IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001823-HB**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Carmarthenshire County Council

Appellant

- v -

LT

Respondent

Before: Upper Tribunal Judge Hemingway

Decision date: 10 August 2022
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 18 February 2021 under number **SC267/20/00165** was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing (which may be a remote hearing).**

2. **The First-tier Tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to its discretion under section 12(8)(a) of the Social Security Act 1998, any other issues which may merit consideration.**

3. **In undertaking that task, the First-tier Tribunal must not take account of circumstances that were not obtaining at the date of the original decision under appeal. Later evidence is permissible provided that it relates to the time of the decision: *R (DLA) 2 & 3/01*.**

4. **The First-tier Tribunal which considers the case on remittal shall be differently constituted to that which considered the case on 18 February 2021.**

5. **These directions may be supplemented, amended or replaced by later directions made by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.**

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Carmarthenshire County Council with the permission of a District Tribunal Judge of the First-tier Tribunal given on 25 May 2021. It is directed towards a decision of the First-tier Tribunal (F-tT) which it made following a hearing of 18 February 2021 and which it explained in a statement of reasons for decision (statement of reasons) of 6 April 2021. The F-tT allowed the claimant's appeal to it and decided that she remained entitled to have a disregard of £175 per week applied to her income for the purpose of calculating her entitlement to housing benefit from 1 April 2020 and that she had, therefore, remained entitled to housing benefit from that date until such time as she ceased to be liable to pay childcare costs. Further, she had not received an overpayment of housing benefit.

2. The claimant had pursued an appeal to the F-tT in order to challenge a decision which had been made by Carmarthenshire County Council (the LA) on 14 May 2020, to remove the £175 disregard from 1 April 2020 on the basis that although she had a registered child minder who had been caring for her child on a commercial basis, Government restrictions brought in as part of the response to the coronavirus pandemic had meant that the childcare which had been provided was no longer being provided (notwithstanding that there remained a contractual obligation to pay) such that there was no longer any legal basis for the application of the disregard. In giving permission to appeal the District Tribunal Judge had seen a possible need to resolve a question of interpretation of the relevant provisions of the Housing Benefit Regulations 2006 which might have wider implications. This was said:

> "4. The interpretation of regulation 28 Housing Benefit Regulations 2006 remains in dispute specifically whether relevant childcare charges (which reduce a claimant's weekly income in the housing benefit calculation by virtue of regulation 27(1)(c) Housing Benefit Regulations 2006) should be interpreted, as submitted by the Respondent, [the LA] so as only to qualify as such a charge if there is direct and actual provision of physical childcare within the terms of regulation 28(6) and (7) of those Regulations. The tribunal at first instance took a wider interpretation based on the continuing contractual obligations between [the claimant] and the registered childcare provider.
>
> 5. The factual circumstances for this appeal involve the suspension of childcare provision arising from Welsh Government legal restrictions due to the Covid-19 pandemic in late March/early April 2020. An issue that is not restricted to Wales but included other parts of the United Kingdom.

> Moreover, the Respondent's position in its application for permission to appeal does not appear to be limited to the suspension of childcare provision arising from the viral pandemic but applies where there is no provision of physical childcare. Such a position brings into consideration any cessation of the physical childcare. For example, due to ill-health of the child or due to short holidays taken by the childcare provided. This brings into sharp focus the practical application of childcare arrangements and the effect that may have on a claimant's income deduction and potentially entitlement to housing benefit.
>
> 6. These are issues of wider interest than the parties to this appeal and require the consideration of the Upper Tribunal".

3. As to the factual background, the claimant was, at all material times, both employed and a tenant. Insofar as it might be relevant, she was not categorised as a "*key worker*". She paid rent in exchange for her right to occupy her home. She has a dependent child who resides with her and who was, at the material times, aged five years. Her child was cared for, whilst she was at work, by a registered childminder (the RC) pursuant to a contractual agreement. The RC charged £200 per week, the level of which triggered a £175 per week disregard (in effect a deduction from the income of the claimant) for the purposes of calculating entitlement to housing benefit. It was as a result of the application of the disregard that the claimant was entitled to housing benefit.

4. The claimant had originally applied for housing benefit in May 2018. On 27 September 2019 she had provided details concerning the arrangement she had entered into with the RC. It appears that the disregard was applied as a result of the provision of that information. Matters continued without incident until 23 March 2020. It seems to be accepted by all parties that actual physical childcare could no longer be provided from that date as a result of the legal restrictions imposed in Wales (sometimes called the lockdown rules) as part of the response to the coronavirus pandemic. But the claimant continued to pay the RC at the same level and also, initially at least, continued to claim and receive housing benefit at the same level.

5. The actual contractual agreement made between the claimant and the RC was not before the F-tT and, indeed, is not before the Upper Tribunal. But there were clear indications as to its terms in the documentary evidence before the F-tT. As to that the F-tT, in its statement of reasons, relevantly said this:

> "11. The appellant's arrangement with the RCP is on the following terms: the weekly charge of £200 is paid by standing order every Friday. This is regardless of whether [the claimant's child] attended for the full hours that week. For example, if [the claimant's child] was ill and unable to attend that did not alter the fee charged. The terms confirmed that if ill, [the claimant's child] would need to stay away from the RCP for forty-eight hours to protect other children from infection. This has happened occasionally. Further, when the RCP is on holiday the fee remains payable at the same rate. If [the claimant's child] does not attend for reasons other than illness, the fee remains payable. These terms are not uncommon in the sector.
>
> 12. Prior to the Government imposing restrictions on movement and the country going into "*lockdown*", the RCP made it clear to the appellant that the weekly fee would still be payable. The claimant does not have a copy of her agreement with the RCP but the terms are reflected in messages between the appellant and the

> RCP which appear as screenshots in the appeal bundle (page 78). Specifically, the RCP states in her message "*With regards to fees, in line with my fee policy if a child is absent at all fees are still payable, with regards to fees if I am forced to close by any governing body I will still be upholding fees due*". On 26/3/20 the RCP sent a message to say "*they have closed the setting now*" apart from children of keyworkers. The appellant is not a keyworker. The appellant understood that her agreement with the RCP would continue on its terms and duly continued to pay even though Government restrictions prevented [the claimant's child] from attending.
>
> 13. At that time, it was hoped by all that the lockdown restrictions would be in place for a short period only. It was therefore expected by both the appellant and the RPC that the terms of their agreement would cover the position i.e., although [the claimant's child] was prevented from attending, the fee for provision of childcare remained payable. If the appellant did not pay, then the provision of a place for [the claimant's child] childcare would be lost".

6. The LA contacted the claimant on 5 May 2020 to enquire as to what the position with respect to childcare and payment of the fees for such currently was. The claimant openly confirmed the position (that is to say she confirmed no childcare was currently taking place but that she was still paying the RC) with the result that the LA terminated the disregard (see above). The claimant was, thus, unable to afford the childcare payments and therefore gave notice to the RCP. The agreement provided for a six-week notice period. Notice was, in fact, given on 26 June 2020 and the RCP, in the circumstances, agreed to waive the notice period and, indeed, refunded the final weeks' fee.

7. Entitlement to housing benefit is provided for in the Social Security Contributions and Benefits Act 1992. Section 130 relevantly provides:

> "**130 Housing benefit**
>
> (1) A person is entitled to housing benefit if –
>
> (a) he is liable to make payments in respect of the dwelling in Great Britain which he occupies as his home;
>
> (b) there is an appropriate maximum housing benefit in his case; and
>
> (c) either –
>
> (i) he has no income or his income does not exceed the applicable amount; or
>
> (ii) his income exceeds that amount, but only by so much that there is an amount remaining if the deduction for which subsection (3)(b) below provides is made.
>
> (2) …
>
> (3) Where a person is entitled to housing benefit, then –
>
> (a) If he has no income or his income does not exceed the applicable amount, the amount of the housing benefit shall be the amount which is the appropriate maximum housing benefit in his case; and
>
> (b) If his income exceeds the applicable amount, the amount of the housing benefit shall be what remains after the deduction from the

appropriate maximum housing benefit of prescribed percentages of the excess of his income over the applicable amount.

(4) Regulations shall prescribe the manner in which the appropriate maximum housing benefit is to be determined..."

8. The calculation of income on a weekly basis is addressed in the Housing Benefit Regulations 2006. Regulation 27 provides:

Calculation of income on a weekly basis

27. – (1) Subject to regulations 34 (disregard of changes in tax, contributions etc.) and 80 and 81 (calculation of weekly amounts and rent free periods) for the purposes of section 130 (1)(c) of the Act (conditions of entitlement to housing benefit) the income of a claimant shall be calculated on a weekly basis –

(a) by estimating the amount which is likely to be his average weekly income in accordance with this Section and Sections 3-5 of this Part and Sections 1 and 3 of Part 7;

(b) by adding to that amount the weekly income calculated under regulation 52 (calculation of tariff income from capital); and

(c) by then deducting any relevant childcare charges to which regulation 28 (treatment of childcare charges) applies from any earnings which form part of the average weekly income or, in a case where the conditions in paragraph (2) are met, from those earnings plus whichever credits specified in sub-paragraph (b) of that paragraph is appropriate, up to a maximum reduction in respect of the claimant's family of whichever of the sum specified in paragraph (3) applies in his case.

(2)…

(3) The maximum deduction to which paragraph (1)(c) above refers shall be –

(a) where the claimant's family includes only one child in respect of whom relevant childcare charges are made, £175 per week;…"

9. Regulation 28 of the same Regulations relevantly provides with respect to childcare charges:

Treatment of childcare charges

28. –(1) This regulation applies where a claimant is incurring relevant child care charges and –

(a) is a lone parent and is engaged in remunerative work;…

(2)…

(3)…

(4)…

(5) Relevant child care charges are those charges for care to which paragraphs (6) and (7) apply, and shall be calculated on a weekly basis in accordance with paragraph (10).

(6) The charges are paid by the claimant for care which is provided –

> (a) in the case of any child of the claimant's family who is not disabled, in respect of the period beginning on that child's date of birth and ending on the day preceding the first Monday in September following that child's fifteenth birthday; or
>
> (b) in the case of any child of the claimant's family who is disabled, in respect of the period beginning on that person's date of birth and ending on the day preceding the first Monday in September following that person's sixteenth birthday.
>
> (7) The charges are paid for care which is provided by one or more of the care providers listed in paragraph (8) and are not paid –
>
> (a) in respect of the child's compulsory education;
>
> (b) by a claimant to a partner or by a partner to a claimant in respect of any child for whom either or any of them is responsible in accordance with regulation 20 (circumstances in which a person is treated as responsible or not responsible for another); or
>
> (c) in respect of care provided by a relative of a child wholly or mainly in the child's home…
>
> (10) Relevant childcare charges shall be estimated over such period, not exceeding a year, as is appropriate in order that the average weekly charge may be estimated accurately having regard to information as to the amount of that charge provided by the childminder or person providing the care….

10. The LA appears to have contended before the F-tT that a disregard for childcare costs can only ever be applied in circumstances where actual physical childcare is being provided. As to the circumstances of this case, its contention seems to have been that such was not actually being provided and could not lawfully have been provided following the imposition of "*lockdown*" restrictions. That being so it was entitled to, or I suppose required to, disapply the disregard. The claimant's position appears to have been that the disregard ought to remain in place because her obligation to pay had remained in place until such time as the agreement with the RC had come to an end. The F-tT dealt with those competing arguments in this way:

> "16. Regulation 28(5) confirms that "relevant childcare charges" are charges for care to which paragraphs (6) and (7) apply (which deal with the age of the child and the type of setting).
>
> 17. The charges are to be calculated on a weekly basis in accordance with Regulation 28(10) which provides for the childcare charges to be estimated over such a period, not exceeding a year, as is appropriate in order to come to an average weekly charge.
>
> 18. It seems clear that the intention of this Regulation is to assist those, such as this appellant who need to pay for childcare. The charges must be for care provided by a registered provider, for a child up to a prescribed age but the charges can be estimated over a period of time to come to an average weekly charge. The appellant was paying the same amount (£200) to her RCP each week and in accordance with the terms of her agreement, this weekly charge was paid whether or not [the claimant's child] attended.

19. The respondent argues that as [the claimant's child] was not with the RCP following lockdown restrictions this means that childcare was not being "provided" in accordance with the Regulations and that the word "provided" is key. It seems to me that it is not quite that straightforward. Given the nature of many Childcare agreements include a requirement for payment even if the child is not physically with the RCP, would that mean that every time a child is ill, or the RCP is on holiday then that day or week's payment no longer meets the conditions to be disregarded under Regulation 28. Is it the actual physical provision of childcare or the overall agreement for provision of childcare that is critical? The respondent submits it is the former, but I find that difficult to reconcile with the reality. The respondent's position is that every time that [the claimant's child] was not with the RCP that was a change of circumstances that needed to be reported to the respondent. It seems unlikely that this happens on a day-to-day basis and I find it an unrealistic interpretation of the Regulations when the childcare fee remains payable whether the child is there or not.

20. If for any reason [the claimant's child] was not with the RCP, the agreement continued on the basis that the weekly fee remained payable. That fee is for the physical provision of childcare when [the claimant's child] is there, and the protection of his place at childcare if he is not there. If the appellant did not pay the weekly fee, then [the claimant's child] would no longer be provided with childcare by that RCP. The structure of these agreements is to make the provision of childcare an ongoing workable arrangement for the parent of the child and for the RCP given that both require as much certainty as possible. Fluctuations in the care provided are envisaged by paragraph (10) of Regulation 28 allowing for an average weekly charge to be estimated. It seems to me that in calculating such an average weekly charge then payments for weeks when the RCP may be on holiday (so not providing physical care) or when a child may be ill (so not there) would be included in that calculation to provide the average weekly charge. It is part of the overall package of provision.

21. The appellant's Tax Credit entitlement was not affected in the immediate aftermath of the lockdown restrictions. Given the circumstances, HMRC allowed a temporary absence and continued paying the childcare element of Working Tax Credits for 8 weeks (page 42). Housing Benefit Regulations were not adjusted to reflect the pandemic and its impact on childcare provision so there is no temporary change to the Regulations that would assist this appellant.

22. Whilst the pandemic is a wholly exceptional circumstance and the government restrictions could not have been anticipated, I find the principle here of wider application i.e., [the claimant's child] could not attend the RCP but the appellant was still obliged to pay the fee. In considering the intention of Regulation 28 and the terms of the agreement between the appellant and her RCP, I find that her entitlement to the disregard continued despite [the claimant's child] being unable to attend the RCP in the same way that her entitlement would continue in other circumstances when [the claimant's child] was not with the RCP if he was ill or the RCP was on holiday, for example.

Conclusion

23. This appeal relates to the very specific and unusual circumstances posed by Government restrictions in a pandemic. However, the principle of childcare charges being incurred when a child is not physically with the RCP, and whether they would still meet the conditions in Regulation 28 is of wider applicability. If they do not meet the conditions of Regulation 28, then this could present a potentially insurmountable problem for claimants such as the appellant who would

> not be able to retain childcare provision. This may result in discrimination towards those who could not then access reliable registered childcare providers.
>
> 24. On the facts before me, I find that this appellant was still entitled to the disregard because she was required to continue her weekly payments for childcare provision in accordance with her contract for provision of childcare and that those weekly payments were in accordance with Regulation 28. I find this because the contract to provide childcare is an ongoing one and that whilst a charge raised in any given week may not reflect the attendance that week it is a charge for the provision of childcare within the scope of Regulation 28".

11. Since the F-tT had decided the disregard remained in place it followed that there was, for that reason, no overpayment of housing benefit.

12. Disenchanted with the outcome, the LA sought permission to appeal to the Upper Tribunal which as I have already indicated (see above) was granted. The grounds of application for permission are contained in a letter of 5 May 2021 which was sent to the F-tT. The arguments to the Upper Tribunal are contained in a Notice of Appeal which was sent to the Upper Tribunal on 18 June 2021. Essentially, the LA argued that a narrow (the term "*very narrow*" might not be entirely inappropriate) interpretation ought to be applied such that the disregard would only itself be applied in relation to times when actual physical care had been provided. The F-tT had been wrong to have regard to the "*ongoing contractual obligations*" which the claimant had to the RC. Such was not a relevant consideration. The narrow interpretation was in line with the words used at regulation 28 of the above Regulations. Further, even if, speaking generally, the F-tT had been correct to adopt a wider interpretation, the particular circumstances created by the impact of the pandemic and the "*lockdown*" provisions meant that the ongoing payments made by the claimant to the RC had taken on the guise and/or identity of "*retainer payments*" rather than payments for childcare. As such, it was no longer appropriate to apply the disregard in any event. It was also the LA's position that regulation 28(10) did not assist with respect to the key question of whether the disregard only applied where actual physical care was being given.

13. On 23 August 2021 I directed submissions from the parties. The claimant, however, has simply indicated by way of response that she maintains her original position on the appeal. That being so, there is nothing for the LA to comment upon by way of reply. Since it has set out its position fully in its Notice of Appeal, I do not consider that I require any further written submissions prior to my deciding this appeal. I have asked myself whether I should direct an oral hearing of the appeal. However, neither party has asked for one and I consider the relevant arguments and issues to be clear from the documentation in front of me. That being so, my having reminded myself of the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and my having satisfied that I may justly decide this appeal on the material in front of me, I have determined the appeal without a hearing.

14. I have decided that the relevant provisions of the Housing Benefit Regulations 2006 are not to be interpreted in the narrow way the LA contends that they should be. This is for the reasons which I will now set out below.

15. Firstly, regulation 27(1)(c) of the above Regulations requires there to be a deduction of "*any relevant child care charges*" from earnings. Relevant childcare

charges are said, at rule 28(5) to be "*those charges for care to which paragraphs (6) and (7) apply*". Paragraph (6) indicates, in effect, that to qualify the charges must be paid "*by the claimant for care which is provided*" in respect of a child who is not disabled, during the period from the child's date of birth to the first Monday in September following that child's fifteenth birthday. It is the sixteenth birthday for a disabled child. Paragraph (7) simply excludes certain types of payments or payments made to certain types of individuals. The LA, in its application for permission to appeal and in its Notice of Appeal, seems to suggest or imply that the wording *"which is provided"* at regulation 28(6) has particular significance. But in context it does not. Those words are simply used as a prelude to the specification of the relevant period in the child's life when the childcare charges must be incurred in order to be relevant charges and in order for the disregard to potentially apply. So, regulation 28(6) is not to be interpreted as supporting the proposition that actual physical childcare must always be provided on any given day or week for the disregard to apply.

16. Secondly, there is nothing else in the content of the relevant Regulations which does suggest or can viably be read as suggesting that relevant childcare charges are limited to those charges specifically incurred as a result of actual physical caring.

17. Thirdly, if, for example, a child who was looked after by an RC on a regular basis happened to be unwell for say two consecutive days in a given week, and so was not looked after by the RC on those days, that would not mean the charges for those days were not paid by the claimant "*for care which is provided*". That is because the payments made in respect of those dates would be payments incurred as a result of the arrangement by which the RC is paid in consequence of and in return for the RC's willingness, ability and ongoing intention to provide such care, along with the obvious expectation and likelihood in such a case, that such would resume quickly.

18. Fourthly, if the intention was to include only charges which relate exclusively to times when actual physical care is provided, that could have been easily, simply and clearly stated within the relevant Regulations. The fact that such is not stated, therefore, is a pointer to a wider, more flexible and more workable interpretation than that which is urged upon the Upper Tribunal and which was urged upon the F-tT, by the LA.

19. Fifthly, as the F-tT (rightly in my view) pointed out, the narrow interpretation would create a substantial administrative burden upon a claimant in having to notify the relevant paying authority whenever a child was ill and a significant and I imagine, unwelcome burden upon those tasked with administering payments of housing benefit and who might, in consequence of frequent routine events such as holidays and illness, have to make numerous adjustments. It is very unlikely that such a scenario was contemplated by those who drafted the Regulations and the difficulties in this respect which the narrow interpretation would cause suggests that the narrow interpretation is not the right one.

20. In light of the above I have concluded that what is required when deciding whether charges amount to relevant childcare charges is an overall assessment as to the circumstances as a whole and the purpose for which payments are being made

rather than an unduly restrictive one based solely upon whether there has been provision of actual care on each and every day in respect of which a payment has been made.

21. But the above does not mean I disagree with everything which is contended by the LA and, of course, there is its alternative argument to consider. I do agree that in undertaking the overall assessment which I have concluded is necessary, contractual terms in agreements with a claimant and a RC, whilst often of evidential value, will not be determinative. I am not sure that the F-tT went quite so far as to suggest that they will always be so, though the wording it used might suggest it came close to that. Certainly, the LA seemed to think it had decided the terms of such a contract would be determinative. But to take a perhaps extreme example, it must be right to say that if, for example, no childcare is taking place, there is no intention for it to resume, but there is nevertheless for some reason a contractual requirement for a claimant to make ongoing payments to an RC, such payments would not constitute relevant childcare charges and would not lead to a disregard being applied. In such circumstances, given the absence of the provision of childcare coupled with there being no intention for it to resume, there would be no connection or insufficient connection between childcare provision and the making of the payments. Those payments would, in that example, be being made solely on the basis of an ongoing contractual obligation.

22. The F-tT did, though, suggest (see paragraph 22 of the statement of reasons) that the unusual circumstances regarding the "*lockdown"* provisions and restrictions were analogous to more routine instances of actual physical care not being provided in consequence of such as illness or holidays. But I would agree with the LA that here there is something of a distinction to be drawn. Ordinarily, with respect to illness and holidays, it may readily be contemplated and indeed expected that the provision of physical childcare will, perhaps after only a very short punctuation, resume. The position regarding lockdown and its prospective lifting was uncertain. There was arguably no immediate expectation of a speedy return to normality. That being so there was a requirement upon the F-tT, in my view, to consider whether the payments which were being made and had been made by the claimant since the imposition of the restrictions had taken on a different nature and could no longer be regarded, when taking an overall view, as relevant childcare costs. Put another way, it was necessary to consider whether those charges could no longer be regarded as ones made in return for childcare or which no longer had a sufficient connection with the provision of childcare but were, instead, payments being made simply due to a contractual obligation or which in the new circumstances amounted, as the LA has suggested, merely to some form of retainer. I have concluded that the F-tT erred in failing to consider that possibility. Had it done so it might have reached a different outcome on the appeal. That being so, notwithstanding the obvious careful thought it has given to this unusual situation and notwithstanding my conclusion that it was right not to apply the narrow and restrictive interpretation urged upon it by the LA, I have decided that it did err in law and that, in consequence, its decision has to be set aside. That is what I do.

23. I now have to decide whether to seek to remake the decision myself or whether to remit. I have been tempted to remake the decision. It seems to me viable for me to do so. But the claimant was the successful party before the F-tT. She may

have legitimate arguments to advance as to why, in her case, the charges she was continuing to pay following the imposition of the lockdown restrictions might be regarded as relevant childcare charges. At least, I think fairness requires her to have that opportunity and to have a hearing to enable her to put her case forward. If there is to be a hearing then it seems to me that it might as well be before the F-tT than before the Upper Tribunal.

23. There will, therefore, be a fresh hearing of the appeal before a differently constituted F-tT which will bear in mind the reasoning of the Upper Tribunal as set out above with respect to the interpretation of regulations 27 and 28 of the above Regulations.

24. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

M R Hemingway
Judge of the Upper Tribunal
Authorised for issue on 10 August 2020