

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CTC/5443/2014

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: No attendance or representation

For the Respondent: Mr Tom Rainsbury, instructed by solicitor to HMRC

Decision: The appeal fails in the result. Although the decision of the First-tier Tribunal sitting at Nottingham on 9 June 2014 under reference SC045/14/00564 did involve the making of an error of law and is set aside, acting under section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision in the following terms:

The claimant's appeal against the decision notified on 15 August 2013 excluding working tax credit from her award of tax credit for the tax credit year 2013-14 with effect from 29 April 2013 is dismissed. She is precluded from an award of working tax credit while in receipt of maternity allowance by reason of not having been engaged in qualifying remunerative work immediately before the beginning of the period during which she was paid maternity allowance.

REASONS FOR DECISION

The facts

1. The claimant, a single parent, worked 16 hours per week, split between two jobs, one of 11 hours and one of 5. The 5 hour job finished on 31 March 2013. She continued to work in the 11 hour job until stopping work immediately before commencing a period in receipt of maternity allowance with effect from 26 April 2013. Whether her contract of employment in the 11 hour job continued during her period of maternity leave is not in evidence. By a decision dated 15 August 2013, her working tax credit ("WTC") was stopped with effect from 29 April 2013. Thereafter, she was awarded child tax credit only for the remainder of the 2013-14 tax year.

The appeal process

2. She appealed to the First-tier Tribunal which on 9 June 2014 dismissed the appeal. She appeals further with my permission. She is supported by a small voluntary organisation who initially, with a number of staffing changes, did not play an active part in pursuing her appeal. I took the step of preparing a decision in draft form for the parties' comments. This prompted both a revised

submission from HMRC and a short, but thoughtful, response on behalf of the claimant. HMRC requested an oral hearing, while the claimant's representatives did not, indicating moreover that they were not in a position to attend one if one was directed. As my draft decision was inconsistent with what HMRC subsequently put forward, I considered it appropriate to hold the hearing, which took place on 6 September 2016. I apologise for the delay in finalising this decision.

The issue

3. The appeal explores the provisions of Part II of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 ("the Regulations"). In particular, it examines whether the claimant was able to rely on reg 7D (which makes special provision – "the four week run on" - where a person's hours drop below the number normally required, so as to enable a WTC claim to continue) in order to access reg 5 (which makes special provision for, among others, those in receipt of maternity allowance). Because WTC forms part of a wider system of social security, partly administered by HMRC and partly by DWP, in the background is the issue of where the legislation draws the line to exclude persons from WTC, with the consequence that they have to rely on such provision, if any, as may be available to them under other parts of the social security system.

Relevant legislative provisions

4. Entitlement is dealt with in section 10 of the Tax Credits Act 2002 ("the 2002 Act") in the following terms:

"(1) The entitlement of the person or persons by whom a claim for working tax credit has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work.

(2) Regulations may for the purposes of this Part make provision—
(a) as to what is, or is not, qualifying remunerative work, and
(b) as to the circumstances in which a person is, or is not, engaged in it.

(3) The circumstances prescribed under subsection (2)(b) may differ by reference to—
(a) the age of the person or either of the persons,
(b) whether the person, or either of the persons, is disabled,
(c) whether the person, or either of the persons, is responsible for one or more children or qualifying young persons, or
(d) any other factors."

5. The regulation-making power is in section 65, of which it is only relevant to note sub-sections (7) and (9):

“(7) Any power to make regulations under this Act may be exercised—
(a) in relation to all cases to which it extends, to all those cases with prescribed exceptions or to prescribed cases or classes of case,
(b) so as to make as respects the cases in relation to which it is exercised the full provision to which it extends or any less provision (whether by way of exception or otherwise),
(c) so as to make the same provision for all cases in relation to which it is exercised or different provision for different cases or classes of case or different provision as respects the same case or class of case for different purposes,
(d) so as to make provision unconditionally or subject to any prescribed condition,
(e) so as to provide for a person to exercise a discretion in dealing with any matter.

...

(9) Any power to make regulations or a scheme under this Act includes power to make any incidental, supplementary, consequential or transitional provision which appears appropriate for the purposes of, or in connection with, the regulations or scheme.”

6. Section 10(2) of the 2002 Act empowers provision as to “what is, or is not” qualifying remunerative work and as to the circumstances in which a person “is, or is not” engaged in it. Neither there nor in section 67 can I see anything which in terms addresses “treated as” provisions. I say this, not in order to suggest that “vires” (statutory powers) are lacking for the Regulations which follow, but because I believe it is relevant to understanding the wording of the relevant regulations, which, as will be seen, involve situations where a person is “treated as” engaged.

7. Turning to the Regulations, regulations 4 to 19 (inclusive) form Part II, which is headed “Conditions of Entitlement”. WTC consists of a number of elements. Regs. 4 to 8 deal with the “basic element”; other regulations within Part II dealt with the disability element, 30-hour element, second-adult element, lone-parent element, childcare element and severe disability element.

8. By regulation 4, as in force at the date of HMRC’s decision :

“(1) Subject to the qualification in paragraph (2), a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies all of the following conditions (and in the case of the Second condition, one of the variations in that condition).”

It then goes on to list the conditions. The claimant whilst working 16 hours a week had satisfied the first variation of the second condition.

9. Paragraph (1A) of regulation 4 provides:

“(1A) For the purposes of interpretation of paragraph (1)—
...
(b) regulations 5, 5A, 6 and 7A and 7B apply in relation to periods of absence from work connected with childbirth or adoption, sickness, strike periods or suspension from work;
(c) regulation[...] 7C appl[ies] where pay is received in lieu of notice;
(d) regulation 7D applies where a person or, in the case of a joint claim, one or both persons cease to work or reduce their hours to the extent that they no longer satisfy the Second condition in paragraph (1);
(e) regulation 8 applies where there is a gap between jobs;
...”

The various limbs of para (1A) are not separated by either “and” or “or”.

10. Paragraph (2), referred to in paragraph (1), lists a number of circumstances in which a person who would otherwise satisfy the conditions in paragraph (1) “shall not be regarded as engaged in qualifying remunerative work”. None is of direct relevance to the present case.

11. Paragraph (3) makes clear that self-employed work may also constitute qualifying remunerative work. (There have been further amendments in relation to the self-employed since the date of HMRC’s decision, which do not need to be set out).

12. Regulation 5 provides:

“(1) This regulation applies for any period during which a person—
(a) is paid maternity allowance,
...”

(2) For the purposes of the conditions of entitlement in this Part, the person is treated as being engaged in qualifying remunerative work during the period.

This is subject to paragraphs (3), (3A) and regulation 7D .

(3) The person must have been engaged in qualifying remunerative work immediately before the beginning of the period.

(3A) [not material to the present case]”

13. Reg 5A makes provision supplemental to reg 5, so that the hours required for a person to qualify under reg 5 are calculated as if the child had already been born or adopted.

14. Reg 6 creates similarly structured provisions to reg 5 where a person is paid statutory sick pay, short-term incapacity benefit, income support on the grounds of incapacity for work or employment and support allowance, or receives national insurance credits on the grounds of incapacity for work. In particular, reg 6(2) and (3) are materially identical to reg 5(2) and (3).

15. Regs 7A and 7B make provision for strike periods and persons suspended from work respectively. Reg 7C provides that a person who stops work and receives pay in lieu of notice shall not be treated as in qualifying remunerative work during the period for which he receives the pay.

16. Regulation 7D provides:

“(1) This regulation applies for the four-week period immediately after—
(a) a person, not being a member of a couple, who is engaged in qualifying remunerative work for not less than 16 hours per week, ceases to work or starts to work less than 16 hours per week,

...

(2) For the purposes of the conditions of entitlement in this Part, the person is treated as being engaged in qualifying remunerative work during that period.”

17. Regulation 8 makes provision for, according to its cross-heading and reg 4(1A)(e), “gaps between jobs” in the following terms:

“For the purposes of the conditions of entitlement in this Part a person shall be treated as being engaged in qualifying remunerative work for the requisite number of hours if he has been so engaged within the past 7 days.”

Summary of claimant's case

18. The case on behalf of the claimant is that under reg 7D a person can be treated as being in full-time paid work if they stop or (as in this case) reduce their hours, for up to 4 weeks. Consequently, it is said, the conditions under reg 5 were fulfilled for the claimant to be entitled to WTC during the period when she was on maternity allowance.

Summary of HMRC's case

19. The case on behalf of HMRC is that:

(a) the underlying legislative purpose of the WTC legislation is to award WTC to qualifying persons who are in remunerative work

(b) qualification for WTC by a person who is paid maternity allowance—because, by paragraph (2), she is “treated as being engaged in

qualifying remunerative work during the period”- is expressly made subject to the requirement, by paragraph (3), that “the person must have been engaged in qualifying remunerative work immediately before the beginning of the period”;

(c) a distinction is to be drawn between the paragraph (3) requirement to “have been engaged” in qualifying remunerative work and other provisions in the Regulations which refer to where a person is “treated as being engaged”;

(d) regulation 7D is, like regulations 5 to 7B and 8, an elaboration of the conditions in reg 4, not an exception to those elaborations;

(e) reg 4(1A) indicates that each of those exceptions applies in different circumstances and not cumulatively;

(f) it is solely reg 4 which provides the “conditions” which reg 7D may fulfil and specifically not regs 5 to 7B and 8;

(g) the effect for which the claimant contends could only be achieved by the addition of words such as “or have been treated as being engaged in qualifying remunerative work”, but those words are absent.

20. Such a structure has the attraction of relative simplicity. However, is it sustainable in the light of the language used and the structure of the relevant part of the Regulations?

Regulation 7D – legislative history

21. Reg 7D was introduced (in an earlier form) by SI 2007 No.968. At that point:

(a) the regulation was expressed to apply “for the purposes of the conditions in regulation 4(1)”;

(b) it was subject to the condition (which appears to have been otiose) that the person must have been engaged in qualifying remunerative work immediately before the beginning of the four week run-on period;

(c) regs 5, 5A and 6 were not amended so as to be expressed to be “subject to” reg 7D;

(d) however, reg 7C (which generally treats those who receive payment in lieu of notice as not engaged in qualifying remunerative work), was so amended.

22. I consider there is sufficient ambiguity in reg 7D and (in particular) the making of other regulations within Part II “subject to” it, that I am entitled to have regard to Explanatory Memoranda. In relation to SI 2007/968, the Explanatory Memorandum indicates that

“Claimants, where entitled, will be eligible to claim Income Support or Jobseekers Allowance and other income related benefits whilst in receipt of the Working Tax Credit four week run-on. Under Social Security legislation Working Tax Credit will be treated as income for benefit purposes.”

23. The “policy background” is said to be, inter alia that

“The measure is to reduce overpayments and to ease the transition from tax credits to benefits. It reflects the mandatory reporting requirement on claimants to inform HMRC within a month when they cease work. The latter also comes in from 6 April 2007.”

24. Amendments were made in 2009, when SI 2009/1829, as well as expanding the categories of claimant to whom the 4 week run-on was applicable:

- (a) got rid of the apparently otiose condition (see [21b]);
- (b) expressed reg 7D to apply for the purposes of “the conditions of entitlement in this Part” rather than for those of the “conditions in regulation 4(1)”;
- (c) made similar amendments to those at (b) in respect of regulations 5, 5A, 6, 7 and 7A; but
- (d) did not make any of the regulations other than reg 7C (which already was) expressly subject to reg 7D.

25. The Explanatory Memorandum indicates that in the various circumstances to which regs 4 to 8 apply:

“where a person is treated as being in qualifying remunerative work during these periods so as to be entitled to Working Tax Credit, their entitlement will extend to all elements of Working Tax Credit to which the individual or couple claiming were formerly entitled. This will include the childcare element where the other conditions for entitlement to that element are met.”

The policy aim therefore reflected the fact that Part II of the Regulations contains not only conditions relating to the basic element, but other elements besides: see [7] above.

26. Further amendments were made by SI 2012/848. These were expressed to be “Miscellaneous Amendments” regulations. Inter alia they:

- (a) introduced reg 4(1A); and
- (b) amended regs 5, 5A, 6, 7A and 7B so that they were expressed to be subject to reg 7D when they had not previously been so expressed.

27. The explanation provided to me that

“the purpose behind these 2012 Regulations was to clarify the entitlement conditions for joint couples and had no other impact as far as the four week run-on period were concerned”

is in my view an over-simplification of what is said in the Explanatory Memorandum and one that I do not entirely accept. However, there is nothing in either the Explanatory Memorandum or the Explanatory Note which addresses these amendments beyond the suggestion (Explanatory Memorandum para 12) that any amendments which were not implementing Budget and Spending Review announcements were “consequential and technical”.

Regulation 7D – wording

28. As noted, paragraph (2) of reg 7D provides that:

“(2) For the purposes of the conditions of entitlement in this Part, the person is treated as being engaged in qualifying remunerative work during that period.”

On an initial view, one might reasonably take the view that the difference between the provision and the opening words of reg 4 is immaterial and that reg 7D, like reg 4, creates conditions which, if fulfilled, lead to being in “qualifying remunerative work”. Further, as reg 7D(2) is expressed no longer to be for the purposes of reg 4 but rather “for the purposes of the conditions of entitlement in this Part” and, as we have seen, “Conditions of Entitlement” is the cross heading to the quite lengthy Part, it might, although there is room for debate, at first sight seem to follow that meeting the requirement of reg 7D was sufficient for any of the conditions in the Part.

29. The opening words of regulation 4 provide that “a person shall be treated as engaged in qualifying work, if, and only if, he satisfies” conditions which are then set out. Those conditions are concerned with those who are actually working at the material time. However, regulation 8, which likewise is stated to apply for the purpose of interpreting reg 4(1), as it is concerned with “gaps between jobs” countenances a situation where a person is not, in fact, engaged in qualifying remunerative work. Regulation 4 is, accordingly,

concerned (as it needs to be) inter alia with those who are “treated as” engaged in qualifying remunerative work. Being so “treated” is clearly considered sufficient compliance with section 10(2): such a person is in qualifying remunerative work for the purposes of that section. Similarly, being so “treated” under reg 7D is, in general terms, likewise good enough. If it were otherwise, the 4 week run-on would not work so as to allow people to be paid, which would be clearly contrary to the legislative intention.

Regulation 7D – its place within Part II

30. However, it is not just a question of looking at reg 7D but of the provisions of Part II. Regulation 5 operates so that, under paragraph (2), a person who qualifies “is treated as being engaged” in qualifying remunerative work. No suggestion has been put forward to the effect that the addition of the words “being” in this and other places yields any different meaning: indeed, “being” appears to be a word which can readily be implied into the phrase “treated as engaged”.

31. Paragraph (3), to which paragraph (2) is expressly made subject, states (as do its equivalents in regs 5A 6, 7A and 7B, without any “treating” being involved), that the person “must have been engaged” in qualifying work immediately before the relevant period (in this case the maternity allowance period).

32. On behalf of the claimant, it was submitted that if actual engagement in qualifying remunerative work at the start of the relevant period was required, that would deprive e.g. the provisions of reg 6 relating to employment and support allowance of effect. I disagree. Even if there is such a requirement to have been in actual remunerative work at the start of the relevant period, I am not dealing here with what that period is for reg 6 purposes. If either the decision in HMRC v TK were to prove to be incorrect as regards the period, so one had to look at a composite period in which SSP preceded ESA, or because there are circumstances in which ESA rather than SSP is payable even though the person does have a contract of employment (see *CPAG Welfare Rights and Tax Credits Handbook 2016/17*p820), the provision would still have meaningful effect.

33. It was then submitted that an interpretation that reg 5(3) required actual work would frustrate the references in reg 5(1)(ca) to additional maternity leave, something which can only arise after a period of ordinary maternity leave, during which by definition more than very limited working is statutorily prohibited (see *Maternity and Parental Leave etc. Regulations SI1999/3312*, reg 12A) and so a person would not have been engaged in qualifying remunerative work. In my view that is likewise a point going to what constitutes the “period” for the purposes of reg 5(3), which in that situation might well consist of first the ordinary maternity leave then the additional maternity leave (in my view they only needed to be dealt with separately in

reg 5(1) because the legislator sought to specify that it is only the first 13 weeks of the additional maternity leave period which counts.)

34. There is therefore a distinction between the language used in paragraphs (2) and (3) and if that were the end of the matter, I would accept that paragraph (3) (and the equivalent provisions in the other regulations mentioned above) is directed to actual engagement. Such was also the view of Judge White in HMRC v TK at [20].

35. However, para (2) is not only expressly subject to para (3) but also to regulation 7D. For unrelated reasons, that did not help the claimant in HMRC v TK (see para 22 of that decision). What are the implications of reg 5(2) being “subject to” reg 7D? Do those implications conflict with what might otherwise be the reading of reg 5 derived from reading paragraphs (2) and (3) together, that reg 7D should not count for the purposes of reg 5(3)? The claimant’s case would be stronger if it was reg 5(3) that was expressed to be subject to reg 7D, but it is not. However, the making of reg 5(2) subject to reg 7D still requires to be considered.

36. Taking stock at this point, though there may be room for debate in some cases about when entitlement does otherwise cease, I do not need to go into it for the purposes of this decision. Whenever it is, there is a readily understandable role for reg 7D in extending entitlement for a four week period beyond that date. Even if one were then to assume in the claimant’s favour (noting the amendment to the Regulations made by SI 2009/1829 and contrary to HMRC’s submission) that the reference to reg 7D applying “for the purpose of the conditions of entitlement in this Part” is apt to include all such conditions, including those in reg 5 and not merely to those in reg 4, they have to be applied in accordance with their terms. Reg 5(3) appears, subject to what follows, to require there to have been actual engagement, for the reasons stated above. But that still does not completely answer whether, very possibly by a side wind, it enables people in a situation such as the claimant’s to qualify under reg 5. If there is a side wind, it arises from the hierarchy of provisions created by the Regulations.

37. What does it mean that regulation 5(2) is “subject to paragraph (3), (3A) and regulation 7D”? Similar structures can be found in regs 6(2), 7A(2) and 7B(2). Paragraphs 5(3) and (3A) impose extra conditions, which limit a person’s rights under reg 5. Reg 7D in my judgment does not. Where the latter applies it confers an additional period of entitlement to WTC on a claimant.

38. If one goes back to the first instance (reg 7C) where a regulation was expressed to be subject to reg 7D, the only sensible interpretation is that although a person was excluded from being in qualifying remunerative work if he received a payment in lieu of notice, he could nonetheless rely on the four week run-on. Effectively, by making reg 7C “subject to” reg 7D, the legislator

was saying that the lack of rights due to the former did not prejudice that person's ability to rely on the latter. When the Miscellaneous Amendment Regulations in 2012 made the other regulations additionally subject to reg 7D when they had not previously been expressed to be, apparently on the basis that they were "consequential and technical", it is reasonable to infer that the intention was the same: that the terms of the respective provisions were not to prejudice a person's ability to rely on the four week run-on when they had otherwise ceased to be in qualifying remunerative work.

Conclusion

39. While I have not found to be helpful the draftsman's use of "subject to" in regs 5(2) and 6(2) in relation to a mixed bag of provisions and for different purposes, from the legislative history of reg 7D and of the references made to it in other regulations within Part II of the Regulations, assisted in reaching an informed interpretation of the ambiguous material by the content of the various Explanatory Memoranda, I conclude that the sole legislative intention was to preserve the ability to rely on the additional four week period of which a claimant would not otherwise have the benefit and that it did not form part of that intention as expressed in the Regulations (as amended) to allow reliance on reg 7D to subvert the otherwise clear intention of reg 5(3).

40. The First-tier Tribunal fundamentally got the law right. However, aspects of its decision notice and statement of reasons are a little opaque and/or inexactly stated. I have set the tribunal's decision aside and have remade it to materially identical, but more accurately expressed, effect in an attempt to provide clarity should this issue arise in other cases.

**CG Ward
Judge of the Upper Tribunal
10 February 2017**