



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. UA-2023-001439-USTA
[2024] UKUT 137 (AAC)**

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

Appellant: AM

Respondent: The Secretary of State for Work and Pensions

Before T H Church, Judge of the Upper Tribunal

Decision: **The appeal is allowed. As the decision of the First-tier Tribunal (which it made at Sutton on 3 May 2023 under reference SC154/23/00205) involved the making of an error of law, it is set aside and is remade as follows:**

“The appeal is allowed.

The decision of the Secretary of State made on 30 July 2021 is set aside.

The appellant was awarded universal credit from 29 September 2016.

His award of universal credit is superseded from 29 June 2021 by reason of a change of circumstances, namely that the claimant then ceased to satisfy the basic condition set out in Section 4(1)(c) of the Welfare Reform Act 2012 and the disregard provided for by Regulation 11(1) of the Universal Credit Regulations 2013 ceased to apply because he had, by 18 June 2021, been absent from Great Britain for a period exceeding one month.

Because the appellant remained entitled to universal credit in respect of the assessment period beginning on 29 May 2021 and ending on 28 June 2021 the payment of universal credit made to him in respect of that assessment period represents a payment in accordance with his entitlement, and not an overpayment.”

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

What this appeal is about

1. All the facts relevant to this appeal are agreed between the parties.
2. The appeal is purely about the proper interpretation of Regulation 11(1) of the Universal Credit Regulations 2013 and how that is to be applied to a person who is absent from Great Britain for a period.

The relevant law

3. Entitlement to universal credit is established under Section 3 of the Welfare Reform Act 2012 (the “**2012 Act**”), which provides:

“3 Entitlement

- (1) A single claimant is entitled to universal credit if the claimant meets-
- (a) the basic conditions, and
 - (b) the financial conditions for a single claimant.
- ...”

4. The basic conditions to entitlement are set out in Section 4 of the 2012 Act, which provides:

“4 Basic conditions

- (1) For the purposes of section 3, a person meets the basic conditions who-
- (a) is at least 18 years old,
 - (b) has not reached the qualifying age for state pension credit,
 - (c) is in Great Britain,
 - (d) is not receiving education, and
 - (e) has accepted a claimant commitment.
- (2) Regulations may provide for exceptions to the requirement to meet any of the basic conditions (and for joint claimants, may provide for an exception for one or both).

...

- (5) For the basic condition in subsection (1)(c) regulations may –
- (a) specify circumstances in which a person is to be treated as being or not being in Great Britain;
 - (b) specify circumstances in which temporary absence from Great Britain is disregarded;
 - (c) modify the application of this Part in relation to a person not in Great Britain who is by virtue of paragraph (b) entitled to universal credit.

...”

5. Regulation 11 of the Universal Credit Regulations 2013 deals with temporary absences from Great Britain. It provides:

“Temporary absence from Great Britain

- 11.-(1)** A person’s temporary absence from Great Britain is disregarded in determining whether they meet the basic condition to be in Great Britain if-
- (a) the person is entitled to universal credit immediately before the beginning of the period of temporary absence; and
 - (b) either
 - (i) the absence is not expected to exceed, and does not exceed, one month, or
 - (ii) paragraph (3) or (4) applies.
- (2) The period of one month in paragraph (1)(b) may be extended by up to a further month if the temporary absence is in connection with the death of-
- (a) the person’s partner or a child or qualifying young person for whom the person was responsible; or

- (b) a close relative of the person, or of their partner or of a child or qualifying young person for whom the person or their partner was responsible,
and the Secretary of State considers that it would be unreasonable to expect the person to return to Great Britain within the first month,
 - (3) This paragraph applies where the absence is not expected to exceed, and does not exceed, 6 months and is solely in connection with-
 - (a) the person undergoing-
 - (i) treatment for an illness or physical or mental impairment by, or under the supervision of, a qualified practitioner, or
 - (ii) medically approved convalescence or care as a result of treatment for an illness or physical or mental impairment, where the person had that illness or impairment before leaving Great Britain; or
 - (b) the person accompanying their partner or a child or qualifying young person for whom they are responsible for treatment or convalescence or care as mentioned in sub-paragraph (a).
 - (4) This paragraph applies where the absence is not expected to exceed, and does not exceed 6 months and the person is-
 - (a) a mariner or
 - (b) a continental shelf worker who is in a designated area or a prescribed area.
- ...”

6. Paragraph 20 of Schedule 1 to the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (the “**Decisions and Appeals Regulations**”) establishes the applicable effective date for a supersession of a universal credit award. It provides:
- “20. Subject to the following paragraphs and to Part 4, in the case of universal credit, a superseding decision made on the ground of a change of circumstances takes effect from the first day of the assessment period in which that change occurred or is expected to occur.”

Background

- 7. The background to the appeal is that the Appellant (to whom I shall refer as the “**claimant**”) made a claim to universal credit on 29 September 2016, and received an award from that date.
- 8. On 17 June 2021 the claimant left Great Britain, travelling to Ethiopia to be with his wife and young son, who was unwell. He intended to return to Great Britain three weeks later.
- 9. However, on 26 July 2021 the claimant contacted the universal credit team to inform them that, because Ethiopia was classified as belonging to the “red zone” for the purposes of the then-prevailing Coronavirus rules, he was prevented from returning to Great Britain for the time being. The restrictions on travel from Ethiopia to Great Britain were eventually lifted in November 2021 and the claimant returned to Great Britain on 23 December 2021.

10. On 30 July 2021 a decision maker for the Secretary of State superseded the claimant's award of universal credit from 29 May 2021 on the basis that:
 - a. 29 May 2021 was the beginning of the Assessment Period in which the claimant left Great Britain,
 - b. the claimant had been absent from Great Britain for over a month, and
 - c. none of the criteria for the one-month period to be extended was applicable.
11. The decision maker decided that the claimant was not entitled to universal credit from 29 May 2021 and that an overpayment of £1,284.17 had been made to him in respect of the Assessment Period starting 29 May 2021, which was recoverable from him (the "**SoS Decision**").
12. The claimant disagreed with the SoS Decision and requested a mandatory reconsideration. On 27 September 2021 a decision maker carried out a reconsideration but decided not to revise the SoS Decision.
13. The claimant appealed the SoS Decision to the First-tier Tribunal, saying that he thought that the restrictions on travel meant that his circumstances were exceptional, and his universal credit should not have been stopped when it was.
14. On 3 May 2023 the claimant attended his appeal hearing at Sutton before a judge of the First-tier Tribunal. A presenting officer appeared on behalf of the Secretary of State.

The First-tier Tribunal's decision

15. The First-tier Tribunal dismissed the appeal and confirmed the SoS Decision (the "**FtT Decision**"). In its statement of reasons, it explained how it arrived at the FtT Decision as follows:
 28. [The claimant]'s absence exceeded one month and therefore could be not disregarded under regulation 11(1).
 29. [The claimant]'s absence was not in connection with a death and therefore did not fall under regulation 11(2). In any event, that subparagraph extends the 1 month disregarded absence by a maximum of only a further month.
 30. [The claimant]'s absence exceeded six months (17/06/2021 to 23/12/2021) and therefore could not be within regulation 11(3). This was sufficient to mean the appeal could not be allowed.
 31. However in addition, by virtue of reg 4 of the Universal Credit Regulations 2013, [the claimant] was not "a person responsible for" [his son] at the time of his absence from GB. At that time, [his son] did not normally live with [the claimant].
 32. The tribunal considered the submissions on behalf of [the claimant] starting at [C1]. The initial point made was incorrect as it was based on the wrong date of [the claimant's] departure from GB. He was absent for more than six months and could not come within reg 11(3), as explained above. The submission went on to refer to guidance in connection with Housing Benefit; however the benefit in consideration on appeal was UC. The part of the benefit paid to [the claimant] to cover his housing costs was UC and not HB. The tribunal had no reason not to accept the Presenting Officer's submission that the easement that applied in relation to UC or delayed returns operated in the

period March 2020 to July 2020 and did not involve an amendment to regulation 11. The submissions did not cause the tribunal to alter its view.

33. [The claimant] gave clear, reasonable and credible oral evidence to the tribunal. The tribunal accepted that he left GB for the reason that he gave that this was an understandable reason for his absence. It was also clear that [the claimant] had kept in touch with the DWP via his UC journal during his absence. The tribunal had no reason to doubt that [the claimant] had intended to return after three weeks but that this was prevented by coronavirus travel restrictions. The tribunal had no reason to doubt that the non-payment of UC was likely to have caused [the claimant] financial difficulties. However, the decision in [the claimant's] case depends on the application of regulation 11 to the circumstances of his absence and these matters do not affect the application of that regulation in his case.

34. As a result [the claimant]'s absence from GB on 17/06/2021 cannot be disregarded.

35. That change affects [the claimant]'s UC from the beginning of the AP in which it occurs: that was 20/05/2021.

36. The tribunal had no reason not to accept that the DWP had already paid [the claimant] UC for that AP in the amount of £1284.17. By section 71ZB Social Security Act 1992 that overpayment of UC is recoverable from [the claimant]."

Grounds of appeal and the permission stage

16. The claimant was unhappy with the FtT Decision. He sought to appeal with the help of Ms Bissell, his representative from Citizens' Advice Esher and District (who was in turn helped by The Child Poverty Action Group's Upper Tribunal Project), on the basis that the First-tier Tribunal had misdirected itself as to the operation of Regulation 11 of the Universal Credit Regulations 2013 to the facts of his case. Ms Bissell produced a clear and persuasive application for permission to appeal.
17. On 15 August 2023 a judge of the First-tier Tribunal was not satisfied that the FtT Decision involved a clear error of law warranting a review but decided that the grounds of appeal were "arguable" and warranted a grant of permission to appeal to the Upper Tribunal.
18. The matter came before me, and I made directions inviting submissions on the appeal and asking the parties whether they requested an oral hearing. Neither party asked for an oral hearing. Given the agreement between the parties and given that the holding of an oral hearing would be likely to introduce further delay into the proceedings, I decided that the overriding objective is best given effect to by my deciding this appeal on the papers.

The Secretary of State's position on the appeal

19. Alex Martin provided a helpful written submission on the appeal on behalf of the Secretary of State supporting the appeal. The submission invited me to set aside the FtT Decision, being materially in error of law, and to remit the matter to the First-tier Tribunal for rehearing before a different panel.

Discussion

20. It was agreed by the parties in the appeal before the First-tier Tribunal that the claimant had been entitled to universal credit immediately before his temporary absence from Great Britain. The condition in Regulation 11(1)(a) of the Universal Credit Regulations 2013 was therefore met.
21. Regulation 11(1)(b)(i) of the Universal Credit Regulations 2013 contains two conditions to the operation of the disregard to a temporary absence from Great Britain. The first is that the absence is “not expected to exceed” one month. It was accepted that the claimant had, when he left Great Britain, “intended” to be absent from Great Britain for only three weeks.
22. Paragraph 20 of Schedule 1 to the Decisions and Appeals Regulations provides that a supersession for a change of circumstances takes effect from the start of the assessment period in which it occurred. That means that one must look at whether there has been a change of circumstances on or before the last day of the assessment period (in this case, on or before 28 June 2021) to decide whether an award may be superseded from the first day of the assessment period (in this case, 29 May 2021).
23. In this case it is clear from the agreed facts that, as at 28 June 2021, the claimant had not been absent from Great Britain for a period exceeding one month.
24. Having accepted that the claimant had “intended” to return in three weeks’ time when he left Great Britain, the First-tier Tribunal made no finding as to whether the claimant’s intention hanged (and if so, when), and it said nothing about when he was “expected” to return (to the extent that that might be different from when he “intended” to return). It said only that it “had no reason to doubt that [the claimant] had intended to return after three weeks but that this was prevented by coronavirus travel restrictions” (paragraph [33] of its statement of reasons). The claimant didn’t contact the universal credit team until 26 July 2021 (after the end of the assessment period beginning on 29 May 2021).
25. In the absence of a finding of fact that the claimant’s intentions had changed in the period up to 28 June 2021, or any finding that his absence was otherwise “expected” to exceed one month (and the date on which that “expectation” arose), the First-tier Tribunal was bound to find that the claimant’s absence from Great Britain in the assessment period beginning on 29 May 2021 was to be disregarded under Regulation 11(1) of the Universal Credit Regulations 2013.
26. The First-tier Tribunal was therefore wrong to decide otherwise, and it was therefore also wrong to find that the claimant had received an overpayment in respect of that period. This was in error of law and the error was clearly material.

Disposal

27. Having decided that the FtT Decision was in error of law, I have a discretion under Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (“**TCEA 2007**”) whether to set the FtT Decision aside.
28. I consider that the error of law made was material and was financially disadvantageous to the claimant. In these circumstances it is appropriate for me to exercise my discretion to set the FtT Decision aside.

29. Having done so, I have a discretion under Section 12(2)(b) of the TCEA 2007 whether to remit the matter to the First-tier Tribunal for redetermination (as the Secretary of State asks me to do) or to remake the decision myself as the First-tier Tribunal should have made it.

30. I consider that the findings of fact made by the First-tier Tribunal were adequate. I am therefore in a position to remake the decision on the claimant's appeal by applying the law to the facts found without making any further findings of fact myself. I have decided that the interests of justice favour my doing so, not least to avoid further delay in bringing these proceedings to a close. I therefore remake the decision in the terms set out at the beginning of this decision notice.

**Authorised for issue on
13 May 2024**

**Thomas Church
Judge of the Upper Tribunal**