THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-001458-TC

NCN No: [2025] UKUT 011 (AAC)

ST

v

HMRC

DECISION OF UPPER TRIBUNAL JUDGE BRUNNER KC

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

Reference:	SC323/20/00997
Decision date:	5 January 2023
Hearing:	East London Tribunal Centre

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

REASONS FOR DECISION

1. This Appeal concerns a decision made by the First-tier Tribunal ('FTT') on 5 January 2023 about tax credits relating to two tax years, the 2017–2018 tax year, and the 2018–2019 tax year. The appellant had appealed to the First-tier Tribunal in relation to two decisions made by SSWP pursuant to section 18 of the Tax Credits Act 2002:

    1. The first decision was made on 23 August 2018 and related to entitlement to tax credits for the tax year 2017–2018.

2. The second decision was made on 19 August 2020, and related to entitlement tax credits for the tax year 2018–2019.

2. The appellant had initially received a single award of tax credits for the 2017-2018 tax year. On 23 August 2018 HMRC determined that she should not be in receipt of a single tax credits award because she was living together with a man called IT who she had married in 2011. The appellant's position at the FTT was that the relationship had ended around 2015 but IT had stayed living at the same address intermittently and used the former marital home as his address for financial products. Her position at FTT was that she should have been entitled to a single award of tax credits for 2017-2018 and also 2018-2019.

3. There is a requirement under section 21 Tax Credits Act 2002 for any prospective appellant to apply in writing for mandatory reconsideration by HMRC about a tax credit decision before any appeal can be made. There is a time limit of 30 days of the date of notification, although HMRC has a discretion under section 21B to extend the time limit if certain conditions are met, including that the application for extension is made within 13 months of the date of notification.

4. The FTT conducted the case via a telephone link and heard evidence from the appellant. The FTT found that the appellant had not requested mandatory reconsideration of the first decision within the required time scale and therefore that it did not have jurisdiction to hear an appeal against that decision. The FTT rejected the appeal in relation to the second decision on the simple basis that the appellant had made a joint claim to tax credits for the 2018-2019 year, which is what she received.

5. The appellant appealed to the Upper Tribunal. In appeal correspondence she said that HMRC had sent a 579 page bundle on the day before the hearing and that she had informed the judge of that. She says she was prejudiced as a result of not having sufficient time to examine the new material. It is difficult to identify the 579 page bundle as the index I have is not clear, but it appears to include material which is now paginated from p204 (top right) in the FTT papers, which is marked 'submission' in the index, with no date. Those papers include a detailed chronology, screenprints from HMRC's database, logs of telephone calls and the like. To put that new bundle in context, it is of note that the original appeal bundle was 193 pages.

6. Upper Tribunal Judge Scolding KC gave permission to appeal on 22 March 2024, following an oral hearing, on four grounds which were in paraphrase:

> Grounds 1 & 2: that it was arguably unfair not to give the appellant the opportunity to read the 579 page bundle submitted by HMRC shortly before the hearing and arguably because of the lateness of that documentation the appellant did not raise arguments which she could have raised;
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> Ground 3: that the FTT's conclusion that the appellant was not single at the time of the 2017–18 submission because of what was said about the 2018–19 claim arguably did not take into account relevant matters, particularly the nature of the relationship between the appellant and IT, and arguably did not follow case law which identifies that sharing a roof is not the same as being in a relationship;
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> Ground 4: that arguably some of the notes on the system from October and November 2018 do show some form of mandatory consideration.

7. Judge Scolding KC set out directions including a requirement for HMRC to respond to the appeal, and to respond to directions about evidence. HMRC made brief submissions dated 7 June 2024. In the submissions, HMRC asserts that the appellant did not ask for mandatory reconsideration of the first decision under appeal. In response to directions, the submissions say:

'*HMRC confirms that the bundle of correspondence filed with the FTT is the exhaustive bundle of interaction with the appellant. I have attached a copy of telephone records between the appellant and the Tax Credit Office during the period from 24 August 2018 to 30 September 2019 as these are not all covered in the bundle. It is observed that all of these telephone call records are in relation to a joint claim that the appellant submitted with IT on 10 October 2018'*.

8. Those sentences do not sit well together. I do not follow how HMRC can assert that it has previously provided all evidence of interaction with the appellant, and at the same time produce new material. The HMRC submission does not address in any way the other grounds of appeal.

9. The appellant has made further submissions dated 18 July 2024, drawing my attention to some parts of the evidence. The appellant says she has recordings of conversations with HMRC officers confirming that a HMRC note made on 12 November 2018 relates to the single claim. That note was part of the 579 page bundle. The appellant says that HMRC was confused in 2018 and treated an application for mandatory reconsideration of one claim as an application for reconsideration of a different claim.

10. Neither party asks for a further oral hearing at this stage, and an oral hearing is not in the interest of justice.

The FTT's findings

11. The FTT judge has directed that the Decision Notice stands as the Statement of Reasons. The Decision Notice records that there was a supplementary submission from HMRC that contained 579 pages, but does not say anything to indicate that active consideration had been given to whether the hearing should proceed on that day by telephone link, or be adjourned. There is no indication that the appellant asked for an adjournment or made representations about the new material causing difficulties.

12. The focus at the FTT hearing was whether the appellant had submitted written material so that HMRC could undertake a mandatory reconsideration within the 13 months time limit set out in section 21 of the Tax Credits act 2022. The appellant said that she had written in October and November 2018 to ask for reconsideration. The FTT found that she had not sent those letters at the time (paragraph 24-29). The FTT found (paragraph 20 Decision Notice) that the earliest possible document that could be construed as a request for mandatory reconsideration of Decision 1 was a form submitted online by the appellant on 30 September 2019. That was out of time. The FTT did not accept the appellant's description of some telephone calls, where she asserts that she was told that mandatory reconsideration was not possible.

The error of law

13. The appellant in her appeal draws particular attention to a number of documents in the 579 page bundle. The appellant says that on further consideration of the 579 page bundle she has been able to identify more material that is missing.

14. The FTT took evidence from the appellant about some of the documents that were within the 579 page bundle, including the documents which the appellant particularly draws our attention to. I have no doubt that the FTT Judge was mindful of the requirement for the hearing to be fair, mindful of previous delays, and took steps to assist the appellant to put her case, including exploring her evidence about some documents within the new bundle.

15. Despite those efforts, the FTT procedure was not fair, in error of law.

16. The production by HMRC of a 579 page bundle on the day before the hearing is unfortunate to say the least. It is unclear on the face of the FTT Decision Notice and Statement of Reasons whether any consideration was given to adjourning the proceedings. The service of such a large volume of material should have triggered active consideration by the FTT as to whether to use its discretionary powers to adjourn, applying the overriding objective. Relevant features of the overriding objective include '*avoiding delay, so far as compatible with proper consideration of the issues'*, and '*ensuring, so far as practicable, that the parties are able to participate fully in proceedings'*.

17. The fact that the appellant did not ask for an adjournment is one factor to be borne in mind, but should not be treated as a decisive factor, particularly in circumstances like this where the appellant was representing herself. I note that the appellant tells the Upper Tribunal that she struggles with documentation because of issues including ADHD, although it does not appear that the FTT were told that. Regardless of that, any appellant representing themselves may feel under pressure to carry on with a hearing, may feel reluctant to ask for an adjournment, and, indeed, may feel strongly that they want their case to be determined even if they have not had time to look at all of the papers. A lack of a request to adjourn plainly does not necessarily mean that a fair hearing can take place. The lack of any request from this appellant to adjourn should not, in the circumstances of this case, have stopped the FTT from giving the matter full and active consideration.

18. The FTT should have considered a range of factors before making a determination about whether to proceed. The FTT should have sought information from the appellant about how much of the new material she had been able to read and consider. In particular, given that the hearing was conducted by telephone, the FTT should have enquired into how the appellant was accessing the new material and whether she was able to access it effectively during the hearing (noting that if a person is speaking on their telephone and does not have a computer, they may not be able to look at documents).

19. In exercising its discretion the FTT should also have borne in mind that HMRC's paperwork in the case had been chaotic, and that it was therefore not easy to pick up a new bundle of material and work out where it all fitted in a chronology. HMRC

had previously sent four submissions which HMRC acknowledged (in a document submitted for a FTT hearing on 18 November 2022) were wrong, or in HMRC's words '*suffered several misapprehensions'*. Some of HMRC's paperwork was contradictory and misleading; as an example a notice from HMRC in this case dated 22 October 2020 referred to a decision which HMRC later conceded did not actually exist (as explained at p164). The importance of having time to study the bundle properly and cross-refer documents in it was amplified by the chaotic nature of HMRC's paperwork.

20. It is apparent that, now that the appellant has been able to study the bundle, and discuss its contents with others including HMRC employees, that she has further information and representations which may have assisted the FTT, including:

- which of the documents in that bundle related to the 2017-2018 claim, and which related to the later joint claim;
- what was discussed in the conversations were which are recorded in the various telephone logs and what material they relate to (as an example the call log dated 12 November 2018 at p430 refers to 'evidence', which appears to be evidence submitted in relation to a challenge to the decision to terminate the 2017 single award);
- how various logs cross-refer to other documentation;
- what she has been told by HMRC about what the various telephone logs relate to;
- what material is still missing from the material provided by HMRC.

21. All of that may have been highly relevant evidence to assist the FTT in determining whether the appellant had, in fact, asked for mandatory reconsideration within the 13 month timeframe. That in turn may have affected the FTT's findings about whether they had jurisdiction to determine the appeal against Decision 1.

22. As that was a material error I am setting aside the decision and remitting the case to be determined by a different FTT. I do not need to determine further points which may also have been errors of law. I note that this appeal concerns two separate decisions, but that all matters were considered together by the FTT as one case. That means that all matters will be reconsidered by the new FTT, including Decision 2.

23. I note that I have bundles with inconsistent pagination. Within one of the bundles provided to the Upper Tribunal there are documents paginated 194-200 in the top corner which include a letter from the appellant dated 9 October 2018 and a print-out which may show that a photographs of the letter was taken on 9 October 2018 (it appears to be a screenshot of the data associated with a photograph of the letter). I am not making any factual findings, but simply drawing attention to this material, given that it may be important, and given that it has duplicate pagination.

24. If parties wish to rely on further material, including recordings, that should be supplied to the FTT within one month of this decision being issued, subject to further direction by the FTT.

Authorised for issue
on 10 January 2025

Kate Brunner KC
Upper Tribunal Judge