IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001444-ULCW**
ADMINISTRATIVE APPEALS CHAMBER (formerly CUC/569/2021)

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

Between:

J.W.

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 20 April 2022
Decided on consideration of the papers

Representation:
Appellant: Mr Alex Jolley, Trafford Welfare Rights
Respondent: Mr Daniel Decker, DMA, Department for Work and Pensions

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 13 November 2020 under number SC946/20/00218 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and re-make the decision of the First-tier Tribunal as follows:

> *The claimant's appeal to the First-tier Tribunal is allowed.*
>
> *The claimant is entitled to the limited capability for work-related activity element in her Universal Credit claim from the beginning of her entitlement to that benefit (i.e. from 20 October 2019).*
>
> *The Secretary of State's decision of 15 November 2019 is accordingly revised.*

REASONS FOR DECISION

The issue raised by this appeal

1. This appeal concerns the circumstances in which entitlement to the Limited Capability for Work-Related Activity element can carry over from an award of Employment and Support Allowance into a new claim for Universal Credit where there is a gap in entitlement between those two benefits spanning several months.

The background to the appeal to the First-tier Tribunal

2. The bare facts of the case are relatively straightforward and not in dispute. For a period of some 10 years or so from about 2008 until 21 April 2019 the Appellant had been in receipt of income-related Employment and Support Allowance (IR-ESA) on behalf of herself and her partner. The Appellant had undergone a Work Capability Assessment (WCA) and had been found to have both limited capability for work (LCW) and limited capability for work-related activity (LCWRA). As such, she was placed in the ESA support group. On 22 April 2019, however, the Appellant's IR-ESA claim ended. This was because her partner had started working for more than 24 hours a week. The Appellant did not have the requisite national insurance contributions record and so she was not entitled to contribution-based ESA. Six months later the Appellant made a claim for Universal Credit (on 20 October 2019). She was not entitled to either form of ESA or to Universal Credit for the period between 22 April 2019 and 19 October 2019.

3. On claiming Universal Credit, it was quickly confirmed, following an assessment by a healthcare professional, that the Appellant still had both LCW and LCWRA. However, a Department for Work and Pensions (DWP) officer decided that the additional LCWRA element was not payable from the outset of the Universal Credit claim. Instead, the DWP ruled that the LCWRA element was only payable after a period of three months had elapsed, namely with effect from 20 January 2020. As the decision letter of 15 November 2019 put it, "You may get extra money because of your disability or health condition … The extra money is awarded from 3 months after the date you first gave us evidence of your health condition or disability, unless an exception applies."

4. So, the DWP applied what might be described as the normal 'you must wait for 3 months before the LCWRA element is paid rule'. This appeal is about whether any exception to that general rule should have been applied.

The First-tier Tribunal proceedings and its decision

5. In her notice of appeal, the Appellant's case was put very clearly as follows:

> "Before we claimed UC [the Appellant] had been in receipt of old style ESA and had LCW and LCWRA. The only reason that the ESA stopped was because [her partner] started full time work. [The Appellant] still had LCWRA and so should have got credits for this (she did not fail a WCA). Therefore the LCWRA component should have been paid from the 1st assessment period as per Regulations 21 and 27 of the UC (Transitional Provisions) Regs 2014."

6. However, on 13 November 2020 the First-tier Tribunal ('the Tribunal') dismissed the Appellant's appeal. The Tribunal agreed with the DWP that the LCWRA element in the Appellant's Universal Credit claim could not be included until the assessment period starting on 20 January 2020, i.e. after three months. Its reasoning was encapsulated in the following paragraph in the Tribunal's decision notice:

> "[The Appellant's] ESA ceased on 22/04/19 and she was not entitled to any National Insurance credits after that date. The link between the previous ESA claim and the Universal Credit claim was broken by the gap from 22/04/19 to 21/10/19."

The proceedings before the Upper Tribunal

7. Upper Tribunal Judge Rowley subsequently gave the claimant permission to appeal and directed written submissions from both parties. I later made directions for a second round of submissions in order to address several further points that had arisen from the first round of submissions.

8. Mr Daniel Decker, the Secretary of State's representative in these proceedings, supports the appeal to the Upper Tribunal for the reasons he explains in his two helpful written submissions. I am also grateful to Mr Alex Jolley of Trafford Welfare Rights for his well-focussed written arguments on behalf of the Appellant.

Discussion and analysis

9. A convenient starting point is regulation 27(1) of the Universal Credit Regulations 2013 (SI 2013/376). This provides that an award of Universal Credit "is to include an amount in respect of the fact that a claimant has limited capability for work and work-related activity ('The LCWRA element')."

10. Regulation 28(1) then goes on to stipulate that an award of Universal Credit is not to include the LCWRA element "until the beginning of the assessment period that follows the assessment period in which the relevant period ends". In plain English, and for at least most intents and purposes, this means the LCWRA element is only payable with effect from the date three months after the claimant provides a medical certificate (see regulation 28(2)(b) below**.** However, there are various exceptions to this rule – and so these are cases where the LCWRA element is payable from the outset of an award – as set out in regulation 28(3)-(5) inclusive below.

11. Regulation 28 of the Universal Credit Regulations 2013 provides in its entirety (and as amended) as follows:

> **Period for which the ... LCWRA element is not to be included**
>
> **28.**—(1) An award of universal credit is not to include the ... LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.
>
> (2) The relevant period is the period of three months beginning with—
>
> (a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of

> universal credit commences or, if later, the date on which the claimant applies for the ... LCWRA element to be included in the award; or
>
> (b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.
>
> (3) But where, in the circumstances referred to in paragraph (4), there has been a previous award of universal credit—
>
> (a) if the previous award included the ... LCWRA element, paragraph (1) does not apply; and
>
> (b) if the relevant period in relation to that award has begun but not ended, the relevant period ends on the date it would have ended in relation to the previous award.
>
> (4) The circumstances are where—
>
> (a) immediately before the award commences, the previous award has ceased because the claimant ceased to be a member of a couple or became a member of a couple; or
>
> (b) within the six months before the award commences, the previous award has ceased because the financial condition in section 5(1)(b) (or, if it was a joint claim, section 5(2)(b)) of the Act was not met.
>
> (5) Paragraph (1) also does not apply if—
>
> (a) the claimant is terminally ill; or
>
> (b) the claimant—
>
> (i) is entitled to an employment and support allowance that includes the support component ..., or
>
> (ii) was so entitled on the day before the award of universal credit commenced and has ceased to be so entitled by virtue of section 1A of the Welfare Reform Act 2007 (duration of contributory allowance).
>
> (6) …
>
> (7) Where, by virtue of this regulation, the condition in section 5(1)(b) or 5(2)(b) of the Act is not met, the amount of the claimant's income (or, in the case of joint claimants, their combined income) is to be treated during the relevant period as such that the amount payable is the prescribed minimum (see regulation 17).

12. It is common ground that the Appellant in the present case did not qualify under any of the exceptions set out under regulation 28(3)-(5). She did not fall within either of the circumstances set out in paragraph (4), not least because she had not had a previous award of universal credit, the precondition required by paragraph (3). Although she was seriously unwell, she was not terminally ill (sub-paragraph (5)(a)). Nor was she a person who either was entitled or had just been entitled to an award of “employment and support allowance” (which, in

this context, means an award of contribution-based ESA – see the definition in regulation 2).

13. The Tribunal duly concluded that the normal rule in regulation 28(1)-(2) applied to the Appellant's case and that her circumstances did not fall into any of the exceptions in regulation 28(3)-(5). As such, the Tribunal agreed with the DWP officer that the LCWRA element was not payable until 20 January 2020, three months after the commencement of the Universal Credit award (see the Tribunal's statement of reasons at paragraphs [21], [22] and [25]).

14. However, the various exceptional circumstances set out in regulation 28(3)-(5) do not represent a complete code of exemptions from the normal three-month rule. Indeed, there is a common thread between the apparently disparate exceptions provided for by paragraphs (3)-(5) inclusive. None of these exceptions deals with the situation in which a claimant was previously entitled to a legacy benefit (i.e. one of those means-tested social security benefits that is in the process of being phased out by the introduction of Universal Credit). The situation of claimants entitled to legacy benefits (and to national insurance credits in default of such entitlement) is governed by the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230).

15. Chapter 3 of Part 2 of the Universal Credit (Transitional Provisions) Regulations 2014 includes a suite of provisions to deal with claimants who transition from some form of previous incapacity for work benefit to universal credit. So, for example, regulation 19 concerns the transition from old-style ESA while regulation 20 deals with the transition from old-style ESA before the end of the assessment phase. For present purposes it is regulation 21 that is of note. This provision is headed "Other claimants with limited capability for work: credits only cases". According to regulation 21(1), it applies in the following circumstances:

> **21.**—(1) This regulation applies where—
>
> (a) an award of universal credit is made to a claimant who was entitled to be credited with earnings equal to the lower earnings limit then in force under regulation 8B(2)(iv), (iva) or (v) of the Social Security (Credits) Regulations 1975 ("the 1975 Regulations") on the date on which the claim for universal credit was made or treated as made (the "relevant date"); and
>
> (b) neither regulation 19 nor regulation 20 applies to that claimant (whether or not, in the case of joint claimants, either of those regulations apply to the other claimant).

16. The Appellant's case was that she fell within regulation 21(1)(a) (she was not entitled to old-style ESA on the date of which she made her claim for universal credit, so neither regulation 19 nor 20 applied for the purpose of regulation 21(1)(b)). The question accordingly was whether she "was entitled to be credited with earnings equal to the lower earnings limit then in force under regulation 8B(2)(iv), (iva) or (v) of the Social Security (Credits) Regulations 1975" (SI 1975/556). Regulation 8B in its entirety provides (as amended) as follows (with the relevant provisions for the purposes of regulation 21 italicised):

Credits for incapacity for work or limited capability for work

8B.—(1) ... *For the purposes of entitlement to any benefit by virtue of a person's earnings or contributions, he shall be entitled to be credited with earnings equal to the lower earnings limit then in force, in respect of each week to which this regulation applies.*

(*2) Subject to paragraphs (2A), (3) and (4) this regulation applies to—*

(a) a week in which, in relation to the person concerned, each of the days—

(i) was a day of incapacity for work under section 30C of the Contributions and Benefits Act (incapacity benefit: days and periods of incapacity for work); or

(ii) would have been such a day had the person concerned claimed short-term incapacity benefit or maternity allowance within the prescribed time; or

(iii) was a day of incapacity for work for the purposes of statutory sick pay under section 151 of the Contributions and Benefits Act and fell within a period of entitlement under section 153 of that Act; or

(iv) was a day of limited capability for work for the purposes of Part 1 of the Welfare Reform Act (limited capability for work) or would have been such a day had the person concerned been entitled to an employment and support allowance by virtue of section 1(2)(a) of the Welfare Reform Act; or

(iva) would have been a day of limited capability for work for the purposes of Part 1 of the Welfare Reform Act (limited capability for work) where the person concerned would have been entitled to an employment and support allowance but for the application of section 1A of that Act; or

(v) would have been a day of limited capability for work for the purposes of Part 1 of the Welfare Reform Act (limited capability for work) had that person claimed an employment and support allowance or maternity allowance within the prescribed time;

(aa) …

(b) a week for any part of which an unemployability supplement or allowance was payable by virtue of—

(i) Schedule 7 to the Contributions and Benefits Act;

(ii) Article 12 of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006;

(iii) Article 18 of the Personal Injuries (Civilians) Scheme 1983.

(2A) This regulation shall not apply to a week where—

(a) under paragraph (2)(a)(i) the person concerned was not entitled to incapacity benefit, severe disablement allowance or maternity allowance;

(b) paragraph (2)(a)(ii), (iva) or (v) apply; or

(c) under paragraph (2)(a)(iv) the person concerned was not entitled to an employment and support allowance by virtue of section 1(2)(a) of the Welfare Reform Act,

and the person concerned was entitled to universal credit for any part of that week.

(3) Where the person concerned is a married woman, this regulation shall not apply to a week in respect of any part of which an election made by her under regulations made under section 19(4) of the Contributions and Benefits Act had effect.

(4) A day shall not be a day to which paragraph (2)(a) applies unless the person concerned has—

(a) before the end of the benefit year immediately following the year in which that day fell; or

(b) within such further time as may be reasonable in the circumstances of the case,

furnished to the Secretary of State notice in writing of the grounds on which he claims to be entitled to be credited with earnings.

17. Mr Decker, for the Secretary of State, accepts Mr Jolley's submission that the Appellant qualified for national insurance (NI) credits by virtue of regulation 8B(2)(a)(iv). This provides that if the only reason a claimant is not entitled to ESA is because she did not satisfy the contribution conditions, she can nonetheless receive NI credits equivalent to the lower earnings limit for the relevant period. Mr Decker accordingly acknowledges that, for the period from the end of her IR-ESA claim to the start of her universal credit claim, the Appellant would still have continued to have LCW had she remained entitled to ESA and satisfied the contribution conditions in section 1(2)(a) of the Welfare Reform Act 2007.

18. Mr Jolley had drawn the Tribunal's attention to both regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014 and regulation 8B of the Social Security (Credits) Regulations 1975. However, the Tribunal had found that regulation 21 did not apply as "it has not been shown that the appellant was entitled to NI credits" on the date her universal credit claim was made (statement of reasons, paragraph 24). It appears the Tribunal were looking in vain for some sort of official notification that credits had actually been awarded. But, as Mr Decker agrees, the issue was not whether the Appellant already had a proven entitlement to NI credits, but rather whether she was "entitled to be credited with earnings equal to the lower earnings limit" for the purposes of regulation 8B(2)(a)(iv).

19. Before considering the consequences of being found to satisfy regulation 8B(2)(a)(iv), it is relevant to mention briefly three matters that had originally given me some cause for concern when reviewing the agreed common position of Mr Jolley and Mr Decker.

20. The first was that opening rubric of regulation 8B(2) of the Social Security (Credits) Regulations 1975 provides that the regulation is subject to "paragraphs (2A), (3) and (4)". Regulation 8B(4) in turn provides that a day shall not be a day to which regulation 8B(2)(a) applies unless the person concerned has provided a written notice and statement of grounds as to the basis of such a claim for credits. How then, I asked, could regulation 8B(2)(a)(iv) apply to the Appellant's advantage in the absence of a written notice under regulation 8B(4)? The short answer to that query, as both representatives point out, is that regulation 8B(4) does not prescribe any particular form or format for such a written notice. In practice, the DWP treat the initial claim for ESA as a written notice and statement of grounds for a claim for NI credits. As Mr Decker explains:

> 3. … Any decision awarding ESA automatically awards credits, and if entitlement to ESA ends for a reason other than the basic condition of having LCW, as in the present case, the disallowance decision also automatically continues the award of credits.
>
> 4. Decisions awarding credits are within the scope of the Social Security Act 1998, and therefore the principle of finality applies. It can be taken from section 17(1) that when a decision is made that a claimant has LCW and is entitled to be awarded credits, that decision is final and it remains in place unless and until it is changed on revision, supersession, or appeal. In those circumstances, no annual written notice is required in practice, and credits are awarded at the end of the tax year through an automated process. The Secretary of State will at intervals exercise her powers under regulation 19 of the ESA Regulations 2008 to establish whether the claimant still has LCW. As such, I submit that no separate notice is required from the claimant to enable regulation 8B(2)(a)(iv) to apply, as the initial ESA claim form would satisfy regulation 8B(4).

21. The second point which I raised was that regulation 3(1) of the Social Security (Credits) Regulations 1975 stipulates that any contributions or earnings credited under those Regulations "shall be **only** for the purpose of enabling the person concerned to satisfy" (emphasis added) the second contribution condition for various national insurance benefits. My question was how this statement could be reconciled with the parties' agreed position. There are at least two persuasive responses to this query. Mr Decker observes that in any event regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014 is not made under any of the powers used to award credits. Rather, it is made under the general powers in paragraph 1(1) of Schedule 6 to the Welfare Reform Act 2012, which refers to the replacement of legacy benefits by universal credit. Mr Jolley, for his part, adds that regulation 3(1) is designed to ensure that an award of credits cannot be used for the purposes of satisfying any contribution conditions other than those listed (in particular the first contribution condition) – not that an award cannot be used for any other purpose *per se* (which, after all, would be inconsistent with the terms of regulation 21). As Mr Jolley argues, his interpretation is more in keeping with the likely intention of the drafters of the Social Security (Credits) Regulations 1975 nearly 50 years ago.

22. I posed the third question in the following terms:

> Third, and taking the parties' agreed position to its logical conclusion, is it the Secretary of State's position that the status of having LCWRA continues indefinitely after a claim for IR-ESA has ended in circumstances such as those in the present case, and assuming there has been no further DWP determination on the LCWRA issue? I recognise that the 'gap' in this case between the IR-ESA and UC awards was only 6 months. I also acknowledge that there is no suggestion in this case that the Appellant's health changed on the facts in any material way during 2019. But what if the gap between the end of the IR-ESA claim and the UC award was say 3 years? Would it be the case – assuming that there had been no further DWP determination on LCWRA – that the Appellant would have retained the status of LCWRA throughout and get NI credits and so qualify for the LCWRA element immediately on claiming UC 3 years later (even if, however improbable on the facts of the present case, the Appellant had in the meantime say gone back into full-time work which then stopped, necessitating a UC claim)?

23. In response, Mr Decker draws a distinction between the respective positions as regards LCW and LCWRA in the above scenario. So far as LCW is concerned, this status continues indefinitely, although the Secretary of State would still need to establish at various intervals that the claimant retained LCW. This is because a claimant must have LCW in order to be entitled to NI credits. LCWRA, however, is different. Having the status of LCWRA is not a condition of entitlement in the way that LCW is. The combined effect of regulation 7(1B)(a) and 35A of the Employment and Support Allowance Regulations 2008 (SI 2008/794) is that in most cases a new determination on LCWRA would be required where a new claim is made. Mr Jolley agrees that a claimant can be treated as having LCWRA under regulation 35A by virtue of having a previous ESA claim that included the support component and which was not ended as a result of a determination that she did not have LCW.

24. Having satisfied myself that the Appellant fell within the terms of regulation 8B(2)(a)(iv) of the Social Security (Credits) Regulations 1975, the question then is the consequential effect of regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014. The short answer is provided by regulation 21(4) and (5):

> (4) Where, on or before the relevant date, it had been determined that the claimant would have limited capability for work-related activity (within the meaning of Part 1 of the 2007 Act) if he or she was entitled to old style ESA—
>
> (a) regulation 27(3) of the Universal Credit Regulations does not apply; and
>
> (b) the claimant is to be treated as having limited capability for work and work-related activity for the purposes of regulation 27(1)(b) of those Regulations and section 19(2)(a) of the Act.
>
> (5) Unless the notional assessment phase applied and had lasted for less than 13 weeks at the relevant date, in relation to a claimant who is treated

> as having limited capability for work and work-related activity under paragraph (4)—
>
> > (a) regulation 28 of the Universal Credit Regulations does not apply; and
> >
> > (b) the LCWRA element is (subject to the provisions of Part 4 of the Universal Credit Regulations) to be included in the award of universal credit with effect from the beginning of the first assessment period.

25. Thus, regulation 21(4) applies in the situation where, before the universal credit claim was made, there was a LCWRA determination for the purposes of old-style ESA. In such a case, there is no need for a further LCWRA assessment ("regulation 27(3) of the Universal Credit Regulations does not apply"). Instead, the claimant is treated as having LCWRA. Regulation 21(5) further provides that in such circumstances regulation 28 of the Universal Credit Regulations 2014 does not apply. Instead, the LCWRA element apples from the outset of the universal credit claim.

26. The legislative history of these various provisions confirms the drafters' intention underpinning regulation 21. It will be recalled that regulation 19 of the Universal Credit (Transitional Provisions) Regulations 2014 concerns the transition from old-style ESA while regulation 20 deals with the transition from old-style ESA before the end of the assessment phase (see paragraph 15 above). Regulations 19 and 20 in effect mirrored the provision previously made by regulations 23 and 24 of the earlier Universal Credit (Transitional Provisions) Regulations 2013 (SI 2013/386). However, those 2013 Regulations did not include any provision equivalent to regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014. As the Explanatory Memorandum to the latter Regulations explained:

> 7.15 Regulations 21, 26 and 27 are new provisions which allow claimants with limited capability for work who are entitled to National Insurance credits only, to be treated in line with existing provisions for claimants receiving ESA, IS on the grounds of incapacity, IB or SDA … who transition to UC. That is, they may be entitled to the … LCWRA element in UC from the start of the first assessment period, on the basis of a previous work capability assessment, an assessment whilst the claimant is in receipt of UC, or (in the case of claimants who are approaching pension age) entitlement to certain other benefits.

27. In conclusion, the DWP's original written response to the appeal at the Tribunal below had wrongly asserted as follows:

> [The Appellant] did not make a claim to UC until 20/10/2019. In order to receive LCWRA from the outset of a UC claim, a claimant must have been in receipt of the ESA Support group element right up to the day before their UC claim. In [the Appellant's] case there is a six-month gap.

28. That assertion was based on the erroneous assumption that the only exception that could apply to the Appellant was that contained in regulation 28(5)(b)(ii) of the Universal Credit Regulations 2013. It took no account of the applicability of regulation 21 of the Universal Credit (Transitional Provisions) Regulations 2014.

In doing so, the original written response failed to address a key relevant statutory provision and set the Tribunal on the wrong path.

29. I am accordingly satisfied that the First-tier Tribunal erred in law for the reasons set out above. I therefore allow the Appellant's appeal to the Upper Tribunal and set aside (or cancel) the Tribunal's decision. There is no point in remitting (or sending back) the original appeal for re-hearing to a new Tribunal. I therefore substitute the decision that the Tribunal should have made in the following terms:

> *The claimant's appeal to the First-tier Tribunal is allowed.*
>
> *The claimant is entitled to the limited capability for work-related activity element in her Universal Credit claim from the beginning of her entitlement to that benefit (i.e. from 20 October 2019).*
>
> *The Secretary of State's decision of 15 November 2019 is accordingly revised.*

30. I formally find that the Tribunal's decision involves an error of law on the basis as outlined above.

Conclusion

31. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I re-make the original decision under appeal (section 12(2)(b)(ii)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 20 April 2022