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| In the First Tier Tribunal (Social Entitlement Chamber) | | Case No: | | |
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| BETWEEN: | | | |
|  | MS X | | **Appellant** |
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| - and - | | | |
|  | SECRETARY OF STATE FOR WORK AND PENSIONS | | **Respondent** |
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|  | APPELLANT’S SUBMISSIONS FOR THE HEARING | |  |

1. I have received the Respondent’s “Supplementary Submission “that she furnished to comply with the Directions issued by Judge on 03/02/2021.
2. I note that the Respondent concedes that the date of Ms X’s award of (contribution based) Employment and Support Allowance (ESA) must be considered when the start of the qualifying period is determined, and I also note the Respondent’s reference back to paragraph 5 of her initial Response.
3. I find paragraph 5 of the Response to be both confused and confusing, but it is evidence that the Respondent has either not considered the implications of R v Johnson and ors [2020] EWCA Civ 778, or that she considers Johnson to be irrelevant to the present case
4. The Respondent avers **(S5(5.12) of the Response page F**).

Whilst I accept that Ms X feels that she has not been treated fairly decision makers and tribunals are obliged to follow such law as laid down by Parliament.

* 1. I accept that decision makers and Tribunals cannot disapply primary legislation, but I am reminded that the Supreme Court held in RR (Appellant) v Secretary of State for Work and Pensions (Respondent) [2019] UKSC 52 held at [27]-[30]

*Conclusions on the principal issue*

27. Although the majority of the Court of Appeal in *Carmichael (CA)* accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the appellant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.

28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) which have already been referred to, but also by the provisions of section 3(2). This provides that the interpretative obligation in section 3(1):

“(a) applies to primary and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility.”

Once again, a clear distinction is drawn between primary and subordinate legislation.

29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.

30. Contrary to the Secretary of State’s argument, *Mathieson* was not a “one off”. As shown by the authorities listed in paras 21 to 23 above, the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in *Francis*, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in *In re G*, where the unmarried couple could be allowed to apply to adopt (in reaching my Opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in *Burnip* and *Gorry*, where housing benefit could simply be calculated without making the deduction for under-occupation; nor was it the case in *Mathieson*, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in *JT*, where criminal injuries compensation could be paid without regard to the “same roof” rule; and nor is it the case here, where the situation is on all fours with *Burnip* and *Gorry*. There is no legislative choice to be exercised. As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X.

* 1. The Court of Appeal found in Johnson that in the circumstances of the case before it, the Universal Credit assessment periods provided by Regulation 54 were both irrational and discriminatory.
  2. It follows that if Johnson stands, it is arguable that the Respondent’s assertion that “*decision makers and tribunals are obliged to follow such law as laid down by Parliament”* may not necessarily be so.

1. I intend to discuss Johnson further but only in so far as it pertains to Universal Credit (UC) payments in respect of service charges, and not in relation to any Loan for Mortgage Interest that Ms X may otherwise be entitled to. I do so because the “qualifying period” provisions in the Loans for Mortgage Interest Regulations 2017 (the LMI Regs) do not mirror to the equivalent provisions in Schedule 5 of the Universal Credit Regulations (the UC Regs).
2. It is furthermore the case that with the coming into force of the LMI regs, paragraph 3 of Sch 5 of the UC Regs was amended. Paragraph 3 now provides :

“**Relevant payments” for purposes of this Schedule**

3 (1) “Relevant payments” means one or more payments which are service charge payments.]

(2)

(3) “Service charge payments” is to be understood in accordance with paragraphs 7 and 8 of that Schedule.

1. It follows that the amendments to paragraph 3 effectively make Schedule 5 irrelevant to the determination of any entitlement to a loan for mortgage interest and that any entitlement is to be determined only by reference to the LMI regs. This is of course in keeping with the fact that the UC regs and the LMI regs needed two different acts of primary legislation (the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016 respectively)

**Entitlement to a Loan for Mortgage Interest (LMI)**

1. I will concede that Ms X cannot rely on paragraph 6 of Schedule 5 of the UC Regs because a LMI is not a relevant payment for the purpose of that Schedule.
2. The nearest equivalent provision to Sch. 5(6) UC Regs in the LMI Regs is provided by LMI Reg 21, however *(in contrast to Sch. 5(6) UC Regs* ) Reg 21 does not refer to “an Employment and Support Allowance”, but to “a legacy benefit”, which only includes an **Income Based** (my emphasis) Employment and Support Allowance.
3. **I will therefore concede that Ms X cannot rely on her receipt of contribution-based Employment and Support Allowance in so far as it relates to the start of her qualifying period for her entitlement to an LMI.**
4. The Respondent argues (**S5(12) page F of the Response**) that the (late) payment of holiday pay by Manpower in January 2020 “resets the clock.” She argues that this is provided by paragraph 4 of Regulation 3 of the LMI Regs, but I submit that she has misinterpreted Regulation 3(4).
   1. Regulation 3(4) provides

(4) A UC claimant shall not be eligible for the offer of loan payments if—

(a)where the claimant is a single person, the claimant has any earned income; or

(b) where the claimant is a member of a couple, either member of the couple has any earned income.

* 1. It is strongly arguable that the above does not “reset the clock” during the qualifying period.
  2. “Qualifying Period” for the purposes of the LMI Regs is defined by Reg 2 as

a period of—

1. nine consecutive assessment periods in which a claimant has been entitled to universal credit;

(b) 39 consecutive weeks in which a claimant—

(i)has been entitled to a legacy benefit; or

(ii)is treated as having been entitled to such a benefit under —

(aa)paragraph 14 of Schedule 3 to the IS Regulations

(bb)paragraph 13 of Schedule 2 to the JSA Regulations(; or

(cc)paragraph 15 of Schedule 6 to the ESA Regulations

* 1. The only relevant criterion in light of above is that of entitlement to UC (regardless of any earned income). There is thus no provision for “resetting the clock” as argued by the Respondent.
  2. My argument is made even stronger when Reg 2 as cited is compared with the provisions in paragraph 5(3) of Sch 5 UC Regs. Paragraph 5(3) provides.

(3) Where, before the end of a qualifying period, an owner-occupier for any reason ceases to qualify for the inclusion of an amount calculated under this Schedule—

(a)that qualifying period stops running; and

1. a new qualifying period starts only when the owner-occupier again meets the requirements of sub-paragraph (2)(a) or (b).
   1. The above provision in Sch 5 UC Regs is completely absent from the LMI Regs.
2. There is thus no need for any Johnson arguments regarding earnings because Ms X will be entitled to an LMI after nine consecutive periods of entitlement to UC (*i.e. from 23 October 2020*) regardless of having any earned income during the intervening period. Earned income would only become relevant if she had any such income during an assessment period **afte**r that qualifying period.

**Payment in Respect of Service Charges**

1. I concede that notwithstanding Johnson paragraph 3(5) of Schedule 5 would otherwise apply.
2. I have attached a copy of an email that Ms X received from Manpower detailing payments that were made to her and the periods to which they related.
3. Ms X has not worked for Manpower since November 2019, and the Respondent concedes that Ms X was entitled to ESA from 8 November 2019 **(S4(6) page C original Response)**
4. Paragraph 6 of Sch. 5 UC Regs provides.

**Application of paragraph 5: receipt of JSA and ESA**

6.—(1) This paragraph applies to any owner-occupier who immediately before the commencement of an award of universal credit is entitled to—

(a)a jobseeker's allowance; or

(b)an employment and support allowance.

(2) In determining when the qualifying period in paragraph 5 ends in relation to the owner-occupier, any period that comprises only days on which the owner-occupier was receiving a benefit referred to in sub-paragraph (1) may be treated as if it were the whole or part of one or more assessment periods, as determined by the number of days on which any such benefit was received.

* 1. The start of the qualifying period in so far as it relates to service charges would therefore otherwise be 8 November 2019 and Ms X would consequently be entitled to payment of UC housing cost in respect of service charges from **8 August 2020** if paragraph 5(3) of Sch 5 can be disapplied. (*It is arguable as outlined at [2]-[4.3] above and for the reasons outlined below that paragraph 5(3) should be disapplied*)

1. I am aware that in PT V SECRETARY OF STATE FOR WORK AND PENSIONS [2015] UKUT 0696 (AAC) Judge Jacobs held at [11]

11. The third question is whether the money in question was received during the assessment period. Despite the claimant’s attempts to argue otherwise, it clearly was. It was money received in that period, even if it was earned earlier.

As such, it was part of the claimant’s earned income (regulation 54(1)). It does not matter that the employment from which it was derived had ceased to exist by the time of payment. The contract of employment remained in force, although the

claimant had completed his performance under it, and the claimant could, if necessary, have sued on it for his outstanding wages. This was in principle no different from the usual arrangement whereby wages are paid after the period in

which they are earned

* 1. There is a great deal of conflict between PT and Johnson, but Johnson is a Judgment of a higher court, and I submit that PT is no longer good law following the Court of Appeal’s Judgement in Johnson

1. The Court of Appeal held in Johnson that Regulation 54(1) was both irrational and discriminatory in the circumstances of the case before it, and I submit that the mischief of Regulation 54(1) becomes even more discriminatory and even more irrational when considered in combination with Sch 5 paragraph 5(3) because it entirely possible that a qualifying period could be extended indefinitely simply because a claimant was owed a small amount by an employer who was inordinately slow in paying.
   1. The provisions will also arguably discriminate (for example) against ESA or former ESA claimants who are engaged in exempt work as provided for by Regulation 45 of the 2008 ESA Regs or Regulation 39 of the 2013 ESA Regulations.
2. I ask the Tribunal to allow the appeal for the reasons outlined above.



Derek Stainsby

Welfare Rights Adviser

Plumstead Community Law Centre For the Appellant 10/03/2021

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| Attachments |
| Copy of Email from Manpower |
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| R v Johnson and ors [2020] EWCA Civ 778 |
| RR (Appellant) v Secretary of State for Work and Pensions (Respondent) [2019] UKSC 52 |
| PT V SECRETARY OF STATE FOR WORK AND PENSIONS [2015] UKUT 0696 (AAC) |