated 17/05/2022. However, the decision not to not extend the award nor backdate it to 01/11/2021 was upheld on review.

The FTT's decision

5. The Appellant lodged an appeal against the Respondent's decision not to award UC from before 25 February 2022 at the First-tier Tribunal ('FTT') on 07/10/2022.
6. The appeal hearing took place on 7 February 2023 at which the Appellant gave evidence. The FTT Dismissed the Appellant's appeal against the Respondent's decision.
7. The FTT provided a statement of reasons for decision ("SOR") dated 27 April 2023 (which was issued to the parties on 3 May 2023).
8. The FTT found that in all of the circumstances, while the Appellant had a physical disability, namely longstanding chronic lower back pain, he could reasonably have been expected to have claimed UC by telephone at an earlier time. Therefore, it decided that the award of UC should not be extended or backdated to cover the period from November 2021 to February 2022 as the Appellant had requested.
9. The FTT's key reasoning is to be found at paragraph 9 of its decision:

'9.The tribunal then considered whether, as a result of his disability, he could not reasonably have been expected to have made his claim earlier. The tribunal found that his disability did not prevent him from claiming universal credit earlier because: (a) he could have claimed universal credit earlier by telephone. He told the tribunal that he made repeated calls to his doctor. The tribunal found that, if he was able to telephone his GP, he was probably well enough to telephone universal credit to make claim. (b) Whilst it is not in dispute that he was unable to work for at least a month prior to his date of claim, and the tribunal had some 'sick notes' before it, this does not mean that

he was unable physically to claim universal credit. There is insufficient medical evidence before the tribunal that he was too unwell to telephone universal credit. (c) He told the tribunal that he had also not claimed this benefit earlier including not knowing about this benefit and not wanting to go back on benefit. These are not grounds for backdating. The tribunal had no evidence before it to the contrary.'

10. The Appellant was granted permission to appeal the decision of the FTT to the Upper Tribunal ('UT') on 4 September 2023 on the basis that the FTT's decision involved an error of law.

Proceeding to determine the Upper Tribunal appeal on the papers

11. Both parties confirmed in writing that they did not seek a hearing of the appeal to the UT and were content for it to be decided on the papers. I therefore take into their preferences for the purposes of Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I am also satisfied that is just and fair to proceed on the papers without a hearing – in accordance with the overriding objective under Rule 2.
12. Both parties have had a reasonable and fair opportunity to present all their arguments in writing and the issues in the appeal are points of law. I have been provided with a full bundle of all the material that was before the FTT as well as the UT papers so have all the relevant evidence and submissions before me in writing. Further, the parties are agreed that there was an error of law in the FTT's decision and it should be set aside. The only dispute in the appeal is whether the decision on appeal against the Respondent's decision should be remitted for a further hearing before a fresh FTT or whether it can be remade by the UT.

The Grounds of Appeal

13. The Appellant's representative relied on two grounds of appeal in submitting that the FTT erred in law in making its decision that the award of UC should not be backdated before the date of claim of 25 February 2022. I granted permission to appeal on both grounds.
14. The first ground of appeal is that the tribunal only considered the physical factors that would have prevented the Appellant from making a claim to UC at an earlier date. The Appellant's representative argues that the FTT should have taken a 'good cause' approach in line with case law set out in R (SB) 6/83.
15. The second ground of appeal is that the FTT made inadequate findings of fact in relation to whether the Appellant could reasonably be expected to make a telephone claim for UC.

The Law

16. Regulation 26 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ('Claims & Payment Regulations') applies which provided at the relevant time as follows:

Time within which a claim for universal credit is to be made

26.—(1) Subject to the following provisions of this regulation, a claim for universal credit must be made on the first day of the period in respect of which the claim is made.

(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it, subject to a maximum extension of one month, to the date on which the claim is made, if—

(a) any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and

(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(3) The circumstances referred to in paragraph (2) are—

(a) the claimant was previously in receipt of a jobseeker's allowance or an employment and support allowance and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired;

...

(b) the claimant has a disability;

(c) the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that prevented the claimant from making a claim;

(d) the claimant was unable to make a claim in writing by means of an electronic communication used in accordance with Schedule 2 because the official computer system was inoperative;

...

17. Regulation 26 (1) of the Claims & Payment Regulations provides that a claim for universal credit must be made on the first day of the period in respect of which the claim is made subject to Regulation 26(2).

18. Regulation 26(2), up until 26 June 2023 when it was amended¹, provided that where the claim is not made within the time specified in paragraph (1), the

¹ By virtue of [The Social Security and Universal Credit \(Miscellaneous Amendments\) Regulations 2023 \(S.I. 2023/543\)](#), [regs. 1\(1\), 5](#), as from 26 June 2023, Regulation 26(2) now provides:

(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it [\[F1\]](#) up to and including the day

Secretary of State is to extend the time for claiming it subject to a maximum extension of one month, the date on which the claim is made, if certain circumstances set out in paragraph (3) apply and as a result of those circumstances the claimant could not reasonably have been expected to make the claim earlier.

19. The condition in Regulation 26(3)(b) – that the claimant has a disability – is agreed to apply in this case.

The Appellant's submissions

20. Mr Hall, the representative for the Appellant, submitted in writing that the FTT erred in law for the following reasons.

21. He argued that the case law in R (S) 2/63 sets out a test for whether a person has good cause for not making a claim for benefit sooner as:

“some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did.”

22. In addition, Mr Hall contends that the above case found that whilst ignorance of ones' rights is not a good cause for delay in making a claim, there should be a margin of appreciation where there are commonly held beliefs about the benefits system that would lead to a person delaying their claim.

23. He also relied on R (SB) 6/83 where it was held that there can be good cause for delay if the delay was due to a mistaken belief reasonably held.

24. Mr Hall also argued that the wording of Regulation 26(2)(b) of The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 is different to the wording of the good cause test applied to previous benefits as it requires that a claimant “could not have reasonably been expected to claim earlier”.

25. However, he submitted that there does not appear to be any authority that distinguishes the test as applied to backdating of Universal Credit from the good cause test referred to in the above cases. Therefore, he argued that the above cases remain good law when considering an application for backdating

that would be the last day of the first assessment period for an award beginning on the first day in respect of] which the claim is made, if—

(a) any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and

(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

of a Universal Credit claim.

26. Mr Hall contended that the Tribunal's decision contains the following errors of law:

- i) The Tribunal only considered factors that would have physically prevented the Appellant from making a claim for Universal Credit at an earlier date. He submits that this is too narrow an interpretation of regulation 26 (2) (b). Instead, the Tribunal should have adopted a "good cause" approach in accordance with the case law set out above. This would have involved considering a broad range of factors that might have led to the appellant having good reasons for not making a claim sooner.
- ii) The Tribunal's finding that the Appellant could have made a claim to Universal Credit by telephone was based on inadequate fact finding. In order to establish whether he could reasonably be expected to make a telephone claim to Universal Credit the Tribunal should have asked questions such as
 - How much prior knowledge the appellant had of claiming benefits and the Universal Credit system.
 - Whether he was aware that Universal Credit could be claimed by telephone.
 - Whether he had any difficulties making a claim by telephone including language or any other communication barrier.
 - Whether he would have needed to take advice before making a claim for Universal Credit and whether this would have been delayed for reasons connected to his disability.

27. Mr Hall relied on the fact that the Appellant states that he had no prior knowledge of the Universal Credit system prior to making his claim. He last claimed benefits over 10 years ago when he claimed legacy benefits. Due to his health problem he also found it difficult to seek benefits advice during the time period in question.

28. He also relied on the fact that the Appellant advises that he is from Nigeria and speaks Igbo as his first language and English as a second language. He has difficulty communicating on the phone and finds that when speaking to public authorities by telephone staff can become abrupt with him so he tries to contact them by other ways where possible.

29. Mr Hall submitted that it is not commonly known that Universal Credit can be claimed by telephone and some claimants report having been discouraged from claiming this way. Therefore, taking into consideration all of the circumstances the tribunal erred in law by making a finding the Appellant could

have reasonably been expected to make a claim for Universal Credit by telephone.

Discussion and Analysis

30. The Respondent's representative, Ms Foody, filed submissions dated 31 October 2023 supporting the appeal being allowed and submitting that the FTT had erred in law.
31. I respectfully agree with both parties. I am satisfied that there was a material error of law in the FTT's decision and set aside the decision for the following reasons as argued by the Respondent.
32. It is not in dispute that the Appellant can properly be regarded as having a 'disability' for the purposes of regulation 26(3)(b) of the Claims and Payments Regulations. This was by virtue of the FTT finding he had suffered from chronic lower back pain which caused him to give up work in November 2021.
33. There is no statutory definition of 'disability' for the purposes of this regulation. However, section 1(1) of the Disability Discrimination Act 1995 and section 27(1) of the Equality Act 2010 both define 'disability' as a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. Although neither definition applies as such to regulation 26, they nonetheless capture well the ordinary meaning of 'disability,' for which reason the scope of regulation 26(3)(b) can usefully be understood in light of them.
34. Chronic back pain of sufficient severity as to oblige a person to give up working (as found by the FTT in paragraph 8 of the Statement of reasons) can plausibly be regarded as a 'disability' on this view.
35. The point of dispute in this case is how the additional condition for an extension of the time for claiming, as set out in regulation 26(2)(b), falls to be applied.
36. In this connection, the Appellant's representative has cited the interpretation of the meaning of 'good cause' in R(S) 2/63. However, the good cause test for backdating claims has not existed since the changes introduced by regulation 6 of the Social Security (Miscellaneous Amendments) (No.2) Regulations 1997 came into force on 07/04/1997.
37. In CIS/4490/98 Mr Commissioner Angus observed in relation to the income support provisions analogous to regulations 26(2) and (3):

'23. As to the relevance of the "old case law" to the interpretation of the new regulation 19(4) and (5), I accept Mr Scoon's argument that the new regulation 19 introduces a completely different regime from that of the old regulation 19(2). I did canvas with Mr Scoon and Mr McMorroo the possibility that I might obtain

a copy of the Secretary of State's submission to the Social Security Advisory Committee on the draft of the new regulation 19. However, I have decided against doing that as it would have involved obtaining submissions from Mr Scoon and Mr McMorrow on the significance for the interpretation of the new regulation of the policy statement in the memorandum. I do not think it is necessary to incur that delay because it is quite clear from a comparison of the old regulation 19(2) with the new regulation 19(4) and (5) that the intention behind the new provisions is to restrict the circumstances in which there is a right to make retrospective claims to benefits to those specified in paragraphs (4) and (5) instead of the variety of circumstances which could amount to "good cause" within the meaning of the old paragraph (2).

24. It has, as Mr Scoon said, been stated by commentators that the enactment of the new regulation 19 swept away years of case law on the interpretation of "good cause". If that statement was intended to mean that none of the judicial interpretations of the old regulation 19(2) and its predecessors can be relevant to the interpretation of the new regulation 19(4) and (5) it is, to my mind, an overstatement. Paragraph 4(b) employs the phrase "could not reasonably have been expected" and paragraph (5)(a) employs "not reasonably practicable". Both provisions, therefore, import the concept of reasonableness on the part of the claimant. Consequently, any judicial interpretation of the old regulation 19(2) "good cause" in which the question of what was reasonable on the part of a claimant was considered may be relevant to the interpretation of paragraphs (4) and (5) of the new regulation 19 [...].'

38. Furthermore, regulation 26(2)(b) makes it clear that the test is whether, as a result of the particular circumstances that brought a claimant within one or more of the categories in regulation 26(3), a claimant could not reasonably have been expected to make the claim earlier. In this case there must be a causal connection between the Appellant's disability and the reasonableness of not making the universal credit claim at an earlier time.
39. This is not to say that a claimant's wider circumstances do not fall to be considered in any way. What was reasonably expected from a claimant, given the circumstances that satisfy regulation 26(3) must be assessed against the background of the claimant's circumstances as a whole.
40. What can reasonably be expected from a person in one set of circumstances may be different from what can reasonably be expected from a person in another. For example, what can reasonably be expected, in terms of claiming a benefit, from a person who is at the same time coping with serious flood damage to his home may be very different from what can be expected from a claimant enjoying more undisturbed domestic circumstances.
41. Nonetheless, in order to satisfy regulation 26(2)(b), a connection must exist between the circumstances that brought the claimant within regulation 26(3) and the unreasonableness of expecting him to have claimed earlier than he in fact did.

42. The Appellant's representative has referred to the appellant's ignorance of: (a) UC in general; and (b) the possibility of claiming that benefit by telephone in particular.
43. I, like the Secretary of State, would agree that a claimant's knowledge of the benefit system is one of the background circumstances that falls to be considered when determining what could reasonably have been expected from a person who comes within regulation 26(3).
44. However, where a person is ignorant of the means or possibility of claiming UC, "the test is whether in the whole circumstances the claimant can show that he did what any reasonable person would have done to ascertain his rights" (CSJSA/811/06 at [13]).
45. If a disabled person, with the same disability and in the claimant's wider circumstances could reasonably have been expected to have discovered UC, and the means of claiming it, and then made a claim, even one day earlier than the Appellant did (cf. R(IS) 3/01 at [18]), the time for claiming cannot be extended.
46. Nonetheless, the FTT does appear to have unduly narrowed its view and failed to have regard to this aspect of the Appellant's wider circumstances when considering regulation 26(2)(b). It simply examined his physical disability and noted that it did not prevent him from ringing his GP so likewise he would not be too unwell to telephone universal credit.
47. The first ground of appeal succeeds - even though the Appellant wrongly submits that the 'good cause' test is the correct test in law - because the FTT failed to consider the Appellant's circumstances fully when applying the test under Regulation 26(2)(b).
48. That is, it failed to properly to consider what a hypothetical person with the Appellant's disability could reasonably have been expected to do, given his knowledge of the benefit system and the possibilities for acquiring information about benefit entitlements and procedures available to him.
49. In the event, the FTT found (paragraph 9 of the Statement of Reasons) that the Appellant could reasonably have been expected to make a telephone claim for UC before 24/02/2022 (his actual date of claim).
50. Further, regulation 8(2) of the Claims and Payments Regulations provides that:

"A claim for universal credit may be made by telephone call to the telephone number specified by the Secretary of State if the claim falls within a class of

case for which the Secretary of State accepts telephone claims or where, in any other case, the Secretary of State is willing to do so."

51. There does not appear to be anything in the bundle of evidence before the FTT to suggest that the claim the Appellant actually submitted was made by telephone, and the FTT made no other findings to support the conclusion that a telephone claim would have been permitted by the Secretary of State under regulation 8(2). Accordingly, the FTT has made insufficient findings to justify the view that a claim by telephone could reasonably have been expected during the period for which an extension of time was sought.
52. Therefore, the second ground of appeal also succeeds.
53. As such, I accept the submissions that the FtT has erred in law in a material manner on both grounds of appeal as argued. I set aside its decision.
54. The question then follows as to whether I can remake the decision myself as to the date of the Appellant's entitlement to UC – the appeal against the Respondent's decision - or whether I should remit the appeal for rehearing by a freshly constituted FTT.

Remaking or remitting

55. The Appellant's representative, Mr Hall, submits that the Upper Tribunal should remake the First Tier Tribunal (FTT's) decision and decide that the Appellant satisfies 26(2) and (3) of The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 and is entitled to an extension of the time limit for claiming Universal Credit to enable his entitlement to be backdated.
56. He argues that the facts that have been established are sufficient to enable the Upper Tribunal to remake the decision as set out above. Specifically, this is because: i) It is accepted by both parties that the Appellant met the definition of having a disability during the relevant time period; ii) The FTT's finding that the Appellant could have claimed earlier appears to be rested entirely on the availability of a telephone claim. However, it is accepted by both parties that there is no guarantee that a telephone claim would have been accepted therefore this was not an adequate basis to refuse the application for an extension of the time period to make a claim.
57. He contends that to remit the appeal to the FTT to arrange a new hearing would entail the use of additional resources but not necessarily lead to determinative new findings of fact being made. This is because the potential new facts that a differently constituted tribunal could find would be limited to whether the Appellant could reasonably have been expected to have known that Universal Credit could be claimed by telephone. However, this would not address the

issue raised by the respondent in their submission where they identify that the regulations give the Secretary of State the discretion to decide whether to accept a telephone claim for UC.

58. The discretion that is given in the Universal Credit regulations as to whether to accept a telephone claim is different from the legacy benefit system where regulations provided for a claimant to make a telephone claim for benefits such as Income Support.

59. Therefore, Mr Hall submits that although it is not clear from the bundle how the claim was eventually made, notwithstanding the issue of whether the Appellant could have been reasonably expected to know that he could claim Universal Credit by telephone, such a claim may not have been accepted in any event. In view of the above, he respectfully requests that the Upper Tribunal considers remaking the decision as set out above.

60. Despite these attractive submissions, I am not satisfied that I should remake the decision in the Appellant's favour and backdate his entitlement to before the claim was made in the manner that his representative requests.

61. I am satisfied that there are a number of areas on which there is or was no evidence before me nor the FTT, whether written or oral. I am satisfied that fresh evidence, written or oral, will need to be considered by a further FTT on the issues highlighted above – such as the effect of the Appellant's disability on his ability to make enquiries in writing or by telephone calls regarding his benefits, the Appellant's knowledge of the benefit system and the possibilities for acquiring information about benefit entitlements and procedures available to him.

62. The FTT should also make enquiries of the Appellant in questions such as:

- How much prior knowledge the appellant had of claiming benefits and the Universal Credit system.
- Whether he was aware that Universal Credit could be claimed by telephone.
- Whether he had any difficulties making a claim by telephone including language or any other communication barrier.
- Whether he would have needed to take advice before making a claim for Universal Credit and whether this would have been delayed for reasons connected to his disability.

63. Mr Hall submits that the Appellant states that he had no prior knowledge of the Universal Credit system prior to making his claim. He last claimed benefits over 10 years ago when he claimed legacy benefits. Due to his health problem the

Appellant also found it difficult to seek benefits advice during the time period in question.

64. He submits that the Appellant advises that he is from Nigeria and speaks Igbo as his first language and English as a second language. He has difficulty communicating on the phone and finds that when speaking to public authorities by telephone staff can become abrupt with him so he tries to contact them by other ways where possible.
65. Mr Hall submits that it is not commonly known that Universal Credit can be claimed by telephone and some claimants report having been discouraged from claiming this way.
66. Each of these are matters upon which the FTT should hear evidence from the Appellant and make fresh findings of fact before coming to its conclusion. The FTT is not bound to accept any evidence given by the Appellant but will have to assess his reliability and credibility in the usual way having heard his oral evidence and make findings on the balance of probabilities.
67. The mere fact that this appeal has been allowed does not mean that the freshly constituted FTT will be bound to allow the Appellant's appeal against the Respondent's entitlement decision of 25 February 2022.
68. The FTT will have to remake the decision afresh in accordance with the guidance on the proper interpretation of Regulation 26(2)(b) and directions given in this decision on areas of evidence and findings of fact which will need to be considered.

Judge Rupert Jones
Judge of the Upper Tribunal

Authorised for release date:

31 January 2024