UPPER TRIBUNAL CASE NO: CCS/0626/2017

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC140/16/00054, made on 14 October 2016 at Colchester, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. A short procedural history

1. This appeal arises from a decision made by the Secretary of State on 23 November 2015 on the father's application for a supersession of the decision fixing his liability for child support maintenance in respect of his daughter, Esme, in light of redundancy. The Secretary of State fixed his liability at £31.71 a week from the effective date of 22 July 2015. The father appealed against that decision to the First-tier Tribunal, which dismissed his appeal, but gave him permission to appeal to the Upper Tribunal. The Secretary of State's representative has supported the tribunal's decision. The mother has not made any comments relevant to the issue that I have to decide and the father's representative has limited himself to saying that an oral hearing is not required.

B. How the Secretary of State decided on the father's liability

2. As the father was receiving an award of disablement benefit, he was liable to pay the flat rate of child support maintenance, which is £5 a week. That is the effect of paragraph 4(1)(b) of Schedule 1 to the Child Support Act 1991 and regulation 4(1)(ix) of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 (2001 SI No 155). This was supplemented by a variation under regulation 19 of the Child Support (Variations) Regulations 2000 (2001 SI No 156). That regulation was applied to bring into account the amount of the father's police pension and injury benefit. Reducing it to the simplest terms, that pension would have been taken into account under paragraph 15 of the Schedule to the Calculation Regulations had the father not been receiving disablement benefit. Paragraph 15 provides:

> 15. This paragraph applies to any periodic payment of pension or other benefit under an occupational or personal pension scheme or a retirement annuity contract or other such scheme for the provision of income in retirement whether or not approved by the Inland Revenue.

C. The core issue

3. The outcome of this appeal requires me to decide how the injury benefit should be treated for the purposes of the child support legislation. The relevant legislation is the Police (Injury Benefit) Regulations 2006 (SI No 932). It provides for a further payment, in addition to a pension payable under the Police Pension Regulations 2006 (SI No 3415). Regulation 11 of the former Regulations provides that injury benefit is payable to 'a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty'.

D. The caselaw

R(CS) 2/00 – Wakefield v Secretary of State for Social Security

4. This case concerned a firefighter. Mr Commissioner Angus decided that the father's ill health and injury pensions both fell to be included in his income for the purposes of the child support scheme in force at the time, which was the original 1993 scheme. The Court of Appeal dismissed the father's appeal. the Court gave two reasons for its decision. All three judges agreed that the injury pension was not compensation for the injury – if it had been, it would have been disregarded. The reasoning on this was set out by Wilson J:

> 21. The father argues, incontrovertibly, that his entitlement to the injury pension is squarely founded upon his injury. But does it follow, as he submits, that the pension must be 'compensation' for the injury? Even if, on the day after leaving the fire service, he had obtained employment as highly remunerated as his former employment, he would still have been entitled to the injury pension. The pension, although calculated in part by reference to the degree of his disablement, was not calculated by reference to his likely loss of income or to any expense relating to the injury. The injury was simply the trigger for an extra pension. When entitlement to a pension arises, let us say, because the pensioner has reached the age of 65, can the pension be described as compensation for his having reached that age?
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> 22. I also consider that, in conceding that the ill-health pension falls to be taken into account, the father's position is illogical. The ill-health pension was founded upon his disablement which, in turn, was wholly attributable to the injury. But for the injury, neither pension would be payable. The question, in both cases, is whether they represent compensation for it.
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> 23. The Commissioner noted that, by virtue of regulation 7(1)(b) and paragraph 6(2) of schedule 1 to the regulations, a disablement pension paid to an absent parent under s. 103 of the Social Security Contributions and Benefits Act 1992 would fall to be taken into account in the calculation of N. By virtue of s. 94 of the Act of 1992, such a pension is payable only where the disablement arises out of personal injury caused by an accident in the course of employment. The Commissioner said - and I agree - that it would be anomalous that, while social security payments referable to disablement arising in such circumstances should be brought into account, analogous

payments under occupational schemes should not be brought into account; and that such was a legitimate aid to the construction of paragraph 5.

24. The Commissioner also noted, however, that, by paragraph 9(b) of schedule 2 to the regulations, an increase of disablement pension under ss. 104 or 105 of the Act of 1992 falls to be disregarded in the calculation of N. Increases are payable under those sections to a pensioner who by reason of the disablement requires constant attendance by another person. Other parts of paragraph 9 require disregard of other social security payments which arise out of the need of a disabled pensioner for a substantial degree of such attendance. Equally, paragraph 8 requires disregard of a disability living allowance which, under ss. 71-73 of the Act of 1992, is payable to someone so severely disabled as to require a significant degree of care, or assistance in relation to mobility, from another person. In my view these exclusions are relevant to the scope of the exclusion for 'compensation for personal injury' outside the realms of social security in paragraph 5.

25. In his argument the father introduces an analogy with the law of ancillary relief following divorce set out in I. 23-25 of the Matrimonial Causes Act 1973. He submits that a claim for ancillary relief would not be assessed by reference to any compensation or damages for personal injury received by one party because such would be regarded as personal to that party. With respect, the submission is mistaken. In proceedings for ancillary relief the law, which I collect primarily from the decision of this court in *Wagstaff v. Wagstaff* [1992] 1 WLR 320, is in my view as follows:

(a) an occupational pension of each of the two forms paid to the father in this case should be taken into account, without qualification, pursuant to s. 25(2)(a) of the Act of 1973;

(b) any sum paid, whether within an award of special damages or otherwise, in order to compensate a party for loss of earnings caused by injury should also be taken into account, without qualification, pursuant to the same sub-section; the court would regard it as illogical that, while earnings should be taken into account and thus be fully available for the support of the family, a sum paid by way of compensation for their loss should be treated otherwise;

(c) any sum paid, whether within an award of special damages or otherwise, in order to compensate a party for the extra expense in looking after himself caused by injury, i.e. loss of amenity, should also be taken into account pursuant to the same sub-section, subject to the fact that he will have an extra 'financial need' which should also be taken into account pursuant to s. 25(2)(b); these factors will not necessarily cancel out; and

(d) any sum paid, whether within an award of general damages or otherwise, in order to compensate a party for pain and suffering caused by injury should also be taken into account pursuant to the same sub-section, subject to the fact that, save perhaps indirectly, the pain

> and suffering fall to be borne by him alone, such being a 'circumstance' which should also be taken into account pursuant to s. 25(1); as before, these factors will not necessarily cancel out.
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> 26. I am clear that the effect of paragraph 5 of the regulations is to require the assessment for the purposes of the Child Support Act 1991 to depart from the court's assessment of claims for ancillary relief in respect of payments of the types referred to in (c) and (d) of the preceding paragraph of this judgment. Amounts paid by way of compensation for loss of amenity and for pain and suffering caused by personal injury must be altogether disregarded for the purposes of the Act of 1991. The grey area relates to payment of the type referred to in (b), namely of sums paid by way of compensation for loss of earnings. Arguably the words of paragraph 5 require in that respect a disregard which would be wholly illogical. Fortunately, however, the present case concerns payment of the type referred to in (a). In my view, for the reasons given, payments made by reason of injury under an occupational pension scheme do not represent 'compensation' for it. The manner in which the Inland Revenue chooses to treat the injury pension is irrelevant.

In addition, Peter Gibson LJ added:

> Mr. Wakefield has had the assistance of a solicitor in preparing his skeleton argument, and I would pay tribute to the lucid way in which the argument has been set out. He has submitted that the Commissioner misdirected himself, in particular because he had read into paragraph 5 in schedule 2 to the Child Support (Maintenance Assessment and Special Cases) Regulations 1992, words which are not there. He says it would have been open to Parliament to define compensation as being a payment from a person liable in tort to make reparation, but it did not do so. He points out that he received his injury pension solely because of his injury, and he says that had he not been injured he would not have received the injury pension.
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> The question turns on the true construction of paragraph 5 of schedule 2 set within the scheme of the regulations. I do not think the fact that the injury pension would not have been payable but for the injury means that the injury pension was 'compensation for personal injury'. Those words naturally connote the periodic payments payable by reason of liability for the personal injury, rather than any payment consequential on the injury.
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> Further, the scheme of the regulations seems to me to support the view that the income which would have been received by the parents, had they continued to live together, is what must be taken into account subject only to specific disregards. Those disregards require the leaving out of account of, for example, payments for particular purposes which would not have been part of the income of the family unit. It cannot be said that the injury pension would have been outside the income of the family unit.

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5. In this case, also brought under the 1993 scheme, Mr Commissioner Williams decided that the reasoning in *Wakefield* applied to the comparable police pension scheme:

> 29. Paragraph 5 of Schedule 2 to the MASC Regulations directs that the following be disregarded in any child support maintenance assessment:
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> 'Any compensation for personal injury and any payments from a trust fund set up for that purpose.'
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> 30. In *Wakefield* the Court of Appeal was asked to overturn a decision by Commissioner Angus that this did not apply to the pension of a fireman who had taken early retirement because of permanent injury. The firefighter concerned received a pension that consisted, as did that of A, in part of a basic pension and in part of a tax-free injury pension. Commissioner Angus took the view that the pension was within the scope of paragraph 9 of Schedule 1 and not within the scope of paragraph 5 of Schedule 2. That view was confirmed unanimously by the Court of Appeal. I do not need to set out any extended analysis of that decision here. Their lordships confirmed both the narrower ground for his decision of the interpretation of the statutory language put forward by Commissioner Angus, and also the broader ground of the purpose of the child support maintenance regulations and scheme.
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> 31. Further, the point in *Wakefield* arose again in another decision of Commissioner Angus taken by him shortly after that one but before it went to the Court of Appeal. This was in CCS 3326 1997. That was later reported as R(CS) 5/00 after it had gone to the Court of Appeal on another issue as *Secretary of State for Social Security v Maddocks*. The Commissioner commented on the point at issue in R(CS) 2/00. He noted that his decision in R(CS) 5/00 was postponed pending an oral hearing in the other case. This was in part because the submissions made for the Secretary of State in the two appeals conflicted with each other. He went on to comment 'Although CCS 3510 1997 concerned a fireman's pension the principle of that decision applies to any retirement pension…'. The case went to the Court of Appeal on another ground and the Court did not comment on this issue. It should be noted, however, that this decision of the Court of Appeal was made after the other decision of that Court and therefore the failure to take the point in the later case suggests that the Secretary of State, in any event, accepted the *Wakefield* decision as of general effect.
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> 32. At the hearing before me A strongly contended that *Wakefield* did not apply to police officers. His argument had three prongs. One was to examine the difference in the position of police officers as compared with fire officers. One was to look at differences in fact between his case and that of Mr Wakefield. And one, to which I return, was to argue that the CSA had taken a consistent view that the case did not apply to him or indeed to any other police officer so could not now argue otherwise.

33. Both Miss Wise for the Secretary of State and P, following the advice given her by her solicitors, argued that A was wrong. *Wakefield* did apply and should be applied.

34. I have no hesitation in taking the view that the CSA, the tribunal and the Commissioner are all bound to apply *Wakefield* to this case. And I respectfully endorse the view of Commissioner Angus that this applies generally to pensions. A's point about the status of a police officer is, as I have already stated, not relevant when considering a pension rather than earnings. His attempt to differentiate the cases on the facts fails because the essential facts for the decision are only those facts that identify the element of the pension in dispute. And, as Wilson J said in *Wakefield*, the tax position is irrelevant. And the views taken by CSA in other cases – assuming that those views were taken – are not a guide to the proper consideration of *Wakefield* in this case.

35. The one clear message to me from this appeal read with R(CS) 2/00 and R(CS) 5/00 is that CSA appeared confused about this issue of law in 1999 and still appears confused 8 years later despite the Court of Appeal decision and the following Commissioner's reported decision. Those two decisions together make the scope of the relevant rules entirely clear to any informed reader. If the results of A's enquiries by means of the Police Federation are correct – and I have no reason to doubt them as conscientiously made enquiries – then it unfortunately serves to illustrate yet another area of operation of the CSA that is seriously in error.

E. The First-tier Tribunal's reasoning

6. The First-tier Tribunal decided that those cases applied under the 2003 child support scheme as they did to the 1993 scheme under which they were decided. The injury benefit paid under the Injury Benefit Regulations was a separate pension from the regular occupational pension, that it was nonetheless a pension. Paragraph 15 did not limit itself to just one pension, as the references to 'any' periodic payment of pension and 'or other such scheme' showed.

7. I can find no error of law in that reasoning. The tribunal made the right decision for the right reasons. The father's injury payment was within paragraph 15, because it is plainly within its terms and the cases I have cited both proceed on the basis that it was within the previous equivalent provision. Despite the argument by the father's representative, the tribunal's reasoning does not distort the meaning of the paragraph. The tribunal properly read the provision as a whole and cannot be criticised for emphasising the phraseology that shows its breadth.

F. Miscellaneous points

8. I now deal with a miscellaneous collection of points raised by the father's representative.

9. The tribunal used the word 'retire'. I see no objection to that. It is as proper to refer to retirement from a particular profession as it is proper to refer to retirement from all work.

10. Regulation 8(4)(d) of the Child Support (Collection and Enforcement) Regulations 1992 (SI No 1989) provides that, for the purposes of deduction from earnings orders, earnings do not include 'pension or allowances payable in respect of disablement or disability'. That does not support the father's argument; quite the reverse. If the injury pension was excluded from the calculation of the father's liability, it would not be necessary to exclude it from the scope of a deduction from earnings order. Moreover, the father's pension would not be earnings in any normal meaning of the word and is not treated as if it were under the child support scheme.

11. Finally, as to how this case might be dealt with under the Child Support Maintenance Calculation Regulations 2012 (SI No 2677), the simple answer is that those Regulations do not apply and there is nothing to be gained from undertaking that entirely academic exercise. The terms of that legislation cannot affect either the meaning or application of the legislation governing the 2003 scheme.

Signed on original
on 05 October 2017

Edward Jacobs
Upper Tribunal Judge