



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

UPPER TRIBUNAL CASE NO: UA-2024-000243-JSA

NCN: [2024] UKUT 424 (AAC)

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

Between:

PE

Appellant

-v-

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Judith Butler

Decided without a hearing.

Representation:

Appellant: In person

Respondent: Ms L. Foody, DMA, Department for Work and Pensions

DECISION

As the decision of the First-tier Tribunal involved the making of an error of law, it is SET ASIDE under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh tribunal.

DIRECTIONS

- A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- B. The new tribunal should not involve the Tribunal Judge previously involved in considering this appeal on 27 January 2023.**

- C.** The new tribunal must not take account of circumstances that were not obtaining at the time the (then) Secretary of State made her decision about PE’s entitlement to jobseeker’s allowance on 24 August 2022: see section 12(8)(b) of the Social Security Act 1998 and *R(IB) 2/04* at paragraph 188. Later evidence is admissible, provided it relates to the circumstances at the time of the decision: see *R(DLA) 2/01* and *R(DLA) 3/01*.
- D.** If the parties have any further written evidence to put before the tribunal, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.
- E.** The tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome from the previous tribunal.
- F.** Copies of this decision, the permission to appeal decision and the submission of the Secretary of State dated 15 July 2024 shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.

These Directions may be supplemented by later directions by a tribunal judge, registrar, or case worker, in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

What this appeal is about

1. This appeal concerns some of the provisions that apply when a claimant asks to claim “New Style” jobseeker’s allowance (“NS JSA”) from a date earlier than the actual date it is claimed. This process is commonly described as “backdating” a benefit claim.

Factual background

2. The Appellant claimed NS JSA on 08 August 2022. When making her claim, the Appellant asked for her claim to be treated as having been made on the earlier date of 18 May 2022, stating she thought she would have been starting a new job but was waiting for Disclosure and Barring Service checks.

3. The Department for Work and Pensions (“DWP”) administers benefit claims and decisions on behalf of the Secretary of State for Work and Pensions. On 24 August 2022, DWP refused to treat the Appellant’s claim as having made earlier than the date she claimed it on 08 August 2022.

4. The Appellant telephoned DWP on 31 August 2022 to dispute its decision about backdating her claim and stated her mother had died at the beginning of May 2022. On 01 September 2022, DWP decided the Appellant's NS JSA claim. DWP awarded the Appellant NS JSA from 15 August 2022 (the first seven days of a NS JSA claim are treated as waiting days for which no benefit is payable). DWP refused to revise its decision not to backdate the claim.

5. Following the mandatory reconsideration process, DWP maintained its decision and the Appellant appealed to HM Courts and Tribunals Service on 12 December 2022. In the appeal form, the Appellant requested for her appeal to be decided on the basis of the appeal papers.

Legal framework

6. The provisions dealing with backdating a NS JSA claim are set out in regulation 29 of the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("the UC etc. (Claims and Payments) regulations 2013"). The relevant parts of this regulation provide:

Time within which a claim for a jobseeker's allowance is to be made

29.—

(1) Subject to paragraphs (2) and (4), a claim for a jobseeker's allowance must be made on the first day of the period in respect of which the claim is made.

(2) In a case where the claim is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming a jobseeker's allowance, subject to a maximum extension of three months, to the date on which the claim is made, where—

(a) any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and

(b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(3) The circumstances referred to in paragraph (2) are—

....(e) the claimant was required to deal with a domestic emergency affecting the claimant and it was not reasonably practicable for the claimant to obtain assistance from another person to make the claim;

(4) In a case where the claim is not made within the time specified in paragraph (1), the prescribed time for claiming a jobseeker's allowance is to be

extended, subject to a maximum extension of one month, to the date on which the claim is made, where—

- (a) any one or more of the circumstances specified in paragraph (5) applies or has applied to the claimant; and
- (b) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(5) The circumstances referred to in paragraph (4) are—

- ...(f) during the period of one month before the claim was made a close relative of the claimant had died and for this purpose “close relative” means partner, parent, son, daughter, brother or sister;
- (6) In a case where the time for claiming a jobseeker's allowance is extended under paragraph (2) or (4), the claim is to be treated as made on the first day of the period in respect of which the claim is, by reason of the operation of those paragraphs, timeously made.”

The First-tier Tribunal’s decision

7. On 27 January 2023, a First-tier Tribunal (the “**Tribunal**”) decided the Appellant’s appeal on the basis of the papers. The Tribunal refused the appeal, stating the Appellant did not satisfy any of the prescribed conditions to allow extending the time limit for claiming NS JSA.

8. On 08 June 2023, the Tribunal provided a Statement of Reasons for its decision. The Tribunal wrote that amongst other matters, the Appellant appealed the decision on the basis the Jobcentre adviser should have asked why she was claiming late as this was her first claim. The Tribunal wrote that the Appellant referred to the hardship that the delay in claiming caused and had reiterated she had not claimed because she was waiting to start a new job she had been offered. The Tribunal explained that it did not consider the Appellant’s circumstances satisfied any of the conditions for backdating her NS JSA claim.

9. The Tribunal explained its decision to proceed on the papers in the following terms:

“4....She [the Appellant] indicated in her appeal form that she did not wish to attend a hearing. Having reviewed the appeal bundle to page 41 I considered that as neither party had objected to a decision without a hearing that it was appropriate to decide the matter on the papers.”

10. At paragraphs 9 to 12 of its Statement of Reasons, the Tribunal wrote:

“9. Although her mother died in early May, [PE] was not providing care to her as her mother lived abroad. At no time was she given information by an officer of the respondent or other relevant person that a claim would not succeed. While it may be the case that she was not directed to entitlement to backdate, failure to do this is not one of the circumstances which applies.

10. Further I do not consider that the death of her mother, while clearly a significant event, amounts to a domestic emergency for the purposes of the regulations. No definition is provided in the Regulations for a domestic emergency. Further, bereavement is provided for elsewhere in the regulations (Regulations 29(4) and (5)) as a circumstance in which the date to claim can be extended for up to a month, It is therefore covered by Regulation 29(4) and 29(5).

11. In my view, in relation to the 3-month period set out in Regulation 29 (2), none of the relevant circumstances which require the respondent to consider whether or not [PE] could reasonably have been expected to have claimed earlier apply.

12. In any event, even if her mother’s bereavement were a “domestic emergency, I do not consider that as a result of that she could not reasonably have been expected to claim earlier...”

Why I granted permission to appeal

11. On 06 February 2024, the Upper Tribunal received the Appellant’s application for permission to appeal against the Tribunal’s decision. She listed six appeal grounds, of which I considered only ground (6) might be arguable with a realistic prospect of success. Ground (6) referred to the Appellant’s mother having passed away, (her mother) was not in the country and she (the Appellant) was emotional and depressed. Using my inquisitorial function, I also identified a separate ground of appeal I considered was arguable.

12. I granted the Appellant limited permission to appeal, making the following observations:

*“11. Determining the appeal on the papers: It is arguable that the tribunal failed to give adequate reasons at paragraph 4 of the Statement of Reasons about why it decided to determine your appeal on the papers. The Upper Tribunal has confirmed in **DT v SSWP (UC) [2019] UKUT 268 (AAC)** and in **MM v SSWP (ESA) [2011] UKUT 334 (AAC)** that the tribunal must acknowledge explicitly that it has considered both whether the parties have consented to a decision being made without a hearing and that it can (fairly) decide the appeal without*

one, and to explain why. The tribunal did not address the second limb of this test in its Statement of Reasons.

12. How the tribunal interpreted domestic emergency and bereavement as grounds within regulation 29: At paragraph 10 of its Statement of Reasons, the tribunal wrote that it did not consider the death of your mother (which it acknowledged was a significant event) would constitute a domestic emergency under regulation 29(3) of the 2013 regulations. The tribunal stated domestic emergency is not defined, and that bereavement is covered elsewhere in regulation 29(5), which the tribunal noted allows a JSA claim to be backdated for up to 3 months.

13. It is unclear that bereavements and domestic emergencies are necessarily exclusive of each other in the way the tribunal appears to have envisaged. Regulation 29 confirms a bereavement involving a close relative could allow a JSA claim to be backdated as long as the bereavement occurred within one month before the claimant made the JSA claim, and as a result of those circumstances the person could not reasonably be expected to make the claim earlier than they did.

14. However, there is nothing in the wording of regulation 29 that prevents a situation involving a bereavement from also constituting a domestic emergency. A hypothetical example might involve a claimant dealing with the aftermath of an accident or incident in which a close relative died, and in which the claimant / other family members were injured or as a result of which their home was extensively damaged (or both). While “domestic emergency” is not defined in the 2013 regulations this approach is consistent with the Oxford English Dictionary definitions of:

- (a) “domestic” as including: “of or belonging to the home, house or household”, and
- (b) “emergency” as including: “a juncture that arises or ‘turns up’ especially a state of things unexpectedly arising and urgently demanding immediate attention.”

15. The examples and wording used at paragraph 14 above carry a particularly difficult and disruptive quality. It may therefore be more difficult for a claimant to demonstrate they have had a domestic emergency than that they have had a bereavement. This is consistent with the more generous period of up to 3 months of backdating permitted in regulation 29(3).

16. However, there is no clear reason to conclude that situations involving a bereavement are always (and only) dealt with under regulation 29(5)(f) and are

carved out from being capable of consideration under regulation 29(3)(e) in appropriate circumstances.

17. It is therefore unclear that circumstances involving a bereavement would only be provided for in regulation 29(5)(f), Given the wording of paragraph 10 of the Statement of Reasons, it is unclear that the tribunal correctly directed itself in law on this point. This is broadly similar to the point you make in point (6) of your reasons for appeal.”

Analysis

13. The Secretary of State’s representative supports the appeal. In terms of the appeal ground relating to determining the appeal on the papers, the Secretary of State’s representative refers to ***DT v SSWP (UC) [2019] UKUT 268 (AAC)*** and states the Tribunal did not adequately explain why it considered rule 27(1)(b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 was satisfied and allowed it to go ahead on the papers.

14. The Secretary of State’s representative makes the following submissions in support of the appeal ground regarding regulation 29(3) of the UC etc. (Claims and Payments) regulations 2013:

“16. Addressing the second ground, a domestic emergency is a serious set of circumstances that affects a person’s home or household and requires immediate action in response. The fact that regulation 29(5)(f) contains a separate and specific provision for the death of a close relative does not, I would suggest, require that regulation 29(3)(e) must be construed as not including the death of a close relative. In relation to the death of a close relative, the former provision applies to all such deaths, regardless of the effect of the death on the appellant, while the latter applies to the subset of deaths that comprises, or gives rise to, the specific and unusual state of affairs that is a domestic emergency that affects the appellant in circumstances in which it is not reasonably practicable for him or her to obtain assistance from another person to make a claim for UC.

17. There is no reason to think that the existence of the broad, unconditional one-month extension of time was intended to preclude a longer extension of time in cases where the death of close relative serves to bring about the obstacles to making a timeous claim for which a three-month easement is generally granted by regulation 29(3)(e). On this view, the FTT has misconstrued the relevant legislation.”

15. It is clear that paragraph 16 of the representative’s submission intended to refer to JSA, rather than UC (universal credit), where backdating is dealt with in a different

way, and under a different regulation (regulation 26) of the UC etc. (Claims and Payments) regulations 2013.

16. I agree with the submission of the Secretary of State's representative. The fact regulation 29(5)(f) of the regulations gives a dedicated ground for a one-month extension of time to claim where a claimant's close relative has died, does not prevent the death of a close relative also being considered under regulation 29(3)(e) in terms of whether it constitutes a domestic emergency. The concept of domestic emergency is not defined in the regulations and is to be given its ordinary meaning when considered by a Tribunal.

17. I am therefore satisfied the decision of the First-tier Tribunal involves an error of law in relation to both the grounds on which I gave the Appellant permission to appeal.

Disposal

18. It is appropriate to exercise my discretion to set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that the Upper Tribunal must either remit the case to the First-tier Tribunal for its reconsideration or remake the decision.

19. Neither party has asked for the decision to be re-made. In any event, the First-tier Tribunal is best placed to evaluate the evidence and to make appropriate findings of fact. The appeal is therefore remitted for rehearing before a new Tribunal.

20. Although my decision sets aside the Tribunal's decision of 27 January 2023, I am not making any findings, or expressing any view about whether PE should be entitled to NS JSA from a date earlier than 15 August 2022. The next Tribunal will need to evaluate the evidence and make its own findings of fact.

**Judith Butler
Judge of the Upper Tribunal**

Authorised for issue: 12 December 2024