

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. CP/819/2016

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal is dismissed.

Representation:

Secretary of State for Work and Pensions: Mr Stephen Cooper (solicitor)

BM: Mr AM (appointee)

REASONS FOR DECISION

Background

1. This appeal concerns BM's entitlement to state retirement pension, and in particular to a lump sum consequent on deferral of receipt of his pension.
2. BM was born on 8 November 1942 and he attained state pension age on 8 November 2007. He did not claim his pension at that time. On 6 March 2015 he wrote to the Department for Work and Pensions (DWP). The letter was headed "Unclaimed Old Age Pension Entitlement" and stated

"I ... have not claimed my Old Age Pension to which I became entitled to on my 65th birthday on November 8th 2007. I would like to rectify this situation, and begin receiving pension payments with immediate effect. I would also like to receive any back-dated payments from my 65th birthday onwards to which I am entitled."
3. The letter provided his national insurance number, his bank details, and the contact details for his brother (AM) to whom correspondence should be sent.
4. BM died on 11 March 2015. AM was the administrator of the estate. The DWP did not reply to the letter of 6 March. AM telephoned the DWP and the DWP sent a state pension claim form which AM completed and returned a few days later. On 15 May 2015 the DWP notified AM of its decision as to BM's pension entitlement, including 3 months arrears prior to the date of claim. The letter stated that AM did not have the option of choosing a lump sum payment on behalf of the estate because BM had not made a claim before he died.
5. AM appealed on the grounds that BM's letter of 6 March was a claim for state pension and that it was clear that BM had chosen to receive a lump sum in respect of his pension from November 2007. The DWP confirmed its decision on mandatory reconsideration, stating that the letter of 6 March had been received on 12 March and so, as it had been received after BM's death, he was not entitled to opt for a lump sum. It is common ground that, if the letter had been received posthumously, that was the correct position.

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6. The First-tier Tribunal allowed the appeal, set aside the decision of the 15 May and decided as follows:
 - a. The letter of 6 March had been received by the DWP on 9 March.
 - b. The letter was a valid claim for state pension.
 - c. BM had made an election to receive a lump sum but, even if he had not, he was deemed to have chosen a lump sum by reason of paragraph A1(2) of Schedule 5 of the Social Security Contributions and Benefits Act 1992.
7. The First-tier Tribunal gave the Secretary of State permission to appeal to the Upper Tribunal. An oral hearing of the appeal took place before me on 5 September 2016. The Secretary of State was represented by Mr Cooper, solicitor. AM appeared in person. They had both provided detailed written submissions in advance of the hearing. I am very grateful to them both for their written and oral submissions.

Legislative framework

8. Subject to certain statutory exceptions which do not apply here, entitlement to benefit (including state pension) is dependent on a claim being made in the manner and within the time prescribed by regulations, or the claimant being treated by regulations as having made such a claim: Social Security Administration Act 1992 section 1(1).
9. Regulation 4 of the Social Security (Claims and Payments) Regulations 1987 makes provision for making a claim for benefit. It includes the following:
 - (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 ... for the purpose of the benefit for which the claim is made or in such other manner, being in writing, as the Secretary of State ... may accept as sufficient in the circumstances of any particular case.
 - ...
 - (7ZA) If a claim, other than a claim for income support or jobseeker's allowance, has been made in writing but not on the form approved for the time being—
 - (a) the Secretary of State may supply the claimant with the approved form; and
 - (b) if the form is received properly completed within one month, or such longer period as the Secretary of State may consider reasonable, from the date on which the claimant is supplied with the approved form, the Secretary of State shall treat the claim as properly made in the first instance.
10. Regulation 4(6A) and (6B) provide that a claim for retirement pension is made by delivering or sending the claim to an appropriate office.
11. Regulation 6 determines the date of claim, and includes the following:
 - “(1) Subject to the following provisions of this regulation...the date on which a claim is made shall be—
 - (a) in the case of a claim which meets the requirements of regulation 4(1), the date on which it is received in an appropriate office;...”

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12. Regulation 30 applies where a claimant dies. It includes:

“(1) On the death of a person who has made a claim for benefit, the Secretary of State ... may appoint such person as he ... may think fit to proceed with the claim ...

...

(5) Subject to paragraphs (5A) to [(5H), where the conditions specified in paragraph (6) are satisfied, a claim may be made on behalf of the deceased to any benefit other than ... income support ..., to which he would have been entitled if he had claimed it in the prescribed manner and within the prescribed time.

(5A) ... a claim may be made in accordance with paragraph (5) on behalf of the deceased for a Category A or Category B retirement pension ...

...

(5D) Paragraph (5E) applies where, throughout the period of 12 months ending with the day before the death of the deceased person, his entitlement to a Category A or a Category B retirement pension ... was deferred in accordance with ...—

(a) section 55 of the Contributions and Benefits Act (pension increase or lump sum where entitlement to retirement pension is deferred); ...

(5E) Where a person claims under paragraph (5) or under paragraphs (5) and (5A)... the deceased shall be treated as having made an election in accordance with...—

(a) Paragraph A1(1)(a) of Schedule 5 to the Contributions and Benefits Act (electing to have an increase of pension), where paragraph (5D)(a) applies; ...

(6) ... the following conditions are specified for the purposes of paragraph (5)—

(a) within six months of the death an application must have been made in writing to the Secretary of State for a person, whom the Secretary of State thinks fit to be appointed to make the claim, to be so appointed;

(b) a person must have been appointed by the Secretary of State to make the claim;

(c) there must have been no longer period than six months between the appointment and the making of the claim.”

13. Section 55 and schedule 5 of the Social Security Contributions and Benefits Act 1992, to which regulation 30 refers, provide that a person may defer receipt of retirement pension and, on claiming their pension, may elect to receive either an increase of pension calculated by reference to the amount of pension and period of deferment, or a one-off lump sum representing the accrued amount they would have received had they not deferred it, and interest. If no election is made within the prescribed period, a person is treated as having elected a lump sum (paragraph A1(2) of Schedule 5). However the effect of regulation 30(5), 5(D) and (5E) of the Claims and Payments Regulations is that, in the case of a posthumous claim for pension, the deceased is treated as having elected an increase of pension.

Date of receipt of letter

14. The relevant passage in the tribunal’s reasons is:

“24. My finding of fact that the letter dated 6 March 2015 was received most likely on 9 March 2015 is based on the likely delivery times that Royal Mail suggest. They do

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not promise delivery by the next working day, but it is a reasonable assumption that most mail post first class [sic] will arrive the next working day. [AM] very frankly states he posted the letter the day he saw his brother at the hospice to get the letter signed, but it may well not have caught that evening's collection. If so, it will have been collected on the next day, a Saturday. That collection will (again I take judicial notice) have most likely been in the middle of the day, not at the end of the day, it being a Saturday. That delivery was made, therefore, by Monday 9 March 2015, is a reasonable conclusion.

25. The issue is not helped by the absence of a date-stamp on receipt, which tends to be usual practice. There is also no evidence at all from the respondent about incoming mail-handling procedures (although once in their hands, I do not think the subsequent procedure really matters for the purposes of this appeal). The only evidence against my finding about the receipt date is the assertion by Ms Cameron¹ of the respondent's dispute resolution team that "On 12 March 2015 a letter dated 6 March was received in the department from [BM] in which he advised of his intention to claim his State Pension (p3A). That claim is then repeated in the Secretary of State's appeal submission. But the respondent produced no evidence about this at all. Had his staff date-stamped it on receipt, that might have helped. A witness statement might have assisted. I do not think the respondent has rebutted the view that it arrived on 9 March 2015. Of course the onus is still on [AM] to prove his case, not on the respondent to disprove it. Nevertheless, on balance of probabilities, I find in conclusion that 9 March 2015 was the day the letter reached the respondent."

15. Mr Cooper submits that the First-tier Tribunal erroneously determined the date of receipt in accordance with section 7 of the Interpretation Act 1978 and not under regulation 6 of the Clams and Payments Regulations.
16. Mr Cooper is correct that section 7, which provides for deemed date of service of a document, has no application: R(G) 2/06. But the tribunal did not apply section 7. It did not address the issue before it as one of service and it did not deem the date of receipt to be 9 March. On the contrary, the above passages from the statement of reasons show that the tribunal made a finding of fact on the evidence as to the date of receipt, as it was required to do by regulation 6(1).
17. For the purposes of the appeal to the Upper Tribunal, the Secretary of State has provided an explanation as to mail handling and recording receipt of mail. This was not before the First-tier Tribunal. The tribunal was not required to adjourn the hearing in order to allow the Secretary of State to produce evidence of date of receipt. That was one of the principal issues for determination by the tribunal and the Secretary of State had ample opportunity to produce supporting evidence.
18. Mr Cooper says that the tribunal's conclusion as to date of receipt was perverse because there was no evidence to support it. He relies on the Commissioner's decision in CG/2973/2004. The DWP in that case asserted that the claim never arrived at the relevant office. There was evidence about claims handling procedures. The Commissioner (who was remaking the decision on the facts) observed that, as most documents sent by post do arrive at their destination, where it is accepted that the claim was posted there is an evidential burden on the Secretary of State to produce evidence that it was not received. In that case the Secretary of State had produced evidence and the Commissioner held that it was more probable that the claim had been mishandled by the Royal Mail before it was received at an appropriate office. The Court of Appeal upheld that decision

¹ The DWP presenting officer

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- Levy v SSWP [2006] EWCA Civ 890 (reported as R(G) 2/06). Having first decided that section 7 of the Interpretation Act 1978 did not apply, the Court held that there could be no challenge to the tribunal's finding of fact as to receipt and so the appeal was dismissed. It is important to note, however, that Pill LJ said that a contrary finding of fact on balance of probabilities would also have been possible so that there may be a "need for investigation into the credibility of an applicant who claims to have posted the application."

19. CP/1350/2005 was another case in which the DWP said that the claim had not been received. The Commissioner agreed with the Commissioner in CG/2973/2004 as to the evidential burden, and he was provided with evidence as to the Department's procedures for handling claims. He said:

"In CG/2973/2004 the Commissioner said that he had to consider the probability of the Department, rather than Royal Mail, having lost the claim because most mail is correctly delivered by the Post Office. I think it is equally true to say that most claims received by the Department are not lost by the Department. There is, therefore, no prima facie greater probability of default on the part of one than there is on the part of the other. I do not see that it is possible for the claimant in this case to establish on the balance of probabilities that the claim which her daughter posted for her in March 2004 was delivered by Royal Mail to the Department or one of the post-opening centres and then lost. I think that it will be very seldom that a claimant ... will be able to fix the Department with the receipt of a claim which everybody accepts the claimant posted."

20. The issue in both the above cases was whether the claims had been received, not the date of receipt. It is one thing for the Secretary of State to prove a negative where his position is that a claim was not received. But where it is accepted that the claim was received, it should be possible to prove date of receipt. In addition, the Commissioner's finding of fact in CP/1350/2005 was based on the relative complexity and multiplicity of tasks involved in the postal system as compared to those in the DWP as to which he had evidence. That comparison is inapplicable where it is accepted, as in this case, that the item in question was delivered by the Royal Mail. Moreover, there was no evidence before the First-tier Tribunal that mail handling procedures in 2015 were the same as those which applied in the above two decisions.

21. In this case the First-tier Tribunal did what Pill LJ envisaged a tribunal might do. It investigated the credibility of the claim by AM as to when he posted the letter and found this to be credible (particularly in the light of his having "frankly" stated that he may not have caught the post collection on 5 March). The tribunal reminded itself that it was for the Appellant to prove his case. As the tribunal noted, there was an assertion by the Secretary of State as to date of receipt but there was no evidence in support. On the other hand, there was evidence that the letter had been posted on the evening of 6 March by first class post. The tribunal was entitled to take judicial notice of Royal Mail practice and to find, in the absence of evidence to the contrary, that it was likely that collection and delivery occurred accordingly.

Whether the letter was a "claim"

22. The tribunal decided that it was "unambiguous" that the letter was a claim:

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“28. ...[AM’s] approach to stating on his brother’s behalf what was wanted is not a technical one but it is perfectly logical. He states, effectively, that the RP claim was deferred, and that he would like to ‘rectify’ this. It is clear that what he wanted rectified was the fact that he had not claimed it. *Rectifying it* means that he now wanted to claim RP. Ms Cameron suggested it was a letter in which ‘he advised of his intention to claim his State Pension’. I think it was more than that.

29. RP is a benefit which does not require the provision of all that much information by a claimant. A lot of the information needed to process a claim is already in the possession of the Pension Service. [AM] furnished his NINo, his name and address, and his bank details. Not much more is needed – that can be seen from form BR1. About the only substantive information missing that the respondent needed in order to process it was his marital status. Providing his bank details also reinforces the view that this was a claim, ie it was written in expectation of payment.

30... Here, the intention is plain. All that was really missing was [BM’s] marital status. That was not a matter so fundamental to his own RP claim that it could not be processed at all, subject to the collection of further information – a common post-claim procedure. It was not, as a result, a defective claim that could only be made valid by the provision of marital status information. It was a valid claim that needed a little more detail but not much.”

23. In his written submissions the Secretary of State had contended that it was not open to the tribunal to conclude that the letter was a claim. He said that a claim must contain sufficient information to enable a decision to be made without any further action, and that the letter did not. At the hearing Mr Cooper, accepted that the letter did constitute a claim. He does so correctly. A document is a claim if it makes it clear, taking into account the context, that a claim to benefit is being made, and a reasonable official receiving the document can understand, with or without further information, which benefit is being claimed: Novitskaya v Brent London Borough Council [2010] PTSR 972. The First-tier Tribunal’s decision that BM’s letter was a claim was reached accordingly and was rational. Indeed my view is that it was the only conclusion reasonably open to the tribunal on the facts of this case. The letter made it clear that BM was claiming state retirement pension. The terms of the letter were unconditional, and BM said that he wished to receive his pension “with immediate effect” as well as to have back-dated payments. As in Novitskaya (paragraph 27), “it made no sense for the claimant to ask for claims to be backdated if not claim was actually being made”. BM provided his bank details so that the payments could be made. The fact that some information was missing did not matter: regulation 7(1) of the Claims and Payments Regulations allows information to be provided after a procedurally effective claim has been made.

Was the claim procedurally effective?

24. Mr Cooper submits that the claim was not procedurally effective. He says that the claim was not made in accordance with regulation 4(1) and that AM could not regularise that after BM’s death.

25. Had BM lived and returned the properly completed claim form within one month of it being sent to him, regulation 4(7ZA) would have required the Secretary of State to treat the claim as properly made – ie. in accordance with regulation 4(1) - at the date of the letter. Accordingly the claim would have been made on the date of

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receipt of the letter: regulation 6(1)(a). However, the Secretary of State's case is that AM returned the claim form after BM's death and so the claim could not be treated as made when the letter was received but was made when the claim form was received. In written submissions the Secretary of State had submitted that AM was not permitted to complete the form for BM, relying on R(IS) 3/04, but Mr Cooper has since agreed that that decision does not apply in the present case. Despite this concession, Mr Cooper nonetheless maintains that the claim was posthumous. Therefore I must start my analysis of the issue with a discussion of R(IS) 3/04.

26. That appeal concerned a deceased claimant who prior to his death had given notification of intention to claim income support but had not made a claim, following which the DWP sent a claim form which was completed and returned (after the claimant's death) by his executor within one month of that notification.
27. It is important to note that the Claims and Payments Regulations make different provision for income support claims and others including retirement pension claims. Income support claims must be made as specified in regulation 4(1A). Regulation 4(7) (which applies to defective claims) and (7ZA) do not apply to income support claims. Regulation 4(7A) applies to defective income support claims and, unlike regulation 4(7) and (7ZA), it does not provide for retrospective validation of defective claims or missing claim forms. Regulation 6(1A)(b) enables a claim for income support to be treated as having been made at the date of notification of intention to claim or a defective claim, but only on receipt of a properly completed claim.
28. In R(IS) 3/04 the executor's case was that the effect of regulation 6(1A)(b) was that posthumous submission of a claim form within one month of the deceased's notification of intention to claim had the effect that the claim was made within the prescribed time. Commissioner Turnbull rejected that submission. The deceased had not made a claim by the date of his death. If he had made a valid claim within one month of notifying his intention to do so, regulation 6(1A)(b) would fix the date of claim as the date when he gave that notification. But a valid claim could not be made after the claimant's death, because there was no express or implied statutory authority to do so. It was a prerequisite of regulation 30(1) that a claim had been made by the claimant before he died.
29. The present case is different. A claim had been made while BM was living, albeit not on the approved form. Accordingly regulation 30(1) applied to enable the Secretary of State to appoint AM to proceed with the claim, in this case by returning the properly completed form.
30. The Secretary of State did not appoint AM under regulation 30(1) because he wrongly treated the claim as a posthumous one and so appointed him under regulation 30(6). Although the tribunal did not address the above statutory provisions, it did find that the claim was not a posthumous claim (paragraph 32). For the reasons which I have given, that was correct. The tribunal also decided that AM was acting as appointee for BM and, on the basis of the finding that the claim was not posthumous, this must have been pursuant to regulation 30(1). It follows from my analysis above that the tribunal's decision that the claim was valid was correct. Mr Cooper was content that, if I found against him on the legal

submissions, the failure specifically to address the statutory provisions was immaterial and I so find. The tribunal reached the right conclusion for substantively the right reasons.

Election to have a lump sum

31. As I have explained the Secretary of State wrongly treated the claim as a posthumous one. It follows that regulation 30(5) of the Claims and Payments Regulations did not apply and so regulations 30(5D) and (5E) did not treat BM as having elected an increase of pension.

32. The First-tier Tribunal decided that BM's request for "any back-dated payments from my 65th birthday onwards to which I am entitled" was a request for the lump sum. That was a finding of fact with which the Upper Tribunal cannot interfere in the absence of an error of law. The tribunal said:

"[AM] argues that neither of them knew 'lump sum' to be a technical term here and that the letter was expressing as best it could a desire to choose to now receive the value of the pension his brother had foregone for the previous 6 years. I agree that that is what it say, in effect. The term 'lump sum' is not used, it is true. But the amount of the lump sum as calculated in schedule 5 to the 1992 Act is essentially a backdated (and re-valued) payment of the amount of RP that has been foregone over the years. In that sense it is indeed a back-dated payment. The other option, enhanced weekly payments into the future, is less sensibly described as 'back-dated payments'. Also, requesting a lump sum is consistent with the fact that [BM] knew he could die soon; with a low life expectancy it is logical that a person would choose the lump sum, and to read that into the interpretation of his words".

33. This is a clearly reasoned finding based on the evidence, and it was a conclusion which was open to the tribunal.

34. In any event, the tribunal covered the ground by finding in the alternative that, if there was ambiguity in the letter, BM had *not* opted for the increased pension and so, if BM had failed to make an election, paragraph A1(2) of Schedule 5 to the 1992 Act operated to treat him as having elected a lump sum. As this was not a posthumous claim, that analysis is correct.

Backdating

35. The First-tier Tribunal decided that the award of Retirement Pension should have been backdated by 12 months from the date of claim (not 3 months as the Secretary of State had decided). The Secretary of State accepts that that is correct, in accordance with paragraph 13 of Schedule 4 of the Claims and Payments Regulations,

**Signed on the original
on 26 September 2016**

**Kate Markus QC
Judge of the Upper Tribunal**