DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 2 January 2018 at Chesterfield under reference SC308/17/01920) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the United Kingdom is the competent State for the claimant's claim for a carer's allowance. The Secretary of State will now investigate and decide whether she qualifies for an award.

REASONS FOR DECISION

1. I held an oral hearing of this appeal on 25 July 2019. The claimant was represented by Tim Buley QC and Kim Ziya of counsel, who acted pro bono through the good offices of the Free Representation Unit. Galena Ward of counsel appeared for the Secretary of State. I am grateful to all of them for their written and oral argument.

A. History and background

2. This case concerns a carer's allowance. The claimant, who is Polish, made a claim for an allowance with effect from 2 February 2017 in respect of the care she provided for her partner. The tribunal did the best it could to make findings of fact about the claimant's employment and income from her work as a cleaner. The evidence was slightly inconsistent, but not to any material extent. In round figures, the claimant was working six or seven hours a week and earning around £2500 a year. She did not advertise, had no business insurance, did not have to pay for materials, and had no stock costs. In other words, she was typical of someone who carried out a small amount of cleaning to supplement the family income.

B. The legislation

3. Section 70(4A) of the Social Security Contributions and Benefits Act 1992 governs carer's allowance and provides:

> (4A) A person to whom either Regulation (EC) No. 1408/71 or Regulation (EC) No. 883/2004 applies shall not be entitled to an allowance under this section for a period unless during that period the United Kingdom is competent for payment of sickness benefits in cash to the person for the purposes of Chapter 1 of Title III of the Regulation in question.

Article 11 of Regulation 883/2004 provides :

> **General rules**
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> 1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.
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> …
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> 3. Subject to Articles 12 to 16:
>
> (a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State; …

And Article 1 of the Regulation provides definitions:

> **Definitions**
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> For the purposes of this Regulation:
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> (a) 'activity as an employed person' means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;
>
> (b) 'activity as a self-employed person' means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists; …

The parties agreed that the relevant definition in domestic law was in section 2(1) of the 1992 Act:

> (a) 'employed earner' means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings; and
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> (b) 'self-employed earner' means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment.

C. Issues for EU and domestic law

4. The application of Article 11(3)(a) involves a mixture of EU and domestic law. As Upper Tribunal Judge Rowland pointed out in *JM v Secretary of State for Work and Pensions* [2018] UKUT 329 (AAC):

> 11. … the meaning of 'any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State' and the construction of Article 11(3)(a) itself must be questions of European Union law …
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> 12. … whether that status continues for the purposes of Article 11(3)(a) of Regulation (EC) 883/2004 during a period of sickness is a matter of European Union law …

I also accept Mr Buley's point that although section 2(1) defines the activity, whether the claimant is pursuing that activity is governed by EU law.

D. The decisions of the Secretary of State and the First-tier Tribunal

5. The Secretary of State refused the claim for a carer's allowance on the ground that section 70(4A) was not satisfied and the First-tier Tribunal dismissed the claimant's appeal. The parties were agreed that the tribunal had made an error of law by applying the test of whether the claimant was a worker, which was developed in respect of a person's right to reside under Directive (EC) 2004/38 and earlier provisions.

6. The parties were agreed that if the claimant was pursuing an activity as a self-employed person, she satisfied section 70(4A) and I should re-make the tribunal's decision accordingly. Having heard argument on the issue at the hearing, I announced that I would allow the appeal on that basis. That leaves the fascinating issues of EU law that would otherwise have arisen for another day.

E. The argument on whether the claimant was pursuing an activity as a self-employed person

7. The argument for the Secretary of State was that in order to be gainfully self-employed a claimant's earnings had to be sufficient to make the claimant liable to pay national insurance contributions. The argument for the claimant was that no authority had been cited for that proposition, which was wrong. Putting the argument into my own words, section 2 does not provide that a claimant has to be liable for national insurance contributions in order to be gainfully self-employed. The liability follows from the classification, but is not part of it. In support, Mr Buley and Ms Ziya cited a consistent line of cases that decided that a person could be gainfully occupied or employed – the language of the legislation differed over time – even if they made no profit at all from their activity.

F. The case law

8. Three of the cases are decisions of the High Court and concerned legislation using the expression 'gainfully occupied'. The other was a decision of the Upper Tribunal and concerned legislation using the current expression 'gainfully employed'.

Vandyk v Minister of Pensions and National Insurance [1955] 1 QB 29

9. This was a decision of Slade J. The case concerned a man whose legs and left arm were paralysed. He was employed by the London School of Economics as a research assistant. He was paid a salary of £300 a year plus £75 a year travelling allowance. He paid £11 a week for a driver and car to take him to and from work. The judge assumed that, overall, he was out of pocket. The issue was whether the man was 'gainfully occupied in employment in Great Britain, being employment under a contract of service' despite making no profit from his employment. The judge decided that he was.

10. The judge began by saying (at 36) that '"gainfully occupied" … must mean the same' in the context of employment and self-employment. Later at 38 he relied on a comparison of employment and self-employment.

11. On the profit issue, he rejected (at 36) the argument as put for Mr Vandyk on two grounds. First, if it was necessary to strike a balance between receipts and expenditure, it would mean that a person's status might fluctuate from day to day. Second, the balance could only be struck if there were some standard or criterion by which the expenditure was to be assessed. Looking at the regulations governing that issue, he thought (at 37) that they 'tend to support the construction that the words "gainfully occupied" are quite independent of the commercial result of the contract of employment' and that 'the striking of a balance is no part' of the assessment.

12. Coming to his own approach to the profit issue, the judge said (at 37-38):

> What I have to do is to look at section 1 (2) (a) and decide what, in the context of that subsection, the words 'gainfully occupied in employment' mean. First, one observes that the words are 'gainfully occupied in employment ... under a contract of service.' If the contract of service were in writing, one would expect to ascertain whether a person was or was not 'gainfully occupied' under it by looking at the terms of the written contract. If it were an oral contract of service, once the oral terms had been determined the same principle would apply. Here the appellant is employed at a salary of £300 a year plus a contribution of £75 per annum towards the expenses of travel. I ask myself, does the receipt of those emoluments constitute a gainful occupation? In my judgment it does.
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> Mr. Ashworth [for Mr Vandyk] submitted that the question which I ought to ask myself is not, is the employed person getting something *out of it,* but is he getting something *for it,* and that the words 'gainfully occupied' are really in contradistinction to a contract of employment in an honorary and unpaid capacity. One then says, if that is the case, why use the words 'gainfully occupied' at all, because a contract of employment usually has a consideration proceeding from the master to the servant and one proceeding from the servant to the master? The consideration which moves from the master to the servant is, of course, in nearly every case some form of pecuniary emolument.
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> In section 1 (2) (b), where the words 'gainfully occupied' appear with regard to self-employed persons, ex hypothesi there is no contract of employment. I think that in category (a) they mean nothing more than a person who receives something from his master as the fruit of his labour, that is to say, who receives from his master under the contract of employment something by way of remuneration for the services which he is contractually bound to render to the master under the contract of service. Similarly (although this does not come before me for decision, but I have expressed the view that the words must mean the same in both (a) and (b)) I think that a 'self-employed' person is a person who is gainfully occupied in employment otherwise than under a contract of service, that is to say, the question is not to be posed at any particular time, has he in fact received some net profit from his activities as a self-employed person, but does he hold himself out as being anxious to become employed for purpose of gain.

As I said earlier, the analysis treats 'gainfully occupied' as not depending on the difference between employed and self-employed and, indeed, the application of the expression to the latter as assisting in the interpretation of the former.

Benjamin v Minister of Pensions and National Insurance [1960] 2 QB 519

13. This was a decision of Salmon J. The case concerned an articled clerk. The articles made no provision for remuneration, but the solicitor made small payments as Christmas boxes in 1954 and 1955. He also told the clerk that, in view of the qualify of his work, he would pay him £100 in 1956 for holidays, to be drawn at the clerk's request. In the event, four payments of £25 were made in March, July, September and December. The issue was whether the clerk was 'gainfully occupied in employment in Great Britain, being employment under a contract of service' in 1956, given that there was no contractual provision of payment or any hope, intention or desire of payment at the time the clerk entered into the articles. The judge decided that he was.

14. The judge separated the issue into two questions (at 529):

> First of all, I think, one has to see if the person concerned is in employment under a contract of service; and then if he is in employment under a contract of service, is he gainfully occupied? In my judgment it matters not at all that the contract of service itself does not provide for any payment to the servant.

The judge accepted that comments in *Vandyk* could be taken as suggesting the contrary, but the judge in that case was only concerned with the issue of profit, not with a case in which the contract made no provision for remuneration at all. Accordingly, the judge explained (at 530):

> I therefore decide against the appellants on the first point without any hesitation. If money is paid to the servant for the services which he has rendered under the contract of service then he is a person gainfully occupied in employment under a contract of service, notwithstanding that the contract makes no provision for those payments.

15. The judge then decided that it was not relevant that the clerk had no hope, intention or desire of remuneration. Not only did the articles make no provision, but he had been told that he was not going to get anything by way of remuneration. The judge explained why that was not relevant in this case (at 530-531):

> It may well be that there are cases when it is important to consider what was the hope, intention, or desire of the person alleged to have been employed or self-employed, during the relevant period. For example, a man may be painting a picture, or writing a book, which he hopes to sell later. It may be that for a year or more he will be engaged in producing the picture or book, but he cannot enjoy the pecuniary fruits of his labour until later; nevertheless, during the time that he is bringing his work to fruition he is hoping, intending and desiring to obtain gain from it and during that period he is gainfully occupied. When, however, the person in question is receiving money during the course of his employment it is not, I think, very important

> to consider what his hopes, intentions or desires were at the time he entered upon his employment or during its course. I do not consider that if a man is in fact paid money for services during the course of his employment the fact that when he entered into his employment he had no hope, intention or desire of obtaining gain is of the slightest relevance.

16. Finally, the judge found by inference that the payment had been made for the work that the clerk had done. The judge set out the test (at 531-532):

> The crucial test in this case is whether the clerk was being paid for his services, or whether he was gaining something merely because of his personality and its impact on the solicitor? If the solicitor liked him, as I am sure he did, and thought that he was a promising and charming young articled clerk, and one day said to him 'You are looking very ill, I think you have been overworked, you had better go away on holiday and I will pay for it,' that would have been a purely personal gift and would in no sense have been payment for services.
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> But if the solicitor, at the beginning of 1956, said to himself 'This young man has now been with me for some 16 months and he is beginning to be very useful as a clerk and I think I would like to pay him some money for what he is doing for me; that would only be fair,' and decided to give him £2 a week for the work he was doing in 1956, then it seems to me that that is quite different. I think in those circumstances the clerk is a person gainfully occupied in employment, and that £2 a week, or the £100 paid to him during 1956, could properly be regarded as payment for services.
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> It is obvious that in cases of this kind there is bound to be a certain amount of overlapping. What is in substance a personal payment to the clerk, because the employer likes him and wants to send him away on holiday, cannot entirely be disassociated from the services the clerk is rendering to the solicitor; and, similarly, when the solicitor decides to pay him for his services during 1956, that cannot be entirely disassociated from the fact that he likes the clerk.
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> Broadly, it comes in the end to a question of fact. On which side of the line does it fall? Is it a personal gift, or is it remuneration?

In re J B Griffiths, Quinn & Co, and others, *Quinn v Heron* (1968) 5 KIR 128.

17. This was a decision of Cooke J. The case concerned two articled clerks. Their articles made no provision for remuneration, but there was a separate parol agreement under which they were entitled to the cost of travel from home to the firm's offices and of lunch on the days of travel. The judge assumed that the amounts paid did no more than reimburse the costs incurred. The issue was whether the clerks were 'gainfully occupied in employment in Great Britain, being employment under a contract of service' in the weeks when they came to the office. The judge decided that they were.

18. The judge saw the gain to the clerks as the decisive factor:

> It seems to me to be clear that these payments were made to the clerks solely as a result of their employment …
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> If that is right, it seems to me that, if the payments involved gain to the clerk, he was gainfully occupied in his employment under the contract. I reject any distinction between the conceptions involved in the word 'gain', whether used as a noun or a verb, and the conceptions involved in such derivatives as 'gainful' or 'gainfully'. When I ask myself as a matter of ordinary language and common sense whether these payments involved gain to the clerk, it seems to me that the answer must be in the affirmative. What he gained was free lunches and free travel to London, or, looked at in another way, enough money to reimburse him for the cost of his lunches and his travel to London. It is true that, in so far as the money was pure reimbursement, it left him in no better pecuniary position than he was before he had incurred the expenses. In that sense, I suppose it may be said that he did not make a profit, but I cannot see how the actual gain is nullified by the fact that there was no profit in this sense.
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> In my view, the sums paid to these clerks were a clear gain to them. It does not, in my view, advance the matter to say that the clerks had to come to London under the terms of their employment. The reimbursement of the cost of travel was still a gain, just as much as the reimbursement of the cost of lunches was a gain.

19. The judge went on to quote extensively from *Vandyk* (including Slade J's discussion of self-employment) and *Benjamin*. On *Vandyk*, he said:

> It seems to me that Vandyk's case (supra) and the authorities cited by Slade J are clear authority for the proposition that a person is gainfully occupied if he receives something from his master as the fruit of his labour, even though he does not make a profit out of his employment. In my view, that authority fortifies the conclusions to which I have come.

JM v Secretary of State for Work and Pensions [2018] UKUT 329 (AAC)

20. This was a decision of Upper Tribunal Judge Rowland. The case concerned the 1992 Act and the issue was whether the claimant was gainfully self-employed from 1 August 2013 when she said she had ceased trading. The judge undertook a detailed analysis of the scope of EU and domestic law, and considered how it applied to a claimant whose work was interrupted by sickness. The parties were agreed that that analysis was not relevant to his decision, which was that the Secretary of State had been entitled to rely on the claimant's unequivocal statement that she had ceased self-employment at the beginning of August.

G. Analysis

21. I have to decide whether the claimant, whose earnings are below the threshold for national insurance contributions, could be gainfully self-employed. I have decided that she could be and was as she was working regularly but for only a few hours at around the minimum wage. This is but one of the numerous

variations that may arise for decision in self-employed cases. Just to take a selection, there may be cases in which:

- a claimant is just starting a business, like the barrister discussed in *Vandyk* (at 36);
- a claimant whose self-employment has been temporarily interrupted by ill health;
- a claimant whose work is seasonal or erratic;
- a claimant who is living off past earnings from activity, like an author.

The outcome for those cases will depend on their individual circumstances. It may be that in some of those cases the answer will be found by applying the requirement of EU law that the claimant must be *pursuing* the activity. Those matters will have to be decided as and when they arise.

22. No one argued that there was a difference between being gainfully *occupied* and gainfully *employed*, and I have not been able to think of anything that could be relevant to the issue I have to decide in this case.

23. In all three of the High Court decisions, the classification of the person as gainfully employed led directly to a liability for contributions. That is not the case under the current legislation in the 1992 Act. Under that Act, the classification is a preliminary stage to any liability that may arise and independent of that liability. But even under the earlier legislation, the classification applied despite there being no profit from the gain. In other words, the classification did not depend on the amount of the person's income or profit. As in the current legislation, liability followed from the classification.

24. Section 2(1) on its own does precisely what the definitions in Article 1 of the Regulation require. It provides for the activities that are treated as employed or self-employed activity for the purposes of the domestic social security legislation. It is relevant to the part of that legislation that provides for the circumstances in which a claimant will be liable for national insurance contributions. But it extends beyond that, even into income-related benefits, to which national insurance contributions are irrelevant. So, only an employed earner may be entitled to industrial injuries benefit under section 94 (1) of the 1992 Act, and the classification is adopted by the Income Support (General) Regulations 1987: see the definitions in regulation 2(1) of those Regulations.

25. It is true that none of the High Court cases concerned a self-employed person. But Slade J in *Vandyk* considered such persons as an integral part of his reasoning. Neither Salmon J in *Benjamin* nor Cooke J in *Griffiths* expressed any doubt about his reasoning as a whole, although it was not binding on them as a matter of precedent.

26. I was referred to the recent decision of the Court of Appeal in *R (Youngsam) v the Parole Board and the Secretary of State for Justice* [2019] EWCA Civ 229 for a discussion of what is and is not a binding part of a decision. Since I am not bound to follow any of the decisions cited to me, I have not needed to consider the reasoning in that case. It has been sufficient for me to ask whether I agree with the judges' decisions, which I do. The reasoning is coherent and persuasive, and it

is supported by the authorities from other areas of law that are cited in some of the decisions.

27. I have particularly taken account of the need to apply Article 11(3)(a) whenever the need arises. That means whenever a claim is made and Regulation 883/2004 has to be considered. Liability for Class 2 contributions for the self-employed is only calculated after the end of the tax year. If the claimant's earnings are sufficiently high, it may be possible to know early in the year that a liability will arise, but in the case of low earnings, that may be in doubt until much later in the year, possibly only when it has ended. That is not consistent with the purpose of Article 11(3)(a), and of the definition in Article 1(b), which is to allow a decision to be made as soon as possible after a claim has been made. I note the provisions in Regulation 883/2004 and in Regulation (EC) 987/2009, which provides for its implementation, that are designed to ensure a prompt identification of the competent State and resolution of the claim. See, as examples, Articles 68(3) and 81 of the former Regulation, and Articles 6 and 7 of the latter Regulation. This context suggests that the minimum earnings threshold is not part of what is envisaged by the definition of activity as a self-employed person in Article 1(b).

H. Disposal

28. I have set aside the First-tier Tribunal's decision and re-made it to decide that this country is the competent State for the claim. The Secretary of State will now decide whether the claimant is entitled to an award.

Signed on original
on 30 July 2019

Edward Jacobs
Upper Tribunal Judge