

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CUC/2058/2016

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is dismissed.

REASONS FOR DECISION

1. The claimant appeals, with my permission, against a decision of the First-tier Tribunal dated 16 March 2016, whereby it dismissed his appeal against a decision by the Secretary of State to the effect that he was entitled to universal credit on the basis that his claim was made on 20 July 2015 rather than on 18 July 2015 and that it could not be backdated.

The facts and procedural history

2. There appears to be no dispute about the facts of the case. The claimant had been employed but his employment came to an end on 17 July 2015. On the following day, Saturday, 18 July 2015, the claimant tried completing an on-line claim form for universal credit. He had originally gone on-line to claim jobseeker's allowance as he had apparently done for a period until 1 March 2015, but he was redirected to claim universal credit. He had to answer a number of questions to determine his eligibility. One question was "Are you expecting take-home pay of £330 or more in the next month?" The options were "yes" or "no". There was no option to say "I do not know". He was expecting a payment but was not sure what amount was due to him. He decided to answer "yes". The consequence was that the computer system told him that he could not claim universal credit and that he should instead make a telephone claim for jobseeker's allowance. He was unable to do so because it was not possible to make a telephone claim on a Saturday. He therefore telephoned on Monday, 20 July 2015 but was advised to make a new claim for universal credit and that, if he was not sure how much he was due to receive from his former employer, he should answer "no" to the relevant question. He duly did so that day and the claim was accepted as validly made on 20 July 2015. In due course, universal credit was awarded on the basis of the claim made on 20 July 2015 (although a letter from the North West Complains Resolution Team dated 22 February 2016 states that the first assessment period began on 22 July 2015, which, at first sight, seems inconsistent with the date of claim having been accepted as 20 July 2015).

3. The claimant subsequently resumed work in September 2015 but became unemployed again in November 2015. He had remained entitled to universal credit while employed, albeit at a reduced rate, but had then claimed jobseeker's allowance when he became unemployed again and from 1 December 2015 he was receiving both universal credit and jobseeker's allowance. The letter dated 22 February 2016 from the North West Complaints Resolution Team states that that was because those administering jobseeker's allowance initially overlooked the award of universal credit and then the "claim for JSA was closed from ... the date of claim as you should never have made a claim for JSA". However, it appears that the

claimant's award of universal credit was also terminated in March 2016. In June 2016, he was again awarded jobseeker's allowance. Exactly what happened in November 2015 and thereafter is not directly relevant to the present appeal but these events do form part of the background to the correspondence between the parties and suggest that claims for jobseeker's allowance may not capture relevant information about universal credit. It is possible in some circumstances for a person who has been entitled to universal credit subsequently to become entitled to jobseeker's allowance but whether those circumstances applied in this case is not an issue that I have explored. There appears to have been a substantial period of about three months when the claimant was not entitled to any benefits for reasons that he did not understand. I hope that by now that has been sorted out.

4. The current appeal is concerned solely with the commencement of the claim made by the claimant in July 2015. The claimant was aggrieved that his claim had not been accepted as validly made on 18 July 2015. He said that, in other geographic areas, he would have been allowed to claim jobseeker's allowance on-line and he argued that he should have been treated as having claimed jobseeker's allowance from 18 July 2015 and had been the victim of discrimination based on his postcode. The Secretary of State, however, treated the claimant as having requested the backdating of his claim for universal credit. In a decision dated 18 August 2015, he took the view that the claim had actually been made on 20 July 2015 and that none of the grounds upon which a claim may be effective from an earlier date was satisfied. The claimant applied for revision, but the Secretary of State refused to revise his earlier decision on the ground that no additional information had been provided and that "[the claimant's] delay in submitting a valid claim is entirely due to error on his part".

5. The claimant appealed. On 16 March 2016, the First-tier Tribunal dismissed the appeal on the ground that there were no grounds for backdating the universal credit claim, that there was no provision allowing a claim for universal credit to be treated as a claim for jobseeker's allowance and that the claimant had not in fact made a claim for jobseeker's allowance so that no question of backdating such a claim arose.

6. It is against that decision of the First-tier Tribunal that the claimant now appeals. The Secretary of State opposes the appeal.

The legislative scheme

7. There are three important points that have to be borne in mind in understanding what happened in this case from a legal point of view. First, there are different types of jobseeker's allowance and it is necessary to distinguish between them. Secondly, the legislation in respect of the making of claims is not the same for all types of jobseeker's allowance and universal credit. Thirdly and most importantly, the question "Are you expecting take-home pay of £330 or more in the next month?" that was asked on the on-line claim form was not asked because the answer was necessary to determine the claimant's entitlement to universal credit if the legislation introducing universal credit was in force but was asked only in order to ascertain whether that legislation was in force at all in relation to the claimant.

8. There are effectively three types of jobseeker's allowance relevant to this case. Originally, there were two types, now known collectively as "old style" jobseeker's allowance: income-based jobseeker's allowance and contribution-based jobseeker's allowance. Part 1 of the Welfare Reform Act 2012 (which I shall call "the 2012 Act") both introduces universal credit and also amends the Jobseekers Act 1995 so as to abolish income-based jobseeker's allowance and make the work-related requirements for contribution-based jobseeker's allowance similar to those for universal credit. The amendments result in a form of jobseeker's allowance that is known as "new style" jobseeker's allowance and may be regarded as a third type of jobseeker's allowance for the purposes of this case, although it remains contribution-based and payable only for 182 days in a period for which entitlement is established by reference to the same two contribution years.

9. Section 1 of the Social Security Administration Act 1992 has the effect that, generally, a person may be entitled to jobseeker's allowance or universal credit only if he or she has made a valid claim. A claim for old style jobseeker's allowance may be made on paper, by telephone, or on-line (see regulations 4(1A) and (11A) and 4ZC of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) (which I shall call "the 1987 Claims and Payments Regulations")). However, it is open to the Secretary of State to permit claims to be made by telephone or on-line only in certain cases. In particular, paragraph 2(3) of Schedule 9ZC to the 1987 Claims and Payments Regulations has the effect that it is a condition of the use of electronic communication to make a claim for old style jobseeker's allowance that the claimant "is for the time being permitted" to do so. There is currently no provision for a claim for new style jobseeker's allowance to be made on-line and so claims must be made on paper or by telephone (see regulations 19, 21 and 23 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) (which I shall call "the 2013 Claims and Payments Regulations")). A claim for universal credit must generally be made on-line but there are some types of case where a claim may be made by telephone and the Secretary of State may also accept a telephone claim if he is willing to do so (see regulation 8 of the 2013 Claims and Payments Regulations). There are provisions allowing claims for one benefit to be treated as a claim for another benefit (see regulation 9 of the 1987 Claims and Payments Regulations and regulation 26 of the 2013 Claims and Payments Regulations) but there is no provision allowing a claim for universal credit to be treated as a claim for jobseeker's allowance or *vice versa*.

10. Moreover, the making of a claim for jobseeker's allowance or universal credit involves the completion of an official form or the provision over the telephone or on-line of all the information required to determine the claim. A mere written or verbal expression of a desire to claim is not by itself capable of constituting a claim for either of those benefits. This is in contrast to the position in relation to some other benefits, where the Secretary of State may accept anything in writing as being sufficient in the circumstances of the particular case to constitute a claim (see regulation 4(1) of the 1987 Claims and Payments Regulations).

11. Although claims for jobseeker's allowance and universal credit are generally effective from the date they are made, there are provisions for backdating claims in some circumstances. For jobseeker's allowance, the circumstances include "the appropriate office where the claimant would be expected to make a claim was closed and alternative arrangements were not available" and "the claimant was unable to make telephone contact with the appropriate office where the claimant would be expected to notify an intention of making a claim because the telephone lines to that office were busy or inoperative" (see regulation 19 of the 1987 Claims and Payments Regulations and regulation 29 of the 2013 Claims and Payments Regulations). I will consider below the provisions relating to universal credit.

12. Part 1 of the 2012 Act is being brought into force gradually, postcode area by postcode area and claimant group by claimant group, by a series of commencement orders. Since the claimant's postcode began "L28 5", he was living in a "No.12 relevant district" for the purposes of the Welfare Reform Act 2012 (Commencement No.17 and Transitional and Transitory Provisions) Order 2014 (SI 2014/1583) (which I shall call "the Commencement No.17 Order"), which therefore partially brought the relevant provisions of the 2012 Act into effect in respect of claims made by him for universal credit or jobseeker's allowance made on or after 21 July 2014. (I am not sure why the Secretary of State submits that the relevant date was 22 September 2014, but nothing in this case turns on the precise date).

13. However, the Commencement No.17 Order brought the relevant provisions of the 2012 Act into force only if the claimant satisfied, or claimed to satisfy, the "gateway conditions" (see articles 3(1) and (2)(i) and (j) and 4(1) and (2)(i) and (j)). In such cases the provisions were brought into force on "the first day of the period in respect of which the claim is made" (see articles 3(3) and 4(3)).

14. By virtue of article 2(1) of the Commencement No.17 Order, the "gateway conditions" are the conditions specified in Schedule 5 to the Welfare Reform Act 2012 (Commencement No.9 and Transitional and Transitory Provisions and Commencement No.8 and Savings and Transitional Provisions (Amendment)) Order 2013 (SI 2013/983) (which I shall call "the Commencement No.9 Order"), paragraph 4(1) of which was, at the material time –

"4. (1) If the claimant is a single claimant, the claimant must declare that, during the period of one month starting with the date on which the claim for universal credit is made, the claimant's earned income is expected not to exceed £330."

15. It is to be noted that what is important in that gateway condition is that the claimant should "declare" that his or her income is expected not to exceed £330. It is not relevant to the question whether the gateway condition is satisfied whether or not the earned income that is subsequently received in the relevant month does in fact exceed £330, although, if the gateway condition is satisfied, the actual amount of the payment received is relevant when determining the amount, if any, of universal credit to which the claimant is entitled. It is also to be noted that it is not specified in the legislation how or when the declaration should be made. Paragraph 8(1) of Schedule 5 merely provides –

“8. (1) A declaration which is required by paragraph 2(3)(c), 4(1), 4(2) or 7(a) or (b) is to be made by such method as may be required by the Secretary of State in relation to the person by whom it is to be made.”

However, it seems fairly clear that the question “Are you expecting take-home pay of £330 or more in the next month?” on the on-line claim form for universal credit was intended to give a claimant an opportunity to make the relevant declaration by answering “no” when making the claim.

16. Against that background, it is possible to analyse this case.

Analysis of the facts

17. It appears from the claimant’s description of his attempts to claim jobseeker’s allowance that the computer system ensures that those living in postcode areas where Part 1 of the 2012 Act has been brought partially into force effect were prevented from claiming jobseeker’s allowance on-line and were first directed to claim universal credit. That was presumably regarded as a convenient way of asking the claimant whether the gateway conditions were satisfied and ensuring that universal credit was claimed rather than income-based jobseeker’s allowance if they were (and that an inconsistent declaration was not made in respect of jobseeker’s allowance).

18. By answering “yes” to the question “Are you expecting take-home pay of £330 or more in the next month?” on 18 July 2015, the claimant was clearly not making the declaration necessary for the relevant gateway condition and so was regarded by the computer system as not being eligible for universal credit. It therefore prevented a claim for universal credit being made. An instruction to claim jobseeker’s allowance by telephone if the gateway conditions were not satisfied was then entirely appropriate in anticipation of the claim being for old style jobseeker’s allowance. Such a claim could have been backdated to the Saturday if the relevant office was closed or the telephone system was inoperative. As I have explained, it is for the Secretary of State to decide whether a person should be permitted to use an electronic communication and, if a person is not, he or she may make a claim for old style jobseeker’s allowance by telephone or on paper. Presumably one reason for telephone claims being preferred to on-line claims in this instance is to check whether the gateway conditions really are not satisfied. In any event, there was no inherent unfairness or illegality in what happened on the Saturday, although it is possible that it could have been better explained to the claimant.

19. On 20 July 2015, the claimant telephoned the relevant office and appears to have been advised to try again claiming universal credit and to change his answer to the relevant question. The effect of changing his answer was that the gateway conditions were found to have been satisfied and he was awarded universal credit. If the gateway condition was satisfied, the claimant ceased to be entitled to claim old style jobseeker’s allowance even in respect of the period before the condition was satisfied. Any claim for old style jobseeker’s allowance in respect of 18 and 19 July 2015 would have had to have been made before the new claim for universal credit. However, I doubt that the claimant lost anything in not making such a claim because

he would not have been entitled to old style jobseeker's allowance for those two days anyway: they would have been "waiting days" (see paragraph 4 of Schedule 1 to the Jobseekers Act 1995 and regulation 46 of the Jobseeker's Allowance Regulations 1996 (SI 1996/207), unless there had been entitlement to jobseeker's allowance or employment and support allowance in the preceding 12 weeks under an award of which I have not been told.

The claim form and the advice given on 20 July 2015

20. I do not know whether the claimant was given any advice on 20 July 2015 as to possible entitlement to new style jobseeker's allowance and I do not know enough about his contribution record and claims record to know whether or not he might have been entitled had he claimed. He has not himself suggested that he might have been entitled to a contributory benefit. Had he been, he could have claimed it as well as universal credit, but it is doubtful that he would have gained any immediate financial advantage in doing so because new style jobseeker's allowance is treated as income for the purposes of universal credit and so would have reduced the amount of universal credit to which the claimant was entitled.

21. In any event, the claimant's main complaint is that he was advised on 20 July 2015 to give an answer that he did not consider correct on the universal credit claim form rather than being enabled to claim old style jobseeker's allowance and, in particular, income-related jobseeker's allowance. His point is that, if he expected to receive a final payment of earnings but did not know how much it would be, it was not correct for him to answer "no" to the question "Are you expecting take-home pay of £330 or more in the next month?" He particularly objects to the statement in the mandatory reconsideration notice, in which the Secretary of State explained his refusal to revise his initial decision, that his delay in submitting a valid claim was entirely due to error on his part. He considers that, as he had telephoned to claim jobseeker's allowance, he should have been advised and allowed to do so, because it was not correct for him to declare that he was expecting take-home pay of less than £330 in the next month.

22. The Secretary of State, however, argues that, if the claimant was uncertain as to the amount of the payment due to him from his former employer, he was wrong to answer "yes" in the form he completed on 18 July 2015 and that he was correctly advised to claim universal credit again and this time to answer "no" to the relevant question. It is submitted that, in ordinary usage, one "expects" something if one considers it highly likely to happen so that, if a claimant does not have the faintest idea how much he will receive as his or her final payment of earnings including accrued holiday pay, the correct answer to the question would be "no" but if he or she has a reasonable expectation based on past experience that the amount would be at least £330, the correct answer to the question might be "yes".

23. Whether or not "highly likely" is the right phrase, I accept that in both paragraph 4(1) of Schedule 5 to the Commencement No.9 Order and in the question posed on the claim form, "expect" or "expecting" is used in the sense of the person concerned being reasonably confident about what will happen.

24. However, it seems to me that the claim form is badly designed, because the Secretary of State's submission works both ways. As a matter of ordinary usage – and particularly when being careful as claimants are always advised to be when making declarations in relation to social security benefits – a person does not say “I am expecting not to receive take-home pay of £330 or more in the next month” or “I am expecting to receive take-home pay of less than £330 in the next month” unless he or she is reasonably confident that no payment will be received or that any sum received will be less than £330. A person may be completely unsure whether he or she will receive any payment or, more likely, as to the whether the amount will be more or less than £330, in which case he or she will not be sufficiently confident to have an expectation one way or the other and will simply say “I do not know whether I will receive take-home pay of £330 or more in the next month”. Thus, while some claimants will be reasonably confident that they will receive take-home pay of £330 or more in the next month and others who will be reasonably confident that they won't, there will be a third group who will simply be uncertain.

25. The Secretary of State argues that, because those who are uncertain are not confident that they will receive take-home pay of £330 or more in the next month, the correct answer for them to give on the claim form is “no”. I accept that, as a matter of very strict logic, that is so and that therefore the advice given to the claimant on 20 July 2015 was, strictly speaking, correct insofar as it explained which answer on the claim form was appropriate. However, it seems to me to be unlikely that this claimant is the only one to have read the option “no” as requiring him to declare that he expected not to receive take-home pay of £330 or more in the next month even though he had no such clear expectation. People do not always distinguish between “I am not expecting take-home pay of £330 or more in the next month” and “I am expecting not to receive take-home pay of £330 or more in the next month”. Without some guidance, the claim form is apt to confuse and a cautious person may prefer to answer “yes” rather than “no” so as to avoid an apparent under-declaration that might be construed as deliberately misleading.

26. What is perhaps more serious is that the implication of the Secretary of State's submissions and my acceptance of them is that the question on the claim form does not appear to achieve the intended goal of giving claimants an opportunity to make the declaration required as a gateway condition.

27. The question asked on the claim form, “Are you expecting take-home pay of £330 or more in the next month?”, is expressed in terms that are nearly the reverse of the terms of the declaration, required to satisfy the gateway condition, that, “during the period of one month starting with the date on which the claim for universal credit is made, the claimant's earned income is expected not to exceed £330”. That is why answering “no” to the question is taken to amount to the declaration.

28. However, it is not logically correct to equate the answer “no” to the declaration. I have said that the question on the claim form is *nearly* the reverse of the declaration because, to be exactly the reverse, it should say “more than £330” rather than “£330 or more”. But what is more important is that (even if one corrects that minor error) not being confident that take-home pay of more than £330 will be

received in the next month is not the same as being confident that earned income will not exceed £330 in that month. In other words, the required declaration requires a reasonable degree of confidence that the earned income will not exceed £330 in the next month and, if those answering “no” on the claim form include those who are too uncertain to make the required declaration, it is illogical to treat all those who answer “no” as having made that declaration.

29. If the claim form still uses the same wording, the Secretary of State may therefore wish to consider whether either that wording or the gateway condition or both should be amended. However, the question for me is whether this defect has any bearing on whether the First-tier Tribunal erred in law.

Backdating the claim for universal credit

30. It is not in dispute that the claimant did make a claim for universal credit on 20 July 2015 and that benefit was awarded on that claim. The issue on this appeal is whether the claim ought to have been made effective from 18 July 2015.

31. Regulation 8(1) of the 2013 Claims and Payments Regulations provides –

“**8.**—(1) ..., a claim for universal credit must be made by means of an electronic communication in accordance with the provisions set out in Schedule 2 and completed in accordance with any instructions given by the Secretary of State for that purpose.”

32. Regulation 10(1)(a) provides –

“**10.**—(1) Where a claim for universal credit is made, the date on which the claim is made is—

- (a) ..., in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office;
- (b) ...;
- (c) ...;
- (d) ...,

or the first day in respect of which the claim is made if later than the above.”

33. Regulation 26(1) to (3), provides, so far as is relevant –

“**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) ...;

- (b) ...;
- (c) ...;
- (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;
- (e) *revoked*
- (f) ...;
- (g)”

34. When giving permission to appeal, I explained that I did so because –

“..., as the claimant argues, there is a question whether the word “inoperative” in regulation 26(3)(d) of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) is to be read as including “defective” or “inadequate” so that a person who is unable truthfully to answer “yes” or “no” to a question because he or she does not know the answer – particularly where the question relates to what will happen in the future – is not penalised by any failure of the computer system to allow doubt to be expressed or to give instructions as to how to answer if in doubt.”

35. The Secretary of State argues that the word “inoperative” cannot be read in the way suggested. He points out that the term “official computer system” is defined in regulation 2 as –

“a computer system maintained by or on behalf of the Secretary of State to –
(a) send or receive any claim or information; or
(b) process or store any claim or information.”

and that regulation 2 also provides that the term “electronic communication” has the meaning given to it by 15(1) of 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)—
(a) by means of an electronic communications network; or
(b) by other means but while in an electronic form”.

He argues that those definitions clearly indicate that the word “inoperative” means that the computer system is not working as intended so that the person is not able to make a claim electronically due to a technical fault rather than because the claimant does not know the answer to a question and is unable to say that.

36. I accept that the natural meaning of the word “inoperative” is that the device concerned is not working. However, it is arguable that the draftsman intended to give the word a meaning that goes beyond mere technical fault to include a case where, perhaps due to a design fault, the computer system improperly prevents a claimant from making a claim so that it fails to perform the task given to it of enabling claims to be made and leaves a claimant without any adequate remedy. I do not consider that the definitions help answer the question whether that is the right construction of the term “inoperative” in this particular context.

37. However, I can leave that question to be considered if and when it arises. In the present case, the official computer system worked properly on 18 July 2016 and so it cannot be regarded as having been inoperative. Whatever defects there may have been in the claim form, answering “yes” to the question “Are you expecting take-home pay of £330 or more in the next month?” was clearly not a declaration sufficient to satisfy the gateway condition and so the claimant was not eligible for universal credit on 18 July 2015.

38. Moreover, while the lack of guidance given by the official computer system on 18 July 2015 might be regarded as a defect, I do not consider it to be arguable that it rendered the system “inoperative”. Although it is understandable that the claimant answered “yes” rather than “no” in the absence of guidance, a very strictly literal approach to the claim form would have led him to answer “no” and so the lack of guidance did not actually prevent the claimant from making a claim. Insofar as there may have been a more fundamental defect in the wording of the question on the claim form, its effect is to facilitate claims for universal credit rather than prevent them. It may have prevented the claimant from claiming old style jobseeker’s allowance, but that is not a ground for backdating a claim for universal credit. In regulation 26(2)(b), the words “the claim” clearly refer to the claim for universal credit.

39. I am therefore satisfied that the First-tier Tribunal did not err in finding that there was no ground for backdating the award of universal credit.

Jobseeker’s allowance

40. The First-tier Tribunal was also clearly correct to find that the claimant could not be entitled to jobseeker’s allowance, simply because he had not made a claim and there was no provision for treating a claim for universal credit as a claim for jobseeker’s allowance.

Conclusion

41. It will be clear that I agree with the claimant, although perhaps not entirely for his reasons, that the claim form for universal credit was not satisfactory. Moreover, I accept that his circumstances may well have been such that he could not properly make the relevant declaration required as a gateway condition, in which case he ought to have claimed income-based jobseeker’s allowance rather than universal credit. The problem is that, in the absence of a claim for jobseeker’s allowance, an award of that benefit cannot now be made (even having regard to article 3A of the Commencement No.9 Order) and, plainly, taking away the award of universal credit in the absence of an award of jobseeker’s allowance would not be helpful. Indeed, the claimant may even have been better off financially on universal credit, at least in the short term since, as the Secretary of State has helpfully pointed out, there were no “waiting days” until 3 August 2015 for universal credit. In any event, although the claimant may have some ground for complaint about the way that the transition from income-based jobseeker’s allowance to universal credit has been administered, the First-tier Tribunal clearly did not err in law in dealing with the issues before it.

42. It follows that this appeal must be dismissed.

Mark Rowland
23 March 2017