

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. CTC/2494/2018

Before: M R Hemingway; Judge of the Upper Tribunal

Decision: The decision of the Upper Tribunal made under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 is that, although the decision of the First-tier Tribunal made on 12 July 2018 at Rochdale involved an error of law, it is not set aside.

REASONS FOR DECISION

Background

1. This appeal to the Upper Tribunal has been brought by the claimant, with the permission of a District Tribunal Judge of the First-tier Tribunal in the Social Entitlement Chamber, from a decision of the First-tier Tribunal (the tribunal) which it made on and following a hearing of 12 July 2018. The tribunal purported to dismiss the claimant's appeal and to uphold a decision of Her Majesty's Revenue and Customs (HMRC) made on 27 March 2017 under section 16 of the Tax Credits Act 2002.

2. This case raises issues about the definition of "self-employed" in the entitlement conditions contained in the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (the 2002 Regulations) and, in particular, the significance of the words used in the definition of "self-employed" at regulation 2. That definition reads as follows:

"Self-employed" means engaged in carrying on a trade, profession or vocation on a commercial basis and with a view to the realisation of profits, either on ones' own account or as a member of a business partnership and the trade, profession or vocation is organised and regular.

3. An issue has also arisen as to how the Upper Tribunal should decide this appeal given that following the decision under section 16 of the Tax Credits Act 2002, decisions have been made under section 18 of the same Act. I have derived considerable assistance in dealing with those matters from the decision of a three-Judge panel of the Upper Tribunal in *LS and RS v Commissioners for Her Majesty's Revenue and Customs (TC)*: [2017] UKUT 257 (AAC); [2018] AACR 2 and the decision of the Upper Tribunal in *JW v HMRC* [2019] UKUT 114 (AAC).

4. The claimant says that he is a self-employed person and that he is in business both as a legal advisor (not a solicitor or barrister) and a motor car dealer (an unusual combination). He has been self-employed and in receipt of Working Tax Credit and Child Tax Credit for a number of years. Latterly, he has found it difficult to turn a profit. This appeal is concerned with his entitlement to Working Tax Credit only. On 23 May 2016 HMRC made an initial decision in relation to the 2016/2017 tax year under section 14 of the Tax Credits Act 2002 and issued an initial award notice with respect to Working Tax Credit for that year in the sum of £7752.60. Further enquiries of the claimant followed and in light of information obtained HMRC made a decision under section 16 of the Tax Credits Act 2002 on 27 March 2017, terminating

the award of Working Tax Credit. According to a letter which HMRC sent to the claimant, that was because it had been decided that he was not in a trade, profession or vocation which is commercial, he was not in a trade, profession or vocation which is carried out with a view to profit and he was not in a trade, profession or vocation that is regular and organised. It is apparent from the wording of that letter that HMRC had in mind the definition contained in regulation 2 of the 2002 Regulations which I have set out above. Since a request for a mandatory reconsideration did not lead to any alteration in the decision, the claimant appealed to the tribunal.

5. The tribunal heard the claimant's appeal, for the first time, on 5 October 2017. It dismissed his appeal but, on 31 January 2018, a District Tribunal Judge of the First-tier Tribunal in the Social Entitlement Chamber set aside that decision. Coincidentally, on the same date, HMRC made a decision relating to the claimant's entitlement to Tax Credits for the tax year 2016/2017 under section 18(1) of the Tax Credits Act 2002. I have not had sight of that decision, or any letter communicating it, but I am told on behalf of HMRC that it mirrored what had been decided with respect to entitlement when the section 16 decision had been made. I am also told that a further decision was taken under section 18(6) of the Tax Credits Act 2002 on 8 March 2018 which HMRC tells me was taken "using actual income" as opposed to estimated income which had formed the basis of the earlier section 18(1) decision. On 12 July 2018, the tribunal reheard the claimant's appeal against the section 16 decision of 27 March 2017, seemingly in ignorance of the further history of decision-making as set out above. It appears that neither party drew any of that to its attention. It dismissed the appeal for reasons which it subsequently explained in a statement of reasons for decision (statement of reasons) of 9 August 2018. Permission to appeal was granted on 1 October 2018, once again, seemingly in ignorance of the full decision-making history as described above.

6. It is perhaps worth saying something, at this stage, about the structure of HMRC decision-making as provided for by the Tax Credits Act 2002. There is, in fact, provision for a number of different decisions to be taken with respect to a single tax year. Provisional or prospective decisions are taken by HMRC under section 14. That is based upon what is anticipated will be a claimant's circumstances throughout the relevant tax year. Later decisions may be made during the currency of the tax year including a decision under section 16 to revise the amount prospectively awarded under section 14. Then, when more information is known, a decision under section 18 will be taken as to actual entitlement for that tax year.

The tribunal's decision of 12 July 2018 and its reasoning

7. The tribunal held an oral hearing of the appeal and heard from the claimant. It had documentation provided by him. It noted that when enquiries had been made of him following the issuing of the decision under section 14 of the Tax Credits Act 2002, he had said that he was working over thirty hours a week and his estimated profit for the relevant tax year was £2151.00. The tribunal found that, with respect to legal work carried out in the 2016/2017 tax year, the claimant had been paid fees amounting to £1850.00. With respect to his trading in motor cars, he had made a profit of £698.00. It noted that, on those figures, he was only making £49.00 per week which, it pointed out, on the basis of a 30-hour working week, equated to an hourly rate of £1.63. Prior to analysing those figures it had observed:

“7. The issue before the tribunal was to determine if the appellant’s work was profitable and commercial and whether he was entitled to Working Tax Credit”.

8. Then, by way of explanation as to why it was dismissing the appeal, it said this:

“11. The tribunal found that although the appellant was engaged in a trade or profession, he had not shown that this was regular and organised, as the evidence only showed only five pieces of legal work and two car sales in a tax year. Nor did the tribunal consider the businesses to be commercial. Whilst the individual transactions were commercial in character, considered overall the activities lacked commerciality as the transactions were so few the businesses did not appear to be conducted as an effective business”.

The arguments of the parties

9. Permission to appeal was granted because it was thought that the tribunal might have misdirected itself in law “*by conflating the minimum wage with self-employment*”. Permission having been granted I directed written submissions from the parties.

10. HMRC’s representative had very little to say about the question of whether the tribunal had erred in law, his simply commenting that it was not agreed that there had been an error along the lines suggested in the grant of permission. HMRC’s representative, instead, focused upon the history of decision-making as set out above (and indeed I have taken that history from HMRC’s representatives submission) and argued that, since there had been a decision under section 18 of the Tax Credits Act, the tribunal appeared not to have had jurisdiction to decide the appeal it had purported to decide. Reference was made to the decision of the three-Judge panel of the Upper Tribunal in *LS and RS* cited above where it had been said that where a section 18 decision had been made a section 16 decision would lapse. So, ran the argument, this appeal to the Upper Tribunal was now academic and it should be dismissed on that basis.

11. The claimant, in his submissions, spent much time making factual assertions regarding his self-employment. But he also argued that the tribunal had erred through applying an approach to him based upon the minimum wage. Minimum wage issues were not relevant to self-employed persons. He disagreed that his self-employment was not organised and was not commercial in nature and was not run with a view to making a profit. He had been a legal advisor for many years. He disagreed that the appeal was now academic although he did not relate his view that it was not, to the implications of the existence of decisions made under section 18 of the Tax Credits Act 2002. He wanted his appeal to be decided. The Upper Tribunal does retain the jurisdiction to decide it.

My reasoning on the appeal

12. The claimant, initially, asked for an oral hearing of his appeal before the Upper Tribunal. HMRC did not. I was not persuaded that it was appropriate or necessary for there to be a hearing before the Upper Tribunal but I afforded the claimant an opportunity to explain to me, in more detail, why he thought I should hold one. But

that simply caused him to agree with my preliminary view that one was not needed. Having reminded myself of the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I have decided that a hearing is not required and that I am able to justly decide this appeal without one.

13. I am not sure that the claimant has appreciated what HMRC are saying as to why it is that the appeal is academic. In *LS and RS* a three-judge panel of the Upper Tribunal had two appeals before it both of which had a similar history to that obtaining here. It was authoritatively decided that where a decision has been made under section 16 of the Tax Credits Act 2002 and where that decision is followed by one under section 18 of the same Act, then the section 16 decision lapses. The decision under section 18 effectively replaces any decision which has been made under section 16. The three-Judge panel of the Upper Tribunal explained that and its implications in this way:

“40. ...If anything, the Tax Credit Scheme makes it clearer that the effect of a section 18 decision is to deprive the decisions under sections 14, 15 and 16 of any operative effect, even within the tax year to which they are related, since their inherently provisional nature makes it more likely than in the Social Security Scheme that they will only be of temporary effect. That is put beyond doubt by the mandatory nature of the procedure under section 17 and 18, and underlined by the provision in section 18(11) that the decision under that section is conclusive on entitlement for the tax year in question. That is the position whether or not the First-tier Tribunal knows of the section 18 decision when it considers the section 16 appeal”.

14. So, following that inescapable logic, the claimant is now in a position where, even if it were possible for him to win his appeal under section 16 (and it is not) he would derive no practical benefit from it. He must seek to challenge the decision or decisions under section 18 if he is to give himself a chance of obtaining any tangible benefit from the appeals process. It now matters not what any tribunal might decide about the section 16 decision because it has effectively been replaced notwithstanding what anybody might or might not think about the merits of that decision itself or of the tribunal's decision on the appeal.

15. The three-judge panel of the Upper Tribunal also explained that, in circumstances where a claimant has appealed a section 16 decision to a tribunal and a section 18 decision has then been made, the tribunal will not have jurisdiction. The appropriate course is for it to strike out the proceedings for lack of jurisdiction. However, as was also explained, where there has, in such circumstances, been an appeal to it, the Upper Tribunal will not lack jurisdiction. That is because an appeal to it is governed by section 11(1) of the Tribunals, Courts and Enforcement Act 2007. That section provides for a right of appeal on any point of law arising from a decision made by a First-tier Tribunal. That decision is valid for the purposes of an appeal regardless of whether or not it was made within the tribunal's jurisdiction or not. So, to that extent, I agree with the claimant that I can decide this appeal in the Upper Tribunal if I wish to do so notwithstanding that it is, to all intents and purposes, academic in that it cannot secure the claimant the result which he seeks.

16. I have, in fact, resolved to decide this appeal. That is because the claimant enthusiastically urges me to do so and has gone to some trouble in setting out his case, because the matter can be dealt with relatively speedily without taking too

much Upper Tribunal time and because there is one point which I would like to make with respect to the tribunal's analysis which is a short point but might be of some limited wider significance.

17. I do not agree that the tribunal erred, as the claimant argues through conflating issues regarding the national minimum wage with issues regarding self-employment. The tribunal did, in its statement of reasons, note that one of the reasons HMRC had given for its section 16 decision was that the claimant was deriving a profit which, when put alongside the hours he claimed to be working in his business, meant he was earning a sum less than the equivalent of the national minimum wage. But the tribunal did not rely upon that for its own decision on the appeal. Such is clear from its reasoning as expressed at paragraphs 7 and 11 of the statement of reasons and which I have set out above.

18. The tribunal did, though, state that the issue before it was whether the claimant's self-employment "was profitable and commercial" (my underlining). That suggests it thought if the self-employment was not profitable then there would not be entitlement to Working Tax Credit. I agree that the tribunal did not repeat that at paragraph 11 of its statement of reasons but the fact that it identified profitability as one of two components comprising the (my underlining again) issue before it suggests that it was requiring there to be profitability.

19. As was pointed out by the Upper Tribunal in *JW*, cited above, the definition of self-employment does not, of itself, require profitability. It is true the definition talks of business being carried on "with a view to the realisation of profits" but there is no requirement of actual profitability so long as there is a view to its realisation (see paragraph 24 of *JW*). Further, the word "commercial" as it appears in the definition is not to be read as "profitable" (paragraph 25 of *JW*). So, whilst the profitability or otherwise of self-employment might be a relevant factor to consider amongst others, it cannot be said that profitability is actually a requirement and it was not strictly speaking correct to say, as this tribunal did, that that was one of the issues it was required to decide with respect to entitlement. Accordingly, I have concluded that the tribunal erred in that respect.

19. Further, the tribunal concluded that the trade or profession being followed by the claimant was not regular and organised (as the definition of self-employment does require) because of the limited number of financial transactions which had taken place during the relevant tax year. However, I do not agree with the implication that it necessarily follows that a business is not regular and/ or organised simply because there are a limited number of actual financial transactions. The latter may be an indicator of the former but it seems to me that if a business is organised in the sense that it is properly administered and if it is regular in the sense that, for example, attempts to obtain business or to generate a profit on transactions are made with regularity even if not successful, then that part of the test may be met notwithstanding a limited number of successful actual financial transactions. I consider that, here, the tribunal misdirected itself and that is the point of some wider significance which I wished to make in determining this appeal to the Upper Tribunal and to which I referred above. I appreciate it might be argued that the tribunal's decision is saved by its conclusion that in any event the claimant was not engaged in carrying on a trade,

profession or vocation on a commercial basis but I regard that aspect of its decision as being scantily and inadequately explained.

20. So, had there been any point in my doing so or, put another way, had there not been a section 18 decision, I would probably have set aside the tribunal's decision and remitted for a re-hearing. But I have not done so because as will be apparent from what I have already said, there is simply no point in my doing that. If I were to set aside the tribunal's decision and to remit then, ultimately, the tribunal dealing with the appeal by way of remittal would have no alternative but to strike out the appeal. There is no point in making a decision which will cause unnecessary administrative procedures for no good purpose and with inevitability as to the outcome. Whilst I suppose I could set aside the decision and remake it myself, once again there is simply no point in my doing so. Neither party would derive any practical benefit from that. So, along the lines of how matters were disposed of in *LS* and *RS* and also in *JW*, I have concluded that the appropriate course is for me to decide that the tribunal's decision involved an error of law but not to set it aside. That is what I have done.

(Signed on the original)

**M R Hemingway
Judge of the Upper Tribunal**

Dated

27 August 2019