KR v SSWP (CA) **[2023] UKUT 202 (AAC)**

IN THE UPPER TRIBUNAL **UT ref: UA-2021-001544-CA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

KR

Appellant

- v –

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 11 August 2023
Decided after an oral hearing on 13 March 2023

Representation The appellant represented herself
Admas Habteslasie of counsel for the Secretary of State

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 8 December 2020 under case number SC335/19/00315 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and give the decision the First-tier Tribunal ought to have made. That decision is to set aside the Secretary of State's decisions of 5 January 2019 and 30 May 2019 and remit the appellant's entitlement to Carer's Allowance to be redecided by the Secretary of State in accordance with the law as set out below (and see further paragraph 21 below in particular).

REASONS FOR DECISION

Introduction

1. The central issues on this appeal, as they were on the appeal before the First-tier Tribunal in December 2020 ("the tribunal"), is whether for the purposes of her entitlement to Carer's Allowance the weekly amount of the earnings the appellant received on 22 June 2028 and 29 August 2018 should be calculated by way of an average and, if so, from when that average should apply. The calculation of earnings and period it covers is important because at the material time if the appellant's

earnings exceeded £120 per week she was not entitled to Carer's Allowance for that week: per section 70(1)(b) and (8) of the Social Security Contributions and Benefits Act 1992 and regulation 8(1) of the Social Security (Invalid Care Allowance) Regulations 1976.

The key legislation

2. The main piece of legislation with which this appeal is concerned is regulation 8 of the Social Security Benefit (Computation of Earnings) Regulations 1996 (the "Computation of Earnings Regs"). Regulation 8 appears in Part II of the Computation of Earnings Regs. Part II is concerned with "Employed Earners". Regulation 8 is headed "Calculation of weekly amount of earnings" and provides as follows (as the particular concern on this appeal is with regulation 8(3), I have placed it in bold):

> "8.—(1) For the purposes of regulation 6 (calculation of earnings of employed earners), subject to paragraphs (2) to (4), where the period in respect of which a payment is made—
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> (a) does not exceed a week, the weekly amount shall be the amount of that payment;
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> (b) exceeds a week, the weekly amount shall be determined—
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> > (i) in a case where that period is a month, by multiplying the amount of that payment by 12 and dividing the product by 52;
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> > (ii) in a case where that period is three months, by multiplying the amount of the payment by 4 and dividing the product by 52;
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> > (iii) in a case where that period is a year, by dividing the amount of the payment by 52;
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> > (iv) in any other case, by multiplying the amount of the payment by 7 and dividing the product by the number equal to the number of days in the period in respect of which it is made.
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> (2) Where a payment of earnings from a particular source is or has been paid regularly and that payment falls to be taken into account in the same benefit week as a payment of the same kind and from the same source, the amount of those earnings to be taken into account in any one benefit week shall not exceed the weekly amount determined under paragraph (1)(a) or (b), as the case may be, of the payment which under regulation 7 (date on which earnings are treated as paid) is treated as paid first.
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> **(3) Where the amount of the claimant's net earnings fluctuates and has changed more than once, or a claimant's regular pattern of work is such that he does not work every week, the application of the foregoing paragraphs may be modified so that the weekly amount of his earnings is determined by reference to his average weekly earnings—**
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> **(a) if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);**

> **(b) in any other case, over a period of five weeks or such other period as may, in the particular case, enable the claimant's average weekly earnings to be determined more accurately.**
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> (4) Where any payment of earnings is taken into account under paragraph (7) of regulation 6 (calculation of earnings of employed earners), over the period specified in that paragraph, the amount to be taken into account shall be equal to the amount of the payment."

Relevant factual background

3. The appeal concerns two decisions made by the Secretary of State, on 5 January 2019 and 30 May 2019. Both decisions decided that the appellant was not entitled to Carer's Allowance because her earnings exceeded the then weekly earnings limit for that benefit of £120 per week. Under the first decision the Secretary of State found that the appellant was not entitled to Carer's Allowance for the periods 25 June 2018 to 29 July 2018 and 27 August 2018 to 9 September 2018. Under the second decision the appellant was found not to be entitled to Carer's Allowance for one week from 17 September 2018 to 23 September 2018.

4. The appellant had been in receipt of Carer's Allowance for closed periods since 25 December 2017 because at the relevant time she cared for her son. The son attended a residential school. This meant that there were weeks when the appellant did not care for her son, because he was at school, and it was this which meant that her entitlement to Carer's Allowance only arose episodically (i.e., for fixed or closed periods). She worked under a 'zero hours' contract as a clerk for a local authority's School's Admission Appeals Panel. The work would be available as and when the appellant was needed to clerk an appeals panel. The appellant was paid a fixed hourly rate and received her earnings for any worked carried out on the 23rd of each month for work carried out in the previous month. Given the nature of her work, the appellant's hours of work and payment varied from month to month. The tribunal had before it the job offer made to the appellant by the council and the terms of her employment as an Appeals Panel clerk. The tribunal noted that the appellant was used by the Council to provide cover on an "as and when required" basis in the absence of regular staff or where additional staffing was needed. Given the casual nature of the job there was no obligation on the council to provide the appellant with work and no obligation on her to accept work that was offered to her by the council. In an email of 15 December 2017 from the council to the appellant she was told, inter alia, that the work was sporadic but it was really busy in June, July and September, the work was handed out on a first come first served basis other than May-July, and she would probably work six days in January and February, four days in March and April, three days in May, fourteen days in June, thirteen days in July, nine days in September and three days in October.

5. The tribunal dismissed the appellant's appeal and in so doing rejected the appellant's case that her earnings ought to have been calculated using a weekly average based on the appellant having a recognisable cycle of work. The tribunal concluded that the Secretary of State had correctly decided that no such cycle existed and that the appellant's earnings had to be calculated on a week by week basis. No recognisable cycle of work arose under regulation 8(3)(a) of the Computation of Earnings Regs as the appellant was on a zero hours contract, worked variable hours each month and needed to bid for work. Nor, moreover, should the discretion to average in regulation 8(3)(b) of the Computation of Earnings

Regs be applied as the appellant was an irregular earner and her earnings were considered retrospectively. The tribunal's reasoning was as follows.

> "29…I accept that [the appellant's] earnings fluctuated but note that the operation of Regulation 8(3) is with a view to most accurately determining the claimant's earnings. The case of CG/4941/2003 examines this area in some detail. The case holds that in order to assess earnings for these purposes that it is "a matter of dealing reasonably with the evidence of actual earnings for the current period as disclosed". I do not accept that simply because the respondent did not make a decision until January 2019, by which time [the appellant's] earnings over the previous year were available, that in itself means they should have applied [the] provisions of Regulation 8(3(a) and found a recognisable cycle of work. It was [the appellant's argument that because, by the time the decision was made, the DWP was in possession of fifteen months of payslips and they could have reasonably used that information to average her weekly earnings.
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> 30. I am more persuaded by the argument put forward [on behalf of the Secretary of State] that the Regulations had in fact been correctly applied and that the fact that [the appellant] would have benefitted from the application of Regulation 8(3) in that she would have likely been entitled to more Carer's Allowance is not grounds for the Regulation to be applied. Simply because it would have been more advantageous to [the appellant] is not the basis on which the Regulation should be applied. As the [Secretary of State's representative] stated in her additional response at page 129:
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> > "The Regulation states that averaging should be used where it is a more accurate method of calculating the customer weekly earnings. [Decision makers] must not average simply because averaging is more beneficial to the customer"
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> 31. [The appellant] quoted the case of [*MC v SSWP* (IS) [2013] UKUT 384 (AAC)] involving a football steward who claimed income support for the fact he was working under sixteen hours a week. He had no contract of employment and the view taken in that case was that his earnings should be averaged because there was a recognisable cycle of work. In his case the "wait and see" approach was applied.
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> 32. However, what is clear to me is that each case must be dealt with on its own facts. In [the appellant's] case what was clear is that there was no actual recognisable cycle of work insofar as work was offered to her but she could choose whether or not to accept. If she was ill, on holiday or for any other reason decided not to take work offered to her, she would be under no obligation to do so, and no payment would be offered to her. In this respect, I agree with [the Secretary of State's' view that the appellant's earnings were clearly attributable to the days and weeks in which they occurred. I appreciate that there were significant amounts of time during the course of the year where considerably less or no work was available to [the appellant]. During those weeks, her earnings would clearly be below the limits for entitlement to Carer's Allowance. However, it is the case, in my finding, that for the weeks she worked which resulted

> in earnings that exceeded the amount limits for Carer's Allowance, she has properly been found to be not entitled.
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> 33. As a final, but important point, the wording of Regulation 8 makes it clear that the view taken by the Secretary of State with regards to the calculation of earnings and the operation of Regulation 8(3), is a matter of the Secretary of State's exercise of discretion. The case of CG/2780/2012 and others which was included in the tribunal bundle…makes this clear."

6. Permission to appeal to the Upper Tribunal was granted to the appellant by the First-tier Tribunal in March 2021. The First-tier Tribunal judge who made the grant of permission to appeal said permission was not limited but that "the extent to which CG/4941/2003 should apply to a recognisable work case, what counts as a recognisable cycle, when Regulation 8(3)(a) should apply and whether this is sufficiently reasoned in the current Statement of Reasons, are all issues upon which guidance from the Upper Tribunal would be helpful".

<u>The arguments on the appeal</u>

7. The Secretary of State, in a helpful submission of 24 September 2021 drafted by Wayne Spencer, supported the appellant's appeal, though not on the primary basis for which the appellant was then contending. Mr Spencer argued that the central point at issue before the tribunal was whether the weekly amount of earnings the appellant received on 22 June 2018 and 29 August 2018 should be calculated by way of an average. Mr Spencer said that it was not in dispute that the appellant's earnings had, at the material time, fluctuated and had changed more than once, and therefore averaging under regulation 8(3) of the Computation of Earnings Regs was in principle possible. Mr Spencer argued, for reasons that need not now concern us, that no recognisable cycle of work had been established at the time of the Secretary of State's decision. That took regulation 8(3)(a) out of the picture, and thus much of the appellant's then grounds of appeal. However, the alternative averaging under regulation 8(3)(b) remained available and it was contended that the tribunal's reasons had failed to disclose any proper reason why averaging should not apply under regulation 8(3)(b). The Secretary of State's representative relied in this regard on paragraph [18] of Mr Commissioner Howell QC's decision in *CG/4941/2003* in which he had said:

> "strictly speaking the accuracy of an average is simply a matter of doing the arithmetic correctly, irrespective of the periods you may happen to select for calculation. Regulation 8(3) must I think be taken as intended less literally (or mathematically), to mean that the Secretary of State is to have the power of substituting an alternative averaging calculation to produce a standardised weekly figure for the week or month, etc., identified in regulation 8(1) as the one in respect of which a given payment is actually made *where he is satisfied this would more accurately reflect the true rate of the claimant's weekly earnings* current at the period for which a week by week figure for those earnings has to be identified, in order to determine some question of entitlement." (The italics are in the original.)

The Secretary of State argued that it could not be discerned from the tribunal's reasons "why such a broad approach to averaging does not warrant an average under regulation 8(3)(b)" in the appellant's case, and this failure of reasoning was an error of law.

8. Mr Spencer further argued that the tribunal's focus on the Secretary of State's discretion in paragraph thirty three of its reasons was "troubling" as it was for the tribunal to stand in the Secretary of State's shoes and exercise his discretion for him: per *AC v SSWP* [2019] UKUT 267 at paragraphs [4]-[9]. The tribunal's comments, in the Secretary of State's view, made it undesirably unclear whether it properly recognised the nature of its task and jurisdiction.

9. There have since been a number of written submissions by the parties. At one stage the Child Poverty Action Group ("CPAG") acted for the appellant on the appeal. CPAG provided the reply to the above submission on the appeal by the Secretary of State. In this reply the appellant accepted the Secretary of State's argument that a recognisable cycle of work had not arisen under regulation 8(3)(a) of the Computation of Earnings Regs because a complete cycle of work had not occurred and so a *recognisable* cycle of work could not be said to have been established. (CPAG observed on behalf of the appellant that the position might have become different by the time of the second decision of the Secretary of State of 30 May 2019.) Unsurprisingly, the appellant through CPAG agreed with the Secretary of State that the tribunal had erred in law in not having any adequate regard to, and then in not exercising, the discretion under regulation 8(3)(b) of the Computation of Earnings Regs. The appellant argued that "if a regulation 8(3)(b) average is taken over the appropriate period in this case….the result is that there are no weeks in which [the appellant] earned more than the threshold – accordingly it does not matter whether the case is approached under reg. 8(3)(a) or (b) as the result is the same". CPAG set out calculations which it argued showed the average earnings were always below the earnings threshold. It also argued that the appellant's earnings included a figure for expenses that were "wholly, exclusively and necessarily incurred in the performance of the duties of employment". Those expenses payments therefore did not come within regulation 9(1)(f) of the Computation of Earnings Regs and so fell to be disregarded, and the tribunal had erred in law in holding otherwise.

10. The Secretary of State addressed these arguments in a further written submission, dated 18 March 2022. This submission was, again, drafted by Mr Spencer. Through those submissions the Secretary of State set out that he was happy to accept that:

(i) the use of an average (under regulation 8(3)(b) of the Computation of Earnings Regs) was appropriate on the circumstances of the appellant's case; and

(ii) the appellant's travelling and subsistence payments were in respect of expenses that were incurred *during* the performance of her duties and not merely when travelling in her own time to *start* work, and accordingly such payments should not be included in the appellant's earnings by virtue of regulation 9(1)(f) of the Computation of Earnings Regs but rather were excluded from those earnings by regulation 9(3)(a) of the same regulations.

11. Pausing at this point, it is now not disputed between the parties, and is not the subject of any contested argument, that the tribunal erred in law in failing to apply the discretion in regulation 8(3)(b) of the Computation of Earnings Regs to the appellant's earnings at the relevant time(s) and in failing to disregard certain of the expenses included in her earnings under regulation 9(1)(f) and (3)(a) of the same regulations.

12. However, one key area of dispute remains between the parties and it is that which led to the oral hearing before me. The Secretary of State argues, notwithstanding his above support for the appeal, that CPAG's calculations showing the appellant's earnings were always below the relevant threshold were wrong as a matter of law in two respects. The first respect has been the subject of argument[1]. The Secretary of State's argument is put in this way by Mr Spencer in the submission of 18 March 2022.

> "In cases in which a claimant does not have a regular pattern of work such that he or she does not work every week, regulation 8(3) only grants a discretion to use an average where "the amount of the claimant's net earnings fluctuates and has changed more than once". In my submission, the first payment the appellant received on 23.2.18 could not have constituted a "fluctuation", there then being no earnings from which fluctuation could occur. Rather, the first fluctuation occurred on 23.3.18, and the condition that the earnings have fluctuated 'more than once' was only satisfied when the next payment after that was made, on 23.4.18. It is only from the latter point onwards that the amount of the appellant's weekly [earnings] could properly be calculated by way of an average. The appellant's [calculation schedule], however, applies…from 23.2.18."

13. In other words, assuming a claimant's 'regular pattern of work' is not such that she does not work every week, regulation 8(3) provides that the averaging to identify weekly earnings found in sub-paragraphs 8(3)(a) and 8(3)(b) of the Computation of Earnings Regs only applies for the period which begins *after* the claimant's fluctuating net earnings have changed more than once.

14. The contrary argument is that all the wording "the claimant's net earnings fluctuates and has changed more than once" is identifying is the circumstance in which the averaging found in sub-paragraphs (a) and (b) may apply, that is that the earnings do fluctuate sufficiently (instead of just being a one off change), rather than *from when* that averaging may apply.

15. At the hearing before me Mr Habteslasie presented a slightly different version of the Secretary of State's case. He argued, first, that the starting point is regulation 8(1) of the Computation of Earnings Regs and that regulation 8(3) is an exception to what he called the 'general rule' in regulation 8(1). That, it seems to me, must generally be right given regulation 8(3), if applicable, expressly modifies the rule found in regulation 8(1). Mr Habteslasie next argued that regulation 8(3) contains a trigger (or more accurately triggers) for its application, which is found in the wording before sub-paragraphs (a) and (b) are reached in regulation 8(3). Once one of the triggers has been met then the modificatory rules in sub-paragraphs (a) and (b) may apply. Again, I do not consider that analysis can be disputed. Mr Habteslasie accepted that both arguments as I have summarised them in paragraphs 13 and 14 above were tenable constructions of regulation 8(3). However, in deciding between them he argued that consideration should be given to the general principle of statutory construction that legislation should not be construed in such a way as to

[1] The second respect concerns the means of calculation and getting the monthly payments into a weekly figure under regulation 8 and has not been the subject of any dispute. I accept what the Secretary of State says about this in paragraph 3b) of Mr Spencer's written submission of 18 March 2022.

give rise to unworkable solutions or absurd results: per *R(Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20; [2003] 4 All ER at paragraphs [116]-[117]. As paragraph 116 of *Edison* sets out, there is a presumption that Parliament intends to act reasonably and courts and tribunals "will presume that Parliament did not intend a statute to have consequence which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless" However, as *Edison* then makes plain in paragraph 117 the strength of these presumptions will depend on the degree to which a particular construction produces an unreasonable result, as the more unreasonable the result the less likely it is that Parliament intended it.

16. Based on *Edison*, Mr Habteslasie argued that consideration had to be given to the consequences of construing regulation 8(3) as only applying to events that post-date the relevant trigger event (the Secretary of State's argument) as against construing the relevant trigger event as applying retrospectively. He argued that even on the Secretary of State's construction account could be taken of the first two months of the appellant's earnings as part of the averaging process, but that average would only apply from the start of the third month, with regulation 8(1) applying to calculate the amount of earnings for the first two months. He further argued that the opening words of regulation 8(3) of the Computation of Earnings Regs signal the temporal trigger for when the averaging in regulation 8(3)(b) may apply but argued that the statutory wording did not put the matter beyond doubt in favour of either construction. Mr Habteslasie accepted that a key statutory purpose underlying regulation 8(3)(b) is to enable a claimant's weekly average earnings to be determined more accurately, but he argued that a balance had to be struck between accuracy and administrative workability. The 'retrospective' construction of regulation 8(3) would, it was argued on behalf of the Secretary of State, create an obligation to recalculate earnings where decisions on entitlement based on prior calculations of earnings may already have been made. Moreover, the consequences of either construction would not be limited to Carer's Allowance or indeed the Computation of Earnings Regs as the same wording was used in other statutory schemes (though not in relation to the statutory scheme governing Universal Credit). Lastly, it was argued for the Secretary of State that the retrospective argument might generally arrive at a more accurate picture in terms of entitlement but the Secretary of State's interpretation of regulation 8(3) did not sacrifice accuracy, it merely circumscribes from when it may apply.

<u>Discussion and conclusion</u>

17. Although this is not a matter of dispute between the parties, I agree that the tribunal erred in law in failing to give any adequate consideration to the application of regulation 8(3)(b) of the Computation of Earnings Regs to the appellant's appeal and the periods in issue in the appeal. The tribunal also failed to provide any sufficient reasoning to explain why it did not apply.

18. I do not consider that the fact the appellant's focus in her arguments on having a 'recognisable cycle of work' meant that the only issue on the appeal was whether regulation 8(3)(a) of the Computation of Earnings Regs was satisfied. The arguments before the tribunal were cast more widely than this, as the reliance on *CG/4941/2003* shows (as that was a regulation 8(3)(b) case), and the tribunal's decision underlines this by concluding that the Secretary of State had applied the Computation of Earnings Regs correctly. Further, the mere fact that the appellant was an irregular earner cannot in my judgment be a basis for regulation 8(3)(b) not applying at all as

regulation 8(3) is plainly intended as having some kind of application in respect of those who earn irregularly. Nor, in my judgment, is the retrospective calculation of the appellant's earnings an obvious determinative bar against regulation 8(3)(b) applying. Neither Upper Tribunal Ward's decision in *CG/2780/2012 and others* nor Mr Commissioner Howell's (as he then was) decision in *CG/4941/2003* supports such an argument[2]. The tribunal also erred in law in failing properly to consider and then apply regulation 9(1)(f) and (3)(a) of the Computation of Earnings Regs to the evidence before it.

19. I also share the Secretary of State's concern about the tribunal's 'final, but important, point' in paragraph 33 of its reasons and its focus on the discretion in regulation 8(3) being a matter for the Secretary of State to exercise. In some ways it is difficult to say where this 'important point' took the tribunal because it did not reason the matter out any further. In so far as the tribunal emphasised this as an important point because it proceeded on the basis that it was limited to exercising a judicial review type review of the Secretary of State's exercise of the regulation 8(3) discretion, it plainly erred in law in so doing for the reasons explained in *AC v SSWP* [2019] UKUT 267. Indeed, and contrary to the tribunal's view in paragraph 33 of its reasons, the final sentence in paragraph [22] of *CH/2780/2012* makes it clear (rightly) that it is for the First-tier Tribunal on an appeal involving regulation 8 of the Computation of Earnings Regs to, where appropriate, exercise the regulation 8(3) discretion for itself afresh.

20. I therefore set aside the tribunal's decision for the above errors of law.

21. At the invitation of the parties, I remake the decision and give the decision the tribunal ought to have given. The formal part of the decision is set out above. I have cast that decision in terms of setting aside the Secretary of State's decisions of 5 January 2019 and 30 May 2019. This will give rise to a fresh decision (or decisions) the appellant in theory will be able to appeal to a First-tier Tribunal if she is dissatisfied with them. This goes wider than the remedy the Secretary of State sought as that was only for the Upper Tribunal to remit the calculation of the appellant's earnings to the Secretary of State (in effect the officers in the DWP's Carer's Allowance Unit) for recalculation in accordance with the law as set out in this decision, with liberty for the parties to apply if there was disagreement about the recalculation(s). My decision is in wider terms than that sought by the Secretary of State because his decisions of 5 January and 30 May 2019 (on the case he now makes) must have been wrongly arrived at because they did not apply the averaging found in regulation 8(3)(b) of the Computation of Earnings Regs. Indeed that is implicit in the remedy the Secretary of State seeks as even in that it was accepted that the recalculation of the appellant's earnings using regulation 8(3)(b) would involve redeciding her entitlement to Carer's Allowance. However, redeciding entitlement for the relevant periods cannot take effect legally if the decisions of 5 January 2019 and 30 May 2019 remain in place and have not been set aside (see section 17 of the Social Security Act 1998). I also consider the remedy my decision affords is more appropriate as it leaves open the possibility that entitlement for the period that had been covered by the 30 May 2019 decision might require

[2] The Secretary of State had argued in a written submission of 29 January 2020 to the tribunal that it is wrong "to average earnings for a past period". That argument, insofar as I have understood it correctly, has no support in any decided case or in the terms of regulation 8(3), and would appear to be contrary to paragraph [23] of Judge Ward's decision in *CG/2780/2012*.

consideration of whether regulation 8(3)(a) of the Computation of Earnings Regs should apply instead of regulation 8(3)(b) (see the comments in brackets in paragraph 9 above).

22. Before leaving this decision, however, I need to address the argument about from when the averaging in regulation 8(3)(b) applies. It is necessary for me to do so in order properly to direct the Secretary of State as to how to redecide the appellant's entitlement to Carer's Allowance correctly under the law.

23. I am not persuaded by the Secretary of State's argument. I consider the argument as set out in paragraph 14 above is the correct reading of regulation 8(3) of the Computation of Earnings Regs and it is that reading that must be applied by the Secretary of State when redeciding the appellant's entitlement to Carer's Allowance for the relevant periods in issue on the appeal. I arrive at this conclusion for the following reasons.

24. First, had the Secretary of State's construction of regulation 8(3) been the one intended then it could have been worded more obviously to say so: for example, by the opening words of regulation 8(3) saying "From the point at which the claimant's net earnings fluctuate and have changed more than once...". Second, the Secretary of State's interpretation places an unwarranted, and as a matter of the statutory language uncalled for, fetter on identifying the periods in sub-paragraph (3)(b) that may enable the claimant's earnings to be determined more accurately. I can identify no good reason in terms of the statutory language used for the first two periods of earnings to be excluded from the averaging exercise in an appropriate case. Those two periods of earnings might on the facts of an individual case have a rational basis for not being taken into account, but that will be as a result of the application of the test of identifying a period that enables the claimant's earnings to be determined more accurately rather than any statutory requirement to ignore those earnings. Third, it ought to be assumed that it was intended that the two trigger events in regulation 8(3) would operate in the same way. However, in terms of identifying the period of one complete cycle of a recognisable cycle of work found in regulation 8(3)(a), I cannot see why either the first two changes in a claimant's earnings, or the establishment of a regular pattern of work in which the claimant does not work every week, should fall to be ignored in identifying the complete cycle of a recognisable cycle of work. Fourth, *Edison* does not assist the Secretary of State's argument. The construction of regulation 8(3) which I consider to be the correct one arises in my judgment on the plainly better view of the statutory language and in any event does not lead to unworkable or absurd results.

25. Nothing I have decided is contrary to *CG/4941/2003* at paragraph [18] and its view that regulation 8(3)(b) "gives [the decision maker] a discretion to be applied rationally on a case by case basis, but is limited in its purpose to the use of a five-week or other period in place of the actual weekly, monthly or other calculation under regulation 8(1) to "enable the claimant's average weekly earnings to be determined more accurately"". Nor is my construction contrary to the view in *CG/4941/2003* (at paragraphs [19] and [20]) that:

> "19. It has to be borne in mind that the overriding purpose of the exercise, in the context of a weekly benefit such as invalid care allowance which is there to provide assistance with current weekly living expenses for people without sufficient weekly earnings of their own, is the relatively short term one of producing a working week by week figure so as to know as quickly

> as possible whether benefit is payable or not. Mr Cahill is I think right in saying that the application of regulation 8(3) in this context may often have to be more a matter of judgment than of science, and there may be no necessarily 'right' answer: it has to be a matter of dealing reasonably with the evidence of actual earnings for the current payment periods as disclosed (or as it should be disclosed) by the claimant to the Secretary of State week by week or month by month. It cannot in my judgment be said that the existence of the discretionary power in regulation 8(3)(b) requires the Secretary of State in a case such as this to "wait and see" over a very extended period, and then juggle and aggregate a whole succession of payments that were each in fact made in respect of specific weekly and monthly periods either side of a significant change in the rate of working and earning, so as to treat them as in effect equivalent to one lumped-together payment for work spread evenly throughout….
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> 20. The starting point, and the basic rule under regulation 8(1), is that whenever a weekly or monthly earnings payment takes the claimant over the weekly limit the entitlement for the relevant succeeding benefit week or weeks is lost. When the actual payments are seen to be fluctuating it is however an entirely proper use of the power in regulation 8(3) to "wait and see" over a period of five weeks or more, until one can be satisfied whether an apparently wide variance over a short period represents a "blip" to be ironed out in the average because there is no real change in the underlying weekly rate, or represents the start of some more substantial change in the pattern and level of working and earning…"

26. I also consider that the Secretary of State's concern about unpicking past decisions is unfounded and is more theoretical than real. It is also worth emphasising that it is a concern that does arise on the appellant's case as no question of changing a past entitlement decision is in issue.

27. A past decision is final under section 17 of the Social Security Act 1998 ("SSA 1998) and can only be disturbed by the Secretary of State by revising (section 9 SSA 1998) or superseding (section 10 SSA 1998) that decision, if a revision or supersession ground is lawfully open to the Secretary of State. It is not immediately apparent to me what such a revision or supersession ground would be. No such ground was identified in argument before me. The concern, if I understood it correctly, was that a decision may have been made on past entitlement based on a claimant's monthly earnings which at that time were the same amount each month, but those earnings then fluctuate and change more than once. I do not see why such a circumstance favours either construction of regulation 8(3) over the other, or why it necessarily requires any reconsideration of the past entitlement decision to be made for the period of past entitlement (even assuming a revision or supersession ground may allow such reconsideration to be made). It seems to me it would be perfectly rational and lawful for the fluctuations to be seen by the decision maker as a change in the pattern of earnings which might require a judgement to be made about whether regulation 8(3) might apply to see if the change is, per paragraph [20] of *CG/4941/2003*, just 'a blip' or part of a longer term fluctuating pattern. However, nothing in such circumstances would obviously require consideration to be given to the past period of entitlement, which would have been based on the circumstances obtaining at the time that (past) entitlement decision was made: section 8(2)(b) SSA 1998. In any event, once the decision maker is satisfied a change to a fluctuating

pattern of earnings has occurred, I do not see why the averaging under regulation 8(3) of the Computation of Earnings Regs cannot take account of the first two changes and may only apply from the third period of change.

28. I should add that I struggled to understand the basis for the Secretary of State's argument that, on his construction of regulation 8(3), the appellant's first two months of fluctuating earnings would be taken into account in arriving at an average figure for her earnings and be applied from the third month, but the first two months of her earnings would be converted to a weekly amount under regulation 8(1) of the Computation of Earnings Regs based on the actual earnings in each of those two months. That would seem to amount to double-counting the first two months of earnings, which is uncalled for even on the Secretary of State's construction of regulation 8(3). Moreover, the Secretary of State's construction of regulation 8(3) involves a decision maker in 'retrospectively' taking account of the first two months of fluctuating earnings, which nullifies considerably the '*Edison* administrative inconvenience' on which the Secretary of State seeks to rely as a reason for favouring his construction and disfavouring the competing construction.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 11 August 2023