

IN THE UPPER TRIBUNAL

Case No: CUC/166/2017

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

## DECISION

I consent to the Secretary of State's application to withdraw his appeal from the Upper Tribunal.

*A copy of this decision is to be placed on the Upper Tribunal Administrative Appeal Chamber's website.*

## REASONS FOR DECISION

1. This appeal was concerned with the correct application of regulation 61 of the Universal Credit Regulations 2013 ("the UC Regs"). This regulation provided at the material time, so far as is relevant, as follows:

**Information for calculating earned income - real time information etc.**

61.—(1) Unless paragraph (2) applies, a person must provide such information for the purposes of calculating their earned income at such times as the Secretary of State may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

(a) the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations and is received by the Secretary of State from HMRC in that assessment period; and

(b) for an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil,

(3) The Secretary of State may determine that paragraph (2) does not apply—

(a) in respect of a particular employment, where the Secretary of State considers that the information from the employer is unlikely to be sufficiently accurate or timely; or

(b) in respect of a particular assessment period where—

(i) no information is received from HMRC and the Secretary of State considers that this is likely to be because of a failure to report information (which includes the failure of a computer

system operated by HMRC, the employer or any other person);  
or

(ii) the Secretary of State considers that the information received from HMRC is incorrect, or fails to reflect the definition of employed earnings in regulation 55, in some material respect.

(4) Where the Secretary of State determines that paragraph (2) does not apply, the Secretary of State must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as the Secretary of State thinks fit.

(5) Where the Secretary of State makes a decision in accordance with paragraph (4) the Secretary of State may—

(a) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Secretary of State has received the information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period); or

(b) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC."

2. The claimant's 'assessment period' ran from the 1<sup>st</sup> of each calendar month to the last day of the same month. The issue in her case was that HMRC's Real Time Earnings ("RTI") feed showed she had received earnings from her employer in two dates in February 2016: on 1.2.16 and 29.2.16. The effect of this, or at least so the Secretary of State in his decision under appeal contended, was to fix the claimant with two lots of earned income for the assessment period covering February 2016 thus considerably reducing the level of her entitlement to universal credit for that assessment period.
3. In her mandatory reconsideration and then appeal against this decision the claimant explained that she was on a zero hour's contract and that her wages for January and February 2016 had been taken into account in assign her entitlement. She said that her wage for January 2016 had been received on 31 January 2016 but not reported by her employer until 1 February 2016. She said that in consequence she had been left with considerably less money had the DWP received Real Time Earnings information a day earlier and she had been unable to pay all of her rent. The claimant stressed that she had no control over

when the earnings information was sent or received. Her earnings were always sent on the last day of the month and this was the same with the payment on 31 January 2016 but as this was a Sunday it made sense that this was not received until 1 February 2016.

4. These considerations did not lead to any change in the decision. Page 36 of the appeal bundle is a copy of a webpage showing Real Time Earnings. It records that the claimant was paid the two sums on, respectively, 31 January 2016 and 29 February 2016 but these payments were not notified until, respectively, 1 February 2016 and 29 February 2016. The Secretary of State relied on this record and regulation 61(2) of the UC Regs as showing that the earnings paid to the claimant on 31 January 2016 fell to be taken into account for the assessment period of the month of February 2016.
5. The appeal to the First-tier Tribunal was adjourned at its first hearing as the First-tier Tribunal wished to be provided with a submission from the Secretary of State on what effect, if any, regulation 61(3) of the UC Regs had on the claimant's case.
6. In that submission the Secretary of State first stressed the importance of the closing "and" in regulation 61(2)(a) of the UC Regs - "[earnings from employment] for each assessment period...based on the information....reported to HMRC....and ... received by the Secretary of State from HMRC in that assessment period". The earnings reported under RTI therefore fell to be taken into account in the assessment period in which that information was *received* by the Secretary of State. Here, that was 1 February 2016 in respect of the earnings paid on 31 January 2016. The submission further argued that 61(3) could only apply if the information received under 61(2) was considered "unlikely to be sufficiently accurate or timely" (per regulation 61(3)(a)) generally in respect of the earned income. However the mere fact that a single RTI report was late in relation to the earnings it was reporting was not, it was argued, a reason to depart from the rule in regulation 61(2). It was also argued that none of the other provisions of 61(3) applied. The

treatment of the claimant's income might seem unfair but it was the treatment prescribed by the law. Despite this, the submission said that the Secretary of State's representative would be "supportive of a referral of the appeal outcome to the Upper Tribunal to assist in establishing case law in this area".

7. The First-tier Tribunal allowed the claimant's appeal (and in so doing met the Secretary of State's support for the case to make its way to the Upper Tribunal, though not in the way he had intended). Its reasoning for allowing the appeal is accurately summarised in its Decision Notice.

"The Tribunal accepted the [claimant's] evidence that she was paid on 28/01/2016....for work completed in January.....either the information about that payment was received by the Secretary of State by 31/01/2016 (which was a Sunday) or...Regulation 61(3)(b)(i) applies because the information about the January earnings should have been reported in January and not February".

8. The First-tier Tribunal expanded on this reasoning somewhat in its statement of reasons and added a further basis on which it had allowed the appeal. Its expanded reasoning on regulation 61(3)(b)(i) was as follows:

"The Secretary of State has...treated [the] January payment as representing earned income for the next assessment period because, so it is said, the information that the appellant had been for January 2016 was received on 01.02.2016 (a Monday) and not before the end of January 2016.....The Tribunal did not agree. Employed earnings are referred to in regulation 55 [of the UC Regs]. Regulation 55(5) seems to make it clear that the purpose of Regulation 55 is to find the employed earnings in an assessment period. The assessment period for January 2016 is 01.01.2016 to 31.01.2016. If the Secretary of State is correct the appellant's employed earnings for January 2016 are £ nil. Regulation 61(3) of the UC Regulations allows some leeway from the approach in Regulation 61(2). In the first place regulation 61(3)(b)(i) applies where there has been no information received in respect of a particular assessment period (in this case January 2016) and it is likely that this is because of a failure to report that information. There clearly was a failure to report the information in the assessment period of January 2016. The reason does not matter: the failure of a computer system is just an example, not an exclusive example. It is beyond doubt, in the tribunal's view, that there was a failure to report January's employed earnings in the January

assessment period. For that reason the tribunal has not applied Regulation 61(2)."

The further basis for its decision was:

"....in accordance with Regulation 61(3)(b)(ii), the tribunal was satisfied that the information received in respect of the assessment period February 2016 failed to reflect the definition of employed earnings in some material respect because it included earnings received in the previous assessment period so that the employed earnings for the assessment period February 2016 included the earnings for two assessment periods. Treating earnings received in January 2016 as received in February 2016 is material. It produces a calculation of [Universal Credit] for January 2016 and February 2016 which does not reflect reality."

9. The First-tier Tribunal gave the Secretary of State permission to appeal to the Upper Tribunal. In giving directions on the appeal I made the following observations:

"The important issue arising on this appeal is the proper approach to regulation 61(1) to (3) of the [UC Regs].....

Issues that may need to be considered on this appeal are:

- (i) assuming "failure to report" means breach of an obligation to report, under what legislation does HMRC's obligation to report arise and what, if anything, does that legislation say about reporting within the calendar month (and only on week-days);
- (ii) to whom is such a report in law to be made and if the Bolton Universal Credit Centre made itself unable to receive that information on a Sunday, should that count against the claimant (R(SB) 8/89)?; and
- (iii) what is the relationship between regulation 61(2)(b) and 61(3)(b)? If no information is received from HMRC during the assessment period and that is due to a failure on HMRC's part, does that mean regulation 61(3)(b) qualifies (or takes precedence over) 61(2)(b)? More particularly perhaps, in what circumstance could a decision maker properly infer that regulation 61(2)(b) and not regulation 61(3)(b) applies where no information is received from HMRC during an assessment period?"

On the facts of this case, issue (iii) above was directed to the January 2016 assessment period.

10. My directions asked for a response first from the claimant but before the time for her so doing had expired the Secretary of State sent a one line email to the Upper Tribunal saying no more than “The Secretary of State respectfully wishes to withdraw the appeal in this case”. This caused me to issue the following directions in which I said the following.

“My directions on this appeal....refer. The next stage is for [the claimant] to make her written submissions on the appeal.....

In the meantime, however,.....the Secretary of State sent the Upper Tribunal a one line email which stated “The Secretary of State respectfully wishes to withdraw the appeal in this case”. No reasons were given for the Secretary of State’s change of position. That is unsatisfactory in a case where the Secretary of State in his application for permission to appeal and then in his grounds of appeal to the Upper Tribunal spoke in terms of the central legal provision in issue on this appeal - regulation 61(1) to (3) of the Universal Credit Regulations – having resulted in a conflicting interpretations between the First-tier Tribunal and the Secretary of State and therefore needed a clear and reasoned decision from the Upper Tribunal on the correct legal effect of regulation 61 of the Universal Credit Regulations. I am also aware from one other Secretary of State appeal that has reached the Upper Tribunal from the First-tier Tribunal concerning the scope of regulation 61 (.....UT reference UK/823/2017, on which I have given directions today) that both appeals involve the interpretation of regulation 61, albeit on different facts. I also note that in that appeal Regional Tribunal Judge Clarke of the First-tier Tribunal indicated that regulation 61 was giving rise to issues of interpretation in a number of universal credit appeals before the First-tier Tribunal.

In all these circumstances, I do not consider it is appropriate to my giving consideration to whether to consent to this appeal being withdrawn until the Secretary of State has explained *why* he wishes to withdraw his appeal in this case. The correct interpretation of regulation 61 is clearly an important issue and it is not apparent, at least at this stage, why it should not be ruled on in this appeal.”

11. The Secretary of State then filed a letter explaining why he wished to withdraw the appeal. I set that letter out in full below.

“The Secretary of State has fully considered his position and hereby applies to withdraw from the appeal for the following reasons:

On further consideration the Secretary of State concludes that the circumstances in this case can be brought within the exception in Universal Credit Regulations 2013 (UC Regs), regulation 61(3)(b)(i) as the reporting of a payment by the employer after the date on which it was actually made can be considered a “failure” by the employer under that provision. We therefore accept that the First Tier Tribunal decided the case correctly [in deciding that there had been a failure to report the January 2016 earnings in the January 2016 assessment period].”

Furthermore, UC Regs, regulation 61(2) enables the Secretary of State to make automated adjustments to an award on the basis of the information received (or not received) from the employer via HMRC's real time information system (RTI) **but** where the claimant has disputed the RTI information and the grounds for an exception under regulation 61(3) are satisfied, UC Regs, regulation 61(4) requires the Secretary of State to make a determination applying the underlying principles for calculating earnings (which means they are taken into account in the Assessment Period in which they are received by the claimant) and, if necessary, make appropriate adjustments under regulation 61(5). On appeal, the First Tier Tribunal did that and so we wish to implement that decision."

12. In the light of what the Secretary of State has said in his response set out above, I consent to his appeal to the Upper Tribunal being withdrawn. The effect of this is that the First-tier Tribunal's decision will stand and the claimant's employed earnings for the assessment period of February 2016 will stand at £706.44. The issues I raised in my initial directions on the appeal will need to await determination in another case.
13. The claimant has not provided any response either to my directions or to the Secretary of State's reasoned basis for withdrawing his appeal to the Upper Tribunal, but I cannot see any good basis on which she would object to First-tier Tribunal's decision remaining in place.
14. This decision is to be placed on the UT(AAC)'s website because the basis of the Secretary of State's concession might be relevant to other, similar cases.

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

**Dated 23rd August 2017**