



GDC v SSWP (UC) [2020] UKUT 108 (AAC)

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CUC/968/2019

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

GDC

(Appellant)

v.

The Secretary of State for Work and Pensions

(Respondent)

Before: Upper Tribunal Judge Wikeley

Hearing venue: Field House, Breams Buildings, London

Hearing date: 4 March 2020

Decision date: 26 March 2020

Representation:

Appellant: Mr Martin Williams, Child Poverty Action Group

Respondent: Ms Katherine Apps of Counsel, instructed by the Government
Legal Department

DECISION

The appeal is dismissed.

The decision of the First-tier Tribunal (Social Entitlement Chamber) under file reference SC124/18/01825 does not involve any error on a point of law. The First-tier Tribunal's decision stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The purpose of universal credit

1. The official position as to the purpose of universal credit (UC) is as follows (the term “legacy system” is a reference to the existing patchwork of means-tested social security benefits and tax credits):

“UC has been a central platform of the Government’s social policy reform agenda since 2010. It is the most significant welfare reform in the past 70 years. It is designed to replace several existing working age ‘legacy’ social security benefits with a single payment calculation. It is designed to be wholly distinct from the legacy system which contains multiple, overlapping payments, which the Government believes are poorly structured. It seeks to achieve a number of objectives including making work pay, tackling fraud and error and simplification of a highly complex system. UC is intended to create a leaner and fairer system, delivering integrated support that is focused and promoting access to work (principally by ensuring that work is always more financially advantageous than claiming social security benefits.”¹

2. It is a matter of public record both that the roll-out of universal credit has not been without its difficulties and that aspects of the new scheme have been successfully challenged in the superior courts. This is not the place to review those problems.

The issue on this appeal

3. The central issue on this appeal is much narrower and disarmingly simple – at what point is a claim (or a defective claim) made for the purposes of the universal credit scheme?

4. The Appellant’s case, in outline, is that where a claimant begins the process of completing the online claim form for universal credit, and saves that information to the official computer system maintained by the Secretary of State, then the date of claim is determined at that point, assuming the online claim form is duly properly completed thereafter in the requisite time allowed.

5. The Respondent’s case, also in outline, is that in such circumstances the date of claim is determined by the date on which the claimant completes the process of entering data on the online claim form, confirms the truth of that information, and clicks on the “Submit claim” button, which automatically has the effect of delivering the claim to the Secretary of State.

6. On the facts of the present case, taken in isolation, just four days of entitlement to universal credit are at stake. But universal credit is claimed by tens of thousands of claimants, a number which will only increase in the Covid-19 world. Moreover, in other cases substantially more may be at stake than in the present appeal. Accordingly, scaled up for all universal credit claims, the outcome of this appeal one way or the other will have significant public expenditure implications.

¹ Witness Statement in these proceedings by Ms Beatrice Fannon, UC policy team leader, DWP, paragraph 6 (17 January 2020).

7. To cut to the quick, and for the reasons that follow, I accept (nearly all) the Respondent's arguments and so dismiss this claimant's appeal.

Unpacking the parties' respective cases in context

8. The Department for Work and Pensions (DWP) mantra is that universal credit is "digital by default". So, to all intents and purposes, claims for universal credit can only be made online.² It is certainly not possible to make such a claim by turning up at a DWP office, queuing in the time-honoured fashion and handing in a paper claim form, or by sending in a claim form by post. It may help to visualise the online process of claiming universal credit as involving three discrete stages.

9. I must stress that my characterisation of the process as having three stages has no official status whatsoever. It is used in these reasons simply for the purposes of exposition. In particular, the descriptive labels adopted for each stage must not be regarded as determinative of the underlying legal issues.

10. Stage 1 is the creation of a unique online universal credit account by the claimant. Stage 2, which at the material time followed on from clicking on a button which was labelled 'Make a claim', involves the claimant inputting relevant data (e.g. number of dependants, housing details, income and capital assets, etc.), a process which can be completed either in one sitting or over several days (or even weeks). Echoing the official DWP jargon, I call this stage "gathering the data". Stage 3, having confirmed the accuracy of the information entered, is when the claimant clicks on the 'Submit claim' button. I describe this stage as "finalising the data".

11. Shorn of their various complexities and nuances, the parties' core contentions were respectively as follows. Mr Martin Williams, of the Child Poverty Action Group for the Appellant, argued that the partial completion of online tasks in Stage 2 involved respectively the submission by the claimant and the receipt by the DWP of a defective claim, which was then later perfected by the claimant (as and when the missing information was entered). Ms Katherine Apps of Counsel, for the Secretary of State, submitted that the first two stages were simply preparatory to, and necessarily anterior to, the actual making of a claim proper, which did not take place until the end of Stage 3. In particular, Ms Apps resisted Mr Williams's characterisation of Stage 2 as being in the nature of the claimant making a defective claim.

The significance of this test case

12. The Appellant embarked on Stage 2 of his universal credit claim on 2 December 2017. He completed all the various steps in both Stages 2 and 3 by 6 December 2017, on which date the DWP and the First-tier Tribunal recognised he had thereby made an effective claim for universal credit. So, the decision as to the fixing of the correct date of claim was worth four days money to him. As Mr Williams noted, this was a not insubstantial sum for a person of limited means. However, as both parties recognised, the present appeal was effectively by way of a test case, as the outcome would determine the date of claim for many tens of thousands of other claimants, some of whom would take longer than four days to finalise their universal credit

² In certain circumstances a UC claim may be made by telephone, but as will be seen this is simply an online claim made through an intermediary.

claims (and so be potentially more out of pocket as a result, if the DWP's interpretation of the rules was correct).

13. The DWP helpfully provided, for the purposes of the present appeal, statistical evidence on the overall numbers of people involved in making universal credit claims. The statistics reported on claims activity on a monthly basis from January 2018 through to November 2019. As might be anticipated, given the gradual roll-out of universal credit, the monthly volumes for the most part showed a steady increase (with the occasional dip) over this period. The figures for November 2019 were typical. During that month, there were 393,000 new universal credit applications started (i.e. cases which had commenced Stage 2 of the claiming process).³ During the same month, 250,000 claims were submitted (based on the DWP's understanding of that term, i.e. cases which had completed Stage 3 of the process). In other words, only 64 per cent of those who had commenced Stage 2 went on to complete Stage 3. Put another way, about one-third of all those who began the claims process did not complete it. That proportion was in the range of 60 per cent to 67 per cent throughout the entire two-year period covered by the official statistics. The average time for submitting a claim throughout the same period – i.e. from the start of Stage 2 to the end of Stage 3 – was one day. Ms Apps advised me, on instructions, that 85 per cent of applicants make a claim on the same day as they start, and that 89 per cent do so within 24 hours. It follows that 11 per cent take longer than one day, but the curve then falls away very rapidly, such that only tiny numbers of claimants take longer than four days.

14. Further empirical evidence on the claims process and claimants' experiences is to be found in the *Universal Credit Full Service Survey*.⁴ This major research study showed that nearly six in ten (57%) of those who submitted claims online said they found the process easy (18% said it was very easy and 39% found it fairly easy) (p.34, para.4.1.3). Predictably, younger claimants (those in the 16-34 age group) reported fewer difficulties. However, in all 30% of users said they had found the process difficult, and those with a long-term health condition were more likely to describe the process as difficult (38% as compared with 25% of those with no health condition) (p.35, para.4.1.3).

15. The big known unknown – at least on the empirical evidence presented as part of these proceedings – is what happens to all those people who set up an account and then start the process of claiming universal credit but do not complete it (i.e. one third of those who progress into Stage 2)? Some may perhaps find other and better paid employment. Some may realise that, for whatever reason, they do not qualify for universal credit. However, given the data discussed above it is difficult to escape the conclusion that a significant proportion of these non-claimants will be vulnerable individuals who lack access to computing facilities and/or lack familiarity with using online systems.⁵

³ This is not the same as saying there were 393,000 new applications for universal credit in that month – the total figure includes e.g. repeat applications and applications to join a new partner's claim (or indeed to split an existing couple claim).

⁴ R. Foster et al., *Universal Credit Full Service Survey* (DWP, Research Report 958, June 2018).

⁵ Note the SSAC recommendation: "The consequences of not managing the Universal Credit claims process are significant, therefore we believe the Department should consider what more can be done to reduce the risk of claimants falling out of the system. In particular, we suggest that DWP should undertake some urgent work to understand how many people start to make an online claim but fail to submit it, the reasons behind the failure to claim, and whether they go on to make a valid claim (and, if

The legislative framework

Introduction

16. Part 1 of the Welfare Reform Act 2012 (“the 2012 Act”) introduced universal credit, but the provisions governing claims for the new benefit are to be found elsewhere.

The Social Security Administration Act 1992

17. As a general rule, and as the heading to section 1 of the Social Security Administration Act 1992 (“the Administration Act”) declares, “Entitlement to benefit [is] dependent on [a] claim”.⁶ Section 1(1) of the Administration Act accordingly provides as follows:

“(1) Except in such cases as may be prescribed, and subject to the following provisions of this section and to section 3 below, no person shall be entitled to any benefit unless, in addition to any other conditions relating to that benefit being satisfied—

- (a) he makes a claim for it in the manner, and within the time, prescribed in relation to that benefit by regulations under this Part of this Act; or
- (b) he is treated by virtue of such regulations as making a claim for it.”

18. The expression “benefit” includes for these purposes universal credit (see section 1(4)(za) of the Administration Act, inserted by paragraph 4 of Schedule 2 to the 2012 Act). So, as well as being entitled to universal credit in accordance with the substantive conditions (see the 2012 Act and the Universal Credit Regulations 2013 (SI 2013/376)), a person claiming universal credit must fulfil three procedural criteria, namely (1) making a claim, which was made (2) in the prescribed manner, and (3) in the prescribed time (see section 1(1)(a) of the Administration Act).⁷

19. Section 5(1)(a) of the Administration Act further provides that:

“(1) Regulations may provide—

- (a) for requiring a claim for a benefit to which this section applies to be made by such person, in such manner and within such time as may be prescribed;”.

20. In the event that the regulation-making powers under section 5 are insufficient (on which explanation see *Levy v Secretary of State for Work and Pensions* [2006]

so, in what timescale). The findings, which should be published, should then be used to help design an approach that is more tailored to individuals.” See *SSAC Response to DWP: Universal Credit (Managed Migration) Regulations 2018* (12 December 2018); <https://www.gov.uk/government/publications/universal-credit-managed-migration-regulations-2018-ssac-correspondence/ssac-response-to-dwp-universal-credit-managed-migration-regulations-2018>.

⁶ In *Insurance Officer v McCaffrey* [1984] 1 WLR 1353 the House of Lords had held that a claim was not a condition precedent to entitlement to benefit. This ruling was reversed by section 17 of the Social Security Act 1985, the predecessor to section 1 of the Administration Act. As the Court of Appeal later observed, section 17 was enacted “to reverse the effect of the decision in *McCaffrey* and make clear the fundamental position that entitlement to a benefit is ordinarily dependent on a claim being made for it” (*Secretary of State for Work and Pensions v Nelligan* [2003] EWCA Civ 555; [2004] 1 WLR 894 (reported as *R(P) 2/03*) at paragraph [25]).

⁷ Inevitably “prescribed” in this context means prescribed by regulations – see section 191 of the Administration Act.

EWCA Civ 890 (reported as *R(G) 2/06*) at paragraph [25] *per* Dyson LJ), section 189(5) of the Administration Act provides as follows (emphasis added):

“(5) Without prejudice to any specific provision in this Act, a power conferred by this Act to make an Order in Council, regulations or an order (other than the power conferred by section 24 above) includes power to make thereby such incidental, supplementary, consequential or transitional provision as appears to Her Majesty, or the authority making the regulations or order, as the case may be, to be expedient for the purposes of the Order in Council, regulations or order.”

21. Since the Court of Appeal’s decision in *Levy*, the scope of section 189(5) has been expanded by the insertion (by section 104(1) of the 2012 Act) of new subsections (5A) and (5B):

“(5A) The provision referred to in subsection (5) includes, in a case where regulations under this Act require or authorise the use of electronic communications, provision referred to in section 8(4) and (5) and 9(5) of the Electronic Communications Act 2000.

(5B) For the purposes of subsection (5A), references in section 8(4) and (5) and 9(5) of the Electronic Communications Act 2000 to an order under section 8 of that Act are to be read as references to regulations under this Act; and references to anything authorised by such an order are to be read as references to anything required or authorised by such regulations.”

22. Historically, the general rules for claiming most social security benefits have been set out in the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968; “the 1987 Claims and Payments Regulations”). Regulation 4(1) provides that subject to certain exceptions – notably income support and jobseeker’s allowance, in respect of which there are more prescriptive rules – every claim for benefit:

“shall be made in writing on a form approved by the Secretary of State or the Board for the purpose of the benefit for which the claim is made, or in such other manner, being in writing, as the Secretary of State ... may accept as sufficient in the circumstances of any particular case.”

23. In effect, the expectation is that a claim for a legacy benefit will be made on the approved form but there remains the possibility of a claim being made “in such other manner, being in writing, as the Secretary of State ... may accept as sufficient in the circumstances of any particular case”. There is also provision for claims for certain social security benefits to be made by telephone (regulation 4(10)). Accordingly, the default position under regulation 4 of the 1987 Claims and Payments Regulations, and especially under regulation 4(1), is to provide for a degree of flexibility over the method of making a claim for most social security benefits. The emphasis is arguably less on the form and more on the substance.

The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013

24. The legislative framework for claiming universal credit is less accommodating, with a greater emphasis on form, as we shall see with regulation 8 of the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment

and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380; “the 2013 Claims and Payments Regulations”).

25. First, however, several relevant definitions in regulation 2 must be noted:

“‘appropriate office’ means—

(a) an office of the Department for Work and Pensions or any other place designated by the Secretary of State in relation to any case or class of case as a place to, or at which, any claim, notice, document, evidence or other information may be sent, delivered or received for the purposes of these Regulations and includes a postal address specified by the Secretary of State for that purpose; or

(b) in the case of a person who is authorised or required by these Regulations to use an electronic communication for any purpose, an address to which such communications may be sent in accordance with Schedule 2;”

“‘electronic communication’ has the meaning given by section 15(1) of the Electronic Communications Act 2000;”

“‘official computer system’ means a computer system maintained by or on behalf of the Secretary of State to—

(a) send or receive any claim or information; or

(b) process or store any claim or information;”

26. The following points should be noted about each of these three definitions.

27. First, the statutory definition of “appropriate office” in effect draws a distinction between a physical building with a letterbox and a postal address on the one hand (limb (a)) and an official electronic address on the other (limb (b)).

28. Second, the definition of “electronic communication” incorporates by reference the definition in section 15(1) of the Electronic Communications Act 2000 (as amended), namely:

“a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa)—

(a) by means of an electronic communications network; or

(b) by other means but while in an electronic form;”.

29. Third, the definition of “official computer system” draws a distinction between receiving, processing or storing any “claim” as against doing the same with any “information”. As we shall see, this important distinction is echoed elsewhere in the statutory scheme.

30. So far as making a *claim* for universal credit is concerned, regulation 8 of the 2013 Claims and Payments Regulations lays down the following rules, which are much more tightly drafted than regulation 4 of the 1987 Claims and Payments Regulations:

“8.— Making a claim for universal credit

(1) Except as provided in paragraph (2), a claim for universal credit must be made by means of an electronic communication in accordance with the provisions set out in Schedule 2 and completed in accordance with any instructions given by the Secretary of State for that purpose.

(2) A claim for universal credit may be made by telephone call to the telephone number specified by the Secretary of State if the claim falls within a class of case for which the Secretary of State accepts telephone claims or where, in any other case, the Secretary of State is willing to do so.

(3) A claim for universal credit made by means of an electronic communication in accordance with the provisions set out in Schedule 2 is defective if it is not completed in accordance with any instructions of the Secretary of State.

(4) A claim made by telephone in accordance with paragraph (2) is properly completed if the Secretary of State is provided during that call with all the information required to determine the claim and the claim is defective if not so completed.

(5) If a claim for universal credit is defective the Secretary of State must inform the claimant of the defect and of the relevant provisions of regulation 10 relating to the date of claim.

(6) The Secretary of State must treat the claim as properly made in the first instance if—

(a) in the case of a claim made by telephone, the person corrects the defect; or

(b) in the case of a claim made by means of an electronic communication, a claim completed in accordance with any instructions of the Secretary of State is received at an appropriate office,

within one month, or such longer period as the Secretary of State considers reasonable, from the date on which the claimant is first informed of the defect.”

31. It follows, as already noted, that there are only two ways of making a claim for universal credit – either by way of an “electronic communication” (in accordance with Schedule 2 to the 2013 Claims and Payments Regulations and completed in accordance with the Secretary of State’s instructions, i.e. an online claim (regulation 8(1)) or by way of a telephone claim (regulation 8(2)).⁸ There is no third way of “such other manner, being in writing, as the Secretary of State ... may accept as sufficient in the circumstances of any particular case”, as permitted or envisaged by regulation 4(1) of the 1987 Claims and Payments Regulations for the purposes of many analogue social security benefits. The remainder of regulation 8 is concerned with the possibility of defective claims, an issue that was central to the submissions by Mr Williams on behalf of the Appellant in this appeal. The phenomenon of defective claims is revisited later in these reasons.

32. While regulation 8 is concerned with the manner of making a claim for universal credit, regulation 10 deals with the date of any such claim:

⁸ This exception is more apparent than real – the DWP agent taking the claim by phone inputs the information directly onto the online UC system, so in effect this is an online claim but through an intermediary. In practice 98% of claims are made online and without a telephone intermediary: R. Foster et al., *Universal Credit Full Service Survey* (DWP, Research Report 958, June 2018) p.13, para. 1.3.1; see also p.31, Figure 4.1).

“10.— Date of claim for universal credit

(1) Where a claim for universal credit is made, the date on which the claim is made is—

(a) subject to sub-paragraph (b), in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office;

(b) in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), where the claimant receives assistance at home or at an appropriate office from the Secretary of State, or a person providing services to the Secretary of State, which is provided for the purpose of enabling that person to make a claim, the date of first notification of a need for such assistance;

(c) subject to sub-paragraph (d), in the case of a claim made by telephone in accordance with regulation 8(2), the date on which that claim is properly completed in accordance with regulation 8(4); or

(d) where the Secretary of State is unable to accept a claim made by telephone in accordance with regulation 8(2) on the date of first notification of intention to make the claim, the date of first notification, provided a claim properly completed in accordance with regulation 8(4) is made within one month of that date,

or the first day in respect of which the claim is made if later than the above.

(2) In the case of a claim which is defective by virtue of regulation 8, the date of claim is to be the first date on which the defective claim is received or made but is treated as properly made in the first instance in accordance with regulation 8(6).”

33. The default rule, therefore, is that the date of claim is, “in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office” (regulation 10(1)(a)). It is significant, as Ms Apps submitted, that regulation 10(1)(a) refers to the applicable date as being “the date on which the claim is received at an appropriate office” (emphasis added), and not simply the date on which information is received there.

34. It will also be recalled that the primary way to claim universal credit is by way of an “electronic communication” (in accordance with Schedule 2 to the 2013 Claims and Payments Regulations and completed in accordance with the Secretary of State’s instructions). Part 1 of Schedule 2 is concerned with the use of electronic communications. In particular, paragraph 2 prescribes as follows:

“2.— Conditions for the use of electronic communications by other persons

(1) A person other than the Secretary of State may use an electronic communication in connection with the matters referred to in paragraph 1 if the conditions specified in sub-paragraphs (2) to (5) are satisfied.

(2) The first condition is that the person is for the time being permitted to use an electronic communication for the purpose in question by an authorisation given by means of a direction of the Secretary of State.

(3) The second condition is that the person uses an approved method of—

(a) authenticating the identity of the sender of the communication where required to do so;

- (b) electronic communication;
 - (c) authenticating any claim or information delivered by means of an electronic communication; and
 - (d) subject to sub-paragraph (6), submitting any claim or information to the Secretary of State.
- (4) The third condition is that any claim or information sent by means of an electronic communication is in an approved form.
- (5) The fourth condition is that the person maintains such records as may be specified in a direction given by the Secretary of State.
- (6) Where the person uses any method other than the method approved by the Secretary of State of submitting any claim or information, it is to be treated as not having been submitted.
- (7) In this paragraph “approved” means approved by means of a direction given by the Secretary of State for the purposes of this Schedule.”

35. Meanwhile Part 2 of Schedule 7 to the 2013 Claims and Payments Regulations (paragraphs 4-7 inclusive) deals with “evidential provisions”. Two of these are worthy of note: paragraphs 4 (effect of delivering information by electronic communications) and 5 (proof of delivery).

“4.— Effect of delivering information by electronic communications

- (1) Any claim or information which is delivered by means of an electronic communication is to be treated as having been delivered in the manner or form required by any provision of these Regulations on the day on which the conditions imposed—
- (a) by this Schedule; and
 - (b) by or under an applicable enactment (except to the extent that the condition thereby imposed is incompatible with this Schedule),
- are satisfied.
- (2) The Secretary of State may, by a direction, determine that any claim or information is to be treated as delivered on a different day (whether earlier or later) from the day specified in sub-paragraph (1).
- (3) Any claim or information is not to be taken to have been delivered to an official computer system by means of an electronic communication unless it is accepted by the system to which it is delivered.

5.— Proof of delivery

- (1) The use of an approved method of electronic communication is to be presumed, unless the contrary is proved, to have resulted in delivery—
- (a) in the case of any claim or information falling to be delivered to the Secretary of State, if the delivery of that claim or information is recorded on an official computer system; or
 - (b) in the case of any information that falls to be delivered by the Secretary of State, if the despatch of that information is recorded on an official computer system.
- (2) The use of an approved method of electronic communication is to be presumed, unless the contrary is proved, not to have resulted in delivery—
- (a) in the case of any claim or information falling to be delivered to the Secretary of State, if the delivery of that claim or information is not recorded on an official computer system; or

(b) in the case of information that falls to be delivered by the Secretary of State, if the despatch of that information is not recorded on an official computer system.

(3) The time and date of receipt of any claim or information sent by an approved method of electronic communication is to be presumed, unless the contrary is proved, to be that recorded on an official computer system.”

36. Schedule 2 thus envisages that the Secretary of State may make further provision by way of “directions” – see paragraphs 2(2), 2(5), 2(7) and 4(2). The statutory authority for such legally binding directions, which do not in themselves require debate and approval by Parliament, is to be found in a legislative paper trail helpfully identified by Mr Williams in an annex to his skeleton argument. This starts with sections 8 and 9(5) of the Electronic Communications Act 2000 (“the 2000 Act”) and continues with section 189(5A)-(5B) of the Administration Act, as amended by section 104 of the 2012 Act (see above, paragraph 21). In particular, section 9(5)(a) of the 2000 Act declares that Orders made under section 8 of the same Act may “provide for any conditions or requirements imposed by such an order *to be framed by reference to the directions of such persons as may be specified* in or determined in accordance with the order” (emphasis added). This takes us to the Social Security (Electronic Communications) Consolidation and Amendment Directions 2011, which lack any further identifying number (unlike, for example, a ‘proper’ statutory instrument).

The Social Security (Electronic Communications) Consolidation and Amendment Directions 2011

37. These “Directions” are therefore arguably the lowest form of statutory norm.⁹ Consistent with that lowly status, a consolidated version of these Secretary of State’s Directions is not publicly available. However, the current extant version of the Directions can be pieced together by examining all the individual sets of directions, which are available online at <https://www.gov.uk/government/publications/the-social-security-electronic-communications-directions>. Universal credit is one of the social security benefits covered by the Social Security (Electronic Communications) Consolidation and Amendment Directions 2011 (see Direction 2(a)(ix) of those Directions, inserted by Direction 2(2) of the snappily entitled Social Security (Electronic Communications) (Amendment) (No. 2) Directions 2016). The relevant provisions of the 2011 Consolidation and Amendment Directions are Directions 2 (authorisation) and 4 (approved method and form). As amended by the Social Security (Electronic Communications) (Amendment) Directions 2013, these read as follows:

“Authorisation

2. A person who, in accordance with ... paragraph 2 of Schedule 2 to the Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ... makes a claim for universal credit ... is authorised to do so by means of an electronic communication, provided that the person uses a method and form approved by the Secretary of State for Work and Pensions for that purpose.”

⁹ The concept of legally binding Directions issued without any meaningful Parliamentary oversight was a novel (and controversial) feature of the original social fund scheme: see Wikeley, Ogus and Barendt’s *The Law of Social Security* (5th edition, 2002, p.468).

“Approved method and form

4. The method and form set out on the gov.uk website, at the time of, and for the purposes of, making any claim or request, giving any notification or providing any certificate, notice, information or evidence referred to in paragraph 2 are—

(a) the method approved by the Secretary of State for Work and Pensions for—

(i) authenticating the identity of the person making the claim or request, giving the notification or providing the certificate, notice, information or evidence;

(ii) electronic communication;

(iii) authenticating the claim, request, notification, certificate, notice, information or evidence delivered;

(iv) making the claim or request, giving the notification or providing the certificate, notice, information or evidence; and

(b) the form approved by the Secretary of State for Work and Pensions in which the claim, request, notification, certificate, notice, information or evidence is to be sent.”

The process of claiming universal credit

Introduction

38. How then does someone make a claim for universal credit in practice? As outlined above, three stages may be identified – setting up an online account, gathering and inputting the relevant data (known in DWP jargon as ‘the gather’) and finalising that data. To recap, Mr Williams’s central submission was that as soon as the claimant started inputting relevant data but then logged out, leaving an incomplete claim form to be finalised later, s/he had made a defective claim for universal credit. Ms Apps, on the other hand, contended that no claim was made (whether defective or otherwise) until the end of the data finalisation stage.

Stage 1: Creating a universal credit account

39. An essential first step to claiming universal credit is to create a personalised universal credit account. The starting point is <https://www.gov.uk/apply-universal-credit>, which explains that “You can apply for Universal Credit online”. Pressing the “Start now” button takes one to a new screen, which states that one can “Use this service to create a Universal Credit account, make a claim or join your partner’s claim. You must have an email address. You will also need access to your mobile phone (if you have one).” This page has a link to press if the individual has already set up an online account. Failing that, pressing the “Start” button again takes the user to a new screen asking if you “are getting any disability benefits”.¹⁰ Pressing “No” takes one to a page headed “Create an account”, which requires a user name and password to be set, along with some standard security questions to be set and answered (“You’ll need your username and password when you sign in online, so make them memorable”). The next screen asks for the claimant’s name, date of birth, e-mail address, mobile phone number and preferred contact method (text or e-mail). As is now standard with most online governmental and banking services, the claimant is then sent a code by their preferred contact method to use on the following

¹⁰ The purpose of this question is to ‘weed out’ claimants on disability benefits and prevent them from claiming (and thereby being potentially financially worse off on) universal credit. Thus, this screen is the online manifestation of the “Severe Disability Premium (SDP) gateway”.

screen to verify the e-mail address they have given. The next page requires the person's home address and postcode to be entered.

40. Applicants have seven days from commencing the process to create an online account. If they fail to complete the process (e.g. by not verifying their e-mail address) then the account is deleted. Once the account is successfully set up, the user is presented with a screen stating that "Account created – Make a claim within 28 days or you'll have to create your account again". It explains that you may need details of housing costs, income and savings and people who live with you, adding that "You can still start your claim if you do not have all these details. You will be able to sign in again later to complete your claim." If the claimant fails to complete all the prescribed steps in Stage 2 within that period of 28 days, then both the information already entered and the account itself are deleted from the system. So, rather as in a game of online snakes and ladders, the claimant goes back to the bottom of the universal credit digital board and must start the whole process all over again.

41. Mr Williams rightly did not suggest that simply by creating an online account a claimant has made a defective claim, let alone a proper claim for universal credit. Such an individual has at most indicated an intention to claim universal credit at some date in the near future. Rather, he focussed on the second stage in the claims process.

Stage 2: gathering the data

42. The "Account created" screen – which a claimant comes to having completed Stage 1, or when logging back in within seven days of having created an account – has a button at the bottom of the screen which is now labelled "Start claim". However, when the Appellant in the present appeal was claiming online (in December 2017), the same button was labelled "Make a claim". According to witness evidence from Ms Beatrice Fannon, the DWP's universal credit policy team leader, the change to the screen, so that it gave the option as "Start claim", was made in December 2019, following user research conducted in October 2019. That research had recommended that the distinction between account creation and making a claim was clarified, as not all users appreciated the difference. Thus, according to Ms Fannon at least (witness statement at paragraph 39):

"The change in the script on the button was not made in order to change the point at which a claim for UC 'is made' for the purposes of entitlement. It has always been the position of the DWP that a claim is made only on submission of the information, which causes it to be received at a relevant office".

43. Having pressed "Make a claim" (up till 11 December 2019) or now "Start claim", the claimant is taken through a series of screens, each asking a single question. The claimant's answers to each of these questions are stored on a cloud-hosted server maintained by the Secretary of State (and as such an "official computer system" within the meaning of regulation 2 of the 2013 Claims and Payments Regulations). At any stage in this process, after pressing "Start claim" but before clicking "Submit claim", the claimant can log out of the official computer system and log back in later.¹¹

¹¹ However, the questions in the universal credit online claim form must be answered in a pre-set pattern. One consequence of this, as Mr Williams pointed out, is that the universal credit claimant does not have a clear picture from the outset of how much data will need to be entered across all the fields.

The first such screen asks “Do you have a partner”, with the three options for answering being “Yes, and we live together”, “Yes, but we don’t live together” and “No, I’m single”.¹² Assuming the claimant, as with the instant Appellant, has no partner, then the next screen reminds the user of the need to notify the DWP if they start living with a partner. The following screen has two tabs at the top of the page – the “to-do list” and the “Journal”.

44. The to-do list, unsurprisingly, is a list of things the claimant must do. On the front page these are simply listed as a series of headings: address, nationality, housing, who lives with you?, work and earnings, savings and investments, income other than earnings, education and training, health, caring for someone and bank account details. The first of these is marked as “now complete” as the claimant’s address will have been provided in the process of setting up the online account. As each of the other areas of information is completed, it disappears from the “to-do list” and appears in the “Journal” as marked “complete”. The core “to-do list” items (listed immediately above) are automatically generated by the universal credit system, whereas other more personalised requirements may be generated by a DWP agent (and any such new ones are notified by text or e-mail, depending on the contact method preferred by the claimant). The vast majority of questions in this phase are ones which require a claimant to select an option from an existing list. “Free text” boxes in the online system are confined to names, addresses and details of health conditions.

Stage 3: finalising the data

45. Once all the claimant has completed all the “to-do list” items, a new “to-do” is generated, being the instruction to “Confirm your details are correct”. This takes the user to a new screen headed “Submit claim”, which is essentially a ‘review your claim’ screen, as it sets out the information inputted for each of the items on the “to-do list” and asks in respect of each area of inquiry “Are these details correct?”, with the only options being “yes” and “no, change this”. Once all the details have been confirmed, a new tick box appears at the foot of the review screen, saying “I agree with the full details of my claim”. Ticking the box takes one to a new screen entitled “Your responsibilities”, followed by this rubric:

“There are a few things you need to know and do before your application to Universal Credit is complete.

It’s important that you tell us immediately if your circumstances change.

This includes things like taking on extra work or losing your job and any changes to your household income.”

Beneath this is a further tick box with the statement “I understand these commitments”.

¹² Presumably – although this is by no means clear – a claimant who lives with a partner *some of the time* is supposed to tick the first of these three options; if so, it is not immediately clear how the online system can then differentiate between a couple who are LTAHAW (to use an analogue term) and a couple who live together some of the time but in circumstances which, taken in the round, do not amount to LTAHAW. But this conundrum may be for another day.

46. Clicking on the “Next” button takes the user to the final screen headed “Declaration”:

“By submitting this claim, you agree that:

- *the information you’ve given is complete and correct*
- *while you’re receiving Universal Credit, you’ll report changes to your circumstances straightaway in your online account ...*

(!) If you give wrong or incomplete information, or you don’t report changes, you may

- *be prosecuted*
- *need to pay a financial penalty*
- *have your Universal Credit reduced or stopped*
- *be paid too much Universal Credit and have to pay the money back”*

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.

The bare facts of the Appellant’s claim for universal credit

48. The Appellant commenced what I have described as Stage 2 of the claims process on 2 December 2017. On that date he completed the entries for his contact details, address, whether he had a partner, his nationality, whether anyone lived with him, education and training and whether he was caring for someone. This took him from 09.03 in the morning to 09.07. He then apparently stopped. Two days later, on 4 December 2017, he completed his bank details at 10.47 a.m. and then the to-do items for income other than earnings, work and earnings and savings and investments between 12.52 p.m. and 12.54 p.m. Finally, on 6 December 2017 he completed the sections on housing (2.08 p.m.) and health (2.23 p.m.) and the system then recorded “New claim details were submitted” at 2.24 p.m. on the same day.

The First-tier Tribunal’s decision

49. There were two issues for the First-tier Tribunal to determine when it heard the Appellant’s appeal on 11 December 2018. The Secretary of State had decided that (1) the Appellant’s claim was made on 6 December 2017; and (2) the Appellant was not entitled to an award of universal credit from that date because he had subsequently failed to attend an “evidence of identity” interview. The Appellant succeeded on the latter point but not the former. Tribunal Judge Roots issued a detailed Decision Notice in the following terms:

“Decision Notice

1. The appeal is allowed.

2. The decision made by the Respondent on 08/01/2018 is set aside. [The Appellant] made a valid claim for Universal Credit (UC) on 6 December 2017 and has satisfied the initial evidence requirements as required by Regulation 37, within a month or such longer period as considered reasonable. The Secretary of State must now consider the other conditions of entitlement, although the Presenting Officer at the hearing indicated that he was not aware of any reasons why he would not be entitled to UC from 6/12/17.

3. REASONS

As set out in the record of proceedings, the presenting officer conceded that the appeal should be allowed from 6 December 2017. Essentially this was because the appellant had not been given sufficient warning before his claim was terminated on 8 January 2018. He was only given such notice on or about 8 January, and then attended the IEI on 24 January 2018.

4. The DWP has not considered any of the other conditions of entitlement. I am therefore unable to say whether the appellant is entitled to universal credit from 6 December 2017 and the respondent will need to consider the other conditions of entitlement. However, the presenting officer at the hearing stated he was not aware of any reasons why the appellant would not satisfy all of the other conditions.

The only remaining issue between the parties was the appellant's argument that he had made a claim on 2 December 2017. His arguments are set out in his reply drafted by Mr Williams of CPAG, together with oral submissions made at the hearing. I have considered these in full. The Respondent made a written submission – a supplementary submission dated 4 December 2018. However, as noted above the presenting officer at the hearing did not agree with all of that submission and conceded some points at the hearing.

As regards the only outstanding issue between the parties i.e. the date of the claim, I do not agree with the appellant's position. Mr Williams relied upon a number of authorities, particularly the housing benefit case of *Novitskaya v LB Brent*. However, that was decided in a very different context. The HB Regulations made specific provisions for defective claims i.e. those which were not made on the approved form, which was the situation in that case. The issue was whether the particular form of words that the Appellant had used, which were not on an approved form, could constitute a defective claim for HB. Universal credit is a very different landscape, which is "digital by default" and where the default position is for electronic claims.

5. I heard detailed submissions on the relevant regulations particularly Regulation 8. I do not accept the appellant's argument that simply clicking the button "MAKE A CLAIM" that can constitute a claim, albeit a defective one. I consider that it is relevant and significant that at that point the appellant will have received very few instructions from the Secretary of State, and the regulations clearly refer to claims being made in accordance with any instructions of the Secretary of State. I find that this weighs against the Appellant's arguments.

I find that the wording of the relevant provisions of regulation 8 must be read as a whole.

The claim must be made online and then completed in accordance with any instructions given.

Regulation 8(3) makes provision for defective claims. I find that this means claims not completed in accordance with the SSWP's instructions, and that these are only provided to Appellants after they have clicked "MAKE A CLAIM". Appellants must then proceed to complete all of the other questions which the online form asks of claimants. In the context of UC, I find that complying with the SSWP's instructions means completing the online boxes/ questions which the Respondent asks all claimants to complete. I do not accept the Appellant's arguments that a claim, albeit a defective one, can be made simply by clicking the "MAKE A CLAIM" button, as is argued.

These are a summary of reasons. For the reasons summarised, I did not accept the Appellant's argument that the date of claim was 2 December 2017."

50. The First-tier Tribunal subsequently issued a Statement of Reasons. This expanded on the findings as to whether there had been a defective claim in the following way:

"(13) The Appellant argues, via his representative, ... that the system makes it impossible to make a defective claim. Whilst I accept that it seems that the Appellant has to complete the process, i.e. to get to 'SUBMIT A CLAIM' before it seems that a claim could be regarded as defective, I do not accept that this means it is necessarily impossible to make defective claims. For example, a claimant could complete some of the fields with nonsense. Or he could submit obviously incorrect information, and then use his journal to advise that he would be submitting correct information later. In either example he could, it seems, proceed to 'SUBMIT A CLAIM'. If he had done that on 2 December, that might arguably have amounted to a defective claim. To repeat, I give no view. But that seems to me arguably more likely to be a defective claim than the facts of the current case. I accept I did not hear argument in detail as to how it might be possible to submit defective claims, and I accept that I have limited information on this. However, my point is that I do not accept Mr Williams' submission that he has shown that it is impossible to make defective claims for UC."

51. The Tribunal also reasoned as follows on the application of regulation 10 and fixing the date of claim (emphasis as in the original):

"(17) As the PO stated at the hearing, the language of Schedule 2 is that of '**submitting**' claims. Paragraph 4 of Schedule 2 refers to **delivering** information. Specifically, as Mr Williams alluded to at the hearing under paragraph 4(3), 'Any claim or information is not to be taken to have been **delivered** to an official computer system by means of an electronic communication unless it is **accepted** by the system to which it is delivered'. I do not find that simply clicking 'MAKE A CLAIM' can result in a claim or information being **delivered or accepted** by the system."

52. Not least given the detailed arguments advanced by Mr Williams, District Tribunal Judge McKenna in the Social Entitlement Chamber of the First-tier Tribunal wisely gave the Appellant permission to appeal to the Upper Tribunal.

Making a claim for universal credit: the Upper Tribunal's analysis

Introduction

53. Mr Williams’s fundamental submission was that at the point where the Appellant started the process of supplying the information required during the gather (i.e. at the outset of Stage 2), or at the latest when he logged out, not having completed the form, he had made a defective claim for universal credit. In the particular circumstances of this appeal, it followed that entitlement to universal credit began on 2 December 2017 and not on 6 December 2017 (as the First-tier Tribunal had found). Ms Apps, on the other hand, contended that no claim for universal credit (defective or otherwise) was made until the claimant had got to the end of Stage 3 and pressed the “Submit claim” button.

54. In support of his contrary submission, Mr Williams marshalled a series of interlocking arguments. He contended that where the Secretary of State received something that appeared to be a claim for benefit, she had a series of three decision-making steps to take. The first was to establish whether it was a claim for benefit at all (or, e.g., simply a request for information). The second step – assuming the person’s intention to claim the benefit in question was evident – was to consider whether the claim was in the prescribed manner or rather was defective. The third stage, if the claim was in the correct form, was to make a decision on entitlement (under section 8 of the Social Security Act 1998) or, alternatively, if the claim was not in the prescribed manner, to advise the claimant of the need to perfect the claim (see e.g. regulation 8(5) of the 2013 Claims and Payments Regulations).

55. The leading authority on the first step in this decision-making process is *Novitskaya v London Borough of Brent (Secretary of State for Work and Pensions intervening)* [2009] EWCA Civ 1260; [2010] AACR 6. I consider that the Appellant’s appeal in this case falls at this first hurdle, for the following reasons.

The first step: is it a claim for benefit? – the Novitskaya argument

56. *Novitskaya* was, as the Court of Appeal itself recognised, a case about whether a claim for housing benefit could be made “without using explicit wording to indicate that a claim for that benefit is being made” (at [1] *per* Arden LJ, as she then was). Mrs Novitskaya had arrived in the United Kingdom in 1999, claiming asylum, but her refugee status was not confirmed until 2004. On 10 June 2004 she gave the DWP a home-made written statement declaring that she “would like my benefits income support or whatever else I am [entitled to] to be backdated from the date I became asylum seeker ... I’m [applying] only now because I’ve become refugee from 14 May 2004”. She concluded with a formal declaration of truth and the document was signed, dated and witnessed. There was a handwritten note at the top of the letter, presumably added by an official, which stated “HB + Income Support”. A fortnight later she delivered a fully completed housing benefit claim form. The question for the Court of Appeal was whether the 10 June 2004 statement, albeit incomplete, amounted to a defective claim which was ‘perfected’ by the later submission of the completed claim form.

57. The Court of Appeal recognised that the Housing Benefit Regulations 1987 (SI 1987/1971) did not in terms define what was meant by a “claim” (at [12]), although regulation 72(1) referred to “a properly completed form approved for the purpose” or in the alternative “in such written form as the relevant authority may accept” – echoing the broad formulation in regulation 4(1) of the 1987 Claims and Payments Regulations for most other benefits. Arden LJ further acknowledged that “In the nature of things, claimants make mistakes and so the 1987 regulations make provision for rectifying claims, called ‘defective claims’, which do not comply with the

regulations” (at [14], referring to regulation 72(6)-(8)). So, she held, “Parliament has made the policy decision that claimants should not necessarily lose their benefits if they fail to make a claim in the right way” (at [15]).

58. Reviewing the earlier case law of the National Insurance Commissioners (e.g. *R(S) 1/63*), Arden LJ counselled that “excessive reliance should not be placed on the Commissioner’s statement that the intention to claim benefit should appear on the face of the document alleged to constitute a claim” (at [19]). This was because claims “are no different from any other document requiring interpretation and it is now well-established that the meaning of documents should be ascertained in the light of the relevant surrounding facts (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98...)” (also at [19]). It followed that tribunal should be wary of “taking a very cautious approach to the interpretation of a document which might otherwise be a timeous claim. Most situations would seem to me to call for a generous approach to the interpretation of such documents” (at [21]).

59. Arden LJ also reminded herself that the process of benefits adjudication is inquisitorial rather than adversarial in nature (see *Kerr v Department for Social Development* [2004] UKHL 23), reflecting the policy objective that it is concerned “not simply with recognising rights or enforcing liabilities but also with sustaining members of the community whom Parliament has decided should be sustained through the welfare state” (at [25]). It followed from the defective claim provisions in the housing benefit scheme that “Parliament did not intend that the courts should approach the question of what is a claim in an over-technical way: that would defeat the object of the legislation” (at [28]). In those circumstances, the Court of Appeal allowed the claimant’s appeal, concluding that the 10 June 2004 statement was a defective claim for housing benefit which was cured by the delivery of the duly completed claim form on 24 June 2004 (at [29]).

60. Mr Williams relied on *Novitskaya* for two principal propositions.

61. The first was as authority for the policy reason of having statutory provision for defective claims. In sum, the purpose of providing that defective claims, once perfected, should count as valid claims (effective from the date the defective claim was commenced) was to ensure that claimants should not lose out financially on their entitlement if they were to fail to make a claim in the right way (see *Novitskaya* at [14]-[15]). The difficulty with this argument is that it assumes that when the Appellant started the process of making a claim, by instigating what I have called Stage 2, he was thereby making what was properly characterised as a defective claim. For the reasons explained further below, I do not accept that assumption.

62. The second principle was the importance of assessing intention from the wider context (see *Novitskaya* at [26]-[27]). So, Mr Williams argued, in the present case the fact that the Appellant had provided his name, address and date of birth and had clicked on the “Make a claim” button was sufficient to infer the intention on his part precisely to make a claim, even if he had yet to populate all the required boxes in the online system with the relevant information about all his circumstances, and so the claim was at this stage defective. The fact that he completed all the tasks on his “to-do list” within four days was further evidence of his intention to make a claim at the outset. One difficulty, however, with this argument based on the claimant’s intention is that it cuts both ways. It is plainly important for both the Secretary of State and the claimant to be clear as to when a claim for benefit has been made. One might just as

well say that a person only evinces an unqualified and unambiguous intention to make a claim for universal credit when they confirm that (i) the details they have entered are correct; (ii) they understand their responsibilities and commitments; (iii) they understand and agree the closing declaration; and (iv) they press the “Submit claim” button. Arguably it is only at that point that one can properly understand that the claimant has expressed an unqualified and unambiguous intention to claim universal credit.

63. There is, moreover, a more fundamental problem with Mr Williams’s reliance on *Novitskaya*. In the context of housing benefit, it is possible and indeed normal to make a claim for benefit by way of a paper claim (which, moreover, need not even be on an approved form). But, as previously noted, there is no option under the 2013 Claims and Payments Regulations to make a paper claim for universal credit. Indeed, nor is it possible to make a claim for the new benefit by e-mail; instead, it must be on the approved online form. The Court of Appeal’s decision is an analogue authority which does not readily translate into a digital world for two further reasons.

64. The first is that it cannot be assumed that online claims will necessarily mirror traditional paper-based claims in all respects. The main legacy benefits (income support, employment and support allowance, housing benefit and jobseeker’s allowance) all have provisions that allow claimants to gain the advantage of an earlier claim date to the date on which the claim form is actually received.¹³ This reflects the fact that there will inevitably be postal delays, both in the DWP office sending out a paper form and then with the claimant in returning it once completed. Typically, legislation provides that, providing the claim form is returned within one month, the date of claim is the date on which the claimant makes an initial contact with the DWP office and expresses an intention to make a claim (see e.g. regulation 4(5) and, for income support, regulation 6(1A)(b) of the 1987 Claims and Payments Regulations). Universal credit, by contrast, is an exclusively online benefit – a claim can be made literally at any time, 24/7. It follows that no allowance need be made for e.g. postal delays or DWP office opening hours. The claimant’s pressing the “Submit claim” button at the end of Stage 3 and the Secretary of State’s receipt of that claim is effectively instantaneous. Accordingly, the universal credit regime has much more limited provision for setting any earlier date of claim (on which see regulation 10).

65. Secondly, and in any event, the fact that both the housing benefit regime and the universal credit system make provision for defective claims does not mean that a direct read across is appropriate. The Court of Appeal’s observations in *Novitskaya* were premised on the relatively relaxed statutory requirements for the form of a claim for most traditional social security benefits (see e.g. regulation 4(1) of the 1987 Claims and Payments Regulations and its housing benefit equivalent), whereas the universal credit claims regime, as described above, is far more prescriptive. One cannot assume, as Mr Williams invited me to do, that the generous Parliamentary intention identified by the Court of Appeal in *Novitskaya* necessarily holds good in the new scheme. Any wider dicta in *Novitskaya* must be applied with some caution in the very different digital environment of online claims for universal credit.

¹³ There is no such relaxation in the tax credits system: see section 3 of the Tax Credits Act 2002 and *MK v HMRC (TC)* [2018] UKUT 238 (AAC).

66. Mr Williams had a further, but much more subsidiary, argument based on the only other case law authority (so far as I am aware) to cast any light on the process of online claims for benefit – although this decision was not taken in the context of universal credit. This was *CW v Secretary of State for Work and Pensions (JSA)* [2016] UKUT 114 (AAC), which concerned the date of claim for an electronic application for jobseeker’s allowance (JSA). The claimant in *CW* had first attempted (and indeed had apparently attempted on more than one occasion) to make her JSA claim by using a computer at her local library to complete the online form. She had pressed “submit claim” but had received no text message or e-mail to confirm that the form had been received. Upper Tribunal Judge Mitchell held that in those circumstances *CW* was not able to discharge the statutory presumption of non-delivery to the Secretary of State of her JSA claim. Mr Williams argues that the reason why the claimant’s appeal in *CW v SSWP* was dismissed was simply because her claim “has not been recorded on an official computer system” (see at [30]). By implication, he contends, her appeal would have been allowed on this point if the claim had been so recorded. However, I agree with Ms Apps that Upper Tribunal Judge Mitchell’s analysis is more consistent with the approach of the Secretary of State in the present appeal than that of the Appellant and CPAG. There was no dispute in *CW* that the claimant had entered information on the online form, but there is no suggestion that this was sufficient to amount to a defective claim (as the Appellant contends in the present appeal), let alone a claim proper.

67. For all the reasons above, I conclude that, at the point where the Appellant began Stage 2 of the process, or more precisely at the point where he logged out with a partially completed online claim form saved in the cloud, he had not evinced an unambiguous intention to claim universal credit. At most he had shown a contingent albeit imminent intention to do so. But, by embarking on Stage 2 and saving an incomplete claim form in the cloud, he had not at that point made either a claim or a defective claim for universal credit. However, if I am wrong on this first issue, I go on to consider the parties’ other principal arguments.

The second step – is the claim in the prescribed manner or is it defective?

Introduction

68. Regulation 8, as its heading declares, makes provision for “*Making a claim for universal credit*”. Mr Williams’s submissions focussed principally on regulation 8(3), dealing specifically with defective claims. However, I agree with the First-tier Tribunal that regulation 8 must be read as a whole and so, as Ms Apps submits, one should therefore start with regulation 8(1).

Regulation 8(1): making a claim in the prescribed manner

69. Regulation 8(1) of the 2013 Claims and Payments Regulations provides as follows (and as such specifies the prescribed manner of claiming universal credit for the purpose of section 1(1)(a) of the Administration Act):

“8.— Making a claim for universal credit

(1) Except as provided in paragraph (2), a claim for universal credit must be made by means of an electronic communication in accordance with the provisions set out in Schedule 2 and completed in accordance with any instructions given by the Secretary of State for that purpose.”

70. Putting the exception in paragraph (2) dealing with telephone claims to one side, regulation 8(1) accordingly lays down two headline requirements for making a claim

in the prescribed manner. These are that a claim for universal credit must be (a) “made by means of an electronic communication in accordance with the provisions set out in Schedule 2”; and in addition (b) “completed in accordance with any instructions given by the Secretary of State for that purpose”. Each of these requirements needs to be considered in turn, but it should be noted at the outset that the level of detail stipulated under requirement (a) leaves relatively little purchase for point (b).

71. **“Made by means of an electronic communication in accordance with the provisions set out in Schedule 2”**: As Ms Apps submits, Schedule 2 to the 2013 Claims and Payments Regulations stipulates a series of discrete requirements for a claim to be made electronically. In particular, paragraph 2 specifies four conditions which must be satisfied in order to use an electronic communication, to quote paragraph 1, “in connection with claims for, and awards of, any benefit” (in this instance, of course, universal credit). If any one of the conditions is not satisfied, then by definition a claim cannot be “made ... in accordance with the provisions set out in Schedule 2”.

72. The first and the fourth of these Schedule 2 conditions – that the claimant be duly authorised to use such electronic communications (paragraph 2(2)) and that s/he maintain such records as are required (paragraph 2(5)) – need not delay matters. Neither formed the primary focus of either party’s submissions.

73. Both advocates concentrated their forensic fire on the second and third of the Schedule 2 requirements. The second condition (see paragraph 2(3)) is that the claimant must use “an approved method” of (a) authenticating their identity (if so required), (b) electronic communication, (c) authenticating “any claim or information” delivered by such means, and (d) “submitting any claim or information to the Secretary of State”. The third condition is that “any claim or information sent by means of an electronic communication is in an approved form” (paragraph 2(4)). These crucial conditions are then supplemented by two further provisions in paragraphs 2(6) and (7):

“(6) Where the person uses any method other than the method approved by the Secretary of State of submitting any claim or information, it is to be treated as not having been submitted.

(7) In this paragraph ‘approved’ means approved by means of a direction given by the Secretary of State for the purposes of this Schedule.”

74. The drafting of paragraph 2 of Schedule 2 (and especially paragraph 2(3), setting out the second condition) is somewhat ‘clunky’ and less than optimal in terms of its clarity. In terms of its legislative heritage, it is closely based on the drafting first used nearly 20 years ago in the original Schedule 9ZC to the 1987 Claims and Payments Regulations, as inserted by Article 2(4) of, and the Schedule to, the Social Security (Electronic Communications) (Carer’s Allowance) Order 2003 (SI 2003/2800). It has not stood the test of time in terms of the elegance in, and the transparency of, the statutory drafting. Be that as it may, one should not lose sight of two noteworthy features of the legislative requirements as set out in the second and third conditions in paragraph 2(3) and (4).

75. The first is that the statutory scheme here, as elsewhere, draws a conceptual distinction between “information” and a “claim”. Typically, “information” will be a

constituent and supporting part of a claim for benefit – e.g. information about the claimant’s housing circumstances or concerning their earnings or other income. This distinction in itself is consistent with the Secretary of State’s contention that where an individual partly completes an online claim form with certain parts of the required information, but does not progress to the final steps (in Stage 3), then what has taken place is at most the transmission of *information* and not the making of a *claim* for benefit as such.

76. The second is that, as a matter of construction of both regulation 8(1) and paragraph 2, the requirements in Schedule 2 are necessarily cumulative – the claim must be “made by means of an electronic communication in accordance with [all] the provisions set out in Schedule 2” and not simply in accordance with some of the provisions set out in Schedule 2. It follows that, for example, the *claim* for benefit must be on the *approved* form (paragraph 2(4)) and *submitted ... to the Secretary of State* (paragraph 2(3)(d)), as well as *received at an appropriate office* (see regulations 8(6)(b) and 10(1)(a)). Accordingly, it is not sufficient, for example, that *information* alone and without more is *delivered* and *accepted* (paragraph 4(1) and 4(3)).

77. It follows that the one substantive point at issue on which I agreed with Mr Williams’s submissions in the event does not assist him. Mr Williams challenged Ms Apps’s argument that the Secretary of State could say that data had not been *received at an appropriate office* because it was not actually visible to DWP staff until the “Submit claim” button had been pressed. However, I am inclined to the view that such information has indeed been *delivered, accepted* and *received*; it is just, as Mr Williams contended, that the official computer system has been configured in such a way that the information cannot be seen by DWP officials until the completion of what I have termed Stage 3. As a matter of statutory interpretation, the protocols as to which DWP staff can see what data in an online account or claim form cannot affect the fact that information has been delivered, accepted and received at an appropriate office, given that last expression includes the Secretary of State’s virtual online office. However, that modest victory does not help Mr Williams, given all the requirements in Schedule 2 need to be satisfied in order to make a claim in the prescribed manner for the purposes of regulation 8(1) and section 1(1)(a) of the Administration Act. It follows that it is not enough for a claimant to complete the online claim form and in effect store that data in a holding pattern in the cloud if that claim form is not also sent in accordance with all the requirements of Schedule 2 – i.e. it must be *submitted* (paragraph 2(3)(d)), *delivered* and *accepted* (paragraph 4) and finally *received at an appropriate office* (regulations 8(6)(b) and 10(1)(a)).

78. Thus, the Secretary of State’s position was that it is only at the point where the claimant clicks on the “Submit claim” button that the claim is made, and this action also amounts to the “approved” method of submitting a claim. Mr Williams, on the other hand, contends that this is bare assertion on the part of the Secretary of State. Although paragraph 2(3)(d) of Schedule 2 (in conjunction with paragraph 2(7)) enables the Secretary of State’s Directions to make provision for an approved method of submitting a claim electronically, his contention is that the Directions do not in fact specify any such “approved method” for submitting a claim. In his stark submission, there is no approved method of submitting a claim.

79. By way of recap, and stripping out surplusage, paragraph 4 of those Directions provides that:

“The method and form set out on the gov.uk website, at the time of, and for the purposes of, making any claim ... referred to in paragraph 2 are

(a) the method approved by the Secretary of State for Work and Pensions for

...

(iv) making the claim”.

(b) the form approved by the Secretary of State for Work and Pensions in which the claim ... is to be sent.”

80. It is undoubtedly the case that there is no express reference to *submitting* a claim anywhere in the text of paragraph 4 of the Directions. To that extent it is true there is no direct read across from the terms of paragraph 2(3)(d) of Schedule 2 to the wording in the Directions, and specifically to Direction 4. However, for two reasons I do not agree with Mr Williams’s submission that this means there is accordingly no approved method for submitting a claim.

81. First, and fundamentally, I agree with Ms Apps that, reading Direction 4 as a whole, the approved way of submitting a universal credit claim is to use the Secretary of State’s approved *form* on the official website and to follow the *method* employed by that website. In that context I also accept her argument that references in Direction 4 to “the method and form set out on the gov.uk website” are sufficiently broad to encompass both what the user can see – the individual questions posed, each of which must be answered before proceeding to the next screen and the next question – as well as what the user cannot see (the coding or programming which underpins the completion and despatch of the online claim form). As Ms Apps put it, in computing terminology which even I could understand, the form and method include the ‘innards’ of the Secretary of State’s “official computer system”. Mr Williams argued this involved an unfair and unacceptable lack of transparency – claimants should be able to see each step in the process. I do not consider this affects the construction of the terms of Direction 4. Rather, Mr Williams’s point is really a complaint about the information and guidance available more generally about the universal credit scheme and how to claim benefit.

82. Secondly, I consider that Mr Williams’s argument assumes a degree of rigour in the drafting of the Secretary of State’s Directions which may not be fully justified, not least given the lowly status of such Directions. For example, direction 4(a)(iv) refers to the approved method for “making the claim”, which is sufficiently broadly expressed to include the final step of submitting the claim. I do not read “making the claim” in this context to be used in contradistinction to, and mutually exclusive to, “submitting the claim”. It follows, given the digital by default environment, that the old learning about the distinction between a claimant making a claim and the Secretary of State then submitting the claim to an adjudication officer for a decision (see *R(IS) 4/93*) has no place in the universal credit scheme. The language may happen to be the same, but this belies the change in the structure of the legal arrangements for claiming the new benefit.

83. **“Completed in accordance with any instructions given by the Secretary of State for that purpose”**: Given the detailed and prescriptive nature of the criteria for what amounts to “an electronic communication in accordance with the provisions set out in Schedule 2”, it is not easy at first sight to see what might amount to “any instructions given by the Secretary of State *for that purpose*” (emphasis added). This formulation has the feel of being a ‘belt and braces’ provision. Given that universal

credit is premised on the digital by default philosophy, it would hardly be consistent to have a detailed set of *written* instructions, as is typically the case for legacy benefits. In any event the theory is that the online process asks the claimant one simply framed question at a time.¹⁴ The phrase might include, for example, generic instructions given to claimants on official DWP websites (e.g. www.gov.uk/universal-credit-how-to-claim and www.understandinguniversalcredit.gov.uk). “Instructions” might also perhaps be a sufficiently broad term to cover the internal coding which the online claim form employs to route claimants down particular series of questions. Alternatively, the expression might include personalised instructions issued by a DWP officer and directed to an individual claimant for some particular reason. Whatever the explanation, the relatively narrow scope of the expression “completed in accordance with any instructions given by the Secretary of State for that purpose”, at least as a standalone requirement that is distinct from the prescribed Schedule 2 criteria, means that the definition of, and the applicability of the notion of, a defective claim has an equally narrow compass.

84. So, we now need to turn to consider what is meant by a “defective claim” for universal credit.

Regulation 8(3): the provision for defective claims

85. A good starting point is the conventional jurisprudence on what is meant by a defective claim. Strictly, as Mr Williams correctly submitted, a defective claim is not a claim for benefit at all. As Mr Commissioner (now Upper Tribunal Judge) Jacobs observed, “[a]s a matter of convenience, an improperly completed claim form is referred to as a ‘defective claim’ ... but the fact remains that it is not yet a claim” (*R(IS) 10/06* at paragraph 11). It follows that it is only once it is perfected that it is a claim properly so-called. It was also tolerably clear from the case law that a defective claim was typically one where the claimant had either not answered all relevant questions on the submitted claim form (see e.g. unreported decision *CIS/1917/2006*) or had omitted to provide all the documents requested with the form (see e.g. reported decision *R(IS) 10/06*). Either way, and by implication, the common theme was that the claim form had not been completed in accordance with the instructions on the claim form. Where a defective claim had been received, the Secretary of State had to advise the claimant of the defect and then treat the claim as properly made in the first instance if a properly completed claim form was received within one month (or such longer period as the Secretary of State considered reasonable): see e.g. regulation 4(7) of the 1987 Claims and Payments Regulations. According to Mr Williams, this means that “a defective claim is an incomplete attempt at making a claim which was at least on the proper form and is received by the DWP – a partially completed form delivered to the DWP being the exemplar case” (skeleton argument at §16).

86. Turning to the new regime, regulation 8(3) of the 2013 Claims and Payments Regulations provides as follows:

“(3) A claim for universal credit made by means of an electronic communication in accordance with the provisions set out in Schedule 2 is defective if it is not completed in accordance with any instructions of the Secretary of State.”

¹⁴ How successful this strategy has been is not for me to say; see also n.12 above.

87. Notwithstanding Mr Williams's submissions, I do not consider that this can simply be read as the digital equivalent of the previous defective claim rules for legacy benefits. The defective claim provision in the 2013 Claims and Payments Regulations (i.e. regulation 8(3)) is expressed in terms such that, in practice at least, it must have a narrower application than the version in the previous regime. This is because the starting point is that a defective claim can only be one "made by means of an electronic communication in accordance with the provisions set out in Schedule 2". In other words, and perhaps somewhat counter-intuitively, compliance with the cumulative statutory requirements of Schedule 2 is a condition precedent of being a defective claim. A failure to adhere to each and every one of the Schedule 2 criteria does not make the application a defective claim. On the contrary, any such omission means it cannot be a defective claim.

88. So, what is it that turns a claim "made by means of an electronic communication in accordance with the provisions set out in Schedule 2" into a defective claim? The answer is provided by the second limb of regulation 8(3), namely that it is one which (although it complies with Schedule 2) "is not completed in accordance with any instructions of the Secretary of State." Thus, it is only a failure to follow one of the Secretary of State's instructions, rather than a requirement of the prescribed online form, which renders an application as defective under regulation 8(3). However, neither of the two typical instances of a defective claim under the previous regime is likely to recur in the universal credit context. The "missed out question" is unlikely to arise in practice as the online system is designed to ask one question at a time and to prevent claimants from proceeding to the next screen unless they answer the single question posed at each step. The "missing document problem" is equally unlikely to arise as the online claim form itself does not ask for supporting documents to be uploaded at the same time (although such requirements may follow later, after the claim has been submitted in accordance with Schedule 2, as further "to-do" tasks on the claimant's individual Journey screen).

89. It follows that under the universal credit regime it is only some other type of failure to follow the Secretary of State's instructions that can turn a claim that is otherwise in accordance with Schedule 2 into a defective claim that requires the Secretary of State to give the claimant the opportunity under regulation 8(5) to perfect the defective claim. The Secretary of State did not give any example, either by way of evidence or in Ms Apps's submissions, of what might constitute such an instruction by the Secretary of State. Ms Fannon, in her witness statement, made the point that the digital nature of the universal credit scheme makes a defective claim unlikely as: (i) the claimant cannot submit a claim without completing all relevant fields; and (ii) the online form uses no free text boxes, with the sole exceptions of those for the person's name, address and health conditions. Therefore, as Ms Apps put it, the design of the online form itself minimises the scope for error; thus, the defective claim concept "can more readily assist applicants in the context of a form which is capable of being submitted while having been partially completed. However, it will rarely be of assistance where the form does not permit itself to navigate the claimant to the submission page if they have not filled in the necessary information" (skeleton argument at §39(d)). This doubtless accounts for the DWP's statement to

the Social Security Advisory Committee that it was “almost impossible to make a defective claim on Universal Credit”.¹⁵

90. Given that context, I accept it is not easy to envisage what type of failure to follow an instruction by the Secretary of State might result in an otherwise Schedule 2-compliant application being found to be a defective claim. As the previous discussion illustrates, it may be that there is very little by way of Secretary of State’s instructions that fall outside the detailed Schedule 2 stipulations. It could be that a claimant’s refusal to desist from using offensive language in one of the free text boxes might be an example. However, I am not sure that such speculation is helpful, as I am satisfied for the reasons given that in any event an incomplete online claim form is not itself a defective claim for universal credit.

91. Finally, Mr Williams argues that the effect of the Secretary of State’s approach to regulation 8(3) is to render the defective claim provisions in the universal credit scheme nugatory and devoid of purpose, bearing in mind the principles set out by the Court of Appeal in *Novitskaya*. However, this submission begs the question in at least two ways. First, for the reasons already given, there was an unambiguous intention in *Novitskaya* to claim benefit, unlike in the present appeal. Second, the defective claim rules in relation to legacy benefits are potentially of much wider application in practice than the rules that go under the same name in the universal credit system, in which steps have been taken to try and design the scope for mistakes out of the system. This is, of course, consistent with several of the stated policy objectives behind the universal credit scheme, such as tackling error and furthering the simplification of a highly complex benefits system.

The third step – making a decision or advising the claimant of need to perfect the claim

92. The third and final step in the claim decision-making process involves a choice between two alternative routes. If the claim was in the prescribed manner, there was no dispute between the parties that the Secretary of State was required to make a decision (under section 8 of the Social Security Act 1998) on entitlement to benefit. On the other hand, if the claim was defective, then the Secretary of State was under a duty to advise the claimant of that problem. Thus regulation 8(5) of the 2013 Claims and Payments Regulations provides as follows:

“(5) If a claim for universal credit is defective the Secretary of State must inform the claimant of the defect and of the relevant provisions of regulation 10 relating to the date of claim.”

93. Those closing words are a reference to regulation 10(2), which states:

“(2) In the case of a claim which is defective by virtue of regulation 8, the date of claim is to be the first date on which the defective claim is received or made but is treated as properly made in the first instance in accordance with regulation 8(6).”

¹⁵ FTT bundle at [83]. See *SSAC Response to DWP: Universal Credit (Managed Migration) Regulations 2018* (12 December 2018), n.5 above.

94. Regulation 8(6) in turn provides that:

“(6) The Secretary of State must treat the claim as properly made in the first instance if—

(a) in the case of a claim made by telephone, the person corrects the defect; or

(b) in the case of a claim made by means of an electronic communication, a claim completed in accordance with any instructions of the Secretary of State is received at an appropriate office,

within one month, or such longer period as the Secretary of State considers reasonable, from the date on which the claimant is first informed of the defect.”

95. Mr Williams’s argument, if I followed it correctly, was that the reminder e-mail sent when a claimant logged out but without completing all the elements in Stage 2 was transmitted in pursuance of the Secretary of State’s duty under regulation 8(5). The reminder e-mail, it will be recalled, advises that the application is incomplete and will be deleted, at least if not completed within 28 days of commencing the Stage 2 ‘gather’. There is no dispute but that the reminder e-mail does not advise the claimant “of the relevant provisions of regulation 10 relating to the date of claim.” As such, if the reminder e-mail is indeed sent pursuant to regulation 8(5), then it demonstrably fails to comply with the statutory requirements, as it does not refer to the relevant time limit. However, I do not accept Mr Williams’s submission on this point. As Ms Apps argues, there is a fundamental conceptual distinction between on the one hand advising a claimant that their application for universal credit has not been completed and, on the other, accepting that a claim meets the terms of the regulation 8(3) definition of a defective claim, namely (as discussed above) that it has been submitted “by means of an electronic communication in accordance with the provisions set out in Schedule 2” but in some other way has not been “completed in accordance with any instructions of the Secretary of State.”

Making a claim for universal credit: conclusion

96. It follows from the analysis above that I agree with the submissions advanced by Ms Apps for the Secretary of State. My main conclusion is that the previous analogue authority of the Court of Appeal’s decision in *Novitskaya* cannot bear the weight that Mr Williams seeks to place on it in the digital world. The essential point was put neatly in the DWP’s original response to the Upper Tribunal appeal, filed by Mr Wayne Spencer for the Secretary of State:

“If an analogy must be drawn with a paper claim, the making of entries during the ‘make a claim’ process is akin to filling in the boxes on a claim form. As with a claim form, the electronic process of putting together all the required information may well take time and be done in stages. As with a claim form, a claim is not made when the expected information is recorded on the form, but rather when the form containing that information is finally transmitted to the Secretary of State.”

97. Furthermore, I also agree with the Secretary of State’s principal submissions as regards the construction of the statutory scheme governing the process of making a claim for universal credit. In particular, submission of an electronic claim, and not just delivery of the information germane to such a claim, is a critical part of making a claim for universal credit. In concluding, there are also several other arguments

which, whilst not necessarily determinative in themselves, in my view support the approach advocated by the Secretary of State in this appeal.

Other arguments

98. The first such argument relates to the fate of the 33%-40% of cases which fall away and do not proceed to the end of Stage 3. If these cases are all defective claims, as Mr Williams's analysis presupposes, then the online system has a high volume of inchoate claims which "churn" in the system for no obvious purpose. It is no answer to this point to say, as does Mr Williams, that the system is entirely automated and so the treatment of such defective claims requires no human intervention by DWP officers. For example, on CPAG's approach it is not immediately obvious how one identifies the point at which the defective claim is made. Mr Williams was driven to argue that this was necessarily on the first occasion during Stage 2 that the claimant logged out of the online claim form without having completed it. However, as Ms Apps submitted, there is no hint in the regulations that the regulation 8(5) duty arises at the point of the first log out. Moreover, sending a regulation 8(5) notice at that stage could serve only to confuse claimants who were consciously completing the claim form in stages.

99. The second argument – which is definitely not determinative, as I did not hear detailed submissions on the point, and indeed it has only occurred to me when writing up this decision – revolves around regulation 10 (date of claim) of the 2013 Claims and Payments Regulations. The parties' respective submissions tended largely to focus on regulation 10(2), which deals with the date of claim for claims which are defective within the terms of regulation 8(3). However, if one puts to one side the special case of telephone-assisted claims for universal credit, the default position is that the date on which a universal credit is made is "in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), the date on which the claim is received at an appropriate office" (see regulation 10(1)(a)). This basic rule is expressly made subject to sub-paragraph (b), not explored in either written or oral argument, which provides that:

"(b) in the case of a claim made by means of an electronic communication in accordance with regulation 8(1), where the claimant receives assistance at home or at an appropriate office from the Secretary of State, or a person providing services to the Secretary of State, which is provided for the purpose of enabling that person to make a claim, the date of first notification of a need for such assistance;"

100. This is, in effect, a recognition, in theory by Parliament, or rather in practice by DWP policy makers, that individuals who are digitally excluded may be disadvantaged by the normal date of claim rules for universal credit. As such, if they notify the DWP that they need assistance from a benefits officer or a DWP-approved third party "for the purpose of enabling that person to make a claim", then the date of claim is "the date of first notification of a need for such assistance", and not the date when the online claim is actually submitted in accordance with regulation 8(1). There may well be a policy argument to be had as to whether regulation 10(1)(b) amounts to adequate protection for vulnerable claimants who have limited digital skills, relying as it does on their self-identification and then the notification of their needs to the DWP. It necessarily provides precious little solace for the digitally excluded who "have a go" by themselves without assistance and persevere to complete their claim some days (or possibly even a few weeks) later (subject to the 28 days rule).

However, be that as it may, it cannot be said that the statutory scheme makes no provision for those who, for whatever reason, may struggle with the digital way of working. Although I do not rely on this factor for my decision, not having heard detailed argument on the point, it further supports the Secretary of State's approach to the construction of regulation 8 of the 2013 Claims and Payments Regulations.

101. Both advocates made further submissions in relation to several other subsidiary arguments – for example, as to the point at which entitlement to a legacy benefit ceased and entitlement to universal credit started – but I did not consider that any of these points shed further light on the central issues raised by the appeal.

Conclusion

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.

**Signed on the original
on 26 March 2020**

**Nicholas Wikeley
Judge of the Upper Tribunal**