IN THE UPPER TRIBUNAL **UT Ref: UA-2021-000630-HB**
ADMINISTRATIVE APPEALS CHAMBER **[2024]UKUT 117 (AAC)**

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

Between:

Ipswich Borough Council

Appellant

- v –

TD

First Respondent

and

The Secretary of State for Work and Pensions

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 11 April 2024
Decided after (video) oral hearings on 15 February 2023 and 11 October 2023.

Representation:

Wal Callaby, Appeals Officer, for the appellant (at both hearings)
The first respondent represented herself (at both hearings)
Denis Edwards of counsel for the second respondent (second hearing only)

DECISION

The decision of the Upper Tribunal is to allow Ipswich's appeal. The decision of the First-tier Tribunal made on 26 July 2021 under case number SC134/20/00416 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be redecided by a freshly constituted First-tier Tribunal.

Further pursuant to that section 12(2)(b)(i), the Upper Tribunal directs: (i) that the remitted appeal is to be decided after an oral hearing before the First-tier Tribunal, and (ii) that the appeal is to be decided by the First-tier Tribunal on the basis that the first respondent to this appeal to the Upper Tribunal (who is the appellant on the appeal to the First-tier Tribunal) was not passported to a full award of housing benefit for the periods relevant to her appeal when she had a 'nil award' of universal credit.

Any further directions are for the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The First-tier Tribunal that decided this appeal on 26 July 2021 ("the FTT") allowed the appeal of the housing benefit claimant (who is the first respondent on this appeal to the Upper Tribunal) on the basis that there had been:

> "no overpayment of housing benefit [to the claimant] for the period 21/01/2020 to 24/05/2020 because [the claimant] remained on Universal Credit throughout [that period]".

2. The central question on this further appeal by the local authority, Ipswich Borough Council ("Ipswich"), to the Upper Tribunal is whether in law the FTT was entitled to conclude that the claimant had remained 'on' universal credit between 21 January and 24 May 2020 when she had what the DWP described as a nil (or £0.00) award of universal credit.

3. The short answer, as I will explain below, is that under the law relating to universal credit there cannot be a nil award of, or nil entitlement to, universal credit. Accordingly, the FTT was wrong to conclude that the claimant was 'on universal credit' for the periods when she had what the DWP described as nil or £0.00 'awards' of universal credit, and so the claimant had been overpaid housing benefit during those periods.

4. However, whether any overpayment of housing benefit which arose between 21 January and 24 May 2020 is recoverable under regulation 100 of the Housing Benefit Regulations 2006 ("the HB Regs"), and from whom any recoverable overpayment may in law be recovered under regulation 101 of the HB Regs, will need to be decided by a freshly constituted First-tier Tribunal to whom this appeal is being remitted.

The relevant background in more detail

5. The claimant and her partner claimed universal credit in October 2019. The assessment period under section 7 of the Welfare Reform Act 2012 and regulation 21 of the Universal Credit Regulations 2013 ran from the 25th of one month to the 24th of the next month.

6. On 21 January 2020, the claimant and her partner became homeless. They were placed in temporary accommodation which was a homeless families unit. It was this relatively unusual circumstance which meant that the claimant had to claim housing benefit in order to meet her rental housing costs while in this temporary accommodation, rather than having those housing costs met through universal credit: see, relatedly, regulation 5(2)(a) and as then was regulation 6(8) of the Universal credit (Transitional Provisions) Regulations 2014. Housing benefit was awarded at the maximum amount for the claimant's temporary accommodation rental costs on the basis of universal credit as a 'passporting' benefit. I will explain what 'passporting' means legally shortly.

7. As the FTT described it, the claimant and her partner received nil payments of universal credit for five consecutive assessment periods spanning the period from 25 December 2019 to 24 May 2020. Ipswich found out about these nil payments on or about 11 May 2020. It decided that the nil payments meant that the claimant (and her partner) was not entitled to, and not in receipt of, universal credit from 25 December

2019 to 24 May 2020, and so had wrongly been passported to full housing benefit for the period from 21 January 2020 to 24 May 2020. As a result, Ipswich reassessed the claimant's entitlement to housing benefit for the period 21 January 2020 to 24 May 2020 and decided she had been overpaid housing benefit of £1,315.19 for this period. It further decided that this overpayment was recoverable from the claimant because she had failed to inform Ipswich that she was "no longer entitled to [universal credit] from 25/12/2019".

The FTT's decision

8. The FTT founded its reasons for allowing the appeal, and finding there had been no overpayment of housing benefit made by Ipswich to the claimant for the above period, on the claimant having remained 'on' universal credit throughout that period, when she was receiving nil payments of universal credit. It found that the claimant had remained entitled to universal credit during the five assessment periods when she received nil payments of that benefit because she had made a claim for that benefit in October 2019 and that claim had been decided and an award of universal credit had been made to the claimant. It had thus been decided that the claimant was entitled to universal credit, and that entitlement had remained in place since the awarding decision because there had been no decision of the Secretary of State bringing that entitlement to an end. The FTT held that claimant had received the nil payments of universal credit simply "because of the way the amount payable was assessed in those [five assessment periods]".

9. Turning to housing benefit, the FTT noted (correctly) that housing benefit is a means-tested benefit, which means entitlement to it depends on a claimant's income and capital (amongst other matters). Drawing on paragraph 12 of Schedule 4 and paragraph 4 of Schedule 5 to the HB Regs, the FTT noted (again correctly) that where a claimant "is on universal credit" the whole of their earnings and other income are to be disregarded for the purposes of assessing entitlement. It is by this statutory means that universal credit is seen as a 'passporting benefit' to entitlement to housing benefit. (Paragraph 5 of Schedule 6 to the HB Regs makes identical provision in respect of capital held by a claimant.)

10. Whether a claimant "is on universal credit" is dealt with in regulation 2(3B) of the HB Regs, which provides that:

> "For the purposes of these Regulations, a person ("P") is on universal credit on any day in respect of which P is entitled to universal credit (whether it is in payment or not)".

11. The FTT focussed particularly on the words in brackets at the end of this definition of being 'on universal credit'. It concluded:

> "14.…[the claimant] was at all material times "on UC"" for the purposes of the income disregard, even though she was paid nil for those [assessment periods]. It was therefore incorrect for [Ipswich] to regard her as "not entitled" or "not in receipt of" UC and there was no legal basis for [Ipswich] to assess her household income during the [five assessment periods] in which she was not paid any UC or thereby to reduce the amount of her HB.
>
> 15. In conclusion, if my analysis is correct, the outcome is that because [the claimant] was at all material times on UC, this was an automatic passport to full HB since all of her household income was ignored, and for these

> purposes, she is treated as being on UC on any day she is entitled to it, whether or not it was being paid to her.
>
> 16. There is therefore no overpayment to be recovered and the appeal succeeds."

12. The FTT gave Ipswich permission to appeal to the Upper Tribunal. In so doing, it said (inter alia):

> "….Ipswich's representative told me [at the hearing] that his local authority had been treating claimants on Universal Credit in the same way for years, and it is possible other local authorities have also done so. I therefore grant permission to appeal for the reasons given below.
>
> Permission to appeal to the Upper Tribunal is allowed. I consider there are issues of general importance arising on this appeal, which would benefit from consideration, guidance and clarification from the Upper Tribunal, concerning the correct approach to the treatment of Housing Benefit claimants who are on UC and whose UC claims have not been terminated, but who are receiving nil payments for some assessment periods, under the [HB Regs]."

The Upper Tribunal proceedings

13. I held an oral hearing, by video link, of Ipswich's appeal on 15 February 2023. At that stage only Ipswich and the claimant were involved in the appeal, and both attended that hearing. After that hearing I gave further directions on the appeal, the material parts of which read:

> "3. The central issue on the appeal, and on which the oral hearing focused, was the legal scope of regulation 2(3B) of the Housing Benefit Regulations 2006 ("the HB Regs"). This provides that for the purposes of the HB Regs "a person ("P") is on universal credit on any day in respect of which P is entitled to universal credit (whether it is in payment or not)". If a person is 'on universal credit' in this sense then their income and capital is ignored for the purposes of calculating entitlement to housing benefit: see, for example, paragraph 4 in Schedule 5 to the HB Regs.
>
> 4. The First-tier Tribunal found…that [the claimant] was 'on universal credit', and so was entitled to housing benefit and had not been overpaid housing benefit, because she had received nil payments of universal credit at the relevant time… The First-tier Tribunal's reasoning proceeded on the basis that [the claimant] was entitled to a nil award of universal credit for the relevant periods. This was seemingly based on the DWP evidence on pages 39 and 40 showing what is said to be awards of universal credit of £0.00
>
> 5. The arguments before me largely proceeded on the basis of whether [the appellant] could be accepted by the housing benefit authority as being entitled to universal credit if her income was too high for her to qualify. The arguable difficulty with that argument, assuming pages 30-40 show entitlement decisions of the Secretary of State (albeit for £0.00), is that, absent fraud (for which no allegation or basis arises in this case), the local authority is effectively bound by the Secretary of State's entitlement decision and cannot go behind it: see *R v Penwith DC ex parte Menear* (1991) 24 HLR 115. The guidance on which Ipswich relied (see page 5 of the UT part of the bundle) would seem to support this view as it only allows the housing benefit authority to reassess the housing

benefit "If a claimant has their UC reduced to nil due to earnings and is no longer entitled to UC…" (my underlining added for emphasis).

6. However, on considering this appeal after the oral hearing, it seems to me that an arguable issue arises about whether in law [the claimant] could be entitled to a 'nil' award of universal credit. That in turn may undermine the view the First-tier Tribunal took of the evidence on pages 39 and 40 (as showing a nil entitlement to universal credit). The reason why, arguably, there cannot be an entitlement to £0.00 of universal credit is because sections 3(1)(b) and 5(1)(b) of the Welfare Reform Act 2012, when read with regulation 17 of the Universal Credit Regulations 2013, would appear to preclude that eventuality. On the face of those provisions, the minimum entitlement is one pence.

7. What then, if what has been said immediately above is correct, of the £0.00 awards of universal credit on pages 39 and 40?

8. I was struck in the hearing that both Mr Callaby (for Ipswich BC) and [the claimant] referred to being able to have 6 months of 'nil awards' of universal credit before "being taken off it". What that would appear to refer to is that there is no need to *reclaim* universal credit for 6 months in such circumstances: see what was regulation 6, and now is regulation 32A, of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("the UC Claims Regs") .

9. These provisions seemingly remove for 6 months the general rule found in section 1 of the Social Security Administration Act 1992 that in order to be entitled to most benefits, including universal credit, a claim must be made for the benefit. However, taken with the terms of section 8(2) of the Social Security Act 1998 (a claim for benefit ceases to subsist after the Secretary of State has made a decision on it) the law would appear, at least arguably, to point to the Secretary of State having superseded and removed [the claimant's] entitlement to universal credit for the assessment period 25 December 2019 to 24 January 2020. [The claimant] was not then required to reclaim universal credit for the next four assessment periods, given what was regulation 6 of the UC Claims Regs, but for each of those four subsequent assessment periods she was, arguably, not entitled to universal credit. It may be it is this state of affairs which pages 39 and 40 are seeking to address, although the language of 'award' is usually associated with entitlement.

10. If the above is correct then it has implications not just for [the claimant] or 'passported HB claimants" more generally but also others who rely on being passported to other benefits (e.g. free prescriptions) because they are 'on universal credit'. If a claimant's income fluctuates over the monthly assessment periods, and so takes them in and out of entitlement to universal credit for those assessment periods, this could have very significant effects on their ability to obtain passported benefits for free. For example, it might require universal credit claimants to plan, if they can, when to renew their prescriptions.

11. It is for these reasons that I am making these directions seeking the view, first, of the Secretary of State for Work and Pensions as to (a) whether he wishes to be joined to this appeal, and (b) if he wishes to be joined to these appeal proceedings, to set out in writing submissions on the points I have raised above. Those points concern (i) [the claimant's] entitlement to universal credit

in the relevant assessment periods when pages 39 and 40 say she had awards of £0.00, and (ii) more generally, issues that may arise in securing passporting to other benefits *if* entitlement to universal credit fluctuates over consecutive assessment periods.

12. If the Secretary of State agrees (as I hope he will) to be joined to this appeal, he will automatically become the second respondent on the appeal. This is the effect of paragraph 8(2)(a) of the Child Support, Pensions and Social Security Act 2000 when read with definition (a)(iii) of "respondent" in rule 1(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

13. In terms of the practical steps taken to obtain the Secretary of State's views, this will involve the Upper Tribunal (AAC)'s office copying to the Secretary of State a copy of the Upper Tribunal appeal bundle on this appeal together with a copy of these directions. The Secretary of State will then have one month to indicate (i) if he wishes to be joined as a respondent to this appeal, and (ii) if he does, to make his written submissions on the two issues set out in paragraph 11 above.

14. The directions below then cater for [the claimant] making a written submission in reply, followed by the Ipswich BC; in both cases on the issues identified in paragraph 11 above."

14. The Secretary of State agreed to be joined as a party to these appeal proceedings. His written response to above directions was, insofar as is relevant, as follows:

"3. I submit that by virtue of section 3(2)(b) of the Welfare Reform Act 2012, it is a condition of entitlement to Universal Credit that joint claimants "meet the financial conditions for joint claimants." Section 5(2)(b) provides that one of the financial conditions for joint claimants is "their combined income is such that, if they were entitled to universal credit, the amount payable would not be less than any prescribed minimum." Regulation 17 off the Universal Credit Regulations 2013 then provides that the prescribed minimum for this purpose is one penny. In the case at hand, the evidence at pages 40 and 49 of the bundle shows that from the couple's income was such that the amount of UC payable to them from 25 December 2019 was nil. Accordingly, they did not meet the financial conditions of entitlement, and therefore they ceased to be entitled to UC, from that point on.

4. I further submit that it is well established that a decision generally does not take legal effect until it is notified. However, where a notification is only belatedly issued, any supersession decision that ends entitlement to UC would nonetheless take effect (retrospectively) from whatever the legislation specifies as its effective date.

5. With regard to the point in paragraph 8 of the Judge's Observations, the administrative action of keeping a claimant's UC computer account open can be done so as to allow the operation of regulation 32A of the Claims and Payments Regulations, under which the claimant could be treated as reclaiming UC if the earnings later fell or ended.

6. Here the income exceeded the UC elements so UC was reduced to nil. As this was below the prescribed minimum of 1p the award of UC was terminated. Regulation 32A was in play so that UC could be re-started should the earnings

change with the result that the claimant became entitled to at least 1p. But that does not mean that there was something in the nature of underlying entitlement before that event. The claim is kept open only in a technical sense. It recognises that claimants may have fluctuating earnings and so entitlement may fluctuate. Regulation 32A helps manage repeat claims in this circumstance. In UC the decision notification is effectively the assessment period statement which set out the change that reduced UC to nil – that includes the dispute rights. But even if there was a gap here, that does not compromise the fundamental issue around actual entitlement to UC.

7. With regard to the general principle of passporting, so long as there is a financial award of UC, maximum Housing Benefit (HB) is awarded. Where no passporting benefit is in payment, HB is assessed as a standard claim and is subject to the usual means test. This principle mirrors the treatment of the legacy DWP benefits (IS, JSA(IB), ESA(IR)) and their relationship to HB.

8. Consequently, we support the appeal."

15. The claimant in her further written submissions on the appeal said, relevant to the issued raised in my further directions, that she had been told by numerous DWP workers that she continued to have the status of a "UC claimant" until she was no longer receiving a statement, whether that statement was zero or describing a financial payment. She argued that even as a claimant receiving a zero award but getting a statement, she would be eligible for all other relevant services like prescriptions and healthcare. The claimant included with her further submissions copies of DWP written notices showing payments of universal credit for the assessment periods 25 September to 24 October 2019 (of £247), 25 October to 24 November 2019 (£122), 25 November to 24 December 2019 (£247) and 25 December 2019 to 24 January 2020 (showing a monthly payment of £0).

16. Ipswich's further written submissions agreed with those of the Secretary of State.

17. Both Ipswich and the claimant sought a further oral hearing of the appeal, which I directed on 21 June 2023. In those directions I said the following:

"6. Part of the reason I am directing a further oral hearing is a concern that the points I raised in paragraphs 10 and 11 of my observations in the directions of 20 February 2023 have not yet been adequately addressed. I hope the oral hearing will enable these points to be more fully, and properly, addressed

7. Those concerns arise from the premise that a claimant cannot have a nil award of, or nil entitlement to, universal credit; a premise which may arguably be supported by the most recent submissions on this appeal. The concern is that if a claimant's income fluctuates over the monthly assessment periods, and so takes them in and out of entitlement to universal credit for those assessment periods, this could have very significant effects on their ability to obtain passported benefits for free. For example, it might require universal credit claimants to plan, if they can, when to renew their prescriptions. It was this concern which in part led me to ask the Secretary of State for Work and Pensions to become a party to these appeal proceedings.

8. The Secretary of State's written submission of 4 April 2023 addresses whether [the claimant] could have been entitled to a nil award universal credit in the relevant assessment periods (per what is said on pages 39 and 40 about her having a universal credit **award** of £0.00), and says she was not in law

> entitled to (nil) universal credit during those assessment periods. However, I do not consider his submission fully addresses the general issues that may arise in securing passporting to housing benefit and other benefits if he is correct on the entitlement point, and I remain concerned that the effect of the nil award letters on pages 39 and 40 may be misleading and have unnecessary adverse effects.
>
> 9. If further written arguments are to be relied upon, they must be provided to the Upper Tribunal no later than seven days before the date fixed for the hearing."

18. No further written submission were made by any of the parties.

19. The second oral hearing of the appeal took place before me (remotely) on 11 October 2023. The Secretary of State was represented by counsel at that hearing. I regret to have to record that the Secretary of State through his counsel was not in a position to help the Upper Tribunal with the concerns I had sought to re-emphasise in paragraphs 7 and 8 of my oral hearing directions 21 June 2023. Indeed, the Secretary of State's counsel seemed surprised that such issues might need to be addressed at the hearing and had to ask for time to take instructions from his clients on them. Even then, he was unable to provide me with anything of any real use. A reference to universal credit being a benefit intended to "make work pay" was not of any assistance in terms of my deciding whether there can be an entitlement to a nil award of universal credit or in considering whether the information provided to the claimant, including the universal credit 'award' or decision notices issued to her by the Secretary of State, clearly and accurately told her what the effects of her having a nil 'award' of universal credit would have for other benefits and sources of state support which she may have needed to access at that time.

Key statutory provisions

20. The key part of the HB Regs – regulation 2(3B) and its definition of what is meant by being 'on universal credit' - has already been set out at paragraph 10 above.

21. Under Part 1 of the Welfare Reform Act ("the 2012 Act") and section 1(1) of that Act, "[a] benefit known as universal credit is payable in accordance with this Part".

22. Section 3 of the 2012 Act provides that:

> "**Entitlement**
>
> 3.-(1) A single claimant is entitled to universal credit if the claimant meets—
>
> (a) the basic conditions, and
>
> (b) the financial conditions for a single claimant.
>
> (2) Joint claimants are jointly entitled to universal credit if—
>
> (a) each of them meets the basic conditions, and
>
> (b)they meet the financial conditions for joint claimants."

23. I need not set out section 4 of the 2012 Act, which deals with the 'basic conditions' of entitlement to universal credit, because none of those are in dispute on this appeal.

24. Section 5 of the 2012 Act deals with the financial conditions of entitlement to universal credit, as follows:

> "**Financial conditions**
>
> 5.-(1) For the purposes of section 3, the financial conditions for a single claimant are that—
>
> (a) the claimant's capital, or a prescribed part of it, is not greater than a prescribed amount, and
>
> (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.
>
> (2) For those purposes, the financial conditions for joint claimants are that—
>
> (a) their combined capital, or a prescribed part of it, is not greater than a prescribed amount, and
>
> (b) their combined income is such that, if they were entitled to universal credit, the amount payable would not be less than any prescribed minimum."
>
> (the underlining in both places is mine and has been added for emphasis)

25. The basis of an award of universal credit and its being made for an assessment period is provided for in section 7 of the 2012 Act, which sets out the following:

> "**Basis of awards**
>
> 7.-(1) Universal credit is payable in respect of each complete assessment period within a period of entitlement.
>
> (2) In this Part an "assessment period" is a period of a prescribed duration.
>
> (3) Regulations may make provision—
>
> (a) about when an assessment period is to start;
>
> (b) for universal credit to be payable in respect of a period shorter than an assessment period;
>
> (c) about the amount payable in respect of a period shorter than an assessment period.
>
> (4) In subsection (1) "period of entitlement" means a period during which entitlement to universal credit subsists."
>
> (the underlining is again mine and has bene made for emphasis)

26. A "prescribed minimum" has been provided pursuant to sections 5(1)(b) and (2)(b) of the 2012 Act in regulation 17 of the Universal Credit Regulations 2013. Regulation 17 provides:

> "**Minimum amount**
>
> 17. For the purposes of section 5(1)(b) and (2)(b) of the [Welfare Reform Act 2012] (financial conditions: amount payable not less than any prescribed minimum) the minimum is one penny."

27. There only other statutory provisions which I need to set out are those which concern (i) the need to make a claim for universal credit in order to be entitled to it and (ii) regulations which disapply that general provision for six months in certain circumstances.

28. By section 1(1) and (4)(za) of the Social Security Administration Act 1992 ("SSAA 1992"):

> "1.-(1) Except in such cases as may be prescribed ….no person shall be entitled to [universal credit] unless, in addition to any other conditions relating to that benefit being satisfied-
>
> (a) he makes claim for it in the manner, and within the time, prescribed in relation to that benefit.…; or
>
> (b) he is treated by virtue of…regulations as making a claim for it."

29. The first regulation disapplying section 1(1) of the SSA 1992 in relation to universal credit was regulation 6 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("the UC Claims Regs"). It provided as follows:

> "**Claims not required for entitlement to universal credit in certain cases**
>
> 6.—(1) It is not to be a condition of entitlement to universal credit that a claim be made for it where all the following conditions are met—
>
> (a) a decision is made as a result of the change of circumstances, whether as originally made or as revised, that the person ("former claimant") is not entitled to universal credit in a case where, but for the receipt of earned income, the former claimant would have continued to be entitled to an amount of universal credit;
>
> (b) at the date of notification to an appropriate office of the change of circumstances referred to in sub-paragraph (a), the former claimant was in receipt of earned income;
>
> (c) not more than six months have elapsed since the last day of entitlement to universal credit;
>
> (d) the former claimant provides such information as to their income at such times as the Secretary of State may require and the Secretary of State is satisfied that the former claimant has provided such information as may be required by the Secretary of State to determine whether an award may be made and if so, the amount;
>
> (e) since the last day of entitlement to universal credit the former claimant's circumstances have changed such that, if the former claimant were entitled to universal credit, the amount payable would not be less than the minimum amount in regulation 17 of the Universal Credit Regulations.
>
> (2) It is not to be a condition of entitlement to universal credit that a claim be made for it where all the following conditions are met—
>
> (a) the former claimant made a claim for universal credit and a decision is made, whether as originally made or as revised, that the former claimant is not entitled to universal credit in a case where, but for the receipt of earned income, the former claimant would have been entitled to an amount of universal credit;
>
> (b) at the time the decision referred to in sub-paragraph (a) was made, the former claimant was in receipt of earned income;
>
> (c) not more than six months have elapsed since the date of that claim;

(d) the former claimant provides such information as to their income at such times as the Secretary of State may require and the Secretary of State is satisfied that the former claimant has provided such information as may be required by the Secretary of State to determine whether an award may be made and if so, the amount;

(e) the former claimant's circumstances have changed such that, if the former claimant were entitled to universal credit, the amount payable would not be less than the minimum amount in regulation 17 of the Universal Credit Regulations.

30. The second provision disapplying the need for a clam for universal credit is regulation 32A of the UC Claims Regs. This regulation was inserted into the UC Claims Regs with effect from 21 May 2020, so four days before the end of the housing benefit overpayment with which this appeal is concerned, and provides as follows:

"**Reclaims of universal credit after nil award due to earnings**

32A.—(1) This regulation applies where—

(a) a claim is made for universal credit, but no award is made because the condition in section 5(1)(b) or 5(2)(b) of the 2012 Act (condition that the claimant's income, or joint claimants' combined income is such that the amount payable would not be less than the prescribed minimum) is not met; or

(b) entitlement to an award of universal credit ceases because that condition is not met.

(2) The Secretary of State may, subject to any conditions the Secretary of State considers appropriate, treat the claimant (or joint claimants) as making a claim on the first day of each subsequent month, up to a maximum of 5, that would have been an assessment period if an award had been made or, as the case may be, if the award had continued."

31. I should add, though I need not set the statutory provisions out, that under section 8 of the Social Security Act 1998 ("SSA 1998") it is for the Secretary of State to decide any claim for universal credit, per section 8(1)(a) and (3)(aa) of the SSA 1998. Moreover, where a claim for universal credit has been decided by the Secretary of State, under section 8(2) of the SSSA 1998 the claim shall not be regarded as subsisting after that time and, accordingly, a claimant shall not (without making a further claim) be entitled to universal credit on the basis of circumstances not obtaining at that time. In other words, if a claimant is found not to be entitled to universal credit on a claim they make for it then, subject to regulations 6 and 32A of the UC Regs, they have to make a further claim for that benefit if and when their circumstances change. I will deal with what is meant by 'not being entitled' to universal credit below.

32. Furthermore, the effect of section 17(1) of the SSA 1998 is that any decision made by the Secretary of State under section 8 of the same Act is final, subject to the provision of revision, supersession or appeal which allow for that decision to be changed. I suspect it was this provision which the FTT had in mind when it spoke in terms of the claimant's entitlement to universal credit having remained in place since the awarding decision because there had been no decision of the Secretary of State bringing that entitlement to an end.

33. <u>Discussion and conclusion</u>

34. The core of the FTT's decision was that the claimant had been 'on universal credit' for the period 21 January to 24 May 2020 and, as a result, had not been overpaid any housing benefit for this period. Central to that conclusion, pursuant to regulation 2(3B) of the HB Regs, was that the claimant had been entitled to universal credit throughout this period, even though she was not paid any universal credit during this period. The FTT found that the evidence in the appeal bundle (at pages 39-40) supported this conclusion because it showed screen prints from the DWP which set out that the claimant had a:

> "**Current award**
>
> The payment of **£0.00** started on **25 March 2020**
>
> This is a single claim
>
> The maximum amount of Universal that can be awarded is **£1057.38** which has been adjusted to **£0.00**…..
>
> **Previous awards**
>
> There are 5 previous awards form this assessment
>
> | | |
> |---|---|
> | 25 Feb 2020 – 24 March 2020 | **£0.00** |
> | 25 Dec 2019 – 24 Feb 2020[1] | **£0.00** |
> | 25 Nov 2019 – 24 Dec 2019 | **£247.49** |
> | 25 Oct 2019 – 24 Nov 2019 | **£122.64** |
> | 25 Sep 2019 – 24 Oct 2019 | **£247.49**" |

35. This was to an extent mirrored in the notifications issued to the claimant by the DWP. These appeared, in (my) summary, as:

> "**Payments**
>
> Assessment period: 25 December 2019 to 24 January 2020
>
> Your payment this month is
>
> **£0**
>
> **What you're entitled to**
>
> **Total entitlement before deductions** **£962.23**
>
> **What we take off (deductions)**
>
> **Total deductions** [which covers the claimant's and her partners' pay]
>
> **-£1,244.56**"

36. However the evidence was presented to the FTT, I am clear that it erred in law in concluding that the claimant was entitled to universal credit when she had nil 'awards' and payments of £0.00 of universal credit during the five relevant assessment periods.

[1] I cannot account for why this is a two month assessment period, though nothing turns on this.

The statutory provisions make clear in my judgment that there cannot be an entitlement to a nil/£0.00 amount or award of universal credit.

37. Apart from making a claim for universal credit, it is a **condition of entitlement** to universal credit that a single claimant meets, inter alia, the financial conditions for a single claimant and joint claimants meet, inter alia, the financial conditions for joint claimants: see section 3(1)(b) and (2)(b) of the 2012 Act. Section 5(1)(b) and (2)(b) of the 2012 Act when read with regulation 17 of the Universal Credit Regulations 2013 makes clear that that financial conditions of entitlement to universal credit can only be satisfied where the claimant's or joint claimants' income is such that an award of at least one penny of universal credit can be made for the assessment period. At least that is the current prescribed minimum award that can be made and thus the prescribed minimum award that is and was needed to satisfy this part of the financial conditions of entitlement to universal credit. Without an at least one penny award, there can be no entitlement to universal credit because section 5(1)(b) or (2)(b) of the 2012 Act has not been met. (It is the latter and not the former which applied to the claimant as she was a joint claimant for universal credit at the relevant time. I wrongly treated the claimant in my directions set out at paragraph 13 above as a single claimant. Nothing turn on this as the material provisions in subsection (1)(b) and (2)(b) of section 5 of the 2012 Act are identical.)

38. As the claimant's nil payments of universal credit in the relevant assessment periods show that in law she was not entitled to universal credit, it must follow that the FTT was wrong to decide that the claimant was 'on universal credit' during those periods. In consequences, the FTT wrongly decided that the claimant had not been overpaid housing benefit for the period in issue.

39. I add that a close inspection of the DWP screen prints on pages 39 and 40 show that a decision was made by the Secretary State on 25 April 2020 in respect of the assessment period 25 March 2020 to 24 April 2020. Taking account of the provisions in regulation 6 and then 32A of the UC Claims Regs, that 25 April decision must have been a decision of the Secretary of State under section 8 of the SSA 1998 on the claim the claimant was deemed as having made for that assessment period. Notwithstanding the confusing and potentially misleading language of "Current award" used in that screen print (given that 'award' of benefit is usually used in the social security system coextensively with having an 'entitlement' to the benefit in question, a perspective which is underscored by the terms of section 7 of the 2012 Act), that decision can only have been that the claimant was not entitled to universal credit for that assessment period. It was not a decision under section 11 of the SSA 1998 superseding a previous awarding decision because on the face of page 40 the previous decision, which covered the period 25 February 2020 to 24 March 2020, was an 'award' of £0.00, which must also have been a decision that the claimant was not entitled to universal credit for that assessment period. The claim for that earlier assessment period did not subsist after the decision on it, per section 8(2) of the SSA 1998. Hence the need for a new claim for the next assessment period, which either regulation 6 or regulation 32A of the UC Claims Regs treated the claimant as having made.

40. As for the FTTs concern that the previous decision awarding the claimant universal credit had not been properly brought to an end, this was not the subject of any argument before me. The last awarding decision, by which I mean one which found the claimant (and her partner) was entitled to universal credit, was for the assessment period 25 November 2019 to 24 December 2019. If, as the evidence shows, the claimant was not entitled to universal credit for the next assessment period thereafter,

that awarding decision will have been superseded by the Secretary of State under section 11 of the SSA 1998 on the basis of a relevant change of circumstances.

41. For the reasons set out above, I allow Ipswich's appeal to the extent set out above and set aside the FTT's decision.

42. Ipswich's success on this appeal to the Upper Tribunal on error of law and on the issue of whether the claimant had been overpaid housing benefit when she had a nil 'award' and so was **not entitled** to universal credit for the five relevant assessment periods, says nothing one way or the other about whether the appellant's appeal to the First-tier Tribunal will succeed or fail on the facts about whether the overpayment is recoverable from her under regulations 100 and 101 of the HB Regs. That will be for the First-tier Tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

43. I comment lastly on the concerns I raised about references to universal credit awards of £0.00 and being paid £0 for a month perhaps leading to claimants wrongly considering themselves eligible for, by way of example, free prescriptions, because they might think they are entitled to a nil award of universal credit. I have explained in paragraph 39 above why the language used by the DWP in its screen prints may potentially have been misleading. The notifications issued to the claimant were also in my view confusing and liable to mislead. A reference to "**What you're entitled to**" in such notices is, to my mind, entirely inapposite in circumstances where the true legal position is that the claimant was not entitled to universal credit. Given the real potential for confusion and claimants being materially misled, I cannot see any good reason why both in the screen prints and in letters or notices issued to claimants the true legal position cannot be set out. All that would have to be stated to do so would be language like: "You are not entitled to universal credit for this assessment period because, for the treasons we explain further below, your income is too high". Nor can I see why any focus group should be needed to arrive at simple and informative but legally accurate language.

44. The Secretary of State did helpfully provide further information after the second hearing of the appeal before me which took the reader from the link at the bottom of the notifications provided to the claimant at "Other support you may be able to get". This takes the reader to a webpage titled Universal Credit: Other Financial Support". Taking the example of claiming help with the cost of prescriptions, the fourth page of this has a link for "help with health costs, including prescriptions and dental treatment". That then takes the reader to another web page which is titled "Help with health costs for people getting Universal Credit – NHS….". This helpfully advises the reader that they should pay for any health costs if they are unsure whether they meet the eligibility criteria. Those criteria are explained as follows.

> "**Eligibility criteria**
>
> You qualify for help with health costs if, on the date you claim, you either:
>
> - receive Universal Credit and either had no earnings or had net earnings of £435 or less in your last Universal Credit assessment period
> - receive Universal Credit, which includes an element for a child, or you (or your partner) had limited capability for work (LCW) or limited capability for work and work-related activity (LCWRA), and you either had no earnings or net earnings of £935 or less in your last Universal Credit assessment period

> If you're part of a couple, the net earnings threshold applies to your combined net earnings.
>
> You should present a copy of your Universal Credit award notice to prove your entitlement."

45. This is likely to assist a claimant once they have accessed and read this page. Moreover, even if a claimant wrongly considers that having a nil 'award' of universal credit means they are entitled to universal credit and thinks that they are therefore receiving universal credit, they may probably be unlikely to take view that they can satisfy the earnings rules set out in these eligibility criteria.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 11 April 2024
Corrected on 7 June 2024