|  |  |
| --- | --- |
| **In the First-tier Tribunal (Social Entitlement Chamber)** | **Tribunal Refs: TO COMPLETE** |

**BETWEEN**

|  |  |
| --- | --- |
| **[APPELLANT’S NAME]** | **Appellant** |
| **-and-** |  |
| **SECRETARY OF STATE FOR WORK AND PENSIONS**  **[NAME OF LOCAL AUTHORITY]** | **Respondent 1 (for ESA and UC appeals)**  **Respondent 2 (for HB appeal)** |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Grounds for appeal**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Introduction**

1. [appellant’s name] appeals against the decisions by the Secretary of State for Work and Pensions (‘**the SSWP’**) and the Local Authority (**‘the LA’**) regarding their entitlement to Universal Credit (‘**UC**’), Employment and Support Allowance (‘**ESA’**) and Housing Benefit (‘**HB**’).
2. The appellant is currently awarded UC. They contend that they should not have been awarded UC and that the awards of ESA and HB should have continued. The Tribunal is requested to revise the decisions awarding UC and ending entitlement to ESA and HB; or
3. The appellant will show that the SSWP’s misapplication of the ‘SDP Gateway’ was unlawful. As a result [appellant’s name] and [partner’s name] were wrongly treated as having claimed UC and [appellant’s name]’s ESA and HB entitlement were wrongly ended.
4. The three appeals are:
   1. UC appeal (APPEAL REFERENCE) against the original decision awarding UC to Mr and Mrs [name] dated [DATE]
   2. ESA appeal (APPEAL REFERENCE) against the supersession decision ending [appellant’s name]’s ESA award dated [DATE]
   3. HB appeal (APPEAL REFERENCE) against the supersession decision ending [appellant’s name]’s HB award dated [DATE]

**Background facts**

1. [appellant’s name] is married to Mr [partner’s name]. They live together as a couple and no-one else lives with them.
2. Before forming a couple with [partner’s name], [appellant’s name] claimed Employment and Support Allowance (ESA) and Housing Benefit (HB) as a single person. They also received [EITHER DLA MIDDLE/HIGH RATE CARE COMPONENT OR PIP DAILY LIVING COMPONENT] and, as a consequence, qualified for a Severe Disability Premium (**‘SDP’**) to be included in the calculation of their means-tested benefits.
3. Before forming a couple with [appellant’s name], [partner’s name] claimed Universal Credit. They also received [EITHER DLA MIDDLE/HIGH RATE CARE COMPONENT OR PIP DAILY LIVING COMPONENT].
4. On [DATE] [partner’s name] moved into [appellant’s name]’s home.
5. Once [partner’s name] moved in with [appellant’s name] they were a couple for benefit purposes and [partner’s name]’s entitlement to UC as a single person correctly came to an end.
6. [appellant’s name] and [partner’s name] appear to have been wrongly treated as having claimed UC from [DATE], the day after the date on which [partner’s name]’s entitlement to UC as a single person ended. This resulted in a decision dated [DATE] purporting to award [partner’s name] and [appellant’s name] UC from [DATE].
7. As a consequence of [appellant’s name] having wrongly been treated as claiming UC and receiving a purported award of UC:
   1. The SSWP made a supersession decision on [DATE] ending [appellant’s name]’s ESA award from [DATE]; and
   2. [LOCAL AUTHORITY] (‘**the LA**’) made a supersession decision, dated [DATE], terminating [appellant’s name]’s award of HB from [DATE].
8. Depending on the outcome of this appeal the couple could be entitled to the following total amounts towards their living expenses during the 2020/21 tax year:
   1. (if the appellants win the appeal), ESA worth **£[AMOUNT]** per month (made up of couple rate personal allowance, support group component, single rate enhanced disability premium (**‘EDP’**), couple rate SDP [IF THERE WON’T BE ENTITLEMENT TO COUPLE SDP THEN IT’S WORTH DOUBLE CHECKING WHETHER THEY WILL ACTUALLY BE BETTER OFF IF THEY WIN THE APPEAL];
   2. (if the respondent wins the appeal) UC worth **£[AMOUNT]** per month (made up of couple rate standard allowance, limited capability for work related activity element, and excluding the housing costs element (so that entitlement can be compared to ESA).

**Background law**

*The SDP Gateway*

1. In *R(TP and AR) v SSWP* [2018] EWHC 1474 (Admin) (subsequently upheld in *R(TP, AR & SXC) v SSWP* [2020] EWCA Civ 37) a claim for judicial review was brought on behalf of two benefit claimants who both saw their benefits reduce by around £178 per month when they moved home and were required to claim universal credit in the area they moved to. The reason for the reduced entitlement was the lack of equivalent to the SDP and EDP in UC. Justice Lewis held that treating a person who moves to a new LA area less favourably than someone who moves within an LA area was in contravention of Art.14 of the European Convention on Human Rights (‘**the ECHR’**) read with Article 1 of the First Protocol.
2. Seven days before the publication of the High Court judgment the Secretary of State, Esther McVey MP, made a written statement on 07/06/2018 that a change would be made so that (House of Commons Written Statement, 07/06/2018, HCWS745):

*In order to support the transition for those individuals who live alone with substantial care needs and receive the Severe Disability Premium, we are changing the system so that these claimants will not be moved to Universal Credit until they qualify for transitional protection*

1. Subsequently the ‘SDP Gateway’, set out in reg.4A of the Universal Credit (Transitional Provisions) Regulations 2014 (**‘ the UC (TP) Regs 2014’**), came into force on 16/01/2019 which states that:

***Restriction on claims for universal credit by persons entitled to a severe disability premium***

*4A.—(1) No claim may be made for universal credit on or after 16thJanuary 2019 by a single claimant who, or joint claimants either of whom—*

* + - * 1. *is, or has been within the past month, entitled to an award of an existing benefit that includes a severe disability premium; and*
        2. *in a case where the award ended during that month, has continued to satisfy the conditions for eligibility for a severe disability premium.]*

*(2) This regulation does not apply in relation to a claim for universal credit by a single claimant who is a notified person or by joint claimants both of whom are notified persons.*

*Effect of couple formation on ESA and HB*

1. ESA and HB are benefits *claimed by an individual*. For a person in a couple, then an additional amount may be payable because they have a partner - note the reference to ‘a claimant’ in s.1(2) of the Welfare Reform Act 2007 (‘**the WRA 2007’**) and the reference to ‘a person’ in s.130 of the Social Security Contributions and Benefits Act 1992 (**‘the SSCBA 1992’**). A claimant’s partner is not themselves a claimant of ESA or HB.
2. This means that an ESA or HB claimant forming a couple does not cause their entitlement to those benefits come to an end (as long as they continue to satisfy the conditions for the benefit). This is to be distinguished from UC which is *claimed jointly* by both members of a couple.

*Effect of couple formation on UC – ending single award and treated as claiming as couple*

1. A single person may be entitled to UC if they meet the basic and financial conditions for UC. Alternatively, joint claimants are jointly entitled to UC if each of them meet the basic and financial conditions for UC.
2. A person claiming UC as a single person who subsequently becomes part of a couple (and therefore ceases to be a single person) ceases to be entitled to UC as a single claimant at the point that they form the couple (s.3 of the Welfare Reform Act 2012 (‘**the WRA 2012’**)). An individual claiming as a single person therefore has their entitlement to UC come to an end in the event of couple formation – in order to continue to be entitled to UC the couple would be required to either make a new claim for UC or be treated as making a claim.
3. Reg.9(8) of the UC (C&P) Regs 2013 states that a couple are to be treated as making a claim for UC (and sets the date on which they are treated as doing so) as follows:

*(8) A couple who are joint claimants are to be treated as making a claim for universal credit where—*

*(a)one of them ceased to be entitled to an award of universal credit (whether as a single person or as a member of a different couple) on the formation of that couple;*

*(b)the other member of the couple did not have an award of universal credit as a single person before formation of the couple.*

*and the claim is to be treated as made on the day after the member of the couple mentioned in sub-paragraph (a) ceased to be entitled to universal credit.*

*Effect of UC claim/award on ESA and HB*

1. Art.4 of the Welfare Reform Act 2012 (Commencement No.9 and Transitional and Transitory Provisions and Commencement No.8 and Savings and Transitional Provisions (Amendment)) Order 2013 (**‘the No.9&8 order’**) provides for the coming into force of s.33 of the WRA 2012 (which abolishes income-related ESA) in the event that a claim for UC is treated as made by a couple:

*[…] in relation to the case of a claim referred to in paragraph (2)(a) to (d) and (g) and any award that is made in respect of such a claim […] is the day appointed in accordance with paragraph (3).*

*(2) The claims and awards referred to are–*

*[…]*

*(c) a claim for universal credit that is treated as made by a couple in the circumstances referred to in regulation 9(8) of the Claims and Payments Regulations 2013 (claims for universal credit by members of a couple) where the claim complies with article 3(7)*

1. The date appointed for the coming into force of the abolition of income related ESA is set out in art.4(3)(a) of the No.9&8 order:

*(3) Subject to paragraph (4), the day appointed in relation to the cases referred to in paragraph (2) is–*

*(a) in the case of a claim referred to in paragraph (2)(a) to (d) and (g), the first day of the period in respect of which the claim is made or (in the case of a claim for universal credit) treated as made;*

Art.4(4) is not applicable to this case.

1. Reg.7 of the UC (TP) Regs 2014 governs the termination of HB awards in the event of a couple being treated as having made a claim for UC, reg.7(1) sets out the circumstances in which the reg. applies:

***Termination of awards of certain existing benefits: new claimant partners***

*7.—(1) This regulation applies where—*

*(a)a person (“A”) who was previously entitled to universal credit as a single person ceases to be so entitled on becoming a member of a couple;*

*(b)the other member of the couple (“the new claimant partner”) was not entitled to universal credit as a single person immediately before formation of the couple;*

*(c)the couple is treated, in accordance with regulation 9(8) of the Claims and Payments Regulations, as having made a claim for universal credit; and*

*(d)the Secretary of State is satisfied that the claimants meet the basic conditions specified in section 4(1)(a) to (d) of the Act (other than any of those conditions which they are not required to meet by virtue of regulations under section 4(2) of the Act).*

*(2) Subject to paragraphs (4) and (5), where this regulation applies, all awards of income support or housing benefit to which the new claimant partner would (were it not for the effect of these Regulations) have been entitled during the relevant period are to terminate […]*

1. Once an award of UC has been made to an individual there can be no entitlement to HB for the period during which there is any entitlement to UC. Reg.5 of the UC (TP) Regs 2014 states that, except in certain situations – none of which apply to the appellants, a claimant is not entitled to any HB in respect of a period when the claimant is entitled to UC.

*The application of deeming provisions*

1. In giving the judgment with which all members of the Court agreed in *Szoma v SSWP* [2005] UKHL 64 (reported as *R(IS) 2/06*) Lord Brown stated that when considering deeming provisions:

*“[…]it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all. “The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further” – the effect of the authorities as summarised by Bennion, Statutory Interpretation, 4th ed (2002), Section 304 at page 815.”*

1. In *KH v SSWP* [2009] UKUT 54 (AAC) Judge Jacobs, in considering the application of a deeming provision regarding the date of claim for Disability Living Allowance, applied *Szoma*:

*“Although it is not worded as a deeming provision, that is what in substance regulation 6(8) is. As such, it is not to be applied more widely than its purpose requires: Lord Brown in Szoma v Secretary of State for Work and Pensions reported as R(IS) 2/06 at paragraph 25. […] [I]t’s purpose is self-evidently to benefit the claimant by allowing time to complete the claim form. […] There is no reason to carry the effect of this provision across to a different context.”*

**Substantive submissions**

1. [appellant’s name] will show that the correct approach to this case would have been for the formation, between [partner’s name] and [appellant’s name], of a couple to:
   1. Have brought [partner’s name]’s entitlement to UC as a single person to an end;
   2. In light of [appellant’s name] being blocked from claiming UC by the SDP Gateway – for [partner’s name] and [appellant’s name] not to be treated as making a claim for UC (to treat them as doing so would apply the relevant provision more widely than it’s purpose requires);
   3. [appellant’s name]’s ESA to have been superseded to have included a personal allowance in respect of a couple and a couple rate SDP and
   4. [appellant’s name]’s HB entitlement to have continued without any change.

*[partner’s name]’s UC entitlement ends*

1. [partner’s name] was, prior to forming a couple with [appellant’s name], entitled to UC as a single person. At the point that they formed a couple with [appellant’s name] their entitlement to UC as a single person correctly came to an end.
2. S.3 of the WRA 2012, sets out that a single UC claimant may be singly entitled or alternatively a couple may jointly claim and be jointly entitled. This is made explicit in reg.9(8)(a) of the UC (C&P) Regs 2013 which refers to a claimant having ‘*ceased to be entitled to an award of universal credit’* in the event of couple formation.
3. The question the Tribunal must consider is what should have happened next.

*Mr. and [appellant’s name] could not be treated as making UC couple claim*

1. Had [partner’s name] and [appellant’s name] actually attempted to make a claim for UC they would have been prevented from doing so by the SDP gateway. The SSWP however has attempted to apply reg. 9(8) in order to *deem them as having done something that they would not have been allowed to actually do.* It is submitted that this is to use the deeming provision in reg.9(8) more widely than it’s purpose requires.

*Covered by the SDP Gateway*

1. [appellant’s name] was, at the time that they formed a couple with [partner’s name], blocked from claiming UC regardless of whether this was by virtue of reg.4A(a) or (b):
   1. On the date on which [appellant’s name] formed a couple with [partner’s name] they were blocked from claiming UC by the SDP Gateway as [appellant’s name] fell into reg.4A(a) of the UC (TP) Regs 2014, i.e. they had been, within the past month, entitled to an award of an existing benefit that included the SDP (as a single person under para.6(2)(a) of sch.4 of the Employment and Support Allowance Regs 2008 (‘**the ESA Regs 2008’)**).
   2. [appellant’s name]’s position is that there was no need for them to meet the condition in reg.4A(b) (i.e. to continue to satisfy the conditions for eligibility for an SDP) as their entitlements to ESA and to HB did not (other than as the result of supersessions due to having wrongly been treated as having claimed UC –supersession decisions that must be revised by the Tribunal) end as a result of forming a couple with [partner’s name].
   3. However, in any event [appellant’s name] *did* continue to satisfy the conditions for the SDP as [partner’s name] was also in receipt of a qualifying benefit (i.e. PIP Daily Living Component) so would have continued to have satisfied the conditions for an SDP (at the couple rateunder para. 6(2)(b) ofsch.4 ofthe ESA Regs 2008).

*Application of the deeming provision in reg.9(8)*

1. Reg.9(8) of the UC(C&P) Regs 2013 contains a deeming provision which treats a couple as claiming UC in the event that a UC claimant (such as [partner’s name]) forms a couple with someone who was not previously entitled to UC (such as [appellant’s name]).
2. The intention of this deeming provision appears to be to minimise disruption to claimants and to maximise entitlement (as opposed to causing disruption and reducing entitlement) by avoiding the need for repeat claims as soon as a claimant has a change in relationship.
3. The intention of the deeming provision in reg.9(8) ***cannot*** have included circumventing the SDP Gateway which was only introduced, seemingly (at least in part) in response to litigation, in 2019 - six years after the UC Regs 2013 were made.
4. To ***treat*** [appellant’s name] as having done something (i.e. claim UC) ***which they were not lawfully permitted to actually do*** would, contrary to the principle set out in *Szoma,* be to carry the effect of reg.9(8) over to a very different context.
5. The Tribunal must, therefore, determine that the SSWP acted unlawfully in :
   1. treating [appellant’s name] as having claimed UC; and therefore
   2. In making an award of UC to [appellant’s name].

*Effect on existing awards*

1. If the Tribunal accepts the arguments put forward by [appellant’s name] then it must revise the decisions made on their ESA and HB awards.
2. The SSWP superseded [appellant’s name]’s ESA to end their entitlement on the basis that income-related ESA had been abolished under s.33 of the WRA 2012. However, the day appointed for the coming into force of s.33 is determined as being the day on which [appellant’s name] was incorrectly treated as making a claim for UC in accordance with art.4 of the No.9&8 Order.
3. [appellant’s name] was incorrectly treated as claiming UC so the determination of the day appointed for the abolition of [appellant’s name]’s ESA was also incorrect. As such, the Tribunal must revise the supersession ending their ESA award. Further, the Tribunal must so revise the supersession that [appellant’s name]’s ESA award includes the following premiums from [DATE]:
   1. Couple rate personal allowance
   2. [SINGLE OR COUPLE] rate EDP
   3. Couple rate SDP
   4. Support Group component.
4. Likewise, the LA superseded [appellant’s name]’s HB award to end their entitlement on the basis that the conditions in reg.7 of the UC (TP) Regs 2014 had been met, which includes the condition that the couple was treated as making a claim for UC in accordance with reg.9(8) of the UC (C&P) Regs 2013. [appellant’s name] was incorrectly treated as claiming UC so the termination of the HB award was also incorrect. As such, the Tribunal must revise the supersession ending their HB award.

[ADVISER NAME , ORGANISATION]

22/04/2021