

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. CJSJA/2164/2015

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal, sitting at Ashford on 16th December 2014 (tribunal ref: *SC 151/14/01055*), involved an error of law. Under section 12 of the Tribunals, Courts and Enforcement Act 2007, I set aside the Tribunal's decision and remit the appeal for re-hearing before the First-tier Tribunal. Directions for the re-hearing are at the end of these reasons.

REASONS FOR DECISION

Introduction

1. Given the prevalence of electronic claims for benefit, it is perhaps surprising that there are few authorities concerning the special 'date of claim' rules for electronic claims. The operation of these rules was an issue in this appeal.
2. The First-tier Tribunal accepted that a JSA claimant, Miss W, made abortive attempts to make an electronic claim. The Social Security (Claims and Payments) Regulations 1999 contain presumptions about the delivery, or non-delivery, of such claims. While the First-tier Tribunal should have addressed these special rules, in the circumstances it correctly decided that Miss W's abortive attempts to claim electronically did not amount to the making of a valid claim. That is because, on her case, Miss W could not have rebutted the statutory presumption of non-delivery of such a claim. That presumption applies where a claim has not been recorded on an "official computer system".
3. However, the electronic claims rules are part of a wider set of rules about fixing dates of claim. In Jobseeker's Allowance (JSA) cases these include certain rules which fix the date of claim by reference to first notification of intention to make a claim. The Secretary of State accepts that Miss W's contact with her Jobcentre about difficulties in making an electronic claim amounted to her notifying an intention to claim. Miss W's notification should have been used to fix the start date of her JSA claim. On that basis, Miss W's appeal succeeds.

Background

4. Miss W made an online claim for JSA on 12th March 2014. She requested that her award be backdated to 12th December 2013.
5. The background to Miss W's backdating request was as follows:

**CW v Secretary of State for Work and Pensions (JSA)
[2016] UKUT 0114 (AAC)**

(a) Miss W says she visited her local Jobcentre in October 2013 to enquire about claiming JSA and was told to make an on-line application. At this point, however, it seems she would not have been entitled to JSA since her subsequent claim form said she did not cease employment until December 2013;

(b) once her employment had ceased, Miss W says she tried to submit an online JSA claim using computers at her local library. She said she completed the online form on more than one occasion but, on submitting it, did not receive any email or text message in response to confirm it had been successfully submitted;

(c) Miss W says she wrote to her local Jobcentre by letter dated 7th February 2014 to inform them of her failed attempts to claim online. This letter is referred to in a Jobcentre letter of 12th February 2014 (see below). Miss W says wrote another letter before this but received no response. Miss W's evidence did not give the date of this earlier letter;

(d) On 12th February 2014, Jobcentre staff wrote to Miss W stating they had no record of an on-line claim and suggested that she make one;

(e) On 12 March 2014, Miss W made an on-line claim. The Department for Work & Pensions (DWP) say this is the only claim received from Miss W;

(f) before Miss W's claim was decided, she was directed by a Jobcentre official to attend an interview at her local Jobcentre on 17th March 2014 which she duly did. It seems that, at this interview, an official "verified" Miss W's claim;

(g) on 20th March 2014, the Secretary of State decided Miss W's claim. He accepted that, from December 2013, Miss W satisfied the main entitlement conditions for JSA (what he calls the 'labour market' conditions). However, he also decided that her date of claim – the date on which entitlement commenced - was 12th March 2014 because that was the date on which a JSA claim was first received.

The First-tier Tribunal's decision

6. Miss W appealed to the First-tier Tribunal. The First-tier Tribunal's statement of reasons says Miss W did not attend the hearing and the Tribunal decided the appeal in her absence.

7. The Tribunal dismissed Miss W's appeal. It found that she first queried her entitlement to JSA at her local Jobcentre in October 2013 and was informed any claim needed to be made on-line. Subsequently, she made "several attempts" to claim on-line but, until her claim of 12th March 2014, did not receive an email or text message informing her that her claim had been received.

8. The First-tier Tribunal accepted that Miss W wrote to her Jobcentre about her attempts to claim on-line “in February 2014” but made no finding as to the date on which she wrote to them or whether, as she argued, she also wrote an earlier letter.

9. Miss W applied to the Upper Tribunal for permission to appeal. I granted her permission to appeal on the grounds that, arguably, the First-tier Tribunal may have erred in law by failing to apply the special date of claim rules for electronic claims and by not considering whether certain of the ‘backdating’ categories (see below) needed to be construed in the light of the modern prevalence of electronic communications.

Legislative Framework

The mainstream date of claim rules

10. Regulation 4(1A) of the Social Security (Claims and Payments) Regulations 1989, which governed Miss W’s claim for JSA, generally requires a claim for JSA to be made in writing on a form approved by the Secretary of State. However, regulation 4ZC also allows a claim for JSA to be made “by means of an electronic communication” in accordance with the provisions of Schedule 9ZC to the Regulations. “Electronic communication” bears the definition in the Electronic Communications Act 2000 which is:

“...a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa) by –

(a) by means of an electronic communications network; or

(b) by other means but while in an electronic form.”

11. Regulation 4(6)(a) contains special rule for JSA claims. Where a person wishes to claim JSA then “unless the employment officer otherwise directs” the person must “attend in person at an appropriate office or such other place, and at such time, as the employment officer may specify in his case in a notification under regulation 23 of the Jobseeker’s Allowance Regulations”.

12. Regulation 23 of the Jobseeker’s Allowance Regulations 1996 provides:

“A claimant shall participate in an interview in such manner, time and place as an employment officer may specify by a notification which is given or sent to the claimant and which may be in writing, by telephone or by electronic means.”

13. Rules for fixing the date of a claim made by a single JSA claimant are found in regulation 6(4A). They link with the rules in regulation 4(6) for claiming JSA but first I need to mention regulation 6(4AA). In the case of a single claimant’s JSA claim, this provides that, “unless the Secretary of State otherwise directs”, “a properly completed claim form shall be...provided or

made...(b) “at or before the time when the person making the claim for a jobseeker's allowance is required to attend for the purpose of making a claim”.

14. Regulation 6(4A)(a) provides that, where a single claimant notifies the DWP “by whatever means” that s/he wishes to claim JSA, then “if he subsequently attends for the purpose of making a claim for that benefit at the time and place specified by the employment officer and complies with the requirements of paragraph (4AA)(b), the claim shall be treated as made on whichever is the later of first notification of intention to make that claim and the first day in respect of which the claim is made”.

Backdating

15. Regulation 19 deals, in effect, with the start date for a JSA award. Regulation 19(4) provides that the time for claiming JSA shall be extended for up to three months from the first day in respect of which it is made where specified circumstances apply and, as a result, the claimant could not reasonably have been expected to make the claim earlier. The circumstances include where “the claimant was given information by an officer of the Department for Work and Pensions...which led the claimant to believe that a claim for benefit would not succeed”.

16. In a similar fashion, regulation 19(5) provides that the time for claiming shall be extended for up to one month in different specified circumstances, including where “there were adverse postal conditions” or “the claimant was unable to make telephone contact with the appropriate office where he would be expected to notify his intention of making a claim because the telephone lines to that office were busy or inoperative”.

The electronic date of claim rules

17. Turning now to the special rules for claims made by way of electronic communication, paragraph 4(1) of Schedule 9ZC provides that any claim “which is delivered by means of an electronic communication shall be treated as having been delivered...on the day the conditions imposed by this Schedule...are satisfied”.

18. Paragraph 4(3) of the Schedule provides that “information shall not be taken to have been delivered to an official computer system by means of an electronic communication unless it is accepted by the system to which it is delivered”. Paragraph 1 of the Schedule defines an “official computer system” as “a computer system maintained by or on behalf of the Secretary of State for the sending, receiving, processing or storing of any claim, certificate, notice, information or evidence”.

19. Paragraph 4(2) of Schedule 9ZC permits the Secretary of State, by direction, to determine that the claim is to be treated as delivered on a different day from that provided for by paragraph 4(1). This may be either an earlier or later date.

20. Paragraph 6(1) of Schedule 9ZC enacts a presumption of delivery for claims made by way of electronic communication. It provides that “if it is necessary to prove, for the purpose of any legal proceedings, that the use of an electronic communication has resulted in the delivery of

any claim...this shall be presumed to have been the case where (a) any such claim...has been delivered to the Secretary of State, if the delivery of that claim...has been recorded on an official computer system”.

21. And paragraph 6(2) enacts a linked presumption of non-delivery for an electronic claim. It provides that “if it is necessary to prove, for the purpose of any legal proceedings, that the use of an electronic communication has resulted in the delivery of any such claim...this shall be presumed not to be the case, if that claim...has not been recorded on an official computer system”.

The arguments

Secretary of State

22. The Secretary of State argues the reference to adverse postal conditions in regulation 19 cannot include difficulties in electronic communication, and that the ‘inability to make telephone contact’ case could not apply to difficulties associated with electronic communication systems. In both cases, this would be stretching the statutory language too far although the Secretary of State’s representative fairly concedes it is unfortunate that regulation 19 has not been updated to keep pace with the modern use of electronic communication. In my view, it would be worth the Secretary of State considering amending regulation 19 to this end. That may well promote his policy objective of encouraging claimants to make electronic claims.

23. The Secretary of State’s representative has also responded to my invitation to explain how the DWP’s computer systems are set-up to record receipt of electronic JSA claims. I am grateful for the time the representative has spent in dealing with this request. The representative says:

“The Judge in this matter has suggested that the Secretary of State provide an explanation of the system in place for receiving on-line claims. In this matter I would advise that JSA Online (JSAOL) is an online service which enables claimants to make a claim for Jobseeker’s Allowance via the Directgov website. The online service is available 24 hours a day, 7 days a week, 52 weeks a year. The service enables claimants to:

- Make a first claim to JSA;
- Reclaim JSA within 26 weeks of a previous claim ending;
- Make a joint claim;
- Make a claim to Housing Benefit (HB) and
- Register a voluntary Child Maintenance & Enforcement Commission (CMEC) interest.

Claimants using the online service are taken through a series of questions which mirror the telephony gather. Once they have submitted their claim, they have the option of receiving

an email to confirm that the claim has been received. They will then receive either an SMS text message or a telephone call to confirm the date and claim of their New Jobseeker Interview. If a claimant states that they have submitted a claim online but there is no trace of the claim on CMS the officer will check the CBS computer system to obtain a caller ID and check the online service. If no claim [is] traced on CBS using the claimant's NINO, Agents should also search using Name and date of birth. If there is no trace of the claim on CBS, the officer should check with the claimant to see if they have retained a copy of their confirmation email, or can remember the specific User ID and Password allocated to their application. If these details are available, a check of the online system should be made to establish claim status.

In this case the evidence shows that no trace of a claim was found for the earlier period and the claimant herself admits that she received no confirmation that the supposed attempt to claim had been successful ("I thought it had been accepted and heard nothing").

24. The Secretary of State's representative also, very fairly, draws my attention to another means by which Miss W might achieve the result she seeks, or at least something closer to that result than she achieved under the First-tier Tribunal's decision.

25. The Secretary of State refers to regulation 6(4A) of the Social Security (Claims and Payments) Regulations 1999 which, to recap, applies where (a) a single claimant notifies the DWP "by whatever means" that s/he wishes to claim JSA, and (b) is directed to attend an appropriate office (in reality a Jobcentre) to make the claim. In such a case, the claim is treated as made on the later of two dates: the date of first notification of intention to claim and the first day in respect of which the claim is made.

26. The representative submits that, when Miss W attended a Jobcentre on 17th March 2014 (that is after her electronic claim was delivered) this involved her "completing" her claim. For that reason, regulation 6(4A) applied so that Miss W's date of claim was 7th February 2014: the date on which she first gave notice of her intention to claim JSA. The representative describes this notice as having been given by telephone but, on Miss W's evidence, I think it was in fact given by letter.

Miss W

27. In reply, Miss W says she should be awarded JSA from the date on which she first tried to make an online claim. Miss W requested an oral hearing of her appeal because "I have told the truth and no one seems to believe me". It is important that I point out that the Secretary of State has not, on this appeal, doubted Miss W's honesty in any way, nor on my reading did the First-tier Tribunal have any doubt that she was telling the truth. It was for technical legal reasons that her arguments did not achieve the result she sought.

28. I have decided not to hold an oral hearing before deciding this appeal. As I explain below, further fact-finding is necessary before Miss W's appeal against the Secretary of State's decision can be finally determined. The First-tier Tribunal is better suited to that task than the

Upper Tribunal. And, were I to finally determine Miss W's appeal, I would deprive her of the opportunity of bringing an appeal against that final determination to the Upper Tribunal.

Conclusion

29. I have to reject Miss W's argument that her date of claim should be the date on which she first attempted to claim JSA online and the First-tier Tribunal erred in law by deciding otherwise.

30. On Miss W's case, before she made an online claim in March 2014 she did not receive notification that a claim had been delivered. Miss W's evidence was that she received neither email nor text message notification that her claim had been successfully submitted. On that case and taking into account the Secretary of State's explanation of how his computer system works, I do not see how Miss W could have rebutted the presumption of non-delivery in paragraph 6(2) of Schedule 9ZC to the Social Security (Claims and Payments) Regulations 1989 which, as explained above, applies if a claim "has not been recorded on an official computer system".

31. While the Tribunal erred in law by failing to apply the special date of claim rules for electronic claims, its conclusion that Miss W's abortive attempts to submit an online claim did not result in a valid claim would have been the only conclusion open to it had it applied the correct rules.

32. I also agree with the Secretary of State that none of the 'backdating' cases in regulation 19 of the 1989 Regulations could have applied in Miss W's case.

33. It would stretch the statutory language past breaking point to conclude that "adverse postal conditions" included a failure in the device by which an electronic claim was attempted. I do not consider there to be sufficient similarities between the act of posting a letter and completing an online form to call for an up-dating interpretation that equates the post with computing operations.

34. And the backdating category that refers to a claimant's inability to make telephone contact could not apply either. This is concerned with problems with telephone lines that impede a claimant's attempts to notify an intention to claim. Even if Miss W's attempts to submit an electronic claim can be construed as including a notification of intention to claim, I do not consider that the reference to "telephone contact" can be read as including unspoken contact by way of electronic communication. If that were intended, the 1989 Regulations, when they were amended to make provision for claims by way of electronic communication, would also have been amended to clarify that telephone contact included contact by way of electronic communication. Furthermore, this backdating category can only shift the start date of a JSA award back by a maximum period of one month from the date of claim. On the Secretary of State's rationalisation of Miss W's case she may be able to achieve a better result than that.

35. The Secretary of State's rationalisation of Miss W's case leaves an important question unanswered. Miss W's case was that she twice wrote to her Jobcentre about her problems in

attempting to make an online claim. The Secretary of State accepts that she wrote a letter dated 7th February 2014 and that it expressed her intention to make a claim. However, Miss W argues she wrote another letter before this. If that is right, then on the Secretary of State's suggested approach, the start date for Miss W's claim is to be determined by reference to that earlier letter. No findings have been made as to the existence or date of such earlier letter. This needs to be investigated in order finally to fix the start date of Miss W's JSA claim.

36. I set aside the First-tier Tribunal's decision because it involved an error of law. The Tribunal, in the light of its inquisitorial obligation, should have investigated the potential applicability of regulation 6(4A) of the Social Security (Claims and Payments) Regulations 1989. I remit to the First-tier Tribunal for re-hearing Miss W's appeal against the Secretary of State's decision, in accordance with the following directions.

Directions for the re-hearing of Miss W's appeal

1. Miss W's appeal against the Secretary of State's decision of 20th March 2014 is remitted to the First-tier Tribunal for re-hearing. The Tribunal's composition must not include the First-tier Tribunal judge whose decision I have set aside.
2. Unless the First-tier Tribunal decides otherwise, the issue for determination at the re-hearing is whether, before 7th February 2014, Miss W gave notice of her intention to claim JSA for the purposes of the Social Security (Claims and Payments) Regulations 1999.
3. Within one month of the date on which this decision is issued, Miss W must supply the First-tier Tribunal with a written statement giving as much information as she can about the contents and date of posting of the letter she says she sent to her Jobcentre before the letter of 7th February 2014. If Miss W has a copy of such a letter, she must supply it with this statement.
4. Within one month of the date on which this decision is issued, the Secretary of State must supply the First-tier Tribunal with a copy of any letter or email from, or record of telephone contact with, Miss W before 7th February about her intention to claim JSA. The Secretary of State must also provide a written explanation of the steps taken to try and locate those things.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
20th February 2016