|  |  |
| --- | --- |
| **In the First-tier Tribunal  (Social Entitlement Chamber)** | **FTT Ref: SC\_\_\_/21/\_\_\_\_\_\_\_\_\_\_** |
| **CLAIMANT NAME**  **Appellant**  **-and-**  **SECRETARY OF STATE FOR WORK AND PENSIONS**  **Respondent** | |
| **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **Grounds of Appeal**  **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** | |

**Decision appealed**

1. CLAIMANT NAME (the Appellant – “**A**”) appeals against the decision of the Decision Maker for the Secretary of State for Work and Pensions (the Respondent- “**R**”), given on DATE DECISION, to the effect that her claim for universal credit (“**UC**”), submitted on DATE OF CLAIM, cannot lead to an award in respect of the period DATE BACKDATING REQUESTED FROM OR MAX ONE MONTH to DAY BEFORE DATE OF CLAIM.

**R’s reasons for decision**

1. R has refused to award UC for the period in issue, for the sole reason that A did not make a request for that period to be considered until DATE REQUEST BACKDATE and her earlier claim had already been determined on DATE OF DECISION. In those circumstances, R maintains that the request on DATE REQUEST BACKDATE is the first claim she had in respect of the period in issue. She then goes on to argue that if one takes that date as the first day on which a claim for the past period was made, one is only allowed to extend the time for claiming forwards for one month ending on that date (ie one can consider backdating only for period from one month prior to when “a claim” for that period was made). R maintains that therefore A was already “too late for a backdate”[[1]](#footnote-1).
2. R’s submissions are made on the basis that s.8(2) Social Security Act 1998 (“**SSA 1998**”) provides that a claim ceases to exist once it is determined (s.8(2)(a)) and accordingly “he claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.” (per s. 8(2)(b)).
3. It should immediately be noted that R’s submissions depend on an unstated assumption: that is that a claim must contain a statement of the period in respect of which it is made and further that it is not a claim for UC which is determined but a claim for UC in respect of a period.
4. Thus R’s case depends on an assumption that what is determined in a decision is not “a claim for UC” but rather “a claim for UC in respect of a specific period”. It is important to understand the impact that approach has given the context in which it operates:
   1. For example, if a person made a claim for UC and failed to mention they had a child, meaning no element for a child was awarded, it would, we assume, be accepted by R that on an any grounds revision the responsibility of the claimant for a child (a circumstance which did exist at the time of the claim) could be taken into account.
   2. However, failing to mention, on a claim, the date you wish entitlement to be considered from is, in R’s view, a different matter. That is because unlike failing to state a fact relating to your claim (responsibility for a child) a failure to state the period you wish to claim from, in R’s view, changes the legal nature of what is being adjudicated upon- there is no claim made in respect of the period in question and that is fatal.
   3. As will be shown, R does not bother to ask claimants, in the online UC claim form, what period they wish to claim from and does not provide any place within the claim form where a claimant could indicate when they want to claim from. R then assumes, without explaining why, that a claim without such a statement is intended to be prospective only.
   4. Claims for UC cannot be determined until 1 month after they are made (due to the fact that one would not know if the financial conditions are met until the end of the first assessment period). One month is also the maximum backdating period allowable.
   5. Thus, R maintains, a person who has not amended their claim to add a request for backdating (amended claims being treated as originally made in the amended form) cannot benefit from backdating at all- their request for backdating is a new claim for a period and the earliest it could be awarded is from when the person had already claimed.
5. R’s practice of not asking what period a claim is intended to be for, coupled with (1) her view that a claim must always be for a particular period and expressly stated to be so and (2) the fact UC claims are not adjudicated upon for a month after they are made, together combine to mean granting UC backdating is not a common phenomenon.

**Summary of A’s grounds of appeal**

1. A will argue that R is wrong to maintain that claims for UC are required to be made in respect of periods. Accordingly, the correct approach when a claim is submitted is to make enquiries as to whether the conditions in reg. 26 of the UC etc (Claims and Payments) Regulations are met, and: (i) If they are, to award benefit from the appropriate date up to a month prior to the claim being made; or (ii) If they are not then award benefit from the date of claim in the usual way.
2. Even if A is wrong and claims are required to be made in respect of periods, in circumstances where the electronic claim for UC does not make clear what period it is intended the claim be made from and further does not provide any space where the claimant could indicate this, the Decision Maker will decide the claim on the basis of official error if s/he does not first ascertain when the claim is intended to be made from.

**Relevant facts and chronology**

1. **Prior to DATE WANTS BACKDATING TO:**A was [….].
2. **DATE WANTS BACKDATING TO:** A [….].
3. **DATE OF CLAIM:** A made a claim for UC using the online claim system. She completed the form entirely in accord with the instructions on the form (indeed as shown in [*GDC v SSWP (UC)* [2020] UKUT 108 (AAC)](https://assets.publishing.service.gov.uk/media/5e987a92d3bf7f4128b01efa/CUC_0968_2019.pdf)(to be reported as [2020] AACR 24) at §88 it is not possible to complete and submit the claim other than in accordance with those instructions). Importantly, the claim form does not ask when A wanted her award to commence from. That is shown by the attached *Universal Credit Account Overview: A walkthrough of the service as of 24/01/20 Release 138.19*- a training product produced by R (see **attached**). This includes all of the questions that are asked on the online claim form. It shows the questions as they would have been at the start of 2020. A, and her advisers, are not aware of any question about the period a person would like to claim from having been added to the form by DATE OF CLAIM, when A completed it. R can presumably assist the FTT by providing it with the relevant question set if she wishes to contest that fact.
4. **DATE OF DECISION:** R determines A’s claim for UC and awards UC from the date on which the claim was submitted. R did not, prior to making that decision ask A what date she wished her claim to be considered from or direct her mind as to whether the conditions for awarding UC from an earlier date were met.
5. **DATE REQUEST MADE:** A note is placed on A’s UC journal, requesting that her entitlement for the period from DATE WANTS BACKDATE TO.
6. **DATE REFUSES PERIOD:** R refuses to award for that period.
7. **DATE REVISION REQUEST:** A seeks mandatory reconsideration of the refusal to pay for that period
8. **DATE MRN:** R refuses to revise- now on the ground that the request for the award to commence from an earlier date had not been made at an early enough point for the period to be considered (i.e. on same basis as R now argues in this appeal).
9. **DATE OF APPEAL:** A files her appeal with the FTT.

**Claims do not need to expressly state period they are in respect of**

*Legal scheme for making claims*

1. S.1 of the Social Security Administration Act 1992, in so far as relevant, provides:

*Necessity of Claim*

1.—(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied–

(a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or

[….]

(2) Where under subsection (1) a person is required to make a claim or to be treated as making a claim for a benefit in order to be entitled to it, the person is not entitled to it in respect of any period more than 12 months before the date on which the claim is made or treated as made.

[….]

(4) In this section and section 2 below “benefit” means–

(za) universal credit;

1. So, s1(1) imposes a requirement for a claim to UC to be made in the prescribed manner and at the prescribed time. *It is to be noted that the primary legislation does not impose a requirement for the claim to be made in respect of a particular period.* Indeed sub-section (2) suggests that the date of claim is independent of the period for which entitlement might arise.
2. The correct (i.e. as prescribed) manner of making a claim for UC is explained by UTJ Wikeley in *GDC v SSWP*. Essentially, the requirement (arrived at by the circuitous route carefully described by Judge Wikeley at §§30-37, where one travels from reg. 8 of the UC etc (Claims and Payments) Regulations 2013 (“**C&P Regs**”), via Schedule 2 of those Regulations, onwards to the The Social Security (Electronic Communications) Consolidation and Amendment Directions 2011 and then to the gov.uk website) is to complete the form in accordance with instructions on the gov.uk website. This is what A did. There is nothing in the instructions on the gov.uk website which required A to state the period she wished her claim for UC to be considered for or states that she must make a claim in respect of a period she wishes entitlement for. Breaking that down:
   1. Reg. 8 of the C&P Regs is as follows (omitting parts relevant to telephone claims):

### Making a claim for universal credit

**8.**—(1) Except as provided in paragraph (2), a claim for universal credit must be made by means of an electronic communication in accordance with the provisions set out in Schedule 2 and completed in accordance with any instructions given by the Secretary of State for that purpose.

(2) […]

(3) A claim for universal credit made by means of an electronic communication in accordance with the provisions set out in Schedule 2 is defective if it is not completed in accordance with any instructions of the Secretary of State.

(4) […].

(5) If a claim for universal credit is defective the Secretary of State must inform the claimant of the defect and of the relevant provisions of regulation 10 relating to the date of claim.

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

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

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

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

As can be seen, nothing in that wording would lead one to conclude that a claim for UC was required to be expressly made *in respect of a period in order to have entitlement in that period considered which is R’s case.*

* 1. The Schedule 2 provisions need not concern us (they also take this point no further). They simply point to the 2011 Directive for the approved method and form.
  2. The approved method and form given in the 2011 Directive are:

“Approved method and form

4. The method and form set out on the gov.uk website, at the time of, and for the purposes of, making any claim or request, giving any notification or providing any certificate, notice, information or evidence referred to in paragraph 2 are—

(a) the method approved by the Secretary of State for Work and Pensions for—

(i) authenticating the identity of the person making the claim or request, giving the notification or providing the certificate, notice, information or evidence;

(ii) electronic communication;

(iii) authenticating the claim, request, notification, certificate, notice, information or evidence delivered;

(iv) making the claim or request, giving the notification or providing the certificate, notice, information or evidence; and

(b) the form approved by the Secretary of State for Work and Pensions in which the claim, request, notification, certificate, notice, information or evidence is to be sent.

There is nothing in those instructions as to the approved method and form, nor on the gov.uk website (i.e. in the UC online claim questions) which requires a claim to be made in respect of a particular period.

1. Reg. 10 C&P Regs deals with the date on which a UC claim counts as made. It is as follows (omitting the telephone provisions and the, useless, according to *GDC,* defective claims provision):

### Date of claim for universal credit

**10.**—(1) Where a claim for universal credit is made, the date on which the claim is made is—

(a)subject to sub-paragraph (b), in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office;

(b)in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), where the claimant receives assistance at home or at an appropriate office from the Secretary of State, or a person providing services to the Secretary of State, which is provided for the purpose of enabling that person to make a claim, the date of first notification of a need for such assistance;

[…]

This regulation says nothing about the time from which an award can be made relative to the date of claim- it merely operates to fix the date a claim counts as made.

1. Reg. 26 C&P Regs is the provision which deals with the date from which entitlement can arise and how that relates to the date of claim as set by reg. 10:

### Time within which a claim for universal credit is to be made

**26.**—(1) Subject to the following provisions of this regulation, a claim for universal credit must be made on the first day of the period in respect of which the claim is made.

(2) Where the claim for universal credit is not made within the time specified in paragraph (1), the Secretary of State is to extend the time for claiming it[[2]](#footnote-2), subject to a maximum extension of one month, to the date on which the claim is made, if—

(a)any one or more of the circumstances specified in paragraph (3) applies or has applied to the claimant; and

(b)as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier.

(3) The circumstances referred to in paragraph (2) are—

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

(aa)the claimant was previously in receipt of an existing benefit (as defined in the Universal Credit (Transitional Provisions) Regulations 2014) and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that the claimant's entitlement expired;

(b)the claimant has a disability;

(c)the claimant has supplied the Secretary of State with medical evidence that satisfies the Secretary of State that the claimant had an illness that prevented the claimant from making a claim;

(d)the claimant was unable to make a claim in writing by means of an electronic communication used in accordance with Schedule 2 because the official computer system was inoperative;

(e). . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

(f)where—

(i)the Secretary of State decides not to award universal credit to members of a couple jointly because one of the couple does not meet the basic condition in section 4(1)(e) of the 2012 Act;

(ii)they cease to be a couple; and

(iii)the person who did meet the basic condition in section 4(1)(e) makes a further claim as a single person;

(g)where—

(i)an award of universal credit to joint claimants has been terminated because one of the couple does not meet the basic condition in section 4(1)(e) of the 2012 Act;

(ii)they cease to be a couple; and

(iii)the person who did meet the basic condition in section 4(1)(e) makes a further claim as a single person.

(4) In the case of a claim for universal credit made by each of joint claimants, the prescribed time for claiming is not to be extended under paragraph (2) unless both claimants satisfy that paragraph.

(5) In the case of a claim for universal credit referred to in regulation 21(3C) of the Universal Credit Regulations (assessment period applied from a previous award within the last 6 months) the claim for universal credit must be made before the end of the assessment period in respect of which it is made.

1. It is reg. 26(1) that first introduces a concept of a claim in respect of a period: “the first day of the period in respect of which the claim is made”. However, that cannot be read to require, particularly in the absence of any method on the claim form of indicating what period one wants entitlement for, an express statement on the claim form that an earlier period is required.

*R(SB)9/84—an ancient and irrelevant case*

1. Administrative arrangements for claims of “Legacy benefits” are dealt with under the Social Security (Claims and Payments) Regulations 1987. Reg. 19 of those regulations used similar terms to those in reg. 26.
2. It is fair to say that the authors of Sweet and Maxwell Volume III assume that, for that similarly worded provision, there is a requirement for the claim form to expressly state the period in respect of which the claim is made in order to have reg. 19(4) & (5) considered (see 2.128 of the current edition: “If claimants wish to claim for a past period that must be expressly stated”).
3. However, the authority to which they refer is *R(SB)9/84* – a Scottish Tribunal of Commissioners decision given in respect of supplementary benefit, which was governed by differently worded rules re backdating, and was decided some 37 years ago, against a background where a paper claim form was used, backdating could be for an indefinite period and the only consequence of there finding was that a Tribunal could not deal with the issue if it first arose before it but would need to remit it to an adjudication officer..
4. The relevant part of that decision is §11 where the Tribunal opined as follows:

11. *(2) Does the claim as presented require to be expressly made for a prior period?* It was pointed out by the Commissioner in case CSB/150/82, paragraph 12, (to be reported as R(SB) 56/83) that no specific provision is made in supplementary benefit claim forms for a claimant to state the starting date of his claim so as to make it clear if in any case a claim is intended to be retrospective as well as prospective. In paragraph 13 of that decision the Commissioner appears to suggest that it will suffice for a claimant merely to claim supplementary benefit and that the onus will then be upon the supplementary benefit officer in investigating the claim to consider whether a retrospective award may be appropriate. If that is the Commissioner’s view we disagree with it. In our opinion it is necessary to give some content to the words in regulation 5(2) of the Claims and Payments Regulations: “Where a claim. . .is made in respect of a period earlier than the day on which it is made,”. That requirement will obviously be satisfied if the claim as presented specifically states that it is made in respect of an earlier period. In our opinion however it will suffice to meet that requirement if in connection with the investigation of a claim the issue of back-dating is raised by or on behalf of the claimant before the supplementary benefit officer makes his determination upon the claim. In the assessment of entitlement to supplementary benefit upon a comparison of a claimant’s requirements and resources the emphasis of the statutory provisions is in our opinion upon the present and the future rather than the past. For this reason, as well as the specific words of regulation 5(2) referred to above, we consider that the investigation of a possible retrospective award cannot be regarded as forming part of the enquiry incumbent in all cases upon a benefit officer.

1. We make the following comments about that decision:
   1. The reasoning of the Tribunal turns on a felt need to “give some content to the words in regulations 5(2)” of the Supplementary Benefit (Claims and Payment) Regulations 1980 (see §3 of the decision for the text of those). The words were: “Where a claim … is made in respect of a period earlier that the day on which it was made”. Such wording does not appear in reg. 26. Rather the wording is now “a claim for universal credit must be made on the first day of the period in respect of which the claim is made”. That is far less of an indicator that a claim is to be made in respect of a period: in the reg. 5 wording then the “claim… is made in respect of a period” whereas in the reg. 26 wording the claim must be made on the first day of the period it is intended to be for- there is less emphasis there that the claim must state the period it applies to.
   2. A failure to ask a question on the supplementary benefit claim form is a very different matter from a failure to ask it on the online UC claim form- the former still offered space on which a claimant could write in they wanted earlier entitlement. The latter does not.
   3. That case was decided in the context of a backdating rule which allowed for unlimited backdating (see §3 for its text) provided there was continuous good cause. The concern of the Tribunal (dealt with in §12) was that the Social Security Appeal Tribunal did not have a power to consider an issue not already before the adjudication officer for decision. As such the suggestion was that the matter be remitted for consideration by the adjudication officer. That is very different to the current situation where we are dealing with a limited backdate provision of one month. For the Tribunal of Commissioners the *consequences* of their decision on this point were simply that where no express request for backdating was made the issue could not be decided by the Tribunal but would need to be first given back to the adjudication officer for decision and then could be challenged on a new appeal. That is very different in the instant case where R is frank about the consequences- they mean no claimant who does not amend their claim prior to R’s decision (and all backdate requests need to be dealt with via amendment as there is no facility to make a request on the form) will benefit from backdating.
   4. R(SB)9/84 is a Scottish decision. Regardless of what principle it stands for it does not bind the FTT sitting in England.
   5. In any event, it is not at all clear that the reasoning on this point is *ratio* – there were 4 appeals before the Tribunal. In the only one we know the facts of then an express claim for backdating had been made anyway- see §22.

*Could you have regulations which transformed claims for benefits into claims for benefits in respect of periods?*

1. More fundamentally, we say that s.1(1) SSAA 1992 (a provision not considered in R(SB)9/84- although we think equivalent provision did exist re supplementary benefit) simply does not allow for the making of regulations which require claims be made in respect of periods. S.1(1) authorises regulations about (1) the time within which a claim must be made and (2) the manner in which a claim must be made. Reg. 26 clearly is made under the power to make rules about the time within which a claim must be made.
2. The regulation which deals with the manner in which a claim must be made is reg. 8 (and then the associated Schedule and Directive). None of those provisions require claims to be made in respect of periods in any event (even if they could). We accept regulations could require that the manner of making a valid claim would require that the claimant state the period they wished entitlement to be considered from. However, those regulations would not alter the legal substance of what was then being adjudicated upon from being simply a “claim for benefit” into a “claim for benefit in respect of a period”. In A’s submission a claim for UC which leaves out information about when the claimant would like entitlement to start from, is no different from a claim for UC which leaves out some other factual details (such as responsibility for a child).
3. Obviously, once a claim is determined then the nature of benefit entitlement will be that entitlement has been determined from a particular date on a particular decision date. One could speak then of a claim made from that earlier date and clearly s.8(2) SSA 1998 would apply so that new circumstances arising after the decision date could not be used to challenge that decision. However, there is nothing in the legislation which provides that the claim that was determined was a claim for a particular period – that is a gloss wrongly added by R.

*Conclusion on the correct approach to reg. 26*

1. Rather than the words in reg. 26(1) being interpreted in isolation to imply that claims for UC need to be made expressly in respect of a period (when no mechanism exists within the prescribed manner or form of claiming for doing this) then the instruction that “a claim for universal credit must be made on the first day of the period in respect of which the claim is made” needs to be understood as simply providing that the claim will be awarded from when it is made subject to the remainder of the regulation.
2. That makes reg. 26 consistent with a statutory scheme where:
   1. The primary legislation does not itself speak of claims being made in respect of periods and does not contain regulation making powers to allow this. That means it would be wrong to interpret reg. 26 as providing for this – the regulation making power is to make regulations setting the manner and time within which claims need to be made and not regulations setting that claims must be made in respect of periods.
   2. The manner and form of making a claim, as set out on gov.uk website does not provide for claims to be made in respect of periods at all.
3. It also ensures that claimants such as A, [INSERT SUMMARY OF HER REASON FOR NEEDING BACKDATE],are not disadvantaged by failing to make an express statement of when they want to claim from despite not being asked to do so.

**If a claim in respect of a period is needed then UC claim is silent on period claimed for**

1. Assuming we are wrong and a claim for UC must always be made in respect of a period we say as follows.
2. As detailed above, there is nothing in the UC online claim form from which one could infer what period was claimed for.
3. As such, it is not possible, following receipt of a claim for UC for R to know what period is being claimed for. No inference that it is only intended to be a prospective claim can be made from the documents. In those circumstances, if it is necessary to state what period the claim is intended to be for, R should not determine the claim. Rather, R is in a position where, having failed to design her form to ask what she maintains is an essential piece of information to make a valid claim, she needs more information. She should ask the claimant to amend the claim to make this clear. A failure to do so will be an official error.
4. Accordingly, when A asks for a revision, reg. 9 of the UC (Decisions and Appeals) Regulations 2013 can be the head under which the decision is revised. Reg. 9 does not contain the prohibition on taking into account circumstances not obtaining at the time of decision (contained in reg. 5 for any ground revisions) and accordingly, on revision R can take account of the period in respect of which the claim is made.

ADVISER

ORGANISATION

DATE

1. See Mears, R and Williams, M [2021], ‘Too late for a backdate’, *Welfare Rights Bulletin 283,* pp9-10. [↑](#footnote-ref-1)
2. The effect of reg. 26(2) is to *extend forwards by a period of up to one month* (where the conditions in (3) are met) the usual time limit for claiming (ie claim must be made on first day of period for which entitlement is wanted)- this is typically referred to as “backdating” the claim but really what is being done is the time for claiming is being extended forwards so as to allow the award to commence from an earlier date. [↑](#footnote-ref-2)