

EE -v- SSWP



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

UA-2023-000846-ULCW
Appeal No. UA-2023-000846-ULCW

ON APPEAL FROM

Tribunal: First tier Tribunal (Social Entitlement Chamber)
Tribunal venue: Peterborough
Tribunal Case No: SC299/22/000358
Tribunal decision date: 26 October 2022

Between:

EE

Appellant/claimant

- v -

SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: Upper Tribunal Judge Hansen

Hearing date: N/A

Decided on consideration of the papers on 10 January 2024

Representation:

Appellant: Kester Disability Rights
Respondent: Emma Fernandes on behalf of the Secretary of State

Decision: The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First Tier Tribunal sitting at Peterborough on 26 October 2022 under tribunal reference SC299/22/000358 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. This case is remitted to the First Tier Tribunal for reconsideration, preferably at an oral hearing.
2. The members of the First Tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.
3. The parties should send to the relevant First Tier Tribunal office any further evidence upon which they wish to rely as soon as reasonably practicable.
4. The new panel of the First Tier Tribunal will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.

REASONS FOR DECISION

1. This is a supported appeal in a case about Universal Credit ("UC"). The claimant was found to be entitled to the limited capability for work and work-related activity ("LCWRA") element of UC but was only awarded that element from 1 January 2022. The issue in the case is whether the First-tier Tribunal ("FtT") erred in law in deciding that the claimant *"cannot claim LCWRA from September 2019 without a fit note whatever the reasons for her failure to produce a fit note may be"*. Depending on how this issue is resolved, the claimant may be entitled to the LCWRA element of UC from 1 January 2020, whereas the decision-maker only awarded that element with effect from 1 January 2022, a decision which was upheld by the FtT in a decision dated 26 October 2022.
2. The claimant made a claim to UC on 1 May 2019 and was found entitled from 1 May 2019. On 19 September 2019 she reported a change of circumstances on the UC system, reporting that she had health conditions (chronic fatigue syndrome, back pain and sciatica, migraine, asthma, depression and PCOS) and advised that her conditions restricted her ability to work. No fit notes were provided at this time. She first provided a fit note on 29 September 2021 from 23 September 2021 to 23 November 2021 and was referred for a work capability assessment on 23 November 2021 and sent a UC50 health questionnaire.
3. On 1 March 2022 the claimant attended a medical examination by telephone undertaken by an approved health care professional ("HCP") whose opinion was that the claimant did have LCWRA. By a decision dated 20 March 2022 the decision-maker acting on behalf of the SSWP decided that the claimant met the criteria for LCWRA from 29 September 2021. It was further decided that the usual 3 month "relevant period" under regulation 28 of the Universal Credit Regulations 2013 must be served and that the LCWRA element could therefore only be added to the award amounts of UC with effect from 1 January 2022, the beginning of the first assessment period following the end of the relevant period.
4. On receipt of the decision the claimant immediately complained that the LCWRA had not been backdated, making the point that between September 2019 and November 2021 she was *"never asked to provide a sick note (which I could have done if I'd known)"*. The decision maker refused to revise the decision and the claimant then

sought mandatory reconsideration. On 11 May 2022, the decision maker completed a mandatory reconsideration of the decision but found no reasons to change the decision. In refusing to change the decision, the decision maker said this:

You first provided a fit note on 29 September 2021 which your GP backdated to cover 23 September 2021 to 23 November 2021. You continued to provide fit notes to cover you up to and including 21 March 2022, you are no longer required to provide fit notes now a decision has been made on your health journey.

The guidance states LCWRA can be awarded from the date you declared your health conditions affect your ability to work if medical evidence covers this date and is provided at the time of declaration or the date medical evidence is provided relating to your current health journey regardless of any backdating your GP may provide unless there were extenuating circumstances for not providing a fit note prior to this time. You have provided no evidence that you would have been unable to obtain or provide a fit note prior to this time and I can find no evidence that you queried your UC award.

It is part of your UC commitments to update UC of any changes to your circumstances that may affect your benefit entitlement at the time a change occurs.

When a claimant is awarded LCWRA, a 3 month relevant period must be served either from the start date of your UC claim, if medical evidence was provided for this period or from the first date medical evidence was provided that relates to the WCA that awarded you LCWRA.

I have also reviewed the exceptions to the relevant period, under regulation 28 of Universal Credit Regulations 2013, and found that none of these apply to your circumstances.

Your UC claim has an Assessment Period (AP) start and end date; LCWRA is awarded the first day of the new AP after the 3 month relevant period ends. In your case, your AP begins on the 01st of each month.

This means that your relevant period is 29 September 2021 to 28 December 2021. Therefore, your award of the LCWRA element should commence from 01 January 2022 to 28 February 2022 as this is your AP immediately following your 3 month relevant period.

I am satisfied that your LCWRA element has been awarded correctly. I am, therefore, unable to change the decision dated 20 March 2022 awarding you LCWRA from 29 September 2021.

5. The claimant then appealed to the FtT. In her notice of appeal the claimant set out her reasons for disagreeing with the decision as follows:

'This is an appeal against a decision of the Respondent dated 20 March 2022, reconsidered but not revised on 11 May 2022. The appeal is against the date of the determination that the Appellant has limited capability for work related activity (LCWRA). The decision that the Appellant has LCWRA is not disputed. The chronology is: 19.09.19 – Appellant reported health changes to the Respondent. 21.09.21 - Respondent requested fit notes. 29.09.21 – Appellant sent the

Respondent fit notes from 23 September 2021 – 21 March 2022. 20.03.22 – Respondent work capability assessment (WCA) decision determining the Appellant had LCWRA from 1 January 2022. In its mandatory reconsideration notice of 11 May 2022 the Respondent stated, "You advised UC of your health conditions when you made your claim on 01 May 2019. At this time, you completed the question, 'Do any of your conditions restrict your ability to look for work?' With Yes. The next question on the declaration asks, 'Do you have a fit note'? To which you selected No. The following message is then displayed: You need to get one from your doctor if you're ill for more than 7 days. It may also be called a 'statement of fitness for work'. You first provided a fit note on 29 September 2021 which your GP backdated to cover 23 September 2021 to 23 November 2021. You continued to provide fit notes to cover you up to and including 21 March 2022, you are no longer required to provide fit notes now a decision has been made on your health journey". And, "It is part of your UC commitments to update UC of any changes to your circumstances that may affect your benefit entitlement at the time a change occurs". The Appellant's UC journal shows an entry of 19 September 2019 stating "Effective from: 19 September 2019 [the claimant] has a health condition that restricts their ability to work or look for work". No work-search or work related activity of any kind was required of the Appellant from that date. Neither were any fit notes requested. It is therefore contended the correct date that the LCRWA element should be calculated from is 19 September 2019. Backdated sick notes can be obtained from the Appellant's GP if required by the Respondent. However, the Respondent notes that medical evidence is required, "...unless there were extenuating circumstances for not providing a fit note prior to this time". The "extenuating circumstances" are contended to be: 1. The Appellant could not possibly have known fit notes were required because none were requested. 2. Indeed, the Respondent had determined already from 19 September 2019 that, "[the claimant] has a health condition that restricts their ability to work or look for work". 3. The Respondent was also aware the Appellant is a severely disabled mother. It knows her family make-up from her UC claim. It knows she is severely disabled from her PIP award. It is therefore contended the LCWRA element can be safely recalculated from 19 September 2019'.

6. The claimant's arguments did not find favour with the FtT who upheld the decision to award the LCWRA element with effect from 1 January 2022 only. The reasons for so deciding are apparent from paragraphs 15 and 16 of the Statement of Reasons dated where the FtT said this:

"[The claimant] cannot claim LCWRA from September 2019 without a fit note whatever the reasons for her failure to produce a fit note may be".

"... there is no capacity to backdate UC owing to a failure by the claimant to realise that she must provide a fit note to make that claim".

7. Permission to appeal was granted by the FtT observing that whilst it did not accept that regulation 2(1A) was sufficiently flexible to allow a claim to be made for LCWRA without a fit note, the point was at least arguable. UTJ Citron subsequently gave case management directions, inviting a response from the Secretary of State, in which he observed that the first of the above statements was arguably inconsistent with

Regulation 2(1A) of the Social Security (Medical Evidence) Regulations 1976 (as amended) which provides as follows:

2.—(1) Subject to regulation 5 and paragraph (1A) below, where a person claims to be entitled to any benefit, allowance or advantage (other than industrial injuries benefit or statutory sick pay) and entitlement to that benefit, allowance or advantage depends on that person being incapable of work or having limited capability for work, then in respect of each day until that person has been assessed for the purposes of the personal capability assessment or the limited capability for work assessment they shall provide evidence of such incapacity or limited capability by means of a statement given by a healthcare professional in accordance with the rules set out in Part 1 of Schedule 1 to these Regulations.

(1A) Where it would be unreasonable to require a person to provide a statement in accordance with paragraph (1) above that person shall provide such other evidence as may be sufficient to show that they are incapable of work or have limited capability for work so that they should refrain (or should have refrained) from work by reason of some specific disease or bodily or mental disability.

Discussion and Conclusion

8. The Secretary of State supports this appeal. In helpful submissions prepared on behalf of the Secretary of State by Emma Fernandes dated 7 November 2023, the arguable error of law identified by UTJ Citron is endorsed and, having referred to Regulation 2(1A) of the 1976 Regulations as set out above, the submissions continue as follows:

18. This indicates that a 'fit note' is not the only form of evidence for the Secretary of State to consider if it's unreasonable for the claimant to provide one. So, did the FTT consider what was reasonable for the claimant to provide in light of this regulation?

19. Paragraph 9 and 10 in the SOR state:

"9. The question in this appeal is whether there were extenuating circumstances which mean that [the claimant] was not required to provide the required evidence in the form of a fit note in September 2019 and therefore, that [the claimant] can claim LCWRA from that date?

10. To answer that question, I must establish whether there can be extenuating circumstances for the failure to provide a fit note for the purposes of claiming LCWRA..."

20. Paragraphs 11-14 go on to vaguely explore this, but I submit that there is no adequate explanation provided for the decision reached especially after setting out at paragraph 13 about how Regulation 2(1A) says it's unreasonable to expect a claimant to provide the fit note then other evidence may be accepted.

21. Page 3 of the claimant's appeal to the FTT, sets out her extenuating circumstances for why a fit note wasn't provided:

- The Appellant could not possibly have known fit notes were required because none were requested.*

- *Indeed, the Respondent had determined already from 19 September 2019 that, "[the claimant] has a health condition that restricts their ability to work or look for work".*
- *The Respondent was also aware the Appellant is a severely disabled mother. It knows her family make-up from her UC claim. It knows she is severely disabled from her PIP award. It is therefore contended the LCWRA element can be safely recalculated from 19 September 2019.*

22. Paragraph 15 in the SOR, briefly acknowledges the above but concludes that even if they were accepted, there is no provision in the regulations to allow the, and that she can't claim LCWRA from September 2019 without a fit note.

23. There is a clear contradiction around whether or not a fit note was the sole piece of evidence which would determine if LCWRA could be backdated. The FTT ought to have used their inquisitorial function, or explain adequately if they did, as to how Regulation 2(1A) may have benefited the claimant here. There is no indication in the SOR that the FTT considered 'other evidence' as described in Regulation 2(1A).

9. In those circumstances, I propose to deal with this appeal relatively briefly, whilst respecting the request made by the claimant's representative for a decision with reasons.
10. Before briefly setting out my reasons for allowing the appeal, I would also make the observation that there was evidence before the FtT, in the form of a GP letter from Dr Carr dated 28 September 2022, which confirmed that whilst fit notes had only been provided since September 2021, the claimant's *"medical condition hasn't been substantially different between September 2019 and January 2022"*.
11. Against that background, I can explain my reasons for allowing the appeal succinctly. Where, as here, the claimant was making a case to the effect that it was unreasonable to require her to provide a fit note in accordance with Reg 2(1) of the 1976 Regulations, the FtT was wrong to hold that nothing short of such a fit note was sufficient to evidence LCWRA and/or support a claim for backdating of payment of that element of UC. Regulation 2(1A) in terms admits of the possibility that there may be circumstances where it is unreasonable to insist on a fit note, and, where that is the case, it is then open to a claimant to provide *"such other evidence as may be sufficient to show that they are incapable of work or have limited capability for work"* (my emphasis). This may take the form of medical certificates not in the prescribed form or indeed any other relevant evidence. This approach is consistent not only with the ordinary and natural meaning of the language in Regulation 2(1A) but also with the case-law on the proper construction of Regulation 2(1) as originally enacted. Reg 2(1) as originally enacted required incapacity to be evidenced by a certificate in the prescribed form *"or by such*

other means as may be sufficient in the circumstances of any particular case". That was construed by Commissioner Mitchell QC as enabling a claimant to rely on any other relevant evidence, including medical statements not in strict conformity to the rules: see *R (IS) 8/93* at [14]. Whilst the language of Reg 2(1A) is somewhat different, I consider that the objective intention disclosed by the language is, in each case, substantially the same and intended to provide a degree of leeway to a claimant who has not provided a fit note.

12. The FtT did touch upon the issue of whether there were "*extenuating circumstances*" which might excuse the claimant's failure to provide a fit note earlier than 2021 but concluded that her claim for LCWRA backdated to 2019 (with a start date of 1 January 2020) was impossible as a matter of law, "*whatever the reasons for her failure to produce a fit note*". Because of the FtT's error, and their conclusion that the claimant could not, absent provision of a fit note, claim LCWRA from any date earlier than January 2022 (3 months after the September 2021 fit note), the FtT did not go on properly to consider the claimant's case on reasonableness or make any relevant findings of fact in relation to that issue. It seems to me that had the FtT properly considered this issue, and made the necessary findings of fact, the result may have been different. As the Secretary of State's representative put it in her submissions at [24]:

"The inadequacy of explanation is a material error of law because it goes to the crux of the appeal as to whether or not LCWRA could be backdated to a time before the fit note from September 2021, based on other evidence".

13. For those reasons, I allow the appeal and remit it for re-hearing before a differently constituted panel of the FtT.

W J Hansen
Judge of the Upper Tribunal
Authorised for issue on 10 January 2024