Neutral Citation Number: [2025] UKUT 061 (AAC) Appeal Nos. UA-2024-001052/3-TC

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

IRD

Appellant

- v -

HIS MAJESTY'S REVENUE & CUSTOMS

Respondent

Before: Upper Tribunal Judge Church
Decided on consideration of the papers

Representation:
Appellant: Not represented
Respondent: Elisa Collins of HMRC Solicitor's Office and Legal Services

On appeal from:
Tribunal: The First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case Nos: SC286/23/00074/75
Tribunal Venue: Gloucester
Decision Date: 31 January 2024
Date of Issue: 6 February 2024

Anonymity: The appellant in this case is anonymised in accordance with the practice of the Upper Tribunal approved in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC), [2017] AACR 28.

SUMMARY OF DECISION

TAX CREDITS AND FAMILY CREDIT (33) 33.7 (other)

This decision is mainly about the proper interpretation of, and proper approach to, the conditions to entitlement for working tax credit under the Tax Credits Act 2002 (the **"2002 Act"**) and the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (the **"2002 Regulations"**)

The Appellant claimed working tax credit on the basis that he was over 60 and worked over 16 hours a week in his business trading financial futures as principal. He argued he was "self-employed" for the purposes of Regulations 2(1) and 4(1) of the 2002 Regulations and was engaged in "qualifying remunerative work" for the purposes of Section 10 of the 2002 Act.

The Upper Tribunal considers what it means for an activity to be carried out "on a commercial basis" and "with a view to the realisation of profits".

It decides that, while the requirement for an activity to be carried on "with a view to the realisation of profits" does not require it to be profitable, or for there to be anything like certainty as to its future profits, there must be more than a mere intention or hope that it will become profitable. It requires a realistic expectation of profit in the foreseeable future, and a credible plan of how to achieve it.

The Upper Tribunal also explains that the Appellant's trading of financial futures solely as principal can't satisfy the fourth condition in regulation 4 of the 2002 Regulations because none of the payments that he receives (or may expect to receive) is payment for the work he does.

Both appeals dismissed.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal did not involve an error of law.

REASONS FOR DECISION

Introduction

1. These appeals are about entitlement to working tax credits. The issue upon which both appeals turn is whether the Appellant (to whom I'll refer as the **"claimant"**) was engaged in qualifying remunerative work for the purposes of meeting the eligibility conditions for working tax credit pursuant to section 10 of the Tax Credits Act 2002 (the **"2002 Act"**) and the Working Tax Credit (Entitlement and Maximum Rate) Regulation 2002 (the **"2002 Regulations"**).

Factual background

2. On 15 December 2022 the Respondent (to whom I shall refer as **"HMRC"**) decided that the claimant was not entitled to working tax credit in the 2021-2022 tax year as he was not in remunerative work, and so did not satisfy the conditions to entitlement in paragraph 4 of the 2002 Regulations (the **"HMRC 2021-22 Decision"**). The claimant disagreed with this HMRC 2021-22 Decision and appealed to the First-tier Tribunal. The appeal was given the appeal reference number SC286/23/00074.

3. On 15 December 2022 HMRC also decided that the claimant was not entitled to working tax credit in the 2022-2023 tax year as he was not in remunerative work, and so did not satisfy the conditions to entitlement in paragraph 4 of the 2002 Regulations (the **"HMRC 2022-23 Decision"**). The claimant disagreed with this HMRC 2022-23 Decision and appealed to the First-tier Tribunal. The appeal was given the appeal reference number SC286/23/00075.

Legal framework

4. Section 10 of the 2002 Act sets out the conditions to entitlement for working tax credit. It provides:

> **"10 Entitlement**

(1) The entitlement of the person or persons by whom a claim for working tax credit has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work.

(2) Regulations may for the purposes of this Part make provision—

(a) as to what is, or is not, qualifying remunerative work, and

(b) as to the circumstances in which a person is, or is not, engaged in it.

(3) The circumstances prescribed under subsection (2)(b) may differ by reference to—

(a) the age of the person or either of the persons,

(b) whether the person, or either of the persons, is disabled,

(c) whether the person, or either of the persons, is responsible for one or more children or qualifying young persons, or

(d) any other factors.

(4) Regulations may make provision for the purposes of working tax credit as to the circumstances in which a person is or is not responsible for a child or qualifying young person."

5. Regulation 4 of the 2002 Regulations provides, insofar as relevant to the issues in these appeals, as follows:

"Entitlement to basic element of Working Tax Credit: qualifying remunerative work

4.—(1) Subject to the qualification in paragraph (2), a person shall be treated as engaged in qualifying remunerative work if, and only if, he satisfies all of the following conditions (and in the case of the Second condition, one of the variations in that condition).

First condition

The person is employed or self-employed and—

(a) is working at the date of the claim; or

(b) has an offer of work which he has accepted at the date of the claim and the work is expected to commence within 7 days of the making of the claim.

In relation to a case falling within sub-paragraph (b) of this condition, references in the second third and fourth conditions below to work which the person undertakes are to be construed as references to the work which the person will undertake when it commences.

In such a case the person is only to be treated as being in qualifying remunerative work when he begins the work referred to in that sub-paragraph.

Second condition

First variation: In the case of a single claim, the person—

…

(c) is aged at least 25 and undertakes not less than 30 hours work per week; or

(d) is aged at least 60 and undertakes not less than 16 hours work per week.

…

Third condition

The work which the person undertakes is expected to continue for at least 4 weeks after the making of the claim or, in a case falling within sub-paragraph (b) of the first condition, after the work starts.

Fourth condition

The work is done for payment or in expectation of payment …"

6. The term "self-employed", used in the first condition, is defined in regulation 2(1) of the 2002 Regulations:

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

The First-tier Tribunal's decision

7. On 31 January 2024 Judge Hobbs of the First-tier Tribunal presided over an oral hearing of both appeals at Gloucester. The claimant attended and represented himself. HMRC was represented by Mr Williams, a presenting officer. HMRC opposed both appeals and argued that both the HMRC 2021-2022 Decision and the HMRC 2022-23 Decision were correctly made.

8. In a decision made on the day of the hearing Judge Hobbs dismissed both appeals and confirmed both the HMRC 2021-2022 Decision and the HMRC 2022-23 Decision (the **"FtT Decision"**). At the claimant's request, Judge Hobbs produced a statement of reasons explaining the FtT Decision in respect of both appeals.

9. The statement of reasons contains a section under the heading 'The law to be applied'. That section of the statement is somewhat difficult to follow as it contains numerous cross references to passages in the bundle, when it could have simply referred to the relevant legislative provisions directly. However, it correctly identified the "central question" that had to be addressed in both appeals:

"is [the claimant engaged in] qualifying remunerative work as defined by the regulation by virtue of his being engaged in futures trading?"

The grounds of appeal and the parties' submissions

10. The claimant's grounds of appeal were lengthy, and not entirely clear. In my decision on the permission application (which was addressed to the claimant) I summarised them as follows:

> "5. You set out your grounds of appeal in very colourful terms in 26 pages of closely typed email text. You apologise for their lack of brevity, explaining that this was a "more than averagely complex case". You say that these grounds are already the product of editing and that further shortening would be liable to obscure important points. I am going to attempt to boil your grounds down to their bare bones.
>
> 6. Taking a step back, I read your document as identifying three principal grounds of appeal:
>
> a. the judge misunderstood or misapplied the proper legal test in respect of the core legal issue in the appeal, namely whether you satisfied the conditions to entitlement to working tax credit set out in section 10(1) of the Tax Credits Act 2002 (the "2002 Act") and regulation 4 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (the "2002 Regulations") (**"Ground 1"**)
>
> b. the judge demonstrated in his conduct of the hearing and in what he said in his written statement of reasons that he was biased against you and in favour of HMRC (**"Ground 2"**); and
>
> c. the judge managed proceedings in a way which was unfair, including by refusing your request for a "continuation hearing" and not taking into account (or explaining what it made of) your post-hearing submissions (**"Ground 3"**)."

11. I considered that it was arguable with a realistic (as opposed to fanciful) prospect of success that the First-tier Tribunal had misunderstood or misapplied the proper test for entitlement to working tax credits.

12. I granted permission and directed the parties to make submissions, which they duly did.

13. HMRC resisted both appeals, arguing that the First-tier Tribunal had made no material error of law. It invited me to confirm the decision on both appeals.

14. The claimant continued to pursue his appeal with some vigour and sent further evidence in support of his appeal.

Analysis

Ground 1

15. As regards Ground 1, section 10(1) of the 2002 Act provides that a claimant for working tax credit must be engaged in "qualifying remunerative work". Section 10(2) provides for the making of provisions as to what is, or is not, qualifying remunerative work (section 10(2)(a)), and as to the circumstances in which a person is, or is not, engaged in it (section 10(2)(b)). Those provisions are set out in the 2002 Regulations (which I have set out under 'Legal framework' above).

16. The entitlement conditions to working tax credit are set out in regulation 4 of the 2002 Regulations. The conditions relevant to the claimant's claim to working tax credit are that:

    a. he was employed or self-employed and working at the date of the claim (First condition);

    b. (as a single claimant who is not responsible for a child or qualifying young person) he was:

        i. aged at least 60 and

        ii. undertaking not less than 16 hours work per week

        (Second condition, First variation (d))

    c. the work which he undertook was expected to continue for at least 4 weeks after the making of the claim (Third condition); and

    d. the work was done for payment or in expectation of payment (Fourth condition)

17. The definition of "self-employed" in regulation 2 of the 2002 Regulations is set out in paragraph [6] above.

18. It was accepted by HMRC that the second and third conditions (summarised in [16 b.] and 16 c.] above were satisfied.

19. The claimant's case was that he satisfied the conditions by reason of his trading of financial futures contracts as principal, which he said amounted to self-employment.

20. The claimant argued that, notwithstanding his substantial losses over the years in this endeavour, his trading was nevertheless carried out "on a commercial basis and with a view to the realisation of profits", and it was "organised and regular".

21. HMRC didn't accept this, and neither did the First-tier Tribunal. They each decided that the claimant's trading activity did not amount to "self-employment" and was not done "for payment or in expectation of payment" and so he was not, therefore, entitled to working tax credit either in the 2021-2022 tax year or the 2022-2023 tax year.

22. The First-tier Tribunal said that the "central question" was correctly identified by HMRC as being whether the claimant was engaged in "qualifying remunerative work as defined by the regulation by virtue of his being engaged in futures trading".

23. The First-tier Tribunal found the following facts (among others):

    a. the claimant was born on 23 December 1952;

    b. he had been undertaking the enterprise of futures trading since at least 2002;

    c. at the time of his claim to working tax credit he was a single claimant;

    d. he reported his annual taxes on the basis that he is in self-employment as a futures trader;

    e. when engaging in futures trading the claimant does so for his own account, he doesn't trade for the account of any third parties and has no clients or customers from whom he earns commission or fees;

    f. he has submitted tax returns for every year in which he has been required to do so; and

    g. he has not made a profit in any of the more than 20 years he has been engaged in futures trading, and indeed has incurred substantial losses.

24. While the claimant has made forthright criticisms of the decision making of the First-tier Tribunal, its findings of fact do not appear to me to be controversial (except that the claimant may well say in relation to g. that it ignores that many of his *individual* trades have been profitable). In any event, I don't consider it to be even arguable that any of these findings of fact was not open to the First-tier Tribunal on the evidence before it.

25. The issue is, rather, the way that the First-tier Tribunal applied the test in regulation 4 to those facts. Judge Hobbs said that he took all the findings of fact he had made into account, and he said that those findings:

> "…led to the stark conclusion that [the claimant] does not show any real level of success in undertaking the enterprise of being a futures trader. Whilst being a futures trader could be seen

as a possible valid form of employment or self-employment, here the [claimant] is not able to show that he is undertaking transactions on behalf of anyone other than himself.

35. He has no clients, no invoices to anybody and no work is undertaken for any third party. All of the transactions and consequent losses of funds has [sic] been funded by himself from his own capital resources. There are no clear recognisable receipts and expenses beyond the transaction sheets supplied from the futures brokerage.

36. In particular the Tribunal notes he has substantial losses across a long period of time. The Tribunal agrees with [HMRC], in applying the balance of probabilities and all the relevant evidence, including the oral evidence given at the hearing. HMRC are correct to conclude that the [claimant] was engaged in the futures trading enterprise but this is not on a commercial basis. Specifically, it is not with a view to making any form of profit in either of the identified tax years or indeed in the recognisable future.

37. The [claimant] is clearly a man of means in that he has been able to fund all losses, in excess of £100,000 across a 20 year period from his own capital. Again, this does not have the hallmarks of being a business on a commercial and realistic basis. The complete lack of client base and involvement with anyone else, as a customer, suggests the enterprise is more akin to him undertaking transactions try and [sic] mitigate the losses he has accumulated, entirely from self [sic], across the 20 year period. It appears to this Tribunal that the futures enterprise, undertaken by the [claimant], is more akin to him betting or undertaking games of chance, which is routinely leading him to make a loss year on year.

38. If the [claimant] did not have such levels of pre-existing capital there is no way he would be able to continue to undertake that enterprise of futures trading and bear the level of losses that he has done.

39. Taking all matters into account the Tribunal is entirely satisfied that HMRC have correctly characterised this form of enterprise as not being remunerative self-employment with his business [sic] a genuine view to making profit and having the potential to make future profit and expand his business.

40. Given the above findings and conclusions the Tribunal considers it is bound to refuse the appeals as [HMRC] have clearly and correctly assessed that, in each of the relevant tax years concluded that the [claimant] was not in remunerative work to satisfy the conditions in paragraph 4 of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002. This is not just about profitability; this enterprise is loss making over the entirety of the time that the Appellant has used it and shows no sign that it ever will generate anything except additional losses.

41. The Tribunal agrees with the conclusions reached by HMRC in both matters and considers there is a failure by the [claimant] to show he meets all the 4 conditions to be regarded as remunerative work. Specifically, he is not doing this for payment or in expectation of payment.

> 42. Furthermore, all the above factors point to this not being self-employed in the sense of being self-employed for tax credit purposes… Again, the evidence suggests this is not on a "commercial" basis or with a view to "realisation of profits." Here the Appellant has not been successful for such a long period it seems he is at best trapped trying to recoup some of the hugely significant losses he has incurred."

26. At the permission stage I was satisfied that it was arguable with a realistic (as opposed to fanciful) prospect of success that the First-tier Tribunal may have misunderstood or misapplied the proper tests for entitlement to working tax credits.

27. I have now given the parties the opportunity to make further submissions and I have considered the matter further in the light of those submissions.

28. The definition of "self-employed" in the 2002 Regulations was the subject of consideration by the Upper Tribunal in *JW v HMRC* [2019] UKUT 114 (AAC); [2019] AACR 23. That case was raised in submissions before the First-tier Tribunal by both parties, and was listed by the First-tier Tribunal in its summary of what documents comprised the appeal bundle. However, the judge didn't engage with what the Upper Tribunal said in *JW v HMRC* in his analysis of the claimant's claimed self-employment.

29. In *JW v HMRC* the claimant (who described himself as an author, musician, publisher and promoter) was earning in the region of £20 to £60 a week from selling his work online. This involved his listing his creations for sale online, contacting traders online, meeting the public for sales, and researching and attending trade fairs. The First-tier Tribunal decided that the claimant, JW, was not self-employed because "his activities are not commercial in the sense that they are quite unprofitable and have been so for many years". Judge Poole QC (as she then was) considered the requirement of "commerciality" in the 2002 Regulations and said:

> "25.4 Using profitability as the touchstone of commerciality ignores the core meaning of "commercial". "Commercial" is essentially about commerce, or buying and selling, and in my opinion that should be the focus of the "commercial" part of the definition of "self-employed". Consideration has to be given to whether a business is truly engaged in buying and selling exchanges, or if there is bogus self-employment abusing the WTC system. Relevant factors are whether the business: generates goods or services by enterprise and effort; makes available and exposes goods or services for sale, for example by advertising, supplying to shops, or listing for sale online; actually makes sales, and the terms on which those sales are made. Also potentially relevant are: the age of the business; business plans for future commerce; and steps being taken

> to increase income from the work, all bearing in mind the dicta in *JR v HMRC* [2017] UKUT 334 about the extent of documentary support required of modest businesses.
>
> …
>
> 25.7 I accept that in some circumstances profit can be relevant to whether something is viewed as commercial, but in my opinion there is limited scope, if any, to take into account profitability when deciding if a trade, profession or vocation is carried on "on a commercial basis" under the 2002 Regulations. HMRC or the tribunal will already be considering whether the trade, profession or occupation is being carried on with a view to the realisation of profits, if it is organised and regular, if the claimant is working for a set number of hours a week, and if the work is done for payment or in expectation of payment, as well as "on a commercial basis". These tests properly applied are sufficient to achieve [the] legislative intention without a need to read in profitability…"

30. The upshot of Judge Poole QC's decision was that what the First-tier Tribunal should have done was simply to "apply all of the various conditions in the 2002 Regulations in order to decide whether the claimant was eligible for WTC" (paragraph [28]). An assessment of "profitability" should not be used as a proxy for whether an enterprise is carried on "on a commercial basis". Rather, there were separate tests to be applied, which required findings of fact to be made accordingly.

31. The questions that must be answered to decide whether a claimant is "self-employed" are:

    a. was the claimant engaged in carrying on a trade, profession or vocation?

    b. was the enterprise carried on "on a commercial basis"?

    c. was it carried on "with a view to the realisation of profits"?

    d. was the trade, profession or vocation "organised and regular"?

32. Turning to the First-tier Tribunal's decision-making in these appeals, having made his findings of fact about the claimant's activities, the judge appears to have carried out a composite assessment of the question whether the claimant was "self-employed" (or at least he explained his decision-making as if he had made a composite decision). I don't favour that approach because it is liable to obscure the Tribunal's decision making.

33. Had the Tribunal instead taken each element of the entitlement conditions one by one and made clear findings on each one in turn that would certainly have improved its reasons and would have made the task of identifying whether its

assessment of each condition to entitlement was done correctly much easier. However, that doesn't necessarily mean that the Tribunal erred materially in law.

Was the claimant engaged in carrying on a trade, profession or vocation?

34. The Tribunal said in paragraph [26] of its statement of reasons that the claimant had been "undertaking the enterprise of futures trading" since about 2002. In paragraph [30] it referred to the claimant "undertaking the enterprise or practice of futures trading". It may be inferred from these statements that the Tribunal accepted that the claimant was "engaged in carrying on a trade, profession or vocation". The waters are muddied in paragraph [34], where the Tribunal says that while being a futures trader "could be seen as a possible valid form of employment or self-employment", here the claimant was "not able to show that he is undertaking transactions on behalf of anyone other than himself". Because the Tribunal is here addressing the issue of whether what the claimant does amounts to "employment or self-employment" it isn't clear which element of the definition of "self-employed" the Tribunal thought that the claimant's lack of clients was inconsistent with.

35. Reading the Tribunal's reasons as a whole, I am satisfied that the Tribunal accepted that the claimant's trading amounted to a trade. Certainly, it made no finding that the claimant's activities were in any way "bogus" or a sham, and it appears from what it said at paragraph [42] of its statement of reasons that the Tribunal's rejection that the claimant was self-employed turned on its not being persuaded that the claimant's activities were carried out "on a "commercial" basis or with a view to "realisation of profits", rather than because it wasn't a trade (or profession of vocation).

Was the claimant's enterprise carried on "on a commercial basis"?

36. The Tribunal didn't engage with *JW v HMRC*, which was cited by both parties in their submissions, but it identified several factors that it considered relevant to whether the claimant's trading activity was "on a commercial basis":

    a. all the claimant's trades have been transacted as principal (not on behalf of any third party);

    b. the claimant hasn't undertaken any work on behalf of any third party;

    c. the claimant hasn't issued any invoices;

    d. the claimant has funded all losses arising from his trading from his own capital; and

e. although the claimant produced trading confirmations from his broker, there were no other records such as receipts, or separate business accounts or business plans.

37. Had the Tribunal made express reference to *JW v HMRC* and the factors that Judge Poole QC identified as being relevant to the issue of "commerciality", that would certainly have improved its reasons, but I am not persuaded that the Tribunal's failure to say in terms how it applied the Upper Tribunal's decision in *JW v HMRC* indicates that it made its decision in ignorance of that authority, or that it renders the Tribunal's reasons inadequate. On a proper reading Judge Poole QC's list of relevant factors (see paragraph [25.4] of *JW v HMRC*) is illustrative rather than prescriptive. Whether those factors are relevant to a particular case will depend on the particular facts of that case. If, for example, an enterprise does not employ advertising, that will not necessarily mean that it is not operated "on a commercial basis". It is just one of a number of factors that may be relevant.

38. The factors identified by Judge Hobbs are consistent with those identified by Judge Poole QC (albeit that not all the factors identified by Judge Poole QC are addressed). Taken together, the factors that Judge Hobbs identified were capable of supporting the Tribunal's conclusion that the claimant's futures trading wasn't "on a commercial basis".

Was the claimant's trading enterprise carried on "with a view to the realisation of profits"?

39. The next issue is whether the Tribunal misunderstood the condition to entitlement that a claimant's activities must be undertaken "with a view to the realisation of profits". In my grant of permission, I said I considered it to be arguable that the Tribunal had failed to apply the proper test of whether the claimant's trading activities were pursued "*with a view to* the realisation of profits" (my emphasis), and instead impermissibly substituted its own test of whether those activities had *in fact* realised profits.

40. The Tribunal's reasons make extensive reference to the claimant's historical losses over a long period. However, there is also a clear finding (see paragraph [36] of its statement of reasons) that the claimant's futures trading was "not *with a view* to making any form of profit in either of the identified tax years or indeed in the recognisable future" (my emphasis again).

41. In his submissions, the claimant referred to the Tribunal misapplying the "intention to make a profit test". That is to misquote the regulation. That the claimant

rephrased the requirement in the 2002 Regulations that activities be undertaken "with a view to the realisation of profits" to "intention to make a profit" is telling.

42. The Tribunal appears to have accepted that the claimant had a genuine intention to make profitable trades, and therefore to turn a profit, but its finding that the futures trading was not "with a view" to profit indicates that it interpreted that phrase as meaning more than an intention to make profits.

43. So, what do the words "with a view to the realisation of profits" mean in the context of the 2002 Regulations? On a proper reading, they don't require past profitability, or anything like certainty as to future profitability. What they require is more than just an intention or, to put it another way, a hope, of realising a profit: there must be a realistic expectation of profit in the foreseeable future and a credible plan of how to achieve it. Both were lacking in the claimant's case.

44. Given his long and consistent history of losses (despite his claims to expertise in futures trading), and given the lack of any credible plan to turn things around, the Tribunal was entitled find that the claimant's futures trading was not "with a view" to realising profit even though the claimant genuinely *hoped* to make a profit on his trades, and genuinely *believed* that he would.

Was the claimant's trade, profession or vocation "organised and regular"?

45. The Tribunal didn't make any clear finding as to whether or not the claimant's trade, profession or vocation was "organised and regular". That would amount to a material error of law if its decision had been that the claimant was entitled to working tax credit, because each of the conditions in regulation 4 of the 2002 Regulations must be satisfied for entitlement to be established. Because the FtT Decision was that the claimant was not entitled to working tax credit, even if that omission amounts to an error of law, it cannot be material because, had the Tribunal made a finding on that issue, the outcome of the appeals would have been no different whatever that finding was.

Was the claimant's 16 hours of work per week done "for payment or in expectation of payment"?

46. For the sake of completeness, although neither party really grappled with it in any detail in their submissions, I shall address the fourth condition in regulation 4. That condition requires that the work referred to in the second condition "is done for payment or in expectation of payment".

47. This requirement presents the claimant with a further difficulty because, as the claimant accepts, he doesn't have any clients on whose behalf he trades, or any

customers in the traditional sense. Instead, he deals through a broker with financial futures exchanges. Neither his broker nor any exchange with which he places his trades pays him for his 16+ hours of work a week. The work he does is for his own benefit and is not done for, or in expectation of, remuneration.

48. Even if one were to take the view that the claimant trades with the market counterparties ultimately on the other side of his trades, looking through the broker and the exchange (which I consider would be the wrong analysis), those counterparties don't pay him for his work either.

49. The claimant receives payment when he sells a futures contract, but that payment cannot be said in any sense to be payment for the work done. The 16+ hours of work that the claimant does on a weekly basis in furtherance of his futures trading amounts to his conducting research and analysis, placing trades and related administration. It doesn't benefit any third party. Any payment he receives when he makes a sale is of the then prevailing market value of the contract (less any fees and commissions applied). Unlike when JW sold recordings of his music at a trade fair, or when a plumber invoices his customer for installing a boiler, or a crafter sells a gonk they have knitted on Etsy, no part of the payment received can be said to relate to work done. As such, it is incapable of satisfying the requirement in the regulation.

Ground 2

50. In his application for permission to appeal the claimant raised concerns about the judge's independence and about the way that the judge conducted the proceedings, including his conduct during the hearing and certain post-hearing matters.

51. At the permission stage I didn't deal with these issues because, given my unrestricted grant of permission, I had no need and it wasn't proportionate to do so.

52. Since this decision determines the appeals, I must deal with these issues now. I therefore turn to what I labelled "Ground 2" in my grant of permission: the claimant's allegation that Judge Hobbs demonstrated by his conduct during the hearing and by what he said in his statement of reasons that he was biased against the claimant and biased in favour of HMRC.

53. It is easy to make allegations of bias, and litigants are sometimes tempted to make such allegations when a judge makes a decision with which they disagree or says something that annoys them. However, if they are to be established, such allegations must be supported by evidence.

54. The claimant alleges that Judge Hobbs's manner at the hearing was "at times bullying and rather intimidating". He makes some quite striking allegations about Judge Hobbs's behaviour and demeanour, including that he "jumped up very angrily across his desk, half-screaming at me to sit down" when the claimant had stood up to assist the judge by handing up his own copy of a document the judge was struggling to locate.

55. I have listened to the recording of the hearing. I was able to identify the incident to which the allegation refers. It is apparent from the recording that the judge was somewhat startled by the claimant getting up. The claimant says that the recording of the hearing "does not relay the visual side and much of Judge Hobbs' approach was conveyed by facial gestures and body language", seeking to explain why this "bullying" manner isn't apparent from the recording. The allegation of the judge "half-screaming" at the claimant is demonstrably false. It reflects poorly on the claimant that he made such a serious claim which he knew to be false.

56. While I appreciate that the claimant was disappointed by the outcome of his appeals and I can see why he found some of what the judge said in his statement of reasons to be offensive (in particular, the judge's likening the claimant's futures trading activity to "betting or undertaking games of chance"), I am wholly unpersuaded that Judge Hobbs was biased either against the claimant or in favour of HMRC. Rather, my listening to the recording of the hearing persuades me that Judge Hobbs came to these appeals with an open mind and was keen to understand the claimant's futures trading activities, and his case against HMRC.

57. While the judge asked the claimant more questions than he asked the presenting officer for HMRC, that was perfectly understandable since the case that HMRC was presenting was a conventional one, while the claimant's case was somewhat unusual. It therefore required more questioning by the judge for him to understand the claimant's arguments and evidence. To me, Judge Hobbs's persistence in his questioning of the claimant indicates his determination to understand the claimant's case properly so that he could decide the appeals fairly and justly in accordance with the Tribunal's overriding objective, and is inconsistent with the claimant's argument that Judge Hobbs was dismissive of his case and had made up his mind before the hearing started.

58. What I have said deals with actual bias. However, because of the principle that "justice must not only be done but also be seen to be done" I must also consider the issue of apparent bias. The legal test for apparent bias is set out in *Porter v Magill* [2002] 2 AC 357:

> "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased."

59. Whether or not the claimant genuinely believes the judge to have been biased, I have no hesitation in concluding that a fair-minded and informed observer who has considered the facts would find the allegations of bias to be unfounded.

Ground 3

60. That brings me to what I labelled "Ground 3" in my grant of permission: the argument that the judge managed the proceedings in a way which was unfair, including refusing the claimant's request for a "continuation hearing", and not taking into account, or explaining what he made of, the claimant's post-hearing submissions.

61. The claimant says that the judge was dismissive of his case, ignored his evidence and arguments, I do not find those assertions to be supported either by the decision notice, the statement of reasons or the record of proceedings.

62. While the claimant says that his arguments were "ignored" or "dismissed" I do not find that to be so. The Tribunal wasn't obliged to address every piece of evidence admitted into evidence or every argument that a party advanced. It only had to address these matters to the extent that they were material to its decision. It is clear to me having reviewed the papers that a great deal of the documentation that the claimant put into evidence was wholly irrelevant to the matters in issue in the appeals. As such, the Tribunal had no obligation to address it.

63. Turning to the application for a "continuation hearing", this was a request made on 2 February 2024 (following the oral hearing of the appeals held on the 31 January 2024). The claimant explained that he had more evidence that he wished to put before the Tribunal and wanted more time to argue his case before the Tribunal. The Tribunal refused that application, with brief reasons. It explained that the claimant had had his opportunity to present his case at the oral hearing on 31 January 2024, and that it would be unfair to HMTC to prolong matters further, the hearing "having closed on the basis that the evidence had been presented" (see paragraph [12] of the decision notice in respect of the FtT Decision.

64. The Tribunal had broad case management powers under its procedure rules. The claimant had had ample opportunity to provide the evidence he relied upon and to make written submissions in advance of the hearing of his appeals. At his hearing he had an opportunity to make oral arguments and to make applications.

65. To borrow a phrase used by Lewison LJ, “The trial is not a dress rehearsal. It is the first and last night of the show” (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]. The time for the claimant to submit his evidence and to make his arguments was before, not after, the hearing. The Tribunal was entitled to refuse the claimant’s application for a “continuation hearing” for the reasons it gave.

Conclusion

66. It will be apparent from what I have said above that the FtT Decision is not perfect, and neither are the reasons given for it as clear as might be hoped. The Tribunal would have benefited from a more methodical approach, identifying the issues it had to decide and deciding them in turn, rather than seeking to deal with multiple issues together. In this case the approach the Tribunal took resulted in it failing to make findings on some of the matters that were required to decide whether the statutory tests for entitlement were satisfied.

67. However, the Upper Tribunal should only interfere in the decision making of the First-tier Tribunal where any errors of law it has made are material. Because the 2002 Regulations require each of the conditions to entitlement to be satisfied, so a failure to satisfy any one of them results in a claim failing, the Tribunal’s failings are not material in this case. The findings of fact the Tribunal made were open to it on the evidence before it, and on those facts the claimant’s appeals were bound to fail.

68. For the reasons I have given I conclude that the decision of the First-tier Tribunal does not involve a material error of law. I dismiss both appeals.

Thomas Church
Judge of the Upper Tribunal

Authorised by the Judge for issue on 13 February 2025