

IN THE UPPER TRIBUNAL

Appeal No. CTC/1514/2015

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Gray

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the Birmingham Tribunal made on 17 September 2014 under number SC 024/14/02493 was not in error of law and it stands.

REASONS FOR DECISION

Background

1. This matter concerns the receipt of tax credits, both working tax credit and child tax credit, by the appellant during the tax year 2012 -2013. Awards of both elements of tax credits had been made to the appellant in each tax year from 2007-2008. Critical in this case was the appellant being entitled to working tax credit, which founded potential entitlement to child tax credits.
2. Following a review conducted by HMRC the 2012-2013 award was terminated by a decision made on 24 September 2012. An appeal was lodged and the matter was heard by the First-Tier Tribunal (FTT).
3. The FTT dismissed the appeal issuing a briefly reasoned decision following the hearing which was expanded upon when, on the application of those representing the appellant, a full statement of reasons was issued. The appellant sought permission to appeal which was refused by the District Tribunal Judge who had heard the appeal and renewed before me.

Proceedings before the Upper Tribunal

4. I granted permission to appeal saying

Whilst I do not think that all the grounds of appeal are arguable I do find that there is an arguable issue as to what might constitute childcare, and whilst in general cases such as this seem to me likely to be fact sensitive, and the request for "binding authority" from Upper Tribunal may be misplaced, it is possible that there are aspects which lend themselves to guidance.

5. HMRC has responded supporting the appeal, although that support is something of a technicality since the tenor of the submission is that a substantive investigation into the claim is planned under section 18, which provides for a review following a final notice of entitlement, if I find in the appellant's favour. I am asked to do that and remake the decision on the basis that the appellant was working for 16 hours per week for the purposes of entitlement to working tax credit.

6. The HMRC submission in support of the appeal argues that the tribunal fell into error in treating the case as one in which it was for the appellant to establish that she had been working for the requisite number of hours per week to qualify for the tax credits, whereas it was in fact for HMRC to show reasonable grounds for believing that the applicant did not satisfy the entitlement conditions.
7. The reversal of the burden of proof is a material matter which must perhaps inevitably result in success on further appeal. However if I were to agree with HMRC as to that error having occurred I would be disinclined to make the finding necessary to remake the decision in the applicant's favour rather than remit to the FTT since it appears to me that there is at the very least confusion as to the appellant's work hours and arrangements.
8. I will initially explain why I disagree with the fundamental submission of HMRC as to the tribunal having taken the wrong approach to the burden of proof. I will then deal with the matters raised by the appellant, but only to a limited extent, since my grant of permission to appeal was limited to the general issue of what might constitute childcare; that point was not dealt with by HMRC and I have decided that I do not need to deal with it here; the material issue was as to the appellant's work arrangements, and without entitlement to working tax credit the issue of childcare falls away. It may yet need to be considered in a future case.

The section 16 procedure

9. Section 16 is an in year review power which enables HMRC to amend or terminate an award if they have reasonable grounds to do so. Its use is intended to avoid the difficulties caused by significant overpayments by amending an award prior to the full annual payments having been made where it is appropriate to do so. It provides:

16.- (1) where, at any time during the period for which an award of the tax credit is made to a person or persons, the Board have reasonable grounds for believing-

- (a) that the rate at which tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period; or
- (b) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period,

the Board may decide to amend or terminate the award.

(2) Where, at any time during the period for which an award of the tax credit is made to a person or persons, the Board believe-

- (a) that the rate at which a tax credit has been awarded to him or them for the period May differ from the rate at which he is, or they are, entitled to it for the period, or
- (b) that he or they may have ceased to be, or never been, entitled to the tax credit for the period,

the Board may give a notice under subsection (3)

(3) A notice under this subsection may-

- (a) require a person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which the Board consider they may need to the considering whether to amend or terminate the award under subsection (1); or
- (b) require any person of a prescribed description to provide any information or evidence of a prescribed description which the Board consider they may need to that purpose, by the date specified in the notice.

The hurdles for HMRC prior to an effective section 16 review

10. The use of the section 16 procedure was considered by Upper Tribunal Judge Wikeley in ZB-v-HMRC [2015] UKUT 198 (AAC). He explained the process, and I paraphrase that here

- (i) A mere doubt as to the accuracy of the award made was insufficient to justify invoking the power; there must be a reason to question the basis of the underlying award decision made under section 14, a "belief" that the decision may be wrong. The belief must have some basis; although the subsection does not require the belief to have "reasonable grounds" HMRC are not permitted to engage in a fishing expedition or random investigation.
- (ii) It must be considered whether there had been notification giving rise to a use of the power to revise for a change of circumstances under section 15. The section 16 power only arises if HMRC have grounds other than notification of a change of circumstances to call into question the award decision.
- (iii) Only if those two hurdles were overcome would the powers under section 16 arise.
- (iv) Having begun the section 16 investigation HMRC can only act if, considering any response from the request for information, there are then reasonable grounds for making a section 16 decision.

11. A tribunal hearing an appeal against the section 16 decision must decide that matter, that is, whether reasonable grounds existed for the termination or amendment. On the factual matrix of this case the effective decision for the FTT was whether the appellant was working in her stated employment for at least 16 hours each week : as Judge Wikeley said in the case of JR-v-HMRC [2015] UKUT 192 (AAC) at [4], quoting from his own grant of permission to appeal

5. It may be – but is unclear – that this appeal was a case in which the s.16(2) procedure was adopted. Alternatively the matter may have been approached on some more informal basis. Be that as it may, the FTT's task was surely to decide whether or not the Appellant was working 16 hours a week at the material time, in either/or/both as a holistic therapist and/or carer. It is by no means clear to me that the FTT addressed itself to that question and made the necessary findings of fact on that issue.

12. But it was not for the appellant to prove that she was working at least those hours; the onus was on HMRC to show that she was not, or, put in terms which encapsulate the standard of proof, that it was more likely that she was not.

The hurdles in practice here

13. In this case it is clear from the submission of HMRC that the decision to review the appellant's award was due to intelligence which indicated that a high number of tax credits claimants from this area were using the same childcare provider, where the charges appeared particularly high compared to other local providers, and the cases were ones in which the claimants seemed to be paying the greater part of their employment income in childcare.

14. Of course it can not be said that to pay what appears at first blush to be disproportionately high percentage of earnings in childcare costs is necessarily irrational or potentially fraudulent. There may be reasons for doing that, the obvious one being the continuation of a career with the possibility of advancement and higher earnings which may be more difficult if a significant career break were taken. An organisation such as HMRC, however, must have an ongoing consideration of its use of public funds, and to investigate something that may be anomalous would appear to be the purpose of a power such as that under section 16. In my view that matter provided a "belief" (rather than an unspecified or random concern) which justified an investigation under that section as to the accuracy of the award made
15. There were no issues in this case as to a change of circumstances; the information relied upon by HMRC did not depend upon that, and if the doubts that it raised were real, was more likely to indicate irregularities in the claim itself. The fact that there had, over the period of renewal claims, been some changes in the appellant's personal circumstances was not a material factor in the decision to review the award; those changes did not prevent the commencement of a section 16 review.
16. The section 16 decision was made following the information received from the appellant and her stated employer as a result of comparing that with information held by HMRC in relation to that employer. The discrepancies noted in the HMRC response to the appeal to the FTT would, prima facie, provide reasonable grounds for the section 16 decision to terminate the award; they indicated that the decision was, to use a term invoked in this context by the learned authors of Social Security Legislation 2015/16 volume 4 (at page 171) "probably right", although of course that very issue was for further investigation and decision by the FTT on appeal.
17. Did the FTT deal with the matter correctly? In particular did it shift the onus on to the appellant to show that she was in remunerative employment?

The burden of proof issue

18. The judge did not deal specifically with the burden of proof in her judgement. That is an observation and not a criticism; it is rarely necessary to do so. Accordingly I have considered the statement as a whole to see whether it indicates that she erred in relation to it.
19. The submission of HMRC does not point to any specific part of the statement which would so indicate. The argument seems to be that the appeal proceeded on the basis that the appellant had not shown that she met the remunerative work criteria. I do not see that it did.
20. Certainly the response of HMRC to the FTT appeal dealt with those criteria. At [14] it argued that because HMRC were unable to validate the childcare costs incurred the decision was reasonable and proportionate, as, on the balance of probability, the childcare fees claimed were not substantiated. As a proposition that has a number of legal flaws, but it is simply a submission. Inaccuracy in a submission made by a one of the parties does not equate to inaccuracy in the decision reached by an independent and impartial tribunal.

21. As I have stated above the task of the tribunal was to decide the employment issue which was the key to tax credits entitlement, and the discrepancies and anomalies highlighted in the response called for an explanation. That is not to reverse the burden of proof. It is the appellant's opportunity to put forward persuasive evidence in order to avoid the conclusion to which the existing evidence points.
22. That a prima facie case had been established was clearly accepted by the judge. At [5] she states "*I was satisfied by the evidence and arguments presented by HMRC that these [the transactions that she had referred to previously] were not genuine*". Having explained why she came to that view, she went on to consider the appellant's evidence.
23. She was required to do that, and she explained why she rejected it. Having done this does not amount, as HMRC seem to argue, to a reversal of the burden of proof. It is clear that the judge was satisfied on the basis of what had been put forward by HMRC. The explanations put forward by the appellant to counter or undermine that evidence did not sway her for the reasons that she gave. Her detailed examination of that evidence is appropriate to explain to the appellant why she lost. It does not indicate that she placed any burden, legal or evidential, upon her.
24. I have no reason to believe that the judge did not apply the burden of proof correctly.

Other aspects of the grounds of appeal

25. Criticism is made of a reference by the judge to other proceedings which related to the same childcare provider, but that matter was clearly before the FTT having been signposted in the submission from HMRC as the very reason for the section 16 investigation. It was relevant to the issue at hand. There is no reason to believe that the judge was influenced against the appellant by the other matters; indeed the analysis in the statement of reasons shows that she considered the evidence before her in detail.
26. The other matters raised seem to me to be little more than disagreement with the factual findings made by the judge. Criticism is made of her approach to the evidence, but there is nothing which appears to me to be fundamentally wrong with her reasoning, and the conclusions that she reached were available to her on the evidence.
27. The fact finding role of the FTT must not be underestimated; it is not for an appellate tribunal to supplant factual findings which have been reached by considering and analysing evidence unless they were outside the ambit of what a reasonable tribunal might have found on the basis of that evidence. That approach allows for the process of fact finding being a matter of judgement over which disagreement is permissible. An appeal tribunal may agree, disagree or take no view about the facts found by the FTT; what it cannot do is interfere with them unless the high threshold of legal irrationality is crossed.
28. The central criticism is that the judge found that the evidence put forward in relation to the appellant's employment was a sham. Although contradictory and benign explanations were put forward to

explain the matters which pointed towards that conclusion, the judge's view that, on balance, the obvious conclusion was the most likely is sustainable.

29. I need say no more about the matters put forward on behalf of the appellant; as I have previously indicated I largely dismissed them previously when granting permission to appeal in relation to one particular aspect.

The stuff of Kafka?

30. There has been considerable and, regrettably, justified criticism of HMRC decision making recently by a number of Upper Tribunal judges. (See for example SB-v-HMRC [2014] 543 (AAC) (Judge Wright); CS-v-HMRC [2015] 407 (AAC) (Judge Hemingway); CTC/1587/2015 (Judge Markus). Those criticisms were encapsulated by Upper Tribunal Judge Wikeley in ZB-v-HMRC (ibid), where he described the decision made in that case as 'the stuff of Kafka' [8]. That was a case in which the FTT was erroneously 'lured' by HMRC into deciding the case against the appellant because he failed to provide information sought by HMRC not merely after they had made the decision but when it was under appeal. Truly that was Kafkaesque, or even "Alice in Wonderland" justice; sentence first, verdict afterwards.
31. Happily that cannot be said about HMRC decision making process in this case. The papers suggest that an in year review under section 16 was begun appropriately. Information was sought from the appellant and her stated employer. On the basis of the information received HMRC systems were interrogated and, given what appeared to be significant discrepancies between information and income figures provided earlier to HMRC by the employers and the documents provided as part of the review, a decision was made terminating the award which had been made on the basis of the renewal claim. When that decision was appealed by those representing the appellant (out of time, but the appeal was accepted by HMRC) a submission was made which set out the decision and the legal basis upon which it was reached clearly, and the evidence relied upon was included. A Presenting Officer attended at the oral hearing of the appeal on behalf of HMRC. Clarity of the legal position, inclusion of relevant documents and positive engagement with the appeal process have not always been features of these appeals, hence the comments to which I have referred, but those criticisms cannot be levelled here. I make these observations in order to positively distinguish the position in this case, given the trenchant criticism and my decision to uphold the FTT and thereby approve the HMRC decision making.

Upper Tribunal Judge Gray
Signed on the original on 31 December 2015