IN THE UPPER TRIBUNAL **Appeal No: CTC/29/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Liverpool on 21 August 2014 under reference SC065/14/00449 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided entirely afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, and subject in particular to whether the section 18 decision now to be made by HMRC will have the legal effect of lapsing the section 16 decision of 4 November 2013 and any appeal against that section 16 decision, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing

(2) The appellant is reminded that the issue before the new First-tier Tribunal is whether there were reasonable grounds for believing as at 4 November 2013 that she had ceased to be, or had never been, entitled to working tax credit for the tax (credits) year from 6 April 2013.

(3) HMRC must provide to the new First-tier and the appellant a further submission on the appeal in which it sets out full particulars of all the information and evidence (written or otherwise) the appellant had submitted to HMRC with her claims for tax credits for the three tax years 2011/2012.,

2012/2013 and 2013/2014, in particular the information and evidence she had submitted about her hours of work.

(4) The First-tier Tribunal should have regard to the points made below.

Appearances: **The appellant (claimant) neither appeared nor was represented.**

Ms Galina Ward of counsel appeared on behalf of the respondent.

REASONS FOR DECISION

Introduction

1. The issue that arises on this appeal concerns the proper application of section 16 of the Tax Credits Act 2002 ("the TCA"). This provides as follows.

> "16 **Other revised decisions**
>
> (1) Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board have reasonable grounds for believing—
>
> (a)that the rate at which the 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 a 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 the 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 for 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 for that purpose,
>
> by the date specified in the notice."

2. In giving the claimant permission to appeal in this case I said the following:

> "First, how does the "reasonable grounds for believing" test in section 16(1) of the Tax Credits Act 2002 operate legally? Can an award be terminated under section 16 simply if the respondent (or First-tier Tribunal on appeal) has reasonable grounds for believing or does the respondent (and tribunal on appeal) have to be satisfied that there was in fact no basis for an award in the first place? If the latter, what function does the "reasonable grounds for believing" test perform? If the former, does that mean that if on further enquiry the reasonable ground for believing is found to in fact be mistaken, the further evidence from that enquiry cannot be used to undermine the reasonable belief or show it to have been wrongly held?
>
> Second, as the award was terminated (i.e. removed from its outset), and so the reasonable grounds for believing test must extend back to the beginning of the award, ought consideration of the reasonableness of that award not extend to the basis upon which the award was first made and the evidence upon which it was made, and ought that evidence not have been before the First-tier Tribunal?"

3. The decision in this appeal has been the subject of very lengthy delay. The reason for the delay is because I considered that the proper resolution of the appeal might be affected by decisions in other appeals before two different three-judge panels of the Upper Tribunal. The first three judge panel was concerned with the legal basis of the power allowing the First-tier Tribunal to admit late tax credits appeals. It was decided on 11 July 2016: *VK –v- HMRC* (TC) [2016] UKUT 331 (AAC); [2017] AACR 3. The other three judge panel (concerning appeals CTC/1938/2016 and CTC/3228/2015) was heard on 20 April 2017 and

is still to be decided. It is concerned with the proper approach to the lapsing of tax credit appeals where the decision under appeal is followed by another HMRC decision on the same tax credit award which may overset the decision under appeal. I shall explain in the course of what I say below why I concluded that neither three-judge panel decision touches materially on the issues I have to decide on this appeal.

4. It is likely that what is decided in this appeal will have a limited, if not a very limited, application to how First-tier Tribunals should approach appeals against section 16 decisions. This is for the simple reason that in most such cases by the time the appeal against the section 16 decision reaches the First-tier Tribunal it is likely that the section 16 decision will have been overset by HMRC's end of year decision under section 18 of the TCA. The three-judge panel's decision referred to above is to rule on whether overset would mean lapsed in the legal sense of the section 16 decision no longer existing and the appeal against it thus falling away. But even if this is not the case, the reality is that the appeal against the section 18 decision ought to enable the appellant to raise all issues they could have raised on the section 16 appeal unfettered by any limitation arising from the "reasonable grounds for believing" language in section 16.

5. The reason why the section 16 appeal still has relevance in these proceedings is because HMRC has positively declined to make the section 18 decision for the relevant tax credits year. That has been done expressly to enable the Upper Tribunal to rule on what therefore, at least for the time being, remains a live and important issue.

6. Whatever the result on this appeal to the Upper Tribunal, however, a decision under section 18 of the TCA will still need to be made by HMRC in respect of the appellant's entitlement to working tax credit for the tax credit year 2013/2014, and the appellant will then have a separate right of appeal to the First-tier Tribunal, if she so wishes,

against that section 18 decision. Depending on the decision in of the three judge panel in CTC/1938/2016 and CTC/3228/2015, it may be that the section 18 decision that is to be made will have the effect of lapsing the section 16 decision in issue on this appeal and the appeal against it, with the consequence that there will be no section 16 appeal for the First-tier Tribunal to decide on my remittal of this appeal. I am satisfied, however, that anything that is said by the three judge panel in its decision in CTC/1938/2016 and CTC/3228/2015 is very unlikely to touch on the key issue with which this appeal is concerned, namely the scope of the decision under section 16(1) of the TCA. It is for that reason that I have not further delayed this decision to await the decision in those appeals.

Relevant factual background

7. In order to understand why section 16 of the TCA is of importance on this appeal it is necessary to sketch in the necessary factual background.

8. The appellant was awarded working tax credit for the 2013/2014 tax credits year amounting to £2559.80. As I will explain below when setting out the relevant law, that was a decision making an award under section 14 of the TCA. This followed a similar award in the 2012/2013 tax credits year, at the end of which the appellant was sent a notice pursuant to section 17 of the TCA. This required her to confirm or update her circumstances and was treated as a claim for working tax credit for the following year. The section 17 notice and the appellant's reply to it is not in the appeal bundle. However, it would seem from the information given on the tax credit award notice for 2013/2014 (which is in the Upper Tribunal bundle but was not in the bundle of papers put before the First-tier Tribunal by HMRC) that the appellant in reply to the section 17 notice had said that she was continuing to work 30 hours a week, that she had earned £6,800 in the tax credits year 6 April

2012 to 5 April 2013, and that she expected to earn £6997.20 in the year 2013/2014.

9. As HMRC told me, it is very likely, if not certain, that this section 14 award for 2013/2014 was made by a computer, without any human involvement, on the basis of the information provided in the reply to the section 17 notice. Such computerised decision making is, or at least was, a common occurrence. It is unclear whether the same occurred in the tax credit year 2011/2012 when the appellant made a claim for and was awarded working tax credit from 19 July 2011, though it seems likely that this was the case.

10. On 20 September 2013 HMRC wrote to the appellant. This letter was before the First-tier Tribunal. This letter said that HMRC had:

> "selected your award for a check because the information you have given is not the same as the information we hold about you……Our information suggests you are not working enough hours per week to meet the criteria for working tax credit. Your tax credit award is based on you working at least 30 hours each week. You told us that you earn £6800.00 and work 30 hours a week. This amount does not support the hours you have stated. If you disagree with our information, please contact us to give us the correct information….If you agree with our information, you need not do anything…..**If we do not hear from you by** 4 October 2013, **we will amend your tax credits award to reduce or remove the award for Working Tax Credit**".

11. This would seem at least in large part, if not entirely, to be a computer generated letter, or at least based on some form of fixed template. The "information we hold about you" was, as I understand it, at least in part, and perhaps no more than, that the national minimum wage in 2013 was set at £6.31 per hour and on that basis working for 30 hours per week ought to have provided the appellant with a weekly wage of £189.30 and an annual income in excess of £6800 or £6997.20. Quite why this key information as to the minimum wage could not have been made clear in the 20 September 2013 letter has not been explained.

12. I say "perhaps no more than" in the preceding paragraph deliberately. HMRC's written response to the appeal provided to the First-tier

Tribunal refers to the information it held at the time of this letter as consisting of "screen prints taken from HMRC's Pay as You Earn (PAYE) system which shows the income earned by [the appellant] as declared by her employers for the tax year 2013-2014 up to December 2013. These prints show that [the appellant] had earned £152.13 from one employment in the period April 2013 to December 2013, and £1161.03 in her second employment for the same period". The appeal response to the First-tier Tribunal then continued "As this amount is well below the National Minimum Wage of £6.31 per hour if the hours declared by [the appellant] (30 per week) are to be believed, this led to HMRC opening their enquiry" (my underlining added for emphasis). The problem with this narrative is that it is difficult, if not impossible, to see how the enquiry could have been opened in September 2013 and then completed before the date of the letter of 31 October 2013 on the basis of evidence which could only have come into existence by December 2013. Indeed the screen print evidence attached to HMRC's appeal response to the First-tier Tribunal shows earnings paid up to 16 December 2013, yet the decision under appeal to that tribunal is dated 4 November 12013 and was appealed on 19 November 2013.

13. It would appear, therefore, that the evidence of the appellant's actual earnings - as opposed to a calculation based on the stated 30 hours worked per week, the minimum wage and the figure(s) the appellant gave for her annual earnings - can have played no part in HMRC's enquiry, let alone the decision it came to on that enquiry.

14. The appellant said she did not get HMRC's letter of 20 September 2013. In any event, she did not reply to it. This led to her being sent another letter by HMRC, on 31 October 2013. This letter said, so far as is relevant:

> "We have not received a reply to our letter and so we have completed our checks without it. We will now amend your tax credits award for the year to 5 April 2014 to show that you are now not working. If we have paid you too much tax credits, you will need to pay them back.

> We will send you a decision notice. This explains your tax credits award and your right to appeal if you do not agree with it."

Again, this letter is not as helpfully worded as it might have been. First, it contains no information about the "checks" HMRC had "completed". Second, the language used in the second sentence is ambiguous as it could mean by the use of the phrase "no longer working" that the award was being amended only with effect from the end of October 2013. Third, and despite HMRC's appeal response to the First-tier Tribunal's attempt to suggest this letter detailed the decision of HMRC to terminate the appellant's working tax credit award with effect from 6 April 2013, this is not the section 16 decision the appellant appealed. That decision, dated 4 November 2013, does not appear anywhere in the papers, thus evidencing again, by absence, HMRC's failure to meet its obligations under rule 24(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008: see paragraph 26 of *DG –v- HMRC and EG* (TC) [2016] UKUT 0505 (AAC).

15. The appellant's letter of appeal is included in the papers. This was written against both the 31 October 2013 letter and the decision letter of 4 November 2013. The appellant's grounds of appeal were:

> "……you presume I am not working. I currently work 30 hours per week for only £6800 per year[.] I know this is a low income but I do it as this is better than nothing and am trying to get a job on a higher salary. I work for a family member and that's all they can pay me……..".

16. The above in substance constituted the totality of the documents and evidence put before the First-tier Tribunal on the appeal. The appeal response of HMRC did, in fairness to it, set out that the basis of its decision was section 16 of the TCA. It argued that based on the PAYE evidence HMRC had reasonable grounds for believing that the appellant had never been entitled to working tax credit in the tax credit year 2013/2014 because she was not working sufficient hours each week.

17. The appellant did not seek an oral hearing of her appeal, nor did HMRC seek such a hearing. The appeal was therefore decided on the papers alone. It was disallowed. The essence of the First-tier Tribunal's reasons for upholding HMRC's decision was because the total income declared on the PAYE records was so small that it was, on the balance of probabilities, unlikely that the appellant could have been working for not less than 30 hours a week. In the course of seeking to challenge the First-tier Tribunal's decision the appellant said:

> "....In my defence I worked on a lower rate as that was the only job I could get at the time. Working for a lower amount is better than nothing at all it was for a family member. The HMRC knew this when I applied for Working Tax Credit[1] and granted it to me which topped up my wage they actually agreed to it and then down the line want the money back off me. I am currently unemployed as that job came to an end in January 2014.....I have no further evidence that I can provide as my employer is working abroad now and I have no contact details....".

18. In its reasons for decision the First-tier Tribunal adopted the reasoning in its decision notice as summarised in the previous paragraph and added "....on the facts before it, the Tribunal were not persuaded that she was working 30 hours or more a week at the material time".

19. I then gave the appellant permission to appeal against the First-tier Tribunal's decision on the grounds set out in paragraph 2 above.

Relevant law

20. As I have already commented in the *DG* case referred to above, a general conceptual difficulty with the TCA, particularly for those versed in traditional social security adjudication, is that "entitlement" to either working or child tax credit is something which only arises at the end of

[1] In essence, it is because the appellant may be implying here that HMRC knew at an earlier stage in her claims for working tax credit that she was working for 30 hours a week for less than the minimum wage that has led me to remit the appeal for further investigation and fact finding by the First-tier Tribunal.

the tax year for which any award has been made: see sections 17 and 18 of the TCA. What is legally in place during the course of the tax year is simply an "award" of tax credit: per section 14 of the same Act. However, as Upper Tribunal Judge Ward explained in paragraphs 28 and 29 of *ZM and AB –v- HMRC* (TC) [2013] UKUT 547 (AAC); [2014] AACR 17:

> "28.....The introduction of tax credits was a significant change of approach, reflected not only in the allocation of responsibility to HMRC rather than to the Department for Work and Pensions, but in the adoption of a host of techniques with their origins in tax law and administration rather than those of social security. Rather than a rigorous decision-taking process in which benefit is awarded on a weekly basis, tax credit awards are typically made for a year at a time. They are made on effectively an interim basis, with ensuing adjustment, using different techniques from the tightly circumscribed techniques of revision and supersession which lie at the heart of social security decision-taking. Where section 12(1)(a) of the 1998 Act adopts for benefit claims the approach that an appeal lies against any decision on a claim for benefit unless excluded, section 38 proceeds by way of conferring a right in respect of a specific list of types of decision. If an appeal is made, HMRC has the power to settle it acting under section 54 of the Taxes Management Act 1970, whereas the Department for Work and Pensions has no such power.
>
> 29. In my view the overall scheme of the tax credit legislation is such that it is impossible to infer on a general level any continuity of approach between social security and tax credits and any similarity of language there may be is only a reflection of the need to use ordinary English words to describe processes of claiming and deciding which are necessarily common to any situation where an individual is seeking payment of a cash sum from the State....."

21. The words of Mr Commissioner Jacobs (as he then was) in paragraph 32 of *CTC/2662/2005 and CTC/3981/2005* are of particular relevance to understanding how "entitlement" works under the TCA.

> "……..entitlement is only decided under section 18 after the end of the tax year and following a section 17 notice. However, that does not mean that entitlement is irrelevant before that. All that section 18 does is to *decide* on entitlement. Entitlement can still be a relevant concept before that decision. Broadly speaking, awards reflect the claimant's likely entitlement on the basis of the information presently available, assuming that it is accurate and complete and does not change. The language of section 15 reflects this. It refers to 'the maximum rate at which a person or persons *may* be entitled to a tax credit'. The language of section 16 is

> perhaps less appropriate. It requires a comparison between the award and the claimant's entitlement. However, it only applies if the decision-maker had reasonable grounds to believe that they may not be correctly reflected by the existing award. There is, therefore, nothing incompatible between (i) the references to entitlement in sections 15 and 16 and (ii) the fact that entitlement is only decided at the end of the tax year."

22. Turning then to the general scheme for claims and decisions under the TCA, section 3(1) and (2) of that Act provide as follows:

> "3.-(1) Entitlement to a tax credit for the whole or part of a tax year is dependent on the making of a claim for it.
>
> (2)Where [HMRC] —
>
> (a) decide under section 14 not to make an award of a tax credit on a claim, or
>
> (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."

The phrase "tax year" is defined by section 48(1) of the TCA as meaning "a period beginning with 6th April in one year and ending with 5th April in the next".

23. The annual focus of the tax credits scheme is emphasised by section 5 of the Tax Credits Act 2002, which deals with the period of awards. Section 5 provides:

> "5.-(1) Where a tax credit is claimed for a tax year by making a claim before the tax year begins, any award of the tax credit on the claim is for the whole of the tax year.
>
> (2) An award on any other claim for a tax credit 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.
>
> (3) Subsections (1) and (2) are subject to any decision by [HMRC] under section 16 to terminate an award."

24. Section 14 of the same Act is concerned with what its heading calls "Initial decisions", and provides as follows:

> "14.-(1) On a claim for a tax credit [HMRC] must decide—
>
> (a) whether to make an award of the tax credit, and
>
> (b) if so, the rate at which to award it.
>
> (2) Before making their decision [HMRC] may by notice—
>
> (a) require the person, or either or both of the persons, by whom the claim is made to provide any information or evidence which [HMRC] consider they may need for making their decision, or
>
> (b) require any person of a prescribed description to provide any information or evidence of a prescribed description which [HMRC] consider they may need for that purpose,
>
> by the date specified in the notice.
>
> (3)[HMRC]'s power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate."

The effect of regulations 11 and 12 Tax Credits (Claims and Notifications) Regulations 2002 enables a reply made by a claimant to an end of year notice under section 17 of the TCA to be treated also as a claim for tax credits for the following year, which then calls for a section 14 decision for that next year.

25. Awards of tax credits once made under section 14 can only be addressed in-year under either sections 15 of 16 of the TCA. Section 15 concerns increases in tax credit awards in-year based on notified change of circumstances made in year. It has no application to this case. The only other basis for changing awards within the year is section 16, the terms of which I have set out above and do not repeat here.

26. By way of contrast, sections 17 and 18 of the TCA address the mechanisms by which a claimant's entitlement to tax credits for the

year is decided at, or usually after, the end of that tax year. Thus, section 18(1) provides that after giving a notice under section 17, HMRC must decide whether the person was entitled to the tax credit and, if so, the amount of the tax credit to which they were entitled for the tax year.

27. The decisions against which there is a right of appeal are dealt with in section 38 of the TCA. This provides, so far as is relevant for present purposes, as follows:

> "**38 Appeals**
>
> (1) An appeal may be brought against—
>
> (a) a decision under section 14(1), 15(1), 16(1), 19(3) or 20(1) or (4) or regulations under section 21,
>
> (b) the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under that section,..."

28. Completing the legislative jigsaw on decision making and appeals, section 23 of the TCA provides so far as is relevant that:

> "23 **Notice of decisions**
>
> (1) When a decision is made under section 14(1), 15(1), 16(1), 18(1), (5), (6) or (9), 19(3) or 20(1) or (4) or regulations under section 21, [HMRC] must give notice of the decision to the person, or each of the persons, to whom it relates.
>
> (2) Notice of a decision must state the date on which it is given and include details of any right to appeal against the decision under section 38....."

29. For the purposes of this appeal the substantive provisions concerning entitlement to working tax credit are contained in section 10 of the Tax Credits Act 2002 and the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002. The former provides, so far as is relevant as follows:

> "10.-(1) The entitlement of the person or persons by whom a claim for working tax credit has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work.

(2)Regulations may for the purposes of this Part make provision—

(a) as to what is, or is not, qualifying remunerative work, and

(b) as to the circumstances in which a person is, or is not, engaged in it.

(3) The circumstances prescribed under subsection (2)(b) may differ by reference to—

(a) the age of the person or either of the persons,

(b) whether the person, or either of the persons, is disabled,

(c) whether the person, or either of the persons, is responsible for one or more children or qualifying young persons, or

(d)any other factors."

30. The main conditions of entitlement are then mapped out in regulation 4 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002.

"**Entitlement to basic element of Working Tax Credit: qualifying remunerative work**

4.—(1) Subject to the qualification in paragraph (2), a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies all of the following conditions.

First condition

The person—
(a) is working at the date of the claim; or
(b) has an offer of work which he has accepted at the date of the claim and the work is expected to commence within 7 days of the making of the claim.....

Second condition

First variation: In the case of a single claim, the person.....

(c) is aged at least 25 and undertakes not less than 30 hours work per week.....

Third condition

The work which the person undertakes is expected to continue for at least 4 weeks after the making of the claim or, in a case falling within sub-paragraph (b) of the first condition, after the work starts.

Fourth condition

The work is done for payment or in expectation of payment.

> (1A) For the purposes of interpretation….
> (a) Paragraphs (3) and (4) provide the method of determining the number of hours of qualifying remunerative work that a person undertakes.
>
> (3) The number of hours for which a person undertakes qualifying remunerative work is—
>
> (a) in the case of an apprentice, employee or office-holder the number of hours of such work which he normally performs—
>
> (i) under the contract of service or of apprenticeship under which he is employed; or
>
> (ii) in the office in which he is employed….or
>
> (c) in the case of a person who is self-employed, the number of hours he normally performs for payment or in expectation of payment.
>
> This is subject to the following qualification.
>
> (4) In reckoning the number of hours of qualifying remunerative work which a person normally undertakes—
>
> (a)any period of customary or paid holiday, and
>
> (b)any time allowed for meals or refreshment, unless the person is, or expects to be paid earnings in respect of that time,
>
> shall be disregarded."

31. Distilled to their basics as relevant to this appeal, these conditions therefore treated the appellant as being engaged in qualifying remunerative work if, and only if, she was in work at the date of claim (for the tax credit year in question) and, as a single person aged over 25 with no children and no physical or mental disability, was undertaking work for not less than 30 hours per week, that work was expected to continue for at least four weeks and was done for payment or in expectation of payment. Furthermore, the test for assessing the number of hours of work for which a person undertakes qualifying remunerative work is, so far as is relevant to this appeal: "the number of hours of work which [she] normally performs under the contract of service under which [she] is employed" (my underlining added for emphasis), disregarding any period of customary or paid holiday.

32. It is perhaps noteworthy that there is nothing in the statutory scheme which excludes work that is paid at less than the minimum wage from being qualifying work for working tax credits purposes. However, as HMRC stressed, it is a criminal offence for an employer to pay an employee less than the minimum wage. It is therefore likely to be appropriate for a decision maker to take as their starting point the assumption that an employer would not be acting illegally and would be paying their employee(s) the national minimum wage.

Discussion and conclusion

Weekly hours of work

33. Before turning to consider the correct application of section 16 of the TCA, I should first address how the number of hours of work are to be assessed under the statutory provisions referred to immediately above. This arises out of a point I raised in directions on the appeal. In the directions I raised a hypothetical case of a person who claims working tax credit and provides credible evidence when making the claim that she will be working for 30 hours per week *on average* across the year, but in September of the year it is evidenced that the claimant has only worked 20 hours a week for the weeks since April of that year. I stated that on its own this might provide reasonable grounds for believing under section 16 that the claimant is not working the necessary 30 hours a week. However, I asked whether if the evidence provided with the original claim showed that the claimant was on a contract of employment where for the first six months she was to work for 20 hours a week and then these hours would rise to 40 per week for the following 6 months, would that evidence undermine the reasonableness of HMRC's belief in September that the 30 hours per week was not going to be met in the tax credit year. This was in the context of addressing whether evidence provided with the claim and under which the section 14 decision had been made needed to be disclosed with HMRC's appeal response to the First-tier Tribunal under

rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 as being evidence relevant to the reasonableness of the belief under the section 16 decision.

34. I will return later to address more generally the issue of the relevance of evidence that led to a section 14 decision to a later section 16(1) decision and its reasonable belief test. HMRC argued that the hypothetical example I posited could not arise under the TCA. It argued that the example wrongly inferred from the yearly basis within which the entitlement to tax credits *may* arise as somehow dictating that the entitlement has to be spread across the whole year. Under section 3(1) of the TCA entitlement to a tax credit can be for the whole or *part of* a tax year and therefore entitlement may lawfully arise for part of the year only. Moreover, the terms of section 5 of the same Act did not militate against this because the award made for the whole of the tax year under section 5(1) can still only be made if the conditions for making an award are satisfied at the time the claim is made and for the period for which the claim is made.

35. More particularly, entitlement to working tax credit is, per section 10(1) of the TCA, dependent on the claimant being engaged in remunerative work. And, if I understood HMRC's argument correctly, under regulation 4 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 this section 10(1) test is satisfied in a case such as this appeal only if the claimant is "normally working" for not less than 30 hours per week at the date of claim (or they have accepted an offer of such work at the date of claim and that work is expected to commence within 7 days of making the claim), and that work is expected to continue for four weeks after the making of the claim. In support of this argument HMRC sought to rely on the view of Upper Tribunal Judge Levenson in *CTC/4372/2014* where, agreeing with *CTC/2103/2006*, he said:

> "The regulations do not provide much assistance when the hours of work fluctuate but this issue was considered Deputy Commissioner White……in CTC/2103/2006. He rejected the notion that the weekly number of hours worked should be calculated by taking all of the hours worked in a particular year and dividing them by the appropriate number of days or weeks. He also held that there was no requirement that [30] hours must be worked each and every week without exception. The question is what hours are normally worked. This is a question of fact to be derived from the evidence……".

36. Applying these provisions to the hypothetical example I raised HMRC argued showed the error in it and why the hours worked were not to be averaged across the year. At the time the claimant in my example made the claim for working tax credits in April of the tax credit year she was not normally working for not less than 30 hours at the date of claim; that circumstance only arose in September of that year. It was not, therefore, correct to say that when working for 20 hours per week at the date of claim "the number of hours of work which the claimant *normally* performs under the contract of service under which [she] is employed" was not less than 30 hours per week. The claimant's remedy would be to reclaim the working tax credit when her hours had increased to (on this example) at least 30 hours per week.

37. I see much force in this argument and would not wish to suggest it was incorrect, especially in the context of a case where on the facts there is no issue about averaging fluctuating weekly hours of work. On the evidence before me the appellant's case has always been that she worked 30 hours each week (but for less than the minimum wage). I would, however, make the following short observations. First, the section 10(1) test of "being engaged in qualifying remunerative work" does not itself set any minimum number of hours per week. Second, the *First condition* under regulation 4(1) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 does not require that the work done at the date of claim is of a specified minimum number of hours for that week. Third, if a claim is made before the start of the tax year the effect of sections 3 and 5 of the TCA is arguably that any award is for the whole of the tax year, and the entitlement at

the end of the tax year under section 18(1) is for the tax year, thus suggesting that the assessment of hours worked may have an annual dimension. Fourth, the provisions of regulation 7 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 concerning workers in schools and others with a recognisable cycle of employment of one year may be said to point towards a one year assessment period for determining the number of house worked, at least for those people to whom that regulation applies, and stands against (again for such workers) a narrow focus on the hours worked in the week of claim (especially if such a week falls within school holidays). Fifth, it is not clear to me that the summary of *CTC/2103/2006* given in *CTC/4372/2014* is necessarily wholly accurate. I say this because in *CTC/2103/2006* what was said was:

> "27. The complex way the tax credits system works means that the question of the appellant's normal hours can be revised at the end of the period of the award when the appellant's entitlement for that year is being finally determined.
>
> 30. In my view the question to be asked is whether, having regard to the hours worked each week, a person can properly be said to normally work for at least [thirty] hours a week. The issue of the number of hours worked each week, and whether the overall pattern of work constitutes normally working for at least [30] hours a week are questions of fact for determination by the tribunal. The use of the word normally means that there is no requirement that the appellant works at least [30] hours in every week.
>
> 32. I agree with the following proposition put to me by [HMRC]:
>
> > "....By following this process, a rough picture of the claimant's working pattern can be obtained and an overall view taken of whether the hours normally worked over the period of the claim were sufficient."
>
> 33. There is, in my judgment, no hard and fast rule as to how many weeks in the year (or part of a year where a claimant starts work during the course of the year) must be weeks in which a person works at least [30 hours] for the conclusion to be reached that the person normally works for at least 16 hours a week. All the circumstances must be taken into account, including the expectations of the appellant and her employer as well as the actual hours worked each week. What is required is a common sense judgment reflecting an overall view of the pattern of the appellant's weekly hours of work over the year (or part of the year) in question." (my underlining added for emphasis)

Again, this might suggest support for an analysis of the weekly hours worked across the year.

38. On the other hand, the terms of regulation 7D(1)(e) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (dealing with the four week "run on", in which a claimant is treated as being engaged in qualifying remunerative work, inter alia, after starting to work for *less* than 30 hours a week); the *Third Condition* under regulation 4 of the same regulations requiring the work which the person undertakes [at not less than (in this case) 30 hours a week] to be expected to continue for at least four weeks; the fact that special provision **is** made for seasonal and term time workers under regulation 7; and the requirement in regulation 21(2)(d) of the Tax Credits (Claims and Notifications) Regulations 2002 on a claimant to notify HMRC within one month of ceasing to undertake work for at least 30 hours per week, all might point to a narrower focus in a non-term time worker case on the assessment of the number of weekly hours normally worked, at least in year.

39. These consideration, however, as I have said, do not apply in this case as it has been no part of the claimant's case that her hours of work varied from week to week. Her case has always been that she was working each week for 30 hours, albeit at a rate of pay below the national minimum wage.

Section 16 TCA

40. How then was HMRC and on appeal the First-tier Tribunal to approach the in-year exercise of checking and perhaps changing the tax credit as mandated by section 16 of the TCA?

41. The first point to note is that the giving of notice under section 16(2), in order to obtain evidence HMRC considers it may need for considering whether to amend or terminate the award, is separate from and not a necessary precondition for the operation of section 16(1). Section 16(1)

may therefore operate even where no section 16(2) notice has been served.

42. A contrast may be said to be drawn within section 16 of the TCA between there needing to be "reasonable grounds for believing" (my emphasis) for any amendment or termination of an award under section 16(1), and HMRC only needing to "believe" that, for example, a claimant has never been entitled to tax credits for the year, in order to serve the section 16(2) notice. I do not consider the contrast here, if there is any, is intended to enable manifestly unreasonable beliefs by HMRC to lead to notices being issued requesting information: though (i) a challenge to that exercise would not arise on an appeal (as the right of appeal provided by section 38(1) of the TCA is only in respect of the section 16(1) decision), and (ii) any unreasonable belief by definition will not provide the foundation necessary for the proper exercise of section 16(1). The section 16(2) belief still has to be *that*, e.g., the claimant may never have been entitled to tax credit, and so as a rational belief must be based on, or have arisen from, matters relevant to the conditions of entitlement in respect of either tax credit. Just as importantly, the belief in s.16(2) is only, for example, that the claimant *may* have ceased to be entitled to tax credits, whereas under section 16(1) HMRC have to have reasonable grounds for believing that, using the same example, the claimant **has** ceased to be entitled to tax credits.

43. Subsections (1) and (2) in section 16 therefore apply at different stages and have different thresholds, but the belief in each has to be rationally connected with the separate but related questions with which the subsections are concerned. In the case of subsection (2) those questions are whether the rate of the tax credit may be wrong or whether the claimant may have ceased to be, or may never have been, entitled to the tax credit. With subsection (1) the issues are the same but the questions concern whether the rate of tax credit is wrong or whether the claimant has ceased to, or never was, entitled to the tax credit; albeit only on the

basis that HMRC (or the First-tier Tribunal on appeal) have reasonable grounds for believing that that is the case.

44. On this basis, in my judgment the lawful use of section 16(2) does not permit HMRC to engage in a 'fishing expeditions' in the mere hope of finding some evidence. The exercise of the notice giving power in section 16(2) has to be based on HMRC holding a rational belief that the particular claimant *may*, for example, have ceased to be entitled. If called upon to justify the section 16(2) notice prior to any appeal against a section 16(1) decision, HMRC would need to be able to explain the basis for its belief that the claimant might, in this example, have ceased in-year to be entitled to tax credit(s) for that year.

45. Given the history of this appeal recited above it is unclear what role, if any, section 16(2) played in the section 16(1) decision with which this appeal is fundamentally concerned. In any event, as I have already indicated the operation of section 16(1) can stand apart from any notice issued under section 16(2).

46. Before turning to the relevant caselaw, it is perhaps helpful to take stock and set as the starting point that, on the basis of the facts in this appeal, the critical section 16(1) issue was whether as at 4 November 2013 HMRC had reasonable grounds for believing that the appellant had never been entitled to working tax credit for 2013/2014.

47. The scope and application of section 16(1) was addressed first (in terms of the date order of the most relevant decisions I have been able to identify) by Mr Commissioner Williams in *CTC/4390/2004*. The relevant parts of that decision read as follows (for context, the case concerned competing claims for child tax credit by separated parents in respect of their children):

> "41 Section 16 is in permissive, not mandatory, terms, as is the information power. The decision-making power is triggered by a broad test, unlike the equivalent triggers applying to enable a decision to be superseded for most social security benefits under section 10 of the Social Security Act 1998. The Commissioners (and the tribunal) had

> the power, not the duty, to terminate F's award if they considered it to be reasonable to do so. The operation of that power must, however, be regulated by the Rules in Regulation 3.
>
> 42 The Commissioners considered it to be reasonable to stop F's award because of the claim by, and award to, M. The tribunal thought otherwise. It has, of course, on appeal, the same powers as the Secretary of State. Had the tribunal in this case concluded, in the terms of section 16, that it had considered the matter in accordance with the Rules and concluded that it was not reasonable to terminate F's award, then that may have been a decision that, if taken properly, would not be susceptible to challenge as in error of law."

48. The next authority is *CTC/3981/2005*, which I have already addressed to some extent in paragraph 21 above. It provides the most detailed consideration of section 16(1) to date and for that reason merits extensive quotation. Following on from the paragraph 32 quoted in paragraph 21 above, *CTC/3981/2005* continues to say the following of relevance:

> "33. I said that awards reflect entitlement 'broadly speaking', because decisions under sections 15 and 16 are discretionary. The decision-maker might decide to leave changes to be dealt with in the section 18 decision, for example because it is too late in the tax year to bother changing an award or because the changes are so frequent and varying in their effects that it is better to leave the award as it is until the end of the tax year. I am not saying that the Revenue would refuse to amend an award in those circumstances. I am merely making the point that it has a discretion that would allow it do so.
>
> *What is the scope of an appeal against a section 16 decision?*
>
> 34. [HMRC] began by arguing that an appeal against a section 16 decision lay only on judicial review grounds. I was doubtful about this argument. The need for reasonable grounds is a condition for amending or terminating the award; it is not a condition on the right of appeal. On general principle, an appeal to an appeal tribunal is by way of a rehearing and the tribunal is entitled to consider the case afresh (*R(IB) 2/04* at paragraph 25). That means that the tribunal must decide for itself whether there are reasonable grounds for the relevant belief.
>
> 35. The decision of the Tribunal of Commissioners in *R(H) 3/04* is some authority for an appeal being limited to judicial review grounds. However, that was in the special and very different circumstances of appeals against overpayment decisions by landlords. And it only applies to 'a right of appeal against an exercise of discretion that is non-justiciable because the relevant considerations cannot be discerned' (*CH/4234/2004* at paragraph 39).

> 36. Later, [HMRC] put a more limited argument. [It] argued that a claimant was not entitled to rely on appeal on a change of circumstances that had not been put to the decision-maker. I found this argument more persuasive. The issue for the tribunal on an appeal is whether the decision-maker had reasonable grounds for belief. If the decision-maker did not know of the change of circumstances, it cannot provide a reasonable basis for belief. Moreover, if the change was favourable to the claimant, the date from which it could be taken into account would be fixed by reference to the date of notification to the Revenue at an appropriate office (regulation 25 of the Tax Credits (Claims and Notifications) Regulations 2002). Notification to the tribunal would not be of any significance.
>
> 37. The scope of the appeal is governed and limited by its terms. It deals only with two matters: entitlement and the rate of the award. On appeal, a claimant may raise issues on either matter. In this case, the claimant could raise any issues on the decision in the box on the first page. That included issues relating to the basic structure of the calculation or the underlying calculations. But she could not raise any issue relating to matters that were outside the scope of the section 16 decision. In particular, she could not raise any issue relating to payment."

49. Lastly, I addressed section 16(1), albeit in a somewhat different context, in *SB –v- HMRC* (TC) [2014] UKUT 0543 (AAC), where I said, relevantly:

> "9. The focus thus for HMRC in its appeal response was on why it had reasonable grounds for believing that the appellant had never been entitled to tax credits (as a single person). Standing in HMRC's shoes on the appeal, that was also the focus for the tribunal: paragraph 34 of *CTC/3981/2005*. However, the test is whether there were reasonable grounds for the belief at the time the section 16 decision was made: see paragraph 36 of *CTC/3981/2005*. Of course, evidence that is provided after the date of the section 16 decision may still be relevant to the time the decision was made and whether there were reasonable grounds for believing at that time.
>
> 10. Given the consent as to the result that should now hold on this appeal, I do not investigate further whether the "reasonable belief" is enough to terminate the award or whether that belief must then be substantiated on the facts on the balance of probabilities so as to show that the person was, for example, never entitled to tax credits for the period for which the award had been made.
>
> 11. However, given the onus of proof rests squarely on HMRC under section 16, in my judgment the correct starting point was that it was for HMRC to make good the evidential basis for the "reasonable grounds for believing" statutory test it was seeking to rely on. Conversely, the starting point was not for the appellant to show that the award had been properly made (i.e. that she was a single

> claimant). She had an award made pursuant to section 14 of the Tax Credits Act 2002 and that award remained valid and lawful unless and until, here, properly terminated under section 16."

It is the issue raised in paragraph 10 of that *SB* that needs to be squarely confronted and answered on this appeal.

50. It was accepted by HMRC that following authority such as the Tribunal of Commissioner's decision in *R(IB)2/04* (at paragraphs 19-26 in particular), the First-tier Tribunal deciding an appeal under section 38(1) of the TCA stands in the shoes of the HMRC decision maker and gives an decision the HMRC decision maker was empowered to give under the legislation they exercised when making the decision under appeal. This in my judgement is correct as a matter of principle, notwithstanding the differences in the social security and tax credits adjudicatory regimes identified in *ZM* above. Despite those differences, there is nothing in either the Social Security Act 1998 or the TCA which sets out the powers of the First-tier Tribunal in deciding an appeal under section 12 of the former and section 38 of the latter. Consequently, all such powers have to be implied, as was recognised in *R(IB)2/04* at paragraphs 11-18. Given the unfettered right of appeal conferred by section 38(1) of the TCA, and given the recognition by section 63(8) of the TCA that the application of provisions in Part I of the Social Security Act 1998 would not be inimical to the proper working of appeals under section 38(1) of the TCA, in my judgment HMRC are right to accept that the First-tier Tribunal on appeal stands in shoes of the HRMC decision maker and exercises the same legal powers that decision maker was able to exercise when making the decision under appeal.

51. This, however, must in my judgment cut against one argument that HMRC sought to make about section 16(1). This was, if I understood the argument correctly, that although the First-tier Tribunal was required for itself to decide whether there were reasonable grounds for believing that, in this case, the appellant had never been entitled to

working tax credit in 2013/2014, the discretionary decision then as to whether to amend or terminate the award vested solely in HMRC. This argument took as its starting point that as a matter of statutory construction section 16(1) involves two decisions, or at least that there are two parts to one outcome decision. The first decision is whether there are reasonable grounds for believing that, as here, the claimant has never been entitled to tax credit. It is only if this decision is answered in the affirmative that the second, discretionary, decision arises, namely whether to amend or terminate the award, given the closing words of section 16(1).

52. I reject this argument for a number of reasons. First, it is contrary to both paragraph 41 of *CTC/4390/2004* and paragraphs 34-35 of *CTC/3981/2005*, neither of which decisions HMRC has sought to challenge on further appeal in the intervening 12 or more years. Second, it wrongly characterises section 16(1) as involving two separate decisions when on its face it only involves one decision. Third, it runs contrary to the terms of section 38(1) of the TCA which do not suggest any restriction on the First-tier Tribunal's powers: the appeal is simply against "a decision under section 16(1)". It also leaves unanswered what the First-tier Tribunal does when it holds, for example, that there were reasonable grounds for believing that the rate of the award should differ, or that a person has ceased at a point in the year to be entitled, but on a different basis and with different effects from that found by HMRC in the decision under appeal. If the First-tier Tribunal has no power to amend the award, how does it give any effective decision on the appeal? Fourth, this argument runs contrary to HMRC's acceptance that the 'standing in the shoes' and 'exercising the same powers' principles identified in *R(IB)2/04* apply to tax credits appeals. Fifth, it ignores, or does not sufficiently answer, a number of authorities in social security adjudication that had no difficulty in finding that a "discretionary" or "judgmental" decision vested in what is now the First-tier Tribunal: see, for example, *CH/1175/2002* (paragraph 4), *R(H)1/08*, *Wirral MB –v- AL* (HB) [2010] UKUT 254

(AAC) and *CJSA/1703/2006*; and note also paragraph 35 of *CTC/3981/2005* set out above.

53. I should make plain, however, that HMRC's argument on this last point did not detract from its agreement that in deciding a section 16(1) appeal the First-tier Tribunal is required to decide for itself whether there *were* "reasonable grounds for believing". It is not limited to deciding whether HMRC had such reasonable grounds.

54. I have stressed the word "were" in the preceding paragraph because a limitation is inherent in section 16(1) as it focuses on the time (i.e. the date) during the period of the award when HMRC amended or terminated the award. In this case, that was on 4 November 2013 when it made its section 16(1) decision. It was thus at that point in time that the onus was on HMRC to show what the reasonable grounds for the belief were and why the award had then been terminated or amended. On an appeal likewise, standing in the shoes of the HMRC decision maker it was for the First-tier Tribunal to decide whether as at 4 November 2013 there were reasonable grounds for believing that the appellant had never been entitled to working tax credit in 2013/2014. This explains away a concern I had at one stage as to the fate of Tax Credit (Appeals) Regulations 2002. I accept following *JI –v- HMRC* (TC) [2013] UKUT 0199 (AAC) that these regulations have not applied in Great Britain since 1 April 2009. Nothing that was said by the three judge panel in *VK –v- HMRC* (TC) [2016] UKUT 331 (AAC); [2017] AACR 3 overrules *JI* on this point. My concern as to the absence of the provisions of section 12(8)(b) of the Social Security Act 1998 was in any event misplaced as section 16(1) provides its own focus as to the date the First-tier Tribunal has to give its consideration as to when the "reasonable grounds for believing" have to be established: and see further, and to the same effect, paragraph 36 of *CTC/3981/2005*.

55. The focus is therefore on the date of the HMRC 16(1) decision. Information provided after that date cannot, by definition, have

provided any basis for the belief as it is not information which could have gone to that belief. However, Ms Ward accepted, in my view correctly, that such information might still be relevant if it went to the *reasonableness* of the belief. The example she provided was where section 16(1) had not been invoked and the claimant can show that they could have provided evidence substantiating their entitlement had they been asked to do so. As she put it "It will not be reasonable to form a belief on the basis of incomplete information". She rightly argued that this did not mean that HMRC was obliged to exercise the evidence gathering power in section 16(2) and (3) before making a section 16(1) decision. Her point here was no more than that "a decision-maker who does not ask for relevant information will take the risk of finding that his grounds for belief were not reasonable, because not fully informed".

56. The above in my judgment is sufficient to inform the basis on which a First-tier Tribunal should address an appeal against a section 16(1) decision. In short, it is for that tribunal to stand in the shoes of the HMRC decision maker and decide for itself whether there were reasonable grounds for believing either the rate of the tax credit(s) on entitlement differs from that which had been awarded or whether the appellant had ceased to be, or had never been, entitled to tax credit(s) in or for that year, and if answering in the affirmative to any of these question then deciding whether to amend or terminate the award.

57. Two points need to be stressed about the approach set out above.

58. First, the reasonable grounds for believing test is not a gateway or necessary condition to the decision maker (HMRC or First-tier Tribunal) then going on to decide in the round and on the balance of probabilities under section 16(1) whether the appellant is <u>in fact</u> not entitled to tax credits for the year or had ceased in fact to be entitled in the year. Following on from *ZM* above, tax credits adjudication, based as it is on yearly assessments, is a different statutory animal to social security benefits administered under the Acts of Parliament concerning social security benefits. Revision and supersession under sections 9 and

10 of the Social Security Act 1998 do not apply to tax credits. In revision and supersession the establishment of a ground for revision or supersession may itself be the final basis for changing entitlement to a benefit. Section 16(1) simply provides a power to interfere with the award within the course of tax year in which the decision is made. This is made plain from the closing words of section 16(1) and the language there used of deciding to amend or terminate the award. Section 16 does not empower the making of any final *entitlement* decision for that year. For that the provisions of section 17 and 18 of the TCA have to be gone through.

59. Second, and related to the first point, the focus for the First-tier Tribunal is on whether there were reasonable grounds for believing as at the decision date that the awarding decision was wrong. If that threshold is satisfied then the *award* may, but need not, be amended or terminated. Put another way, but mindful of the dangers of judicial rephrasing of statutory language, and trying to make some sense of the use of "entitled" in section 16, given that entitlement under the scheme authorised by the TCA only arises at the end of the tax year, the test is whether there are reasonable grounds for believing that at the end of the tax year the appellant will be found, in this case, never to have been entitled to tax credits for the year, or at least the period of the tax year up to the date of the section 16(1) decision. If such reasonable grounds for believing exist then, save for considerations as to whether the award should be amended or terminated, that is the end of the enquiry. It is not for the First-tier Tribunal to decide whether in fact at the end of the year the award will amended or terminated for the year

60. In terms of the above conclusions, I should say that I remain troubled by the terms of section 3(2)(b) of the TCA. Section 3(2)(b) refers to a fresh claim being needed for the tax year so as to unlock any entitlement to the tax credit(s) for any part of the same tax year in the situation where a decision is made under section 16(1) to terminate the award of a tax credit made on a claim. This prohibition on entitlement

is said to be "(subject to any appeal)". It is far from clear what effect those words in brackets are intended to have. They do, however, on their face apply in this case and that is sufficient for my not considering the issue in detail any further in circumstances of this appeal, particularly where (a) this issue was not the subject of any argument, and (b) HMRC has made clear and consistent representations that a section 18 decision will be made for the year 2013/2014 in this case. The words in brackets get out, if it is such, in section 3 do not, of course, cover where there has been no appeal made.

61. The concern in outline is that the end of year final notice duty under section 17(1) of the TCA arguably only applies where "a tax credit has been awarded for the whole or part of a tax year". If, however, the award has been terminated from the beginning of the year under section 16(1) because there were reasonable grounds for believing the claimant had never been entitled to the tax credit(s) and no further claim has been made in that year, that arguably may have the effect that a tax credit has not been awarded for the whole or a part of the year. The contrary argument may be that all that section 17(1) is looking at is whether in fact in the tax year just gone an award of tax credits was in fact made, regardless of whether it was later terminated under section 16(1). Even if this is the case, however, the decision under section 18(1) of the TCA, after the giving of the section 17(1) final notice, is concerned with whether the person was entitled to tax credit(s) for the year. But the terms of section 3(2)(b) of the TCA would seem arguably to preclude entitlement for *any part* of the same tax year where a section 16(1) termination decision has been made in the year unless a fresh claim is made.

62. The answer may lie in HMRC never in fact terminating awards under section 16(1) even in cases where there are reasonable grounds for believing the claimant has never been entitled to the tax credits for the tax year, but instead amending the award and replacing it with a nil award from the outset of the year. Section 16(1) does not dictate that in

such cases a termination decision must be made. If unappealed section 16(1) termination decisions would have the effect of blocking out the application of the full year entitlement consideration under section 18(1), it may be that in recognition of this HMRC has sensibly taken the amending to a nil award approach to get round this effect.

63. Reverting finally to the First-tier Tribunal's decision in this appeal, HMRC accepted that it had erred in law by not applying the reasonable grounds for believing test under section 16(1) and instead wrongly asked itself whether the appellant was on the evidence entitled to working tax credit. It had also erred in law in relying on the PAYE evidence because on the evidence available that could not have been before the decision maker when they came to the decision on 4 November 2013 and so could not have formed any basis for a belief held on that date. I agree with all of that. However, HMRC argue these errors of law were not material to the decision the First-tier Tribunal arrived at because on any rational analysis of the earnings declared by the appellant herself for the previous year and the national minimum wage figure, she could not have been normally working for 3o hours a week.

64. I see the force in this argument, up to a point. However I remain concerned that at least one part of the appellant's evidence and argument after the First-tier Tribunal's decision was made might suggest that she had provided HMRC at an earlier stage or on an earlier claim with evidence that she was working for less than the minimum wage, for a relative, but for 30 hours each week, and it was that evidence that had led to her being awarded working tax credit on an earlier claim (see paragraph 17 above). This I appreciate may seem slight. However in a context where there was no disclosure by HMRC as to the evidence that had led to the earlier successful claims for working tax credit, it seems to me that this evidence (if it exists) would be relevant to the reasonableness of HMRC's later belief that the appellant was not working for 30 hours a week. I also bear in mind

here that the section 18 decision once made is likely to render all of these points redundant.

65. The First-tier Tribunal's decision dated 21 August 2014 is therefore set aside. The Upper Tribunal is not in a position to re-decide the first instance appeal. Subject to the effect of any supervening section 18 decision, the appeal will have to be re-decided completely afresh by an entirely differently constituted First-tier Tribunal (Social Entitlement Chamber) at an oral hearing. The appellant is strongly encouraged to attend that hearing. HMRC is required to provide the new First-tier Tribunal with the further submission directed under direction (3) above.

66. The appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether her appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 12th May 2017