IN THE UPPER TRIBUNAL **Case No.** CE/1849/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **T H Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made at Peterborough on 18 February 2019 under reference SC304/18/02779) involved the making of an error of law, it is set aside and I remake the decision in the following terms:

"The appeal is allowed.
The decision of the decision maker for the Respondent dated 10 July 2018 is set aside.
The regular payments received by the Appellant from the discretionary family trusts established by her parents are voluntary payments which fall to be disregarded under paragraph 16(1) of Schedule 8 to the Employment and Support Allowance Regulations 2008 (the "ESA Regulations"), Regulation 104 of the ESA Regulations and Section 4 of the Welfare Reform Act 2007. The Respondent shall now re-assess the Appellant's income and capital and make any appropriate award of ESA(IR) on that basis."

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Background

1. The background to the case is that the Appellant made a claim for income-related Employment and Support Allowance (**"ESA (IR)"**) on 03 August 2016, asking that any award be backdated to 02 June 2016. It is agreed that at the time she made her claim she was receiving regular monthly payments from trust funds established by her parents, initially at a level of £600 per month, rising to £750 per month from July 2016. She also declared regular monthly payments of £750 per month from a lodger from July 2016.
2. A decision maker for the Respondent decided on 10 July 2018 that the Appellant was not entitled to ESA(IR) (the **"SoS Decision"**) as her income exceeded the allowable limit for eligibility under the Employment and Support Allowance Regulations 2008 (the **"ESA Regulations"**). The Appellant requested a mandatory reconsideration of the SoS Decision but while it was reconsidered by another decision maker for the Respondent the SoS Decision was confirmed and the outcome remained unchanged.
3. The Appellant appealed to the First-tier Tribunal on the basis that the trust payments she received from the family trusts should have been disregarded when calculating her income. On 18 February 2019 the Appellant's appeal was determined by a judge of the First-tier Tribunal on the papers without a hearing. The judge refused the appeal and confirmed the SoS Decision (the **"FtT Decision"**).

The Permission Stage

4. The Appellant applied to the First-tier Tribunal for permission to appeal the FtT Decision to the Upper Tribunal.
5. Her grounds of appeal were, in essence, that the First-tier Tribunal erred in law because it misinterpreted paragraph 16(2) of Schedule 8 to the ESA Regulations. The Appellant's representative, Mr Williams, argued that since the First-tier Tribunal judge accepted that the trust fund established by the Appellant's parents was discretionary in nature the judge should have found that the regular payments which were made to the Appellant were to be treated as voluntary payments and should therefore be disregarded when calculating the Appellant's income under paragraph 16(1) of Schedule 8 to the ESA Regulations. The judge decided that the payments made to the Appellant were not voluntary payments. The judge said that they were payments made by the trustees on behalf of the testators and, as such, they fell under paragraph 16(2) and not paragraph 16(1).
6. The application was considered by a salaried judge of the First-tier Tribunal who gave permission to appeal. This was given on the basis that, while it was not appropriate to review the FtT Decision, the fact that prior to reaching the SoS Decision different decision makers had reached different conclusions as to whether the Appellant's trust income should be taken into account when calculating her income for the purposes of the eligibility conditions to ESA(IR), indicated that guidance from the Upper Tribunal would be helpful. The matter then came before me and I made directions.

Submissions

7. The Respondent did not support the appeal. Mr Jennings, on behalf of the Respondent, provided written submissions to the effect that the judge did not err in the interpretation of paragraph 16 of Schedule 8 and the decision was not otherwise in error of law. He submitted that the regular payments made to the Appellant were not "voluntary payments".
8. Mr Williams, on behalf of the Appellant, said that the situation in *R(IS) 4/94* could be distinguished from the current situation because in *R(IS) 4/94* the coal board, as trustee of the trust fund, stood to benefit from the making of payments to members through "the efficient running of the coal industry" while in this case the trustees of the family trust were wholly independent. He cited *LG v SSWP (ESA)* [2019] UKUT 220 (AAC), in which *R(IS) 4/94* was considered, for its discussion of how legally owed payments are to be differentiated from discretionary trust payments.
9. Neither party asked for an oral hearing. I could see no compelling reason to hold one and decided that the interests of justice didn't require one. I exercised my discretion in favour of deciding the appeal on the papers alone.

The issues

10. By the date of the FtT Decision it was common ground between the parties that:
    a. valid trusts had been established in respect of the Appellant's parents' estates;
    b. the trusts were managed by professional trustees according to the terms set out in the wills of the Appellant's mother and father;
    c. the trusts were discretionary in nature; and

d. the Appellant received regular monthly payments from the fund.

11. It was accepted by the Respondent that while in trust the capital was to be disregarded. The issue was whether the income from the trusts was also to be disregarded.

The framework under the Welfare Reform Act 2007 and the ESA Regulations

12. In order to qualify for ESA(IR), under Section 1(2)(b) of the Welfare Reform Act 2007 (the **"2007 Act"**) a claimant must satisfy financial conditions set out in Part 2 of Schedule 1 to the 2007 Act, as well as the basic conditions of entitlement. The financial conditions include that the claimant has an income which does not exceed the applicable amount, or has no income (paragraph 6(1)(a) of Part 2 of Schedule 1).
13. There are also capital conditions, but these are not in issue in this appeal.
14. The amount of ESA(IR), under Section 4 of the 2007 Act, is the applicable amount if there is no income, or if there is an income, the amount by which the applicable amount exceeds income. The references to "applicable amount" are to an amount prescribed from time to time, which is then used to calculate the amount of ESA(IR) to which there is entitlement.
15. Section 17 of the 2007 Act provides:

> **"Income and capital: general**
> 17. – (1) … the income and capital of a person shall be calculated or estimated in such manner as may be prescribed.
> (2) A person's income in respect of a week shall be calculated in accordance with prescribed rules, which may provide for the calculation to be made by reference to an average over a period ….
> (3) Circumstances may be prescribed in which …
> … (b) capital or income which a person does possess is to be disregarded."

16. The regulations which prescribe the matters mentioned in Section 17 of the 2007 Act are the ESA Regulations. Part 10 of the ESA Regulations is headed "Income and Capital" and deals with how income is calculated in different situations.
17. Regulation 104 of the ESA Regulations sets out how a claimant's unearned income is to be calculated for the purposes of section 4 of the 2007 Act:

> **"OTHER INCOME**
> **Calculation of income other than earnings**
> 104. – (1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) the income of a claimant which does not consist of earnings to be taken into account will, subject to paragraphs (2) to (7), be the claimant's gross income and any capital treated as income under regulation 105 (capital treated as income).
> (2) There is to be disregarded from the calculation of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 8."

18. Paragraph 16 of Schedule 8 to the ESA Regulations sets out what sums are to be disregarded when calculating income for the purposes of entitlement to ESA:

"SCHEDULE 8
SUMS TO BE DISREGARDED IN THE CALCULATION OF INCOME OTHER THAN EARNINGS

… 16.- (1) Subject to sub-paragraph (2) and paragraph 41, any relevant payment made or due to be made at regular intervals.

(2) Sub-paragraph (1) is not to apply to a payment which is made by a person for the maintenance of any member of that person's family or of that person's former partner or of that person's children.

(3) In this paragraph, "relevant payment" means –

(a) a charitable payment;

(b) a voluntary payment;

(c) a payment (not falling within sub-paragraph (a) or (b) above) from a trust whose funds are derived from a payment made in consequence of any personal injury to the claimant;

(d) a payment under an annuity purchased –

(i) pursuant to any agreement or court order to make payments to the claimant; or

(ii) from funds derived from a payment made,

in consequence of any personal injury to the claimant; or

(e) a payment (not falling within sub-paragraph (a) to (d) above) received by virtue of any agreement or court order to make payments to the claimant in consequence of any personal injury to the claimant."

19. Regulation 2 of the ESA Regulations defines 'family' as follows:

"'family' means –
(a) a couple;
(b) a couple and a member of the same household for whom one of them is or both are responsible and who is a child or young person;
(c) a person who is not a member of a couple and a member of the same household for whom that person is responsible and who is a child or a young person;"

20. Regulation 2 of the ESA Regulations defines 'child' as follows:
"'child' means a person under the age of 16"

Were the amounts received from the trust funds "voluntary payments"?

21. The first issue the First-tier Tribunal needed to decide was therefore whether the regular income which the Appellant received from the trust fund was a "relevant payment" falling within paragraph 16(3)(b) (as "a voluntary payment").
22. Although Mr Jennings' submissions are made on the basis that the payments in question were not "voluntary" payments the statement of reasons issued by the First-tier Tribunal does not actually say whether the Tribunal found the payments to be "voluntary payments" falling within paragraph 16(3) or not:

"3.4 The Tribunal considered that the regular payments should be taken into account under reg. 104 unless disregarded under Schedule 8 and agreed with Mr. Williams that the only provision of schedule 8 that could apply is paragraph 16. The Tribunal disagreed with Mr. Williams in finding that paragraphs 1 and 3 applied. The Tribunal found that paragraph 16(2) applied to exclude [the Appellant's] payments as they were payments made by the trustees of the testator for the maintenance of that person's family."

23. It can be inferred from the judge's finding that paragraph 16(2) applied, that the First-tier Tribunal accepted that the payments in question were voluntary payments. This is because any disapplication under paragraph 16(2) of the disregard in paragraph 16(1) would only apply if there were a "relevant payment" that would otherwise fall to be disregarded. The only "relevant payment" argued for was a "voluntary payment" under paragraph 16(3)(b).
24. If the First-tier Tribunal did indeed find that the payments were "voluntary payments" was it entitled to do so?
25. Mr Jennings, for the Respondent, submitted that the payments in question were not "voluntary payments" (although he maintained that the making of the FtT Decision involved no error of law). He cited the case of *R(IS) 4/94,* which centred on the question whether a payment of cash in lieu of concessionary coal was "voluntary" in the context of the Income Support (General) Regulations 1987 in the context of disregard provisions in similar terms to those in Schedule 8 to the ESA Regulations. In that case the Commissioner quoted Laws J in *The Queen v Doncaster Borough Council, ex parte Frances Alice Boulton* 25 HLR 195 (another case about whether payments in lieu of concessionary coal were "voluntary", this time in the context of the disregard provisions in the Housing Benefit (General) Regulations 1987 and the Community Charge Benefit (General) Regulations 1989). Laws J cited the dicta of Lord Halsbury in *Overseers of the Savoy v Art Union of London* [1896] AC 296, in which he said:

> "….there is no doubt that the word "voluntary" is constantly used in two different senses: it is constantly used as the antithesis of something done under compulsion; but it is also used…as denoting the obtaining or giving of something without anything being obtained in return…There is no doubt of the frequent use of the word "voluntary" in both these senses; and the problem to be solved is in what sense, or in which of these two senses, the legislature has used the word in the section under construction".

26. Laws J preferred the second of the two meanings identified by Lord Halsbury, and he said that it was a matter of looking at the intention of the volunteer rather than whether the recipient had legal rights to the payment. He said that the underlying policy behind the provision for the disregard in relation to voluntary payments was the same as in relation to charitable gifts: the volunteer wants their largesse to be enjoyed in full rather than relieving the state of its obligations (see p. 204). He found that the payments in issue in the *Boulton* case were not voluntary because the Coal Board was getting something in return for the payments, namely improved employee relations contributing to the efficient running of the coal industry, and because they lacked the necessary purpose of benevolence:

> "That is not of course to say that British Coal entertained no more than a selfish motive for making these payments or to suggest that they have no

> lively and genuine concern for the interests of miners and widows for their own sake; rather, it is to indicate that the purpose of the National Agreement is to promote the efficient running of the coal industry in which, no doubt as with any large organisation, an important element is to see that employees, ex-employees and their widows (in other contexts they might be widowers) are properly looked after. This legitimate and proper purpose is, however, far removed from the purpose of benevolence behind voluntary payments in the regulations as I have sought to expound it."

27. In *R(IS) 4/94* the Commissioner held that the approach taken by Laws J in *Boulton* applied equally to the use of "voluntary" in the Schedule to the Income Support (General) Regulations 1987 which that case concerned.
28. Mr Jennings maintained that the trustees of the family trusts in this case had a legitimate and proper purpose in making the payments they made to the Appellant that was, like the purpose of British Coal in the case from which the passage above is taken, far removed from the purpose of benevolence required to bring them within the meaning of "voluntary".
29. Mr Williams, for the Appellant, cited *LG v SSWP (ESA)* [2019] UKUT 220 (AAC), a Scottish case that concerned a liferent trust, and commended the distinction drawn in that case by Judge Poole QC between the payments of liferent income under the trust on the one hand, which were not voluntary payments because the trustees received something in return for the payments in the form of a discharge of their legal obligation arising under the trust to pay the liferent income to the claimant, and discretionary advances of capital in excess of the liferent income on the other, which were voluntary because the trustees received nothing in return for making them.
30. Clause 4(b) of the Appellant's mother's will requires the trustees to apply the income from the "Family Fund" (as defined in the will) to any of the beneficiaries they think fit. Mr Jennings maintained that while this element of discretion meant that the trust property would not be taken into account as capital in assessing the Appellant's eligibility for ESA(IR) it did not make the exercise of those powers "voluntary" within the meaning of paragraph 16(3) of Schedule 8 to the ESA Regulations. The payments were made in exercise of the powers required by the terms of the will ("my trustees shall pay or apply…") and not with a purpose of "benevolence".
31. This analysis is flawed because, at least now, the Respondent accepts that the trusts established by the wills of the Appellant's parents are discretionary in nature. This concession is rightly made because the wording of the trust instruments in respect of the trusts of which she is a potential beneficiary is clear. The Appellant's mother's will provides at clause 4(b) "My Trustees shall pay or apply the remainder of the income to or for the benefit of any of the Beneficiaries as my Trustees think fit during the Trust Period". Similarly, the Appellant's father's will provides at clause 4(a)(ii) "…my Trustees shall pay or apply the income of the Nil Rate Fund to or for the benefit of any of the Beneficiaries as my Trustees think fit".
32. While the trustees may discharge their obligations under the trusts by making payments to the Appellant, they may just as well discharge their obligations under the trust without making any payments to the Appellant whatsoever, and there would be nothing that the Appellant could do about that. She is only one of a pool of potential beneficiaries.

33. The payments made to the Appellant in this case have much more in common with the payment of the discretionary advances of capital in LG v SSWP than with the payment of liferent income in that case, or with the payments in lieu of discretionary coal in the *Boulton* case or in *R(IS) 4/94*.
34. Since the trustees are under absolutely no obligation whatsoever to make payments to the Appellant I cannot see how the payments to her can be characterised as anything but "voluntary". Similarly, it is difficult to see the purpose of the payments as anything but benevolent. If the First-tier Tribunal did decide that the regular payments made to the Appellant were (subject to the operation of paragraph 16(2)) "voluntary payments" then it was right to do so.

Did the payments fall within the category of payments identified in paragraph 16(2) of Schedule 8 to the ESA Regulations?

35. Assuming for the moment that the First-tier Tribunal judge did find the payments to be voluntary payments, and putting to one side the issue of adequacy of reasons, was the judge's interpretation of paragraph 16(2) of Schedule 8 to the ESA Regulations correct?
36. The judge explained the First-tier Tribunal's decision as follows:
"3.6 The payments disregarded in paragraph 16 are distinct from payments simply made by a person to benefit family members which are specifically excluded under para. 2. If [the Appellant's] payments were not to be taken into account under section 4 WRA 2007 and reg 104 ESA Regs., it would make no sense of statutory interpretation and would render the income aspect of ESA nonsensical since a claimant with a regular income deriving from funds accumulated by the claimant's family and settled on the family albeit by way of a discretionary trust would be able to claim the benefit. Mr. Williams' interpretation of the regulation makes no sense of the proper interpretation of the regulations and the reason for imposing them which is to prevent people claiming the benefit when they enjoy an income in excess of the applicable amount for their claim status."
37. The First-tier Tribunal found that sub-paragraph 16(2) applied because the regular payments received by the Appellant "were payments made by the trustees of the testator for the maintenance of that person's family". However, sub-paragraph 16(2) says nothing about payments made by trustees. It refers only to "a payment which is made by a person for the maintenance of any member of that person's family or of that person's former partner or of that person's children".
38. The First-tier Tribunal judge looked through the trust and characterised the payments by the trustees as payments made by the Appellant's deceased parents to the Appellant, saying that to do otherwise would "make no sense of statutory interpretation and would render the income aspect of ESA nonsensical". I disagree. A straightforward interpretation of the words of paragraph 16(2) does not make a "nonsense" of the conditions of entitlement to income-related ESA. Any form of income disregarded by reason of the operation of paragraph 16(1) may give a claimant an income in excess of the applicable limit. The whole purpose of Schedule 8 is to define in precise terms which forms of additional income should count towards the limit and which shouldn't. The words of paragraph 16(2) of Schedule 8 are clear and they must be given their clear meaning. If it had been intended to

exclude income payments from trust property settled by family members then the regulation would surely have said so.

39. In any event, the disapplication of paragraph 16(1) provided for in paragraph 16(2) applies only in respect of payments made by a person "for the maintenance of any member of that person's family or of that person's former partner or of that person's children" so, even if the judge was entitled to look through the trust, paragraph 16(2) would not be applicable because, while the Appellant is a member of the same family as the settlors within the ordinary meaning of the word, she is not a member of their family within the very narrow meaning given to "family" in regulation 2 of the ESA Regulations.
40. I find that the judge's interpretation of paragraph 16(2) of Schedule 8 was in error of law, and the error was material because it formed the basis for the First-tier Tribunal's rejection of the appeal. I also find that the reasons provided for the FtT Decision were inadequate in that they did not explain whether the First-tier Tribunal were satisfied that the payments in question were "voluntary payments" or indeed the basis on which it was so satisfied or not satisfied. I set the FtT Decision aside.
41. Having set the decision aside I have a discretion whether to remit the matter back to the First-tier Tribunal for redetermination or to remake the decision myself as it should have been made. Given that the issues in this appeal are narrow and there is no dispute on the facts it is appropriate for me to remake the decision myself so that the matter can be resolved without further delay in accordance with the overriding objective.
42. I therefore remake the decision in the terms set out at the beginning of this decision notice.

Authorised for issue by

Thomas Church
Judge of the Upper Tribunal

Dated **02 September 2020**