

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

UNIVERSAL CREDIT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 1 April 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application by the claimant for leave to appeal from the decision of a tribunal with reference LD/3523/20/05/O.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I proceed to determine the appeal myself under Article 15(8)(a) of the Social Security (NI) Order 1998.
3. I allow the appeal. I decide that the appellant is entitled to Universal Credit (UC) amounting to £1339.10 for the assessment period from 28 July to 27 August 2020.
4. However, this figure will require to be adjusted for any payments previously made for the same period. In addition, any overpayment for the period from 28 June to 27 July 2020 may need to be offset from it.

REASONS

Background

5. The issue in this case is whether the tribunal adopted the correct approach to a determination of whether two particular monthly payments of wages were made in the same assessment period.
6. The appellant claimed UC from the Department for Communities (the Department) from 28 October 2019. Her assessment period therefore ran

from the 28th of each month to the 27th of the following month. On 28 August 2020 the Department received income figures for the assessment period from 28 July 2020 to 27 August 2020. It decided that she was entitled to UC amounting to £916.96 for the period. The appellant requested a reconsideration, submitting further evidence. The decision was reconsidered by the Department but not revised. The respondent appealed.

7. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the respondent's appeal. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 21 September 2021. The appellant applied to the tribunal for leave to appeal to the Social Security Commissioner. The President of Appeal Tribunals refused leave to appeal by a decision issued on 7 December 2021. On 28 October 2022 the appellant applied to a Social Security Commissioner for leave to appeal.
8. The application was received after the expiry of the relevant statutory time limit. However, on 15 February 2023 the Chief Social Security Commissioner admitted the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

9. The appellant submits that the tribunal has erred in law on the basis that the figure supplied by HMRC was wrong, placing further reliance on the decision of the Court of Appeal in England and Wales in *Secretary of State for Work and Pensions v Johnson and others* [2020] EWCA Civ 778.
10. The Department was invited to make observations on the application. Observations were received from Mr Rush of Decision Making Services on behalf of the Department. He submitted that the tribunal had erred in law and indicated that the Department supported the application.

Relevant legislation

11. The scheme of UC was established in Northern Ireland by the Great Britain Secretary of State for Work and Pensions under powers granted by section 1 of the Northern Ireland (Welfare Reform) Act 2015. It was introduced on a phased basis, commencing on 27 September 2017. By article 8(2) of the Welfare Reform (NI) Order 2015 (the Order):
 - (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.

By article 10 of the Order:

- (2) ..., the financial conditions for joint claimants are that—
 - (a) ...
 - (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.

By article 12 of the Order:

- (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 paragraph (1) “period of entitlement” means a period during which entitlement to universal credit subsists.

By article 13 of the Order:

13.—(1) The amount of an award of universal credit is to be the balance of—

- (a) the maximum amount (see paragraph (2)), less
 - (b) the amounts to be deducted (see paragraph (3)).
- (2) The maximum amount is the total of-
 - (a) any amount included under Article 14 (standard allowance),
 - (b) any amount included under Article 15 (responsibility for children and young persons);
 - (c) any amount included under Article 16 (housing costs), and

- (d) any amount included under Article 17 (other particular needs or circumstances).
- (3) The amounts to be deducted are—
- (a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and
 - (b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).
- (4) In paragraph (3)(a) and (b) the references to income are—
- (a) in the case of a single claimant, to income of the claimant, and
 - (b) in the case of joint claimants, to combined income of the claimants.

The relevant regulations, made under article 12(3) by the Great Britain Secretary of State for Work and Pensions, are the Universal Credit Regulations (NI) 2016 (the UC Regulations). By regulation 22, these provide for an assessment period as follows:

22.—(1) An assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.

The definition of “earned income”, which falls to be deducted from the maximum UC award as required by article 13(3), appears at regulation 51 of the UC Regulations. This provides:

51. “Earned income” means—
- (a) the remuneration or profits derived from—
 - (i) employment under a contract of service or in an office, including elective office,
 - (ii) a trade, profession, or vocation, or
 - (iii) any other paid work; or
 - (b) any income treated as earned income in accordance with this Chapter.

The general principle for the calculation of “earned income” is provided for at regulation 53

53.—(1) The calculation of a person’s earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.

(2) Where the Department—

(a) makes a determination as to whether the financial conditions in Article 10 of the Order are met before the expiry of the first assessment period in relation to a claim for universal credit, or

(b) makes a determination as to the amount of a person’s unearned income in relation to an assessment period where a person has failed to report information in relation to that earned income,

that determination may be based on an estimate of the amounts received or expected to be received in that assessment period.

The mechanism for calculating earned income is provided by regulation 55. This provides:

55.—(1) This regulation applies for the purposes of calculating earned income from employment under a contract of service or in an office including elective office (“employed earnings”).

(2) Employed earnings comprise any amounts that are general earnings as defined in section 7(3) of the ITEPA but excluding—

(a) amounts that are treated as earnings under Chapters 2 to 11 of Part 3 of that Act (employment income: earnings and benefit etc treated as income), and

(b) amounts that are exempt from income tax under Part 4 of that Act (employment income: exemptions).

(3) ... (not relevant)

The reference to ITEPA is a reference to the Income Tax (Earnings and Pensions) Act 2003. By section 7(3) of that Act:

(3) “General earnings” means—

(a) earnings within Chapter 1 of Part 3, or

(b) any amount treated as earnings (see subsection (5)),

excluding in each case any exempt income.

Chapter 1 of Part 3 of the Act consists of section 62 of the ITEPA, which provides:

62(1) This section explains what is meant by “earnings” in the employment income Parts.

(2) In those Parts “earnings”, in relation to an employment, means—

- (a) any salary, wages or fee,
- (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money’s worth, or
- (c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) “money’s worth” means something that is—

- (a) of direct monetary value to the employee, or
- (b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

The particular provision which is central to the reasoning applied by the tribunal in this case is regulation 62 of the UC Regulations. This was amended from 16 November 2020 but at the material time read:

62.—(1) Unless paragraph (2) applies, a person shall provide such information for the purposes of calculating their earned income at such times as the Department may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

- (a) the amount of the person’s employed earnings from that employment in respect of each assessment period is to be based on the information reported to HMRC under the PAYE Regulations and received by the Department from HMRC in that assessment period; and
- (b) in respect of an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil.

(3) The Department may determine that paragraph (2) does not apply in respect of —

- (a) a particular employment, where it considers that the information from the employer is unlikely to be sufficiently accurate or timely, or

- (b) a particular assessment period where—
 - (i) no information is received from HMRC and the Department considers that this is likely to be because of a failure to report information (which includes the failure of a computer system operated by HMRC, the employer or any other person), or
 - (ii) where the Department considers that the information received from HMRC is incorrect or fails to reflect the definition of employed earnings in regulation 55, in some material respect.

(4) Where the Department determines that paragraph (2) does not apply, it must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as it thinks fit.

(5) When the Department makes a decision in accordance with paragraph (4) it may—

- (i) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Department has received information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period), or
- (ii) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC.

(6) ...

The tribunal's decision

12. The LQM of the tribunal has provided a statement of reasons for his decision. From this I can see that he had a number of documents before him, including the Department's submission with a copy of the online UC claim form, earnings details provided by HMRC, the decision, payslip and bank statement evidence provided by the appellant, the reconsideration request and decision and the decision in *Johnson and others* before the Administrative Court in London, with citation [2019] EWHC 23. The appellant had not responded to the letter inviting her to attend the hearing and had not attended. The LQM decided to proceed in her absence.
13. The LQM identified the issue in the appeal as essentially a dispute by the appellant of her UC assessment on the basis that two sets of earnings were taken into account in the same assessment period from 28 July 2020

to 27 August 2020. She disputed that she received the sum of £1,269.56 in the relevant assessment period. Her evidence, in the form of a bank statement, showed that she received pay amounting to £703.27 on 24 July 2020, and £610.81 on 24 August 2020. She showed two payslips, one with a process date of 31 July 2020 and one with a process date of 24 August 2020 in the same two amounts.

14. The tribunal noted that Departmental policy was to treat the date on which HMRC reported the claimant's earnings to the Department as the date for taking them into account for UC purposes. In this case the "real time information" provided by HMRC recorded that the appellant received two sets of earnings in the same period. The LQM found that the Department had correctly taken these figures into account, that the appellant was no worse off as a result and found that the Department had correctly awarded the sum of £916.96 for the period. The appeal was dismissed.

Assessment

15. The grounds relied on by the appellant are that the tribunal was wrong to state that she was no worse off financially by the decision, that it was based on erroneous financial information, and she cited the Court of Appeal in England and Wales (EWCA) decision in *Johnson* in support of her contention that the tribunal had erred in law.
16. Mr Rush responded with observations on behalf of the Department. I am grateful to Mr Rush for his careful analysis of the position. He accepts that the tribunal has erred in law, pointing out deficiencies in its decision and in the submission to the tribunal. On the basis that the submissions of Mr Rush support the appellant, I grant leave to appeal.
17. The decision under appeal is dated 28 August 2020, therefore the form of regulation 62 to be applied in this case is that as originally made, rather than as substituted from 16 November 2020 by the Universal Credit (Earned Income) (Amendment) Regulations 2020 (SR 2020/262). The later amendment had been a consequence of the decision of the EWCA in *Johnson*.
18. The facts are not in dispute. In the present case the appellant was actually paid on 24 July 2020 and 24 August 2020, as can be seen from her bank statements. However, there would appear to be a delay in issuing the payslip for July 2020, which is dated 31 July, whereas the August payslip is dated 24 August. The relevant assessment period was from 28 July to 27 August, and therefore only one payment of earnings was actually made in that assessment period.
19. Mr Rush indicates that he agrees with the appellant that she is financially worse off as a result of having two payments of earnings taken into account in one assessment period, as the work allowance is not then applied to one of the two monthly payments. He submits, however, that *Johnson* can be distinguished from the present case. His reasoning is that in *Johnson*,

due to earnings falling due for payment on non-banking days, they were actually paid earlier than they normally would have been (the “non-banking day salary shift”). In the present case, however, earnings were paid on the actual days they were due.

20. Where he offers support for the appellant lies in his analysis of regulation 62 (above). He observes that this appeared in full in the Department’s submission that was before the tribunal. However, he notes that no express reference was made to it. He notes that the tribunal accepted that the payments of earnings were made in separate months. He notes that it accepted that it was “Crown Policy” that the date on which the HMRC reports the earnings is the date when they are taken into account for UC purposes. Where he submits that the tribunal erred in law lies in its failure to consider all the relevant paragraphs of regulation 62.
21. It is correct that regulation 62(2) sets out a general rule that the amount of earnings for an assessment period is to be based on the information reported to HMRC under the PAYE Regulations and received by the Department from HMRC in that assessment period. However, regulation 62(3) sets out some exceptions to that general rule. Specifically, regulation 62(3)(a) provides that paragraph (2) does not apply in respect of a particular employment, where the Department considers that the information from the employer is unlikely to be sufficiently accurate or timely. The information here was manifestly not accurate or timely.
22. The tribunal in an appeal hearing stands in the shoes of the Department, and therefore the tribunal enjoyed a discretion under regulation 62(3)(a) to apply the earnings in this case to the assessment periods in which they were actually received. It could then have determined the appeal under regulation 62(4) on the basis of the evidence that it had before it. For the Department, Mr Rush accepts that the inaccuracy of the one payment recorded in July 2020 - together with references in the correspondence between the Department and the appellant that indicate that this issue had previously occurred - is sufficient to decide that the evidence provided was not at times sufficiently timeous to permit the Department to rely on the information received from HMRC.
23. The language of the regulation is permissive rather than mandatory, using the word “may” instead of “shall”. It may be that a tribunal could have considered the evidence and been satisfied that the conditions of regulation 62(3)(a) were not met. However, in the circumstances of this case where the accuracy of the real time information was directly challenged, by its failure to address the question of whether the conditions of regulation 62(3)(a) were met, the tribunal fettered its own discretion in the matter. It was not directed to the specific power by the Department’s submission, but that does not mitigate the error of law.
24. The tribunal had reported the submission from the Department that overall, the appellant would be no worse off financially, but that her award of UC would vary. This submission appears to have been accepted by the

tribunal in an unqualified way. However, as noted by the Administrative Court and by the EWCA in *Johnson*, the loss of a work allowance inevitably occurs in this situation. A claimant will be treated as having no earnings in the preceding or succeeding month to a month in which they are assessed as having two sets of earnings. This means that the earnings allowance can only be applied once rather than twice. As I understand it, this would have an effect of leaving the appellant potentially £292 worse off in consequence. A copy of the decision of the Administrative Court in *Johnson* had been relied on by the appellant and was before the tribunal. By accepting the Department's submission that the appellant would be no worse off financially, despite the contrary assessment of the Administrative Court, and later the EWCA, I consider that the tribunal based its decision on a mistake of fact. Basing a decision on a mistake of fact can also amount to an error of law.

25. It follows that I allow the appeal. I set aside the decision of the appeal tribunal.
26. As this was a decision of a legal member sitting alone, I consider that I am in an equal position to determine the appeal myself. I consider that it is appropriate in the circumstances to proceed to determine the appeal under Article 15(8)(a) of the Social Security (NI) Order 1998.

Findings

27. Mr Rush has assisted me by obtaining an assessment from the Department based upon the figures that should properly have been taken into account in the relevant assessment period. These are consistent with my own calculations, and I am grateful for his assistance.
28. The evidence in the file indicates that in the assessment period from 28 July to 27 August 2020 the appellant received net pay of £610.81, which included £11.32 of expenses. Her earnings for the assessment period were therefore £599.49.
29. From this figure, the work allowance of £292 falls to be deducted. This leaves £307.48.
30. A taper of 63% has to be then applied to the figure of £307.49, leaving £193.72 to be taken into account as earned income.
31. Her maximum amount of UC was £1628.16.
32. An advance payment of £95.34 falls to be deducted from this, along with the earned income figure, leaving a total of £1339.10 entitlement to UC for the assessment period.
33. I therefore find that the appellant is entitled to the sum of £1339.10 for the assessment period from 28 July to 27 August 2020. An offset of any UC

already paid for the same period will have to be addressed by the Department.

34. The only appeal before me relates to the later assessment period. However, the decision for that period also has implications for the earlier period from 28 June to 27 July 2020, as the earnings received on 24 July will have to be taken into account in it. It seems to me that an adjustment will have to be made in respect of that period. That particular assessment period is not a matter for me, but for the Department. However, I anticipate that, overall, the appellant will be due a payment of benefit net of any overpayment. I trust that Mr Rush will communicate with the appellant to explain the financial implications of my decision for each of the assessment periods.

(signed): O Stockman

Commissioner

18 May 2023