IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal Nos. UK/481/2019
UK/608/2019
UK/868/2019

On appeal from First-tier Tribunal (Social Entitlement Chamber)

Between:

THE COMMISIONER FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

- v -

JS
LG
EL

Respondents

Before: Upper Tribunal Judge Gray

Decision date: 9 September 2021

Representation:
Appellant: Mr I Ahmed
Respondents: JS and LG: Martin Williams CPAG
EL: unrepresented

DECISIONS

Decision in JS UK/481/2090

The appeal by HMRC is dismissed.

The decision of the Tribunal sitting at Newport dated 7 September 2018 under file reference SC was made without jurisdiction. Under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 if I find that the making of a decision involved the making of an error on a point of law I may, but need not**,** set aside the decision of the First-tier Tribunal. In this case the issues the issues have become academic, and to set the decision aside would be futile. The decision stands.

This decision is made under sections 11 and 12(1), (2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Decision in LG UK/608/2019

The appeal by HMRC is dismissed.

The decision of the Tribunal sitting at Ashford dated 6 July 2018 under file reference SC1132/17/01713 was made without jurisdiction. Under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 if I find that the making of a decision involved the making of an error on a point of law I may, but need not**,** set aside the decision of the First-tier Tribunal. In this case the issues the issues have become academic, and to set the decision aside would be futile. The decision stands.

This decision is made under sections 11 and 12(1), (2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Decision in EL UK/868/2019

The appeal by HMRC is dismissed.

The decision of the Tribunal sitting at Wallsall East dated 1 August 2018 under file reference SC 196/18/00658 was made without jurisdiction. Under section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 if I find that the making of a decision involved the making of an error on a point of law I may, but need not**,** set aside the decision of the First-tier Tribunal. In this case the issues the issues have become academic, and to set the decision aside would be futile. The decision stands.

This decision is made under sections 11 and 12(1), (2)(a) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Background to the childcare schemes

1. There are two separate and distinct schemes intended to help with the cost of childcare for those with the responsibility for children and who work.

> (i)Tax Free Childcare (TFC) is an HMRC scheme. The legislation that underpins it is The Childcare Payments Act 2014, the Childcare Payments (Eligibility) Regulations 2015, The Childcare Payments Regulations 2015 and the Childcare Payments (Appeals) Regulations 2016.

2. Described broadly, the scheme allows those with the care of children under 12 who are either employed or self-employed at between a minimum and a maximum earnings level, to claim an amount which translates to 20% tax relief on a sum spent on childcare up to £10,000. Special provision is made for increased amounts and the age range in respect of children with disabilities. I mention that scheme for background information only. It does not feature in these appeals.

(ii)The '30 hours' scheme is a Department of Education scheme, but HMRC has been given the legal functions of determining entitlement under it, issuing any penalties due, reviewing determinations and penalty decisions, and defending appeals. The legal framework is quite different. It comprises the Childcare Act 2016 and the Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 which I refer to as the 30 hours Regulations or the 30 hours scheme.

3. That scheme provides for the cost of childcare for certain pre-school children who are receiving care from an approved childcare provider for up to 30 hours each week. There are similarities between the two schemes regarding entitlement, in that there are conditions that relate to hours of work, and minimum and maximum earnings.

4. Both benefits are applied for online at the same time, using the same form in what is known as a JOCA, Joint Online Childcare Application. The legislative provisions are, as I have said, different, and although the decision-making process via HMRC is similar, two separate decisions are made. Entitlement under one scheme does not necessarily mean that there is entitlement under the other. Further, there are (or were) differences in the appeals process, which I will deal with towards the end of this judgment.

These appeals

5. This judgment concerns three cases, but other decisions may depend upon them. Because of that I mention at the outset that due to my conclusion in respect of one aspect of each decision (the jurisdictional issue) is in legal terms *obiter dicta*. This means that rather than being a decision that binds both the parties and judges below the Upper Tribunal it is, in effect, an opinion on the legal point upon which, in each case, Her Majesty's Revenue and Customs (HMRC) has pursued their appeal. Nonetheless, I hope that it is useful, guidance being a function of the Upper Tribunal per Lord Carnwath in *Jones-v-FTT & CICA* [2013] UKSC 19 [41].

6. Each of the three cases involved claims to 30 hours free childcare per week, and the entitlement criteria for that. In each case HMRC rejected the claim on the basis that the entitlement criteria were not met but on appeal the First-tier Tribunal found in favour of the claimant.

7. I will deal firstly with the particular facts of each case and then move on to explain the parties' positions in respect of the legal points. I will then explain my decision on the issues. Finally, I will move on to the jurisdictional issue, and the effect of my finding on that on my judgment.

8. Before I do so I must express my gratitude to EL for her helpful submission, and to the legal representatives, Mr Ahmed who acts for HMRC in all three cases and Mr Williams who represents JS and LG. Their arguments have been of considerable assistance to me in coming to my conclusions.

The relevant legislation

9. I set out only the relevant parts of each regulation or other provision.

The Childcare Act 2016

Duty to secure 30 hours free childcare available for working parents

(1) The Secretary of State must secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year.

(2) "Qualifying child of working parents" means a young child—

(a) who is under compulsory school age,

(b) who is in England,

(c) who is of a description specified in regulations made by the Secretary of State,

(d) in respect of whom any conditions relating to a parent of the child, or a partner of a parent of the child, which are specified in such regulations, are met, and

(e) in respect of whom a declaration has been made, in accordance with such regulations, to the effect that the requirements of paragraphs (a) to (d) are satisfied.

(3) The conditions mentioned in subsection (2)(d) may, in particular, relate to the paid work undertaken by a parent or partner.

Income Tax (Earnings and Pensions) Act 2003

(hereafter ITEPA)

Section 62 Earnings

(1) This section explains what is meant by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means—

(a)any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

The Childcare (Early Years Provision Free of Charge) (Extended Entitlement) Regulations 2016 (SI 2016/1257) *(the 30 hours Regulations hereafter).*

Interpretation

2.*—(1) In these Regulations—*

"the Act" means the Childcare Act 2016;

"the Commissioners" means the Commissioners for Her Majesty's Revenue and Customs;

"declaration" means a declaration under section 1(2)(e) of the Act;

….

"minimum weekly income" means—

(a) the amount a person would be paid for 16 hours of work a week at the hourly rate for a person in that person's circumstances as set out in regulation 4A of the National Minimum Wage Regulations 2015;

(b) for a person aged 25 years or older, the amount a person would be paid for 16 hours of work a week at the hourly rate set out in regulation 4 of the National Minimum Wage Regulations 2015;

"paid work" means work done for payment or in expectation of payment and does not include being engaged by a charitable or voluntary organisation, or as a volunteer, in circumstances in which the payment received by or due to be paid to the person is in respect of expenses;

"the Tribunal" means the First-tier Tribunal.

4.*—(1) For the purposes of section 1(2)(d) of the Act, a parent of the child must meet the following three conditions.*

(2) The first condition is that the main reason, or one of the main reasons, the parent of the child seeks the free childcare referred to in section 1(1) of the Act is to enable the parent, or any partner of the parent, to work.

(3) The condition in paragraph (2) is treated as being met in relation to a person to whom any of the cases in regulation 8(1)(a) to (m) or 9(1)(b) applies.

(4) The second condition is that the parent of the child is in qualifying paid work in accordance with this Chapter.

(5) The third condition is that the parent does not expect their adjusted net income to exceed £100,000 in the relevant tax year.

The requirement to be in qualifying paid work

***5.**—(1) A person is in qualifying paid work if—*

(a) the person is in paid work as an employed person whose expected income from the work in the period specified in paragraph (4) is greater than or equal to the relevant threshold; or

(b) the person is in paid work as a self-employed person and either—

(I) the person's expected income from the work in the period specified in paragraph (4) is greater than or equal to the relevant threshold; or

(ii) the person's expected income from the work in the period specified in paragraph (5) is greater than or equal to four times the relevant threshold.

(2) For the purposes of this regulation a person is to be treated as in paid work as an employed person if—

(a) the person—

(i) has accepted an offer of work on or before the date of the declaration that person or that person's partner makes; and

(ii) expects the work to start within 14 days of that date; or

(b) the person—

(i) is absent from work on unpaid leave on the date of the declaration that person or that person's partner makes; and

(ii) expects to return to work within 14 days of that date.

(3) A person's "expected income" is the income which the person has a reasonable expectation of receiving, calculated in accordance with regulation 6.

(4) The period specified in this paragraph is—

(a) the period of 3 months beginning with the date of the declaration the person or the person's partner makes; or

(b) if paragraph (2)(a) or (b) applies, the period of 3 months beginning with the day on which the work is expected to start or the person is expected to return to work.

(5) The period specified in this paragraph is, in relation to a declaration made by the person or the person's partner, the tax year in which the date of the declaration falls.

(6) In this regulation, "the relevant threshold" is the product of the calculation—

$$M \times W$$

where—

- *M is the minimum weekly income; and*
- *W is the number of weeks in the period specified in paragraph (4).*

Calculation of expected income

***6.** (1) An employed person's expected income comprises the amount of earnings the person expects to receive from—*

(a) any employment under a contract of service; and

(b) any office, including an elected office.

(2) In paragraph (1), "earnings" has the meaning given by section 62 of the Income Tax (Earnings and Pensions) Act 2003.

(3) A self-employed person's expected income comprises—

(a) the amount of receipts the person expects to derive from a trade, profession or vocation less the amount of expenses the person expects to incur wholly and exclusively for the purposes of the trade, profession or vocation; or

(b) if the person carries on a trade, profession or vocation in a business partnership, the share expected to be allocated to the person of the partnership's receipts less the share expected to be allocated to that person of the partnership's expenses incurred wholly and exclusively for the purposes of the trade, profession or vocation.

(4) In calculating a self-employed person's income, receipts and expenses of a capital nature are to be disregarded.

(5) A person's expected income may include income from a person's employment and self-employment taken together.

(6) For the purposes of paragraph (5) a person may not rely on the condition in regulation 5(1)(b)(ii).

Period of time for which the first declaration has effect

***15.**— (1) In this regulation—*

(a) "declaration period" means the first declaration period or a subsequent declaration period;

(b) "first declaration period" means the period described in paragraph (2);

(c) "subsequent declaration period" means a period described in paragraph (3).

(2) The first declaration in respect of a young child has effect for a period of three months, subject to paragraphs (5), (6), (7) and (9), beginning with the day on which a determination that the criteria in section 1(2)(b), (c) and (d) of the Act are met in relation to the child is made by—

(a) the Commissioners under regulation 17 or 21(6)(c); or

(b) the Tribunal under regulation 24(4).

(3) At the end of the first declaration period, a series of consecutive new periods begins, each of which:

(a) begins with the day after that on which the preceding period ends, subject to paragraph (4); and

(b) lasts for three months, subject to paragraph (7)

Appealing a determination under regulation 17

23.*—(1) A person who makes a declaration may appeal against a determination that the criteria in section 1(2)(b), (c) and (d) of the Act are not met in relation to the child in respect of whom the declaration is made.*

(2) But a person may not appeal under paragraph (1) unless—

(a)the person has applied under regulation 21 for a review of the determination; and

(b)the period applicable under regulation 21(9) has expired.

(3) An appeal under this regulation is an appeal to the Tribunal.

Powers of tribunal: appeals against determinations

24.*—(1) This regulation applies where a person is appealing to the Tribunal under regulation 23 against a determination.*

(2) The Tribunal may—

(a) uphold the determination; or

(b) quash the determination.

(3) The Tribunal may act as mentioned in paragraph (2)(b) only to the extent that it is satisfied that the determination was wrong on one or more of the following grounds—

(a) that the determination was based on an error of fact;

(b) that the determination was wrong in law.

(4) If the Tribunal quashes the determination, it must substitute its own determination for that of the Commissioners.

The two issues before me

10. The issues that HMRC have sought to have determined arise under the 30 hours regulations. They are:

(i) the assessment of income under regulations 5 and 6 (the calculation issue);
(ii) whether the tribunal decision must be prospective only under regulation 15 (the prospective decision issue).

11. The calculation issue applies in relation to two cases, EL and LG; the prospective decision issue in relation to the third case, JS.

The calculation issue: EL and LG

EL

12. In this case Upper Tribunal Judge Poynter granted HMRC permission to appeal.

13. EL's claim for 30 hours free childcare was made in respect of the first three-month period of 2018.

14. There is no dispute that the relevant minimum threshold which applied was £120 per week over a 13-week period. Under the regulations that was calculated as 16 hours at the then minimum wage of £7.50 per hour.

15. HMRC decided that EL's expected income did not reach the relevant threshold. The result of such a calculation is that the claimant is not in qualifying paid work under regulation 5 (i). The free childcare is available for qualifying children of working parents: section 1 (2)(a) Childcare Act 2016; satisfying the regulations as to being in qualified paid work is thus a prerequisite of entitlement.

16. EL worked at a school. She was contracted to work 39 and a half weeks per year between September and July, at a figure above the minimum wage, and additionally was entitled to almost 6 weeks of paid leave which took her paid hours to 45.08 weeks per year. Her annual income from this source was £6216 .07.

17. This was paid in equal monthly instalments throughout the year, not at the request of EL but because this was the system operated by her employer. Calculation of her income on a 12-month basis means that she falls short of the £120 threshold by about 50p per week. If the earnings are calculated over the period of work and paid leave entitlement, however, they are £137 .89 per week.

18. In addition to that work EL had a small income, around £1000 each year, for marking exams scripts over the summer. Her employment ran from 1 April 2018 to 30 September 2018. Some work, for example training in relation to the process, was done before the summer exams, but the main work was at the time of those, and her full salary was paid during July. I note that had this employer chosen to pay her in the same way as her main employer by splitting her salary over the year into 12 monthly parts, when added to her main 12 payments she would have satisfied the threshold.
19. HMRC refused her entitlement, and she appealed. Her appeal was sent to HMRC, who forwarded it to the Social Entitlement Chamber of the First-tier Tribunal (FTT).

20. In its analysis the FTT did not consider whether the income should be calculated based on payment for time worked or using the actual payment periods. Instead it decided that, considered together, regulations 5 and 6 enabled a calculation to be made in respect of the income from both sources aggregated over one-year and applying the test under regulation 6 (5) of a reaching the threshold on a quarterly basis, she exceeded it, and was therefore found to be in qualifying paid work and entitled to the 30 hours child care.

21. I will discuss the prospective aspect of that decision in relation to the case of JS below, but my understanding is that, because of the immediacy of a need for childcare and the delay in appealing an adverse HMRC decision, HMRC have accepted the tribunal decision in practice, and going forward EL has been entitled to the benefit of ongoing childcare. This has been the practice in all these appeals.

LG

22. On 22 August 2017 LG made a declaration for 30 hours free childcare. She was expecting to start work the following month which, subject to satisfying the other conditions, would entitle her to claim.

23. Like EL she was a term time worker and her annual salary of £5739 was paid monthly throughout the year. A similar issue arose regarding the threshold for that reason: her 12 monthly payments of £478.25 per month were some £10 per week lower than the threshold on the HMRC calculation.

24. The judge allowed the appeal, dividing the annual salary by 38 weeks, and multiplying that amount by the number of weeks she in fact worked in the period for which the declaration was made. That was 11 weeks because of a two-week break over the Christmas holiday. He then divided that amount by 13 weeks (the declaration period), and the threshold amount of £120 was comfortably satisfied.

25. HMRC has in fact implemented the tribunal decision; nonetheless, as in the case of LG, HMRC argues that the calculation point is an important one which requires a judicial decision.

26. District Tribunal Judge Collopy granted permission to appeal on the basis that there was an arguable point of law in relation to the calculation element.

The positions of the parties in EL and LG

HMRC position on the income issue

27. HMRC argue that each of the Tribunal calculations were impermissible under the 30-hour regulations. They seek clarification as to the proper application of the legal tests here, albeit that my decision may not actually be a binding one.

28. In both cases HMRC argue that the expected income under regulation 6(1) is the amount the person expects to receive during the 13-week period, and not the amount that the person has earned during that period. Simply put, each claimant expected a particular amount to be credited to their bank account each month during that period. After totalling and dividing that by the 13 weeks it did not reach the threshold.

29. Mr Ahmed concedes that the position appears unfair but argues that this is what the legislation says.

The position argued by EL and LG

30. EL argues that her earnings during the requisite period exceed the threshold. She points out that “earned” and “paid” are different things. She tells me that she has no control over how she is paid for the work that she does and asks me to take a ‘common sense’ approach.

31. Mr Williams on behalf of LG asserts that the calculation should be related to the amount of work to be performed in the period covered by the declaration irrespective of the arrangements made for payment for it. That would result in three periods each year of entitlement to childcare, and one where there was no (or little) income, and therefore no entitlement. That approach would enable low paid term time workers to receive free childcare when they are working.

32. He argues that regulation 5 (a) permits that approach. The person is in qualifying work if-

> (a) the person is in paid work as an employed person whose expected income from the work in the period specified in paragraph 4 is greater than or equal to the relevant threshold.

(Mr Williams' emphasis).

33. This approach, he says, is consistent not only with the language of the provision, but the purpose and structure of the scheme, whereas the HMRC approach is inconsistent with that.

34. He points out that the regulation deals with the concept of 'expected income': it does not look at actual receipts in a period, but rather at work done in that period and what the person might expect to receive from that work. The HMRC approach concentrates only on the income received; that may be is inconsistent with the purpose of the scheme, which is to enable a parent with a young child to access childcare so they can afford to work.

35. Mr Williams refers to other legislation, for example the Income Support (General) Regulations 1987 which deal specifically with term time only workers by treating them as always in work. There is no similar provision here.

36. He argues that the references to regulation 6 do not assist, because that regulation provides only for what is income and not how it is to be attributed over a period.

Discussion

37. My approach to construction is to examine the wording of the regulations in the context of the statutory scheme.

38. The Childcare Act places a duty on the Secretary of State for Education to ensure 30 hours free childcare each week for 38 weeks or an equivalent period for qualifying children of working parents. Entitlement is qualified by the regulations I am considering; nonetheless, to state this primary duty is important.

39. Regulation 4 of the Childcare Regulations sets out the conditions which must be met by the parent of a child making a claim for childcare. The first condition (at regulation 4 (2)) is that the main reason, or one of the main reasons, the parent of the child seeks the free childcare referred to in section 1(1) of the Act is to enable the parent, or any partner of the parent, to work.

40. Further, whilst as a matter of law the Explanatory Note to the Regulations is not part of the regulations themselves, it is legitimate to refer to it as to context because it is "of use in identifying the mischief which the regulations were attempting to remedy" (*Pickstone & Ors v Freeman plc* [1989] AC 66 *per* Lord Oliver at page 127). I bear in mind that it is not an aid to construction of the language of the regulations.

41. Paragraph 8.7 reads: *"With respect to disadvantaged families' eligibility for the extended entitlement, the government has made clear that the introduction of 30 hours free childcare is a work incentive and is intended to help low income families back into work or to increase their hours. Entering employment is the best way to lift families out of poverty".* This is indicative of the target group including those who seek term time work, much of which is at the lower end of the income scale.

42. I have not been presented with policy arguments in favour of the HMRC approach. Reliance is placed simply on the wording of the regulation, Mr Ahmed saying that the law as it is written only considers the amount of earnings a person reasonably expects to receive during the period covered by the declaration from any employment under a contract of service (self-employment is not relevant to this issue). He maintains that because the respondents receive their income in 12 monthly instalments, it is to that fact that the law must be applied.

43. I note that LG and EL have no control over the way in which they are paid, and under the construction he favours others who are working similar hours at similar hourly rates but whose employers choose to pay them other than over a 12-month period will qualify for this valuable benefit; indeed, the cost of childcare is such that for those working, as both EL and LG are, for around 38 hours each week, it would consume virtually their entire income.

44. Each declaration made is as to the three-month period that it covers. That may be immediately following the declaration, or slightly further forward if starting work within the period set out in the regulations.

Regulation 6

45. Expected income, under regulation 6 (1) is (as applicable here)
"the amount of earnings the person expects to receive from-
(a) any employment under a contract of service."
(b) (The link to section 62 of ITEPA in regulation 6(2) takes the matter no further, that section providing simply for a wide definition of the concept of earnings.)

46. At 6 (5) it states that a person's expected income may include income from a person's employment and self-employment taken together. This may be a convenient moment for me to point out that EL's second employment as an exam marker was as an employee. The judge in her case fell into error in calculating her income from that work as a self-employed person. Even if DL had been self-employed in that work, however, the judge's approach was wrong because the regulations limit the way in which self-employed income is calculated where it is to be amalgamated with the expected income from employed earnings.

47. A wholly self-employed person's expected income can be calculated under regulation 5 (1) (b) (i) with its reference to the relevant threshold within the declaration period as for an employed person; alternatively it may be calculated under 5 (1) (b) (ii):

> (ii) "The person's expected income from the work in the period specified in paragraph (5) is greater than or equal to four times the relevant threshold."

Paragraph 5 reads "the period specified in this paragraph is, in relation to a declaration made by the person or person's partner, the tax year in which the date of the declaration falls."

48. Regulation 6 (6) prohibits the use of regulation 5 (1) (b) (ii) as the basis for the where earnings from both employment and self-employment need to be considered. I now turn to regulation 5.

Regulation 5

49. Regulation 5 (1) (a) states "the person is in paid work as an employed person whose expected income from the work in the period specified in paragraph (4) is greater than or equal to the relevant threshold."

50. Under paragraph (4) the period specified is (as is relevant to these cases) the period of three months beginning with the date of the declaration (EL), or the period of three months beginning with the day on which work was expected to start (LG).

51. The threshold is the minimum wage multiplied by 16 (hours): there is no dispute here as to the actual threshold in these cases. The issue, therefore, is the meaning of "expected income" in the context of regulation 5, regulation 6 providing the calculation framework.

52. The reference in regulation 5 (1) (a) to "the work in the period specified" cannot be ignored. Given the purpose of the scheme and the wording of regulation 4(2), the link between the need for childcare and earnings is clear, and I consider that Mr Williams' argument has real force.

53. To make sense of the wording of the regulations, and indeed the scheme itself, the concept of expected income must reference the level of earnings that relate to the contractual obligations, or the work expected to be carried out (for the self-employed) during the period of the declaration, the period for which childcare is being claimed.

54. As Mr Williams explains, this will, for many term time workers, result in three quarters of the year during which they are entitled to the childcare, and one quarter in which they are not. That chimes with the purpose set out in the Childcare Act as being childcare provided so that a parent can work.

55. This does not seem to me to be a case in which the construction that I prefer will cause HMRC administrative difficulties. That is to say, I do not accept that the regulations must relate to receipts by whatever payment method an employer chooses because of structural problems in calculation or payment in an alternative

construction. HMRC is dependent on the declaration process for its information about earnings. For those in the position of EL and LG the calculation may be done on the basis of their contractual hours of work. In some cases, such as EL, there is in addition some paid annual leave entitlement which will need to be brought into the calculation. All these details can be stated within the relevant three-month declaration.

56. Although I am conscious of the difference in my powers and those in Judicial Review proceedings, given that the issue in these cases arises out of the payment structure of an employer I am fortified in my approach to the construction of these regulations by the case of *Johnson* and *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 788.

57. It considered the rationality of regulations under the Universal Credit scheme in the context of difficulties arising out of double payments from employers in some months due to the movement of pay days due to public holidays. This caused difficulties in the calculation of otherwise regular benefit payments of universal credit to affected employees. The point was made that

> *"It is … no part of the policy underlying universal credit to encourage claimants to base their employment choices on the salary payment date offered by a prospective employer. Yet that is what is happening for these Respondents."*

58. Excluding someone from entitlement who works at least the minimum hours at the minimum wage or slightly above that, and who would qualify for various periods of childcare when they needed it but for the way in which they are paid is to undermine the basis of the scheme, and if there is a purposive construction which supports what is clearly the objective then it is to be preferred.

59. A construction in which HMRC must accept as final an employer's approach of dividing the money actually earned during (approximately) only 38 weeks throughout the year also ignores the principal behind the calculation of the lower income threshold. The threshold figure is based upon a person working at least 16 hours each week at the minimum wage. The way in which these claimants (and many others) are paid dilutes the hours worked as calculated on a weekly basis throughout the year.

Conclusion on the calculation issue

60. The approach advocated by HMRC would defeat the purpose of the scheme itself, which is to provide childcare for those who work at least a minimum number of hours at the minimum wage.

61. The convenience for an employer, and perhaps an employee, of regular payments over the year is understood; however, that regularity of income does not reflect the need for childcare (which is synonymous with the actual work done) in relation to the thirteen week period under consideration.

62. Mr Ahmed accepts that the vagaries of entitlement which depends on the way in which an employer chooses to pay an employee seems unfair, but he argues that the wording of the regulation demands that outcome.

63. I am persuaded by Mr Williams arguments.

The prospective decision issue:

64. This concerns the powers of the tribunal, and in particular regulations 15 (1), (2), and 24 of the 30-hour Regulations.

JS

65. JS made a declaration on 4 February 2018 for a three-month period from that date.

66. He had the care of his son F, and he worked as a labour only subcontractor. The HMRC decision was that F could not be a qualifying child because JS's income did not reach the income threshold under the legislation to count as qualifying paid work. The FTT disagreed and allowed the appeal.

67. HMRC's appeal concerns the fact that the tribunal had decided the entitlement question from the date of the application, 4 February 2018 rather than the date of the tribunal decision. HMRC's argument was that regulation 15 meant the decision could be prospective only.

68. It is that aspect of the Tribunal's decision only which is under appeal. The issue of whether JS satisfies the income condition is no longer challenged.

69. Permission to appeal was granted to HMRC by District Tribunal Judge Brownhill. Having succinctly analysed the legal issues she expressed concerns as to JS perhaps losing a period of entitlement because of an error in the tribunal decision regarding the date it began. She also observed, pertinently, that the assertion by HMRC, although arguable, seemed to run counter to the usual jurisdictional effect of FTT decisions in other areas of social security law. She held open the possibility that that may have been the intention of Parliament.

70. Following the tribunal decision (and on production of income details for the period in question) JS received a payment under the HMRC compensation scheme for childcare that he had purchased over that period, and he was in fact provided with 30 hours free childcare for his son from the beginning of 2019. I will return to the compensation scheme below.

The position of the parties in JS

71. Before me HMRC asserts that Regulation 15 prescribes that any determination given by a tribunal can only have effect from the date of the tribunal decision (the prospective effect).

72. The period covered by the decision under appeal is, of course, prior to the tribunal decision, often significantly so. I say that because the eligibility decision is made upon declarations of expected income during a specific three-month period, which will almost certainly have begun, if not ended, by the time the FTT hears the case. In directions I asked for further submissions on this point. I was concerned that, if HMRC was correct, the FTT process may not amount to an effective remedy by way of appeal.

73. Mr Ahmed agrees that this appeal may be 'moot' in that JS had already obtained entitlement to 30 hours childcare following the FTT decision; HMRC, nonetheless, want a ruling on the point of law, given that there is no existing authority on the issue.

74. Mr Williams accepts that, given the nature of the dispute, that the outcome is prospective in effect is inevitable: a nursery place cannot be made available retrospectively.

75. He notes the view expressed by HMRC that the appeals have a function in that they may affect ongoing entitlement, and, in effect, give access to HMRC's compensation scheme.

76. As to the possibility of compensation for childcare purchased during the period when a tribunal decides that the conditions for 30 hours free childcare were met, he points out that in this case JS was able to pay for childcare over the disputed period, and has been recompensed for the cost of those hours. Understandably perhaps, Mr Williams reserves his position in respect of whether the appeal provisions as a whole are article 6 compliant, but he observes that if there is a risk of a parent being unable to fund childcare, and thereby unable to work, it may be incumbent on the FTT to deal with such a case swiftly.

My analysis of the prospective decision issue

77. Both parties accept that this is the inevitable result of the legislative drafting, and indeed the practicalities of actual childcare provision.

78. It is useful, however, to set out the context, which I am able to do succinctly using Mr Williams' helpful submission. I refer here to provisions that I have not set out in full above, as they are only of tangential importance to the issues.

79. Section 1 (1) Childcare Act 2016 imposes a duty on the Secretary of State for Education to ensure that 30 hours childcare free of charge is available to qualifying children of working parents as defined in section 1 (2) of that Act, and in regulations made under it. Section 1 (5) allows the Commissioner for HMRC to make determinations as to whether a child is the qualifying child of working parents, for the purpose of assisting the Secretary of State to discharge that duty.

80. The regulation making powers under section 1 include making provision about

(i) the form of the declaration and the manner in which it is made;

(ii) the conditions to be met by the person making the declaration;

(iii) the period for which a declaration has effect.

It is that power under which Regulation 15 (which is set out above) is made: it provides that where a tribunal decides a case under regulation 24 the date of the tribunal decision is the first day of the first period in which the declaration has effect. Somebody appealing to the FTT can therefore only obtain 30 hours free childcare from a date significantly in advance of their initial declaration.

81. I pause to observe that the income details used for that decision may well be out of date in respect of the forward period covered by the FTT decision.

82. Section 2 (2) (ii) provides for a right of appeal under those determinations by way of regulations: all three of these appeals are brought under regulation 24 of those Regulations.

83. I have not had full argument about the potential human rights point; however, it is not unknown for a statute to provide for a prospective decision. Edward Jacobs in his book Tribunal Practice and Procedure[1], cites authority for the proposition that there is nothing inherently unjust in this: Evans LJ in *Chief Adjudication Officer v Woods* reported as R(DLA) 5/98, and further examples [2] to the effect that, exceptionally, decisions may be made that are prospective in effect.

84. I endorse Mr Williams' point that time may be of the essence in hearing and deciding these cases.

85. It is best that I make no further observations on the law, as the issue may fall to be decided in a future case; however, I will say something about the compensation scheme.

The compensation scheme

86. Mr Ahmed tells me that although there is no statutory compensation mechanism within the 30 hours scheme, the Department of Education has, using its powers under section 14 of the Education Act 2002, designed a method of providing financial assistance to those applicants who have missed out on free childcare on their initial application but satisfy the conditions of entitlement upon review or appeal.

87. Mr Williams makes the point that there is no reference to entitlement on review or appeal, but to compensation being available where there has been "technical error"; neither is there any appeal against decisions under the scheme. https://www.gov.uk/government/publications/childcare-service-compensation which Mr Ahmed signposts, however, may be a useful resource.

88. An FTT decision (despite it being made without jurisdiction, an issue which I discuss below) continues in any effect it might have. The declaration in this case was effective only for three months; nonetheless, the determination of the FTT on the facts may yet be of some value. The factual findings of the tribunal are binding on

[1] 6th edition. Published by LAG

[2] of the House of Lords; the European Court of Justice and the European Court of Human Rights

the parties, and that aspect of the decision (in JS and the other cases) has not been questioned before me.

The "jurisdiction" problem

89. I dealt with this as a potential difficulty in case management directions, and I borrow from those in explaining the problem here. I am indebted to Judge Poynter for expressing the counter argument in his grant of permission to appeal in EL, and I set it out below. It is helpful if I set out the position regarding both childcare schemes that I have described above, the Tax Free Childcare scheme (TFC) and the 30 hours scheme, as the contrast serves to highlight the problem.

90. Although I term it as such, this is not quite a jurisdictional issue. The relevant legislation in each scheme confirms jurisdiction on the First-tier Tribunal, but the Chambers Order allocates business between the various tribunals. I discuss the effect of that below.

The TFC scheme

91. In respect of TFC, Section 56 (1) Childcare Payments Act 2014 provides for a right of appeal following a review of the decision.
92. Under section 59, an appeal under section 56 is to "the appropriate tribunal". That is defined under subsection (2) as
(a) the First-tier Tribunal, or

(b) in Northern Ireland, the appeal tribunal.

The appeal tribunal is further defined.

The 30-hours scheme

93. In respect of the 30-hours scheme section 2(2)(i) Childcare Act 2016 makes provision for regulations enabling appeals to the First-tier Tribunal. These appear in the 30 hours regulations 23-24 and 31-32. Reference is made to "the Tribunal", which, in section 2, the interpretation section, is defined as the First-tier Tribunal.

Re both schemes

94. None of the legislation states to which Chamber or Chambers of the First-tier Tribunal the appeal lies, so one looks to the First-tier Tribunal and Upper Tribunal (Chambers) Order SI 2010/2655. I refer to that as the Chambers Order.

The Chambers Order

95. Article 6 of the Chambers Order allocates the functions relating to a variety of appeals to the Social Entitlement Chamber. They include at (ea) "appealable decisions within the meaning of section 56(3) of the Childcare Payments Act 2014".

This relates to Tax Free Childcare appeals. There is no similar allocation in respect of appeals under the Childcare Act 2016 in respect of the 30 hours scheme.

96. Under Article 7 of the Chambers Order provision is made for what I might describe as the default position in respect of appeals against HMRC decisions. The appeal route lies to the Tax Chamber. That is the position for HMRC appeals unless there is a specific allocation to another Chamber. The lack of an allocation for appeals under the 30 hours scheme to a particular Chamber means that they must be heard in the Tax Chamber.

Can this be the intention?

97. HMRC say it was intended that both appeals should go to the same Chamber, and that is clearly desirable: it would be onerous for appellants (especially those who, because of the nature of the benefits involved are known both to work and to have childcare responsibilities) to have to appear before two tribunals. It would also be a better use of judicial resources for these appeals to be heard together as much of the preparation for the two cases overlaps.

98. Since I initially raised this issue the problem has been resolved by the amendment of the Chamber Order allocating the 30-hour cases to the Social Entitlement Chamber. Although that amendment is not retrospective, it does mean that the problem does not pertain for cases brought following that amendment. There may, however, be certain cases left in something of a limbo.

Judge Poynter's argument

99. Judge Poynter, in granting permission to appeal in the case of EL, expressed his view as to the jurisdiction problem not being sufficiently persuasive for him to grant permission to appeal: he granted permission on the basis of the Tribunal's approach to regulation 6.

100. Having set out the relevant parts of section 7 (9) of the Tribunals Courts and Enforcement Act 2007, the enabling power for the making of the Chambers Order, he explained his position thus:

> *"21. My provisional view is therefore that if the Chambers Order does not allocate any particular function of the First-tier Tribunal to a specified chamber, it remains a function of the First-tier Tribunal as a whole and may therefore be exercised by any chamber of that tribunal.*
>
> *22. So, unless this appeal was expressly allocated to a chamber other than the Social Entitlement Chamber (which, as I understand it, is not suggested), I provisionally doubt that the first-tier Tribunal was without jurisdiction to consider and decide the appeal in this case."*

101. Judge Poynter's remarks suggest that he may have been under the impression that there was a lacuna in the 30 hours cases not being allocated to any chamber, whereas the Chamber Order allocates all appeals against HMRC decisions

to the Tax Chamber unless there is a specific provision to the contrary. Prior to the amendment that was not the case for the 30 hours appeals.

The practical position

102. If there are cases waiting for decision in the FTT which predate that amendment, in my view they can now be heard in the Social Entitlement Chamber because of the amendment to the Order.

103. Cases heard before the amendment which have not been appealed from the FTT have a decision that is valid unless or until it is set aside.

104. Decisions which have been appealed to the Upper Tribunal are also valid until they are set aside. However, unless the actual circumstances meant that the appeal was moot, as is the case in relation to these appeals, the issue would need to be grappled with.

105. The nature of the issue, however, and the approach of HMRC as demonstrated in these cases may make it less likely that the outcome of any is live.

Disposal

106. Where I find that there has been an error of law in a decision of the FTT, my powers under section 12 Tribunals Courts and Enforcement Act 2007 provide that I **may** set the decision aside.

107. These appeals are now academic, in the sense that no decision that I make, or which a further FTT might make on remittal, can alter what has happened. This means that nothing would be gained by my setting aside the decisions, and I do not do so.

Paula Gray
Judge of the Upper Tribunal
Signed on the original/authorised for issue on 9 September 2021
Corrected on 9 February 2022 – UT Case Ref. No. only