

IN THE UPPER TRIBUNAL

Appeal No: CJSA/1207/2015

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Rochdale on 8 January 2015 under reference SC947/14/00642 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. This is simply to set aside the Secretary of State's decision of 20 June 2013 because that decision was unnecessary given that the earlier claim for jobseeker's allowance made on 17 April 2013 was, and still remains, to be decided.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Representation: The appellant represented himself.

Mr Cooper, solicitor, represented the Secretary of State for Work and Pensions

REASONS FOR DECISION

1. This appeal arises out of a claim for jobseeker's allowance ("JSA") that the appellant made on 28 May 2013 and his attempts to 'backdate' that claim under the provisions in regulation 19 of the Social Security (Claims and Payments) Regulations 1987. Backdating of this claim for the period 23 March 2013 to 27 May 2013 was refused, and that refusal was upheld by the First-tier Tribunal on 8 January 2015 ("the

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tribunal”) on the basis that no reasons had been given by the appellant for the backdating sought. Upper Tribunal Judge Markus QC gave the appellant permission to appeal against the tribunal’s decision on the basis that it had arguably erred in law by failing under its inquisitorial duty to elicit from the appellant at the hearing before the tribunal what his reasons for backdating were. It is now common ground that tribunal did so err in law and its decision should be set aside on this basis.

2. The issue that next arose, however, was how to correct this omission - in other words, what were the reasons for backdating? – as if there were none, or no good reasons, that could have affected whether the tribunal’s error of law was material to the decision to which it came. The appellant was therefore asked to provide his reasons for backdating. As these were unclear, an oral hearing of the appeal was directed. That hearing took place before me, in Manchester.
3. An issue separate to backdating arose at that hearing. To understand that issue it is necessary to sketch in some of the background concerning the period prior to the 28 May 2013 claim for JSA. The appellant had claimed JSA at least twice before. One claim was made on 17 April 2013 after the appellant had returned to the United Kingdom from being abroad. This claim was “closed as defective” on 22 May 2013. I will return to what these words mean shortly.
4. Prior to this claim, another claim for JSA had been made by the appellant on 30 August 2012. This claim was decided on 12 December 2012. It would *seem* (the Secretary of State’s analysis in the written appeal response to the tribunal is not the clearest) that this claim must have led to an award of JSA, if only a ‘credits only’ award under regulation 8A of the Social Security (Credits) Regulations 1975, as it is said that this claim (which must mean award given the terms of section 8(2)(a) of the Social Security Act 1998), continued until it was ‘closed’ on 23 March 2013 when the appellant went abroad. (The language used

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by the appeal response writer here of 'closed' is, again, incorrect, and potentially misleading (in the sense of suggesting an administrative act which could not be challenged by the appellant as opposed to a supersession decision bringing the award of JSA to an end and against which decision an appeal could be made. The 'closing' of the JSA awarding decision would almost certainly have been a supersession of that decision on the basis of a change of circumstances pursuant to section 10 of the Social Security Act 1998 and regulation 50 of the Jobseeker's Allowance Regulations 1996 (which deals with the limited circumstances where persons temporarily absent from Great Britain (GB) may be treated as still being in GB and thus still entitled to JSA under section 1(1)(i) of the Jobseekers Act 1995).)

5. This claim for, and award of, JSA has, however, no relevance to the issues with which this appeal is concerned, save to set the basis for the appellant needing to make another claim for JSA on his return to Great Britain in April 2013.
6. At the hearing before me the appellant made it clear that the only 'backdating' period he was concerned with was that from 17 April 2013 to 27 May 2013. He accepted he was not entitled to JSA for the period from 23 March 2013 to 16 April 2013 as he was then out of the country. Regulation 50 of the Jobseeker's Allowance Regulations 1996 (the "JSA Regs") therefore does not fall to be considered on this appeal.
7. As to *backdating* for the period 17 April 2013 to 27 May 2013 (which is now, or at least for now, academic – see further below), having heard from the appellant I was satisfied that the only relevant part of regulation 19 of the Social Security (Claims and Payments) Regulations 1987 was regulation 19(5)(d) of those regulations – which covers "being given information by an officer of the DWP which led the claimant to believe that a claim for benefit would not succeed". In the context of this appeal the 'claim for benefit' under regulation 19(5)(d) was the 28 May 2013 claim for JSA and the 'information given' may have been information

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concerning the earlier (allegedly defective) claim of 17 April 2013, which was not 'closed' until 22 May 2013. I indicated both at and after the hearing that it was arguable the tribunal had further erred in law in not investigating adequately what information the appellant had been given about his 17 April 2013 claim and its subsequent closure and what effect this may have had on his not making another claim for JSA until 28 May 2013.

8. However a logically prior issue arises that renders these backdating issues redundant, at least for the moment. This issue concerns whether the 17 April 2013 claim had been properly 'closed' as defective. That this can properly arise as a separate issue on this appeal against the refusal to backdate decision of 20 June 2013 would seem to be established by *CJSA/2327/2011* (at paragraphs 18-19), and the Secretary of State does not argue against this. (Nor does he take any point as to whether the mandatory reconsideration regime, if applicable, affects this analysis. I therefore do not travel down that path.)

9. What may be termed the 'defective claim' rules are set out in regulation 4(1A) of the Social Security (Claims and Payments) Regulations 1987 (the "Claims and Payments Regulations"). The issue is whether these rules have effect in the circumstance where, as in this appeal and the 'closing' of the 17 April 2013 claim for JSA, what is alleged is a failure to provide information which is not sought on the claim form but is only sought at an interview following completion of that form. This depends on the terms of regulation 4 (and 4(1A)) of the Claims and Payments Regulations, which provided at the relevant time and so far as is material as follows.

"Making a claim for benefit

4.—(1)every claim for benefit other than a claim for income support or jobseeker's allowance shall be made in writing on a form approved by the Secretary of State or the Board for the purpose of the

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benefit for which the claim is made or in such other manner, being in writing, as the Secretary of State or the Board may accept as sufficient in the circumstances of any particular case.

4(1A) Subject to paragraph (11A) [*paragraph (11A) deals with claims made by telephone and is not relevant to the 17 April 2013 claim*], in the case of a claim for income support or jobseeker's allowance, the claim shall—

(a) be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which the claim is made;

(b) unless any of the reasons specified in paragraph (1B) applies, be made in accordance with the instructions on the form; and

(c) unless any of the reasons specified in paragraph (1B) applies, include such information and evidence as the form may require in connection with the claim.

(1B) The reasons referred to in paragraph (1A) are—

(a) subject to paragraph (1BA),

(i) the person making the claim is unable to complete the form in accordance with the instructions or to obtain the information or evidence it requires because he has a physical, learning, mental or communication difficulty; and

(ii) it is not reasonably practicable for the claimant to obtain assistance from another person to complete the form or obtain the information or evidence; or

(b) the information or evidence required by the form does not exist; or

(c) the information or evidence required by the form can only be obtained at serious risk of physical or mental harm to the claimant, and it is not reasonably practicable for the claimant to obtain the information or evidence by other means; or

(d) the information or evidence required by the form can only be obtained from a third party, and it is not reasonably practicable for the claimant to obtain such information or evidence from such third party; or

(e) the Secretary of State is of the opinion that the person making the claim or, in the case of a claim for a jobseeker's allowance by a joint-claim couple, either member of that couple, has provided sufficient information or evidence to show that he is not entitled to the benefit for which the claim is made, and that it would be inappropriate to require the form to be completed or further information or evidence to be supplied.

(1BA) In the case of a joint-claim couple claiming a jobseeker's allowance jointly, paragraph (1B)(a) shall not apply to the extent that it is reasonably practicable for a member of a joint-claim couple to whom that sub-paragraph applies to obtain assistance from the other member of that couple.

(1C) If a person making a claim is unable to complete the claim or supply the evidence or information it requires because one of the reasons specified in subparagraphs (a) to (d) of paragraph (1B) applies, he may so notify an appropriate office by whatever means.

7(6) Subject to paragraphs (6A) to (6D) a person wishing to make a claim for benefit shall—

(a) if it is a claim for a jobseeker's allowance, unless the employment officer otherwise directs, attend in person at an appropriate office or such other place, and at such time, as the employment officer may

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specify in his case in a notification under regulation 23 or 23A of the Jobseeker's Allowance Regulations;

(b) if it is a claim for any other benefit, deliver or send the claim to an appropriate office.

(7B) In the case of a claim for a jobseeker's allowance, if a defective claim is received, the Secretary of State shall advise (a) in the case of a claim made by a joint-claim couple, each member of the couple of the defect and of the relevant provisions of regulation 6(4ZA) relating to the date of the claim;

(b) in any other case, the person making the claim of the defect and the relevant provisions of regulation 6(4A) relating to the date of claim.

(9) In the case of a claim for income support or jobseeker's allowance, a properly completed claim is a claim which meets the requirements of paragraph (1A) and a defective claim is a claim which does not meet those requirements." (my underlining added for emphasis).

10. It is thus apparent from the wording of regulation 4(9) that the statutory 'defective claim' is limited to a claim which does not meet the requirements of regulation 4(1A) alone. Moreover, and most importantly for the purposes of this appeal, the information or evidence (the lack of which, or failure to provide which may render a claim defective) has to be information or evidence that has been required by the claim form, as the underlined words in regulation 4(1A)(c) and the "required by the form" language in regulation 4(1B) in my judgment make evident. Information or evidence required other than by the claim form, at a follow-up interview for example, cannot therefore make the claim 'defective' if not provided. The only exception to this might be where the claim form contains wording such as "and any other information you might be asked to provide at the claim interview once this claim form has been submitted"; but even there it may be argued that the information or evidence sought at the interview is not information or evidence required by the form but rather information or evidence required by the interview.

11. Accordingly, in my judgment, and absent any contrary argument from the Secretary of State (he indeed "no longer seeks to argue that [the 17 April 2013 claim for JSA] was validly closed as a defective claim under regulation 4(1A) of the [Claims and Payments Regulations]"), under the terms of regulation 4(1A) (and the rest of regulation 4) of the Claims

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and Payments Regulations any failure by the appellant to provide information at the interview subsequent to the 17 April 2013 claim form did not give rise to a defective claim. I have concluded this on the evidence before me and drawing inferences from that evidence as to what the 17 April 2013 form required. It is noteworthy that the Secretary of State does not argue against this approach or suggest that the 17 April 2013 claim form was other than what I have inferred.

12. The need to draw inferences is because not all the relevant documents are in the appeal bundle. The 17 April 2013 JSA claim form is a form JSA4 (RR) 10/12 – a rapid reclaim form. However section 4.2 in the appeal response to the tribunal says that this claim was “closed as defective” because the appellant did not complete a JSA1 form as requested. This was said to be because no identification was provided by the appellant for his wife. (There is an oddity here, which does not suggest a particularly coherent or end-to-end decision making process, that the form that contains the statement that no identity information had been provided for the appellant’s wife (of itself perhaps curious given that this was a *reclaim* and there is no suggestion that the appellant had not claimed for himself and his wife before) was issued or written on 24 April 2013 on the basis of a failure to provide information which did not occur until the day *after* the form was issued or written and which therefore could not have been known about when the form was issued or written ¹.)

13. A form JSA1 does appear in the papers, but in respect of the later 28 May 2013 claim for JSA made by the appellant. I have drawn inferences from this as to what I will term the April 2013 JSA1 form required. I can see no good reason to assume the JSA1 form the appellant is said to have completed in April 2013 was any different to this May 2013 JSA1 form.

¹ I ignore the information on page 138 which gives a completely different basis for the 17 April 2013 claim for JSA having been ‘closed’ – failure to attend a work-focused interview. At no stage in the Upper Tribunal proceedings has the Secretary of State sought to make good this claim.

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14. Bearing in mind the terms of regulation 4(1A) and its focus on answering the questions the form asks and providing the information and evidence the form requires, there is nothing on the JSA1 form that required the appellant to provide identification for his wife. On that basis I cannot see any ground on which regulation 4(1A) was not complied with. The form ends, at least in terms of what the appellant declared as being correct and complete, on page 108 of the appeal bundle. The form then continues to give information about an interview the appellant needed to attend, which I understand he did after the 17 April 2013 claim form. However, if what is being held against him in terms of a 'defective claim' is his failure to provide identification for his wife at an interview which took place after he had correctly completed the April 2013 JSA1 form, I can identify no basis under regulation 4(1A) for that alleged interview failure acting as a breach of regulation 4(1A) so as to make that claim defective and not therefore open to ordinary adjudication.

15. Furthermore, there is nothing elsewhere in regulation 4 of the Claims and Payments Regulations, or elsewhere in the statutory scheme, which provides that a failure to provide evidence at an interview that takes place after a properly completed claim has been made renders the claim made 'defective' and thus not open to any substantive entitlement adjudication. As regulation 4(9) of the Claims and Payments Regulations makes clear, a 'defective claim' can only arise if it is a claim that does not meet the requirements of regulation 4(1A). If the claim does meet those requirements, or is excepted from meeting them under regulation 4(1B), then a failure to provide information or evidence sought other than by the claim form cannot in my judgment make the claim defective. It may, however, lead to a decision under section 8 of the Social Security Act 1998 that the claimant is not entitled to the benefit claimed on the basis of adverse inferences being drawn from the failure to provide the information or evidence sought: see, by analogy, *R(H)3/05*. (It would seem that this last point could not

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arise here when the 17 April 2013 claim is now decided as the evidence as to identify of the appellant's wife has long since been provided.)

16. Given this, and given the Secretary of State's own view that the 17 April 2013 claim has never been 'closed', it follows that that claim has never been properly determined and so remains to be decided. Unless and until it has been decided, any issue of backdating of a later claim to cover the period that a decision on the 17 April 2013 claim may cover is otiose: see, again, 8(2)(a) of the Social Security Act 1998. It is for this reason that I have rejected the Secretary of State's suggestion as to the disposal of the appeal and why I have decided the appeal in the manner set out above. Remitting the appeal back to the First-tier Tribunal for it to decide the 'backdating' issue is unnecessary given that the decision on the 17 April 2013 claim is likely to cover the period of the 28 May 2013 claim. Moreover I cannot see any basis on which either the First-tier Tribunal or the Upper Tribunal in their statutory appellate capacities can make the decision on the as yet undecided 17 April 2013 claim: that decision making function vests solely with the Secretary of State (see section 8(1) of the Social Security Act 1998), with the First-tier Tribunal's and Upper Tribunal's jurisdictions only arising once a decision has been made on the claim and an appeal is made against that decision.

17. If, for whatever reason, the decision on the 17 April 2013 claim does not cover a period up to and including 28 May 2013 then it may be necessary for the 28 May 2013 claim to be decided (including backdating of that claim), but my decision allows for that possibility.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 28th April 2016