DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Watford First-tier Tribunal dated 21 December 2017 under file references SC304/17/00552, SC304/17/00553 & SC304/17/00554 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

Appeal file number SC304/17/00552:

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***The Appellant's appeal against the Secretary of State's decision of 12 December 2016, as subsequently revised on 4 July 2017, superseding the award of Employment and Support Allowance (ESA), is allowed.***
>
> ***The Appellant's periods of entitlement and non-entitlement to ESA are to be taken by the Secretary of State on the basis of a 5-week rolling average (i.e. as per the spreadsheet provided by the Appellant's representative at pp.196-197 of case file CE/870/2018).***

Appeal file number SC304/17/00553:

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***The Appellant's appeal against the Secretary of State's decision of 30 December 2016, as subsequently revised on 5 July 2017, namely that there was an overpayment of contribution-based Employment and Support Allowance (ESA), is allowed as to the calculation of the amount of the overpayment only.***
>
> ***The matter is remitted to the Secretary of State for recalculation of the amount of the overpayment on the basis of the outcome of the entitlement appeal in* SC304/17/00552.**
>
> ***The Secretary of State must notify the Appellant's representative of the revised calculation no later than 2 months after the date of the letter sending him this Decision. The Appellant may than, within 1 month of the date on which that calculation is sent to her representative, apply in writing to the Upper Tribunal for any dispute as to the calculation of the periods and amounts involved to be resolved.***

Appeal file number SC304/17/00554:

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> ***The Appellant's appeal against the Secretary of State's decision of 30 December 2016, as subsequently revised on 5 July 2017, namely that there was an overpayment of income-related Employment and Support Allowance (ESA), is allowed as to the calculation of the amount of the overpayment only.***

***The matter is remitted to the Secretary of State for recalculation of the amount of the overpayment on the basis of the outcome of the entitlement appeal in* SC304/17/00552.**

The Secretary of State must notify the Appellant's representative of the revised calculation no later than 2 months after the date of the letter sending him this Decision. The Appellant may than, within 1 month of the date on which that calculation is sent to her representative, apply in writing to the Upper Tribunal for any dispute as to the calculation of the periods and amounts involved to be resolved.

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This appeal to the Upper Tribunal by the Appellant against the decision of the First-tier Tribunal succeeds (or technically the three associated appeals each succeeds). I can also re-decide the decisions taken by the First-tier Tribunal on appeal from the relevant decisions by the Secretary of State.

2. The appeals concern the rules governing the process of averaging a claimant's earnings for the purposes of assessing entitlement to employment and support allowance under the permitted work rules, in a situation where the claimant was working irregular hours under a zero hours contract.

The background to this appeal

3. The Appellant, who has mental health problems including depression and generalised anxiety disorder, was undertaking some part-time work as "permitted work" for the purposes of her continued entitlement to employment and support allowance (ESA). The permitted work appeared to be on the basis that the work was for less than 16 hours a week and the earnings did not exceed 16 times the National Minimum Wage (NMW) (see regulation 45(4) of the Employment and Support Allowance Regulations 2008 (SI 2008/794; "the 2008 ESA Regulations"). Subsequently the Secretary of State took a series of three decisions about the Appellant's ESA entitlement.

4. The first decision was a determination superseding the Appellant's entitlement to ESA for certain periods (First-tier Tribunal (FTT) reference SC304/17/00552, now Upper Tribunal case number CE/870/2018). This decision was based on comparing the Appellant's earnings with the relevant permitted work weekly earnings limits over a period of many months.

5. The second was a decision finding the Appellant was liable to repay an overpayment of contribution-based ESA for the period from 19.03.15 to 06.01.16 amounting to £3,636.85 and then again for the period 31.03.16 to 28.09.16 amounting to £2,841.80 (i.e. a total across the two periods of £6,478.65): this was the appeal with FTT reference SC304/17/00553, now Upper Tribunal case number CE/871/2018).

6. The third was a decision finding the Appellant was liable for the recovery of an overpayment of income-based ESA for the period from 19.03.15 to 07.10.15 amounting to £456.15 and then again for the period 31.03.16 to 28.09.16 amounting to £409.50 (i.e. a total of £865.65): FTT reference SC304/17/00554, now CE/874/2018.

7. Taken together, the latter two overpayment decisions produced a grand total of £7,344.30 in overpaid ESA.

8. The main issue which arises on this further appeal to the Upper Tribunal is the process by which the respective periods of the Appellant's entitlement and non-entitlement to ESA were identified. This in turn depends on how the Appellant's earnings are to be averaged over time. As noted, regulation 45(4) of the 2008 ESA Regulations requires the claimant's earnings to be compared with a figure representing 16 x NMW, a weekly figure which is updated each year on 1st October.

For the period in question the permitted work weekly average earnings limits were as follows:

1 October 2014 to 30 September 2015:	£104.00
1 October 2015 to 30 September 2016:	£107.50
1 October 2016 to 30 September 2017:	£115.50

The DWP decision-making process in this case

9. In a decision dated 12 December 2016, the decision-maker averaged the Appellant's earnings and made the appropriate comparison with the permitted work weekly average earnings limits by looking at the position in 'chunks' of approximately 6 months at a time. The net effect of this decision was that the Appellant was found to be not entitled to contribution-based ESA for the period from 19 March 2015 to 30 September 2015 as her average weekly earnings were above the then relevant limit of £104 p.w. The decision-maker accepted that a new claim would have been made, and carried out a further calculation for the period thereafter, having allowed for the requisite seven waiting days. This resulted in a further overpayment as during this period ESA would have been payable at the assessment phase rate only (as for a new claim).

10. Following the Appellant's request for a mandatory reconsideration, the decision was looked at again on 30 January 2017. Apart from correcting the date of the original decision to be superseded, this resulted in no substantive change to the outcome of the decision dated 12 December 2016. However, the decision was further revised on 4 July 2017, principally to the effect that the Appellant was now also found to be not entitled to contribution-based ESA on earnings grounds for the period from 31 March 2016 to 21 September 2016 (broadly, for another 26 week 'chunk', running up to the next annual up-rating of the NMW) and from 22 to 28 September 2016 (as waiting days).

11. Thus, the decision-maker's final assessment, excluding periods of waiting days, ran was follows:

20 March 2015 - 30 September 2015:	earnings £110.61 p.w. (above £104 limit)
11 October 2015 - 27 March 2016:	earnings £106.69 p.w. (below £107.50)
3 April 2016 - 18 September 2016:	earnings £116.99 p.w. (above £107.50)
2 October 2016 - 4 December 2016:	earnings £105.99 p.w. (below £115.50)

12. In very broad terms, therefore, the net effect of this process of averaging was to find the Appellant excluded from entitlement to ESA for the first six months, followed by five months' ESA entitlement, then a further five months of nil entitlement and finally two months of entitlement.

The First-tier Tribunal's decision

13. The First-tier Tribunal sitting in Watford on 21 December 2017 refused the Appellant's appeals at a so-called "paper hearing". The FTT Judge issued one decision notice for the entitlement appeal and a joint decision notice for the two overpayment appeals. These were followed by a single unified statement of reasons.

14. In the entitlement decision notice the FTT found as follows, before setting out the specific dates for the respective periods of ESA entitlement and non-entitlement:

> "The appellant worked under a zero hours contract during her award of ESA. Her hours varied so it was not possible to establish a weekly pattern of earnings. In such situations it is for the respondent to calculate earnings using averaging

> to obtain a fair outcome. The respondent has set out in detail the way the averages were calculated in this case and how these established the permitted work periods and the earnings limits to be applied. The Tribunal could not identify a different/fairer pattern."

15. The FTT's statement of reasons added little if anything to that explanation of the earnings calculation process, being focussed primarily on the factors relevant to the associated overpayment decisions that were under appeal.

The appeal to the Upper Tribunal

16. The Appellant then sought advice from Mr David Martinez of Harrow Law Centre. In response to his application, the District Tribunal Judge gave permission to appeal in the following terms:

> "The Appellant's representative asserts that regulation 45 of the Employment and Support Allowance Regulations 2008 has not been properly applied. Specifically, the Appellant's representative states that entitlement to ESA should be looked at on a week by week basis in terms of whether actual earnings were above or below the relevant permitted work earnings limit in any one week and not in large blocks of average weekly earnings as has been done by the Secretary of State and the Tribunal."

17. Mr Martinez's initial argument, in short, was that the decision-maker and the FTT had misapplied regulation 45 and worked on the basis that the Appellant had been overpaid for a total of 56 weeks (roughly two 26 week 'chunks' and some waiting days), whereas (on his calculations) the Appellant had actually only worked for 31 weeks during this whole period when her earnings were above the permitted work weekly limit.

The Upper Tribunal's analysis: averaging and regulations 45(4), 88 and 94(6)

18. Regulation 45 of the 2008 ESA Regulations is the provision which defines the various categories of exempt work, including permitted work as defined by regulation 45(4). This provision also includes a rule defining how the number of *hours* for which a claimant is engaged in work is to be calculated (see regulation 45(8)). However, there is no special rule governing the averaging of *earnings* in this regulation. Furthermore, the earnings assessment provisions in the Social Security (Computation of Earnings) Regulations 1996 (SI 1996/2745) do not apply in this context as ESA – unlike incapacity benefit – is not a benefit governed by the Social Security Contributions and Benefits Act 1992 (see *Secretary of State for Work and Pensions v Doyle* [2006] EWCA Civ 466, reported as *R(IB) 1/06,* and the Commissioner's decision following remittal by the Court of Appeal, *R(IB) 3/07*)

19. However, as a result of the helpful exchange of several further written submissions by Mr Mick Hampton, acting for the Secretary of State in these proceedings, and by Mr Martinez, the focus of this appeal has shifted elsewhere. As Mr Hampton explains, regulation 88 of the 2008 ESA Regulations enables decision-makers and tribunals to look beyond the narrow confines of regulation 45. Regulation 88 applies to both forms of ESA (contribution-based and income-related) and as such enables a claimant's earnings from exempt work to be calculated in the same way for both purposes, so ensuring uniformity of treatment. Regulation 88 provides as follows:

> "**Calculation of income which consists of earnings of participants in exempt work**
> 88. Notwithstanding the other provisions of this Part, regulations 91(2), 92 to 99

> and 108(3) and (4) and Schedule 7 (sums to be disregarded in the calculation of earnings) are to apply to any income which consists of earnings which is to be calculated for the purposes of regulations 45(2) to (4) (exempt work – earnings limits)."

20. Regulation 94, one of those provisions so incorporated, deals with "Calculation of weekly amount of income", with the general rule being that where the period in respect of which a payment is made does not exceed a week, then the weekly amount is to be the amount of that payment (see regulation 94(1)(a)). However, regulation 94(6) makes provision for averaging, and achieves for the purpose of *averaging earnings* what regulation 45(8) does for the purpose of *averaging hours*:

> "(6) Where the amount of the claimant's income fluctuates and has changed more than once, or a claimant's regular pattern of work is such that the claimant does not work every week, the foregoing paragraphs may be modified so that the weekly amount of the claimant's income is determined by reference to the claimant's average weekly income–
> (a) if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);
> (b) in any other case, over a period of 5 weeks or such other period as may, in the particular case, enable the claimant's average weekly income to be determined more accurately."

21. Regulation 94(6) of the 2008 ESA Regulations is essentially in the same terms as regulation 32(6) of the Income Support (General) Regulations 1987 (SI 1987/1967)). Regulation 32(6) (on averaging earnings) in turn is broadly in the same terms as regulation 5(2) (on averaging hours) of those same 1987 Regulations. Furthermore, where appropriate the same principles derived from the case law apply in both contexts (see *MC v Secretary of State for Work and Pensions (IS)* [2013] UKUT 384 (AAC) at paragraph 15 *per* Upper Tribunal Judge Wright). Mr Martinez has helpfully directed my attention to Upper Tribunal Judge Ward's decision in *MS v Secretary of State for Work and Pensions (IS)* [2015] UKUT 423 (AAC). That income support appeal concerned the averaging of hours, rather than earnings, but also related to an employee who had worked for several years under a zero hours contract. She had no "recognisable cycle of work" within the terms of regulation 5(2)(b)(i). Judge Ward concluded that the appropriate averaging process was to rely on a five-week rolling average, based on regulation 5(2)(b)(ii), which broadly mirrors regulation 94(6) of the 2008 ESA Regulations. As Judge Ward explained:

> "44 ... When doing so, it seems to me that the standard 5 week period should apply. A person who had been working less than 16 hours weekly would not have been disentitled to income support on the grounds of being engaged in remunerative work. Income support is, in principle, a weekly benefit. Statute requires a 5 week period to be looked at as a starting point and I do not see that for the purposes of this notional exercise, to choose any different period would result in the claimant's hours being 'determined more accurately'.
>
> 45. It follows that in my view the correct approach when calculating the amount of the overpayment is to look at the matter weekly, on the basis of a 5 week average. This will thus give rise to a rolling average. That is not unfair. There are periods in 2004/05 and in early 2008/9 when the general trend, reflected in such 5 week averages, would be that the claimant was not working for 16 hours or more weekly. For such periods it is fair that the overpayment should be

> calculated on the basis that she was not disentitled by virtue of having been in remunerative employment (the other conditions of entitlement and any amount payable may be another matter and I express no view upon them.)"

22. Mr Martinez has also helpfully prepared a spreadsheet making the assessment of the Appellant's earnings on this basis of a 5-week rolling average. On this basis the Appellant was entitled to ESA for a total of 45 weeks over the period in question, rather than only the 32 weeks calculated by the decision-maker.

23. Mr Hampton acknowledges that regulation 94(6)(b) provides for the decision-maker to exercise a wide-ranging discretion in relation to the averaging process. He also accepts that Mr Martinez's use of a 5-week rolling average is both permitted by regulation 94(6) and as legitimate as any other averaging process.

Disposal

24. I accordingly conclude that the FTT erred in law in its conclusion that it "could not identify a different/fairer pattern." I therefore allow the Appellant's appeal and set aside the FTT's decision. It is not appropriate to send the case back to a fresh FTT for reconsideration. This is a case where the Appellant and the Department had both been content with an FTT hearing "on the papers". The Appellant has shown no enthusiasm for an oral hearing at the FTT and may well have difficulties in attending. The issues have been extensively ventilated in the written submissions. Another FTT is really going to be no better placed than I am to decide the issue under appeal.

25. The Appellant's income, as she was working variable hours under a zero hours contract, plainly fluctuated, bringing into play regulation 94 by virtue of regulation 88. The Appellant did not have a recognisable cycle of work, so regulation 94(2)(a) did not apply. The default position thereafter is to assess over a period of 5 weeks, in the absence of any other period which enabled her earnings to be determined more accurately (regulation 94(2)(b)). Intuitively it might be thought that the longer the period under review, the more accurate the resulting average will be. However, this is not necessarily so, with the possibility of a small number of outlier weeks having a significant effect on the average. It must also be borne in mind that ESA, like income support, is designed as a weekly benefit, and not made subject to annual awards (as are tax credits). As is now accepted by both representatives, I therefore conclude that the appropriately nuanced way to assess the Appellant's average weekly earnings is to conduct a 5-week rolling average. On that basis I re-make the FTT's decision on the entitlement appeal as set out at the head of these reasons.

The two overpayment appeals

26. These two associated appeals also necessarily succeed, but as to the amount of the respective overpayments only. Accordingly, I set aside the FTT's two overpayment decisions and remit those matters to the Secretary of State, as the calculations will need to be re-made in keeping with the findings on the entitlement appeal as to the periods of ESA entitlement and non-entitlement respectively.

The regulation 30 issue

27. There is a separate procedural ground of appeal relating to the notification of the Secretary of State's revised decisions.

28. Consideration of this ground of appeal requires a quick recap of the original decision-making process. The DWP's original decisions were made on 12 December 2016 (the entitlement decision) and 30 December 2016 (the overpayment decisions). The Appellant lodged her appeal on 23 February 2017. The Secretary of State applied for an extension of time to lodge a response to the appeal. This was duly

provided on 14 July 2017 – and that response included the revised decisions dated 4 and 12 July 2017. The FTT was asked to accept these decisions, which had not otherwise been formally issued to the Appellant, under regulation 30 of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991).

29. Regulation 30(3) provides that where a decision is revised and the revised decision is not more advantageous to the appellant, then "the appeal shall be treated as though it had been brought against the decision as … revised". However, regulation 30(4) further provides that in such circumstances the appellant "shall have" one month in which to make further representations as to the appeal, and the appeal shall thereafter proceed (regulation 30(5)). On one reading, strictly speaking, the Appellant in this case was not given a month to make further representations. A District Tribunal Judge issued case management directions on 22 November 2017 which required the Appellant to provide any further evidence within 14 days.

30. Mr Hampton accepts that the failure formally to issue the revised decisions was a procedural irregularity as regulation 30(4) was not complied with. However, his submission is that the irregularity was immaterial – the appeal would have continued in any event and in practice the Appellant had sufficient time to make any further representations.

31. Mr Martinez contends that the failure to comply with regulation 30(4) was material, as we simply do not know what would have happened had the correct procedure been followed.

32. I do not need formally to resolve this ground of appeal, given I have not had full argument on the point and in any event the case has been decided on the substantive issue that arises. That said, I would be inclined to the view that the failure was not in the event material. The Secretary of State's response – which did contain the revised decisions – appears to have been issued to the Appellant on 14 July 2017. As noted above, some while later on 22 November 2017 the Appellant was invited to provide any further evidence within 14 days. She was also encouraged by those directions to attend the hearing to give oral evidence (in the event she felt unable to attend due to her health condition). The FTT hearing then took place on 21 December 2017. In practice, looking at matters in the round, there was ample time to make any further representations.

Conclusion

33. For all those reasons the decision of the First-tier Tribunal involves an error of law. I therefore allow this appeal to the Upper Tribunal (Tribunals, Courts and Enforcement Act 2007, section 11) and set aside the decision of the First-tier Tribunal (section 12(2)(a)). However, I can re-make the decision (section 12(2)(b)(ii) and do so as set out above at the head of these reasons.

Signed on the original
on 9 May 2019

Nicholas Wikeley
Judge of the Upper Tribunal