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| In the First Tier Tribunal (Social Entitlement Chamber) | | Case No: SC124/21/00857 | | |
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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. This is an appeal against the decision dated (date) as confirmed by the mandatory reconsideration dated 08/06/2021. The Respondent decided that Ms X was entitled to Universal Credit (UC) from (date). She determined that the time for claiming cannot be extended and Ms X’s award cannot be backdated (*or in correct parlance the time for claiming cannot be extended from an earlier date to the date UC was claimed.).*
2. The Respondent avers

Section 8(2) of the Social Security Act 1998 states

a) the claim shall not be regarded as subsisting after that time; and

(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances beyond (sic) that time

Due to the above law this means that your backdating request made on (date) is treated as a further claim made to UC from that date…

* 1. The Respondent has (as I show below) not even cited S8(2) accurately but her determination to treat the “backdating request “as a “further claim” is a nonsense because a purported claim made during the currency of an existing award must take effect as a supersession (R(IB)2/04 at [146], CH/2008/2011 at [6])

1. The Response from the Secretary of State is quite frankly incoherent, not least because she appears not to understand what S8(2) of the Social Security Act 1998 provides or its consequences.
   1. S8(2) provides (the emphasis is mine)

(2) Where at any time a claim for a relevant benefit is decided by the Secretary of State–

(a) the claim shall not be regarded as subsisting after that time; and

(b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit **on the basis of circumstances not obtaining at that time**

* 1. S8(2) precludes a (nil award) decision from being superseded so as to allow an award from any date after the date the nil award decision took effect but is does not preclude the nil award decision from being revised so as to make an award of benefit from that date (or an earlier date) if entitlement can be established. S8(2) does not preclude so called closed period supersessions where a claimant’s award is terminated but then becomes entitled to benefit at the time the superseding decision is made (No further claim is required in these circumstances (CIB/4090/1999, CIB/5170/1999, CSIS/754/2002, CIS/2595/2003).
  2. S8(2)(b) pertains to original decisions and is mirrored by S12(8)(b) in respect of decisions under appeal to a Tribunal. S12(8)(b) provides (again the emphasis is mine)

(8) In deciding an appeal under this section, [2the First-tier Tribunal]–

and

(b) shall not take into account **any circumstances not obtaining at the time when the decision appealed against was made.**

* 1. Mr Commissioner (now Judge) Jacobs analysed the provision in R(DLA)2&3/01. Judge Jacobs held at [9]

9. Section 33(7) limits the tribunal’s jurisdiction to the claimant’s entitlement. In the case of a claim for a disability living allowance, the jurisdiction is limited to the inclusive period from the date of claim to the date of the decision under appeal. The effect is also to limit the evidence that is relevant to the appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However, it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time, it is not admissible

1. The Respondent has proceeded on the basis that her consideration of the matter of whether the time for claiming can be extended is something that she has **decided** . The Respondent uses the term “request for backdating, and it seems that in her mind that she has made **a decision** on that “request for backdating.”.
   1. In this context “request for backdating “has connotations of “claim for backdating” which was the language found in Regulation 83(12) the Housing Benefit Regulations 2006 prior to their amendment on 1 November 2010. (The connotations become stronger in the Response at (**page number)** when the Respondent explicitly states that she is treating the “backdating request” as “a further claim”)
   2. Regulation 83(12) provided

(12) Where the claimant makes a claim in respect of a past period (a “claim for backdating”) and, from a day in that period up to the date of the claim for backdating,

he had continuous good cause for his failure to make a claim, his claim in respect of that period shall be treated as made on–

(a) the first day from which he had continuous good cause; or

(b) the day 6 month before the date of the claim for backdating

* 1. There is of course no such thing as a “claim for backdating “in the universal credit, personal independence payment, jobseeker’s allowance and employment and support allowance (claims and payments) regulations 2013, and it is strongly arguable that the Regulations do not specifically require any “request for *backdating “( the relevant provision is Regulation 26 which I discuss in more detail below)*
  2. The Respondent appears for no good reason to have imported the provisions of the former version of Housing Benefit Regulation 83(12) into Regulation 26. There is no requirement under Regulation 26 for a claim for backdating or even a “request for backdating”.
  3. Whether the time for claiming can be extended is a matter for **determination by the Secretary of State** (in other words she must consider whether the claimant’s circumstances are those specified in Regulation 26(3).)

1. Judge Jacobs explained the important distinction between decisions and determinations in CIB/2338/2000 at [19]-[25]

Adjudication under the Social Security Act 1998

Decisions and determinations

19. The Social Security Act 1998 and the regulations made under it draw a distinction between decisions and determinations. The distinction is not always immediately obvious, because ‘determine’ and ‘determination’ are used both (a) to distinguish a determination from a decision and (b) to refer to the process by which a conclusion (whether a decision or a determination) is reached.

20. Only three of the decisions under the 1998 Act are relevant to this case. They concern the Secretary of State’s responsibility:

“to decide any claim for a relevant benefit”: section 8(1)(a) - the relevant benefits are defined by section 8(3) and include incapacity benefit, severe disablement allowance and income support;

“to make any decision that falls to be made under or by virtue of a relevant enactment”: section 8(1)(c) – the relevant enactments are defined by section 8(4) and include the Social Security Contributions and Benefits Act 1992, which governs the crediting of earnings (section 22(5)) and capacity for work (Part XIIA);

for “making a decision” that revises or supersedes an earlier decision: sections 9 and 10.

21. There is no definition of ‘determination’ in the legislation. The best indication of the nature of a determination is given by section 17(2) of the Social Security Act 1998:

‘(2) If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, shall be conclusive for the purposes of-

1. further such decisions’.

22. Without attempting a definition, the nature of a determination is that it is a building block of a decision. Take as an example an award of income support. The findings of fact on which the award is based are all determinations. So are the conclusions on the individual components of the calculation that lead to an award, like the amount of the eligible housing costs and the premiums that are included in the applicable amount. The decision - that the claimant is entitled to income support of a specific amount from and including a particular date - is the result of combining those determinations. (There are also determinations that are conclusions on procedural matters, but they are not relevant to this case.)

23. The distinction between a determination and a decision is relevant, because an appeal lies to an appeal tribunal only against a decision. This is made clear by section 12 of the Social Security Act 1998. This reflects the new emphasis on outcome decisions.

Outcome decisions

24. Standing back from the details of the Social Security Act 1998 and the regulations made under it, there is a clear theme uniting most of the decisions that are appealable. This is that they are, to use the new jargon, ‘outcome decisions’. This is not a term of art. It is merely a useful expression to refer to decisions that have, in crude terms, an impact on a claimant’s pocket. In other words, an outcome decision is one that directly affects the money that the claimant receives or might receive in the future.

25. The determinations that are the building blocks of outcome decisions also, of course, affect the money that the claimant receives or might receive in the future. But they do not have this effect directly. They have this effect only when incorporated in an outcome decision. The claimant is able to appeal against the outcome decision and is able to challenge, as an issue arising on that appeal, the underlying determination

* 1. What the Respondent refers to as the “request for backdating” in the present case is in the light of the above, an application for a revision of the Respondent’s decision dated ( date) (**see (relevant section) of the Secretary of State’s Response).** That decision embodied an implicit determination that thetime for claiming could not be extendedfromany date before (date). Ms X’s application was refused, the decision was not revised and is now of course under appeal.

1. It is common ground that Ms X must satisfy Regulation 26 of the universal credit, personal independence payment, jobseeker’s allowance and employment and support allowance (claims and payments) regulations 2013 (SI 2013/380 ) in order for her award to be “backdated”. Regulation 26 in so far as is relevant provides:

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, 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–

…..

(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;

1. “Disability” in sub paragraph 3(b) is not defined. It must therefore be given its normal everyday meaning and it is arguable that it can be interpreted widely.
2. Ms X is not in any way asking for an award of UC on the basis of circumstances not obtaining at the time of her claim or the decision under appeal. She maintains that she had a disability such that she could not reasonably be expected to make her claim at an earlier date (i.e that Regulation 26(3)(b) of the universal credit, personal independence payment, jobseeker’s allowance and employment and support allowance (claims and payments) regulations 2013 (SI 2013/380 applies)
3. It is arguable in the alternative that Regulation 26(3) (c) may apply, although I concede that the Respondent has not included medical evidence (required by Regulation 26(3)(c)) in the bundle and that I have not seen the relevant evidence (I am working remotely)
4. Regulation 26(3)(c) does not provide a time limit for that medical evidence to be provided and I submit that in the absence of any new provision to the contrary, it has been a long-established principle that retrospective medical evidence is acceptable (CIS/2699/2001). It is also strongly arguable that the Tribunal stands in the shoes of the Decision Maker (DM) and can make any decision that the DM could have made. (R(IB)2/04) at [55])
5. I make the following observations relating to Ms X’s application for her award to be “backdated “to (date), and I concede that following GDC v SSWP (UC) [2020] UKUT 108 (AAC) CUC-968-2019 the Respondent is fortuitously correct when she says that the award cannot be “backdated” to that date. This is because Judge Wikely held in GDC at [102].

102. In the course of this appeal, Mr Williams of CPAG, acting on behalf of the Appellant, has made what are arguably telling criticisms of the way in which the universal credit claims process is explained to claimants and how it operates. However, for the reasons above he has not persuaded me as a matter of the proper construction of the legislation that an incomplete online universal credit claim form, even if the data is held on the Secretary of State’s official computer system, amounts to a defective claim in circumstances where the claim has not been submitted in accordance with all the requirements of Schedule 2 to the 2013 Claims and Payments Regulations. I therefore dismiss this appeal.

However, the Respondent is completely wrong to suggest that the award cannot be “backdated” (**i.e. the time limit for claiming be extended for one month from (date to (date)**)

1. The Respondent avers **(p? of the bundle)**

I am unable to find a record of you making a claim prior to (date), but feel it is reasonable to expect you, having attempted to claim in (date) to have made some enquiries or asked for help regarding making a claim sooner

1. The Respondent’s own internal processes will have prevented the DM from finding any record as is explained by Judge Wikeley in GDC at [47] (the emphasis is mine)

47. Immediately below this statement is a further tick box (“I understand and agree”) **followed by a final green button labelled “Submit claim”.** Once that button is clicked, the system logs this action in the Journal as the date of the claim and sends the claimant an automated message. This advises him or her to book an initial evidence interview (IEI) and tells them that they have a month in which to produce evidence to support the claim for universal credit. At the same time, the system prompts DWP team leaders to allocate the claim to a case manager. **It is only at this point, according to Ms Fallon’s witness statement for the DWP, that the information supplied by the claimant online during Stage 2 becomes ‘visible’ to DWP staff.**

1. It is common ground that Ms X did not get as far as “the final green button labelled Submit” claim when she made her first attempt to claim in (date) so her transactions would remain invisible to DM’s
2. It is useful to explain the UC claims process in more detail because the Respondent has oversimplified it in her submissions to the Tribunal. The process is not straightforward.

15.1 Claims are normally made online, and the claimant must first create an “account” and then answer several sequential questions before the claim can be submitted. The claimant must then prove their identity, (*usually online via a separate “government gateway” account*). If the claimant does not answer every question the claim will not be submitted and there are a number of security checks every time the person logs on the their “account.” The checks include acknowledging a code that is sent by text to a nominated (UK) mobile number.

15.2 The Gov.uk page for starting a UC claim advises (if one scrolls down far enough) that

If you cannot verify your identity online

The Universal Credit team will phone you to help you verify your identity.

Help with your application

If you need help with your application, ask straight away - the sooner you apply for Universal Credit, the sooner you get your first payment.

There are 2 ways to get help with your Universal Credit application.

Universal Credit helpline

Contact the Universal Credit helpline if:

you cannot use digital services at all - this might be because of disability or your circumstances.

you have a question about your claim and cannot access your online claim

Universal Credit helpline

Telephone: 0800 328 5644

15.3 The Universal Credit helpline starts with a recorded message. The message gives the following instructions.

“Welcome to Universal Credit….. To make a new claim for Universal Credit please go to Gov.UK/universal credit”

Please listen carefully to all the options as they have changed.

If you are calling about a universal credit appointment press 1

For universal credit queries press 2

To make a new claim for new style employment and support allowance press 3

For advance payments press 4

15..4 There is no specific option in the list which enables a person to make a telephone claim, the person is directed back to Gov.uk from the start.

15.5 The instructions given by the Respondent on the Universal Credit Helpline is potentially misleading to anyone who calls. The potential is arguably far greater for someone who has a disability because that person may well lack the ability to be “persistent” and is likely to give up on the call when faced with the instruction to “go to Gov.UK/universalcredit”

1. I am reminded that (admittedly in a somewhat different context) . in Hinchy v Secretary of State for Work and Pensions [2005] UKHL 16, Baroness Hale of Richmond stated at [56]:

56. I say this because this regulation has to be interpreted and applied in its factual context. Those administering the system on behalf of the Secretary of State have to understand all its ramifications and interactions. Claimants cannot be expected to do so. They cannot be expected to guess all the information which may be relevant to their claims. They do not know the conditions of entitlement or how their right to one benefit may affect their right to another. It is incumbent upon the Secretary of State to make it clear what information he requires. This has to be made particularly clear where any reasonable claimant might not think that it was relevant at all …

* 1. In Hull City Council v JS 2012] UKUT 477 (AAC) Judge Mark held at [16].

…It seems to me that what the claimant could reasonably have been expected to realise must be a subjective matter depending on the claimant’s abilities and understanding….

1. I submit that although the contexts are different, the words of Baroness Hale and Judge Mark are relevant to the present case because they both shed light on the question of what can “reasonably be expected…” Baroness Hale and Judge Mark both establish that the question is a subjective one to be considered in the light of all the circumstances and the claimant’s “abilities and understanding”.
2. Whether Ms X could “*not reasonably have been expected to make* *the claim earlier*,” must therefore be considered in the light of Ms X’s mental ill health or disability *(given that this is common ground and accepted by the Respondent*), and in the light of the Respondent’s potentially misleading advice that is given on her own UC helpline. The question must also be considered in the light of the limited services available from advice agencies during the pandemic.
3. I submit that once the question is considered in the light of Ms X’s mental condition, and in the light of all the circumstances, Regulation 26(2) is satisfied and the time for claiming is therefore extended from **(date to date)** .
4. 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 24/09/2021