

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No. CTC/1212/2015

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: If Miss H's appeal against H.M.R.C's decision of 28th February 2013 had not lapsed, the Tribunal's decision on that appeal (3rd February 2015, file reference SC 200/14/00187) is not set aside. This appeal is dismissed.

REASONS FOR DECISION

Introduction

1. In this case, the First-tier Tribunal expended significant resources dealing with an appeal concerning competing claims for child tax credit. It would probably have been spared that trouble had H.M. Revenue & Customs (H.M.R.C.) provided it with updated information about the relevant decision-making history. The First-tier Tribunal has enough demands on its resources without having to deal with unnecessary child tax credit appeals.

2. The Tax Credits Act 2002 draws a distinction between an award of tax credit and entitlement to tax credit. While an award of tax credit is made during or before the tax year to which it relates, actual entitlement is not fixed until the award has ended. Typically, an award ends once the tax year to which it relates has ended. Entitlement is fixed by a decision under section 18 of the 2002 Act, which represents the culmination of the end-of-year reckoning that is part of the legislative scheme. But practical complications can arise if, before this, a claimant appeals against a H.M.R.C. decision under section 16 of the 2002 Act to amend or terminate an in-year award of tax credit.

3. Since a section 18 decision deals with entitlement for a particular tax year, H.M.R.C need to inform the First-tier Tribunal dealing with a section 16 appeal if a section 18 decision was taken during the mandatory review process or after the appeal was made.

4. Rule 24(4) of the First-tier Tribunal (Social Entitlement Chamber) Rules 2008 requires HMRC in their appeal response to supply "copies of all documents relevant to the case in the decision maker's possession". Section 18 documentation is clearly relevant to a section 16 appeal. If a section 18 decision is taken after supply of H.M.R.C's response, their duty to co-operate with the Tribunal, and help it further the overriding objective of dealing with cases fairly and justly, under rule 2(4), calls for H.M.R.C. to supply the Tribunal with a supplementary submission. This should explain the section 18 decision and set out H.M.R.C's view as to its implications for the pending appeal.

5. H.M.R.C. needs, therefore, to ensure that, in appeals against section 16 decisions, the First-tier Tribunal is updated as and when section 18 decisions that may have implications for the

appeal proceedings are taken. There may also be legal issues as to whether extant section 16 appeal proceedings, or the Tribunal's decision on a section 16 appeal, affect the exercise of H.M.R.C's decision-making function under section 18. However, those issues do not arise for resolution in this case.

Background

Tax credits decision-making: legislative framework

6. If an in-year tax credit claim succeeds, section 5(2) of the 2002 Act provides that the award is “for the period beginning with the date on which the claim is made and ending at the end of the tax year in which that date falls”. Section 5 also shows that tax credits are annual, rather than indefinite, benefits. For each year, a separate claim is required although the deemed claim rules – linked to the statutory end of year declarations – mean tax credits can appear on the surface to involve indefinite awards.

7. A decision to award a tax credit is an “initial decision” under section 14 of the 2002 Act. Section 16(1)(b) of the Tax Credits Act 2002 provides:

“Where, at any time during the period for which an award of a tax credit is made to a person or persons, [H.M.R.C] have reasonable grounds for believing...that...(b) [she] has...ceased to be... entitled to the tax credit for the period, [H.M.R.C] may decide to amend or terminate the award.”

8. In this case, H.M.R.C's decision that Ms H (hereafter “mother”) did not have main responsibility for her child must have been a section 16 decision because it was taken during the period for which her award was made. The period of her award ended on 5th April 2013 (the end of the 2012/13 tax year) and the decision was taken on 28th February 2013.

9. H.M.R.C's written submission to the First-tier Tribunal said that the 28th February 2013 decision “amended” (rather than terminated) mother's child tax credit award. Had the award been terminated, section 3(2) would have applied. This provides:

“Where [HMRC]...(b) decide under section 16 to terminate an award of a tax credit made on a claim, (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim.”

10. Once the period of an award ends, a different set of H.M.R.C. decision-making powers arise, as part of the end-of-year tax credits reckoning provided for by the 2002 Act. Where a tax credit award has been made for the whole or part of a tax year, H.M.R.C. are required by section 17(1) & (2) of the 2002 Act to give a statutory notice to the recipient/s requiring specified declarations or statement to be made (or stating that, in default of a response, they will be treated as having made the specified declaration). The giving of such a notice is a pre-

condition to the exercise of H.M.R.C's function under section 18 of determining final tax credit entitlement for a tax year. Section 18(1) requires H.M.R.C "after giving a notice under section 17", to decide entitlement to the tax credit for the tax year but generally:

- (a) section 18(2) prevents H.M.R.C. from making that decision before the section 17 declaration or statement has been made; unless
- (b) the declaration or statement has not been made by the date specified in the notice.

11. The relationship between section 18 decisions and section 16 appeals was addressed by Social Security Commissioner (now Upper Tribunal Judge) Jacobs in *CTC/2662/2005* which, I note, seems to have involved an appeal against a section 16 amendment, rather than termination. Judge Jacobs found as follows:

"What happens to an appeal once a decision is given under section 18?"

"42... The Tax Credits Act 2002 makes no provision for the effect of a section 16 decision after a section 18 decision has been made. However, section 18(11) provides that the decision under that section is conclusive, which carries with it the implication that the section 16 decision is no longer of any force or effect. That is lapsing in all but name. The disadvantage of this approach is that it is automatic. In most cases that would not matter, but there may be cases in which it would be appropriate to proceed with the appeal despite the fact that it had been overtaken by the section 18 decision.

43. Another analysis is that the tribunal should treat the appeal as raising only hypothetical issues. Courts decline to deal with such issues in public law cases. The appeal tribunal could do the same, simply declaring that the only issues raised are hypothetical and declining to decide them. The advantage of this approach over the lapsing of a decision or an appeal is that it gives the tribunal a discretion. The courts are prepared to decide hypothetical issues in public law cases if 'there is a good reason in the public interest for doing so', as Lord Slynn explained in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 A.C. 450 at 457. This would allow a tribunal to proceed with an appeal against a decision under section 16 (or for that matter under section 14 or 15) if, for example, it raised an issue of general importance, such as the scope of an appeal under that section."

The child tax credit main responsibility rules

12. I will now explain the child tax credit child responsibility rules.

13. Section 8(1) of the Tax Credits Act 2002 ("2002 Act") provides that a person's entitlement to child tax credit is dependent on the person being "responsible" for a child (or qualifying young person). Section 8(2) authorises regulations to make provision "as to the circumstances in which a person is or is not responsible for a child".

14. Regulation 3 of the Child Tax Credit Regulations 2002 contains rules for determining “the circumstances in which a person is or is not responsible for a child”. Rule 1 is that the responsible person is that with whom the child is “normally living”. Rule 2 applies where there are competing claims. Rule 2.2. provides that only one of the competitors can be treated as responsible for a child and that is “whichever of them has (comparing between them) the main responsibility for him (the “main responsibility test”)

15. Rule 3 permits the competitors to “jointly elect” which of them has main responsibility. If they do not, H.M.R.C. “may determine that question on the information available to them at the time of their determination”. That is a factual question which, in many cases, is far easier to state than answer.

The decision-making history

16. On 28th February 2013 H.M.R.C. made a decision about Miss H’s (hereafter “mother”) child tax credit award for tax year 2012/13. In their written submission to the First-tier Tribunal, H.M.R.C. described the 28th February 2013 decision as a decision that, from 28th July 2012 (when child E was ‘added’ to mother’s tax credit award) until 26th February 2013, mother was not responsible for child E and did not therefore satisfy the entitlement conditions for child tax credit. Mother’s award of child tax credit was amended accordingly. She had already received child tax credit payments for that period but so had the competing claimant, the child’s father Mr F.

17. Mother appealed to the First-tier Tribunal and the father was sensibly made a party to the appeal. Following a number of adjournments, the First-tier Tribunal decided the appeal on 3rd February 2015 by which time the appeal bundle exceeded 400 pages. The Tribunal’s decision notice states that it allowed the appeal and records that “[mother] is entitled to child tax credit in respect of her son E...because I find that, in the period with which the Tribunal was concerned, she had “main responsibility” for child E”.

18. The Tribunal’s statement of reasons says the case was “about as close to the margin as one can get” because the parties insisted there was “absolute equality” in the number of nights that E spent with each of them. Moreover, day-time responsibilities were equal and there was no clear evidence that any one parent spent more on E’s upkeep than the other. The statement then explains that, after a short period of difficulty soon after E’s birth, by 28th July 2012 mother had “picked up the threads” of her life sufficiently to be able to take full responsibility for E when he was in her care. The statement concludes “I find also, but by the narrowest of margins, that she, rather than [Mr F], had main responsibility for E at that time”.

19. The Tribunal made that finding despite having also concluded that “neither parent could be relied on to provide reliable evidence, either because of difficulties of recall or because of deliberate withholding or distortion of the truth”.

Proceedings before the Upper Tribunal

20. A different First-tier Tribunal judge granted father permission to appeal to the Upper Tribunal and, in so doing, said this:

“The Upper Tribunal is invited to consider whether the First-tier Tribunal has given adequate reasons for its decision and, if not, to suggest what further directions might have been issued with a view to deciding the issue of “main responsibility”.

21. I translated the First-tier Tribunal’s comments into grounds of appeal, taking into account the basis on which father sought the First-tier Tribunal’s permission to appeal. That led me to direct that the grounds of appeal were whether:

- (a) the First-tier Tribunal gave adequate reasons for finding that mother had main responsibility for the child during the period in question;
- (b) whether the First-tier Tribunal erred in law by failing to direct further evidence or submissions before deciding the appeal;
- (c) whether the First-tier Tribunal’s findings of fact were perverse or irrational;
- (d) whether the First-tier Tribunal overlooked relevant evidence.

HMRC’s position

22. H.M.R.C. provided the Upper Tribunal with written submissions on this appeal. They are summarised, together with my observations, as follows:

(a) the decision to amend mother’s child tax credit award under section 16 of the Tax Credits Act 2002 was the only decision under appeal to the First-tier Tribunal. There was no appeal before it against H.M.R.C.’s subsequent section 18 decision as to Ms H’s entitlement to child tax credit for 2012/13. I note that was hardly surprising since the First-tier Tribunal was unaware that any such decision had been made;

(b) the First-tier Tribunal was “not concerned with the level or rate of [father’s] award in 2012/13”. I accept that father did not appeal against H.M.R.C.’s decision on his award. Why would he, since the decision was in his favour? However, the entitlement conditions are such that, on competing claims, a finding that one parent has main responsibility for a child necessarily implies that the other parent does not and, hence, does not meet the child tax credit entitlement conditions. Whether or not anything will be done about that – any adverse consequential taken in respect of the non-responsible parent’s award or entitlement – is for H.M.R.C. to decide. It is clear, however, that a Tribunal’s finding of non-responsibility creates a real risk that such action might be taken;

(c) on 25th June 2013, H.M.R.C. made a section 18 decision as to father’s entitlement to child tax credit for 2012/13. The decision was that he was entitled to child tax credit for the whole

of 2012/13. It is regrettable that this decision was not brought to the First-tier Tribunal's attention;

(d) on 21st August 2013, H.M.R.C. made a section 18 decision as to mother's entitlement to child tax credit for 2012/13. This decision reflected that subsequently made by the First-tier Tribunal on the section 16 appeal. In other words, H.M.R.C. decided that mother was entitled to child tax credit in respect of child E during the relevant period. It is doubly regrettable that this decision was not brought to the First-tier Tribunal's attention;

(e) in any event, on 25th February 2015, in response to the First-tier Tribunal's decision H.M.R.C. made a revised section 18 decision as to mother's entitlement to child tax credit for the year 2012/13. This simply reflected their earlier section 18 decision that mother was entitled to child tax credit;

(f) H.M.R.C. have not taken, nor do they intend to take, any action in response to the First-tier Tribunal's decision. In other words, H.M.R.C. have decided that they either have no power, or do not wish, to take any rectifying action in response to two separate claimants having been paid child tax credit in respect of child E – on the basis that both had main responsibility for him – during tax year 2012/13;

(g) in the light of H.M.R.C's section 18 decision as to mother's entitlement for 2012/13, the appeal to the First-tier Tribunal had either lapsed or it was dealing with a "hypothetical point". As authority for that, H.M.R.C. relied on the decision in *CTC/2662/2005* (see above);

(h) neither father nor mother received child tax payments contrary to the entitlement decisions taken on their claims. Formally, therefore, neither has been overpaid and so cannot possibly face overpayment recovery action in respect of payments received for the 2012/13 child tax credit year.

24. In response to H.M.R.C's submission, father wrote that H.M.R.C. had demanded he repay overpaid tax credits. However, the copy notice he supplied related to tax credits year 2014/15. This appeal is solely concerned with entitlement for tax year 2012/13.

My decision

25. I have decided not to hold a hearing before deciding this appeal. There is no need in the light of H.M.R.C's stance.

26. H.M.R.C's clarification of the decision-making history on mother's and father's child tax credit claims for 2012/13 has informed the approach I to take to determining this appeal.

27. Assuming the First-tier Tribunal made a valid decision on mother's section 16 appeal, I decline to set its decision aside even if it did involve an error on a point of law. To set its decision aside would serve no useful purpose because the evidence as to responsibility for

child E is clearly very finely-balanced, the First-tier Tribunal's decision does not act as factual precedent for any other tax credit year and H.M.R.C. have explained that neither party will face overpayment recovery for the 2012/13 tax credit year for reasons related to main responsibility for child E.

28. If the First-tier Tribunal in fact had no jurisdiction to decide the appeal because it had lapsed, there is no decision on which these proceedings can bite and, hence, no decision for me to make. But the practical outcome for the parties is the same however the Tribunal's decision is rationalised.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
22nd January 2016