IN THE UPPER TRIBUNAL **Appeal No. CTC/3231/2016**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE JUDGE WEST

DECISION

The decision of the appeal tribunal sitting at Chester dated 25 July 2016 under file reference SC065/16/00575 involves an error on a point of law. The appeal against that decision is allowed and the decision of the appeal tribunal is set aside.

The decision is remade. The claimant was not entitled to the disability element of working tax credit for the tax year 2009-2010 because he did not qualify under either Case E or Case G of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002.

This decision is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. The issue with which this decision is concerned is the entitlement to the disability element of working tax credit in the tax year 2009-2010 and in particular whether the claimant fulfilled the requirements of regulation 9(1)(c) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 ("the Regulations") and was a person who satisfied any of Cases A to G on a day for which the maximum rate was determined in accordance with the Regulations.

2. This is an appeal, with the permission of Judge Rowley, against the decision of the appeal tribunal sitting at Chester on 25 July 2016.

3. I shall refer to the appellant hereafter as "the claimant". The respondent is Her Majesty's Revenue and Customs. I shall refer to it hereafter as "HMRC". I shall refer to the tribunal which sat on 25 July 2016 as "the appeal tribunal".

The History of the Claim

4. The claimant and his wife first claimed tax credits in November 2002, as was permitted in advance of the new scheme of tax credits which came into full effect on 6 April 2003. They were awarded working tax credit with effect from that date. No disability element was claimed or included. The award was renewed each year until it ceased for unspecified reasons on 5 April 2008.

5. On 23 July 2008 they submitted a fresh claim for tax credit in form TC600 which was received by HMRC on 28 July 2008 (pages 54 to 58G). (Although the claim was submitted to HMRC in the tax year 2008-2009, the form used by the claimant and his wife was the version for the preceding tax year 2007-2008; nothing, however, turns on that insofar as the questions related to disability.) Question 1.11 asked if the claimant were disabled and he answered that question by putting an X beside it (page 55).

6. However, the question about disability was not self-contained because the direction "Put 'X' in the box if you are disabled" continued "See Notes, page 12". The notes, so far as material, stated as follows

> *"1.11* ***Disability***
>
> *You can get a disability element of Working Tax Credit if you meet all of the following 3 qualifying conditions:*
>
> - *you usually work for 16 hours or more a week (see the notes on pages 25 to 29), and*
> - *you have a disability which puts you at a disadvantage in getting a job, and*
> - *either*
> - *you meet the 'qualifying benefit' test, or*

- *you are returning to work after a recent period of sickness and are eligible to use the 'Fast-Track' route to a disability element.*

  For more information on the tests you have to meet to show that you are at a disadvantage in getting a job, please see the notes on page 53. For details of the qualifying benefit test or the 'Fast-Track' rules, see the notes on pages 54 to 55".

7. On page 55 of the notes the Fast-Track rules set out the qualifying benefits, including statutory sick pay and occupational sick pay, and continued

> *"The 'Fast-Track' helps people who are finding it hard to stay in work because of a disability.*
>
> *To qualify under the 'Fast-Track' rules, you must have been getting one or more of the benefits shown in the box alongside.*
>
> - *for 20 weeks or more (this need not be a single continuous period – add together any periods when you received the benefits or credits that are separated by 8 weeks or less)*
>
> - *with the last day of receipt being in the last 8 weeks.*
>
> *Your disability must be likely to last for at least 6 months or the rest of your life. In addition, your gross earnings (before tax and National Insurance contributions are deducted) must be at least 20% less than they were before you had the disability, with a minimum reduction of £15 a week".*

8. On 20 August 2008 the claimant received an award of working tax credit with the disability element for the period from 26 April 2008 to 5 April 2009, although there is no copy of that decision notice on the file. That was an initial decision under s.14 of the Tax Credits Act 2002 ("the TCA").

9. The award for the tax year 2008-2009 expired in the normal way on 5 April 2009, but actual payment continued whilst arrangements were made for an award in the 2009-2010 tax year.

10. A s.17 final notice under the TCA (a tax credits annual declaration) in form TC603 was sent to the claimant and his wife on 25 April 2009 for the tax year 2008-2009 (pages 81 to 83). The form stated "Phone us or send back this form before 31/07/2009". They signed the form on 24 June 2009 and returned it on 8 July 2009, reporting no change in their personal circumstances. On the same day HMRC issued a s.18 decision after final notice in respect of the tax credits claim for the tax year 2008-2009, although that decision is not on the file.

11. On 14 July 2009 the claimant and his wife were made an award of tax credit for the whole of the tax year 2009-2010, with the disability element of working tax credit, in the total sum of £4,223,55. That again was an initial decision under s.14 of the TCA.

12. The award for that tax year expired in the normal way on 5 April 2010, but again actual payments continued whilst arrangements were made for an award in the 2010-2011 tax year. However, on 7 April 2010 a compliance interest was flagged up, specifically in respect of the disability element of working tax credit. Although the issue was flagged up internally, no formal step was taken by HMRC at that stage to bring the matter to the attention of the claimant and his wife.

13. A s.17 final notice under the TCA (a tax credits annual declaration) in form TC603 was sent to the claimant and his wife on 6 May 2010 for the tax year 2009-2010 (page B paragraph 2). They signed the form on 22 June 2010 and returned it, again reporting no change in their personal circumstances (page C, paragraph 4).

14. The claimant submitted that HMRC's s.19 power to enquire into the couple's tax credits entitlement for the tax year 2008-2009 expired on 31 July 2010, rendering the earlier s.18 decision of 8 July 2009 conclusive as to the entitlement in that tax year. I shall return to that submission below.

15. It was not until 17 September 2010 that the claimant was asked for evidence of his disability (page 4) and he replied to that letter on 1 October 2010. Neither letter is on the file.

16. Whatever he said did not satisfy HMRC since on 12 October 2010 it decided that the claimant did not meet all three conditions for the disability element of working tax credit (pages 5 to 6). He was issued with a formal notice dated 15 October 2010 to the effect that his entitlement in 2009-2010 did not include entitlement to the disability element of working tax credit and that the claim had been adjusted accordingly. The reason why he did not qualify was that he did not meet condition 3 as set out in the disability helpsheet which was sent out with the end of year annual declaration, viz. the qualifying benefit condition. There was some discussion of the status of the letter at the hearing before me, but it was agreed that it was an interim decision which did not carry rights of appeal. The letter concluded

> "You will soon receive an award notice detailing your tax credits for 2010-2011 which includes your right of appeal if you disagree with my decision".

17. As the disability element had been paid in the year 2009-2010, the net result was that the claimant had been overpaid in that year.

18. An identical notice, but this time amounting to a formal decision under s.18, was issued to the claimant on 9 February 2011 (page 3), revising the couple's entitlement to tax credits for the period from 6 April 2009 to 5 April 2010 to the total sum of £1,697.14. That decision carried the right of appeal, which the claimant duly exercised.

19. The subsequent awards for the next two tax years 2010-2011 and 2011-2012 (page 10) did not include the disability element of working tax credit.

20. The claimant's appeal, which was made on 20 February 2011 (page 1), seems to have lain fallow for several years, but on 12 September 2015 the claimant stated that he wished to appeal the original decision (page 13). It is not clear either why HMRC did not process his appeal in the first place in 2011 or why the claimant sought to revive the appeal as late as September 2015, although no objection was taken to the late prosecution of the appeal in the autumn of 2015. The claimant had in fact retired in December 2011.

21. Be that as it may, the matter finally came before the appeal tribunal on 25 July 2016. The claimant opted for a paper hearing and so was not present, but the tribunal considered that it was proper to proceed in his absence. The appeal was dismissed and the s.18 decision made by HMRC on 9 February 2011 was confirmed. The appeal tribunal concluded that in the 2009-2010 tax year the claimant and his wife were entitled to £1,697.14 working tax credits and £0.00 child tax credits for the period from 6 April 2009 to 5 April 2010 because HMRC was not satisfied that he was entitled to the disability element of working tax credit. They were not entitled to child tax credits because they did not declare being responsible for any children. Since there was no hearing, there is no record of the proceedings. The decision notice appears at page 23. The appeal tribunal's statement of reasons appears at pages 25 to 26. The claimant stated that he wanted to appeal (somewhat prematurely) by letter dated 27 July 2016 and received on 1 August 2016 (pages 24 and 28), but the statement of reasons was not in fact produced until 17 September 2016 and was sent to the parties three days later.

22. The claimant reiterated his request for permission to appeal from the Tribunal Judge on 7 September 2016 (page 27), which was refused by District Tribunal Judge McMahon on 20 September 2016 (page 29), the date on which the statement of reasons was sent to the parties. He applied to the Upper Tribunal for permission to appeal on 27 October 2016 (pages 33 to 37), although the form was not in fact received until 9 November 2016. Technically the application was out of time and would have required an extension of time. Although an extension was never formally granted, Judge Rowley's subsequent grant of permission to appeal must be treated as implicitly having extended the time for the submission of the application.

23. On 8 February 2017 Mr Registrar James wrote to the claimant to clarify certain matters (page 41), to which the claimant replied on 10 February 2017, although his letter did not answer the question asked by the Registrar (page 42). Consequently the Registrar wrote again for further clarification on 1 March 2017 (page 43). He pointed out that the matter of overpayment was not one on which there was any right of appeal; the only matter which the Upper Tribunal could determine was whether there was an entitlement to the disability element of working tax credit. To that letter the claimant replied on 6 March 2017 (page 44).

24. Although at one point in his written submission on behalf of the claimant, Mr Abbott submitted that what was in dispute was whether the claimant was at fault for having placed a cross in box 1.11 of the TC600 form for the tax year 2008-2009, and whether or not as a result of that action he should in 2018 be made to repay the disability element, HMRC accepted that it had never made a decision based on any fault or neglect on the part of the claimant and accepted that it was not now open to it to do so (since the 5 year time limit prescribed by s.20(5)(b) of the TCA had elapsed).

25. Moreover, (a) the decision under appeal was concerned with the question of whether the claimant was entitled to the disability element of working tax credit for the tax year 2009-2010 and (b) there is no right of appeal under the TCA against an overpayment decision. Decisions about either recovery or recoverability under ss.28 and 29 of the TCA are not included in the list of decisions which are appealable under s.38 of the Act. As Mr Commissioner Jacobs (as he then was) explained in ***CTC/2662/2005***

> "17. So far I have not mentioned appeals. Decisions under sections 14, 15, 16 and 18 all carry the right of appeal (section 38). However, decisions on payment under section 24, on overpayment under section 28 and on recovery of overpayments under section 29 do not carry that right. This has two effects so far as the recovery of overpayments is concerned. First, unlike social security benefits, the *law* does not apportion responsibility between the claimant and the Revenue. It places the responsibility on the claimant in all circumstances. Any relief that the claimant receives is a matter of concession under the Revenue's Code of Practice 26. Second, as there is no right of appeal in respect of the Code, any challenge to the Revenue's decision can only be made by way of judicial review in the Administrative Court and on judicial review grounds."

26. Similarly, as Judge Wikeley explained more recently in ***VH v. HMRC*** [2017] UKUT 128 (AAC)

> "15. … under the tax credits regime issues of fault do not come into play when considering legal liability for overpayments. In other words, arguments that the claimant did not misrepresent anything or did not fail to disclose a change

> in circumstances because she was unaware of such a change have no purchase. Those types of arguments may have some traction in relation to most DWP social security benefits other than universal credit (see Social Security Administration Act 1992, section 71), but they are irrelevant in the HMRC tax credits context (see Tax Credits Act 2002, sections 28 and 29). In short, if tax credits have been paid but it later transpires there is no entitlement to tax credits, there is an overpayment, and in principle any overpayment is recoverable. That explains the logic behind the absence of appeal rights (see paragraph 7 above). If there are mitigating circumstances, they can at best go to the (non-appealable) discretionary issue of whether HMRC should recover the overpayment (on which see HMRC Code of Practice 26), and not the prior question of legal liability for the overpayment ...".

27. On behalf of HMRC Ms Ward accepted that, although the issue of overpayment (£2,526.41) was not before the Tribunal and could not have been the subject of an appeal in any event, there were avenues open to the claimant were he to be required to repay the overpayment, including concession under HMRC's Code of Practice 26, recourse to the Ombudsman and, if necessary, judicial review.

28. To revert to the narrative, on 5 April 2017 Judge Rowley directed HMRC to make a submission to assist in deciding whether permission to appeal to the Upper Tribunal should be granted (pages 47 to 48). The issue was whether the claimant was entitled to the disability element of working tax credit for the tax year 2009-2010 and that raised the question of whether he could satisfy any of the Cases A to G as listed in regulation 9 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/2005) ("the 2002 Regulations"). That submission was produced by Mr Eland on behalf of HMRC on 8 May 2017 (pages 49 to 53, with an appendix in the form of form TC600 (originally completed by the claimant and his wife on 23 July 2008) on pages 54 to 58G and the decision of Mr Commissioner Levenson in ***CTC/0643/2005*** at pages 58H-58K).

29. On 31 May 2017 Judge Rowley made further directions that, if the claimant wished to respond to Mr Eland's submission, he should reply within 1 month of the date of the letter issuing her direction (page 60). He briefly did so on 25 June 2017 (pages 61 to 62), stating that his personal independence payment award was relevant

and should be applied retrospectively (an argument which was not pursued on appeal, as I shall explain in paragraphs 43 to 47 below).

30. As a result, on 7 August 2017 Judge Rowley made a further direction for HMRC to provide a further submission on the matter arising from its first submission concerning the adjudication history of the case since further matters had emerged as a result of Mr Eland's original submission and in particular what was the correct construction and effect of regulation 9(8) of the 2002 Regulations (pages 63 to 64). Mr Eland made his further submission on 17 October 2017 (pages 65 to 67).

31. On 28 November 2017 Judge Rowley granted permission to appeal (at pages 68 to 69). She considered that she would be assisted by an oral hearing because of the complexity of the legal issues involved.

32. In giving permission to appeal she stated that the appeal tribunal did not give any justification for its decision in its own words, but merely adopted the response originally filed on behalf of HMRC. However, the submission indicated that the only issue being considered was whether the claimant was receiving qualifying benefit in 2009-2010, i.e. consideration was being limited to Case C. By adopting that submission it was arguable that tribunal fell into the same error. It was arguable that, pursuant to its inquisitorial jurisdiction, the tribunal should have considered entitlement under all the Cases in regulation 9 of the 2002 Regulations. If it had done so, when it came to Case G it would have been uncertain whether or not the claimant had been in receipt of the disability element in 2008-2009 as the submission was silent on the issue. In those circumstances, it was arguable that the tribunal should have asked HMRC for further information on the point. Thus, it was arguable that in failing to do so, and by limiting its consideration to Case C, the tribunal erred in law. Whether such an error was material depended on whether there was entitlement under Case G. Determination of entitlement under that Case depended on an issue of statutory interpretation, namely whether Case G covered the situation where the disability element was present in the previous year's assessment, without any consideration of whether or not that was the result of a correct decision. In other words, did a person who incorrectly had the disability element paid as part of his

working tax credit award for the preceding year satisfy the conditions of Case G in the current year?

33. Judge Rowley directed that a registrar should send the claimant a letter with details about the Free Representation Unit scheme for him to consider if he wished to explore that possibility, to which he should reply within 14 days. She directed HMRC to provide a response to the appeal within 1 month of the date on which the notification of the grant of permission was sent to the parties (if so advised) and the claimant to reply within 1 month thereafter.

34. Mr Eland on behalf of HMRC had nothing to add on 15 January 2018 (page 70). On 29 March 2018 the Upper Tribunal received confirmation from Mr Paul Abbott, then of Arnold & Porter, that his firm would act for the claimant on a referral from the Free Representation Unit. On 5 April 2018 Mr Registrar James directed that the firm should make its submission on behalf of the claimant within 1 month of the date of the issue of the latest direction (pages 71 to 72). The submission on his behalf was made on 8 May 2018 (pages 73 to 80) with an appendix of the tax credits annual declaration signed by the claimant and his wife on 24 June 2009 (which stated on its face that it had to be returned to HMRC by 31 July 2009) (pages 81 to 83).

35. The matter came to me for final determination. At the hearing before me on the afternoon of 4 September 2018 the claimant was represented by Mr Paul Abbott, now of Freshfields Bruckhaus Deringer. Ms Galina Ward of counsel appeared on behalf of HMRC; she had produced a skeleton argument dated 30 August 2018 with appendices in advance of the hearing. I am grateful to both of them for their concise submissions, both written and oral. Given the lapse of time since the 2009-2010 tax year and the fact that over 2 years had passed since the decision of 25 July 2016, there was understandably no appetite on either side for a remission and rehearing of the question of entitlement were I to decide that there had been an error of law and it was agreed that, were I to allow the appeal, I should remake the decision rather than remit it.

The Statement of Reasons

36. So far as is material, in its statement of reasons the appeal tribunal found that

"5. In the 2009-10 tax year … HMRC calculated [their entitlement] as £4,223.55 WTC for the period 6 April 2009 to 5 April 2010 on the basis they were in a joint award, [his wife] was in remunerative employment for 16 hours or more per week and [he] was in remunerative work for 32 hours per week as well as being disabled for tax credit purposes. On 6th May 2010 [they] were issued with a notice pursuant to section 17 of the Tax Credits Act 2002 for the purposes of confirming their entitlement in the 2009-10 tax credit award year.

6. Before reaching a decision on entitlement HMRC required further evidence from [them] about [the claimant's] disability. [They] were sent a letter of enquiry by HMRC. HMRC did not have a copy of the letter. A screen shot of the system note made at the point the letter was issued was included at page 4 of the appeal papers. [They] replied on 1 October 2010 but did not provide the required evidence to support that [the claimant] was entitled to the disability element of WTC. HMRC therefore amended the award with effect from 6 April 2010. On 9 February 2011, a decision notice was issued to [the claimant and his wife] showing their entitlement for the 2009-10 tax year as WTC of £1,697.14. This notice carried the right of appeal.

7. On 22.02.11 [the claimant] appealed against the decision date[d] 09.02.11. [He] was again invited by HMRC to provide the evidence to support that he was entitled to the disability element of WTC. [He] provided further information to HMRC which was received on 29.06.11 but this information still did not provide the evidence required to support his entitlement to the disability element of WTC. HMRC sent [them] a further letter dated 27.07.11 advising that they did not qualify for the disability element of WTC and the letter outlined the conditions to be met in respect thereof. Further correspondence was received from [them] on 15.09.15 but, again, no evidence was provided to support that [the claimant] was entitled to the disability element of WTC.

8. The matter in question was whether the rate at which [the claimant and his wife's] tax credits had been awarded was correct specifically relating to [his] disability element of WTC. They were asked to provide further evidence of the disability in order to show that [he] was in receipt of one of the qualifying benefits which would entitle him to the disability element. [He] responded but did not provide the specific evidence that had been requested. As a result, HMRC were not satisfied [that he satisfied] the entitlement conditions of the disability element of WTC to be eligible to receive it in the award for the 2009-10 year.

> 9. When a claimant fails to provide the information which is required for the determination of their entitlement it is open to HMRC to determine entitlement by deciding the particular point against the claimant and, in this case, such information was not provided and the point was therefore decided against the claimant.
>
> 10. Based on the information available and provided at the relevant time, HMRC decided that there were reasonable grounds for believing that [the claimant] was not receiving qualifying benefit during 2009-10.
>
> 11. The tribunal was satisfied that, based on all the information provided by [the claimant], the decision to remove the disability element of WTC from 06.04.2009 onwards in 2009-10 was correct. In the circumstances, the tribunal adopted the response filed by the respondent and confirmed the decision of the respondent issued on 09.02.2011."

The Legislation

37. The disability element of working tax credit assists claimants with disabilities to take up, and remain in, work. It dos so by increasing the rate at which working tax credit is paid. This provides an incentive for those who have not been working because of disability to undertake some work, even if it is not possible for them to work to the same extent as those who are not disabled. For those who are already in work, the disability element can provide an incentive to increase their hours and can also help with the additional costs incurred by people with disabilities who work. To qualify for the disability element, claimants have to satisfy the normal conditions of entitlement to working tax credit and meet three additional conditions. So far as is material, regulation 9 of the 2002 Regulations provides that

> **"9. Disability element and workers who are to be treated as at a disadvantage in getting a job**
>
> (1) The determination of the maximum rate must include the disability element if the claimant, or, in the case of a joint claim, one of the claimants—
>
> (a) undertakes qualifying remunerative work for at least 16 hours per week;

(b) has any of the disabilities listed in Part 1 of Schedule 1, or in the case of an initial claim, satisfies the conditions in Part 2 of Schedule 1; and

(c) is a person who satisfies any of Cases A to G on a day for which the maximum rate is determined in accordance with these Regulations.

…

(4) Case C is where the person is a person to whom at least one of the following is payable—

(a) a disability living allowance;

(b) an attendance allowance;

(c) a mobility supplement or a constant attendance allowance which is paid, in either case, in conjunction with a war pension or industrial injuries disablement benefit

(d) personal independence payment

(e) armed forces independence payment.

…

(6) Case E is where the person—

(a) has received—

> (i) on account of his incapacity for work, statutory sick pay, occupational sick pay, short-term incapacity benefit payable at the lower rate or income support, for a period of 140 qualifying days, or has been credited with Class 1 or Class 2 contributions under the Contributions and Benefits Act for a period of 20 weeks on account of incapacity for work, and where the last of those days or weeks (as the case may be) fell within the preceding 56 days; or
>
> (ii) on account of his incapacity for work or having limited capability for work, an employment and support allowance, or the pay or benefit mentioned in paragraph (i), for a period of 140 qualifying days, or has been credited with Class 1 or Class 2 contributions under the Contributions and Benefits Act for a period of 20 weeks on account of incapacity for work or having limited capability for work, and where the last of those days or

> weeks (as the case may be) fell within the preceding 56 days;
>
> (b) has a disability which is likely to last for at least six months, or for the rest of his life if his death is expected within that time; and
>
> (c) has gross earnings which are less than they were before the disability began by at least the greater of 20 per cent and £15 per week.
>
> For the purpose of this Case "qualifying days" are days which form part of a single period of incapacity for work within the meaning of Part 11 of the Contributions and Benefits Act or a period of limited capability for work within the meaning of regulation 2(1) of the Employment and Support Allowance Regulations 2008.
>
> …
>
> (8) Case G is where the person was entitled, for at least one day in the preceding 56 days, to the disability element of working tax credit or to disabled person's tax credit by virtue of his having satisfied the requirements of Case A, B, E or F at some earlier time.
>
> For the purposes of this Case a person is treated as having an entitlement to the disability element of working tax credit if that element is taken into account in determining the rate at which the person is entitled to a tax credit.
>
> (9) For the purposes of the Act, a person who satisfies paragraph (1)(b) is to be treated as having a physical or mental disability which puts him at a disadvantage in getting a job".

38. In order to qualify for the disability element of working tax credit, the claimant must therefore be able to satisfy three conditions: the qualifying remunerative work condition under regulation 9(1)(a), the disability condition under regulation 9(1)(b), and the qualifying benefit condition under regulation 9(1)(c).

Regulation 9(1)(a)

39. It was not in dispute that the claimant undertook qualifying remunerative work for at least 16 hours per week, so that the requirements of regulation 9(1)(a) were fulfilled.

Regulation 9(1)(b)

40. It was the claimant's case that he had 2 of the disabilities listed in Part 1 of Schedule 1 (page 24), namely that he was unable to walk a continuous distance of 100 metres along level ground without suffering severe pain (paragraph 2) and that, due to lack of manual dexterity, he could not pick up a coin which was not more than 2½ cm in diameter (a 10p coin) (paragraph 6).

41. HMRC was content to proceed at the hearing on the basis that the claimant complied with the terms of regulation 9(1)(b).

Regulation 9(1)(c)

42. The dispute between the claimant and HMRC was whether he fulfilled the requirements of regulation 9(1)(c), namely whether he was a person who satisfied any of Cases A to G on a day for which the maximum rate was determined in accordance with the Regulations.

Case C

43. When he did not have the benefit of representation, the claimant sought to argue that he fulfilled Case C in that he was a person to whom personal independence payment was payable (page 61). In my judgment Mr Abbott was right not to pursue that argument on the claimant's behalf.

44. The claimant stated that he had applied for disability living allowance "many times" between 2009 and 2014, but was unsuccessful on each such occasion (page 42). It was not until 11 May 2014 that he was awarded the enhanced rate of both the daily living component (15 points) and the mobility component (12 points) of personal independence payment from and including 6 January 2014 to and including 1 April 2018.

45. It seems to me, however, that the claimant's argument in that respect was misconceived. A successful claimant is a person who satisfies any of Cases A to G on *a day for which the maximum rate is determined* in accordance with those Regulations. Case C is where the person is a person to whom personal independence

payment *is* payable. As a matter of construction the regulation thus requires the Case C "passporting" benefit to have been payable in respect of the same tax year as that for which the disability element of working tax credit is claimed. A successful claim for personal independence payment in May 2014 cannot therefore be prayed in aid to fulfil regulation 9(1)(c) in respect of the 2009-2010 tax year.

46. In the materially equivalent case of disability living allowance, Mr Commissioner Levenson (as he then was) held in ***CTC/643/2005*** that on any day on which disability living allowance was not payable, the claimant did not fall within Case C (pages 58H to 58K). The same result must apply in the case of personal independence payment.

47. Thus, entitlement to tax credit could only be established under Case C in respect of each day on which the claimant was entitled to personal independence payment and there was no such day. It is apparent from the terms of the statement of reasons that the appeal tribunal limited its consideration of the claimant's entitlement to Case C and did not consider whether any of the other Cases might be applicable to him. Cases A, B, D and F plainly did not apply, but Cases E and G were potentially of application to his situation.

Case E

48. I shall therefore turn to consider whether the claimant qualified for the disability element by virtue of Case E.

49. In his letter of 6 March 2017 (page 44) the claimant stated

> "In May 2008 I was diagnosed as having obstructive sleep apnoea so I was not allowed to drive at all.
>
> I was on the sick from May 2008 until August 2008, when I started my CPAP treatment and DVLA allowed me to drive again.
>
> Returning to work in August 2008, I was soon to be on the sick again for another 4 weeks after the accident until I was forced back to work by my employer who threaten[ed] me with the sack while I was on the sick.

> Although I was not fit for work, due to financial difficulties and the threat of the sack still ringing in my ears, I returned to work on light duties for 3 or 4 days a week until I retired in December 2011 when I was eligible for pension credits and my working life was over".

50. The accident to which he referred in that letter was explained in his earlier letter of 10 February 2017 (page 42) in which he had written

> "Although I have been in constant, severe pain following a road traffic accident in November 2008, due to cervical spondylosis from C3 to C7 vertebrae, which affects the whole of the body from the neck down".

51. Finally, in his submissions of 25 June 2017 (page 61) he wrote

> "Between 2008 and 2011 I was on the sick and receiving SSP many times".

52. Mr Abbott argued that with the passage of time it was now "wholly unclear" whether or not the claimant met the criteria set out under Case E. Clearly there was an extensive period of sick leave between May 2008 and August 2008, but what leave occurred prior to May 2008 was no longer known. However, he pointed out what the claimant had said on page 61, namely that between 2008 and 2011 he had been "on the sick" and receiving statutory sick pay "many times". All of the claimant's statements taken together suggested that he "may well have satisfied" the fast-track rules by virtue of his receipt of statutory sick pay.

53. He had searched for and failed to locate any documentary evidence of that sick pay, but owing to the lapse of a decade since the start of the period of illness he could not now reasonably be expected to have maintained records of his time off work due to illness throughout that period.

54. However, the point should have been confirmed at the time by HMRC. In ***TS v. Her Majesty's Revenues & Customs*** [2015] UKUT 507 (AAC) it had been held that the burden of proof in an appeal against a s.19 decision was on HMRC rather than the claimant. Mr Abbott accepted that this was not a s.19 appeal, but argued that the

burden of proof was the same because no in-time review had ever been undertaken and so the s.18 determination was conclusive under s.18(11). When going behind a conclusive determination, the burden of proof was on HMRC to show that the otherwise conclusive determination was wrong. It would be perverse if the claimant were required to prove what HMRC had definitively determined in his favour. As the editors commented in vol. IV of the *Social Security Legislation 2017/18* para.1.342 (page 182) it was particularly important in such cases that a tribunal considering an appeal ensured that it had all of the evidence in front of it and in particular all the evidence which that claimant had submitted to HMRC in response to its power to inquire. The burden of proof to provide evidence proving that the claimant was not in fact entitled to the disability element of working tax credit in 2008-2009 by virtue of the receipt of statutory sick pay was on HMRC. Under s.2(1) of the Statutory Sick Pay Percentage Threshold Order 1995, an employer was entitled to recover the amount by which the payments of statutory sick pay made by him in any income tax month might exceed 13% of the amount of his liability for contributions payments in respect of that income tax month. Thus HMRC may well have had records showing that the claimant's employers at the time claimed from it payments of statutory sick pay made to the claimant at the time. Equally, the employer should have kept records which HMRC could have asked to see. If the records were no longer extant, the blame could not be placed on the claimant. On behalf of the claimant, Mr Abbott accepted that if a clear error could be shown subsequently, then it would be possible for HMRC to go behind the claim in a later year, but he submitted that here it was simply not in a position to show any such error and therefore it could not go behind the conclusive s.18(11) determination.

55. Moreover, Mr Abbott submitted, HMRC's power to inquire into the claimant's entitlement for the tax year 2008-2009 had expired on 31 July 2010. In paragraphs 4 and 5 of his submission of 17 October 2017 Mr Eland had stated that it was apparent that the claimant had not in fact satisfied the entitlement conditions or the disability element in 2008-2009, but the decision in respect of 2008-2009 was not however changed. But, submitted Mr Abbott, HMRC was not in fact capable of changing the entitlement for the tax year 2008-2009 at the time at which it took action to challenge the 2009-2010 entitlement because of the time limits imposed by the TCA.

56. Ss.17 and 18 of the TCA are concerned with deciding claimant's entitlement to tax credits for the year. S.17 deals with "Final Notices" and, so far as material, provides that

> "(1) Where a tax credit has been awarded for the whole or part of a tax year—
>
> (a) for awards made on single claims, [HMRC] must give a notice relating to the tax year to the person to whom the tax credit was awarded …
>
> (b) for awards made on joint claims, the Board must give such a notice to the persons to whom the tax credit was awarded (with separate copies of the notice for each of them if the Board consider appropriate).
>
> (2) The notice must either—
>
> (a) require that the person or persons must, by the date specified for the purposes of this subsection, declare that the relevant circumstances were as specified or state any respects in which they were not, or
>
> (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the relevant circumstances were as specified unless, by that date, he states or they state any respects in which they were not.
>
> …
>
> (4) The notice must either—
>
> (a) require that the person or persons must, by the date specified for the purposes of this subsection, declare that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified or comply with subsection (5), or
>
> (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (5).
>
> …

> (6) The notice may—
>
> (a) require that the person or persons must, by the date specified for the purposes of subsection (4), declare that the amount of the previous year income was the amount, or fell within the range, specified or comply with subsection (7), or
>
> (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the previous year income was the amount, or fell within the range, specified unless, by that date, he complies or they comply with subsection (7)".

57. S.18 is headed "decisions after final notice" and in s.18(1) provides that

> "After giving notice under section 17 [HMRC] must decide —
>
> (a) whether the person was entitled to, or the persons were jointly entitled to the tax credit, and
>
> (b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled,
>
> for the tax year".

58. S.18(11) then provides that

> "Subject to sections 19, 20, 21A and 21B and regulations under section 21 (and to any revision under subsection (5) ... and any appeal)—
>
> (a) in a case in which a decision is made under subsection (6) in relation to a person or persons and a tax credit for a part tax year, that decision, and
>
> (b) in any other case, the decision under subsection (1) in relation to a person or persons and a tax credit for a tax year,
>
> is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

59. Thus, submitted Mr Abbott, the decision by HMRC was "conclusive", subject to the power to inquire under s.19 of the Act.

60. S.19, which is headed "Power to enquire", provides (so far as material) that

> "[HMRC] may enquire into—
>
> (a) the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year, and
>
> (b) the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year,
>
> if they give notice to the person, or each of the persons, during the period allowed for the initiation of an enquiry.
>
> …
>
> (4) The period allowed for the initiation of an enquiry is the period beginning immediately after the relevant section 18 decision and ending—
>
> (a) …
>
> (b) … one year after the beginning of the relevant section 17 date …
>
> …
>
> (6) The relevant section 17 date means—
>
> (a) …
>
> (b) … the date specified for the purposes of subsection (4) of that section in the notice given to him or them under that section in relation to the tax year".

61. The s.17 notice for the tax year 2008-2009 was sent to the claimant on 25 April 2009 and was required to be returned by him by 31 July 2009.

62. Thus, submitted Mr Abbott, the relevant date specified in the s.17 notice, which was necessary for the purpose of establishing the end of the period during which HMRC would have had the power to inquire into the claimant's award for 2008-2009 under s.19(6), was 31 July 2009 and one year falling after the date specified in the s.17 notice was 3 July 2010.

63. On that basis, HMRC's power to inquire into the 2008-2009 entitlement under s.19 expired on 31 July 2010. The first relevant action taken by HMRC to investigate the 2009-2010 entitlement was taken on 17 September 2010, almost two months after the s.19 power expired. Therefore, irrespective of the correctness or otherwise of the 2008-2009 entitlement, HMRC did not choose in September 2010 not to investigate the 2008-2009 entitlement, but in fact it was not able to do so given the time limits imposed by s.19(6) since it had not supplied the claimant with notice of intention to inquire by 31 July 2010 as required by s.19(1) and thus could not have challenged the 2008-2009 entitlement.

64. Ms Ward submitted that the claimant's case was no higher than that he "may" have satisfied Case E, which would have required him inter alia to have received sick pay for a period of 140 qualifying days. However, the only period of sick leave referred to by him on page 44 was from May 2008 to August 2008, following his diagnosis with obstructive sleep apnoea which prevented him from driving. There was no reference to any earlier periods of sick leave or to any later period which might meet the threshold of 140 days. Even assuming in his favour that he was on sick leave from 1 May 2008 to 31 August 2008, that was only 123 days, which was 2½ working weeks shy of the qualifying 140 day target. It was not a case of having received sick pay for, say, 135 days and then there being a question of having a week off for a cold or similar ailment. Any later period of sick leave after the accident in November 2008 could not be taken into account because there were more than 8 weeks between 31 August and 1 November, so that any statutory sick pay which may have been paid in November 2008 could not for the purposes of Case E have been linked to a period of statutory sick pay which ended in August 2008.

65. She argued that he had not therefore advanced any positive case that he met Case E in the tax year 2008-2009. This was not a case under either s.16 or s.19 of the TCA in which the burden of proof was held to be on HMRC. It was not the case that, if the s.18 decision were not reviewed, nevertheless HMRC was saddled with the consequences of the decision until the claimant either ceased to be entitled to working tax credit at all or ceased to have a disability which put him at a disadvantage in getting a job. The s.18 decision on entitlement did not clarify which of the Cases in regulation 9 was the basis of the entitlement and the decision maker in the following

tax year would still be obliged to investigate which of the Cases was the basis of the entitlement.

66. Nor was it right to say that the claimant was now unable to prove his entitlement because of HMRC's failure to check crucial documentary evidence at the time. He had been asked for relevant information in 2010 (page 4) and on 27 July 2011 was expressly provided with the Disability Helpsheet which clearly set out the criteria for entitlement to the disability element. It was open to him then to point out, if such were the case, that he had had a period of sick leave in 2008-2009 which brought him within Case E; the fact that he did not do so indicated that, on the balance of probabilities, it was not the case.

Conclusion on Case E

67. Although Mr Abbott accepted that this was not a s.19 appeal, he submitted argued that the burden of proof was the same, and was thus on HMRC, because no in-time review under s.19 had ever been undertaken. Ms Ward did not argue that the burden of proof was on the claimant, but argued that the evidence here established that the requirements of Case E had not been fulfilled.

68. In my judgment, if the burden of proof is on HMRC, the evidence establishes on the balance of probabilities that claimant was not in receipt of statutory sick pay for 140 qualifying days. (If the burden of proof is on the claimant, the evidence does not establish on the balance of probabilities that claimant was in receipt of statutory sick pay for 140 qualifying days.) There is no evidence that the claimant was off sick and receiving statutory sick pay before May 2008. Assuming in his favour that the period of absence from May to August of that year ran from 1 May 2008 to 31 August 2008, that period would only have amounted to 123 days.

69. The only specifically identified period of sickness after that was the 4 week period after the road traffic accident in November 2008. That 4 week period could not, however, be aggregated with the earlier 123 days because there were more than 8 weeks which had elapsed before the second period of absence from work began (even assuming, again in the claimant's favour, that the second period of absence from work began on 1 November 2008).

70. As against that evidence there is the wholly unspecific statement that between 2008 and 2011 the claimant "was on the sick and receiving SSP many times". That, however, is inconsistent with the much more specific statement in the letter of 6 March 2017 to the effect that

> "Returning to work in August 2008, I was soon to be on the sick again for another 4 weeks after the accident until I was forced back to work by my employer who threaten[ed] me with the sack while I was on the sick.
>
> Although I was not fit for work, due to financial difficulties and the threat of the sack still ringing in my ears, I returned to work on light duties for 3 or 4 days a week until I retired in December 2011 when I was eligible for pension credits and my working life was over".

71. In my judgment, that specific evidence has more weight and is to be preferred to the wholly unspecific evidence in the submission of 25 June 2017.

72. On the balance of probabilities I am therefore satisfied that the claimant was not in receipt of statutory sick pay for 140 qualifying days in the tax year 2008-2009.

73. Moreover, even if the evidence established that there were 140 qualifying days, there was no evidence that the last of those days fell within the preceding 56 days before 6 April 2009 and the commencement of the 2009-2010 tax year. Accordingly, he did not qualify for the disability element of working tax credit by virtue of having satisfied the requirements of Case E at some earlier time.

74. Although Mr Abbott submitted that HMRC should have checked its records and should not seek to rely on the claimant now to produce evidence of his sick pay entitlement almost a decade after the event, he was in fact asked for evidence of his disability on 17 September 2010 (page 4). Although the precise terms of his letter of 1 October 2010 are no longer extant, it is apparent that whatever answer he gave did not satisfy HMRC as to his entitlement since on 12 October 2010 it decided that the claimant did not meet all three conditions for the disability element of working tax credit

75. In addition, when the matter was still live and the claimant would have been likely still to have the records of his sick pay entitlement, he was sent the Disability Helpsheet on 27 July 2011. On the cover that Helpsheet stated that

> *"To qualify for the disability element of Working Tax Credit you must be able to answer yes to all three conditions below.*
>
> ***Condition 1 Do you usually work for 16 hours or more a week?***
>
> ***Condition 2 Do you have a disability that meets one of the descriptors in Table 1? (page 2)?***
>
> ***Condition 3 Can you satisfy one of the qualifying benefit conditions in Table 2a or 2b? (pages 5-11)***
>
> *If you have answered no to any of the three conditions you will not be entitled to the disability element of Working Tax Credit".*

76. On pages 5 and 6 appeared in tabular form

> *"**Statutory Sick Pay** Have received for 140 days or more, with the last day of receipt falling within the 56 days before you claimed the disability element*
>
> ***and***
>
> *your disability is likely to last for at least six months or the rest of your life*
>
> ***and***
>
> *your gross earnings are at least 20% less than they were before the disability began, with a minimum reduction of £15 (gross) a week".*

77. The claimant was thus given the opportunity to produce evidence to demonstrate that he had been in receipt of 140 qualifying days of statutory sick pay; the fact that he did not do so when expressly given that opportunity suggests that he had not in fact done so.

78. Although HMRC's power to inquire into the claimant's entitlement for the tax year 2008-2009 expired on 31 July 2010, that does not mean that HMRC was precluded from determining his entitlement to the disability element in the following tax year. In the following tax year HMRC would be entitled to proceed on the footing that the previous year's assessment was correct in the absence of any evidence to the contrary. If, however, such evidence to the contrary did emerge and so it was found that the claimant did not satisfy the requirements of Case A, B, E or F at some earlier time, the entitlement for the current year could be adjusted accordingly.

79. That is consistent with the use of the present tense in regulation 9(1)(c) of the 2002 Regulations and reflects the annual nature of the tax credit entitlement in which matters can be considered afresh in each year, as happened in this case. Since no s.19 inquiry was opened before 31 July 2010, the entitlement in the tax year 2008-2009 remained as it was. The principle of finality enshrined in s.18(11) was respected and that previous year's entitlement was unaffected by any subsequent decision which HMRC took when deciding the level of entitlement in a later year.

80. I am therefore satisfied that the claimant did not qualify for the disability element of working tax credit under Case E of the 2002 Regulations in the 2009-2010 tax year.

Case G

81. However, quite apart from the question of entitlement under Case E, Mr Abbott submitted that the claimant was entitled to the disability element for another reason, namely that he was entitled under Case G of the 2002 Regulations. He submitted that the change in the text of regulation 9 in the Regulations in 2003 was not merely textual, but effected a substantive change to the legal position.

82. In short, he submitted that there was a significant difference between the choice of the word "qualified" in the original version of the 2002 Regulations and "entitled" used in the amended version in 2003.

83. The original text of regulation 9 was enacted by SI 2002/2005 with effect from 1 August 2002. So far as material, it read as follows

> **"Disability element and workers who are to be treated as at a disadvantage in getting a job**
>
> 9(1) The determination of the maximum rate must include the disability element, if any person in respect of whom the claim is made—
>
> (a) undertakes qualifying remunerative work for at least 16 hours per week;
>
> (b) satisfies paragraph (2); and—
>
> (c) has any of the disabilities listed in Part 1 of Schedule 1, or, in the case of an initial claim, satisfies the condition in Part 2 of Schedule 1.
>
> (2) A person satisfies this paragraph in any of the Cases listed below.
>
> [Cases A-F]
>
> (3) If—
>
> (a) a claim for working tax credit is made or treated as made not later than the end of 8 weeks commencing with the last day of the claimant's previous award,
>
> (b) on the claim which resulted in that award the claimant qualified for the disability element by virtue of falling within Case A, Case B or Case E of paragraph (2), and
>
> (c) the claimant satisfies regulation 9(1)(a),
>
> he shall be treated on the claim mentioned in sub-paragraph (a) as if he still qualified as mentioned in sub-paragraph (b)".

84. That version was amended and replaced by the present version of regulation 9 (which is set out in paragraph 37 above) by SI 2003/701, which was both made and laid before Parliament on 17 March 2003, with effect from 6 April 2003 (the commencement date of the TCA itself).

85. Regulation 9(1)(a) (the qualifying remunerative work condition) remained the same. Regulation 9(1)(c) (the disability condition) remained substantively the same, but became regulation 9(1)(b). Regulation 9(1)(b) (the qualifying benefit condition) was recast as regulation 9(1)(c). The previous version was cast in terms of satisfying

paragraph (2) which set out Cases A to F; the subsequent version required satisfaction of any of the Cases A to G on a day for which the maximum rate was determined in accordance with the 2002 Regulations. What was originally regulation 9(3) was recast as Case G in regulation 9(8).

86. For ease of reference I shall set out the two versions of the key regulation – the old regulation 9(3) and the current regulation 9(8) – one immediately after the other (with emphasis added) thus:

Original (1 August 2002 to 5 April 2003)

> "(3) If—
>
> (a) a claim for working tax credit is made or treated as made not later than the end of 8 weeks commencing with the last day of the claimant's previous award,
>
> (b) on the claim which resulted in that award the claimant *qualified* for the disability element by virtue of falling within Case A, Case B or Case E of paragraph (2), and
>
> (c) the claimant satisfies regulation 9(1)(a),
>
> he shall be *treated* on the claim mentioned in sub-paragraph (a) *as if he still qualified* as mentioned in sub-paragraph (b)".

Current (since 6 April 2003)

> "(8) Case G is where the person was *entitled*, for at least one day in the preceding 56 days, to the disability element of working tax credit or to disabled person's tax credit by *virtue of* his having satisfied the requirements of Case A, B, E or F *at some earlier time.*
>
> For the purposes of this Case a person is *treated as having an entitlement* to the disability element of working tax credit if that element is taken into account in determining the rate at which the person is entitled to a tax credit".

87. The original regulation 9(3) was cast in terms of three conditions and a conclusion; regulation 9(8) consists of two sentences. The former uses the language of "qualification", the latter the language of "entitlement". Regulation 9(8) stipulates

entitlement to the disability element of working tax credit by virtue of having satisfied the requirements of Cases A, B, E or F "at some earlier time", a phrase which does not appear in regulation 9(3), which instead stipulated that if, on the claim which resulted in the award of working tax credit the claimant *qualified* for the disability element by virtue of falling within Case A, Case B or Case E (but not Case F), the claimant was to be treated on the claim as if he still qualified as mentioned in sub-paragraph (b).

88. Mr Abbott submitted that the amendment reflected an intentional removal by legislators of the link between what a recipient's entitlement *should have been*, if determined correctly, in tax year one and his entitlement in tax year two. The amended version of the 2002 Regulations instead favoured the linking of a recipient's *actual* entitlement in tax year one, be it correct or otherwise, and his entitlement in tax year two. The use of the word "entitlement" in the amended version of the Regulations and the language surrounding its use suggested that it was merely necessary to have been awarded the disability element in the previous tax year regardless of whether or not the award was correctly made (subject to it not having been changed under s.19).

89. He submitted that the evidence for that interpretation was threefold:

(i) the legislators had actively changed the word used from "qualified" to "entitled". They would not have done so and taken an active step in amending the terminology used were there not a relevant difference in the meanings of the words

(ii) the legislators have actively added a definition to the word "entitled", whereas "qualified" was previously undefined, which suggested that the purpose was to clarify its meaning

(iii) that construction of the meaning of "entitled", so as not to read "correctly entitled", was consistent with the use of the word "conclusive" in s.18(11) of the TCA and the principle of finality and was in any case the fairer interpretation on the grounds of public policy. By definition, those who received working tax credits were on low income, and might have children and/or disabilities, making maintaining a job

more difficult. Using the time limits in s. 19(1), the TCA clearly sought to limit HMRC's power to inquire into previous decisions once a certain amount of time had passed after the "conclusive" s.18 decision had been issued. That was in order to afford recipients of such credit some level of financial certainty. The correct construction of "entitled" should be one which spoke to that intention as well. Case G clearly intended to support recipients with the continuation of an entitlement, for one year alone, following a decision, particularly since the decision on entitlement is made after the end of the tax year to which it related and in which the tax credits were received.

90. He noted that HMRC's analysis conceded that "Case G was indeed concerned with whether the disability element was present in the calculation", but that it was not "intended to (and did not) oblige HMRC to perpetuate an error in the previous year's assessment".

91. In his original written submission he had submitted that the legislation had capped the extent to which HMRC was obliged to perpetuate an error by not including Case G in the list of cases which could be used to satisfy Case G itself, and instead listing only Cases A, B, E and F. As a consequence, Case G could only continue a potentially incorrect entitlement for a maximum of one tax year following the mistake. Such drafting struck a reasonable balance between limiting the number of years for which a recipient could incorrectly receive the disability element, whilst also affording such a recipient a reasonable level of certainty and security with respect to the credits which he could receive, without the risk of being required to pay back a year of tax credits if a mistake were found.

92. However, he resiled from that submission in the light of the decision of Judge Poynter in ***PW v. Her Majesty's Revenue & Customs*** [2018] UKUT 12 (AAC) (which Ms Ward had referred to in her skeleton argument) in which the judge had held that, once the disability element has been awarded under Case A, it continues in payment on an indefinite basis until the claimant either ceases to be entitled to working tax credit or ceases to have a disability which puts him at a disadvantage in getting a job. Mr Abbott's primary submission was that the meaning and effect of regulation 9(8) was, as he had first submitted, essentially different from the meaning

and effect of the original regulation 9(3), but he accepted that ***PW*** was correctly decided and that once the disability element had been awarded, it continued in payment on an indefinite basis until the claimant ceased to be entitled to working tax credit or ceased to have a disability. He did, however, point out that on the facts of this case the element of perpetuation was not made out since the claimant had retired from work in December 2011 (page 44), although he accepted that it might potentially arise in other cases. His secondary (and alternative) submission, in order to avoid the problem of indefinite perpetuation, was that on that point ***PW*** was wrongly decided and that Case G only had a limited effect in circumstances where a claimant was entitled, for at least one day in the preceding 56 days, to the disability element of working tax credit by virtue of having satisfied the requirements of one of the requisite Cases within that 56 day period, so that "at some earlier time" was synonymous with the preceding 56 days.

93. By contrast, Ms Ward submitted that HMRC was not obliged to perpetuate an error in the previous year's assessment and, if it appeared that the disability element had been included in error, it should not be included in the assessment of entitlement for the next year.

94. Contrary to the claimant's argument, she submitted that there was no evidence that the change in the terminology used in regulation 9 from "qualified" in the original version to "entitled" in the amended version reflected an intentional removal by legislators of the link between what a recipient's entitlement should have been, if determined correctly, in tax year one and his entitlement in tax year two. There was no statement of policy at the time as to the reasons behind the change. It was at least as likely to have been intended to bring the language of regulation 9 into line with that of the TCA itself, which referred to awards and entitlement, but not to "qualifying" for credits.

95. Regulation 9(3) as originally drafted mirrored s.11(3) of the Social Security Administration Act 1992 which provided for repeat claims for disabled person's tax credit under s.129 of the Social Security Contributions and Benefits Act 1992. The change from the use of the term "qualifies" or "qualified" in those provisions to

"entitled" in the amended regulation 9 was consistent with an intention to align the terminology in regulation 9 to that of the 2002 Act in general.

96. S.11(3), in the version in force from 5 October 1999 to 7 April 2003, provided that

> "(3) If—
>
> (a) a repeat claim is made or treated as made not later than the end of the period of 8 weeks commencing with the last day of the claimant's previous award; and
>
> (b) on the claim which resulted in that award …
>
> (i) he qualified under section 129(2) of the Contributions and Benefits Act by virtue of paragraph (a) of that subsection; or if there being payable to him a benefit under an enactment having effect in Northern Ireland and corresponding to a benefit mentioned in that paragraph; or
>
> (ii) he qualified under subsection (2C) of that section or of section 128 of the Northern Ireland Contributions and Benefits Act,
>
> he shall be treated on the repeat claim as if he still so qualified".

97. S.129, in the version in force from 3 November to 7 April 2003, provided that

> "(2) Subject to subsection (4) below, a person qualifies under this subsection if—
>
> (a) for one or more of the 182 days immediately preceding the date when the claim for a disabled person's tax credit is made or is treated as made there was payable to him one or more of the following—
>
> (i) the higher rate of short-term incapacity benefit or long-term incapacity benefit;
>
> (ii) income support, an income-based jobseeker's allowance, housing benefit or community charge benefit,
>
> or a corresponding benefit under any enactment having effect in Northern Ireland;

> (b) when the claim for a disability working allowance is made or is treated as made, there is payable to him one or more of the following—
>
> (i) an attendance allowance;
>
> (ii) a disability living allowance;
>
> (iii) an increase of disablement pension under section 104 above;
>
> (iv) an analogous pension increase under a war pension scheme or an industrial injuries scheme,
>
> or a corresponding benefit under any enactment having effect in Northern Ireland …".

98. HMRC's position was that the change in terminology was at best neutral on the issue of statutory interpretation.

99. Ms Ward submitted that the use of the word "entitled" in regulation 9(8) was in fact necessary in order that entitlement to the disability element was preserved for the future in cases where, due to the claimant's income, no extra amount was actually payable in a given year. In that respect, its meaning in that context was distinguished from s.18(11) of the TCA, which applied in relation to whether a person was entitled to a tax credit for the year and, if so, the amount to which he was entitled. That did not assist in determining whether, if a person was wrongly considered to be entitled to the disability element of working tax credit (in the sense that it was taken into account in determining his maximum entitlement), regulation 9(8) was properly to be interpreted as requiring that mistake to be perpetuated in subsequent tax years.

100. That interpretation was not inconsistent with s.18(11) which applied in relation to entitlement to tax credit and the amount of that entitlement, not to every element in the process by which that amount was calculated.

101. Moreover, the claimant was wrong to submit that the effect of his construction, if correct, would only be to perpetuate the error for one year. The effect of regulation 9(8) was, as explained by Judge Poynter in ***PW v. Her Majesty's Revenue & Customs*** [2018] UKUT 12 (AAC) at [6]-[7]:

> "6. Once the disability element has been awarded under Case A, it continues in payment on an indefinite basis until the claimant either ceases to be entitled to WTC or ceases to have a disability which puts her or him at a disadvantage in getting a job. That is because, as soon as such a claimant ceases to be in Case A, she or he instead immediately falls within Case G.
>
> 7. The way in which the claimant puts the point is to say that previous receipt of the disability element is itself a qualifying benefit for the disability element. That is not how a lawyer would explain it, and it does not apply where the disability element was previously awarded under Cases C or D. However, for those in Cases A, B, E and F, it is a very good plain English summary of what I have decided."

102. Although ***PW*** was a case about Case A, HMRC argued that there was no basis on which to distinguish any of the other Cases (B, E and F) listed in Case G.

103. HMRC accordingly submitted that an interpretation of regulation 9 which did not require a clear error to be perpetuated indefinitely was to be preferred. The Upper Tribunal was not considering whether the claimant was in any way at fault nor whether he should be made to repay the disability element. For the avoidance of doubt, however, he was wrong to submit that the expiry of the time for inquiring under s.19 of the TCA prevented HMRC from looking again at entitlement for the tax year 2008-2009 in any circumstances: the power in s.20(4) was available in case of fraud or neglect, which might in certain circumstances encompass errors in competing the application form.

Conclusion on Case G

104. It seems to me that the argument of Ms Ward is to be preferred to that of Mr Abbott. There is no evidence that the amendment of the text of the regulation from "qualified" in the original version to "entitled" in the amended version reflected an intentional removal by legislators of the link between what a recipient's entitlement should have been, if determined correctly, in tax year one and his entitlement in tax year two. There was no statement of policy as to the reason behind such a change of the sort which one would have expected to find if it had been intended to effect a substantive change by reason of the amendment of the legislation even before it had

come into force. The more likely explanation for the amendment from the use of the term "qualifies" or "qualified" in the original version of the regulation to the term "entitled" in the amended regulation 9 is that it was intended to align the terminology in regulation 9 to that of the 2002 Act in general.

105. As Judge Wright explained in ***HO v. Her Majesty's Revenue and Customs (TC)*** [2018] UKUT 105 (AAC) at [13], the concept of "entitlement" in the context of tax credits is fundamentally different from that which applies in other social security schemes:

> "I have commented before – in the *DG* case and *ME –v- HMRC* (TC) [2017] UKUT 0227 (AAC) – on the different adjudicatory world which tax credits inhabit under the Tax Credits Act 2002 ("TCA") when compared with the other schemes for social security within Great Britain. Perhaps most notably, the concept of "entitlement" to either working or child tax credit is something that only arises at the end of the tax year for which any award has been made. What is legally in place during the course of the tax year is simply an "award" of tax credit and once made the award may only be changed during the year for which it has been made in certain defined statutory circumstances. This difference of approach is both fundamental and deliberate: see paragraphs 28 and 29 of *ZM and AB –v- HMRC* (TC) [2013] UKUT 547 (AAC); [2014] AACR 17."

106. The answers to Mr Abbott's threefold submission in paragraph 89 are, in my judgment, that

(i) the intention of the legislators in changing the word used from "qualified" to "entitled" is more likely to have been to align the terminology in regulation 9 to that of the 2002 Act in general, which is drafted in terms of "entitlement", rather than to effect a substantive difference in the regulation as amended

(ii) whilst a definition of the word "entitled" is included in the second sentence of paragraph 9(8), whereas the term "qualified" was previously undefined in the original regulation 9(3), the purpose of the second sentence in that paragraph was to clarify rather than to alter its meaning

(iii) the construction of the meaning of "entitled", so as not to mean "correctly entitled", is a more natural construction than the alternative one by which "entitled" effectively means "incorrectly entitled".

107. What the second paragraph of Case G is designed to do is to provide certainty in those cases where the entitlement conditions have been found to have been satisfied for a particular year, but no disability element has actually been paid, or was due, in that year as a result of the level of the claimant's income (or, in the case of a joint claim, the income of both claimants). The second paragraph ensures that the focus is on the calculation of the maximum rate of the entitlement applicable in the claimant's case for the year (such being the applicable amount before any adjustment due on account of income) rather than what was actually paid or the actual amount due. In that respect, Case G is indeed concerned with whether the disability element was present in the calculation.

108. Mr Abbott submitted that the claimant's position was consistent with the use of the word "conclusive" in s.18(11) of the TCA and the principle of finality. It is, however, important to note that what s.18(11) provides is that

> "Subject to sections 19, 20, 21A and 21B and regulations under section 21 (and to any revision under subsection (5) ... and any appeal)—
>
> [the decision]
>
> is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year."

That provision is not inconsistent with the position which I have set out in paragraphs 104 to 107 above. In other words, the conclusivity provided by s.18(11) applies in relation to entitlement to tax credit and the amount of the entitlement, but not to every element of the process by which that amount is calculated.

109. Mr Abbott had originally submitted that the claimant's argument was the fairer interpretation on the grounds of public policy. Using the time limits in s. 19(1), the

TCA clearly sought to limit HMRC's power to inquire into previous decisions once a certain amount of time had passed after the "conclusive" s.18 decision had been issued in order to afford recipients of such credit some level of financial certainty. On that footing Case G was intended to support recipients with the continuation of an entitlement, but for one year alone, following a decision, particularly since the decision on entitlement was made after the end of the tax year to which it related and in which the tax credits were received.

110. That argument, in the form in which he originally presented it in his written submission, was he accepted inconsistent with Judge Poynter's decision in ***PW***. Once the disability element has been awarded, whether under Case A, B, E or F, it continues in payment on an indefinite basis until the claimant either ceases to be entitled to working tax credit or ceases to have a disability which puts him at a disadvantage in getting a job because as soon as such a claimant ceases to be within that Case he instead immediately falls within Case G. As Judge Poynter went on to explain with regard to the facts of that case

> "28 ... the claimant was originally awarded the disability element because she had been on ESA immediately before she claimed WTC, *i.e.*, under Case A.
>
> 29 In those circumstances, regulation 9(1) and (8) of the WTC Regulations has the effect that the maximum rate of her WTC must continue to include the disability element unless and until she ceases to be entitled to WTC altogether or ceases to have a disability which puts her at a disadvantage in getting a job.
>
> 30 The claimant told the FTT that that was the case, although she did not, and, as a non-lawyer, could not have been expected to, refer in terms to Case G and cite regulation 9(8) of the WTC Regulations."

111. Although it was very much Mr Abbott's secondary submission that ***PW*** was wrongly decided on that point, I am satisfied that Judge Poynter was right in his exposition of the law. He very carefully set out the analysis which led to the result in paragraph 29 of his decision in the following paragraphs, considering separately the position as at the date of the claim for working tax credit, on the 183rd day of entitlement and 56 days thereafter.

112. His consideration of the entitlement as at the date of the claim calls for no further comment, but because of the error of the First-tier Tribunal in the case before him in apparently concluding that a claimant could only be entitled to the disability element by receipt in the previous 182 days of a benefit for incapacity, or limited capability, for work or by current receipt of a disability benefit, he continued

> "*On the 183rd day of entitlement to WTC*
>
> 36 Next consider the claimant's position on 30 January 2013, which is the 183rd day after 31 July 2012, the last day on which she was entitled to ESA.
>
> 37 For the first time, she no longer fell within Case A because she had not been in receipt of any of the benefits listed in regulation 9(2) for at least one day in the preceding 182 days.
>
> 38 However, that did not mean that her maximum rate no longer included the disability element because falling within Case A is not the only way of satisfying regulation 9(1)(c). There are six other Cases into which she might have fallen, all of which needed to be considered before HMRC could legitimately amend the award by removing the disability element: see, by analogy, *R(IS) 10/05* at paragraphs 15-16.
>
> 39 Consideration of those other cases shows that, on 30 January 2013, the claimant moved from Case A to Case G
>
> 40 That case applies where, for at least one day in the preceding 56 days, a claimant was entitled to the disability element of working tax credit by virtue of having satisfied the requirements of Case A, B, E or F "at some earlier time": see regulation 9(8).
>
> 41 The phrase "at some earlier time" must refer back to the words "a day for which the maximum rate is determined in accordance with these Regulations" in regulation 9(1)(c). It cannot refer back to the day (or each of the days) in the preceding 56 days that are mentioned earlier in the same paragraph.
>
> 42 Entitlement under Cases A, B, E and F for any particular day depends on the satisfaction of the requirements of those cases on that particular day, not on some previous day. If the phrase "at some earlier time" meant that the claimant had to have been entitled under one of those cases by virtue of

> having satisfied the requirements of that case at a time before the day of entitlement, Case G could never apply.
>
> 43 So when the claimant's maximum rate for 30 January 2013 is determined, "at some earlier time" includes any period up to and including 29 January 2013.
>
> 44 Therefore, on 30 January 2013, the claimant fell within Case G because, on the previous day and during each of the 55 days before that, she had been entitled to the disability element by virtue of her having satisfied the requirements of Case A, and that 56-day period amounted to "some earlier time" because it was before 30 January 2013.

113. He then considered the position fifty-six days later:

> "*Fifty-six days later*
>
> 45 Finally, consider the claimant's position on 26 March 2013 which was 56 days from 30 January 2013 (including that date).
>
> 46 It can no longer be said that she satisfied the requirements of Case A, B, E or F "for at least one day in the preceding 56 days".
>
> 47 But that does not matter, because Case G does not require that the claimant fell within one of those Cases during one of the preceding 56 days. It only requires that, for one day in that period, she should have been entitled to the disability element by virtue of having satisfied the requirements of Case A, B, E or F at some earlier time.
>
> 48 Entitlement under Case G is itself entitlement to the disability element by virtue of having satisfied the requirements of Case A, B, E or F at some earlier time. If the claimant had not satisfied Case A, B, E or F at some earlier time, she would not have satisfied Case G.
>
> 49 Therefore, other things being equal, entitlement to the disability element under Case G on any particular day gives rise to entitlement under Case G on the following day and the 55 days after that, and so on indefinitely."

114. By way of coda he added

> "52 It may be helpful if I make two final points.
>
> 53 The first is that although the present appeal concerns previous entitlement under Case A by virtue of receipt of a qualifying benefit, the result is the same for previous entitlement under Cases B, [E] and F.
>
> 54 The second is that if a claimant whose maximum rate of WTC includes the disability element ceases to be entitled to WTC (or to meet the criteria in Schedule 1) but becomes entitled again (or meets the criteria again) within the 56 day period specified in Case G, entitlement to the disability element revives because the claimant will continue to fall within Case G."

(The text of paragraph 53 as printed refers to Cases B, *D* and F, but that must be a misprint for Cases B, *E* and F: see paragraph 7 of ***PW***.)

115. What that analysis makes clear is that, whilst in certain circumstances the preceding 56 days may coincide with "some earlier time" (as in paragraph 44 of ***PW***), they are not coterminous or synonymous with it (as paragraphs 46 to 48 make clear).

116. As Judge Poynter explained in the course of his analysis at paragraph 41, the phrase "at some earlier time" must refer back to the words "a day for which the maximum rate is determined in accordance with these Regulations" in regulation 9(1)(c). It cannot refer back to the day (or each of the days) in the preceding 56 days which are mentioned earlier in the same paragraph.

117. I am also therefore satisfied that the claimant did not qualify for the disability element of working tax credit on the true construction of Case G of the 2002 Regulations. Entitlement under Case G is itself entitlement to the disability element by virtue of having satisfied the requirements of Case E at some earlier time. If the claimant had not satisfied Case E at some earlier time, as in fact he did not, he could not have satisfied Case G.

Conclusion

118. The original submission of HMRC before the appeal tribunal proceeded on the footing that the only issue under consideration was whether the claimant was

receiving qualifying benefit in 2009-2010, i.e. consideration was being limited to Case C. By simply adopting that submission, I am satisfied that the appeal tribunal fell into error. The tribunal should have considered entitlement under all the Cases in regulation 9 of the 2002 Regulations. If it had done so, when it came to Case G it would have been uncertain whether or not the claimant had been in receipt of the disability element in 2008-2009 as the submission was silent on the issue. In those circumstances, the tribunal should have asked HMRC for further information on the point. In failing to do so, and by limiting its consideration to Case C, the tribunal erred in law.

119. As part of its inquisitorial function, the appeal tribunal should have investigated the claimant's case and not simply have accepted and adopted what HMRC had submitted. Pursuant to that inquisitorial jurisdiction, the tribunal should have considered entitlement under all the Cases in regulation 9 of the 2002 Regulations, of which Cases E and G were potentially engaged. As Judge Poynter said in ***PW***

> "31 As part of the FTT's enabling role, the judge should have investigated what the claimant said and addressed her argument. Instead, he appears simply to have ignored it. His written statement of reasons does not refer to the law he had to apply, or to the existence of the different Cases. It gives the impression that the only way in which a person can be entitled to the disability element is by receipt in the previous 182 days of a benefit for incapacity, or limited capability, for work or by current receipt of a disability benefit. That is not the case. And a brief look at the commentary in the annotated volumes of social security legislation that are provided to all judges in the Social Entitlement Chamber would have been enough to alert the Judge to the fact that it is not the case."

120. For these reasons I am satisfied that the appeal tribunal made an error of law and that the decision of the appeal tribunal should be set aside.

121. I have considered whether the appropriate course, in the event that I found that the tribunal fell into an error of law, but one which did not affect the outcome of the entitlement decision, might simply be to dismiss the appeal. The decision notice simply states that

> "1. The appeal is refused.
> 2. The decision made by the Respondent on 09/02/11 is confirmed.
> 3. In the 2009-10 tax year [the claimant and his wife] were entitled to £1,697.14 Working Tax Credits and £0.00 Child Tax Credits for the period 06/04/2009 to 05/04/2010. This was because HMRC were not satisfied that [he] was entitled to the disability element of WTC".

Although it is not clear on the face of the decision notice, it is apparent from the statement of reasons that that decision was made, as I have explained, on the erroneous basis of non-compliance with Case C (which was not in fact in issue). I consider that the correct course is to set aside the erroneous decision and remake the decision which should have been made, explicitly making clear the basis on which it is made. As I explained in paragraph 35 above, neither side was seeking a remission and rehearing of the appeal after this length of time.

122. I therefore allow the appeal and set aside the decision of the appeal tribunal. I remake the decision which the appeal tribunal should have made. The claimant was not entitled to the disability element of working tax credit for the tax year 2009-2010 because he did not qualify under either Case E or Case G of the 2002 Regulations.

123. The substantive effect of that decision is that the claimant still loses in that he was not entitled to the disability element of working tax credit for that year, not for the reasons given by the appeal tribunal, which effectively only considered Case C (which was not in fact in issue), but because he did not qualify under either Case E or Case G of the 2002 Regulations.

124. As I explained in paragraphs 25 to 27 above, the decision under appeal was concerned with the question of whether the claimant was entitled to the disability element of working tax credit for the tax year 2009-2010, not the question of the recoverability of the overpayment of £2,526.41 and there is no right of appeal under the TCA against an overpayment decision.

125. However, as Ms Ward accepted on behalf of HMRC there are avenues open to the claimant were he to be required to repay the overpayment, including concession

under HMRC's Code of Practice 26, recourse to the Ombudsman and, if necessary, judicial review.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **25 September 2018**