THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CI/0242/2021
[2021] UKUT 279 (AAC)

AR V THE SECRETARY OF STATE FOR WORK AND PENSIONS

Decided without a hearing

Representatives

Claimant	Not represented
Secretary of State	DMA Leeds

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	SC288/19/00356
Decision date:	26 August 2020
Venue:	Barnsley by telephone

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. In 1989, the Government announced that it would phase out reduced earnings allowance. It is now more than 30 years later and that phasing is not yet complete.

2. The claimant in this case was working under a zero hours contract. According to the Office of National Statistics, there were almost one million workers on these contracts in the final quarter of 2020, representing 3% of the work force. The issue in this appeal is how the reduced earnings allowance legislation that was drafted in 1990 applies to zero hours contracts.

A. The legislation

3. Paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992 provides:

(1) Subject to the provisions of this Part of this Schedule, a person who–

(a) has attained pensionable age; and

(b) gives up regular employment on or after 10th April 1989; and

(c) was entitled to reduced earnings allowance by virtue either of one award or of a number of awards) on the day immediately before he gave up such employment,

shall cease to be entitled to reduced earnings allowance as from the day on which he gives up regular employment.

4. The Social Security (Industrial Injuries) (Regular Employment) Regulations 1990 (SI No 256) provides for the meaning of 'regular employment' as used in Schedule 7:

2 Meaning of 'regular employment'

For the purposes of paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992, 'regular employment' means gainful employment—

(a) under a contract of service which requires a person to work for an average of 10 hours or more per week in any period of five consecutive weeks, there being disregarded for this purpose any week when the contract subsists during which he is absent from that employment in circumstances where such absence is permitted under the contract (for example in the case of sickness or taking leave); or

(b) which a person undertakes for an average of 10 hours or more per week in any period of five consecutive weeks.

3 Circumstances in which a person over pensionable age is to be regarded as having given up regular employment

Unless he is entitled to reduced earnings allowance for life by virtue of paragraph 12(1) of Schedule 7 to the Social Security Contributions and Benefits Act 1992, a person who has attained pensionable age shall be regarded as having given up regular employment at the start of the first week in which he is not in regular employment after the later of—

(a) the week during which this regulation comes into force; or

(b) the week during which he attains pensionable age.

B. The Secretary of State's decision

5. The claimant was born on 13 September 1953 and reached State pension age on 13 September 2018 when he attained 65. He had claimed disablement benefit on 10 June 2002 and his disablement for prescribed disease A11 was assessed at 7% for life from 1 April 1985, when A11 was first prescribed. He also claimed reduced

earnings allowance on 7 October 2002. His allowance was last renewed for the inclusive period from 16 September 2018 to 10 September 2019. Before the award ended, he had attained State pension age and had for a period not worked at least an average of 10 hours per week. This led the Secretary of State to decide that his reduced earnings allowance was converted to retirement allowance from and including 9 June 2019.

C. The appeal to the First-tier Tribunal

6. The claimant exercised his right appeal to the First-tier Tribunal against that decision. This is how the explained its decision to dismiss the appeal:

> 15. The appellant was registered throughout the relevant period with an agency Questech on a zero hours contract. He was paid by the agency when he found work. He explained that he had struggled to get a permanent position and worked on a temporary or interim basis through the agency; he did 'all sorts'. He experienced gaps between particular contracts at times; some short gaps; at other times work was continuous. He conceded that gainful employment is to him paid work but he argued that he remained employed on a regular basis and that he had never retired or intended to retire; he remained in employment and was employed by Questech throughout.
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> 16. He stated that he had worked 1200 hours plus in approximately the last 12 months, which I calculated would average 23.08 hour pw, if, as he told me, he cannot go on sick and although he could, he did not take holiday as he did not get paid for holiday on a zero hours contract. I noted also that he wrote on 27/08/19 page 85 that he had worked 944 hours from June 2018 to Friday 23/08/19 and 40 hours the week after i.e. the week ending Friday 30/08/19. I calculated that this equated to a total of 944 hours over 55 weeks from 04/06/18 to 23/08/19 excluding the 9 weeks he did not work, an average of 17.16 hours pw with no holiday or sick leave or even assuming a reasonable period of holiday take of 6 weeks, 944 hours over 49 weeks, an average of 19.26 hours pw,
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> 17. He had completed a form on 30/06/19 page 60 of the bundle to continue his REA declaring an average of 40 hours pw. However, the evidence overall demonstrates that his hours varied, and he could work 40 hours pw page 64 or 24 hours pw page 66 and my calculations as above from the oral and written evidence of the appellant himself contradicts what he said at page 60.
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> 18. Assuming 24 hours work pw in the weeks leading up to Friday 07/06/19 (and the 2 week after he restarted i.e. weeks commencing 12/08/19 and 19/08/19 then 40 hours [the written reasons say 40 *weeks*, which must be a typo] the week after although these are weeks worked after the date of decision and cannot be taken into account) I decided that there was a period of 5 consecutive weeks in the 9 week period when he was not working an average of at least 10 hours pw. He remained registered with Questech on a zero hours contract but for the 9 week period at issue he was not in fact working and he was not being paid. His entitlement to REA ceased; he had attained

pensionable age and had given up regular employment as defined and as such became entitled to RA.

D. The First-tier Tribunal gave permission to appeal to the Upper Tribunal

7. The tribunal gave the claimant permission to appeal to the Upper Tribunal, saying:

> **Permission to appeal is granted on the ground that the approach taken by the tribunal in calculating regular employment of 10 hours or more a week is wrong and does not reflect the current contractual arrangements for employment.**
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> [The claimant] is unhappy about the decision because he states he is still in regular employment. The Regulations described working for an average of 10 hours or more under a contract of service. The language may have reflected employment practices in 1990 but does not reflect the emergence and widespread use of zero hours contracts. The approach taken by the tribunal may not have interpreted the Regulations in light of current employment practices.

E. The appeal to the Upper Tribunal

Introductory remarks

8. The Secretary of State's representative did not support this appeal and the claimant did not reply to her submission.

9. I have decided this appeal on the evidence that was before the tribunal at the time of the hearing of the appeal. Its findings of fact were based on an assessment of the reliability of that evidence relevant to the statutory conditions the claimant had to satisfy to retain his reduced earnings allowance. In view of some of the comments that claimant had made, I asked him to send me a copy of his contract with Questech, but he did not respond to the request.

The importance of the legislation

10. I have set out the legislation that applies, because it is important. It is important, because it has to be applied. The Secretary of State has no power to disapply it or modify it to take account of the merits of a particular case. The same is true for the First-tier Tribunal and the Upper Tribunal. That explains why the claimant's criticisms of the way he was treated by the Department for Work and Pensions do not help his case. It also explains why the claimant's total number of hours worked over a long period cannot simply be averaged. The legislation looks at work for periods of five consecutive weeks, so that is the time scale that the decision-maker and the tribunals have to apply.

The gap in the claimant's work

11. The tribunal's conclusions were soundly based in the evidence. On 27 August 2019, the manager at Questech was contacted by telephone and told an officer of the

Department that the claimant had a contract that ended on 7 June 2019 and he started another on 12 August 2019. He had done no work between those dates. The tribunal's calculations show that the evidence from Questech was reliable. The question is how the law applies in those circumstances.

How regulation 2 applies

12. Paragraph 13 of Schedule 7 to the 1992 Act provides that a claimant shall cease to be entitled 'as from the day on which he gives up regular employment.' Regulation 2 defines the expression 'regular employment'. The regulation provides what 'regular employment' *means*. That word conveys that the regulation contains an exhaustive definition of the expression. There is no scope for arguing that the claimant actually remained in regular employment as that expression might normally be understood. As Mr Commissioner Howell wrote in *CI/16202/96* at [5], regulation 2 contains:

> … an artificial test of when a person is to be regarded as having 'given up regular employment' and if the facts of his case are caught by the regulations it is no answer to say that he always intended to go on working regularly, or had in fact done so, in ways that for some reason or another failed to meet the prescribed conditions.

13. Regulation 2(a) does not apply to the claimant's circumstances. It only applies if a claimant is party to a contract of service (employment) that requires them to work. This applies to the traditional contract of employment in which a claimant contracts to work for a particular number of hours a week, barring periods of holiday or sickness. It does not apply to a zero hours contract under which: (a) the employer is not obliged to make any work available for the employee; and (b) the employee is not obliged to take up any work offered.

14. Regulation 2(b) does apply to the claimant's circumstances. It was almost certainly not drafted with zero hours contracts in mind. It was probably designed for claimants who were self-employed or working on a casual basis. But that does not matter. What matters is what it says. By its terms, it applies to work actually undertaken rather than work that the claimant is required to do under a contract. That is apt to cover zero hours contracts and exactly captures the claimant's circumstances. There is no equivalent provision to the qualification in regulation 2(a) for absences allowed by the contract. The reason is that, unlike regulation 2(a), regulation 2(b) is based on actual work outside the framework of a contract.

15. The tribunal applied the correct law and did so correctly on its findings of fact.

Signed on original
on 10 November 2021

Edward Jacobs
Upper Tribunal Judge