IN THE UPPER TRIBUNAL **Case No UA-2023-001483-CSM**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 077 (AAC)**

Appellant: **EVH**
Respondent: **SSWP**
Second Respondent **DH**

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal: **First-tier Tribunal (Social Security and Child Support)**
Tribunal Case No: **SC296/22/00293**
Tribunal Venue: **Hull Combined Court**
Decision date: **23.2.23**

Decision date: 25th February 2025
Decided after an oral (CVP) hearing on 10.12.24

Representation
Representations from the Appellant on her own behalf.
Representations on behalf of the First Respondent, Ms J McArthur of counsel.
Representations from the Second Respondent on his own behalf.

Anonymity: The appellant, second respondent and qualifying child in this case are 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

Child Support (5) Period of assessment/calculation 5.14

Judicial summary

(1) The application by the FTT of regulation 76(2) of the Child Support Maintenance Calculation Regulations 2012 to a period of time before it was before it was in force is in error of law.

(2) Regulation 76(2)(a) considers engagement in remunerative work in *any week* during a prescribed period does not permit the use calculation of hours worked on an average basis over a representative period. This is an observation which is not germane to the decision in this case.

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.

IN THE UPPER TRIBUNAL **Upper Tribunal Case No. UA-2023-001483-CSM**
ADMINISTRATIVE APPEALS CHAMBER **[2025] UKUT 077 (AAC)**

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC296/22/00293) of 23.2.2023 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. In brief, as helpfully set out in the first Respondent's skeleton argument the Appellant, EVH, has been the Parent with Care of two Qualifying Children who she shares with the Second Respondent, DH. DH, as the Non-Resident Parent, had been liable to pay child maintenance to EVH in respect of the two Qualifying Children. On 25th September 2021, the Secretary of State's Child Maintenance Service ("CMS") made a supersession decision with respect to previous child maintenance assessments made as against DH (the "Decision"). In the Decision, the CMS decided to remove one of the Qualifying Children ("Child E") from the claim, and DH became liable to pay child maintenance only in respect of the younger Qualifying Child, with the result that his weekly child maintenance liability was reduced. The Decision had an effective date of 6th September 2021.
2. DH appealed the Decision, contending that it should have had an earlier effective date. DH contended that Child E had stopped education in May 2021, and had commenced working on average 24 hours per week or more since either 1st June or 7th June 2021. He argued that she had stopped being a "qualifying child" within the meaning of the Child Support Act 1991 as of either 1st June or 7th June 2021, and therefore the Decision should have had a corresponding effective date.
3. The First-tier Tribunal found, on the evidence before it, that Child E had worked on average more than 24 hours per week across the period from 7th June 2021 to 2nd September 2021, and therefore she had engaged in "remunerative work" across that entire period. When taken together with the fact that she was no longer in education during that period, the result was that she was not a "qualifying child"

within that period. The FTT based its assessment on an average number of hours worked over the period. The First-tier Tribunal at paragraph 23 of its written reasons acknowledged a "different average may have been achieved if the weeks were taken to run from another day." The Tribunal gave permission for the decision to be appealed to the Upper Tribunal as "the application of the legislation to the facts of this appeal is open to different interpretations." While this may well be the case in the particular circumstances of this appeal, the jurisdiction of the Upper Tribunal is based on error of law. It would be helpful therefore if when granting permission any potential errors of law could be specifically identified.

Proceedings before the Upper Tribunal

4. Given permission to appeal had been given by the FTT, I held an oral (remote) hearing of this appeal on 10th December 2024.This was attended by the Appellant and both Respondents. The SSWP conceded an error or indeed errors of law may have been made by the FTT but did not actually support the appeal but was of the view, in the event a material error of law was identified, the appeal should be remitted to the FTT as further fact finding was required. The Appellant argued multiple errors of law had been made by the FTT as set out in her written and oral submissions. The second Respondent submitted it was unreasonable that he was expected to pay for a child who was working full time, that the decision was unfair and that it was wrong that the First-tier Tribunal did not look at the hours E worked in detail but rather as a whole. I thank all parties for their attendance and their submissions.

Legislative Background

5. Under the Child Support Act 1991, a non-resident parent may have maintenance liability with respect to a "qualifying child". A "qualifying child" must be a "child" (s. 3(1)); a person between the ages of 16 and 20 can only be a "child" if they satisfy conditions set out in the Child Support Maintenance Calculation Regulations 2012.

6. The Child Support Maintenance Calculation Regulations 2012, r. 76(1), refers to the definition of a "qualifying young person" used in social security legislation for determining eligibility for Child Benefit. The conditions contained in the Child Benefit (General) Regulations 2006, Part 2, include that a person between the ages of 16 and 20, who has left full-time education, will thereafter remain a "qualifying young person" for a period up to a set date (referred to as the "terminal date"): r. 7, case 1.

7. Regulation 76(2)(a) of the 2012 Regulations provides that a person who is between 16 and 20 years of age does not satisfy the conditions for being a "child" if they are "engaged in remunerative work in any week". "Remunerative work" is defined (r. 76(4)) by reference to the Child Benefit (General) Regulations 2006, r. 1(3), being "work of not less than 24 hours per week."

Discussion – error of law

8. This appeal is complicated by the fact that Regulation 76(2) of the Child Support Maintenance Calculation Regulations 2012 was inserted into the 2012 Regulations on the 19th of July 2021 by the Child Support (Collection and Enforcement of Maintenance Calculation) (Amendment No 2) Regulations 2021 (S.I.2021/763). Therefore, while this provision was in force at the date of the decision under appeal before the FTT in this case (25.9.21), it was *not* in force throughout the whole period considered by the FTT i.e. 7th June 2021 to 2nd September 2021. This is accepted by SSWP.

9. On this basis the FTT was in error of law. In my view this is a significant and material error. It impacts on much of the period considered by the FTT and gives the provision retrospective effect for that period. In my respectful judgment, the FTT has misdirected itself on the applicable law (albeit this may not have been drawn to the attention of the FTT and its reasons are in many other respects cogent and detailed) in its consideration of this issue and for this reason the decision must be set aside.

Calculation of hours worked

10. For the sake of completeness and to assist other Tribunals grappling with the assessment of hours worked in the context of this part of the 2012 regulations I observe regulation 76(2) provides:

A person does not satisfy the condition referred to in paragraph (1) where the person is—
(a)engaged in remunerative work in any week during a prescribed period; or

(b)in receipt of other financial support in any week.

11. A person who is between 16 and 20 years of age does not satisfy the conditions for being a "child" if they are "engaged in remunerative work ***in any week*** *during a prescribed period****"*****.** "Remunerative work" is defined r. 76(4)) by reference to the

Child Benefit (General) Regulations 2006, r. 1(3), being “work of not less than 24 hours per week”.

12. The FTT in its assessment of hours worked took a view over a “representative period” (paragraph 19 of the written reasons). This equates to an average of the hours worked over the period. It correctly observes a different average result may have been achieved if the weeks were taken to run from another day (para 23).

13. In considering the interpretation of this regulation I am mindful of the primacy of the text taking into account the regulation as a whole and that words should be given their ordinary natural meaning in this context (*R on the application of O (a minor, by her litigation friend AO)) V SSHD [2022] UKSC 3.* On that basis I do not consider there is any way to read this provision as including an option to assess the number of hours worked on the basis of an average of the hours worked over a “representative” period without effectively adding a statutory gloss to the regulation or at the very least straining the language far beyond its ordinary natural meaning.

14. On this question, therefore, I agree with the submissions of SSWP. Reg 76(2)(a) refers to engaging in remunerative work in *any week*. There is no provision in regulation 76(2)(a) (even leaving aside the issue of the insertion of regulations 76(2)-(4) on 19th July 2021) that allows the FTT to average how many hours the child worked over the period 01/06/2021 – 01/09/2021. S.147(1) of the Social Security Contributions and Benefits Act 1992 sets out the definition of 'week' in relation to child benefit as *'a period of 7 days beginning with a Monday'*. Therefore, the calculation of hours in remunerative work should have been from a Monday to Sunday in *any week* in the prescribed period and not as an average over the whole period. I would add this view is not germane to my decision in this appeal.

Conclusion

15. I find that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal’s decision is set aside.

16. The Secretary of State has suggested the Upper Tribunal remit this case to the First-tier Tribunal for re-hearing and, given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.

17. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view on this case. That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Directions for the re-determination of the appellant's appeal

I direct as follows:

18. The appeal against the Secretary of State's decision of 25th September 2021 is remitted to the First-tier Tribunal for re-determination.

19. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.

20. If the Appellant wishes the First-tier Tribunal to hold an oral hearing before her remitted appeal is determined she must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.

21. If the Appellant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.

22. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

23. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not obtaining at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at the date of decision.

E Fitzpatrick
Judge of the Upper Tribunal
Authorised for issue 25th February 2025