

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

These decisions are given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decisions of the First-tier Tribunal under references SC915/16/00233 and 00270, made on 8 September 2017 following a hearing on 25 August 2017 at Caernarfon, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. I have written this decision in English; it will be translated and be available in Welsh. The proceedings have been conducted in Welsh using translations provided by the Welsh Language Unit.

A. What happened

2. The claimant was receiving a jobseeker's allowance when he found temporary work from 3 to 26 November 2015. He was not paid until 15 December 2015. When the work was complete, he was told that he could no longer claim a jobseeker's allowance and had to claim universal credit. This he did and an award was made. The first assessment period under the award was 1 to 31 December 2015. The decision-maker was not aware of, or overlooked, that a payment had been made in mid-December. This mistake was corrected by revision and the claimant was made liable to repay an overpayment of £583.73. Formally, there were two decisions: (a) a revised decision on the claimant's entitlement for December 2015; and (b) a decision that he was liable to repay the overpayment.

3. The First-tier Tribunal dismissed the claimant's appeal against both decisions, but gave him permission to appeal to the Upper Tribunal. The Secretary of State has not supported the appeal.

B. The Secretary of State's decision on entitlement was correct

The legislation

4. Section 3 of the Welfare Reform Act 2012 provides that a single claimant is only entitled to universal credit if both the basic conditions and the financial conditions are met. Section 5 deals with the financial conditions:

5 Financial conditions

(1) For the purposes of section 3, the financial conditions for a single claimant are-

...

- (b) the claimant's income is such that, if the claimant were entitled to universal credit, the amount payable would not be less than any prescribed minimum.

Section 8 then deals with the calculation of awards. The basic structure of the calculation is that there is a maximum amount from which specified amounts are to be deducted. One deduction is for earned income:

- (3) The amounts to be deducted are-
 - (a) an amount in respect of earned income calculated in the prescribed manner ...

5. Chapter 2 of the Universal Credit Regulations 2013 deals with earned income.

51 Introduction

This Chapter provides for the calculation or estimation of a person's earned income for the purposes of section 8 of the Act (calculation of awards).

52 Meaning of 'earned income'

'Earned income' means-

- (a) the remuneration or profits derived from-
 - (i) employment under a contract of service or in an office, including elective office,
 - (ii) a trade, profession or vocation, or
 - (iii) any other paid work.
- (b) any income treated as earned income in accordance with this Chapter.

54 Calculation of earned income – general principles

- (1) The calculation of a person's earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.

...

55 Employed earnings

- (1) This regulation applies for the purpose of calculating earned income from employment under a contract of service or in an office, including elective office ('employed earnings').
- (2) Employed earnings comprise any amounts that are general earnings, as defined in section 7(3) of ITEPA ...

Section 55(3) then provides for deductions to be made, including:

- (b) any amounts paid by the person in that period in respect of the employment by way of income tax or primary Class 1 contributions ...

6. In order to understand and apply those provisions, it is necessary to take account of two definitions: assessment period (used in regulation 54(1)) and ITEPA (used in regulation 55(2)). Regulation 2 defines what is meant by ITEPA:

2 Interpretation

In these Regulations-

...

'ITEPA' means the Income Tax (Earnings and Pensions) Act 2003; ...

Regulation 21 defines what is meant by assessment periods:

21 Assessment periods

(1) An assessment period is, subject to paragraph (5), a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

7. It is also necessary to take account of what general earnings means. Section 7 of the Income Tax (Earnings and Pensions) Act 2003 provides:

7 Meaning of 'employment income', 'general earnings' and 'specific employment income'

(1) This section gives the meaning for the purposes of the Tax Acts of 'employment income', 'general earnings' and 'specific employment income'.

...

(3) 'General earnings' means-

(a) earnings within Chapter 1 of Part 3 ...

Chapter 1 of Part 3 contains only one section: section 62. It is sufficient to quote the first two subsections:

62 Earnings

(1) This section explains what is meant by 'earnings' in the employment income Parts.

(2) In those Parts 'earnings', in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

How the legislation applies here

8. What matters is when a payment is made. When it is made within an assessment period, it is treated as income as income for that period. The decision-maker correctly fixed the claimant's assessment period. The money that the claimant earned for his temporary work was earned income and paid in that period. That means that it was income in respect of that period. It had to be taken into account in reduction of the universal credit he would otherwise be entitled to. The legislation is clear and the facts were not in dispute. The Secretary of State interpreted the law correctly and applied it properly. So did the First-tier Tribunal.

Secretary of State for Work and Pensions v RW (rule 17) [2017] UKUT 347 (AAC)

9. The claimant has relied on this decision of Upper Tribunal Judge Wright in which he consented to the Secretary of State withdrawing an appeal on the ground that regulation 61(3)(b)(i) of the Universal Credit Regulations applied. This applies when an employer fails to report a payment to the claimant at the time it was made. That did not happen here. The employment did report the payment at the correct time. What happened was that the decision-maker overlooked it. Regulation 61(3)(b)(i) does not apply here.

C. The claimant is liable to repay the overpayment

10. Liability for overpayments is governed by section 71ZB of the Social Security Administration Act 1992:

71ZB Recovery of overpayments of certain benefits

(1) The Secretary of State may recover any amount of the following paid in excess of entitlement—

(a) universal credit, ...

(2) An amount recoverable under this section is recoverable from—

(a) the person to whom it was paid, ...

(3) An amount paid in pursuance of a determination is not recoverable under this section unless the determination has been—

(a) reversed or varied on an appeal, or

(b) revised or superseded under section 9 or section 10 of the Social Security Act 1998,

except where regulations otherwise provide.

This is different from the law that previously applied to most social security benefits: liability does not depend on a claimant misrepresenting or failing to disclose. It is also different from the law that applies to housing benefit: liability does not depend on whether there has been an official error or whether the claimant could reasonably have been expected to realise that too much benefit was being paid. That means that a claimant is liable for an overpayment even if it was caused by the Secretary of State.

11. A claimant can appeal against ‘the amount of payment recoverable under section 71ZB’, but nothing else: section 12(1)(b) of, and paragraph 6B of Schedule 3 to, the Social Security Act 1998. So the claimant cannot challenge on appeal the Secretary of State’s decision to recover the overpayment. He did at one stage make an argument about recovery for the waiting days in the assessment period, but he did not pursue that argument before the First-tier Tribunal. I am satisfied that the overpayment recoverable has been correctly calculated by the Secretary of State, as approved by the First-tier Tribunal. That means that there is no issue under section 71ZB that can help the claimant.

12. In giving permission to appeal, the First-tier Tribunal referred to Judge Wright’s decision in *RW* and asked: ‘is it arguable that this was [the Secretary of

State's] error which is to say an official error and therefore is not recoverable? The answer is: no. The cause of the overpayment is irrelevant on an appeal under section 71ZB. It may be relevant to whether the Secretary of State decides to recover the overpayment, but the First-tier Tribunal and Upper Tribunal have no power to deal with that, as actual recovery cannot be the subject of an appeal.

13. Although the decision-maker's mistake is not a defence for the claimant, the Secretary of State did take this into account when deciding not to impose a civil penalty.

D. The claimant's argument from fairness and common sense

14. The claimant is annoyed that he has lost out financially by going to work. He puts the loss at £230. He says that this is absurd and has quoted Iain Duncan Smith, the Secretary of State who was the principal architect of universal credit, as saying that 'work will pay'.

15. I cannot accept these general arguments. Tribunals are judicial bodies and they have to interpret and apply the law. The general policy underlying universal credit may be to make work pay, but some of the detailed provisions do not have that effect. As the claimant has discovered. The law must always be interpreted and judges try if possible to avoid results that are absurd. In this case, the language is too clear for any interpretation that would help the claimant.

**Signed on original
on 10 October 2018**

**Edward Jacobs
Upper Tribunal Judge**