



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-000720-JSA

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

Between:

K.L.

Appellant

- v -

Secretary of State for Work and Pensions (SSWP)

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 6 October 2022
Decided on consideration of the papers

Representation:

Appellant: In person
Respondent: Ms Emma Fernandes, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

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

REASONS FOR DECISION

Introduction

1. This is an appeal relating to a decision on a late claim for national insurance credits. I dismiss the Appellant's appeal for the reasons that follow.

The Secretary of State's original decision

2. On 1 March 2021 the Secretary of State (or rather in practice one of her decision-makers) decided that the Appellant was not entitled to national insurance credits for the period from 5 April 2017 until 6 April 2018. The basis for this decision was two-fold. First, there was a finding that the Appellant had not requested credits at the start of that period, namely 5 April 2017, or within such time thereafter as would be regarded as reasonable. Second, the decision-maker found that the Appellant had not provided sufficient evidence that he was actively seeking work throughout this period. Following a request for a mandatory reconsideration, the Appellant appealed that non-entitlement decision to the First-tier Tribunal.

The First-tier Tribunal's decision on the Appellant's appeal

3. On 20 August 2021 the First-tier Tribunal (FTT) dismissed the Appellant's appeal, confirming the Secretary of State's decision of 1 March 2021. In its decision notice, the FTT recorded that "the Appellant did not claim NI credits when he stopped work in November 2016 and did not make any enquiries about making such a claim until at the earliest, May 2018 when he wrote to the JobCentre. In the circumstances, the delay was unreasonable" (para [6]).
4. The FTT subsequently issued a full Statement of Reasons setting out its reasons more extensively.

The further appeal proceedings in the Upper Tribunal

5. On 7 March 2022 I gave the Appellant permission to appeal to the Upper Tribunal. I indicated that the grounds of appeal were arguable, but this was no indication as to the likely outcome of the appeal.
6. The Appellant has set out his arguments carefully and clearly in a number of detailed documents on file, being written submissions to both the FTT and the Upper Tribunal. I have considered them all in reaching my decision but have found them unpersuasive for the following reasons.
7. Ms Emma Fernandes, who now acts for the Secretary of State in these proceedings, does not support the appeal to the Upper Tribunal.
8. Neither party has requested an oral hearing of the appeal. Their respective cases have been set out so well in writing that I am satisfied it is fair and just to proceed to determine this appeal 'on the papers' and so without an oral hearing.

The Upper Tribunal's analysis

Introduction

9. There is one issue in this appeal that needs disposing of at the outset. This concerns whether the Appellant was both available for and actively seeking work during the period in question. It will be recalled that this was one reason the Secretary of State advanced for her decision about non-entitlement to NI credits. However, the FTT accepted that the Appellant had been both available

for work and actively seeking employment and so would have satisfied regulation 8A of the Social Security (Credits) Regulations 1975 (SI 1975/556, 'the 1975 Regulations'). The FTT acknowledged as much in both its decision notice (para [5]) and the subsequent statement of reasons (para [11]), indicating it took a different view on this matter to that of the Secretary of State's decision-maker. It follows that the Appellant does not need to establish this point or challenge the FTT's decision on this matter.

10. However, he still needs to show that his claim for NI credits was (to use a neutral term) timely. Moreover, in order to succeed in an Upper Tribunal appeal, the Appellant needs to show that the FTT erred in law in its approach on a material issue. A disagreement over factual matters is insufficient to support an appeal on a point of law. As Ms Fernandes rightly states, the Appellant's grounds of appeal on a point of law can be summarised as being two-fold.

The first ground of appeal: regulation 8A

11. The first ground of appeal is the Appellant's argument that the FTT applied the wrong law, being regulation 8A of the 1975 Regulations. For present purposes the relevant provisions are as follows:

Credits for unemployment

8A.—(1) For the purposes of entitlement to any benefit by virtue of a person's earnings or contributions, he shall be entitled to be credited with earnings equal to the lower earnings limit then in force, in respect of each week to which this regulation applies.

(2) Subject to paragraph (5) this regulation applies to a week which, in relation to the person concerned, is—

(a) a week for the whole of which he was paid a jobseeker's allowance; or

(b) a week for the whole of which the person in relation to old style JSA—

(i) satisfied or was treated as having satisfied the conditions set out in paragraphs (a), (c) and (e) to (h) of section 1(2) of the Jobseekers Act 1995 (conditions for entitlement to a jobseeker's allowance); and

(ii) satisfied the further condition specified in paragraph (3) below; or

(ba) a week for the whole of which the person in relation to new style JSA—

(i) satisfied or was treated as having satisfied the conditions set out in paragraphs (e) to (h) of section 1(2) of the Jobseekers Act 1995 (conditions for entitlement to a jobseeker's allowance);

(ii) satisfied or was treated as having satisfied the work-related requirements under section 6D and 6E of the Jobseekers Act 1995 (work search and work availability requirements); and

(iii) satisfied the further condition specified in paragraph (3) below; or

...

12. The Appellant's contention is that regulation 8A applies only to those individuals who make a claim for jobseeker's allowance (JSA) and not to those who are unemployed but not JSA claimants. In that regard he notes that regulation 8A(2)(ba)(i) cross-refers to section 1(2) of the Jobseekers Act 1995, being a

provision which refers to a "claimant" as being entitled to JSA if certain conditions are met. So, the Appellant argues, as he was not a claimant, the decision-maker and the FTT fell into error of law by applying regulation 8A(2)(ba)(i) to his situation.

13. There are three reasons why this ground of appeal does not hold good.
14. The first is that I am satisfied, contrary to the Appellant's submission, that regulation 8A could apply to an unemployed person who was not a JSA claimant. Regulation 8A(2)(ba)(i) refers to a person who "satisfied or was treated as having satisfied" certain of the conditions set out in section 1(2) of the Jobseekers Act 1995. The only persons who could have *satisfied* those conditions were indeed JSA claimants. However, the Appellant was a person who could properly be "*treated as having satisfied*" those conditions. The expression "treated as having satisfied" necessarily imports the concept of an individual being notionally regarded as having met the relevant statutory criteria – including as having the status of being a claimant in the first place.
15. The second reason is that the above interpretation is consistent with the policy objective. The heading to the regulation provides part of the context for the process of interpretation (see *R v Montila* [2004] UKHL 50 at [34]). If the Appellant's reading were correct, one would expect the heading to regulation 8A to be labelled "Credits for jobseeker's allowance claimants" or even simply "Credits for jobseeker's allowance", in the same way that e.g. regulation 7A applies to "Credits for carer's allowance". But the heading to the regulation is expressed in more general terms, namely "Credits for unemployment", so referring to a person's work status and not their receipt of a particular named benefit.
16. The third reason is that even if were correct, it would then leave the Appellant in no better position. Regulation 8A is just one means amongst many in the 1975 Regulations whereby people may qualify for NI credits. The 1975 Regulations list a number of categories of individuals who can qualify for credits. If regulation 8A does not apply to the Appellant, he has not shown that he is covered by any of the other provisions and has made an in-time claim for such another route to obtain such credits (unless it is one of those types of credits which is awarded automatically).
17. Accordingly, the first ground of appeal is premised on a misconceived interpretation of the 1975 Regulations and does not succeed.

The second ground of appeal: the discrimination argument

18. It is not in dispute that JSA claimants are automatically credited with NI credits (see regulation 8A(2)(a), which contains no link to regulation 8A(3)). However, unemployed people who are not in receipt of JSA need to make a claim for NI credits. This much is evident from regulation 8A(3), which provides as follows:
 - (3) The further condition referred to in paragraph (2)(b) and (ba) is that the person concerned—
 - (a) furnished to the Secretary of State notice in writing of the grounds on which he claims to be entitled to be credited with earnings—
 - (i) on the first day of the period for which he claims to be so entitled in which the week in question fell; or

(ii) within such further time as may be reasonable in the circumstances of the case; and

(b) has provided any evidence required by the Secretary of State that the conditions referred to in paragraph (2)(b) or the conditions and requirements in paragraph (2)(ba) are satisfied.

19. The Appellant's second ground of appeal is that the DWP discriminated against him by misleading him and making it difficult for him to make a claim for NI tax credits for the relevant tax year. He has set out in some considerable detail the difficulties he had in getting relevant answers out of both the DWP and HMRC at various times. There is, however, no discrimination as such in the legal sense of that term. It may also be that both the clarity and the quality of the DWP's advice on claiming NI credits could doubtless be improved.
20. But the difficulty that faces the Appellant on this ground of appeal is that the question as to whether the condition in regulation 8A(3) is met – and, in particular, whether the claim was made “within such further time as may be reasonable in the circumstances of the case” – is ultimately a question of fact. The test of “within such further time as may be reasonable in the circumstances of the case” also appears in regulation 8B(4), and as Mr Commissioner Mesher held in CIB/2445/2006:

29. However, the other factor that comes into play is the precise form of the test in regulation 8B(4). It is not whether a claimant had good cause for the delay in claiming credits or whether there were reasonable grounds for the delay, but the more general test of what is a reasonable time in the circumstances for a claim to be made. Therefore ... the length of the time after the period for which credits are claimed is a factor, along with all the other circumstances. When entitlement to credits rests on proof of incapacity for work, the assessment of the evidence and the making of a proper decision becomes more difficult the further away from the period in question one gets. As a general proposition it can be accepted that the longer the gap from the tax year in question the more compelling the other circumstances must be for it to be concluded that the time for claiming, outside the following benefit year, is reasonable.

21. There were two facts which are not in any way in dispute in this appeal. The first was that the Appellant's employment ended in October or November 2016 (the precise date does not matter for this purpose). The second was that he made a claim for NI credits for the 2017/18 tax year on 27 January 2021, which was received by the DWP on 1 February 2021.
22. That being so, the NI credits claim was plainly not made “on the first day of the period for which he claims to be so entitled in which the week in question fell” within regulation 8A(3)(a)(i). So the question was then whether the claim was made “within such further time as may be reasonable in the circumstances of the case” within regulation 8A(3)(a)(ii). The FTT found that it was not so made. I recognise that the Appellant disagrees profoundly with the FTT's assessment, pointing to the lack of response or the conflicting answers he received from officialdom to his enquiries at various times. However, those matters were considered by the FTT along with all the other circumstances. What is “reasonable in the circumstances of the case” is a quintessential question of fact, not law. In short, the FTT considered the evidence and made sustainable

findings of fact, giving its reasons as appropriate. A disagreement over the facts does not ordinarily give rise to an error of law, and that principle applies here.

23. I should add that the Appellant also relies on the decision of Judge Brunner KC in *SM v Secretary of State for Work and Pensions (JSA)* [2021] UKUT 179 (AAC). That was a case in which the DWP treated unemployment credits under regulations 8A as if they were jobseeker's allowance and mistakenly applied the Jobseeker's Allowance Regulations 1996 to stop the claimant's unemployment credits when he refused to provide identification and was deemed to have failed to attend an interview. Judge Brunner KC has some critical comments to make of the DWP's documentation relating to claims for NI credits by those unemployed people who are not JSA claimants. To that extent, there is undeniably some common factual ground between the two cases. However, the difference is that in *SM v SSWP (JSA)* the claimant was found to continue to be entitled to unemployment credits by virtue of regulation 8A. There was in that case no question of any need to consider a late claim for credits by reference to the test in regulation 8A(3). The case does not therefore assist the Appellant in the instant appeal.

Conclusion

24. Accordingly, it follows I must dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 6 October 2022