IN THE UPPER TRIBUNAL **Appeal No.** CJSA/458/2021
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Mrs N.H.

Appellant

- v –

The Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 6 September 2021
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Mr T. Overrill, Decision Making & Appeals, Department for Work and Pensions

DECISION

I dismiss the Appellant's appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal concerns entitlement to new-style (i.e. contribution-based) jobseeker's allowance. In particular, it relates to the criteria for satisfying the first contribution condition for entitlement to that benefit.

A summary of the factual background

2. Most of the essential facts are not in dispute. The Appellant had the misfortune to lose her job during the first national Covid-19 lockdown in the spring of 2020. She had previously been made redundant from a former employment in the summer of 2018. The final payment of earnings made by her previous employer on that earlier occasion had included payment of a lump sum in lieu of her

notice period and accrued annual leave. She was, in effect, put on garden leave. As her former employer had been in a weak financial position, she had been glad to have been paid the lump sum in advance.

3. On 6 April 2020, having lost her more recent employment in the Covid-19 crisis, the Appellant made a claim for new-style jobseeker's allowance (all references in this decision to 'jobseeker's allowance' or to 'JSA' are to this variant of the benefit). The Department for Work and Pensions (DWP) initially informed her that her claim had succeeded, but on 27 April 2020 advised her that this was not in fact the case, as she had been found not to meet the contribution conditions for new-style JSA.

The Appellant's appeal to the First-tier Tribunal

4. The Appellant requested a mandatory reconsideration of the DWP's decision and then appealed to the First-tier Tribunal ('the Tribunal'). Following a telephone hearing, the First-tier Tribunal dismissed her appeal. The Tribunal concluded that the Appellant did not satisfy the first contribution condition to qualify for new-style JSA in either the tax year 2017/18 or the tax year 2018/19. The gist of its decision was that had the Appellant not been paid her notice period and accrued annual leave in 2018 as a lump sum in advance, then she would have paid additional national insurance contributions over a sufficient number of weeks so as to satisfy the first contribution condition. However, the District Tribunal Judge who heard the appeal at first instance, recognising that the Appellant had made "a compelling argument", granted permission to appeal to the Upper Tribunal.

Entitlement to new-style JSA: the law on the contribution conditions

5. The qualifying conditions for new-style JSA are set out in the Jobseekers Act 1995, as principally amended by the Welfare Reform and Pensions Act 1999, the Welfare Reform Act 2009 and the Welfare Reform Act 2012. The core criteria are contained in section 1, including the requirement that the claimant "satisfies the conditions set out in section 2" (see section 1(2)(d)).

6. Section 2 in turn is headed "The contribution-based conditions". Section 2(1)(a) and (b) then detail the two contribution conditions in the following terms (disregarding the modifications made by regulation 75 of the Jobseeker's Allowance Regulations 2013 (SI 2013/378), which are not relevant for present purposes):

> (1) The conditions referred to in section 1(2)(d) are that the claimant—
>
> (a) has actually paid Class 1 contributions in respect of one ("the base year") of the last two complete years before the beginning of the relevant benefit year and satisfies the additional conditions set out in subsection (2);
>
> (b) has, in respect of the last two complete years before the beginning of the relevant benefit year, either paid Class 1 contributions or been credited with earnings and satisfies the additional condition set out in subsection (3).

7. The first contribution condition as set out in section 2(1)(a) refers to the additional condition set out in section 2(2), which is as follows (again, without inapplicable modifications):

(2) The additional conditions mentioned in subsection (1)(a) are that—

(a) the contributions have been paid before the week for which the jobseeker's allowance is claimed;

(b) the claimant's relevant earnings for the base year upon which primary Class 1 contributions have been paid or treated as paid are not less than the base year's lower earnings limit multiplied by 26.

8. Section 2(2)(b), as set out in the terms immediately above, had been substituted by section 12 of the Welfare Reform Act 2009, which also inserted sections 2(2A) and (2B):

(2A) Regulations may make provision for the purposes of subsection (2)(b) for determining the claimant's relevant earnings for the base year.

(2B) Regulations under subsection (2A) may, in particular, make provision—

(a) for making that determination by reference to the amount of a person's earnings for periods comprised in the base year;

(b) for determining the amount of a person's earnings for any such period by—

(i) first determining the amount of the earnings for the period in accordance with regulations made for the purposes of section 3(2) of the Benefits Act, and

(ii) then disregarding so much of the amount found in accordance with sub-paragraph (i) as exceeded the base year's lower earnings limit (or the prescribed equivalent).

9. Regulation 34 of the Jobseeker's Allowance Regulations 2013 was made under the power conferred by section 2(2A) of the Jobseekers Act 1995 and provides as follows:

The conditions and relevant earnings

34.—(1) A claimant's relevant earnings for the purposes of section 2(2)(b) of the Act are the total amount of the claimant's earnings equal to the lower earnings limit for the base year.

(2) For the purposes of paragraph (1), earnings which exceed the lower earnings limit are to be disregarded.

10. Regulation 34 is the equivalent provision for the purposes of new-style JSA as regulation 45A of the Jobseeker's Allowance Regulations 1996 (SI 1996/207), which relates to old-style contributory JSA. Regulation 45A in turn was inserted with effect from November 1, 2010, by regulation 2 of the Social Security (Contribution Conditions for Jobseeker's Allowance and Employment and Support Allowance) Regulations 2010 (SI 2010/2446) ('the 2010 Regulations'). This involved a significant tightening up of the contribution conditions for both JSA and ESA as signalled by the Welfare Reform Act 2009. I return later to the consequences of the 2010 Regulations.

11. The second contribution condition, as set out in section 2(1)(b) of the Jobseekers Act 1995, refers to the additional condition as contained in section 2(3), which is as follows (and again, without the inapplicable modifications):

> (3) The additional condition mentioned in subsection (1)(b) is that the earnings factor derived from so much of the claimant's earnings as did not exceed the upper earnings limit and upon which primary Class 1 contributions have been paid or treated as paid or from so much of the claimant's earnings as did not exceed the upper earnings limit and credited is not less, in each of the two complete years, than the lower earnings limit for the year multiplied by 50.

12. It follows that the first contribution condition only uses "relevant earnings" at the lower earnings limit, and specifically disregards earnings above that modest weekly amount. In contrast, however, the second contribution condition applies to all earnings which do not exceed the upper earnings limit. This is one reason why a person may satisfy the second contribution condition whilst not meeting the first such condition.

The application of these rules to the Appellant's case

13. Several matters are not in dispute about the application of section 2 of the Jobseekers Act 1995 to the circumstances of the Appellant's case. The "relevant benefit year" (as defined by section 2(4)(b); see further Social Security Contributions and Benefits Act 1992, section 21(6)) for the Appellant, given her date of claim, was the year running from the first Sunday in January 2020. It followed that the last two complete (tax) years for the Appellant's case were the tax years 2017/18 and 2018/19, and so included the period when she had previously been made redundant. It was also accepted that the Appellant met the second contribution condition for new-style JSA, as set out in section 2(1)(b), i.e. that she had either paid Class 1 contributions or been credited with earnings for each of the last two complete years. HMRC records showed that the Appellant had paid Class 1 national insurance contributions of £1,811.41 in 2017/18 and £1,257.96 in 2018/19. Those figures were also not disputed. The lower earnings limits for each of those two years were £113.00 a week and £116.00 a week respectively.

14. The bone of contention between the parties was whether the Appellant met the first contribution condition for new-style JSA as contained in section 2(1)(a) of the Jobseekers Act 1995.

15. The DWP's position, as put in its response to the appeal before the Tribunal, was that the "earnings factor" (as it put it) required for 2017/18 was £2,938.00 (being 26 weeks x £113) and for 2018/19 was £3,016.00 (26 x £116). On that basis the DWP decided that the Appellant had paid insufficient contributions in both 2017/18 and 2018/19 to meet the first contribution condition.

16. The Appellant's case was that she did satisfy the 26 week rule (i.e. the first contribution condition) for the 2017/18 tax year (she acknowledges that she did not meet it for the 2018/19 tax year, but for the purposes of section 2(1)(a) she only needed to have satisfied the requirement for one of those two complete years (i.e. "the base year")). In her detailed submissions to the DWP and to the Tribunal, she set out the basis on which she claimed to have qualified as follows, referring to the three payslips from 2017/18 which she had put in evidence, and had helpfully annotated:

> Condition 1 – 26 week rule
>
> **2017/18 Tax year**

Paid 4 weekly 39 hours a week	
Paid 14/4/2017, 156 hours (39 hours*4 weeks= 156 hours)	4 weeks
Paid 12/5/2017, 156 hours (39 hours*4 weeks= 156 hours)	4 weeks
Paid 09/6/2017, 117 hours (39 hours*4 weeks= 117 hours)	3 weeks
13 Weeks Notice Period subjected to Tax and National Insurance	13 weeks
Holiday entitlement accrued up to the end of the Notice period of 2.5 weeks	
97.11 hours divided by 39 hours = 2.5 weeks (Holiday year April to March)	2.5 weeks
Total weeks worked and earnings paid, taxed and subject to National Insurance	**26.5 weeks**

17. The employers' payments made in respect of the notice period and accrued holiday entitlement were both included on the last payslip dated 09/6/2017, along with the salary for the last three weeks of the Appellant's employment. Thus, as the Tribunal correctly found, the Class 1 contributions actually paid in 2017/18 were "deducted from earnings at source over 3 payslips between April and June inclusive".

18. In essence, however, the Appellant's case was that she had been paid for a total of 26½ weeks work in the 2017/18 tax year, all of which was subject to Class 1 national insurance contributions, and so she had complied with the first contribution condition for that base year.

The Appellant's submissions in more detail

19. The Appellant's submission was that she had met the first contribution condition. She argued that she had indeed earned and was paid for 26½ weeks at more than the lower earnings limit in 2017/18 (being £113 a week). She pointed out that her earnings for those 26.5 weeks were £50,253 – this was calculated from the total employer payments for the 2017/18 tax year of £122,720.64, less the redundancy payment of £72,467.46, resulting in earnings of £50,253.18, well in excess of the threshold of £2,938 (26 x £113). She accepted that the amount of Class 1 national insurance contributions she had actually paid in 2017/18 was £1,811.41, but denied this sum represented her earnings factor. All that was required, she said, was that her earnings for the required 26 weeks must be at least at the level of the lower earnings limit. She contended her earnings factor for 2017/18 was £2,994.50 (26.5 x £113).

20. In her application to the Tribunal for permission to appeal to the Upper Tribunal, the Appellant set out her case with admirable clarity:

> I was paid my notice period and accrued holiday on the 9th of June 2017 in advance and effectively put on garden leave. I appreciate that if I had not been paid in advance for my notice period and accrued holiday but paid over the notice period I would have paid more Class 1 National Insurance. This is because Class 1 National Insurance is unlike other taxes, in that it is not calculated on cumulative earnings over the tax year.
>
> But the requirement of the First condition (c) and (d) does NOT specify the amount of Class 1 National Insurance paid, but only that Class 1 National Insurance has been paid on at least 26 weeks of relevant earnings at the Lower Earnings Limit of £113 a week.
>
> As explained above I paid Class 1 National Insurance on all the 26.5 weeks and earned above the Lower Earnings Limit for all the 26.5 weeks

in the 2017/18 tax year and therefore consider that I have complied with the First Condition and am therefore entitled to the New Style JSA benefit.

21. The Appellant's reference to "the requirement of the First condition (c) and (d)" in the passage above is a reference to those conditions as contained in the DWP's summary of the legislation in the Tribunal papers. In particular, it is a reference to the criteria laid down by section 2(2)(b) of the Jobseekers Act 1995 and regulation 34 of the Jobseeker's Allowance Regulations 2013 respectively (see paragraphs 7-10 above).

A summary of the Secretary of State's submissions

22. Mr Overrill's submission on behalf of the Secretary of State is short and to the point. He argues that the crucial factor is that section 2 of the Jobseekers Act 1995 refers to "paid" contributions and to "earnings factors" and not to actual earnings. He agrees with the Appellant's observation that Class 1 national insurance contributions, unlike other taxes, are not calculated on cumulative earnings over the tax year. Furthermore, and with regard to the lump sum payments following her redundancy, he contends that account is only taken of the Appellant's earnings that do not exceed the upper earnings limit in any given week (section 2(3)). Mr Overrill continues: "Had the earnings been attributed over a longer period … she would have paid a greater amount of National Insurance Contributions. However, entitlement to JSA is based on National Insurance Contributions 'actually' paid or credited." He adds that his argument is fortified by the fact that HMRC has specific anti-abuse powers to prevent directors of limited companies from manipulating their remuneration packages. These powers enable HMRC (contrary to its normal approach) to calculate national insurance contributions on the basis of directors' cumulative annual earnings (see Social Security (Contributions) Regulations 2001 (SI 2001/1004), regulation 8). The very existence of these powers, Mr Overrill submits, demonstrates that the cumulative aggregation of earnings over the tax year for the purpose of national insurance contributions is not available in other situations.

The Upper Tribunal's analysis

23. I agree with Mr Overrill's succinct analysis for the following reasons.

24. The first contribution condition as set out in section 2(1)(a) of the Jobseekers Act 1995 comprises two limbs. The first is that the claimant "has actually paid Class 1 contributions in respect of one ("the base year") of the last two complete years before the beginning of the relevant benefit year". The Appellant meets that criterion; so far, so good. However, the second limb is that the additional conditions are satisfied. There are two additional conditions. One is that the contributions have been paid before the week for which JSA is claimed (section 2(2)(a)), again a requirement which is met here. The other is that "the claimant's relevant earnings for the base year upon which primary Class 1 contributions have been paid … are not less than the base year's lower earnings limit multiplied by 26" (section 2(2)(b)). This is where the Appellant's case runs into difficulties.

25. One might be forgiven for thinking that the phrase "the claimant's relevant earnings for the base year" in section 2(2)(b) simply means the claimant's total earnings for the year in question. It does not. As Mr Commissioner Stockman

observed in an analogous context, "earnings" has "a particular technical meaning in this context" (*ND v Department for Social Development (ESA)* [2016] NICom 40 at paragraph 22). In particular, the expression "relevant earnings" has to be read in the light of regulation 34(1) – namely that the relevant earnings are "the total amount of the claimant's earnings equal to the lower earnings limit for the base year". Moreover, and by way of a legislative belt and braces provision, for these purposes "earnings which exceed the lower earnings limit are to be disregarded" (regulation 34(2)).

26. It follows that the fundamental difficulty with the Appellant's submissions is that the implications of her acknowledgement that the national insurance scheme is premised on the weekly assessment of contributions liabilities are not followed through. The week by week approach underpins the entire statutory scheme. For example, section 6(1)(a) of the Social Security Contributions and Benefits Act 1992 imposes a primary Class 1 contributions liability "where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment" (emphasis added). Section 8(1) of the same Act further provides as follows (again, emphasis added):

> (1) Where a primary Class 1 contribution is payable as mentioned in section 6(1)(a) above, the amount of that contribution is the aggregate of–
>
> > (a) the main primary percentage of so much of the earner's earnings paid in the tax week, in respect of the employment in question, as–
> >
> > > (i) exceeds the current primary threshold (or the prescribed equivalent); but
> >
> > > (ii) does not exceed the current upper earnings limit (or the prescribed equivalent); and
> >
> > (b) the additional primary percentage of so much of those earnings as exceeds the current upper earnings limit (or the prescribed equivalent).

27. The scheme's focus on the payment of earnings as being attributable to the actual calendar weeks in which they are paid is further reinforced by paragraph 1(1) of Schedule 1 to the Social Security Contributions and Benefits Act 1992 (again, emphasis added):

> *Class 1 contributions where earner employed in more than one employment*
>
> 1.—(1) For the purposes of determining whether Class 1 contributions are payable in respect of earnings paid to an earner in a given week and, if so, the amount of the contributions–
>
> > (a) all earnings paid to him or for his benefit in that week in respect of one or more employed earner's employments under the same employer shall, except as may be provided by regulations, be aggregated and treated as a single payment of earnings in respect of one such employment; and
> >
> > (b) earnings paid to him or for his benefit in that week by different persons in respect of different employed earner's employment shall

> in prescribed circumstances be aggregated and treated as a single payment of earnings in respect of one such employment;
>
> and regulations may provide that the provisions of this sub-paragraph shall have effect in cases prescribed by the regulations as if for any reference to a week there were substituted a reference to a period prescribed by the regulations.

28. These statutory provisions demonstrate that the focus of the national insurance scheme is on earnings payments received in any given week; there is no scope for payments to be disaggregated and then notionally attributed to other weeks beyond the period in which they were actually paid. It follows from the above that the Appellant's "relevant earnings" cannot be aggregated over the whole of the tax year, disregarding regulation 34. Furthermore, and in any event, the lower earnings limit is a set weekly figure – again, there is no provision for annual aggregation. Accordingly, Mr Overrill is correct to emphasise that the focus of section 2 is on Class 1 contributions which have been "actually paid" (see section 2(1)(a)). In that regard, the evidence in the present case was clear – the lump sum payment in lieu of notice (and the lump sum for accrued holiday entitlement) was paid in the single pay period covered by the third payslip dated 9 June 2017. For the purposes of the assessment of national insurance liabilities and the first contribution condition, that lump sum was attributable to the period covered by that payslip. For each of those three weeks, the effect of section 2(2)(b) and regulation 34 was that only the earnings at the lower earnings limit counted in calculating the Appellant's "relevant earnings". The fact that the payment in lieu of notice may have been calculated on the basis of 13 weeks' notice was irrelevant, given it was paid in the single pay period and not spread out and paid over 13 separate weeks. Moreover, the fact that the arrangement for an advance payment was eminently sensible from the point of view of what would otherwise have been the financial risk to the Appellant in the event of her employer's later default cannot alter that analysis.

29. Mr Overrill also points out that section 2 of the Jobseekers Act 1995 also refers to the notion of an "earnings factor" rather than actual earnings. This submission is perhaps less compelling. This is because, strictly speaking, that legislative reference to earnings factors appears only in the context of the second contribution condition (section 2(1)(b)) and not the first (see section 2(3) and (3A)). The concept of an "earnings factor" was devised in the national insurance scheme because individuals might combine contributions from more than one Class in the same tax year. Accordingly, it was "necessary to create some common denominator whereby equivalent conditions could be exacted from those paying different types of contributions, hence the 'earnings factor'" (Wikeley, Ogus and Barendt, *The Law of Social Security* (5th edition, 2002), p.121). Earnings factors are thus a mechanism for achieving parity of treatment across the national insurance scheme. For the purpose of Class 1 contributions, the earnings factor is essentially a notional figure which represents the amount of earnings on which contributions have been paid, or treated as having been paid, in any given earnings period.

30. The statutory framework for earnings factors is contained in section 22 of the Social Security Contributions and Benefits Act 1992. Section 22(1)(a) provides that, for the purposes of establishing whether the contribution conditions for a contribution-based JSA are satisfied (see section 22(2)(a)), a person shall "be

treated as having annual earnings factors derived – … from so much of his earnings as did not exceed the upper earnings limit and upon which primary Class 1 contributions have been paid or treated as paid". Furthermore, separate earnings factors may be derived for different tax years "from earnings not exceeding the upper earnings limit upon which primary Class 1 contributions have been paid or treated as paid" (section 22(3)(a)). The technical machinery for governing the ascertainment of earnings factors from Class 1 contributions is contained in regulation 2 of, and Schedule 1 to, the Social Security (Earnings Factors) Regulations 1979 (SI 1979/676).

31. The basic rule is laid down in paragraph 2(1) of the Schedule (sub-paragraph (2), which qualifies that rule, is simply a rounding provision) and provides for the notional figure described in paragraph 29 above:

> (1) Subject to sub-paragraph (2) below, a person's earnings factor derived in respect of the year commencing on 6th April 1987, or any subsequent year, from–
>
> > (a) those of his earnings paid in that year upon which Class 1 contributions have been paid or treated as paid in respect of that year, and
> >
> > (b) earnings with which he has been credited in respect of that year,
>
> shall be equal to the amount of those actual and credited earnings.

32. However, for the reasons explained above, earnings factors are principally relevant to the criteria for meeting the second contribution condition (section 2(1)(b), (3) and (3A)). Satisfaction of the *first* contribution condition is governed by section 2(1)(a) and section 2(2), and especially section 2(2)(b), which in turn is qualified by regulation 34. None of those provisions specifically refers to earnings factors as such. The effect of regulation 34 is to confine "relevant earnings" to the weekly amount of the lower earnings limit for the specific calendar weeks in which earnings were paid and the national insurance liability is assessed. The calculation of that amount is not affected by some notional future attribution of particular component elements of that pay. In the present case that meant the lump sum was attributable to the pay period in which it was actually paid, rather than being spread out over weeks in which it was not paid. The Appellant argues that the legislation only requires that "Class 1 National Insurance has been paid on at least 26 weeks of relevant earnings at the Lower Earnings Limit of £113 a week." But that is precisely the point – the Appellant's total earnings (and consequential contributions) were actually paid over a substantially shorter calendar period of some 11 weeks in total. My conclusion is therefore that the DWP (at the second attempt; see paragraph 3 above) and the Tribunal (at the first attempt; see paragraph 4 above) correctly applied the relevant legislation pertaining to the first contribution condition.

33. This construction is confirmed when one considers the relevant legislative history. I referred above to regulation 45A of the Jobseeker's Allowance Regulations 1996, which is the forerunner to regulation 34 of the Jobseeker's Allowance Regulations 2013. Regulation 45A was inserted by the 2010 Regulations (see paragraph 10 above). This amendment represented a significant tightening of the contribution conditions for what was then

contributory-based JSA. The Explanatory Memorandum accompanying the 2010 Regulations explained the purpose of the changes as follows:

> 2.1 From 1 November 2010, all new customers claiming contributory Employment and Support Allowance (ESA) or contribution-based Jobseeker's Allowance (JSA) will need to have paid National Insurance contributions on relevant earnings at the lower earnings limit for at least 26 weeks to qualify for benefit. As a result, people will need to have worked for at least 26 weeks in one of the last two complete tax years to claim either benefit. This differs from current rules where people can qualify for either ESA or JSA having paid contributions on earnings for around 12 weeks' work at the National Minimum Wage, or less than four weeks work at higher-rate tax levels.
>
> 2.2 These Regulations make provision for determining a claimant's 'relevant earnings' for the purposes of the first contribution condition for ESA and JSA. They provide that, for the purpose of this condition, a claimant's 'relevant earnings' will be the total amount of their earnings at the lower earnings limit in one of the last two complete tax years before the benefit year in which the claim is made.

34. According to the Explanatory Memorandum, this amendment reflected the proposal in the 2008 Welfare Reform White Paper *Raising expectations and increasing support: reforming welfare for the future* (Cm 7506), which proposed that "people would have to work for a reasonable amount of time before claiming contributory benefit by ensuring claimants must have worked at least 26 separate weeks in one of the two relevant income tax years before qualifying for contributory ESA or contribution-based JSA" (paragraph 7.1).

35. I have not relied on this Explanatory Memorandum for reaching my decision, but refer to it simply to demonstrate, for better or for worse, that the outcome of this appeal is consistent with the Parliamentary policy intention.

Conclusion

36. I therefore dismiss the Appellant's appeal (under section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 6 September 2021