

Appeal No. CE/1882/2018

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Before Upper Tribunal Judge Poynter

DECISION

The appeal succeeds.

The making of the decision of the First-tier Tribunal given at Fox Court on 25 April 2018 under reference SC242/18/02080 involved the making of a material error on a point of law.

That decision is set aside.

I remake the decision in the following terms:

- 1. The appeal is allowed.**
- 2. The decision of the Secretary of State issued on 1 November 2017 is set aside.**
- 3. For the purposes of the claim for employment and support allowance that he made on 18 September 2017, the claimant was not receiving education.**
- 4. Therefore section 1(2)(b) of, and paragraph 6(1)(g) of Part 2 of Schedule 2 to, the Welfare Reform Act 2007 do not exclude him from entitlement to employment and support allowance.**
- 5. The Secretary of State is directed to reconsider the claimant's claim on that basis and to give a final decision as to his entitlement, if any, to employment and support allowance from and including the first date covered by his claim.**

REASONS FOR DECISION

Introduction

1. The claimant appeals with my permission, granted following an oral hearing, against the above decision of the First-tier Tribunal, which confirmed a decision made by the Secretary of State on 1 November 2017. The Secretary of State had decided that the claimant was receiving education and so was excluded from entitlement to employment and support allowance ("ESA").

2. The claimant's case is that he was not receiving education because although he was enrolled on a course of study, he had agreed with his University that—for reasons of ill-health—he would "intermit" his studies for the 2017/18 academic year.

3. The Secretary of State's representative supports the appeal and has invited me to set aside the Tribunal's decision and re-make it in the claimant's favour. I have accordingly done so.

Reasons for setting aside the First-tier Tribunal's decision

4. In those circumstances, it is unnecessary for me to give detailed reasons. However, I wish to do so because the point may be of general importance. What I say below closely follows the reasons I gave when giving permission to appeal.

The relevant law

5. I will begin by setting out the law under which the decision was reached.

The Welfare Reform Act 2007

6. ESA was created by an Act of Parliament, the Welfare Reform Act 2007 ("the Act"). So far as is relevant to this case, the principal conditions of entitlement to that benefit are set out in section 1 of that Act. They are as follows:

"Employment and support allowance

1.—(1) An allowance, to be known as an employment and support allowance, shall be payable in accordance with the provisions of this Part.

(2) Subject to the provisions of this Part, a claimant is entitled to an employment and support allowance if he satisfies the basic conditions and either-

- (a) the first and the second conditions set out in Part 1 of Schedule 1 (conditions relating to national insurance) or the third condition set out in that Part of that Schedule (condition relating to youth), or
- (b) the conditions set out in Part 2 of that Schedule (conditions relating to financial position).

(3) The basic conditions are that the claimant-

- (a) has limited capability for work,
- (b) is at least 16 years old,
- (c) has not reached pensionable age,
- (d) is in Great Britain,
- (e) is not entitled to income support, and
- (f) is not entitled to a jobseeker's allowance (and is not a member of a couple who are entitled to a joint-claim jobseeker's allowance)."

7. The evidence suggests that the claimant satisfies the basic conditions in section 1(3). (It has yet to be decided whether he had limited capability for work but, if it were to be established that he satisfied the other conditions of entitlement, he would be treated as satisfying condition (a) by regulation 30 of the Employment and Support Allowance Regulations 2008 ("the ESA Regulations") as long as he continued to provide medical certificates, which I understand to be the case.)

8. The legal question that the First-tier Tribunal had to decide was whether he also satisfied either condition (a) or condition (b) in section 1(2). If the answer to that question is no, then he is not entitled to ESA because the requirements of section 1(2) and 1(3) are cumulative

9. As regards section 1(2)(a), the claimant was too old, at 49, to satisfy the "condition relating to youth" (and, in any event, it has not been possible to make a new claim based on that condition since 1 May 2012: see section 1(3A)). Further, he did not meet the "conditions relating to national insurance".

10. Focussing, then, on section 1(2)(b), the "conditions relating to financial position" in Part 2 of Schedule 1 to the Act are (again so far as relevant) as follows:

"6.-(1) The conditions are that the claimant—

- (a) has an income which does not exceed the applicable amount or has no income;

- (b) does not have capital which, or a prescribed part of which, exceeds the prescribed amount;
- (c) is not entitled to state pension credit;
- (d) is not a member of a couple the other member of which is entitled to an income-related allowance, state pension credit, income support or an income-based jobseeker's allowance;
- (e) is not engaged in remunerative work;
- (f) is not a member of a couple the other member of which is engaged in remunerative work;
- (g) is not receiving education.

(2)-(3) ...

(4) Regulations may-

- (a) make provision about when, for the purposes of sub-paragraph (1)(g), a person is, or is not, to be treated as receiving education;
- (b) prescribe circumstances in which sub-paragraph (1)(g) does not apply.

(5) In this paragraph-

...

"education" has such meaning as may be prescribed;

...

(7)-(8) ..."

11. Again—although no formal means-test has been carried out—the current evidence suggests that the claimant probably meets conditions 6(1)(a)-(f). However, the Secretary of State's decision, confirmed by the First-tier Tribunal, was that he is not entitled to ESA because he does not meet the condition in paragraph 6(1)(g), namely that he "is not receiving education".

12. If one treats the phrase "is not receiving education" as having the meaning it would have in everyday conversation, most people would probably say that it applied to the claimant.

13. Although he was in the middle of a degree course, I do not understand it to be in dispute that—and, in any event, the uncontested evidence of the University which provided that course was that—he was not enrolled on the course and did not have to undertake any modules during the 2017/18 academic year. Looking at the matter as at the effective date of the claim and as at the date of the Secretary of State's decision, most people would probably have said that "had received education" in the past and "might receive education" again in the future but "is not receiving education" at present.

14. Unfortunately for the claimant, that does not necessarily help him because the phrase "is not receiving education" has a special meaning for the purposes of the ESA scheme and does not have the meaning it would have in everyday conversation.

15. Section 1(5) allows the Secretary of State to make regulations defining the word "education" for the purposes of the scheme. And, for the same purposes, section 1(4) allows him to make regulations about the circumstances in which "a person is, or is not, to be treated as receiving education". That provision allows the Secretary of State to make regulations that treat the claimant as "receiving education" even when he is not actually receiving education in the sense described in paragraphs 12 and 13 above.

The ESA Regulations

16. The Secretary of State has exercised the powers in section 1(4) and (5) to make Part 4 of the ESA Regulations.

17. "Education" is defined by regulation 14. Regulation 14(1) states:

"Meaning of education

14.—(1) Subject to regulations 15 and 16 [which only apply to people aged less than 20], for the purposes of paragraph 6 of Schedule 1 to the [Welfare Reform] Act [2007], "education" means a course of study to which paragraph (2) applies which is being undertaken at an educational establishment."

18. Paragraph (2) of regulation 14 is complex but, to summarise, refers to a "full-time course" of higher education that meets certain funding requirements. The claimant does not dispute that the course he was previously undertaking falls within paragraph (2). The University that provides that course is unquestionably "an educational establishment" within regulation 14(1).

19. But even though the course that the claimant was undertaking counted as "education" as defined by regulation 14, nothing I have mentioned so far treats him

as "receiving" such education during periods when he is not actually pursuing his studies.

20. The provision that the Secretary of State says has that effect is regulation 17. It is necessary to quote it in full:

"Courses of study

17.—(1) For the purposes of the definition of "education" in regulation 14, a person is to be regarded as undertaking a course of study—

- (a) subject to paragraph (2), in the case of a person undertaking a part of a modular course that would be a course of study for the purposes of these Regulations, for the period beginning on the day on which that part of the course starts and ending—
 - (i) on the last day on which the person is registered with the educational establishment as attending or undertaking that part as a full-time course of study; or
 - (ii) on such earlier date (if any) as the person finally abandons the course or is dismissed from it;
- (b) in any other case, throughout the period beginning on the date on which the person starts undertaking the course and ending on the last day of the course or on such earlier date (if any) as the person finally abandons it or is dismissed from it.

(2) For the purpose of sub-paragraph (a) of paragraph (1), the period referred to in that sub-paragraph includes—

- (a) where a person has failed examinations or has failed to successfully complete a module relating to a period when the person was attending or undertaking a part of the course as a course of study, any period in respect of which the person attends or undertakes the course for the purpose of retaking those examinations or that module;
- (b) any period of vacation within the period specified in that paragraph or immediately following that period except where the person has registered with the educational establishment to attend or undertake the final module in the course and the vacation immediately follows the last day on which the person is required to attend or undertake the course.

(3) In paragraph (1), "modular course" means a course of study which consists of two or more modules, the successful completion of a

specified number of which is required before a person is considered by the educational establishment to have completed the course."

21. For the sake of completeness, I should add that, under regulation 18, the requirement that a claimant "is not receiving education" does not apply to claimants who are entitled to disability living allowance, armed forces independence payment, or personal independence payment. However, as he candidly accepts, this does not assist the claimant: what prevented him from continuing with his course was a fluctuating illness that had relapsed, not a disability.

Where the First-tier Tribunal went wrong

22. In a nutshell, the First-tier Tribunal went wrong in law, by accepting (correctly) that the claimant's course was "modular" (see paragraph 6 of the written statement of reasons), and then, applying the test for non-modular courses in regulation 17(1)(b) rather than investigating the facts further to ascertain whether he had the benefit of the potentially more favourable rules for modular courses in regulation 17(1)(a).

23. That was unfortunate. The whole point of having a different rule for modular and non-modular courses is that—except during periods of vacation prior to the completion of the final module: see regulation 17(2)(b)—a person enrolled on a modular course is not "receiving education" during periods in which he is not undertaking any module or is only undertaking one or more modules on a part-time basis.

24. The error is therefore material and I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set the First-tier Tribunal's decision aside.

Reasons for re-making the decision

25. Having set the decision aside, I must then decide whether to re-make the decision myself or to remit the case to the First-tier Tribunal with directions for its reconsideration.

26. Both parties have submitted that I should re-make the decision in the claimant's favour, and I agree that that is the appropriate course.

Reasons for the re-made decision

27. I accept the First-tier Tribunal's finding that the claimant's course was modular.

28. On the basis of the evidence that the claimant gave me at oral the hearing of the application for permission to appeal and the documents that he subsequently submitted in satisfaction of my directions. I also find that, in this case, each year of study amounted to a "part" of a modular course.

29. The claimant told me, and I accept, that he completed his second year successfully (with the consequence that regulation 17(2)(a) does not apply) and that he never embarked on the next “part” of that modular course, namely the third and final year of study.

30. It follows that, when he claimed ESA, the claimant was not “undertaking a part of a modular course that would be a course of study for the purposes of these Regulations” within regulation 17(1)(a).

31. That gives rise to the question of when the previous part of the modular course ended.

32. That question is answered by regulation 17(1)(a): it ended on “the last day on which [he was] registered with the educational establishment as attending or undertaking [the previous] part as a full-time course of study”. That was on the last day of the claimant’s second year of study.

33. It follows that, when he claimed ESA:

- (a) the claimant was not a “a person [who] is to be regarded as undertaking a course of study” (see the opening words of regulation 17); and therefore
- (b) he was not receiving “education” as defined in regulation 14; and therefore
- (c) he satisfied the condition in paragraph 6(1)(g) of Part 2 of Schedule 1 to the Act and was not thereby excluded from entitlement to employment and support allowance.

Conclusion

34. For all those reasons, my decision is as set out on page 1.

Richard Poynter
Judge of the Upper Tribunal

21 March 2019

(Signed on the original)