

R(TC) 1/05

Mr C Turnbull
Commissioner
9.8.04

CTC/3433/2003

Revision – refusal to extend time for an application for revision – whether decision appealable – whether decision delays time running for appeal against original decision

The claimant on 9 January 2002 claimed working families' tax credit (WFTC). The Inland Revenue requested further information from him and stated (which the claimant denied) that this was not supplied. On 22 April the Revenue disallowed the claim on the ground that the claimant had not established that he satisfied the conditions of entitlement. The claimant denied receiving notification of this decision.

On 11 September 2002 the claimant requested another WFTC claim form, which he subsequently completed and returned. The Revenue made an award of WFTC under this claim. At the same time the claimant submitted the information that had previously been requested and the Revenue treated this as an application for revision. On 25 November 2002 a decision was issued that purported to revise the decision of 22 April and award WFTC for the period 15 January 2002 to 15 July 2002. However the notification continued: "This award cannot be paid. This is because your request should have been made earlier." On 27 November 2002 the claimant appealed this decision.

The Revenue's submission to the tribunal described the appeal as an in-time appeal against the decision of 25 November and contended that the issue that the tribunal needed to consider was whether the decision-maker had rightly refused to exercise the power in regulation 4 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 to extend the one-month time limit for an application for revision under regulation 3(1) of those Regulations. The tribunal apparently dealt with the case on that basis and rejected the appeal. The claimant appealed to a Commissioner.

Held, allowing the appeal, that:

1. The decision of 25 November 2002 was in substance (and despite its wording) a decision not to revise the decision of 22 April 2002 (paragraph 11);
2. The decision purportedly under appeal to the tribunal was the decision of 22 April 2002: an appeal following a refusal to revise is an appeal against the original decision, not against the refusal to revise (R(IB) 2/04 at paragraph 188 applied) (paragraph 12). Further, a refusal to accept a late application for revision is not itself a decision capable of being appealed to an appeal tribunal (paragraph 16);
3. On the footing (as found by the tribunal) that the claimant was duly notified of the decision of 22 April, the appeal against that decision was out of time. The time for appealing was not extended by regulation 31 of the Decisions and Appeals Regulations because, since the time for applying for revision had not **in fact** been extended by the Secretary of State under regulation 4, the application for revision had not been made under regulation 3(1) (paragraph 14);
4. There was no indication that either the Inland Revenue or a legally qualified panel member had considered using their powers to extend the time for appealing under regulation 32 of the Decisions and Appeals Regulations, and in the absence of such an extension there was no valid appeal before the tribunal and its decision was therefore erroneous in law (paragraphs 19, 20 and 23);
5. The tribunal could in no circumstances have had jurisdiction to consider whether the Secretary of State **ought** to have extended the time for applying for revision under regulation 4 : if the time for appealing the decision of 22 April had been extended, that appeal would have been bound to succeed. If not, the tribunal had no jurisdiction to hear the appeal at all (paragraphs 15 to 17).

The Commissioner remitted the appeal with directions that it should first be considered by a legally qualified panel member for determination (1) under regulation 31(4) whether the decision of 22 April

was in fact sent to the claimant (if not, the appeal was in time); and (2) if so, whether the claimant's time for appealing should be extended under regulation 32.

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the claimant, brought with my permission, against a decision of the Rochdale appeal tribunal made on 8 May 2003. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. The case is remitted for determination by a legally qualified panel member whether there is a valid appeal against the decision of 22 April 2002, and if so for decision of that appeal by a new appeal tribunal.

2. The claimant applied for working families' tax credit (WFTC) by an application which was treated as made on 9 January 2002. He was asked to supply some further information which the Revenue says that he did not, despite reminders, supply. On 22 April 2002 a decision was made refusing the claim on the ground that, owing to the absence of the information, the claimant had not established that he satisfied the conditions of entitlement.

3. According to the Revenue the next time it heard from the claimant was on 11 September 2002, when he requested another claim form. He completed that claim form and also supplied further information which the Revenue required in relation to the claimant's contention that he should be awarded benefit under the claim which he had made in January 2002. The claimant was awarded and paid WFTC under the subsequent claim, which is not in issue before me.

4. What is in issue is the claimant's entitlement to WFTC under the claim which he had made in January 2002. As regards that, after examining the further information supplied the Revenue concluded that the claimant had fulfilled the conditions of entitlement to WFTC, and on 25 November 2002 made a further decision in the following form:

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

The new entitlement is £93.43 per week from 15 January 2002 to 15 July 2002.”

5. However, the letter of 25 November 2002 notifying the claimant of that decision added that “This award cannot be paid, this is because your request should have been made earlier. (11 September 2002 was when you asked for reconsideration).”

6. The claimant appealed on 27 November 2002. His letter of appeal made clear that he considered that he should have been paid WFTC for the period for which it had been awarded by the decision of 25 November 2002. In numerous letters and submissions, both before and after the letter of appeal, the claimant has contended that he had supplied the requested information before 22 April 2002, had not received the reminders asking for that information and had not received any notification of the decision of that date. The claimant may also have asserted (as I understand it) that he had also attempted (unsuccessfully) to contact the Revenue between April and 11 September 2002 in order to find out what was happening. For

the purposes of this decision it is not necessary to set out the claimant's contentions (which have been advanced at considerable length) in any greater detail.

7. The Revenue's first written submission to the tribunal stated the "date of decision" to be 22 April 2002, but then stated the terms of the "decision under appeal" to be those set out in paragraphs 4 and 5 above (ie the decision of 25 November 2002). The submission also stated:

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

As to the merits of the appeal, the submission presented the issue as being whether the decision-maker had been right, on 25 November 2002, in effect to refuse to exercise the power in regulation 4 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991) (the 1999 Regulations) to extend the one-month time limit for applying under regulation 3(1) to revise the decision of 22 April 2002.

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

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

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

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

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

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

10.3 That the issue before the tribunal was rightly considered as being whether the decision-maker had been correct, on 25 November 2002, in effect to refuse under regulation 4 to extend the time for applying for **revision** of the decision of 22 April 2002.

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

11. In my judgment, however, the decision of 25 November 2002 was in substance simply a decision not to revise the decision of 22 April 2002. An award of WFTC remained payable for a period of 26 weeks (section 128(3) of the Social Security Contributions and Benefits Act 1992). What fell to be decided by the decision-maker on 25 November 2002 was whether the decision of 22 April 2002

should be altered (to use a neutral word for the moment) so as to award WFTC under the claim which had been made on 9 January 2002. By 25 November 2002 more than 26 weeks had of course expired since the date of that claim. It makes no sense to say that the decision-maker on 25 November 2002 decided to supersede the decision of 22 April 2002, when his decision was in substance that that decision should not be altered so as to award WFTC.

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

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

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

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

16. It seems to me that in neither of those events does the appeal tribunal have any jurisdiction to determine whether the decision-maker **ought to have** exercised the power in regulation 4 to extend the time for applying for revision under regulation 3(1). A refusal or failure to extend time under regulation 4 is not in my judgment a decision which is itself capable of being appealed. What is appealable under section 12 of the Social Security Act 1998 is "any decision of the Secretary of State under section 8 or 10 above (whether as originally made or as revised under

section 9 above) ...”. The decision-maker, in deciding on 25 November 2002 not to revise the decision of 22 April 2002, may be said implicitly to have refused to extend the time for applying to revise that decision. But the only decision capable of being appealed was the original decision of 22 April 2002. If the decision-maker had extended the time for applying for revision of that decision, the appeal against that decision would have been within time, and would have been bound to succeed. As it was, he did not, which meant that, unless the time **for appealing** was extended, the appeal was out of time.

17. The tribunal in my judgment therefore would have had no jurisdiction to hold that the decision-maker on 25 November 2002 **ought**, under regulation 4, to have extended the time for applying for revision under regulation 3(1), and therefore ought to have revised the decision of 22 April 2002. At the risk of repetition, the tribunal only had jurisdiction to hear the appeal at all if the time for **appealing** was extended, and if it was, there was no need for the claimant to rely on regulation 4.

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

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

20. I think that the tribunal’s brief reasons indicate that, if he had specifically considered the position **under regulation 32**, the chairman would very probably have refused to extend the time for appealing. What weighed with the chairman was simply that the claimant appeared to have been inactive for a long time. However, as

I have said, it is clear to me that no actual consideration was given to the question of extension under regulation 32. That means that I must hold the tribunal's decision to have been erroneous in law and must set it aside. The claimant was entitled to have the question of whether there should be an extension of time considered under the correct statutory provision. Further, in the absence of an actual extension under regulation 32 the appeal was out of time and the tribunal had no jurisdiction to consider it at all.

21. Had I considered that the tribunal's decision amounted in substance not to a purported decision by the tribunal of an appeal, but to a determination by the chairman not to extend the time for appealing under regulation 32, there would appear to have been no decision by the tribunal capable of being appealed to me, and I think that my jurisdiction would have been limited to so declaring. The chairman's determination under regulation 32 would not, on the face of the legislation, have been capable of appeal to a Commissioner, but only of challenge by judicial review. For what it is worth, however, I would myself, had I had any jurisdiction in the matter, have been disposed to accept the submissions on behalf of the claimant that, in the light of the very detailed contentions which he had made as to the sequence of events from the date of his claim onwards, the reasoning in the final paragraph of the statement of reasons was unsatisfactorily brief. For example, there was no finding on whether the tribunal accepted that the claimant had not in fact received the notification of the decision of 22 April 2002. It may be that the tribunal was saying that it did not matter whether he had or not, but even that is not clear from its very brief reasons.

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

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

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

- 24.1 under regulation 31(4) whether the decision of 22 April 2002 was in fact sent to the claimant as contended by the Revenue;
- 24.2 if so, whether the claimant's time for appealing should be extended under regulation 32.

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

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