

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 30 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 BM/7983/19/05/D.
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. Due to irregularities in the decision making process, I refer the matter to the Department for Communities (the DfC) for a mandatory reconsideration of the decision of 28 May 2019.

REASONS

Background

3. The substantive issue in this case is whether the appellant's claim to universal credit (UC) can be backdated to an earlier date. However, a preliminary issue arises regarding the respective jurisdictions of the Department for Work and Pensions (the DWP) and the DfC, and the requirement for notification of DfC decisions. A further issue arises regarding the composition of the tribunal that decided the appeal.
4. The appellant had made a claim for UC on 24 April 2019. He was awarded UC from and including 24 April 2019. He had previously received employment and support allowance (ESA) to 3 March 2019. He was notified by a letter dated 6 March 2019 that his entitlement to ESA had ceased on 4 March. He requested backdating of his UC claim to 4 March 2109 but the DWP decided that he was not entitled to backdated UC. The

appellant requested a reconsideration, supplying additional information. On 8 October 2019 the appellant was notified that the decision had been reconsidered by the DfC but not revised. He appealed but waived his right to an oral hearing of the appeal.

5. The appeal was considered on the papers on 30 April 2021 by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 7 June 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 26 July 2021. On 25 August 2021 the appellant sought to apply to a Social Security Commissioner for leave to appeal, but sent his application to an incorrect address. On 29 September 2021 it was received in the Office of the Social Security Commissioner.
6. The application was received after the expiry of the relevant statutory time limit. However, on 30 November 2021 the Chief Social Security Commissioner admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

7. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) it gave inadequate reasons for its decision;
 - (ii) it failed to address conflicts of fact or opinion;
 - (iii) it failed to address his submissions to it.
8. The DfC was invited to make observations on the application. Observations were received from Mr Clements of Decision Making Services on behalf of the DfC. He submitted that the tribunal had not erred in law and indicated that the DfC did not support the application.

Relevant legislation

9. 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.
10. Claims for UC are governed by the Universal Credit, Personal Independence Payment, Jobseekers Allowance and Employment and Support Allowance (Claims and Payments) Regulations (NI) 2016. By regulation 7:

7.—(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 1 and completed in accordance with any instructions given by the Department for that purpose.

(2) A claim for universal credit may be made by telephone call to the telephone number specified by the Department if the claim falls within a class of case for which the Department accepts telephone claims or where, in any other case, the Department is willing to do so.

(3) A claim for universal credit made by means of an electronic communication in accordance with the provisions set out in Schedule 1 is defective if it is not completed in accordance with any instructions of the Department.

(4) A claim made by telephone in accordance with paragraph (2) is properly completed if the Department is provided during that call with all the information required to determine the claim and the claim is defective if not so completed.

(5) If a claim for universal credit is defective the Department must inform the claimant of the defect and of the relevant provisions of regulation 9 relating to the claim.

(6) The Department must treat the claim as properly made in the first instance if—

(a) in the case of a claim made by telephone, the person corrects the defect; or

(b) in the case of a claim made by means of an electronic communication, a claim completed in accordance with any instructions of the Department is received at an appropriate office,

within one month, or such longer period as the Department considers reasonable, from the date on which the claimant is first informed of the defect.

Regulation 9 provides for establishing the date on which a UC claim is made, as follows:

9.—(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 7(1), the date on which the claim is received at an appropriate office;

(b) in the case of a claim made by means of an electronic communication in accordance with regulation 7(1), where the

claimant receives assistance at home or at an appropriate office from the Department or a person providing services to the Department which is provided for the purpose of enabling that person to make a claim, the date of first notification of a need for such assistance;

(c) subject to sub-paragraph (d), in the case of a claim made by telephone in accordance with regulation 7(2), the date on which that claim is properly completed in accordance with regulation 7(4), or

(d) where the Department is unable to accept a claim made by telephone in accordance with regulation 7(2) on the date of first notification of intention to make the claim, the date of the first notification, provided a claim properly completed in accordance with regulation 7(4) is made within one month of that date, or the first day in respect of which the claim is made, if later than the above.

(2) In the case of a claim which is defective by virtue of regulation 7, the date of claim is to be the first date on which the defective claim is received or made but is treated as properly made in the first instance in accordance with regulation 7(6).

Regulation 25 makes further provision relating to the time within which a claim for UC is to be made, as follows:

25.—(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 Department 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—

(a) the claimant was previously in receipt of a jobseeker's allowance or an employment and support allowance and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired;

(b) the claimant has a disability;

(c) the claimant has supplied the Department with medical evidence that satisfies the Department 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 1 because the official computer system was inoperative;

(e) ... (not relevant)

(4) ... (not relevant)

(5) In the case of a claim for universal credit referred to in regulation 22(7) of the Universal Credit Regulations (assessment periods) the claim for universal credit must be made before the end of the assessment period in respect of which it is made.

The tribunal's decision

11. The LQM of the tribunal has provided a statement of reasons for the tribunal's decision. From this I can see that the tribunal had a number of documents before it, including the DfC's submission with the notice of appeal and copies of the various notifications and decision letters that were relevant to its decision. As the appellant had waived his right to attend a hearing there was no oral evidence.
12. The tribunal found that the appellant had been notified that his ESA had expired on 3 March 2019 by a notice that he did not receive until 6 March 2019. It accepted that he therefore met the criteria of regulation 25(3)(a) above. However, it observed that the appellant did not then claim UC until 24 April 2019, which it noted was 7 weeks after ESA had expired. From the information available to the tribunal regarding the appellant's health and circumstances, the tribunal could find no reason for the delay. It found that he could reasonably have made his claim for UC earlier and decided that he did not meet the criteria of regulation 25(2)(b), disallowing the appeal.

Submissions and hearing

13. I held an oral hearing of the application. The appellant had indicated that he would not be attending, having previously made written submissions. Mr Clements appeared for the DfC.
14. The appellant essentially submitted that the tribunal had not dealt fully with his explanation of why the delay in claiming was reasonable in the circumstances. He referred in particular to the correspondence in the case communicating decisions and the submissions he had made to the effect that he had not understood that his ESA claim had ended. He submitted that the tribunal had not addressed his submissions about the confusing and overlapping correspondence in the case.

15. Mr Clements made observations in response. He first addressed the issue of why an officer of the DWP had decided the appellant's UC claim on 5 May 2019. He advised that the DfC and the DWP use the same computer system, but that guidance instructs DWP officers not to make decisions on claims made by Northern Ireland residents. However, he indicated that decision makers do not always remember to check the claimant's address. He accepted that the DWP decision was not a valid decision, as the DWP did not have jurisdiction to make it.
16. Nevertheless, he submitted, when the appellant had requested written reasons for the decision, an officer of the DfC had made a decision on the claim, dated 28 May 2019, albeit that this was not formally notified and not made known to the appellant until 17 June 2019. He further observed that the appellant had requested reconsideration and that a reconsideration decision was made by an officer of the DfC on 8 October 2019, refusing to revise the decision of 5 May 2019 (the DWP decision). He accepted that ordinarily this would mean that the appellant had no right of appeal, as there had been no reconsideration of the DfC decision of 28 May 2019.
17. Nevertheless, he advanced the submission that, since there were other failings in the decision making process regarding notification of the right of appeal, the requirements of regulation 7(2) of the Decisions and Appeals Regulations 2016 were not engaged as the requirements of regulation 7(1) and 7(3) were not satisfied. On this basis, he reasoned that the tribunal had jurisdiction to consider the appeal. He addressed the conditions required for backdating a UC claim, and maintained that the tribunal was correct in the decision it reached, and that it could not have acted in any other way.
18. A further issue had occurred to me when preparing the application for hearing. I observed that the tribunal making the decision was composed of an LQM and a medically qualified member. It was not clear why the medically qualified member formed part of the tribunal. Mr Clements accepted that the tribunal was not composed of the members specified in regulation 36 of the Decisions and Appeals Regulations 1999. In light of the arguable issues arising, I grant leave to appeal.

Assessment

Issues arising from adjudication in the case

19. It appears to me that the relevant chronological sequence of applications and decision making in the present case was as follows:

5 May 2019 – DWP decision maker determines that the appellant's UC claim cannot be backdated;

5 May 2019 – DWP issues notification of the above decision;

21 May 2019 – appellant requests written reasons for the decision;

28 May 2019 – DfC decision maker determines that the UC claim cannot be backdated, in terms virtually identical to the DWP decision, but notification of that decision evidently not communicated to the appellant by DfC until 19 June 2019;

27 June 2019 – appellant requests reconsideration;

8 October 2019 – DfC decision maker on reconsideration expressly upholds DWP decision of 5 May 2019, without reference to the DfC decision of 28 May 2019, and notifies appellant of appeal rights;

6 November 2019 – appellant appeals.

20. Mr Clements for the DfC accepted that the DWP decision maker had no jurisdiction to make a decision in the appellant's case. While, for political reasons, the Welfare Reform (NI) Order 2015 and the UC Regulations were made by the DWP, they have extent to Northern Ireland only and the functions under the legislation are conferred on the DfC. The equivalent legislation in Great Britain does not confer any decision making jurisdiction on the DWP within Northern Ireland, as far as I am aware. Therefore, I accept that the decision of 5 May 2019 was made beyond the powers of the relevant DWP officer who purported to make it and can have no legal effect.
21. Similar difficulties arise in relation to the reconsideration decision made by the DfC on 8 October 2019. This purports to reconsider the DWP decision of 5 May. However, the informal term "reconsideration" refers to what the legislation formally calls a revision. The power to revise in regulation 5 of the 2016 Decisions and Appeals Regulations enables revision of a decision made under Article 9 or Article 11 of the Social Security (NI) Order 1998 (the 1998 Order). As the DWP has no decision making power under the 1998 Order, the decision of 5 May was not made under either of those provision. Therefore the DfC had no power to revise the DWP decision of 5 May and the DfC's reconsideration decision of 8 October was of no legal effect.
22. It appears to me that an officer of the DfC had tried to correct the problems of jurisdiction which arise in this case by way of her decision of 28 May 2019. However, this decision was not notified to the appellant as a new decision, but appeared to be issued as a result of his request for an written explanation of the earlier decision. It is therefore not clear to me that the DfC decision of 28 May 2019 satisfied the requirements of *R v SSHD ex p Anufrijeva* [2003] UKHL 36, which requires that a decision must be notified to an affected party to have legal effect.
23. There was plainly also confusion within the DfC about the standing of the decision of 28 May. As indicated above, despite the making of that decision, when the appellant requested a reconsideration of the decision

in his case, the DfC addressed the DWP decision of 5 May. As indicated above, I consider that the decision of 5 May 2019 had no legal effect. The decision of 8 October purporting to review it (when it was not a decision under the 1998 Order) similarly had no legal effect. This leaves the 28 May decision as the only potentially valid decision, whatever its standing regarding notification. However, a different problem then arises. When the appellant appealed to the tribunal, there had been no “mandatory reconsideration” of the 28 May decision carried out, as would be required by legislation in order to give rise to a right of appeal.

24. The relevant provision is regulation 7 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016. It precludes a right of appeal as follows. Regulation 7 provides:

7.—(1) This regulation applies in a case where—

(a) the Department gives a person written notice of a decision under Article 9 or 11 of the 1998 Order (whether as originally made or as revised under Article 10 of that Order); and

(b) that notice includes a statement to the effect that there is a right of appeal in relation to the decision only if the Department has considered an application for a revision of the decision.

(2) In a case to which this regulation applies, a person has a right of appeal under Article 13(2) of the 1998 Order in relation to the decision only if the Department has considered on an application whether to revise the decision under Article 10 of that Order.

(3) The notice referred to in paragraph (1) must inform the person—

(a) of the time limit under regulation 5(1) (revision on any grounds) for making an application for a revision; and

(b) that, where the notice does not include a statement of the reasons for the decision (“written reasons”), the person may, within one month of the date of notification of the decision, request that the Department provide written reasons.

25. Mr Clements submitted a right of appeal did exist, despite the absence of a mandatory reconsideration. He submitted that the restriction imposed by regulation 7(2) only operates in a case to which the regulation generally applies. He submitted that it did not apply as the requirements of regulation 7(1) and 7(3) were not met. He submitted that there was no evidence in the case papers that a decision notice was issued to the appellant informing him of the 28 May 2019 decision until he requested a written statement of reasons for the DWP’s 5 May 2019 decision. Whereas a copy of the 28 May 2019 decision was issued to the appellant on 19 June

2019, there was no evidence in the case papers that this was accompanied by a notice that met the requirements of paragraphs (1) and (3). He therefore reasoned that regulation 7(2) did not apply to this case, and submitted that the appellant enjoyed a right of appeal against the 28 May 2019 decision, even if the Department had not considered whether to revise that decision.

26. It is evident that the tribunal proceeded on the understanding that the decision under appeal was that of 28 May 2019 and that it had been reconsidered on 8 October 2019. It therefore did not address the rather more problematic adjudication issues that arise. The analysis advanced by Mr Clements would cure some of those problematic aspects and give a way forward despite the defects in decision making. I find his argument persuasive to some extent. However, I am reluctant to find a route around this unusual problem through the inadvertent failure of normal operational systems. In essence, Mr Clements is submitting that two errors, namely the incorrect focus of the revision decision of 8 October 2019 and the fact that the decision of 28 May 2019 was not properly notified, allow me to bypass the requirements of the 2016 Decisions and Appeals Regulations.
27. I find myself returning to the question of whether the decision of 28 May was communicated sufficiently for the appellant (and, seemingly, within the DfC itself) to be aware of its standing as a formal decision. The decision of 28 May was generated in response to a request for a statement of written reasons, which would have been made under paragraph (4) of regulation 7 above. From the file, it does not appear that any decision notice for the decision of 28 May was generated by the DfC. The purported revision on 8 October 2019 of the decision of 5 May appears to have been made by the DfC in ignorance of the decision of 28 May. I find myself asking whether a decision that can evade the notice of both the appellant and the DfC in this way can satisfy the requirements of *Anufrijeva*.
28. In *Anufrijeva*, Lord Steyn said, at paragraph 26:

“The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system”
29. In the circumstances of the present case, the tribunal – by Mr Clements’ argument - was hearing an appeal from the DfC decision of 28 May, notwithstanding the fact that no mandatory reconsideration had been conducted, such as would normally be required by regulation 7(2) above in order to give rise to a right of appeal. The DfC’s submission to the tribunal indicated that the appeal was against the (DWP) decision of 5 May

2019, that was reconsidered on 8 October 2019 but not revised. However, the tribunal found that the decision before the tribunal was the (DfC) decision of 28 May.

30. It is plain that there was a decision of 28 May 2019, and that it was the only decision in the case that was made within the jurisdiction given by Northern Ireland social security law. However, there is no evidence that it was ever notified to the affected party as a decision. It is characterised in the DfC's submission as written reasons issued by the DfC under regulation 7(4). I consider that in order to notify the appellant of its status as a decision, it required to spell out that it was a notification of that decision and to indicate the available remedies of revision and appeal. In my judgment it fell short of that requirement and fell short of the standard required by *Anufrijeva* to amount to a notification of a decision.
31. The DfC submitted to the tribunal that the decision under appeal was the DfC's reconsideration decision of 8 October 2019, refusing to revise the DWP decision of 5 May. The tribunal instead considered the DfC decision of 28 May 2019 as the decision under appeal. It appears to me that by focussing on the decision of 28 May the tribunal may have sought to adopt a pragmatic approach to get around the evident problem. However, for the reasons I have given, I conclude that the decision of 28 May was not properly notified, and required to be the subject of a mandatory reconsideration before the tribunal could have jurisdiction to determine the appeal. I therefore consider that the tribunal erred in law on this basis.

Composition of the tribunal

32. A further issue arose in the course of preparation for the hearing. I asked for submissions from Mr Clements as to whether the tribunal was properly constituted to hear the appeal in question – assuming that the appeal was validly brought. Mr Clements referred to the provisions of the Decisions and Appeals Regulations 1999 and regulation 36 in particular. By regulation 36:

36.—(1) Subject to the following provisions of this regulation, an appeal tribunal shall consist of a legally qualified panel member.

(2) Subject to paragraphs (3) to (5) and (8), an appeal tribunal shall consist of a legally qualified panel member and—

(a) a medically qualified panel member where—

(i) the appeal involves the personal capability assessment, the limited capability for work assessment or the determination of limited capability for work-related activity,

(ii) the appeal is made under Article 13(1)(b) of the Recovery of Benefits Order; or

(iii) the appeal is made under Article 9(1) of the Recovery of Health Services Charges (Northern Ireland) Order 2006; or

(b) ... (not relevant) ...

33. Mr Clements submitted that the subject matter before the tribunal was not such as to require or permit the involvement of a medical member. He submitted that the tribunal was wrongly constituted for, and that it had erred in law by, determining the issue of backdating of the appellant's UC claim. He noted that the President of Appeal Tribunals had power to alter the composition of tribunals under regulation 36(5). This provides:

(5) Where the composition of an appeal tribunal is prescribed under paragraph (1), (2)(a) or (3), the President may determine that the appeal tribunal shall include such an additional member drawn from the panel as he considers appropriate for the purposes of providing further experience for that additional member or assisting the President in the monitoring of standards of decision-making by panel members.

34. However, he submitted, there was no indication that this is what had transpired in the particular case. He further referred me to the decision of Deputy Commissioner Parker in *FMcC v Department for Social Development* [2010] NI Com 38, where she had set aside the decision of an appeal tribunal that had included a medically qualified member on the basis that it was improperly constituted.

35. The appeal tribunal was composed of an LQM and a medically qualified member. It was not addressing either the personal capability assessment, the limited capability for work assessment or the determination of limited capability for work-related activity. While it appears that the appellant may have been encouraged to send medical evidence in support of his case, no substantive issue arose to justify the inclusion of a medically qualified member under regulation 36(2). There is nothing in the record of the tribunal to indicate that the President of Appeal Tribunals directed an additional member. For this reason it appears to me that the tribunal was wrongly constituted. I consider that it has erred in law as – constituted as it was - it lacked jurisdiction to decide the particular issue before it. I must also set aside its decision on that basis.

Backdating of UC

36. Much of the above is technical law that is only of interest to specialists in social security law. The principal issue in the case, and the issue that directly concerns the appellant, is whether the conditions that permit backdating of an award of UC were satisfied. Under regulation 25(2), of the Claims and Payments 2016 regulations, backdating of up to a maximum of one month may be permitted 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.
37. It is common case that the claimant fell within category (3)(a), namely that the claimant was previously in receipt of an employment and support allowance and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired. The sole remaining question to be determined is whether, as a result of that circumstance or those circumstances, the claimant could not reasonably have been expected to make the claim earlier.
38. The above provision, it seems to me, is addressed to the situation where entitlement to a particular benefit has ceased – unknown to the claimant – and where a claim for UC as an alternative to that benefit has been delayed as a result.
39. The situation in this case was that by a letter of 28 February 2019 the DfC asked the claimant to furnish a medical certificate by 4 March 2019, as the previous certificate that covered the period from 25 September 2018 to 3 March 2019 was about to run out. He then received a letter on 6 March 2019 indicating that his entitlement had ceased on 4 March 2019.
40. The appellant sent a new medical certificate to cover the period 4 March to 1 April 2019 to the DfC on 12 March 2019 – which was received on 19 March 2019. I note from the file that he appears to have sent a further certificate dated 3 May 2019 covering the same period. I accept that a degree of confusion clearly crept in to the appellant's mind. Whereas the appellant had received a letter telling him that he needed to supply a medical certificate by 4 March 2019, the letter telling him that his entitlement had ceased coincidentally also referred to an end of entitlement from 4 March 2019. However, the letter did not address the medical certificate issued, but referred to something entirely different. That letter notified him that his entitlement had ceased because his work capability assessment had shown that he was capable of doing some work. It set out the reasons for that decision and advised what to do if he thought the decision was wrong.

41. The appellant was presumably misled by the coincidence that the date of 4 March 2019 was both the expiry date of his medical certificate and the notified date of the end of his entitlement in the letter about the personal capability assessment. He appears to have understood that the provision of a medical certificate was all that was required in the circumstances. He tried to remedy the situation by that route and that in turn contributed to the delay in making his UC claim. The question is whether that misunderstanding can assist him under regulation 25(2)(b).
42. It appears to me that the relevant question can be crystallised as follows. As a result of the notification of expiry of entitlement to ESA not having been sent to the appellant before the date that his entitlement expired, was it the case that he could not reasonably have been expected to have made the UC claim earlier? His challenge to the tribunal's decision was on the basis that it had not addressed his submissions fully. I accept his submission on the grounds that the tribunal does not appear to have addressed the submissions he made.

Disposal

43. Having set the tribunal decision aside, and as the tribunal should have been constituted as a single LQM, there would seem to be pragmatic grounds for dealing with the backdating issue myself. However, I have found that the reconsideration decision of the DfC was not made in compliance with the Social Security (NI) Order 1998 and the Decisions and Appeals Regulations, with a consequence that the first tribunal lacked jurisdiction. Further, if I were to proceed to decide the appeal, the fact that that tribunal was not correctly constituted would mean that the appellant would have been denied his entitlement to a hearing by a tribunal.
44. As a matter of fairness, I consider that I am compelled to refer the matter back to the DfC for a reconsideration of the decision of 28 May 2019. Depending on the outcome of that reconsideration, the appellant would enjoy a fresh right of appeal to a tribunal. I apologise to the appellant for prolonging this matter, but trust that he will derive some satisfaction from the fact that his appeal has been successful to this stage.

(signed): O Stockman

Commissioner

11 May 2022