IN THE UPPER TRIBUNAL **Case No.** CTC/2033/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimants' appeal is allowed. The decision of the First-tier Tribunal dated 7 May 2015 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

REASONS FOR DECISION

1. This is an appeal, brought by one of joint claimants with my permission, against a decision of the First-tier Tribunal dated 7 May 2015, whereby it dismissed the Appellant's appeal against a decision of the Respondent dated 16 December 2013 to the effect that he and his wife were not entitled to working tax credits during the tax year 2012-13 (although the decision actually said that they were entitled to £11.97, being one day's entitlement at the rate previously awarded, because the Respondent's computer did not allow the making of a decision that completely removed a final award!). A similar decision (although accurate because there had been no previous final award) was issued on the same day in respect of the tax year 2013-14. A consequence of these decisions is that it has been determined that the Appellant and his wife have been overpaid working tax credit and must repay a very considerable sum of money.

2. By virtue of section 10 of the Tax Credits Act 2002, it a condition of entitlement to working tax credit that the claimant is engaged in qualifying remunerative work. Regulation 4 of the Working Tax Credits (Entitlement and Maximum Rate) Regulations 2002 (SI 2002/2005) has the effect that the work must be employment or self employment, that in the case of a couple not responsible for children a claimant over the age of 25 must undertake not less than 30 hours a week if under 60 or not less than 16 hours a week if aged at least 60, that the work must be for at least four weeks after the date of claim (or its start if the claim is prospective) and that the work must be "done for payment or in expectation of payment".

3. Here, the Appellant and his wife were employed by a company that they owned and of which they were respectively the managing director and the sales director. They worked from home, marketing information technology for independent travel agents and dealing with technical issues relating to it. The company's income was derived from commission based on the fees paid by subscribers, the number of which had declined with the decline in the number of independent travel agents.

4. In an admirably clear decision notice followed by an equally clear statement of reasons, the First-tier Tribunal explained that it had decided that the Appellant's wife, who was under the age of 60, had worked in expectation of payment in the form of a salary paid by the company, but had done so for fewer than 30 hours a week, while the Appellant himself, who turned 60 during the year in question, had not worked in expectation of payment because, although he did work, he had been

resigned to the fact that the company would not make sufficient money to pay him a salary.

5. The Appellant challenges both elements of the decision. The Respondent supports the appeal on the ground that the First-tier Tribunal did not give adequate reasons for deciding that, throughout the relevant year, the Appellant did not work in expectation of payment.

6. Mr Alty, for the Respondent, helpfully points out that the issue of expectation of payment was not addressed in the Respondent's response to the appeal to the First-tier Tribunal because it was not the basis of the Respondent's decision of 16 December 2013. That decision was made under section 19 of the 2002 Act – rather than section 18 – following the Appellant's failure to reply to a letter dated 5 September 2013. The letter had asked for information as to the number of hours worked and the income of the Appellant and his wife and had indicated that the Respondent did not believe the figures supplied for the number of hours worked (following, I think, the issue of a final notice under section 17). This, it emerged from the response to the appeal, was because the figures suggested hourly rates of earnings for both the Appellant and his wife that were well below the minimum wage. It appears that the letter was overlooked, at least partly because the letter was referred to the accountant who dealt with their tax affairs and who did not usually prepare accounts for the company for a tax year until the following January. In any event, in light of the letter and the response to the appeal, it is not surprising that the Appellant considered that the principal issue in his appeal was the number of hours he and his wife worked. As Mr Alty points out, there may therefore have been some procedural unfairness in the First-tier Tribunal considering the question whether work was in expectation of payment. Even in his grounds of appeal to the Upper Tribunal, the Appellant has focused on the number of hours he worked.

7. The number of hours the Appellant worked was important if he was to succeed before the First-tier Tribunal, but it was unnecessary for the First-tier Tribunal to make a finding on that issue in the light of its finding that any work he did was not in expectation of payment and it did not in fact do so. The Appellant may be right that paragraph 8 of the First-tier Tribunal's statement of reasons suggests that it would at least have found that he worked 16 hours a week and might have found that he worked 30 hours a week – he is certainly right, as Mr Alty agrees, that the relevant threshold from his 16th birthday was 16 hours a week – but the First-tier Tribunal made no explicit finding and it did not err in not doing so. Nor, did it err in law in stating, at paragraph 16 of the statement of reasons, that the Appellant's wife was working "only when she is on the telephone or engaged in administration", a test that it had clearly also applied to him. Being free and available to take a telephone call does not in itself amount to work if one is at home and can get on with non-work activities between calls. There is of course scope for argument in this case, as in many other cases, as to the number of hours worked by both the Appellant and his wife, but those are issues of fact and an appeal to the Upper Tribunal lies only on points of law. The First-tier Tribunal, rightly, did not apply the formula used by the Respondent to calculate the number of hours suggested in its letter of 5 September 2013. That is not to suggest any error by the Respondent. It was quite entitled to use that formula for the purpose of deciding that an enquiry should be opened under

section 19 of the 2002 Act because there was a question that the Appellant and his wife were required to answer. In other words, until an explanation is provided, it is entitled to consider that figures suggesting that a person is working for less than the minimum wage are implausible. Here, there was eventually at least a partial explanation.

8. The claimant's main argument on the issue of whether he worked "in expectation of payment" is that the company paid part of his household bills. When I granted permission to appeal, I suggested that this raised the question whether, in the case of a claimant who is both a director and a shareholder of a small company, "payment" refers only to director's remuneration (as the First-tier Tribunal held) or whether it also refers to income of the company, particularly if it is available to meet expenses in respect of the claimant's home that are treated as expenses of the company. Mr Alty submits, in effect, that entitlement to tax credits depends on the personal income of the claimant and not the company's income. I agree.

9. As Mr Alty points out, it is perfectly proper for a company to calculate its taxable income by deducting from its income expenses that are wholly and exclusively incurred in the performance of its business. It is equally entitled to pay household expenses as part of the remuneration of a director or simply to pay a director a salary out of which he pays his own household expenses. In this case, it is clear from the company accounts and also from the appellant's other evidence that a proportion of household expenses was treated for tax purposes as having been incurred wholly and exclusively by the company. Even though the payments may in fact have passed through the claimants' hands before being paid to, say, a utility company, such an arrangement amounts to a payment by the company of those expenses to the utility company. If they were paid to the Appellant or his wife as part of their remuneration, the payments would be shown as such in the accounts and would, of course, be taxable if their income was high enough. An expectation that the company would earn enough money to be able to pay those expenses may well have been a reason that the Appellant worked, but it is clear from the context that in order for a person to be entitled to working tax credit, work must be in expectation that he or she personally will be paid; an expectation that the company for whom the work is done will be paid is not enough. From a tax credit perspective, it might have been more advantageous to the Appellant and his wife had they arranged for the company to pay him a salary out of which he could have paid all the household expenses, rather than arranging for it to be treated as having paid part of the household expenses itself. However, they cannot expect their arrangements to be treated in one way for the company's tax purposes and in another, inconsistent, way for their tax credit and personal taxation purposes.

10. The other point I raised when I granted permission to appeal related to the First-tier Tribunal's reasons for finding that the Appellant had not been working in expectation of payment. It said –

> "11. Was the work done in expectation of payment? The business has made a loss over a number of years and it was clear from [the Appellant's] evidence that by 2012 he had resigned himself to the fact that no profit was going to be made, that he would have to derive his income from his pension in

> future and that it only remained worthwhile for him to continue working for the sake of the 'benefits' which he has described [i.e., the ability to set household expenses against income]. Consequently, I find that his work was not done in expectation of payment."

Mr Alty submits that there were a number of issues that required to be explored and, given that the relevant issues had not been addressed in the Respondent's response, I accept that the reasoning was not adequate because the timing and nature of the Appellant's resignation has not been investigated or explained.

11. First, Mr Alty draws attention to *Chief Adjudication Officer v Ellis* (reported as R(IS) 22/95), which concerned a similar provision relating to income support and where Millett LJ, with whom Sir Thomas Bingham MR and Kennedy LJ agreed, said –

> "The question is whether 'the work is paid for or done in expectation of payment'. That falls to be decided at the time that the work is done, not at the end of the year or other period of account, but periodically and probably on a weekly basis, since that is the period with reference to which income support is calculated."

Thus, the finding in the present case that the Appellant was resigned "by 2012" – which I do not read as meaning "before 2012" – to the company not making a profit did not mean that he might not have been working in expectation of payment for at least part of the tax year 2012-13. Further, it cannot be assumed that work done during the whole of the tax year was not done in expectation of payment merely because no salary was paid for any part of the year. It is important to consider a case such as this month by month because, if the Appellant and his wife were overpaid at all, they might have been overpaid for only part of the tax year.

12. As the Appellant has argued, work may be done in expectation of payment notwithstanding that no profit is in fact made. Moreover, work may be done in expectation of payment even if it is known that no profit will be made for some time but it is expected that the relevant business will become profitable in the future, although that appears not to have been the case here. What may be more material in this case is that a small director's salary had been paid to the Appellant in the previous year and the decision not to pay a salary in 2012-13 may well have been made only during, or after the end of, that year and it is not clear that the company could not have chosen to pay a small salary and contribute less to the household expenses. In addition, the company did have an income, the amount of which varied from quarter to quarter, and, although it might have been unrealistic to expect it to generate a salary commensurate with the value of the time, effort and skill put into it, it is not obvious that the Appellant had been resigned at the time to it not producing any worthwhile salary at all.

13. It seems to me to be appropriate to take a fairly cautious approach to retrospective decision-making that may have the effect that people on law incomes who have acted in good faith find themselves unexpectedly substantially in debt to the Government who paid the money in the first place. Of course, many claimants

have only themselves to blame for overpayments. However, that is not always the case and care should be taken not to make too much use of hindsight when considering whether, at the time that relevant work was undertaken, the work was done for payment or in expectation of payment.

14. In any event, I accept that the First-tier Tribunal's decision was erroneous in point of law in this case, despite the obvious care taken by the judge, and that this appeal should therefore be allowed. In the circumstances of this case, there having been no hearing before the Upper Tribunal because none was sought, I accept the unopposed suggestion of Mr Alty that it should be remitted to the First-tier Tribunal before whom there should be a complete rehearing. All issues will be at large. As Mr Alty also suggests in paragraph 27 of his submission to the Upper Tribunal, it would be helpful were the Appellant to provide further written evidence to the First-tier Tribunal before the next hearing.

15. Finally, I observe that the First-tier Tribunal mentioned that no response had been received to the Appellant's appeal in respect of the year 2013-14. This appears to be another case where HMRC made two decisions at the same time in respect of consecutive tax years but treated an appeal that clearly raised an issue relevant to both decisions as being against only one of them. This should not happen: it is unfair to claimants and it wastes the resources of HMRC and the First-tier Tribunal when there are separate proceedings. If the Appellant's 2013-14 appeal has still not been heard, it would obviously be sensible for it to be heard at the same time as the case that I am now remitting.

Mark Rowland
9 February 2016