



IN THE UPPER TRIBUNAL
UOTH
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000043-

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

Between:

NK

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decided on consideration of the papers

Representation:

Appellant: Not represented

Respondent: Emma Fernandes (written submissions)

DECISION

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

The decision of the First-tier Tribunal made on 22 March 2021 under number SC124/20/00551 involved no material error of law. That decision is confirmed.

REASONS FOR DECISION

What this appeal is about

1. In this decision I shall refer to the Appellant as the “claimant” and the Respondent as the “Secretary of State”.
2. This appeal is about the claimant’s entitlement to Universal Credit, and whether his entitlement should be from a date earlier than the date on which he made his claim.
3. The context is that the claim was made shortly after the announcement of the first UK “lockdown” in response to the spread of coronavirus. The claimant says that the overloading of the DWP’s online and telephone systems, together with his being

required to self-isolate due to having tested positive for Covid-19, meant that he wasn't able to make his claim to Universal Credit before 29 March 2020.

4. The claimant made an online claim to Universal Credit on 29 March 2020, and his claim was allowed from 29 March 2020. On 23 April 202 the Appellant asked for his entitlement to Universal Credit to be "backdated" to 24 March 2020. The reason he gave for not making his claim sooner than 29 March 2020 was:

"It took time to find my diagnosis and report it to your GP and obtain a sick note electronically its all a new process rather than just going to visit my GP. I have two NHS isolation notes 25.3.20-31.3.20 and 2.4.20-8.4.20."

5. On 24 April 2020 a decision maker for the Secretary of State decided that the claimant's entitlement properly started on 29 March 2020 and could not start on any earlier date (the "**SoS Decision**"). The claimant disagreed with the SoS Decision. The SoS Decision wasn't changed on mandatory reconsideration, so the claimant appealed it to the First-tier Tribunal (Social Entitlement Chamber). A judge of the First-tier Tribunal decided the appeal on the papers on 22 March 2021 (the "**Tribunal**"). The Tribunal dismissed the appeal and confirmed the SoS Decision (the "**Tribunal's Decision**"). The claimant applied for the Tribunal's Decision to be set aside, but this was refused. However, the District Tribunal Judge who considered the application for set aside treated the application as an application for permission to appeal the Tribunal's Decision to the Upper Tribunal. Having produced a statement of reasons and having considered grounds of appeal provided by the claimant, the judge gave permission to appeal to the Upper Tribunal on the basis that the claimant's case that the Tribunal "misapplied the law to the facts and misinterpreted precedent" was arguable with a realistic prospect of success. In particular, the claimant had argued that the overloading of the online system operated by the Secretary of State for the purposes of managing claims for, and administering, Universal Credit during the first days of lockdown meant that the "official computer system" was rendered "inoperative" for the purposes of Regulation 26(3)(d) of the Universal Credit etc. (Claims and Payments) Regulations 2013 (the "Claims and Payments Regulations"). This prevented the claimant from being able to make his claim sooner, which meant that the Secretary of State had the power to extend the time for his making his claim.

The parties' positions

6. The Secretary of State opposed the appeal, maintaining that the Tribunal did not misdirect itself as to the law: the Tribunal considered the relevant provision in the Claims and Payments Regulation, and it considered the relevant Upper Tribunal authority (AM v Secretary of State for Work and Pensions (UC) [2017] UKUT 0131 (AAC)), which includes consideration of the proper meaning of the word "inoperative" in Regulation 26(3)(d) of the Claims and Payments Regulations. The Secretary of State argues that, while it was certainly "busy" in the early days of the first lockdown, the official computer system was functioning, and was not "inoperative".

7. The claimant continues to say that the queues on both the online Universal Credit platform and the telephone lines meant that the system was "effectively inoperative", that this was widely commented upon in the media and in parliament, and that the Secretary of State is "in denial".

Why there was no oral hearing of this appeal

8. Neither party asked for an oral hearing. Given the parties had provided clear written submissions on the appeal, I decided that no oral hearing was necessary. The interests of justice favoured this appeal being determined on the papers to avoid further delay.

The law

9. The Claims and Payments Regulations provide, so far as relevant to this appeal:

Interpretation

2. In these Regulations-

...

“electronic communication” has the meaning given by regulation 52 of the Universal Credit Regulations 2000;

...

“official computer system” means a computer system maintained by or on behalf of the Secretary of State to-

- (a) send or receive any claim or information; or
- (b) process or store any claim or information;

...

Making a claim for universal credit

8.-(1) Except as provided in paragraph (2), a claim for universal credit must be made by means of an electronic communication in accordance with the provisions set out in Schedule 2 and completed in accordance with any instructions given by the Secretary of State for that purpose.

...

Date of claim for universal credit

10.-(1) Where a claim for universal credit is made, the date on which the claim is made is-

- (a) subject to sub-paragraph (b), in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office

...

Time within which a claim for universal credit is to be made

26.-(1) Subject to the following provisions of this regulation, a claim for universal credit must be made on the first day of the period in respect of which the claim is made.

(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it, subject to a maximum extension of one month, to the date on which the claim is made, if-

- (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-

...

(c) the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that prevented the claimant from making a claim;

(d) the claimant was unable to make a claim in writing by means of an electronic communication used in accordance with Schedule 2 because the official computer system was inoperative

...

Why I have dismissed this appeal

10. In substance, the claimant's case was that there were two potential bases for his claim being permitted from 24 March 2020: first, under Regulation 26(3)(c) (provision of medical evidence satisfying the Secretary of State that he had an illness that prevented him from making a claim), and second, under Regulation 26(3)(d) (his being prevented from making his claim earlier because the official computer system was "inoperative").

11. The Tribunal's Decision is set out in its Decision Notice and its Statement of Reasons, which are to be read together. The Tribunal clearly considered both bases of extending time.

12. In terms of Regulation 26(3)(c), the Tribunal acknowledged that the claimant had provided NHS isolation notes covering the period 25 March 2020 to 31 March 2020. It found, however, that the coronavirus symptoms which the claimant was experiencing were not such that he was prevented by illness from making a claim.

13. The Tribunal explained how it decided that Regulation 26(3)(c) could not be relied upon as follows:

"17. Despite his symptoms, [the claimant] was still able to attempt to call the UC telephone line and to access the website "continuously" through the relevant period. He was able to leave home to visit his local job centre and Citizens Advice office.

18. I am not satisfied on the evidence before me that [the claimant]'s symptoms were such that he was disabled or prevented by illness from making a claim. The NHS Isolation Notes are not medical evidence of an illness that would prevent him from making a claim by phone or online."

14. The Tribunal had a wide ambit of discretion in making its findings of fact based on the evidence. Given the mild symptoms reported by the claimant it was entitled to find that those symptoms would not prevent the claimant from telephoning or accessing the online system for claiming Universal Credit (putting to one side, for the moment, the issue of whether they were "inoperative").

15. I am puzzled by the Tribunal's reasoning on the claimant's ability to "leave home to visit his local job centre and Citizens Advice Centre", partly because it is clear from paragraph 18 of its Statement of Reasons that it accepted the claimant's evidence that both his local job centre and the welfare benefits adviser were closed

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at the relevant time due to the lockdown, and partly because the claimant had produced evidence that he was required to self-isolate. The Isolation Notes meant that his leaving home to go to such places would, at least from 26 March 2020 when the lockdown measures became legally binding, have been unlawful.

16. I am persuaded that the Tribunal erred in law in this regard, but I am not persuaded that such error was material, because the Tribunal's decision didn't turn on the claimant's being able to make his claim in person.

17. Moving on to the second basis of appeal, relation to Regulation 26(3)(d), the Tribunal explained its reasoning in paragraphs 19 to 22 of its Decision Notice as follows:

"19. [The claimant] submits that during the relevant period, the UC system was described in the media, in Parliament and by the Secretary of State as "overwhelmed, swamped, unprecedented pressure, busy, very busy, outage, crashed". He has provided extracts from press articles about the difficulties. For example, The Guardian reported on 26/03/2020 that more than 500,000 people had applied for UC in a 9 day period and that at one stage on 25/03/2020 there were 145,000 users in the queue. [The claimant] has provided screen shots showing 136,689, 76,628 and 145,270 users in a queue (these appear to be from third party sources and not taken by [the claimant] himself).

20. At the hearing the representative for the Secretary of State accepted that phone lines were very busy during the relevant period but submitted that there was no outage of the website. In her supplementary submission provided on 27/11/2020 the Secretary of State states that: "there were no reported system outages recorded during requested period but user traffic was very high".

21. Based on the evidence before me, I find that during the relevant period the traffic on the UC website was very high and that at times it took several hours to complete a claim. The website was an official computer system as defined in the Regulations and I note that UTJ Rowland suggests that "inoperative" may mean more than a mere technical fault. However, I find that despite the issues, it was still possible to make a claim for UC during the relevant period. The condition in regulation 26(3)(d) does not apply because the official computer system was not inoperative.

22. Even if I am wrong about that and the official computer system was inoperative at times during the relevant period, I am not satisfied on the evidence before me that as a result, [the claimant] could not reasonably be expected to make the claim at any point earlier than 29/03/2020. It may have taken him several hours to make a claim, but not several days. Regulation 26(2)(b) does not apply."

18. The question of whether the official computer system was "inoperative" is a question of fact. What "inoperative" means is a question of law. The only case I am aware of which discusses the meaning of "inoperative" for these purposes is AM v Secretary of State for Work and Pensions (UC) [2017] UKUT 0131 (AAC)), in which Judge Rowland said:

"36. I accept that the natural meaning of the word "inoperative" is that the device concerned is not working. However, it is arguable that the

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draftsman intended to give the word a meaning that goes beyond mere technical fault to include a case where, perhaps due to a design fault, the computer system improperly prevents a claimant from making a claim so that it fails to perform the task given to it of enabling claims to be made and leaves a claimant without any adequate remedy, I do not consider that the definitions help to answer the question whether that is the right construction of the term “inoperative” in this particular context.”

19. Because Judge Rowland was satisfied that the official computer system was working properly in the circumstances of the appeal before him, he left issues of the proper construction of “inoperative” to another case.

20. The issue I need to decide is whether the Tribunal gave “inoperative” an impermissible interpretation, or whether it otherwise misapplied the law.

21. It is adequately clear from the Tribunal’s Decision Notice that, while it didn’t accept that the screenshots provided by the claimant represented his own place in the queue for the website or the telephone line, it did accept that traffic on the website was “very high”. It is also adequately clear that the Tribunal accepted the Secretary of State’s evidence that “there were no reported system outages recorded during requested period but user traffic was very high” (paragraph 20 of Decision Notice). While more explanation of why it assessed the evidence as it did would have improved its decision, I am satisfied that the Tribunal’s reasons meet the standard of “adequacy” in this regard.

22. The Tribunal went on to make findings of fact that, while traffic on the Universal Credit website was “very high”, and it sometimes took “several hours” to complete a claim, it was nonetheless still possible to make a claim for Universal Credit during the relevant period. I am satisfied that those findings were open to it on the evidence. Further, the Tribunal was entitled to decide, based on those findings, that the official computer system was not “inoperative” at that time.

23. There may well be circumstances in which the level of traffic on a website is such as to render it “inoperative”, but I do not consider it appropriate to set down any hard and fast rules as to what number of users in a queue, or how many hours’ wait, would tip the balance from a system being properly characterised as “operative but very busy” to “inoperative”. That is a matter of judgment for the tribunal of fact when considering all the circumstances.

24. For these reasons I dismiss the appeal and confirm the Tribunal’s Decision.

Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 10 March 2023