

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CCS/294/2019

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: In person

For the First Respondent: Mr Rhys Hadden, instructed by Government
Legal Service

For the Second Respondent: In person, assisted by Mr IJ

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Southampton on 29 May 2018 under reference SC266/17/00877 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 31 of the Reasons.

REASONS FOR DECISION

Introduction

1. In this appeal the appellant is the “non-resident parent”, the father of H, a teenage boy. H lives with his mother, the “parent with care”. In this decision I refer to them as “the father” or “the mother”, or “H’s father” or “H’s mother”, as the context may require.

2. By a decision dated 31 March 2017, H’s father was adjudged liable to pay child maintenance of £21.48 per week in respect of H from that date. H’s mother was of the view that H’s father had undisclosed income but the Secretary of State refused to revise the decision and the mother appealed and applied for a variation of the basic calculation. It appears from para 7 of the Reasons given for its decision by the First-tier Tribunal (“FtT”) that variations were sought both in respect of unearned income and in respect of diversion of income (although the basis for the latter is unclear).

3. H’s father is a director of and shareholder in 2 companies, which I shall refer to as C1 Ltd and C2 Ltd. On the available evidence, C2 Ltd was dormant, while C1 Ltd at the time was a recent start-up and of relatively modest scale. H’s father also carries out duties as and when required for Maritime Coastguard (formerly HM Coastguard), for which - to put it neutrally - some remuneration was paid. While it was a matter for him how he chose to prioritise the competing demands of the tribunal proceedings and his business, his prioritisation of the latter certainly did not help his case, nor the First-tier Tribunal (“FtT”). He did not provide before the FtT hearing evidence

which he had been directed to provide, though he did engage up to a point and I accept there may have been misunderstandings along the way.

The First-tier Tribunal proceedings and decision

4. The hearing was attended by the mother and a representative of the Secretary of State, but not by the father. It was taken by an experienced tribunal judge, sitting alone (i.e. without a Financially Qualified Panel Member). With hindsight, had one been on the panel, some of the difficulties in this case might have been avoided.

5. The judge, faced with the problem of the lack of evidence from the father about things which only he could know about, adopted the approach of making on 29 May 2018 a provisional decision allowing the appeal and setting aside the Secretary of State's decision. The decision ruled that:

“the Secretary of State shall remake the basic calculation effective from 31/03/2017 on the basis that the receipts totalling £23,871.31 from [C1 Ltd] and the receipts totalling £913 from Maritime Coastguard in 2016 and 2017 are net earnings from employment and hence that [the father's] current income exceeds his historic income by at least 25%.”

There was to be no variation of the basic calculation. The parties were given liberty to apply if there was a dispute over the arithmetical accuracy of the Secretary of State's calculation.

It was further stated that:

“The above is a provisional decision. It shall automatically become final on 26/06/2018 unless [the father] has produced evidence which demonstrates that the above receipts were something other than earnings from employment, for example dividends.”

6. On 31 May, the date on which he received the (provisional) decision, H's father emailed the tribunal to query the £23K+ figure used by the FtT. His email explained that the company's head of finance had run a report for all payments made to him from the business account and even including expenses he could only get to the figure of £20,387.50. An Excel spreadsheet was attached, showing which sums out of that total were in respect of expenses and which dividends, leaving (by implication) the remainder as salary.

7. On 11 July 2018 the judge issued a decision notice saying:

“The spreadsheet does not demonstrate that the payments to [the father] were something other than earnings from employment. At best it is a submission which is unsupported by evidence.

No evidence has been produced in relation to the receipts from Maritime Coastguard.

Consequently the decision automatically became final on 26 June 2018.”

8. The decision was issued to the parties on 19 July 2018 and on 20 July 2018 the father submitted further evidence via Dropbox. He also chased up (for a second time) his request for a breakdown of the £23K+ figure the FtT had arrived at. The further evidence was on any view too late. If the FtT had not gone wrong in law, the evidence would not have fallen to be considered. H's father is in that respect fortunate that events will give him a second chance by way of the rehearing now ordered. The time to provide evidence to the FtT is (at latest) in time for its hearing or, where specific Directions have been given, in accordance with those Directions.

The appeal to the Upper Tribunal

9. H's father submitted numerous grounds of appeal. I held an oral hearing of the application in Exeter, following which I gave permission on a number of grounds, while refusing it on numerous others. Submissions were received on behalf of the Secretary of State, supporting the appeal on all the grounds on which permission to appeal had been given and from, or on behalf of, H's mother, opposing it - on grounds (p517) which were largely comments on the evidence rather than addressing the potential errors of law - and asking for an oral hearing. There had been a degree of equivocation on the part of H's mother and/or her representative about attending the permission hearing, as result of which she lost the chance to do so when she might have preferred to attend, and thus, while a little doubtful as to the need for it, I acceded to her request for an oral hearing of the appeal. I gave the parties an opportunity to indicate whether, in the event that the appeal were to be allowed, they would wish the Upper Tribunal to remake the decision rather than remit the case to the FtT. No party invited the Upper Tribunal to remake the decision, so the appeal proceeded purely on the points of law.

The parties' submissions

10. For his part, H's father was content to rely on what he had previously said to the extent that it had come to be reflected in the grounds on which permission had been given.

11. Mr Hadden adopted the Secretary of State's written submission, helpfully précising it for the benefit of the parties and offering useful minor clarifications of the Secretary of State's position to the judge.

12. Mr J sought to argue that the conduct by H's father of the case in the FtT had been such that his appeal should not be allowed. As I commented in the hearing, the function of the Upper Tribunal is to adjudicate on whether or not the FtT's decision was in error of law and that whilst I appreciate that, perhaps in particular in child support cases, one party may take a dim view of how the other has behaved, the Upper Tribunal has no generalised remit of policing

their conduct or of penalising them by dismissing an appeal on which they would otherwise be entitled to succeed.

13. He further made the point that when considering the legality of the FtT's actions, it should be borne in mind that a representative of the Secretary of State was present. Indeed, one was and I do bear it in mind; however, the responsibility for reaching a legally sound decision on appeal to the FtT is the FtT's.

14. Other than that, his representations were principally concerned with what Directions the Upper Tribunal should make in the event that it were to allow the appeal and remit the case. I deal with those below.

15. It follows from what I have written so far that there was virtually nothing arguing that the grounds on which I had given permission appeal did not constitute errors of law. I deal, therefore relatively briefly, with each one in turn. Before doing so, however, I summarise the relevant law.

The law in summary

16. The relevant regulations are the Child Support Maintenance Calculation Regulations 2012/2677. In general, gross income is to be determined by reference to historic figures supplied by HMRC (reg.34). Where these are not available, or where current income differs from historic income by more than 25%, current income is to be used: reg 34(2)(a). Only certain kinds of income are relevant to the historic income figure (reg 36). For present purposes it suffices to note that they include income which is taxable under the tax legislation relating to employment; they do not include dividends. "Current income" is defined by reg 37 as the sum of income as an employee or office holder, from self-employment or from a pension. Once again, dividends are excluded.

17. Where dividends may come into the picture is if an application is made for a variation on the grounds of unearned income exceeding £2,500 per annum. This is provided for by reg 69, made under the provisions of para 4(1) of Schedule 4B to the Child Support Act 1991. In a case falling within Schedule 4B, the Secretary of State may agree to a variation if she is of the opinion that, "in all the circumstances of the case, it would be just and equitable to agree to a variation": 1991 Act, s.28F. Section 28F requires the Secretary of State in considering what would be just and equitable, to have regard to (amongst other factors) the welfare of the child concerned: s.28F(2)(a).

18. Properly incurred and reimbursed expenses do not fall to be taken into account at all, by any route.

Evidence of Mr A

19. The FtT had a letter dated 28 August 2017 (p159) from Mr A, a chartered accountant, business adviser and shareholder in the company. He gave details of C1 Ltd.'s circumstances as a start-up, observing that H's father's

remuneration was low for reasons he explained. His evidence was that the father receives £850 gross salary per month through the payroll and that “assuming it is possible to do so, may receive dividends prior to 31 March 2018 of up to £5,000.” He confirmed that he was reimbursed expenses in the performance of his duties against appropriate supporting evidence. He was writing about a subsequent year (1.4.17 to 31.3.18) but it was at least possible that a similar structure of arrangements was in place for the previous year. In paras 9 and 10 of its reasons, where it discusses Mr A’s evidence, the FtT makes no mention at all of what Mr A had said concerning the potential payment of dividends. The FtT appears to have erred in law by overlooking that part of Mr A’s evidence; alternatively, if it did not overlook it, it ought to have said what it made of it, given the centrality of both the amount of income and the form in which it is received to calculations under the 2012 Regulations. Whilst it is possible, as the written submission by H’s mother puts forward, that the financial arrangements for the year April 2016-March 2017 were not the same as those for the following year, it is not possible to infer that that was the FtT’s reason for not accepting Mr A’s evidence; one is left to speculate and that is unacceptable on such a central matter.

20. Further, if, as the FtT indicated, it considered Mr A’s evidence “very clear”, it is unclear why his explanation of H’s father’s remuneration structure was not accepted and its reasons on that ground fail to meet the legal standard of adequacy.

Reliance on concession by Mr J

21. The FtT relied on a concession by Mr J that there was no dividend income. In my judgment that concession could carry no probative weight. If part of H’s father’s income was by way of dividend, that would tend to be against the interests of H’s mother, whom Mr J was representing, because (as shown above) dividends are outside the calculation of earned income and H’s mother would be dependent at best on a variation which amongst other things would have to pass the “just and equitable” test. It therefore does not appear that the concession made that there was no dividend income was in any way a concession against interest: it served the interests of H’s mother.

Findings of fact concerning incidence of periodic payments

22. The FtT erred in law by failing to make sufficient findings of fact about the incidence of periodic payments. The statement that “the figure of £550 appeared at the end of some quarters, but not invariably” appears to have been a submission by the presenting officer. On the evidence before the FtT it was both wrong (to the extent that it was not open to the FtT to make such a finding) and incomplete. When lump sum payments were being made of £550 (from 30.9.16), they were monthly, not quarterly. Prior to that date monthly payments were being made of £670 and £700 but this is not noted. What seems to have happened is that the £670 was increased to £828.64 from 30.9.16, while the £700 was reduced to £550 – a more or less cash neutral position in terms of the money paid over.

Findings of fact regarding irregular payments

23. The FtT erred in law by failing to make sufficient findings about the irregular payments. These were made on differing days of the month, of odd, precise amounts and variable in extent from £58.80 to £1001.10. Without making such findings, the FtT was not in a position to address that part of Mr A's evidence which, having explained the structure of H's father's remuneration, went on to say that he was reimbursed expenses.

Failure to apply relevant law relating to tax and national insurance contributions

24. An individual can earn up to the personal allowance free of tax (in this case, I note, from two employments or offices combined). Dividends are not deductible by the company, but nor does it have to pay NI contributions on them, while in the hands of the recipient they are taxed at a lower rate compared with earned income above the personal allowance, or even at a nil rate. For those reasons, a remuneration structure consistent with what is disclosed by the bank statements and as explained by Mr A is entirely plausible. The relevant tax issues are matters of law which the FtT was required to apply. There is no indication that it did so and its conclusion was accordingly vitiated.

View of H's father's 31 May submission

25. It is relevant to consider whether what would otherwise have been errors of law were cured by the provisional nature of the decision of 29 May and the judge's subsequent treatment of the material received from H's father. I do not consider that the judge was entitled to take the view that the material Mr Blench had submitted was "at best... a submission ... unsupported by evidence" in the light of the explanation of what it was which Mr Blench gave at p326 (email of 31/5). I cannot see that what H's father had to say about the breakdown of payments to him did not have the character of evidence. It may not have been the best evidence, being based on information given to him by another and not further corroborated by direct documentary evidence, but evidence it was. Moreover, as the Secretary of State points out, it was consistent with evidence already before the FtT, such as the father's bank statements.

Reliance on summaries given by H's mother's representative

26. I consider that the FtT erred in law by relying on arithmetical summaries given by Mr J of the sums received from C1 Ltd and Maritime Coastguard, rather than reaching its own conclusions on the evidence before it. The evidence appears to lead to a different outcome from Mr J's calculations, thus the error was a material one.

Directions

27. Mr J asked me to make a direction requiring H's father to provide to the FtT what were described as "full accounts" for the period 4 April 2016 to March 2017 for all companies in which he has "any involvement, financial interest or shareholding." Mr J was unable to suggest any reason to suppose that H's father did have such involvement, interest etc. in any companies other than C1 Ltd and C2 Ltd. Nor was he able to specify what sort of "full accounts" he had in mind, other than that they should go beyond the summary available through Companies House. It seems to me that the request is too wide (in that the full accounts of a trading company will contain all manner of things of no possible relevance to the present case) and is in the nature of a "fishing expedition", made in the hope that something will turn up.

28. An application was also made for the bank accounts of C2 Ltd to be provided to show that it is in fact dormant. Mr J and H's mother indicated they had no reason to suspect that it was not dormant as claimed. I can see no reason to make such an order.

29. H's mother indicated they wanted evidence that was more "official" than what was so far available. When the matter goes back before the FtT, both parties will be able to submit such relevant evidence as they see fit, if there is any additional to what is already in the bundle. I suspect that H's father will have learned from this appeal the importance of attending, fully and in good time, to the evidence to be provided. It will be open to each party to address the FtT on what they perceive the strength (or otherwise) of the other side's evidence to be. If H's mother wants to submit that the evidence is from an insufficiently "official" source and should as a result be accorded only limited weight, she may do it there. Deciding what weight to put on evidence is a matter for the FtT.

30. H's mother said that she "only wants what's right for H", maintenance has not always been paid and the amounts fluctuate widely between one year and the next. As to the first of those, the duty of the tribunals is to apply the system which Parliament and those acting under the authority of Parliament have, by making legislation, determined is to be applied; as to the second, the tribunals do not have jurisdiction over enforcement of child maintenance obligations; and as to the third, whilst the system does provide some control over fluctuations via the requirement for the current income figure to exceed the historic income figure by 25% before it will be used, I can appreciate that there does remain scope for large fluctuations in the sums payable or receivable and that these may be inconvenient to payer and recipient alike, but that is a reflection of the fact that the system incorporates regular reviews, and that incomes may change.

31. I direct that:

- a. the file is to be placed before a judge of the First-tier Tribunal who is authorised under the relevant Practice Statement¹ to consider whether the panel to which this appeal is remitted should include a Financially Qualified Panel Member;
- b. the tribunal must make full findings of fact as to the income received by H's father in the relevant period, both as to its amount and to type of payment. In doing so it must take into account the totality of the available evidence;
- c. it must apply the legislation summarised at paras 16-17 above, relevant tax law and any other relevant legislation, including (in the event that its findings of fact include that H's father had unearned income), the legislation relevant to whether there should, on that ground, be a variation;
- d. the tribunal must clarify whether H's mother continues to argue alternatively for a variation based on diversion of income and if she does, establish the basis for that argument, and must make any necessary findings of fact to enable it to address it;
- e. the tribunal must give reasons for its decision to the standard required by law, including explaining which of the financial and other evidence is accepted or rejected and why; and
- f. unless otherwise directed, the parties must ensure that any further written evidence is filed with the First-tier Tribunal no less than 21 days before the hearing date.

32. The decision on the re-hearing is a matter for the FtT and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

33. While it is not for me to direct parties to attend the FtT hearing, they should be aware that tribunals can only go on the evidence that they have and that a party who does not attend risks the FtT making a finding against them on a point on which, had they attended, they might have been able to provide an explanation or countervailing evidence.

CG Ward
Judge of the Upper Tribunal
4 December 2019

¹ Practice Statement on the composition of tribunals in social security and child support cases in the Social Entitlement Chamber on or after August 1, 2013