

**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 26 January 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 ST/03865/19/05/O.
2. For the reasons I give below, I grant leave to appeal. However, I dismiss the appeal.

**REASONS**

**Background**

3. The issue in this case is whether tribunal was correct to hold that a payment of pay in lieu of notice, made after the termination of the appellant's employment, fell to be treated as employed earnings.
4. The appellant made a claim for universal credit (UC) to the Department for Communities (the Department) on 19 February 2018. On 25 March 2018 the Department decided that he was entitled to UC amounting to £0.00 as his earnings exceeded his entitlement to UC. This was on the basis that he had received earnings of £475.49 in the assessment period from 19 February 2018 to 18 March 2018. The appellant requested a reconsideration. On 29 March 2018 the decision was reconsidered by the Department but not revised. The respondent appealed. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the respondent's appeal.

5. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 27 April 2021. On 25 May 2021 the appellant applied to the tribunal for leave to appeal to the Social Security Commissioner. The LQM refused leave to appeal by a decision issued on 28 June 2021. On 1 July 2021 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

6. The appellant, represented by Mr MacManus of Quigley MacManus (Solicitors), submits that the tribunal has erred in law on the basis that the payments received by the appellant should not have been taken into account as they were termination of employment payments, and that they were attributable to a different period than the assessment period. He further submitted that the tribunal had misconstrued the relevant law as demonstrated by comments distinguishing between dismissal and redundancy.
7. The Department was invited to make observations on the application. Observations were received from Mr Finnerty of Decision Making Services on behalf of the Department. He submitted that the tribunal had not erred in law and indicated that the Department did not support the application.

### **Relevant legislation**

8. 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(1) of the Welfare Reform (NI) Order 2015 (the Order):
  - (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.

By article 10 of the Order:

- (1) For the purposes of Article 8, 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.

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.
9. Relevant regulations 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.

10. 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.

11. 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.

12. 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)

13. The reference to ITEPA is a reference to the Income Tax (Earnings and Pensions) Act 2003, which I will henceforth also refer to as the ITEPA. By section 7(3) of the ITEPA:

(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.

14. “Exempt income” is defined in section 8 which provides that:

For the purposes of the employment income Parts, an amount of employment income within paragraph (a), (b) or (c) of section 7(2) is “exempt income” if, as a result of any exemption in Part 4 or elsewhere, no liability to income tax arises in respect of it as such an amount.

15. 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 tribunal's decision**

16. The LQM of the tribunal has provided a statement of reasons for the tribunal's 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, the system decision, earnings details provided by HMRC, bank statements and the reconsideration request and decision. He further had the directions for listing, letters from the Independent Case Examiner, record of previous proceedings, submissions from the appellant's representative, a fresh submission from the Department, a reply form, a further e-mail from the appellant's representative and a further Departmental submission. The appellant attended the hearing and gave oral evidence, represented by Mr MacManus. The Department was represented by Mr Best.
17. The tribunal found that the appellant's employment had been terminated on 22 January 2018 by dismissal. It noted that the appellant had received earnings of £475.49 in the relevant assessment period of 19 February to 18 March 2018. This consisted of three separate payments, made on 2 March, 7 March and 16 March 2018 respectively. The net payment of £222.84, made on 2 March 2018, represented a gross payment of £300 of pay in lieu of notice net of tax and employee's national insurance. The net payment of £18.84, made on 16 March 2018, represented a gross payment of £343.65 of holiday termination pay, net of £233.81 owed to the employer, tax and employee's national insurance. The tribunal did not have the payslip for the third payment, which I believe was a payment of £233.81 wages, net of tax and employee's national insurance.
18. The tribunal rejected the argument that these sums should have been paid on 27 January 2018 and attributed to that date, finding that the date of actual payment was what was relevant. It further addressed and rejected the argument that payments were termination of employment payments

and should not be taken into account – in particular distinguishing them from redundancy payments. It further noted that tax and national insurance contributions were deducted from the payments, indicating that they were not payments that were exempt from taxation. It disallowed the appeal accordingly.

### **Submissions and hearing**

19. I held an oral hearing of the application. Mr MacManus appeared for the appellant and Mr Finnerty of DMS appeared for the Department. I am grateful to each of the representatives for their assistance.
20. Mr MacManus for the appellant relied upon his previous written submissions and expanded on these. He submitted that the appellant's last date of employment was 22 January 2018, as evidenced by his P45. He had appealed against dismissal from employment and had claimed UC on 19 February 2018 only after the internal workplace appeal process had been exhausted. He received payment totalling £475.49 in March 2018, consisting of pay, pay in lieu of notice and holiday pay owed to him. Mr MacManus submitted that it should have been paid on the date of termination. He referred to UC Guidance at H3108, which set out a list of payments excluded as earnings for UC purposes which included termination of employment payments. He submitted that by finding that the £475.49 was not a termination of employment payment, the tribunal had taken an unduly narrow interpretation of that expression which, he submitted, was undefined. He submitted that the tribunal had distinguished between redundancy and dismissal termination without any basis for doing so and had erred in law.
21. Mr Finnerty for the Department submitted that the appellant had received three payments from his employer in the relevant assessment period. He submitted that by regulation 53 of the UC Regulations, earned income had to be based on actual payments received in an assessment period and, while acknowledging that they related to employment that had ceased on 22 January 2018, there was no provision in the UC Regulations to allow them to be attributed to a different assessment period. He noted the decision of the Court of Appeal in England and Wales in *Secretary of State for Work and Pensions v Johnson* [2020] Civ 778, overturning the Divisional Court below.
22. He submitted that the appellant was wrong to assert that there was no definition of termination of employment payments. He submitted that the guidance referred to regulation 55(2)(b) of the UC Regulations, which in turn refer to Part 4 of the ITEPA. He referred to Chapter 10 of Part 4 of the ITEPA and submitted that it provided for redundancy payments and outplacement benefits. He submitted that payment of pay in lieu of notice and holiday pay in the present case did not equate to redundancy payments in any way. Mr Finnerty further relied upon the Upper Tribunal decision of Judge Jacobs in *PT v SSWP* [2015] UKUT 696.

23. At the conclusion of the hearing, the parties indicated that they were content with me, if I were to grant leave to appeal, proceeding to treat and determine the application as if it were the appeal. Each indicated that, if I was minded to set aside the decision of the appeal tribunal, I should determine the appeal myself rather than remit the case to a newly constituted tribunal.

### **Assessment**

24. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
25. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
26. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
27. UC is a relatively new benefit in Northern Ireland and the question arising in the present appeal is a novel one in this jurisdiction. As no relevant precedent exists, I accept that an arguable case arises in this instance and I grant leave to appeal.
28. At hearing, Mr MacManus focussed his submissions on the particular issue of whether payment of pay in lieu of notice should be taken into account as earnings in the assessment period. He did not pursue the submission that, although made in the particular assessment period, it was not in respect of that assessment period. This was the inevitable consequence of the decision of the Court of Appeal in England and Wales (EWCA) on the precisely equivalent provisions in Great Britain in *R(Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778. While in *RM v Department for Communities* [2021] NI Com 36 I expressed personal misgivings about the approach of the EWCA, preferring that of the Divisional Court below, I indicated that I considered that principles of comity required me to follow it. I must reject Mr MacManus' submissions for the same reasons as I gave in *RM v Department for Communities*.
29. At hearing Mr Finnerty further relied upon the Upper Tribunal decision of Judge Jacobs in *PT v SSWP* [2015] UKUT 696. He also made the submission that the fact that tax and national insurance had been deducted by an employer was definitive of whether earnings were not exempt from taxation. I do not find the decision of Judge Jacobs particularly helpful in addressing the particular issue in this case. I also reject Mr Finnerty's submission that the fact of an employer having made deductions is

decisive of anything. The issue for a decision maker is to determine whether payments fall within the statutory definitions in the UC Regulations and the ITEPA and not simply to accept how a third party has interpreted them.

30. In his submissions to me, Mr MacManus had relied upon the Department's own UC guidance. He referred to paragraph H3108 of the guidance, which describes particular payments that are exempt from taxation and do not fall to be treated as earnings for UC purposes. These include "termination of employment payments", with reference to regulation 55(2)(b) of the UC Regulations and Part 5 [sic] of the Income Tax (Earnings and Pensions) Act 2003. In the absence of a definition of "termination of employment payments", Mr MacManus submitted that the tribunal had applied an unduly narrow approach, referring to redundancy payments but distinguishing redundancy from dismissal, and by declining to accept that pay in lieu of notice was a payment on termination of employment.
31. However, agreeing with the submission made by Mr Finnerty, I do not accept that termination of employment payments are not defined in legislation. The starting point is regulation 55 of the UC Regulations. By regulation 55(2) "employed earnings" comprise 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).
32. By Chapter 10 of Part 4, certain payments upon termination of employment are exempted from income tax liability. Specifically, Chapter 10 provides at section 309 for redundancy payments (including statutory redundancy payments) and approved contractual payments to be exempt from income tax liability. "Redundancy payment" means a redundancy payment under Part 12 of the Employment Rights (NI) Order 1996 (ER(NI)O 1996). "Approved contractual payment" means a payment to a person on the termination of the person's employment under an agreement in respect of which an order is in force under Article 192 of ER(NI)O 1996. Identifying a redundancy payment is straightforward enough. In my understanding, an approved contractual payment is a compensatory award in respect of unfair dismissal, which is not in any event relevant to the present case. However, I have not had submissions or heard argument on this point.
33. The tribunal appears to have identified the reference to redundancy payments in the income tax legislation. Mr MacManus challenged the tribunal's approach of making a distinction between payments made upon redundancy and dismissal. However, this can be understood only when Chapter 10 of Part 4 of the ITEPA is considered. The tribunal was clearly correct to turn its mind to the scope of payments on termination of

employment that are exempt from income tax. While noting that redundancy payments were exempt, it found that a payment following dismissal did not fall into that category. Therefore I do not accept that the tribunal has erred in law by distinguishing between redundancy payments and payments upon dismissal.

34. The tribunal was not assisted, in so far as I can see, by being provided with a copy of the relevant income tax legislation or a summary of the legislation. Whereas social security tribunals are furnished with copies of social security legislation and of case law that the Department considers relevant, it seems to me that regulation 55 opens a link into a completely different body of income tax law. In this context, I judge that more needs to be provided by the Department, including explanatory material, legislation and jurisprudence relating to income tax, to enable tribunals fully to perform their role in cases such as the present one and to enable appellants and advisors to understand the decisions in a case.
35. As set out above, the definition in section 7(3) of the ITEPA is subject to the exclusion of exempt income from general earnings. Section 8 further provides that an amount of employment income is “exempt income” if, as a result of any exemption in Part 4 or elsewhere [my emphasis], no liability to income tax arises in respect of it. The focus in the present case is in relation to payments upon termination of employment. It can be seen that by section 401 of the ITEPA, Chapter 3 of Part 6 also applies to payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person’s employment.
36. I consider it arguable that the expression “as defined in section 7(3) of the ITEPA” appearing in regulation 55 of the UC Regulations has to be read in the light of section 8 of the ITEPA. It is similarly arguable that any exemptions provided for at Chapter 3 of Part 6 of the ITEPA would therefore fall within the scope of the general expression “or elsewhere” appearing in section 8. For that reason, I have also given some consideration to Chapter 3. Within that Chapter, it appears to me that specific attention is given to post-employment notice pay by section 402D of the ITEPA. It further appears to me, without having heard argument on the point, that pay in lieu of notice falls within the scope of post-employment notice pay as addressed in section 402D and is taxable. It is clear, in any event, that it does not fall within any of the exclusions set out in sections 405-416 in Chapter 3.
37. I cannot accept the submissions of Mr MacManus that the tribunal erred by adopting an unduly narrow interpretation of payments made upon termination of employment. It appears to me that the scope of such payments is defined within the ITEPA and that pay in lieu of notice is not an excluded payment made upon termination of employment. I consider that the tribunal was entitled to make the findings that it did within the legislative framework.

38. Therefore, I must dismiss the appeal.

(signed): O Stockman

Commissioner

8 December 2021