IN THE UPPER TRIBUNAL **Case No.** CTC/1841/2015
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed to the extent that the First-tier Tribunal's decision dated 27 October 2014 is set aside and there is substituted a decision that the appeal to the First-tier Tribunal against the decision of the Respondent dated 24 December 2012 has lapsed.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 27 October 2014 whereby it dismissed her appeal against a decision by the Respondent dated 24 December 2012 to the effect that she was not entitled to the childcare element of working tax credit from 6 April 2012.

2. The childcare element of working tax credit would meet 70% of eligible childcare costs up to £300 pw week where there were two or more children. In this case, the Respondent decided not to award the child care element in respect of the year from 6 April 2012 because it regarded the arrangement between the claimant and the childcare provider as "collusive". In its submission to the First-tier Tribunal, the Respondent gave a number of reasons for its decision. Perhaps most important was that the claimant worked for the childcare provider, Khair Daycare and earned only £96.00 pw so that the 30% of the claimed childcare costs that would not be covered by the child element of the tax credit would have amounted to £90 pw, which was considered to be a disproportionate amount for her to pay out of her household income. It was argued that it was "not feasible" for the claimant to pay such costs. The Respondent also asserted that "the average help with childcare costs for postcodes in SE area was £70.00 per week" and it further asserted that three claimants – it is not entirely clear whether those three included this claimant – were claiming to pay a total of £39,000 pa in child care fees to the childcare provider and that that was "far in excess of the total income declared by the care provider to HMRC". It was also submitted that the claim for childcare costs included holidays whereas "HMRC found that this provision was not available in holiday weeks". This was a reference back to the last sentence of paragraph 3 of the submission to the First-tier Tribunal, which said –

> "3. … the Ofsted report of May 2011 states that this childcare provider is open daily 8.30am to 4.30pm daily in term time only."

The submission also said –

> 9. It has been noted from the information obtained from Companies House that there was a business by the name of One Love Child's Centre registered at the

same address as Khair Daycare and that this was dissolved. There are no other records of businesses at this address.

10. Khair Daycare childcare provider has registered with Ofsted. However, it seems that this is the only registration that has taken place with regards to the business or company. Khair Daycare cannot be traced at the address given. Searches completed through Company Check and HMRC systems such as Fame & Dash (which are fed by Companies House) cannot find any trace of this childcare provider registered as a business or limited company."

3. The claimant appealed to the First-tier Tribunal who dismissed her appeal. It found that the claimant did work for Khair Daycare as a cleaner for 16 hours pw and that an inspection report by Ofsted showed that the business was registered for the care of a maximum of 32 children under the age of 5 from 8.30 am to 4.30 pm during term time, whereas the claimant's children were at secondary school and attended for three hours a day after school "an organisation/Madrassa which helped with their homework" and which the claimant had been told when she was employed that they should attend. It also found that Khair Daycare operated from premises that were connected with the Madrassa and the London Skills College but that it was not clear what the relationship between them was. The claimant's contract of employment and contract for childcare both purported to be with Khair Daycare. It found that receipts for payments stamped with Khair Daycare's name did not coincide with cash withdrawals shown on the claimant's bank statements and her bank statements showed payments of wages from the London Skills College whereas her payslips and P60 identified the Somali Community Centre as her employer. It said that £90 "was a lot of money for [the claimant] to find each week" and it concluded that the claimant's children were not receiving relevant childcare from Khair Daycare or any relevant childcare provider and that the claimant did not make payments of £300 pw for childcare costs.

4. The claimant applied for permission to appeal on the ground that the First-tier Tribunal's findings were incorrect, were not supported by any evidence and were based on an understanding of the facts that was not put to her during the hearing. She argued that the first-tier tribunal's reasoning was inadequate and that, in particular failed to provide any explanation for the existence of the receipts provided by Khair Daycare. She produced a letter from Khair Daycare, stating that her children attended the Khair Daycare After-School Club in the evenings and that Khair Daycare Nursery and London Skills College were "two of the projects that come under the umbrella of Somali Community Centre, which is a registered charity".

5. The claimant may have partially misunderstood the findings of the First-tier Tribunal but I nonetheless gave permission to appeal, saying –

"I give permission to appeal with some hesitation, but it is arguable that the First-tier Tribunal did fail to give adequate reasons for its decision in respect of the claimant's ability to pay for the claimed childcare.

Moreover, this case raises issues about childcare registration that may be of wider applicability. First, a childcare provider may be "an individual provider" (see doc 64) rather than a company. The individual is, perhaps surprisingly, not named in the

> Ofsted report but presumably may have a different address from the place where the childcare is provided, in which case the lack of information thrown up by the searches mentioned in paragraph 10 of HMRC's submission to the First-tier Tribunal appears to be of no significance. Secondly, day-care for pre-school children and after-school clubs for secondary-age school children are subject to different registration regimes, even if based at the same premises. It appears from the third paragraph on doc 63 that the last sentence of paragraph 3 of HMRC's submission to the First-tier Tribunal was inaccurate or, at best, misleading. Cannot HMRC obtain information direct from Ofsted as to whether particular provision is registered?"

6. In relation to the first of those paragraphs, I had in mind among other matters the fact that, even after removal of the disputed childcare element of working tax credit, the claimant's income from tax credits was over £9,000 pa and she might have been entitled to housing benefit to cover at least part of her housing costs. She was therefore not dependent only on her limited earnings.

7. In relation to the second of those paragraphs, doc 63 was the introduction to the Ofsted report, which was highlighted in the claimant's grounds of appeal and said –

> "The setting also makes provision for children older than the early years age group that is registered on the voluntary and/or compulsory part((s) of the Childcare Register. This report does not include an evaluation of that provision, but a comment about compliance with the requirements of the childcare register is included in Annex B."

Annex B (doc 69) confirmed that there was compliance with the requirements of both parts of the Childcare Register. This is consistent with the letter from Khair Daycare that has now been provided. Indeed, it is not, I believe, unusual for nursery provision for very young children and after-school clubs for older children to share premises, since the children to a large extent attend for different periods of the day.

8. The Respondent accepts that both the decision-maker and the First-tier Tribunal failed to appreciate the circumstances of the childcare provider and drew conclusions of fact that were unwarranted on the evidence available. In answer to my question about asking Ofsted for information, it is pointed out that the status and registration of providers can be found on Ofsted's website. Whether or not it may still be desirable for the Respondent to make arrangements with Ofsted for the obtaining of more detailed information is not something on which I need express a view, but it seems to me that, if the relevant information was available on the website in this case, the Respondent failed to notice it.

9. Some further observations can be made on the Respondent's submission to the First-tier Tribunal. First, if, as the Respondent submitted, there was collusion between the claimant and the childcare provider, it would still have been necessary to consider whether the collusion involved lying or not because, if it did not involve lying, it might well be arguable that the collusion resulted in an arrangement that, although contrived, was nonetheless genuine and legitimate under the legislation as it stands. Secondly, it is not fair for the Respondent to rely in proceedings before the First-tier Tribunal on discrepancies between information provided by claimants and

information it alleges was provided by childcare providers in their tax returns unless the tax returns are revealed so that their relevance or accuracy can properly be considered. If the Respondent does not consider it appropriate to disclose the tax returns, it should not mention the apparent discrepancies. Thirdly, I am also not convinced that it was relevant that the average help with childcare costs in "SE area", whatever that is, were £70 pw. That figure, the source of which was not disclosed, was obviously affected by the number of hours for which childcare was used. An average hourly rate for children of the relevant age might have been more relevant.

10. In any event, the primary ground on which the Respondent supports this appeal is entirely different from the grounds upon which I granted permission to appeal. It is pointed out that the decision under appeal to the First-Tier Tribunal was made under section 16 of the Tax Credits Act 2002 but that, unknown to the First-tier Tribunal, a further decision under was made on 17 June 2013 in respect of the claimant's entitlement to tax credits in the tax year from 6 April 2012. That decision was made under section 18 and, relying on the decision of Mr Commissioner Jacobs in CTC/3981/2005 and the more recent decision of Upper Tribunal Judge May QC on file CSTC/840/2014, it is submitted that its effect was to cause the appeal to the First-tier Tribunal to lapse. That submission is not opposed by the claimant and I accept that it is correct, although this system of adjudication seems bizarre. (Surely there must be some way of either postponing the making of section 18 decisions until any appeal against a section 16 decision has been heard or, alternatively, of making sure that tribunals considering appeals against section 16 decisions are told of section 18 decisions so that either the appeal against the section 16 decision can be struck out or the claimant can be treated as having appealed, or can be invited to appeal, against the section 18 decision? In this case, the submission to the First-tier Tribunal was made eighteen months after the claimant appealed and over six months after the section 18 decision was made, but failed to mention the section 18 decision.) It is further submitted by the Respondent that the appeal against the First-tier Tribunal's decision should be dismissed on the basis that the decision is of no effect, but I prefer to follow Judge May's example and give the decision set out above.

11. It is, however, conceded by the Respondent that the decision of 17 June 2013 was defective to the extent that it did not inform the claimant of her right of appeal. The effect is that time for appealing against it did not start to run. Thus the claimant may appeal against the decision now, which will put her in the same position as she would have been had that decision not been made and I had remitted this case. (I have a feeling that it would complicate matters in this case were I now to treat the claimant as having already appealed against that decision, particularly if she has in fact already done so since the Respondent's submission to the Upper Tribunal was made.)

12. If there is an appeal against the section 18 decision, it will clearly be necessary for the Respondent to make a different submission to the First-tier Tribunal from the one it made last time.

Mark Rowland
2 September 2016