

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Rochdale Appeal Tribunal made on 8 May 2003. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. The case is remitted for determination by a legally qualified panel member whether there is a valid appeal against the decision of 22 April 2002, and if so for decision of that appeal by a new appeal tribunal.
2. The Claimant applied for working families' tax credit ("WFTC") by an application which was treated as made on 9 January 2002. He was asked to supply some further information which the Revenue says that he did not, despite reminders, supply. On 22 April 2002 a decision was made refusing the claim on the ground that, owing to the absence of the information, the Claimant had not established that he satisfied the conditions of entitlement.
3. According to the Revenue the next time it heard from the Claimant was on 11 September 2002, when he requested another claim form. He completed that claim form and also supplied further information which the Revenue required in relation to the Claimant's contention that he should be awarded benefit under the claim which he had made in January 2002. The Claimant was awarded and paid WFTC under the subsequent claim, which is not in issue before me.
4. What is in issue is the Claimant's entitlement to WFTC under the claim which he had made in January 2002. As regards that, after examining the further information supplied the Revenue concluded that the Claimant had fulfilled the conditions of entitlement to WFTC, and on 25 November 2002 made a further decision in the following form:

"The decision disallowing [WFTC] dated 22 April 2002 has been revised because it was assumed that [the Claimant's] income was too high to qualify for WFTC.

The new entitlement is £93.43 per week from 15 January 2002 to 15 July 2002"
5. However, the letter of 25 November 2002 notifying the Claimant of that decision added that "This award cannot be paid, this is because your request should have been made earlier. (11 September 2002 was when you asked for reconsideration)."
6. The Claimant appealed on 27 November 2002. His letter of appeal made clear that he considered that he should have been paid WFTC for the period for which it had been awarded by the decision of 25 November 2002. In numerous letters and submissions, both before and after the letter of appeal, the Claimant has contended that he had supplied the requested information before 22 April 2002, had not received the reminders asking for that information and had not received any notification of the decision of that date. The Claimant may also have asserted (as I understand it) that he had also attempted (unsuccessfully) to contact the Revenue between April and 11 September 2002 in order to find out what was happening. For the purposes of this decision it is not necessary to set out the Claimant's contentions (which have been advanced at considerable length) in any greater detail.
7. The Revenue's first written submission to the Tribunal stated the "date of decision" to be 22 April 2002, but then stated the terms of the "decision under appeal" to be those set out in paras. 4 and 5 above (i.e. the decision of 25 November 2002). The submission also stated:

"The appeal was not made on the appropriate form but was received within the time for making an appeal. The decision under appeal is easily identifiable and grounds for the appeal are given. The Tribunal are respectfully asked to accept the appeal as being duly made."

As to the merits of the appeal, the submission presented the issue as being whether the decision maker had been right, on 25 November 2002, in effect to refuse to exercise the power in Reg. 4 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 ("the 1999 Regulations") to extend the one month time limit for applying under Reg. 3(1) to revise the decision of 22 April 2002.

8. The Tribunal's Decision Notice stated that the appeal was disallowed, and that "the decision of the Secretary of State issued on 22 April 2002 is confirmed."

9. The Tribunal's short statement of reasons set out some of the facts very briefly and concluded as follows in the final paragraph:

"The Tribunal found that the decision [i.e. that of 22 April 2002] had been legally notified, that the Appellant had allowed a period of 6 months to elapse before pursuing the claim and that there had been no good reason for the delay and, in these circumstances, it was correct not to extend time."

10. In this appeal to me the Revenue submits as follows:

(1) That on its true analysis the decision of 25 November 2002 was a supersession, but with effect only from 25 November 2002, of the decision of 22 April 2002, on the ground of ignorance of material facts (i.e. the further information subsequently supplied by the Claimant).

(2) That the appeal to the Tribunal was against the decision of 25 November 2002, and therefore had been rightly accepted as having been made within time.

(3) That the issue before the Tribunal was rightly considered as being whether the decision maker had been correct, on 25 November 2002, in effect to refuse under Reg. 4 to extend the time for applying for revision of the decision of 22 April 2002.

(4) That the Tribunal had made no error of law in deciding that the decision maker had on the facts been correct not to extend time under Reg. 4 and therefore in effect that the decision of 22 April 2002 could not be revised.

11. In my judgment, however, the decision of 25 November 2002 was in substance simply a decision not to revise the decision of 22 April 2002. An award of WFTC remained payable for a period of 26 weeks (s.128(3) of the Social Security Contributions and Benefits Act 1992). What fell to be decided by the decision maker on 25 November 2002 was whether the decision of 22 April 2002 should be altered (to use a neutral word for the moment) so as to award WFTC under the claim which had been made on 9 January 2002. By 25 November 2002 more than 26 weeks had of course expired since the date of that claim. It makes no sense to say that the decision maker on 25 November 2002 decided to supersede the decision of 22 April 2002, when his decision was in substance that that decision should not be altered so as to award WFTC.

12. It follows that, on a correct analysis, the decision which the Claimant sought to appeal to the Tribunal was not the decision of 25 November 2002, but the decision of 22 April 2002: an appeal following a refusal to revise is an appeal against the original decision, not against the refusal to revise: R(IB) 2/04 at para. 188.

13. One of the Claimant's contentions was that he had not received notification of the decision of 22 April 2002. If that was so, one possible reason was that no notification of it was sent to him. If that was the case, his appeal on 27 November 2002 was within time, because the time for appealing generally starts to run from the date of notification of the decision sought to be appealed: Reg. 31(1). The question whether the appeal was within time was for determination by a legally qualified panel member: Reg. 31(4) of the 1999 Regulations.

14. On the footing (as found by the Tribunal) that the Claimant *was* duly notified of the decision of 22 April, the Claimant's appeal against that decision, made on 27 November 2002, was out of time. The effect of Reg. 31(1) and (2) is that the time for appealing against an original decision, following a refusal to revise it, runs from the date of notification of the original decision, unless the application for revision was made under reg. 3(1), when it will run from the date of the refusal to revise. If (as here) a claimant's application for revision is made outside the one month time limit allowed for making an application under Reg. 3(1), then his application for revision is not made under Reg. 3(1), unless that time limit is extended under Reg. 4. In this case time was not extended under Reg. 4. It follows that the Claimant's application for revision was not made under Reg. 3(1), and the time for appealing against the decision of 22 April therefore ran from the date of notification of that decision, not from the date of the refusal to revise.

15. Where a claimant applies, more than 1 month but less than 13 months after the date of notification of the decision, for revision of a decision which is accepted (in the light of information subsequently produced) to have been wrong, and the decision maker refuses the application on the ground that it was out of time, and the Claimant appeals, there are in my judgment only two possible outcomes of that appeal. The first is that time for making *the appeal* (i.e. the appeal against the original decision) is extended under Reg. 32 of the 1999 Regulations. If that is done, the appeal will necessarily succeed. The second is that the time for making *the appeal* is not extended under Reg. 32. In that event the tribunal simply has no jurisdiction to hear the appeal.

16. It seems to me that in neither of those events does the appeal tribunal have any jurisdiction to determine whether the decision maker *ought to have* exercised the power in Reg. 4 to extend the time for applying for revision under Reg. 3(1). A refusal or failure to extend time under Reg. 4 is not in my judgment a decision which is itself capable of being appealed. What is appealable under s.12 of the Social Security Act 1998 is "any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under section 9 above)" The decision maker, in deciding on 25 November 2002 not to revise the decision of 22 April 2002, may be said implicitly to have refused to extend the time for applying to revise that decision. But the only decision capable of being appealed was the original decision of 22 April 2002. If the decision maker had extended the time for applying for revision of that decision, the appeal against that decision would have been within time, and would have been bound to succeed. As it was, he did not, which meant that, unless the time *for appealing* was extended, the appeal was out of time.

17. The Tribunal in my judgment therefore would have had no jurisdiction to hold that the decision maker on 25 November 2002 *ought*, under Reg. 4, to have extended the time for applying for revision under Reg. 3(1), and therefore ought to have revised the decision of 22 April 2002. At the risk of repetition, the Tribunal only had jurisdiction to hear the appeal at all

if the time for *appealing* was extended, and if it was, there was no need for the Claimant to rely on Reg. 4.

18. Until amendments made to Reg. 32 of the 1999 Regulations as from 20 May 2002 the conditions for extending time under Reg. 4 were in fact very similar to those applicable under Reg. 32. In particular, in neither case could an extension be granted unless there were special circumstances and as a result of those circumstances it was not practicable for the application for revision or (as the case may be) the appeal to be made within the required time. However, from 20 May 2002 two significant changes were made to Reg. 32. First, an application for extension of the time for appealing can be granted if a legally qualified panel member is satisfied that there are reasonable prospects that the appeal will be successful. That is not of course to say that the reasons for the delay are not highly material in determining whether the power should be *exercised*. But the panel member's power can now *arise* whether or not there are special circumstances which prevented the appeal being made within the required time. Secondly, in a case where there are such special circumstances, the application for extension of the time can now be granted by the Secretary of State or (as the case may be) the Inland Revenue. Only a panel member can, however, extend time on the basis of the alternative test introduced in May 2002.

19. As noted in para. 7 above, in the present case the Revenue in its submission to the Tribunal accepted that the appeal was within time, and the Tribunal proceeded on that footing. However, that was because it was considered (mistakenly in my view) that the appeal was against the decision of 25 November 2002, not that of 22 April 2002. In the last paragraph of the Tribunal's reasons the chairman concluded that "it was correct not to extend time." That, in the context of the submissions made to the Tribunal, must be a reference to an extension of the time under the provisions of Reg. 4. There is no evidence that anyone (whether the Revenue, a legally qualified panel member prior to the Tribunal hearing, or the chairman (and sole member) of the Tribunal at the hearing), considered whether, on the footing that the appeal was against the decision of 22 April 2002 and was out of time, the time for appealing should be extended under the by then different provisions of Reg. 32.

20. I think that the Tribunal's brief reasons indicate that, if he had specifically considered the position *under Reg. 32*, the chairman would very probably have refused to extend the time for appealing. What weighed with the Chairman was simply that the Claimant appeared to have been inactive for a long time. However, as I have said, it is clear to me that no actual consideration was given to the question of extension under Reg. 32. That means that I must hold the Tribunal's decision to have been erroneous in law and must set it aside. The Claimant was entitled to have the question of whether there should be an extension of time considered under the correct statutory provision. Further, in the absence of an actual extension under Reg. 32 the appeal was out of time and the Tribunal had no jurisdiction to consider it at all.

21. Had I considered that the Tribunal's decision amounted in substance not to a purported decision by the Tribunal of an appeal, but to a determination by the chairman not to extend the time for appealing under Reg. 32, there would appear to have been no decision by the Tribunal capable of being appealed to me, and I think that my jurisdiction would have been limited to so declaring. The chairman's determination under Reg. 32 would not, on the face of the legislation, have been capable of appeal to a Commissioner, but only of challenge by judicial review. For what it is worth, however, I would myself, had I had any jurisdiction in the matter, have been disposed to accept the submissions on behalf of the Claimant that, in the light of the very detailed contentions which he had made as to the sequence of events from the date of his claim onwards, the reasoning in the final paragraph of the Statement of Reasons was unsatisfactorily brief. For example, there was no finding on whether the Tribunal accepted that the Claimant had not in fact received the notification of the decision of 22 April

2002. It may be that the Tribunal was saying that it did not matter whether he had or not, but even that is not clear from its very brief reasons.

22. Some of the Claimant's contentions are ones of "official error" on the part of the Revenue. "Official error" is a ground for revision "at any time" under Reg. 3(5)(a). However, this does not affect the above analysis, because it is still necessary for there to be a valid appeal before the appeal tribunal. An appeal following a refusal to revise for official error is still an appeal against the original decision, and the time limit for appealing against the original decision still runs from the date of the original decision: see R(IS) 15/04, where the statutory provisions were analysed at length in paras. 19 to 31.

23. In the result, therefore, I set aside the Tribunal's decision as erroneous in law. On the Tribunal's finding that the decision of 22 April 2002 had been duly notified there was, in the absence of an extension of the time for appealing under Reg. 32, to which no consideration had been given, no appeal properly before it. Although the Revenue and the Tribunal considered that there was a valid appeal before it, that was on the mistaken footing that the decision under appeal was that of 25 November 2002, not that of 22 April 2002.

24. It will therefore now be for a legally qualified panel member to determine:

(a) under Reg. 31(4) whether the decision of 22 April 2002 was in fact sent to the Claimant as contended by the Revenue;

(b) if so, whether the Claimant's time for appealing should be extended under Reg. 32.

25. If either (a) or (b) is determined in the Claimant's favour, the Claimant's appeal against the decision of 22 April 2002 is entitled to succeed. If neither are determined in his favour, there is no valid appeal against that decision, and therefore nothing for a new appeal tribunal to decide.

26. The procedures to be adopted in relation to the determinations and (if necessary) the tribunal rehearing are for a legally qualified panel member to determine.

**(Signed) Charles Turnbull
Commissioner**

9 August 2004