

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

UNIVERSAL CREDIT

Appeal to a Social Security Commissioner by the Department
on a question of law from a Tribunal's decision
dated 28 October 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Department for Communities from the decision of a tribunal with reference LD/4562/19/05/D.
2. For the reasons I give below, I allow the Department's appeal. I set aside the decision of the appeal tribunal on the basis of error of law and I determine the appeal myself under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998.
3. Having considered the appeal myself I make further findings of fact on the basis of agreed evidence. I disallow the respondent's appeal.

REASONS

Background

4. The applicant had made a claim for universal credit (UC) from the Department for Communities (the Department) on 19 November 2018. On 28 December 2018 the Department decided that he was entitled to nil UC for the assessment period from 19 November 2018 to 18 December 2018 as his earnings exceeded his entitlement to UC. The Department decided that he had received earnings of £1,014.90 in the assessment period. The applicant requested a reconsideration. On 17 September 2019 the decision was reconsidered by the Department but not revised. The respondent appealed. The appeal was considered on 28 October 2020 by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal allowed the respondent's appeal.

5. The Department requested a statement of reasons for the tribunal's decision, and this was issued on 14 June 2021. The Department applied to the tribunal for leave to appeal to the Social Security Commissioner. The President of the Appeals Service granted leave to appeal by a decision issued on 27 September 2021 on the grounds advanced by the Department in its letter of 24 June 2021. On 1 October 2021 the Department appealed to the Social Security Commissioner in the same terms

Grounds

6. The Department submits that the tribunal has erred in law on the basis that:
 - (i) It erroneously discounted earnings received in the assessment period on the basis that they were not made "in respect of" the assessment period;
 - (ii) It erroneously applied an amended version of the UC Regulations that was not in force at the date of the decision under appeal.
7. The respondent was invited to make observations in response to the appeal, giving him one month to respond. No observations were received from the respondent.
8. The Department subsequently made further submissions, placing reliance on the Upper Tribunal decision of *PT v Secretary of State for Work and Pensions* [2015] UKUT 696.

Relevant legislation

9. The scheme of UC was established in Northern Ireland by the Great Britain Secretary of State for Work and Pensions under powers granted by section 1 of the Northern Ireland (Welfare Reform) Act 2015. It was introduced on a phased basis, commencing on 27 September 2017. By article 8(2) of the Welfare Reform (NI) Order 2015 (the Order):
 - (2) Joint claimants are jointly entitled to universal credit if—
 - (a) each of them meets the basic conditions, and
 - (b) they meet the financial conditions for joint claimants.
10. By article 10 of the Order:
 - (2) ... , the financial conditions for joint claimants are that—
 - (a) ...

- (b) their combined income is such that, if they were entitled to universal credit, the amount payable would not be less than any prescribed minimum.

11. By article 12 of the Order:

- (1) Universal credit is payable in respect of each complete assessment period within a period of entitlement.
- (2) In this Part an “assessment period” is a period of a prescribed duration.
- (3) Regulations may make provision—
 - (a) about when an assessment period is to start;
 - (b) for universal credit to be payable in respect of a period shorter than an assessment period;
 - (c) about the amount payable in respect of a period shorter than an assessment period.
- (4) In paragraph (1) “period of entitlement” means a period during which entitlement to universal credit subsists.

12. By article 13 of the Order:

13.—(1) The amount of an award of universal credit is to be the balance of—

- (a) the maximum amount (see paragraph (2)), less
- (b) the amounts to be deducted (see paragraph (3)).

(2) The maximum amount is the total of-

- (a) any amount included under Article 14 (standard allowance),
- (b) any amount included under Article 15 (responsibility for children and young persons),
- (c) any amount included under Article 16 (housing costs), and
- (d) any amount included under Article 17 (other particular needs or circumstances).

(3) The amounts to be deducted are—

- (a) an amount in respect of earned income calculated in the prescribed manner (which may include multiplying some or all earned income by a prescribed percentage), and

- (b) an amount in respect of unearned income calculated in the prescribed manner (which may include multiplying some or all unearned income by a prescribed percentage).
 - (4) In paragraph (3)(a) and (b) the references to income are—
 - (a) in the case of a single claimant, to income of the claimant, and
 - (b) in the case of joint claimants, to combined income of the claimants.
13. The relevant regulations, made under article 12(3) by the Great Britain Secretary of State for Work and Pensions, are the Universal Credit Regulations (NI) 2016 (the UC Regulations). By regulation 22, these provide for an assessment period as follows:
- 22.—(1) An assessment period is a period of one month beginning with the first date of entitlement and each subsequent period of one month during which entitlement subsists.
14. The definition of “earned income”, which falls to be deducted from the maximum UC award as required by article 13(3), appears at regulation 51 of the UC Regulations. This provides:
51. “Earned income” means—
- (a) the remuneration or profits derived from—
 - (i) employment under a contract of service or in an office, including elective office,
 - (ii) a trade, profession or vocation, or
 - (iii) any other paid work; or
 - (b) any income treated as earned income in accordance with this Chapter.
15. The general principle for the calculation of “earned income” is provided for at regulation 53
- 53.—(1) The calculation of a person’s earned income in respect of an assessment period is, unless otherwise provided in this Chapter, to be based on the actual amounts received in that period.
- (2) Where the Department—

(a) makes a determination as to whether the financial conditions in Article 10 of the Order are met before the expiry of the first assessment period in relation to a claim for universal credit, or

(b) makes a determination as to the amount of a person's unearned income in relation to an assessment period where a person has failed to report information in relation to that earned income,

that determination may be based on an estimate of the amounts received or expected to be received in that assessment period.

16. The mechanism for calculating earned income is provided by regulation 55. This provides:

55.—(1) This regulation applies for the purposes of calculating earned income from employment under a contract of service or in an office including elective office (“employed earnings”).

(2) Employed earnings comprise any amounts that are general earnings as defined in section 7(3) of the ITEPA but excluding—

(a) amounts that are treated as earnings under Chapters 2 to 11 of Part 3 of that Act (employment income: earnings and benefit etc treated as income), and

(b) amounts that are exempt from income tax under Part 4 of that Act (employment income: exemptions).

(3) ... (not relevant)

17. The reference to ITEPA is a reference to the Income Tax (Earnings and Pensions) Act 2003. By section 7(3) of that Act:

(3) “General earnings” means—

(a) earnings within Chapter 1 of Part 3, or

(b) any amount treated as earnings (see subsection (5)),

excluding in each case any exempt income.

18. Chapter 1 of Part 3 of the Act consists of section 62 of the ITEPA, which provides:

62(1) This section explains what is meant by “earnings” in the employment income Parts.

(2) In those Parts “earnings”, in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

19. The particular provision which is central to the reasoning applied by the tribunal in this case is regulation 62 of the UC Regulations. This was subsequently amended from 16 November 2020 but at the material time read:

62.—(1) Unless paragraph (2) applies, a person shall provide such information for the purposes of calculating their earned income at such times as the Department may require.

(2) Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer—

(a) the amount of the person's employed earnings from that employment in respect of each assessment period is to be based on the information reported to HMRC under the PAYE Regulations and received by the Department from HMRC in that assessment period; and

(b) in respect of an assessment period in which no information is received from HMRC, the amount of employed earnings in relation to that employment is to be taken to be nil.

(3) The Department may determine that paragraph (2) does not apply in respect of—

(a) a particular employment, where it considers that the information from the employer is unlikely to be sufficiently accurate or timely, or

(b) a particular assessment period where—

(i) no information is received from HMRC and the Department considers that this is likely to be because of a failure to report information (which includes the failure

of a computer system operated by HMRC, the employer or any other person), or

- (ii) where the Department considers that the information received from HMRC is incorrect or fails to reflect the definition of employed earnings in regulation 55, in some material respect.

(4) Where the Department determines that paragraph (2) does not apply, it must make a decision as to the amount of the person's employed earnings for the assessment period in accordance with regulation 55 (employed earnings) using such information or evidence as it thinks fit.

(5) When the Department makes a decision in accordance with paragraph (4) it may—

- (i) treat a payment of employed earnings received by the person in one assessment period as received in a later assessment period (for example where the Department has received information in that later period or would, if paragraph (2) applied, have expected to receive information about that payment from HMRC in that later period), or
- (ii) where a payment of employed earnings has been taken into account in that decision, disregard information about the same payment which is received from HMRC.

(6) ...

The tribunal's decision

20. The LQM of the tribunal has provided a statement of reasons for his decision. From this I can see that he had a number of documents before him, including the Department's submission, which placed reliance on its guidance in Advice for Decision Makers H3191, and included a copy of the online UC claim form, the system decision, earnings details provided by HMRC, and the reconsideration request and decision. The tribunal also had received copies of the respondent's bank statements for the time around the assessment period. The applicant attended the hearing and gave oral evidence, but was not represented. The Department was not represented.
21. The tribunal accepted the evidence of the respondent to the effect that he stopped work on 9 November 2018, and that he claimed UC on 19 November 2018. He did not work in the subsequent assessment period from 18 November 2018 to 19 December 2018 but received payments for earlier work done. The question was whether earnings for work done before the UC claim, but received in the assessment period after the claim, must be taken into account. The tribunal applied regulation 53 of the UC Regulations, which provides that a person's earned income in respect of

an assessment period is to be based on the actual amounts received in that period. It reasoned that earnings received in an assessment period should not be earnings for any other period. On the basis that the respondent's earnings in the particular assessment period were not for that particular assessment period, it found for the respondent. It was satisfied that, as the earnings were earned outside that employment period, they were not for that assessment period. It considered that its reasoning was fortified by regulation 62(2)(a) of the UC Regulations.

Hearing and submissions

22. I held an oral hearing of the appeal. Mr Rush of DMS appeared for the Department and Mr McCloskey of Law Centre NI appeared for the respondent. I am grateful to them for their helpful submissions.
23. Mr Rush submitted that the correct approach to interpretation to the legislation in question, while in respect of the equivalent Great Britain legislation, had been given by the Court of Appeal in England and Wales (EWCA) in *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778. He submitted that the decision of the EWCA confirmed that it is the actual amount which is received in an assessment period which must be taken into account when assessing a claimant's earnings, subject to any modifications set out in the 2016 Regulations. While not binding, he submitted that the decision of the EWCA should be followed in Northern Ireland. He further relied upon the subsequent decision of Upper Tribunal Judge Jacobs in *NM v Secretary of State for Work and Pensions* [2021] UKUT 46.
24. Moreover, Mr Rush pointed out that the tribunal had expressly applied regulation 62 as amended by Regulation 2 of the Universal Credit (Earned Income) (Amendment) Regulations (NI) 2020. He submitted that the amending regulation had come into operation on 16 November 2020 and could not be applied retrospectively to the decision of 28 December 2018.
25. Mr McCloskey candidly accepted that the tribunal had set out and applied a version of regulation 62 of the UC Regulations that only came into force from 16 November 2020. As it had applied legislation that was not yet in force, he conceded that the tribunal had erred in law and accepted that I was required to set aside the tribunal decision. Nevertheless, he indicated that issues of legal interpretation remained in dispute.
26. On this basis, Mr McCloskey asked me to set aside the tribunal decision but, rather than remit the appeal to a newly constituted tribunal, requested me to decide the appeal on the basis of his further submissions of law. In particular, he wished to address the issue of permitted departure from regulation 55 further. On the premise that the facts were agreed and that legal interpretations only were in dispute, the Department was content to proceed on that basis. I indicated that I would set aside the tribunal decision under Article 15(8)(a)(ii) of the Social Security (NI) Order 1998, and proceeded to hear further legal submissions.

27. On the basis of agreed evidence, which differed from that originally relied upon in the Departmental decision under appeal, Mr Rush submitted that two payments fell for consideration within the relevant assessment period, based on regulation 53 of the UC Regulations, as they were both received within the assessment period. These were a payment of £404.34 made on 23 November 2018 and a payment of £225.52 made on 30 November 2018. These were, he submitted, respectively a payment of final wages owed to the respondent and a payment of accrued holiday pay. He submitted that these fell to be assessed as payments in respect of an assessment period under regulation 53(1).
28. Mr McCloskey submitted that a matter that had not been considered judicially was something alluded to in the commentary to the current Sweet & Maxwell's Social Security Legislation 2021/22, volume II (see paragraph 2.226). He indicated that this had been also referred to in the previous year's volume (2020/21, volume V) addressing the legislation in the form it took prior to 16 November 2020 and which has relevance in the circumstances of this particular case. He submitted that RTI could be departed from in certain circumstances, set out in regulation 62(3) of the UC Regulations. Mr McCloskey submitted that the RTI information in the instant case was incorrect, within the meaning of regulation 62(3)(b)(ii). He submitted that non-employed amounts were included and that the dates of the RTI payments were inaccurate. However, that was not his principal argument.
29. The main submission advanced by Mr McCloskey was that RTI itself had a statutory origin in the Income Tax (Pay as You Earn) Regulations 2003 (the PAYE Regulations). He referred to the requirement on employers under regulation 67B of the PAYE Regulations to deliver information specified in Schedule A1 to the Regulations in accordance with the regulation. He made further reference to HMRC guidance to employers. He submitted that information should be provided by the employer to HMRC on or before the payment being made to the employee. He submitted that HMRC instructions referred to the requirement to record payments on the date that the employee was entitled to be paid.
30. Mr McCloskey submitted that the respondent was entitled to be paid on 16 November 2018, but that his employer failed to operate PAYE on the date he was entitled to be paid. This meant that the information received from HMRC was incorrect in a material manner. He submitted that the tribunal was not bound by regulation 62(2) and was entitled to apply regulation 65(2)(b) and disregard the information provided by HMRC, meaning that it should treat the earnings actually received on 23 November 2018 as received on 16 November 2018. This would mean that the payment would not fall to be treated as made in the initial assessment period. He submitted that it was irrational to apply earnings which were reported incorrectly to the assessment period in which they were received.

Assessment

As indicated above, the parties were in agreement that the tribunal had erred in law. The submission of Mr Rush was that *Johnson* should be followed in Northern Ireland. In fact, I have previously accepted, albeit reluctantly, in *Department for Communities v RM* [2021] NI Com 36 that the decision of the EWCA in *Johnson* should be followed in Northern Ireland. At paragraphs 75-6, I said:

75. The regulation 54 in the Great Britain regulations referred to in the judgement is the equivalent of regulation 53 in the Northern Ireland regulations. Although addressing the question of whether a payment of income is properly considered within a particular assessment period, as opposed to the amount that is attributable, the Divisional Court in *Johnson* plainly advocates a flexibility of approach that would be consistent with the decision reached by the tribunal in the present case. Such an approach would permit tribunals to mitigate any injustice or harsh effects that might arise from inflexible application of the regulations. It appears to me that such an approach would be generally consistent with the role of tribunals in administering justice.

76. However, as I have indicated above, the EWCA in *Johnson* expressly rejected the reasoning of the Divisional Court at paragraphs 34-45 of its decision. I find myself in disagreement with the EWCA on this issue. Technically, I am not bound by the EWCA. Nevertheless, while not, strictly speaking, binding on me as a Northern Ireland Social Security Commissioner, I consider that long-established principles of comity, applying when identical provisions may come to be interpreted differently in Great Britain and Northern Ireland, require me to follow the judgement of Rose LJ (as she then was) in the EWCA in *Johnson* in preference to that of Singh LJ in the Divisional Court (see *EC v Secretary of State for Work and Pensions* [2015] UKUT 618 at paragraphs 26-35). This has the coincidental effect of achieving consistency with the decision of Upper Tribunal Judge Jacobs in *NM v SSWP*.

Mr McCloskey did not accept that *Johnson* was correct, but he conceded that by expressly referring to legislation that only came into force on 16 November 2020, and by applying it to a decision of 28 December 2018, the tribunal had erred in law. I agree with this proposition and accept that the tribunal has reached a decision that is inconsistent with *Johnson*. I therefore allow the Department's appeal and set aside the decision of the appeal tribunal. Rather than remit the case to a newly constituted tribunal for determination, I proceed to determine the appeal myself under Article 15(8)(a)(i).

As indicated, the regulation at the centre of Mr McCloskey's submissions has been amended since the decision under appeal. The previous form of regulation 62(3)(b)(ii) created an exception to the use of Real Time Information where "the Department considers that the information received from HMRC is incorrect ... in some material respect". The

present form of regulation 62(3) creates an exception where “it appears to the Department that the amount of a payment reported to HMRC is incorrect ... in some material respect”. This appeal is concerned with the older form of the legislation, as it was prior to 16 November 2020, and it is accordingly of historic interest only.

31. The submission advanced by Mr McCloskey is essentially that, where Real Time Information is available, the UC legislation takes responsibility from reporting the amount of wages received away from the employee and places it on to the employer. In this context, the employer is required and expected to follow legislation and guidance pertaining to PAYE. His submission is that the payment of wages made to the respondent on 23 November 2018 should have been made on 16 November 2018. As it was not, he submits, it was made other than in accordance with PAYE regulations and guidance. As the payment in question was made on a day other than the date specified in HMRC instructions, the information received from HMRC was “incorrect ... in some material respect” as per regulation 62(3)(b)(ii). Whereas the amended form of the legislation refers to the “amount of a payment” being incorrect, the applicable version refers to the “information received from HMRC” being incorrect.
32. There is plainly some force in the submissions of Mr McCloskey. The PAYE legislation sets out some structures for employers to observe when paying employees. In ideal circumstances, employers would invariably comply with these. However, in the real world it is unlikely that employers will comply in all circumstances, with the consequence that situations such as the present one will occur. The question is whether a failure to observe PAYE requirements can affect the application of regulation 62(3)(b)(ii).
33. The key word in issue, it seems to me, is “incorrect”. Mr McCloskey, as I understand him, submitted that the information that was received from HMRC was incorrect in the sense that the employer ought to have reported payment of wages on a different, earlier date, falling outside the relevant assessment period. It is not disputed that the information about the amount received was correct. It is not disputed that the information about the date on which the payment was actually made was correct. It is submitted that the information was incorrect in the sense that it was not communicated to the Real Time Information system in accordance with the requirements of the PAYE Regulations or HMRC guidance.
34. I am sympathetic to the situation of former employees who find themselves in a position of being paid wages late by their employers. These wages, representing earnings for past work and past periods, are assessed as income for UC assessment periods when the claimant may be unemployed. It seems to me that there is an element of injustice arising in this situation, since wages that should have been paid earlier are deemed attributable to a period when the claimant has no income. However, that is what the legislation, made by the Department for Work and Pensions in Great Britain but extending to Northern Ireland, achieves. Mr McCloskey is submitting, it appears to me, that accurate reports of

amounts and dates of payment can be ignored on the basis of what should have happened, as opposed to what has actually happened, and that the word “incorrect” should be given a broad meaning.

35. The term “incorrect”, when applied to information, it appears to me, has the meaning of being inaccurate or being wrong. I can find no authority for construing the expression “the information received from HMRC is incorrect ... in some material respect” to encompass the situation where otherwise accurate information is not recorded on the correct date. There may well be a legitimate expectation that information should be provided on a particular date under legislation and guidance. A failure to do so may well be an incorrect application of the relevant PAYE rules. However, in the absence of persuasive authority, I cannot hold that this procedural failing renders the information “incorrect” when it amounts to accurate information being provided at the wrong date.
36. The regulation was amended from 16 November 2020, and now refers to the “amount of a payment reported to HMRC” being incorrect, rather than simply to “information”. Thus, it seems to me, any debate about information being incorrect on the basis of the date reported for the payment appears to have been stifled by the amendment. In the absence of any policy analysis relating to the legislative amendment being placed before me, I do not find that the fact of amendment of the legislation assists me either way in my interpretation of the earlier form of the legislation.
37. I consider that I must allow the Department’s appeal under Article 15(8)(a) of the Social Security (NI) Order 1998 and set aside the decision of the appeal tribunal.
38. I am in as good a position as any tribunal consisting of an LQM sitting alone to determine the issues in the appeal, making further findings of fact on the basis of agreed evidence, and I decide the appeal accordingly.
39. I find on the basis of the evidence agreed by the parties that the respondent received payment of £404.34 on 23 November 2018 and £225.52 on 30 November 2018. I find that these fall to be assessed as the respondent’s employed earnings for the relevant assessment period. I accept the calculation of his entitlement to UC as £215.12 for the relevant assessment period. Having determined the issue myself, I disallow the respondent’s appeal to the extent that he seeks to exclude payments made within the assessment period from consideration.

(signed): Odhrán Stockman

Commissioner

20 October 2022