NCN: [2025] UKUT 423 (AAC)
Appeal No. UA-2025-000173-CA
UA-2025-000177-CA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

BH

Appellant

- v -

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Respondent

Before: **Upper Tribunal Judge Eleanor Grey KC**
Mode of hearing: **Decided on consideration of the papers**

Representation:
Appellant: In Person
Respondent: Mr M. Ford

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: 1700491722406412 - 1696694359621106
Tribunal Venue: Cardiff
Decision Date: 25 October 2024

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 25 October 2024 under number 1700491722406412/ 1696694359621106 was made in error of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a Tribunal in accordance with the following directions.

SUMMARY OF DECISION

In this appeal against a First-tier Tribunal (F-tT) decision regarding Carer's Allowance overpayments and employment status classification, I considered the F-tT's approach to deciding whether the claimant (BH) was employed or self-employed in his work. The sole ground of appeal was whether the F-tT correctly applied the legal test distinguishing between employment under a "contract of service" (employee) or a "contract for services" (self-employed). I accepted BH's argument that the F-tT wrongly treated payment through PAYE as determinative of BH's status; it was the contractual relationship that was key. I also found that the F-tT was wrong to rely on the category of "worker employment status" for benefits computation, treating BH as employed despite having the status of neither employee nor self-employed. I took the view that this was inconsistent with The Social Security (Computation of Earnings) Regulations 1996, which recognize only two categories: employed earners and self-employed earners. The F-tT's use of the broader "worker" definition, derived from other legislation, was inappropriate in this context. The case was remitted for further consideration of BH's status.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing, to be listed at the first available opportunity that is convenient for all the parties.**

2. **The Tribunal that re-determines the appeal must not include any member of the panel whose decision has been set aside by the Upper Tribunal.**

3. **The First-tier Tribunal may determine the issues in the appeal afresh, having regard to the guidance set out in this decision and any other relevant caselaw or guidance.**

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

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("the F-tT") which on 25 October 2024 heard an appeal against overpayments decisions made by the Respondent, the Secretary of State for Work and Pensions ("the SSWP"). The

SSWP had decided that the Appellant had been overpaid Carer's Allowance ("CA") and that £828 was recoverable from him in relation to these overpayments. A civil penalty of £50 was also imposed; this was also appealed. The District Tribunal Judge allowed the appeal, but only in part. He decided that the sum overpaid, from 1 August 2022 to 25 September 2022 was £557.60 and this sum was recoverable from the Appellant. He further decided that the civil penalty should not have been imposed.

2. After permission to appeal had been refused by the F-tT, the Appellant ("Mr H") appealed to the Upper Tribunal. Permission to appeal was granted by Upper Tribunal Judge West on 7 March 2025.

3. The sole ground of appeal is whether or not the F-tT was right to conclude that the Appellant was employed, in his work for three companies, rather than self-employed. He contends:

> *"The FTT failed to apply the correct legal test (whether or not the work [the Appellant] did was done under a contract of service or a contract for services). Instead the FTT applied a test of whether or not the work done was taxed under the PAYE system and held that to be determinative of whether [the Appellant's] earnings should be assessed under the "employed earner" rules in the [Social Security Benefit (Computation of Earnings) Regulations 1996 or the "self employed earner" rules [under the same Regulations]."*

4. The decision to disallow the civil penalty was not appealed and no longer forms part of these proceedings.

5. The appeal is resisted by the SSWP. Both parties have filed helpful submissions outlining their position. Neither have asked for an oral hearing and I am satisfied that I can decide this appeal fairly on the papers.

6. An appeal to the Upper Tribunal lies on a point of law. In this case, it concerns a matter of employment law, perhaps one that may more often arrive in the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT). As the Court of Appeal observed in *Stevedoring & Haulage Service Ltd v Fuller* [2021] EWCA Civ 651 *"In considering whether the decisions of the ET and the EAT can be sustained, we bear in mind that whether there is a contract and, if so, what its terms are, are questions of fact or mixed questions of law and fact. Appeals from the ET lie only on questions of law and so their findings of fact can only be challenged for perversity."* (para 9). It further noted that an appeal could be allowed if there was "*an error of legal approach or direction"* (see para 15). These observations apply equally to this appeal.

Factual background

7. On 9 March 2021, the Appellant was awarded Carer's Allowance from and including 9 March 2021, in respect of the care provided to his wife.

8. In December 2021, he began to carry out work for CPM Field Marketing ("CPM") and subsequently undertook work for Elevate Field Marketing ("Elevate") and Resource Experience Limited ("Resource"), signing contracts with each company. This work was not disclosed to the DWP until October 2022. There was no set pattern to the assignments Mr H accepted with each company.

9. Thereafter, the SSWP decided that the work had led to overpayments of CA and imposed a civil penalty of £50 in respect of the non-disclosure. The Appellant appealed to the F-tT.

10. Considering the work for CPM, Elevate and Resource, the F-tT made the following findings of fact:

    a. There was no mutuality of obligation created by the agreements with the three companies who paid Mr H for services he performed (Statement of Reasons, §14(v)).
    b. Mr H incurred expenses to carry out his work which were not claimable from the companies (Statement of Reasons, §14(vi)).
    c. Mr H's earnings were taxed via the PAYE system (Reasons, §14(vii)). I note that he would therefore pay Class 1 National Insurance contributions rather the Class 2 that would be payable as a self-employed individual.

11. The judge noted that the UK Government website states that the self-employed cannot be paid for their work through the PAYE system (Reasons, §15(b) and §15(d)), and continued:

    "c) Whilst [the Appellant] does not have employee status, as the various agreements that he had signed preclude the acquisition of such rights, he was (and continues to be) paid through PAYE.
    d) Therefore, [the Appellant] cannot be self-employed, and is correctly categorised as having worker employment status, working under a series of agreements to perform work or services personally for another party, where the other party is not a customer or client of [the Appellant's] own business."

12. The F-tT noted that the HMRC "Check Employment Status for Tax" questionnaire suggested that Mr H would be "*self employed for tax purposes for this work*" (Reasons, §15(g)). However, the judge also noted that it stated that in order to benefit from self-employed status, *"the person must ensure that the organisation hiring them "pay your earnings in full, without deducting Income Tax and National Insurance contributions*" and this step was not taken; so he did not place any weight on this. Mr H was rightly treated as an 'employed earner' under the Social Security (Computation of Earnings) Regulations 1996.

Legal Background: Employees and the Self-Employed.

13. The income of the 'employed' and the 'self-employed' is treated differently under the Social Security (Computation of Earnings) Regulations 1996 ("the 1996 Regulations"). The definition of an 'employed earner' is set out in Regulation 2(1): it means (relevantly) "a person who is in gainful employment in Great Britain under a contract of service". (The definition also includes "a person in any such employment which, in accordance with the provisions of the Contributions and Benefits Act and of any regulations made thereunder, is to be disregarded in relation to liability for contributions", but no one has suggested that any disregards are relevant in this case).

14. The "self-employed earner" is a residual category: it is a person "who is in gainful employment in Great Britain otherwise than as an employed earner…" (underlining added). These definitions then feed through to the computation provisions in Part II ('Employed Earners') and Part III ('Self-Employed Earners'), which in turn are used to assess earnings for the purpose of entitlement to Carers Allowance.

15. Also relevant to the F-tT's approach is the wider definition of 'worker' created by certain statutes and statutory instruments. Under statutes such as the National Minimum Wage Act 1998 or statutory instruments such as Working Time Regulations 1998, certain employment rights have now been granted to a wider category of persons than the traditional category of 'employees'. Regulation 2(1) of the Working Time Regulations 1998 states:

" "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;".

16. But the assessment of who is an "employee" under a 'contract of service' continues to be governed by the common law. There is no one single test to decide the issue, and nor can the terms of any written contract be considered in isolation without having regard to the parties' dealings, which may also cast a light on their intentions. It requires an assessment of all the relevant circumstances including the terms of the contracts, whether there was 'mutuality of obligation' between the parties and whether the companies exercised a 'sufficient degree of control' over the manner in which an individual carries out the work he or she has agreed to do. See, for example, the recent decision of the Supreme Court in *Revenue and Customs Commissioners v Professional Game Match Officials Ltd* [2024] UKSC 29 including at paragraphs 30 – 34.

Discussion and further Legal Analysis

17. Returning to the F-tT decision, it seems to me that the key steps in the F-tT's analysis and conclusions, as set out in its paragraph 15, were that (i) the Appellant was not employed (there was no 'mutuality of obligation' and he 'did not have employee status', see §14(v) and 15c); but (ii) neither was he self-employed – as he was paid through PAYE; (iii) 'therefore' he had 'worker employment status' – and should be treated as a employed earner as a result.

(1) Employment Status – the contracts as a whole

18. The first of these steps involved assessing the nature of three contracts, essentially a question of fact. In relation to the question of whether each, or any of them, created a general relationship of employment between the company and the Appellant, the conclusion reached seems to me one that was eminently open to the Tribunal. In particular, the finding of a lack of 'mutuality of obligation' was clearly founded on the evidence: none of the three companies had any obligation to offer the Appellant work, and he did not have any obligation to accept an assignment. Mutuality of obligation may not be the only mark of an employment relationship, but it remains a key one.

19. The finding that the overarching relationship between each company and the Appellant was not, therefore, an employer-employee relationship seems to me to be unassailable.

20. However, for reasons that I have explained at paragraph 36 onwards, below, I do not consider that this conclusion disposed of the issue of whether the Appellant was, nevertheless, an employee – not under any of the contracts as a whole, but because an employer-employee relationship was instead created in relation to each, separate assignment that he accepted.

21. Before addressing that further issue, I have returned to the second and third steps of the F-Ft's reasoning (as set out at para 17 above).

(2) The PAYE Contributions

22. The Appellant's key challenge is to the emphasis placed by the F-tT on the fact that he was paid by PAYE. He says that this should not have been treated as a (if not the) decisive factor in his employment status; the F-tT should have considered the possibility that the method adopted was, simply, wrong.

23. I have already set out the steps in the F-tT's reasoning at paragraphs 10 and 13 above. The Appellant correctly emphasises the importance of the use of the PAYE system in the finding that he was 'not self-employed'.

24. I accept that this approach was wrong, in law. The use of the PAYE system should be the consequence of an (accurate) analysis of the parties' contractual relationship, rather than defining it. Even if it is permissible to use it as one of the factors which shows the parties' true intentions, the whole relationship has still to be assessed. (This might be different if HMRC had considered the contracts

and relationships, and its views had to be taken into account; but that is not this case).

25. See, for example, the comments in *CG/645/2008* at paragraph 8 (*"I stress here that the P14 [i.e., the year-end income tax summary] is at best presumptive evidence of the identity of the employer. It is certainly evidence of payment of wages subject to the PAYE system. But it cannot be conclusive evidence as to the true identity of the employer – that is a matter of contract law, not revenue law*") and paragraph 50 (*"As indicated, the labels used by the parties cannot be conclusive. So the mere fact that Mr L regarded himself as employing the claimant as an employee (and that the claimant saw it that way) does not determine the matter, nor does the deduction of tax and contributions through the payroll. The underlying realities must be considered*"). Or see *Clark v Oxford Health Authority* [1988] IRLR 125 CA, where 'bank' nurses were paid through the PAYE system, but there was held to be no 'global' contract of employment (although the issue of whether each assignment accepted created a contract of service was remitted back to the Tribunal, see further below).

26. It therefore seems to me that the finding that because the Appellant was paid via the PAYE system he was "therefore" not self-employed amounted to "*an error of legal approach or direction",* to use the language of the *Stevedoring* case set out at paragraph 6 above.

(3) The Definition of 'worker'

27. The third step in the F-tT's reasoning was the conclusion that as the Appellant was not an employee nor self-employed, he was an "employed worker" (*"having worker employment status, working under a series of agreements to perform work or services personally for another party, where the other party is not a customer or client of [the Appellant's] own business*"). This effectively created a further, third category of persons for the purposes of the 1996 Regulations, but one to be treated as if an employee working under a contract of service, for the purpose of calculating earnings.

28. I do not think that this approach is consistent with the language or categories of those 1996 Regulations.

29. The definition of 'worker employment status' used by the F-tT is consistent with, and presumably derived from, the limb (b) definition of 'worker' used in (for example) the Working Time Regulations 1998 – see the definition set out at paragraph 15 above.

30. I accept that it was, moreover, relevant to the Appellant's rights under the three contracts he held. Each of them agreed to pay him holiday pay (FTT Bundle p11, p34 and p48). Regulations 16 and 16A of the Working Time Regulations confer entitlement to holiday pay on "workers"; Regulation 16A makes specific provision for 'rolled-up holiday pay for irregular hours workers and part-year workers',

stipulating a 12.07% uplift to the renumeration for work done (as the Appellant's contracts provided). From the perspective of the Working Time Regulations, it is probably correct that the Appellant was a 'limb (b) worker'.

31. However, the 1996 Regulations do not use this definition; and neither does the Social Security Contributions and Benefits Act 1992, which is the Act under which the 1996 Regulations were made. The 1996 Regulations echo the definitions of 'employed earner' and 'self-employed earner' contained in s2 of the Social Security Contributions and Benefits Act 1992. Both assume that if a claimant is not employed under a 'contract of service', they should instead be treated as 'self-employed'; there are only two categories of earner.

32. In this case, the F-tT in effect created a third category: not employed (see step 1) but not self-employed either (step 2) but still a 'worker' – who, it was held, should then be treated as if they were employed.

33. This approach seems to me inconsistent with the framework of the 1996 Regulations. First, those Regulations do not refer to 'limb (b)' workers. Second, they assume and require that if a claimant is not an employee (employed "under a contract of service"), he or she must be treated as if self- employed, which is the only residual category (""who is in gainful employment in Great Britain otherwise than as an employed earner…").

Conclusions – Error of Law

34. In summary, I find that the F-tT erred in:

    a. Concluding that because he was paid via the PAYE system, 'therefore' the Appellant could not be self-employed; and further

    b. By holding that, although the Appellant was neither an 'employee' nor 'self-employed', he was nevertheless to be treated as 'employed' within the meaning of the Social Security Benefit (Computation of Earnings) 1996, by reference to the wider definition of 'worker' contained in legislation such as the Working Time Regulations 1998, when this was not a concept recognised under the 1996 Regulations.

Disposal – Determination or Remittal

35. Having found these errors of law in the Tribunal's approach, I have to decide whether to resolve this appeal myself, or whether it should be remitted back to the F-tT for fresh findings of fact.

36. In order to assess whether or not there was an employment relationship, the judge should have assessed the relationship between the Appellant and the three companies for which he undertook assignments broadly, looking at all the relevant circumstances. I have already referred to the decision of the Supreme Court in *Revenue and Customs Commissioners v Professional Game Match Officials Ltd* [2024] UKSC 29, including at paragraphs 30 – 34.

37. I have noted, and upheld, the finding that the three contracts between the companies and Appellant did not create any 'mutuality of obligation', and that, as a result the Appellant "does not have employee status", in that context.

38. I have considered whether this finding is sufficient to allow the disposal of the appeal.

39. However, the analysis of the Supreme Court in *Professional Game Match Officials Ltd* shows that it is not sufficient. In that case, successive courts and tribunals had considered both the 'overarching' terms of engagement of referees engaged by Professional Game Match Officials Ltd and the terms of the individual assignments accepted on each occasion. By the time the case arrived in the Supreme Court, it had been established that there was no overarching, global or 'umbrella' contract (as there was no mutuality of obligation - as in this case). But the issue of whether or not single, individual contracts of employment were created on each occasion a refereeing assignment was accepted was still contentious.

40. At paragraph 53 - 55, the Supreme Court stated:

> *"53. The position as regards single engagements and overriding contracts was summarised in Atholl House at para 74:*
>
> > *"It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work …"*
>
> *54. The single engagement was addressed by Lord Leggatt in Uber at para 91:*
>
> > *"Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg McMeechan v Secretary of State for Employment [1997] ICR 549; Cornwall County Council v Prater [2006] ICR 731. As Elias J (President) said in James v Redcats(Brands) Ltd [2007] ICR 1006, para 84:*
> >
> > *'Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract,*

> *and therefore no employment status in the gaps, but that does not preclude such a status during the period of work.'*
>
> *I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see Windle v Secretary of State for Justice [2016] ICR 721, para 23."*
>
> *55. In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative employer."*

41. The Supreme Court concluded that each individual engagement to officiate at a match, if accepted by a referee, satisfied the test of mutuality of obligation (see para 57) as it gave rise to rights and obligations on either side. It was also held that the employer had a "sufficient element of control" over the referee's work to be consistent with a contract of employment. But the ultimate question of whether it should thus be held that, in all the circumstances, a contract of employment was created on each occasion was remitted to the First-tier Tribunal for decision (paragraphs 91 – 93).

42. Cases like *Carmichael v National Power Ltd Plc* [1999] 1 WLR 2042 (HL) and *Clark v Oxfordshire Health Authority* (see above) are further examples of cases where both the issue of a 'global' or umbrella contract, and the possibility of individual, repeated contracts of service was in issue.

43. Here, the finding of that there was no 'mutuality of obligation' does dispose of the argument that there was a 'global' contract of employment between the Appellant and any of the three companies in question.

44. But the issue of individual, successive employment contracts was not considered. The Tribunal did not consider, or make findings upon, the possibility that each separate assignment gave rise to a contract of employment between the Appellant and the company that had engaged him to do this work. Furthermore, there is some material in the documents which could point in that direction. Specifically, the SSWP draws attention to the fact that the Elevate contract stated (Bundle p36): *"Nothing in this agreement shall render you an employee unless and until you accept an assignment on the terms offered to you by the Company, in which case you will be an employee of the Company solely for the duration of the assignment."* (The Appellant replies that this term was not in the other two and he did little work for Elevate only; and the contract with CPM by contrast stated "*tactical work is not deemed to form a Contract of Employment*").

45. Although this may seem a complex set of arrangements, it is no different from the *Professional Game Match Officials Ltd* case, where HMRC was seeking to establish employment status in order to establish the correct tax liabilities (see paragraphs 2 - 3 of the decision).

46. In those circumstances, it seems to me that I have no real alternative but to remit the case back to the First-tier Tribunal, in order to enable this issue to be considered and for the necessary findings of fact to be made on the status of the individual engagements, in the light of the caselaw contained in, in particular, *Revenue and Customs Commissioners v Professional Game Match Officials Ltd* [2024] UKSC 29.

Eleanor Grey KC
Judge of the Upper Tribunal

Authorised by the Judge for issue on 12 September 2025