



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. CCS/2802/2019

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

Between:

HH

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

ASP

Second Respondent

Before: Upper Tribunal Judge Robinson

Decision date: 12 November 2021

Decided on consideration of the papers

Representation:

Appellant: In person

First Respondent: Decision Making and Appeals, Leeds

Second Respondent: In person

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 11 October 2019 under number SC242/18/01247 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 rehearing.**
- 2. The First-tier Tribunal hearing the remitted appeal-**
 - a. should include a Financially Qualified Panel Member, and**

b. should not involve the Judge or Member who heard the appeal on 11 October 2019.

3. These Directions may be supplemented by later directions by a Tribunal Judge or Registrar in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. I granted the Appellant permission to appeal in a determination dated 13 November 2020. The background to the case was set out in that determination as follows:

“3. This case concerns the child support maintenance payable by the Appellant to the Second Respondent in respect of their daughter (the “qualifying child”). The Appellant, who is the father of the qualifying child, is the non-resident parent, while the Second Respondent (the mother) is the parent with care.

4. The application for a maintenance calculation was made by the Second Respondent on 22 September 2017. On 30 October 2017 the Appellant and Second Respondent were notified of the decision by the First Respondent (the Secretary of State) that the Appellant was liable to pay child support maintenance of £147.70 per week from 1 October 2017 (the “effective date”). The Appellant’s gross weekly income for the purposes of the calculation was based on information obtained by the First Respondent from HMRC regarding the Appellant’s income in the 2015/16 tax year (and was therefore based on “historic income” in accordance with regulations 34 and 35 of the Child Support Maintenance Calculation Regulations 2012, S.I. 2012/2677 – the “2012 Regulations”).

5. On 30 October 2017 the First Respondent received information from the Appellant regarding his current income (see pages 23 to 30 of the First-tier Tribunal appeal bundle). That information indicated that the Appellant’s income at the effective date was significantly lower than it had been during the period covered by the information obtained from HMRC (£8163.96 a year as compared with £135,849). As the difference between the Appellant’s historic income and his “current income” (determined in accordance with regulation 37 of the 2012 Regulations) was greater than 25%, the First Respondent revised her earlier decision and recalculated the Appellant’s child maintenance liability on the basis of his current income. On 22 December 2017 the Appellant and Second Respondent were notified of the revised decision, that the Appellant was liable to pay £9.50 per week from the effective date (see pages 8 to 11 of the bundle).

6. The Second Respondent lodged an appeal to the First-tier Tribunal (the “FTT”) against the revised maintenance calculation, in which she argued that the Appellant had not fully disclosed his sources of income, and that the level of his disclosed income was inconsistent with his lifestyle and expenditure (see page 16 of the bundle). An oral hearing was held on 7 June 2018, at which the Appellant and Second Respondent were present, and the First Respondent was represented, but was adjourned so that further evidence could be obtained. In the adjournment notice dated 8 June, the FTT Judge directed the Appellant to provide detailed information and evidence in relation to his employment position and income (see pages 41 to 43 of the bundle). The FTT Judge observed that the Appellant had been employed as a senior manager with a large company until May 2016, when he resigned to pursue his own management consultancy business, via a limited company (“H Ltd”) incorporated in January 2016. Among other things, the FTT Judge’s directions required the Appellant to provide complete copies of his tax returns for the years 2015/16 and 2016/17, and, in relation to his company, copies of the full accounts and a list of dividends paid in relation to the same period.

7. The Appellant provided the information and evidence required by the FTT Judge’s directions of 8 June 2018 (see pages 49 to 449 of the bundle). The hearing proceeded on 11 October 2019 before a different FTT Judge, sitting with a Financially Qualified Panel Member. In a decision notice and reasons issued on the day of the hearing, the FTT allowed the appeal and set aside the First Respondent’s revised maintenance calculation of 21 December 2017 (see pages 476 to 479). The FTT held that the Appellant’s gross income for the purposes of the maintenance calculation effective from 1 October 2017 should be regarded as £30,603 a year, and in addition, that a variation should be made on grounds of diversion of income (under regulation 71 of the 2012 Regulations) so that additional income of £51,413 would be taken into account in the calculation. The FTT’s reasons for reaching this decision are considered in more detail below.

8. The Appellant sent three letters to the FTT following its decision; one dated 24 October (received 28 October) headed “Correction/Setting aside”; one dated 25 October (received 28 October) headed “Application for correction of wrong calculation by CMS”; and one dated 24 October (received 12 November) headed “Application for a statement of reasons for the Tribunal’s decision”. In those letters the Appellant queried a number of aspects of the FTT’s decision, including the basis for its finding that his annual income for the purposes of the maintenance calculation was £30,603, and the amount of the additional income taken into account under the variation (see pages 480 to 482 of the bundle). The FTT treated these letters as seeking permission to appeal, and refused permission on 14 November 2019 (page 483).

9. The Appellant renewed his application for permission to appeal to the Upper Tribunal on 16 December 2019 (pages 484 to 490). In his grounds of appeal he argued (in summary) that the FTT had been wrong to take into account the income amounting to £22,542.72 that he had received

from his previous employment in April or May of 2016 (the Appellant in fact refers to April or May 2017, but this must be a slip), as it was not relevant in relation to the effective date of the calculation (1 October 2017). He further argued that it should not have been taken into account because it constituted part of the savings that the FTT accepted he was using to live on at the relevant time, and that he used some of it to pay for child care. [...]"

2. I gave the following reasons for granting permission to appeal:

"13. I consider that the FTT may have erred in law in its conclusion that the Appellant's income from his previous employment, received in or around May 2016, should be included in his current income for the purposes of the maintenance calculation.

14. The FTT's reasons for its decision in respect of this point were as follows:

"14) [The Appellant] supplied Tax returns which showed income from his former employer amounting to £22542.74 in the tax year 2016/2017.

15) The same return showed his directors salary for [H Ltd] of £8059.95 for the same year.

16) Therefore his earned income in the tax year 2016/2017 amounted to £30,603."

15. The 2012 Regulations provide that the gross weekly income of a non-resident parent for the purposes of a maintenance calculation is "a weekly amount determined at the effective date of the decision on the basis of either historic income or current income" (regulation 34(1)). It is not disputed in the current case that the First Respondent was correct to determine the Appellant's gross weekly income based on his current (rather than historic) income. Regulations 37 to 42 of the 2012 Regulations provide for the determination of current income. So far as relevant to this case, they provide as follows:

"37(1) Current income is the sum of the non-resident parent's income-

(a) as an employee or office-holder;

(b) from self-employment; and

(c) from a pension,

calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42.

38(1) The non-resident parent's current income as an employee or office-holder is income of a kind that would be taxable earnings within the meaning of section 10(2) of [the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA")] and is to be calculated as follows.

(2) As regards any part of the non-resident parent's income that comprises salary, wages or other amounts paid periodically—

(a) if it appears to the Secretary of State that the non-resident parent is (or is to be) paid a regular amount according to a settled pattern that is likely to continue for the foreseeable future, that part of the non-resident parent's income is to be calculated as the weekly equivalent of that amount; and

(b) if sub-paragraph (a) does not apply (for example where the non-resident parent is a seasonal worker or has working hours that follow an irregular pattern) that part of the non-resident parent's income is to be calculated as the weekly average of the amounts paid over such period preceding the effective date of the relevant calculation decision as appears to the Secretary of State to be appropriate.

(3) Where the income from the non-resident parent's present employment or office has, during the past 12 months, included bonus or commission or other amounts paid separately from, or in relation to a longer period than, the amounts referred to in paragraph (2), the amount of that income is to be calculated by aggregating those payments, dividing by 365 and multiplying by 7.”

16. The 2012 Regulations do not include express provision about the period by reference to which a non-resident parent's current income as an employee or officer-holder (hereafter referred to as “employment income”) is to be determined. The reference in regulation 37(1) to “a weekly amount at the effective date” suggests that the starting point is the state of affairs on that date, and therefore, so far as employment income is concerned, the employment (or office) the non-resident parent was in on that date. If that is correct then, as the Appellant's only employment or office on 1 October 2017 was as director of C Ltd, the outcome would appear to be that only his remuneration in that capacity (which was £8594 in the year ended 31 January 2018) could be taken into account as employment income. That interpretation seems to be supported by the provisions of regulation 38, and the overall rationale that appears to underlie them. Paragraph (2)(a) deals with the straightforward case where a non-resident parent is in receipt of employment income which is paid as “a regular amount according to a settled pattern that is likely to continue for the foreseeable future”. Clearly that could not apply to income from employment that has ended before the effective date. Paragraph (2)(b) deals with other cases (in relation to which the Secretary of State is given some discretion in determining the period over which employment income is to be averaged) and could, conceivably, be regarded as a basis for taking into account income from an employment or office that the non-resident parent has left before the effective date; however, the examples given (seasonal working and irregular working patterns) suggest that it was intended for different sorts of cases. Paragraphs (3) and (4) make provision in relation to certain other payments of employment income received by the non-resident parent prior to the effective date, but expressly apply to a non-resident parent's “present employment or office” rather than any previous employment or office (and, in any event, are limited to income in “the past 12 months”, so on the facts of the current case could not cover income dating back to May 2016).

17. On the other hand, regulation 38(1) defines employment income by reference to s.10(2) of ITEPA, which is concerned (broadly) with a person's income in respect of a tax year. In light of the FTT's focus on the Appellant's tax return for the year 2016/17 as a key source of evidence regarding his income at the effective date, it is perhaps not surprising that it concluded that the Appellant's employment income in May 2016, which fell within the 2016/17 tax year, was relevant to determining his current income at the effective date of 1 October 2017. However, as the reference to ITEPA in regulation 38(1) is specifically aimed at identifying the "kinds" of income that are to be regarded as employment income for the purposes of a maintenance calculation, I consider that it has limited (if any) significance for determining the period in respect of which income must have been paid in order to be taken into account.

18. The approach in regulation 39 in relation to current income from self-employment also seems to me to support the view that the rationale of the 2012 Regulations is that current income is income from sources which are on-going at the effective date. Regulation 39(1) defines current income from self-employment by reference to self-employment activities "carried on by the non-resident parent at the effective date", and paragraph (6) expressly excludes any income from self-employment activities that the non-resident parent has ceased to carry on at the effective date.

19. For those reasons, I consider it is arguable that the 2012 Regulations do not permit the determination of a non-resident parent's current income for the purpose of a maintenance calculation to take into account income from an employment or office that the non-resident parent was no longer in at the effective date of the calculation; the FTT therefore arguably erred in law by holding that the Appellant's income in May 2016 from the employment that he left shortly thereafter should be included in his current income for the purposes of the maintenance calculation which had an effective date of 1 October 2017.

20. Although I did not consider it arguable that the FTT erred in law in any other respect, the grant of permission to appeal is not limited to the ground set out above."

3. My case management directions on the appeal directed the First Respondent to provide a written response within one month, following which the Second Respondent and Appellant were to be given one month each in which to make written submissions on the appeal.

The parties' submissions on the appeal

4. The representative for the First Respondent (the Secretary of State) submitted a response dated 15 January 2021, supporting the appeal. She argues, with reference to the decision of Upper Tribunal Judge Mitchell in *SB v (1) Secretary of State for Work and Pensions, (2) TB (CSM) [2016] UKUT 84 (AAC)*, that: "Both the [First Respondent] and the First Tier Tribunal erred by not requesting the HMRC figure for 2016/2017 which was the historic figure for an effective date of 1/10/2017."

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She invites me to set aside the First-tier Tribunal's decision and substitute my own decision "with directions to the [First Respondent] to request the correct HMRC figure for 2016/2017, and if the current income for 2017/2018 breaches the 25% tolerance figure to calculate the maintenance using the current income as per Regulation 37(1) of the [2012 Regulations]." I consider the First Respondent's submissions further at paragraphs 7 to 13 below.

5. By a letter dated 21 January 2021, the Second Respondent (the parent with care) was invited to submit a response to the appeal, in accordance with my directions. No response was received, and on 7 September 2021 the Appellant was invited to make his final written submissions.

6. The Appellant sent his reply on 6 October 2021. The reply focuses on issues which, the Appellant acknowledges, are not relevant to the outcome of this appeal. That is because they largely concern alleged deficiencies in the child support regime as established in legislation, rather than whether that legislation has been correctly interpreted and applied in this case. The Appellant also makes allegations of bias in relation to subsequent appeal hearings in which he has appeared before the First-tier Tribunal. Those proceedings are outside the scope of the present appeal and can have no bearing on my decision in this case.

The "latest available tax year" for the purpose of determining historic income

7. As noted above, the First Respondent's representative submits in her response to the appeal that both the First Respondent and the First-tier Tribunal erred by accepting that the 2015/16 tax year was the "latest available tax year" (as defined in regulation 4 of the 2012 Regulations) for the purpose of determining the "HMRC figure" (see regulation 36), and therefore the Appellant's "historic income" (see regulation 35), in relation to the maintenance calculation effective from 1 October 2017. She submits that, if I set aside and remake the First-tier Tribunal decision as she invites me to do, I should direct the First Respondent to request the HMRC figure for the 2016/17 tax year, and to compare that figure to the Appellant's "current income" (calculated in accordance with regulations 37 and 38) to determine whether the maintenance calculation should be based on the Appellant's historic income or current income (in accordance with regulation 34).

8. As the First Respondent's representative acknowledges, the question of whether 2015/16 or 2016/17 was the "latest available tax year" for the purpose of determining the Appellant's historic income is unlikely to affect the maintenance calculation which is the subject of this appeal. That is because, on either basis, it appears likely that the Appellant's current income as at the effective date (based on annual taxable earnings in the region of £8000) would have differed from his historic income (based on an HMRC figure of £135,849 for 2015/16 or £30,602.69 for 2016/17) by an amount equal to at least 25% of the historic income figure. Therefore, the maintenance calculation would be based on his current income in either case.

9. However, I make the following observations on the basis that it may nonetheless be of assistance to the parties and the First-tier Tribunal to clarify this point.

10. The meaning of "latest available tax year" was considered in detail in the reported decision of Upper Tribunal Judge Wikeley in *AR v SSWP, HMRC and LR (No.2)* [2019] UKUT 151 (AAC). In that case, the First Respondent, acting through

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the Child Maintenance Service (the “CMS”), requested information from HMRC in April 2017 in order to carry out an annual review of the non-resident parent’s child maintenance liability. The information provided by HMRC in response related to the 2015/16 tax year, rather than the 2016/17 tax year which had just ended. The non-resident parent argued that HMRC should have provided data relating to the 2016/17 tax year, because at the time the CMS made the request, HMRC was in possession of all of the relevant information regarding his income for that year. Although the non-resident parent was required to submit a Self-Assessment Tax Return (“SAR”) in relation to the 2016/17 tax year, the deadline for which had not yet passed (and which he in fact submitted in November 2017), it was accepted that the information contained in the SAR would not alter the figure that HMRC would have provided in response to the CMS’s request, had it regarded 2016/17 as the latest available tax year.

11. Judge Wikeley accepted the submission made on behalf of HMRC, and supported by the First Respondent, that in “*a case in which a SAR is required ... HMRC are not able to provide the ‘sum of the income on which the non-resident parent was charged to tax’ until the SAR has been received and processed*” (see paragraph 41 of the judgment). Therefore, in that case, when the CMS requested information from HMRC at the end of April 2017, the 2015/16 tax year was the “latest available tax year” as defined in the 2012 Regulations, and the CMS was correct to calculate the non-resident parent’s historic income by reference to that year.

12. In the present case, the papers include copies of SARs filed by the Appellant in relation to the 2015/16 and 2016/17 tax years. It appears that he was legally required to file those SARs (rather than having filed them voluntarily), further to the HMRC notices addressed to him, dated 6 April 2016 and 6 April 2017, which are at pages 272 and 290 of the bundle. The deadline for filing the SAR in respect of 2016/17 was 31 October 2017 (if filing on paper) or 31 January 2018 (if filing online). Page 289 of the bundle suggests that the Appellant filed his return online in January 2018. Therefore, when the CMS made its request to HMRC in September or October 2017 (following the Second Respondent’s application for a maintenance assessment on 22 September 2017) to ascertain the income on which the Appellant was charged to tax for the latest available tax year, and received the 2015/16 figure from HMRC in response, it seems to me that it was probably correct in using that figure to determine the Appellant’s historic income under regulation 35.

13. The Appellant and Second Respondent have not had an opportunity to make submissions on this point. As I am setting aside the First-tier Tribunal’s decision for the reasons set out below, and remitting the appeal for rehearing, it is not necessary for me to decide the issue. Insofar as the First-tier Tribunal’s consideration of the remitted appeal requires it to determine the Appellant’s historic income, it will need to apply *AR v SSWP, HMRC and LR (No.2)* in identifying the “latest available tax year” for that purpose.

The error of law in the First-tier Tribunal’s decision, and disposal of this appeal

14. No party has requested an oral hearing of this appeal, and I do not consider it necessary to hold one to reach a decision.

15. I have concluded that the First-tier Tribunal erred in law in the manner identified at paragraphs 13 to 19 of my reasons for granting permission to appeal (reproduced

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at paragraph 2 above). It is clear from the terms of regulations 37 and 38 of the 2012 Regulations that the determination of the Appellant's "current income" for the purposes of the maintenance calculation effective from 1 October 2017 should have been based solely on the employment or office that he was in at that time. There was no basis on which to take into account the income that the Appellant received in early 2016 from his previous employment, which ended in May 2016. The First-tier Tribunal's error was clearly material, as it increased the amount of the Appellant's gross weekly income on which the maintenance calculation was based. I am therefore setting aside the tribunal's decision.

16. I have considered whether I am able to remake the decision, but have concluded that I should instead remit the case to be reheard by the First-tier Tribunal. The tribunal which heard the appeal on 11 October 2019 not only reached a different conclusion from the First Respondent regarding the amount of the Appellant's current income, it also decided that the maintenance calculation should be varied on the ground of diversion of income. The tribunal held that it was able to do so because the Second Respondent had (in effect) applied for a variation in her grounds of appeal (see paragraphs 7 and 19 to 36 of the tribunal's statement of reasons). In those grounds of appeal the Second Respondent had asked the First-tier Tribunal to investigate how the Appellant had paid for various alleged items of spending (see page 16 of the papers). The First Respondent's submission on the appeal observed in response that the 2012 Regulations (unlike the Child Support (Variations) Regulations 2000, S.I. 2001/156, which applied for the purposes of the previous child support scheme) did not permit a variation to be made on the ground of "life-style inconsistent with declared income" (page 6). That is correct, but the facts alleged by the Second Respondent potentially raised the question of whether there were grounds for a variation under the 2012 Regulations (such as unearned income or diversion of income), and the First Respondent should therefore have decided whether to revise the maintenance calculation to apply a variation on any of those grounds.

17. In those circumstances, the First-tier Tribunal was entitled to consider whether a variation should be applied (see CCS/3862/2007, paragraph 15; although that decision concerned a previous child support scheme, its reasoning remains relevant to the 2012 Regulations).

18. The Appellant's grounds in support of his application to the First-tier Tribunal for permission to appeal disputed the amount of the additional income that the tribunal decided should be taken into account in the maintenance calculation by way of a variation for diversion of income (pages 480 and 481). I have not received written submissions from the parties on that issue.

19. In addition, there is evidence in the papers to suggest that there may be additional grounds for varying the calculation which the First-tier Tribunal does not appear to have considered; the Appellant's SAR for the 2016/17 tax year records that he received dividends from UK companies of £5000 (see page 292) and dividends from foreign companies of £961.10 (page 301). Dividends received by a non-resident parent can be taken into account as "unearned income" by way of a variation under regulation 69 of the 2012 Regulations (as "income of a kind that is chargeable to tax under Part 4 of [the Income Tax (Trading and Other Income) Act 2005] (savings and investment income)" – see regulation 69(2)(b)). Such a variation can only be made (as with all variations) if the First Respondent (or the First-tier Tribunal, standing in the First Respondent's shoes) is of the opinion that in all the circumstances of the

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case it would be just and equitable to agree to a variation (see section 28F of the Child Support Act 1991).

20. Regulation 69(3) provides:

“Subject to paragraphs (5) and (6), the amount of the non-resident parent’s unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent’s unearned income is to be treated as nil.”

21. For the reasons set out above at paragraphs 10 to 12, it is likely that the “latest available tax year” at the time of the maintenance calculation decision in October 2017 was 2015/16 rather than 2016/17. However, regulation 69(5) provides:

“Where—

(a) the latest available tax year is not the most recent tax year; [...]

the Secretary of State may, if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent’s unearned income by reference to the most recent tax year; and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return.”

22. The “most recent” tax year at the time of the maintenance calculation decision was the 2016/17 tax year, so the calculation could potentially have been varied on the ground of unearned income to take into account the dividend income that the Appellant received in that year.

23. The First-tier Tribunal, as an expert fact-finding body with the benefit of specialist members, will be in a better position to undertake the task of considering the evidence afresh and deciding whether grounds exist to vary the maintenance calculation, and if so, the amount of any additional income to be taken into account. I am therefore remitting the appeal to the First-tier Tribunal.

Helen Robinson
Judge of the Upper Tribunal
Signed on the original on 12 November 2021