IN THE UPPER TRIBUNAL **Case No.** CUC/2641/2018
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: The appeal to the Upper Tribunal is dismissed.

REASONS FOR DECISION

Introduction

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a District Tribunal Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on and following a hearing of 25 July 2018. The tribunal decided to dismiss the claimant's appeal against a decision of the Secretary of State for Work and Pensions (the Secretary of State) of 23 January 2018 to the effect that the minimum income floor applied with respect to his entitlement to universal credit. There was, in fact, an issue about whether the decision the tribunal decided was the subject of the appeal before it was an appealable decision at all. That matter is addressed, albeit relatively briefly because it was not the subject of any dispute between the parties, below.

2. I have decided to dismiss the claimant's appeal to the Upper Tribunal. That is despite some support for the appeal having been expressed on behalf of the Secretary of State by her representative. I have resolved the appeal on the basis of the documentation before me, neither party having sought an oral hearing. I have in the course of my consideration of the appeal received three written submissions from the Secretary of State and two replies from the claimant. The claimant did not reply to the Secretary of State's third submission.

Background

3. The claimant is a single man. He says he has Asperger's syndrome. The tribunal seemed to accept that. He has a history of having worked as a gardener on a self-employed basis. He had previously been in receipt of working tax credit but, during the winter months when gardening work was typically more scarce, there was a history of his having claimed jobseekers allowance. However, by January 2018 the area in which he resides had become a "full service" area such that, instead of making a claim for jobseekers allowance, he had to claim universal credit. It was that claim which led to the Secretary of State deciding, on 23 January 2018, to apply a minimum income floor of £1048.17 to him. There followed a decision of 16 February 2018 to the effect that there was no entitlement to universal credit in light of the applicability of the minimum income floor at that level. The claimant was subsequently to tell the tribunal that he was seeking to appeal the 23 January 2018 decision rather than the 16 February 2018 decision. His appeal was heard by the tribunal on 25 July 2018 and was dismissed.

Universal credit and certain of the legislation concerning it

4. Universal credit has been introduced with the stated intention of simplifying the Social Security system and, it is said, ensuring that claimants will always be better off in work. Part of the planned simplification involves the abolition of various benefits including income-based jobseekers allowance, housing benefit and working tax credit all of which the claimant had previously been in the habit of claiming at various times depending upon the availability or otherwise of gardening work. Universal credit is provided for by provisions contained within the Welfare Reform Act 2012 (WRA) and regulations made under certain of its provisions

including the Universal Credit Regulations 2013 (the 2013 Regulations). Entitlement is calculated by reference to a standard allowance and then to additional elements linked to a claimant's specific circumstances. A single defines claimant will be entitled if he/she meets the basic conditions and the financial conditions (see section 3(1) of the WRA). The basic conditions are listed in section 4(1) of the WRA. The financial conditions are described in section 5 of the WRA. One such condition is that the claimant's income is such that, if he were entitled to universal credit, the amount payable would not be less than any prescribed minimum (section 5(1)(b)).

5. An important regulation in the context of this appeal is Regulation 62 of the 2013 Regulations. That regulation creates a creature known as the "minimum income floor" to which I have referred above. Regulation 62 says it applies to a person who is in gainful self-employment and who would, apart from that regulation, be subject to what is sometimes termed "full conditionality" which, essentially, means being subject to a requirement to be available for and actively seeking work (Regulation 62(1)). For such claimants there has to be calculated an "individual threshold" which, in light of the content of Regulations 88 and 90, is the hourly rate of the national minimum wage multiplied by the number of hours per week a claimant is expected to be available for work, which is normally thirty-five (but see below). The key rule is that if a claimant's earnings are less than that claimant's individual threshold, that claimant is to be assessed for entitlement to universal credit as if he/she had earnings equivalent to the threshold. Put simply, the rationale for that is to prevent the State being put in the position of subsidising an inadequate level of income generated by self-employment. But there is, in a sense, a trade off in that a claimant who is running a poorly performing business is not put in a position whereby he/she would be forced under the threat of a sanction, to take up employed work and conceivably therefore to have to close the relevant business.

6. Regulation 64 defines "gainful self-employment". It essentially provides that a claimant is in gainful self-employment where the Secretary of State has determined that he/she is carrying on a trade, profession or vocation as their main employment; where earnings from it are self-employed earnings; and where the trade, profession or vocation is organised, developed, regular (the concept of regularity will be addressed below) and carried on in expectation of profit. Regulation 88 deals with the concept of a claimant's "expected hours", in other words the hours for which he/she is expected to be available for and actively seeking work and in respect of which the normal requirement is thirty-five. But the regulation affords discretion to reduce it to a lower figure in certain prescribed circumstances. One ground for reduction is in Regulation 88(2)(c) which, in the case of a claimant with a physical or mental impairment, gives a general discretion to reduce the hours to whatever is considered reasonable.

The tribunal's decision

7. As indicated, the tribunal dismissed the appeal. It did so after holding an oral hearing which was attended by the claimant and at which he gave evidence to it.

8. The first matter of concern for the tribunal was that of whether the decision of 21 January 2018 which is the decision the claimant was obviously intent upon challenging, was an appealable decision at all. As to that, it noted that the Secretary of State had informed the claimant, with respect to the decision of 23 January 2018, that it could be challenged by way of a request for mandatory reconsideration and, thereafter, by way of an appeal. It resolved the possible problem in this way:

> "9. The tribunal is doubtful whether the decision of 23 January 2018 is an appealable decision. It does not appear to fall within Schedule 3 to the Social Security Act 1998 nor using the power in paragraph 9 of that Schedule, within Schedule 2 to the

Universal Credit (Decisions and Appeals) Regulations 2013. The Government informed the Social Security Advisory Committee in 2012:

> "It is proposed that there will be no right of appeal against a decision to apply the Minimum Income Floor (MIF) made in accordance with the Universal Credit Regulations – in effect against the rate of Universal Credit provided by law. Where the claimant disputes that the MIF has been applied correctly, they will be able to appeal the decision".

However, the Decision Notice suggested an appeal was available and the Secretary of State in her appeal submission has not questioned the admissibility of the appeal.

10. The tribunal therefore proposes to accept the appeal as made against an appealable decision of 23 January 2018 and to leave it to others elsewhere to determine if this appeal was not validly brought and if it was not validly brought, to rescue the appeal by treating it as an appeal against the 16 February 2018 decision. That allows the tribunal to deal with the main issue in the appeal".

9. The tribunal then did, indeed, deal with what it perceived to be the main issue namely the lawfulness of applying the minimum income floor to the claimant. As to that, he had sought to make the points that his earnings varied depending upon the availability of gardening work, and that there was a seasonal aspect to that (people primarily wanted gardening work done in the spring and summer rather than in, say, the winter). He pointed out that he would only, in fact, earn the sum attributed as the minimum income floor in four months of each year. He thought that the application of the minimum income floor to him resulted in unfairness. This is what the tribunal made of those arguments:

"**The Appellant's Grounds of Appeal**

13. The Appellant appealed on the grounds that he was a self-employed gardener and he only earned a sum attributed as the Minimum Income Floor in four months of the year. The Appellant also had Asperger's Syndrome which limited his ability to find paid employment. In oral evidence, the Appellant submitted that it was unfair as he would be worse off.

The Tribunal's Findings

14. The purpose of the Minimum Income Floor is to treat self-employed claimants as earning the equivalent of a full-time job at minimum wage even where they do not in reality earn that much. It operates to prevent the State from subsidising businesses that are financially unviable in that they fail to support the person's engaged in those businesses at least to the same degree as minimum wage employment.

15. The Appellant appeared to be in gainful self-employment. There was no suggestion that his gardening was a hobby or secondary employment. He had no other occupation. He recorded that he was working more than 40 hours a week. As such he was not primarily unemployed. The tribunal was satisfied that his gardening was his main employment. The Appellant reported that he was self-employed and HMRC records agreed with this. The Appellant had been engaged in his gardening business for seven years. It had a business name. The Appellant rendered invoices to his customers. He advertised on social media and on Yell.com. The trade was, in the tribunal's opinion, organised and developed. The trade was regular albeit the regularity of the activity was affected by seasonality and appeared to be a conventional business carried on in expectation of profit.

16. The Appellant had carried on the business for seven years and so the start-up provisions had no application.

> 17. Accordingly, the Secretary of State was correct to find that the Minimum Income Floor applied to the Appellant.
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> 18. The Appellant lived alone and there was no sign of any caring responsibilities. There was nothing to suggest that if the Appellant became unemployed that he would be expected to jobseek for less than the standard thirty-five hours per week. Accordingly, the Secretary of State was correct to calculate the Minimum Income Floor on the basis of the adult National Minimum Wage multiplied by thirty-five hours and then converted to a calendar monthly sum (after allowing for Income Tax and Class 2 and Class 4 National Insurance contributions). The tribunal found no fault with the Secretary of State's calculations".

10. Hence, the claimant's appeal failed.

The permission to appeal stage

11. The claimant asked the tribunal to give permission to appeal its own decision. The grounds he offered were to the effect that the tribunal had over-estimated the hours he would work each week when gardening work was available; that he suffers mood swings because of his Asperger's syndrome which limits the amount of work he can perform in a day, its being said that the mood swings impact upon him each morning; and that the tribunal had not taken into account the therapeutic effects his gardening has upon him. Whilst those written grounds did not obviously identify any arguable error of law on the part of the tribunal, permission was granted (very fairly) by a District Tribunal Judge who said this:

> "Permission to appeal is granted. The Appellant's argument, in essence, is that the Minimum Income Floor was inappropriate because his work is seasonal. Universal Credit is a new benefit and the Upper Tribunal should have the chance to consider whether the First-tier Tribunal has correctly applied Regulation 62 of the Universal Credit Regulations 2013".

12. Permission having been granted I directed written submissions from the parties.

The arguments to the Upper Tribunal

13. The claimant's written submissions to the Upper Tribunal did not significantly add to the arguments he had deployed before the tribunal and the arguments he had deployed in seeking permission to appeal the tribunal's decision. The Secretary of State argued that the tribunal had been bound to apply the minimum income floor notwithstanding any seasonal variability with respect to the claimant's self-employed work. No discretion to vary the application of the minimum income floor had been available to it as a matter of law. But, said the Secretary of State, the tribunal had failed to consider whether in light of the claimant's Asperger's syndrome, the "expected number of hours per week" should be reduced under regulation 88 (2)(c). The Secretary of State suggested that such was an error of law which would justify my setting aside the tribunal's decision and remitting for a re-hearing.

14. The Secretary of State did not, despite an invitation to do so in directions, comment upon the correctness of the tribunal's approach with respect to whether or not the decision of 23 January 2018 was an appealable one. As to another point I had made in the directions with respect to the regularity of employment, the Secretary of State's position was that the pattern of work carried out by the claimant was regular, as the term is used at regulation 64 of the 2013 Regulations, despite there not being an even pattern throughout a typical twelve-month period. Having already made two submissions encompassing the above points the Secretary of State's representative made an unsolicited but nevertheless helpful further submission, drawing to my attention the then recent judgment of the Administrative Court in *Parkin, R (On the Application Of) v Secretary of State for Work and Pensions* [2019] EWHC

2356 (Admin). That judgment, said the Secretary of State's representative, was confirmation as to the lawfulness of the minimum income floor with respect to self-employment of a type prone to variations in income. Whilst I specifically directed the claimant should have an opportunity to respond to what the Secretary of State's representatives had had to say about that judgment of the High Court (which I shall now simply refer to as *Parkin*) he has not availed himself of it.

My reasoning on the appeal

15. First of all, I shall deal with the claimant's own grounds of appeal to the Upper Tribunal. I have summarised those above. Essentially though, those grounds simply amount to re-argument with certain of the tribunal's findings or an attempt to introduce new factual claims designed to challenge those factual findings at a stage where it is now too late to do so. As to all of that, the tribunal had noted that the claimant had previously indicated he would work for more than forty hours a week when work was available. Although the tribunal did not expressly refer to it, the claimant himself had indicated on a claim form which was before the tribunal when it considered the appeal, that his condition did not restrict his ability to work or look for work (see page 19 of the Upper Tribunal's bundle). There does not appear to be any indication that the claimant had contended before the tribunal that his Asperger's syndrome resulted in mood swings which, in turn, resulted in his frequently not being able to work during the mornings. I am comfortably satisfied that, on the material before it, the tribunal was entitled to conclude as it did with respect to the claimant's ability to work, unrestricted by his condition, for at least thirty-five hours per week when work was available.

16. I next turn to the question of whether the decision of 21 January 2018 was an appealable one. I have set out the tribunals concerns as to that and how it resolved them. I have invited but not received views from the parties as to the way in which the tribunal dealt with the issue. The claimant, whose appeal of course this is, has not taken issue with the tribunal's reasoning as to that and, of course, it would be most odd if he had sought to do so given that he himself had told it that that was the decision he was seeking to challenge before it. There is in fact, it seems to me, a great deal of merit in what the tribunal had to say about the legislation not defining a decision as to the applicability of the minimum income floor as an appealable one. But the point has not been argued by either party and, in any event, it seems to me most unlikely that the issue could be one of relevance with respect to the outcome of this appeal to the Upper Tribunal. I say that because even if the tribunal had treated the applicability of the minimum income floor decision as simply a building block in the outcome decision of 16 February 2018, and had treated the appeal as being directed towards that latter decision, there appears to be no reason to conclude that the outcome before the tribunal would have been any different. Accordingly, and in the absence of any challenge to the tribunal's reasoning, and strictly for the purposes of this particular decision of the Upper Tribunal, I will not interfere with the tribunal's conclusion as to that discrete issue.

17. The claimant did, as noted above, appear to assert before the tribunal that there was unfairness in the application of the minimum income floor in his particular circumstances. I do not think that he was asserting that unfairness with respect to persons whose work has a seasonal element, when he prepared and submitted his application for permission to appeal. To that extent if the District Tribunal Judge who granted permission to appeal was interpreting his grounds of appeal in that way, then I would disagree. But, nevertheless, I am sure that it was appropriate to grant permission for the clear and succinct reason explained by the District Tribunal Judge notwithstanding that it was a point which (on my reading at least) the claimant had not sought to raise himself.

18. Put simply, there is nothing in the legislation itself concerning universal credit and the minimum income floor which suggests that a different approach ought to be taken to

claimants whose work is wholly or partly of a seasonal nature. It is perhaps worth saying, by way of background, that in any event, given the claimant's own indications, he is not what might be thought of as being a "true seasonal worker". His indication when seeking permission to appeal was to the effect that he does "not have much work" in the months spanning November to the following February rather than that he never has any work at all. Indeed, a schedule showing his amount of earnings during the period from January 2017 to January 2018 (see pages 58 and 59 of the Upper Tribunal bundle) demonstrates that a degree of work was declared, for benefit entitlement purposes, for each and every month.

19. Whilst there has been previous case law relating to what in some situations became a vexed question as to how claims made by seasonal workers for other benefits ought to be treated, it is difficult to find any basis to conclude that such case law might assist with respect to universal credit. Rather, in light of the above legal provisions and the legal structure of universal credit, the essential question is whether a claimant is "in gainful self-employment" during any one-month assessment period. The relevant definition, as stated, appears at regulation 64 of the 2013 Regulations. The only aspect of that definition which might conceivably have potential relevance with respect to self-employed persons impacted by seasonality is the regularity requirement. As to that, although the claimant had not taken a specific point about it when seeking permission or in any further submissions, it does seem to me that there is something of an issue as to whether the use of the term "regular" in regulation 64(2)(c) of the 2013 Regulations envisages work performed at a constant frequency or whether it merely refers to work performed according to a standard pattern. If the first, then any substantial reduction in the level of work due to, for example, bad weather, or other causes of seasonality, would render it not regular. But if the second, then the fact that, in the claimant's case and in the cases of persons in an analogous position, of the shortage of work in winter being entirely predictable, would mean that it was, nevertheless, regular. I raised the point in directions and the claimant has not addressed it. The Secretary of State has done and has expressed the view, albeit in quite brief terms, that the second interpretation would be the appropriate one. Without having had the benefit of what I would consider to be full argument on the point I would conclude, for the purposes of this appeal, that it would simply go too far to say that the use of the word "regular" would require work to be performed at a constant or almost constant frequency. Indeed, it seems to me that the word regular would be entirely appropriate to describe a business which conformed to a standard pattern even if that pattern had predictable or relatively predictable variations. So, I would conclude that it was open to the tribunal to find, essentially for the reasons it gave in its statement of reasons, that the requirement of regularity was satisfied in this case.

20. There is then the decision in *Parkin*. In that case, the Administrative Court considered and rejected arguments that various of the 2013 Regulations (including those concerned with the minimum income floor) were unlawfully discriminatory, irrational and had not been passed in accordance with the Secretary of State's public-sector equality duty under the Equality Act 2010. The Administrative Court concluded that although employment or self-employment were each a "status" within the meaning of Article 14 of the European Convention on Human Rights (ECHR), the two groups were not in an analogous position and that, in any event, the measure was not manifestly without reasonable foundation. As such, although employed and self-employed universal credit claimants were treated differently, this was not unlawful discrimination contrary to Article 14. It was also decided that there was no basis upon which the regulations could be said to be irrational and that due regard had indeed been paid to requirements stemming from relevant provisions contained within the Equality Act 2010. I do not intend to set out the detail of the judgment in full. The Secretary of State has placed it before me and the claimant (perhaps understandably since he is not a lawyer and is not represented) has not commented upon it despite having had the opportunity to do so. The Upper Tribunal is free to depart from the reasoning contained in judgments of the High Court if satisfied that such reasoning is wrong. I am not at all so satisfied. Indeed, I agree with the reasoning and I follow it. I would add that, in any event,

there has been no serious suggestion made in this appeal to the effect that there has been unlawful discrimination, irrationality or any breach of the public-sector equality duty.

21. All of that leaves a single remaining issue. As I have said, the Secretary of State based her limited support for this appeal on her view that the tribunal did not consider whether the "expected number of hours per week" figure ought to be lowered from the normal thirty-five because of the claimant's Asperger's syndrome. The tribunal did consider the possibility of reduction, albeit briefly and absent any reference to Asperger's syndrome, at paragraph 18 of its statement of reasons. But I cannot say it was required to say any more or decide any more than it did. First of all, it does not appear that the claimant sought to argue the point before the tribunal even though he has subsequently raised it. Secondly, as already indicated, there was evidence before the tribunal suggesting that he was capable of working a thirty-five-hour week (see above). Additionally and in any event, whilst Asperger's syndrome may limit the type of work a claimant is able to do, there seems no obvious reason (and none was suggested to the tribunal) why such a condition should limit the number of hours a claimant can work if the claimant has found a suitable type of work he or she is capable of undertaking. After all, it is not a debilitating condition that obviously reduces, on the face of it at least, mental or physical effort tolerance. The claimant had not, prior to the tribunal deciding his appeal, sought to raise the point he subsequently raised about "mood swings". Against that background I am satisfied that the tribunal was not required to give specific consideration or to make specific findings about whether the usual thirty-five-hour "expected hours" position ought to be reduced.

22. In the circumstances I would conclude that the tribunal, in deciding the appeal to it, did not make an error of law.

Conclusion

23. In the above circumstances the claimant's appeal to the Upper Tribunal is dismissed.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated 14 January 2020