THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CCS/1116/2019
[2019] UKUT 321 (AAC)

EB v SECRETARY OF STATE FOR WORK AND PENSIONS AND CW

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference: SC269/18/00784
Decision date: 17 December 2018
Venue: Teesside

As the decision of the First-tier Tribunal 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 non-resident parent's gross weekly income is to be based on his current income at the effective date of 24 January 2018. At that date, his income from employment is nil and his income from self-employment is the profit from his trading as reported to Her Majesty's Revenue and Customs in respect of the 2016/2017 tax year.

REASONS FOR DECISION

1. This case is about the child support maintenance payable in respect of Imogen by her father, who is her non-resident parent under the child support scheme. He is a respondent to this appeal. Imogen's mother (her parent with care under the scheme) is the appellant and the Secretary of State is the other respondent.

A. The decision-making

2. The non-resident parent's liability was calculated at £73.13 a week from the effective date of 8 November 2017, based on income from both employment and

self-employment of £31,777. That liability was at the basic rate, based on historic income provided by Her Majesty's Revenue and Customs.

3. On 24 January 2018, the non-resident parent notified a change of circumstances in that his employment had come to an end on his employer going bankrupt. The Secretary of State refused to supersede the decision fixing his liability at £73.13 on the ground that he had not provided evidence relating to his earnings from self-employment. The different decision-maker who undertook a mandatory reconsideration came to the same conclusion.

4. On the non-resident parent's appeal, the First-tier Tribunal decided that the non-resident parent's liability should be based on income from self-employment of £8086. The tribunal reasoned that that was the current income figure to be applied from the effective date of 24 January 2018. It relied on a set of accounts for the tax year ending on 5 April 2018. The tribunal also took into account rental income from property of £3063 a year.

B. How income is calculated

5. Child support maintenance at the basic rate is a percentage of the parent's 'gross weekly income' (paragraph 2 of Schedule 1 to the Child Support Act 1991). That income is calculated in accordance with the Child Support Maintenance Calculation Regulations 2012 (SI No 2677). The general rule is that gross weekly income is based on the parent's historic income at the effective date of the decision (regulation 34(1)). In simple terms, historic income is derived from information provided to Her Majesty's Revenue and Customs for the last available tax year (regulations 4 and 36). It is the sum of income from employment, a pension, some social security benefits and trading (regulation 36(1)(a)-(d)).

6. In some circumstances, 'gross weekly income' is based on current income rather than on historic income. Current income is the sum of income from employment, self-employment and a pension, but not from social security benefits (regulation 37(1)). For the purposes of this appeal, it is sufficient to say that current income applies if it 'differs from historic income by an amount that is at least 25% of historic income' (regulation 34(2)(a)). This fits in with the Secretary of State's power to supersede a decision fixing the amount of child support liability when 'there has been a relevant change of circumstances since the decision had effect' (regulation 17(1)(a)). If there is a reduction in the non-resident parent's historic income of at least 25%, sufficient to trigger the application of current income, that is a *relevant* change of circumstances.

7. Historic income is a composite figure of all income from relevant sources. So is current income. Either historic income applies or current income (regulation 34(1)). There is no scope for income from employment to be historic and income from self-employment to be current, or vice versa. The 25% minimum change provision in regulation 34(2)(a) applies to historic income, which is the sum of all the types of income listed in regulation 36(1). It cannot be applied separately to

each type of income. And once the 25% threshold is satisfied, the parent's gross weekly income has to be based on current income as a whole.

C. Income from employment

8. In this case, the claimant's employment income came to an end on his employer's bankruptcy. His P45 says that that happened in August 2017, but he told the tribunal that he was paid until December 2017. Either way, the income had ceased by the time he applied to the Secretary of State for a supersession in January 2018.

9. Current income is governed by regulation 38:

> **38 Current income as an employee or office-holder**
>
> (1) The non-resident parent's current income as an employee or office-holder is income of a kind that would be taxable earnings within the meaning of section 10(2) of ITEPA and is to be calculated as follows.
>
> (2) As regards any part of the non-resident parent's income that comprises salary, wages or other amounts paid periodically–
>
> (a) if it appears to the Secretary of State that the non-resident parent is (or is to be) paid a regular amount according to a settled pattern that is likely to continue for the foreseeable future, that part of the non-resident parent's income is to be calculated as the weekly equivalent of that amount; and
>
> (b) if sub-paragraph (a) does not apply (for example where the non-resident parent is a seasonal worker or has working hours that follow an irregular pattern) that part of the non-resident parent's income is to be calculated as the weekly average of the amounts paid over such period preceding the effective date of the relevant calculation decision as appears to the Secretary of State to be appropriate.
>
> (3) Where the income from the non-resident parent's present employment or office has, during the past 12 months, included bonus or commission or other amounts paid separately from, or in relation to a longer period than, the amounts referred to in paragraph (2), the amount of that income is to be calculated by aggregating those payments, dividing by 365 and multiplying by 7.
>
> (4) Where the earnings from the non-resident parent's present employment or office have, in the past 12 months, included amounts treated as earnings under Chapters 2 to 11 of Part 3 of ITEPA (the benefits code) the non-resident parent's current income is to be taken to include the amount of those benefits as last obtained by HMRC divided by 365 and multiplied by 7.
>
> (5) Where the non-resident parent's employer makes deductions of relievable pension contributions from the payments referred to in paragraph

(2) or (3) the amount of those payments is to be calculated after those deductions.

10. That regulation is not well-drafted to take account of a parent who no longer has any income at all from employment. However, regulation 38(1) is capable of applying to those circumstances. If the parent has no income from employment at the effective date, then there is no income of kind that would be taxable earnings. Accordingly, the parent's income from employment to be included in current income is nil. That was the position in this case.

D. Income from self-employment

11. Given that the loss of income from employment satisfied the 25% reduction in historic income, the non-resident parent's income from self-employment had to be his current income in accordance with regulation 39:

> **39 Current income from self-employment**
>
> (1) The non-resident parent's current income from self-employment is to be determined by reference to the profits of any trade, profession or vocation carried on by the non-resident parent at the effective date of the relevant calculation decision.
>
> (2) The profits referred to in paragraph (1) are the profits determined in accordance with Part 2 of ITTOIA for the most recently completed relevant period or, if no such period has been completed, the estimated profits for the current relevant period.
>
> (3) The weekly amount is calculated by dividing the amount of those profits by the number of weeks in the relevant period.
>
> (4) In paragraphs (2) and (3) the "relevant period" means a tax year or such other period in respect of which the non-resident parent should, in the normal course of events, report the profits or losses of the trade, profession or vocation in question to HMRC in a self-assessment return.
>
> (5) In the case of a non-resident parent who carries on a trade, profession or vocation in partnership, the profits referred to in this regulation are the profits attributable to the non-resident parent's share of the partnership.
>
> (6) The profits of a trade, profession or vocation that the non-resident parent has ceased to carry on at the effective date of the relevant calculation decision are to be taken as nil.

12. The tribunal's approach was to use the income for the 2017/2018 tax year. That was wrong. Current income from self-employment has to be calculated as at the effective date (regulations 37(1) and 39(1)), which was in January 2018. But the calculation is not a free-standing one based on whatever evidence the tribunal has available that is relevant to that time. It has to be calculated 'in accordance with regulations 38 to 42' (regulation 37(1)). And regulation 39(2) required the tribunal to use the 'profits … for the most recently completed

relevant period', as defined by regulation 39(4). In this case, that relevant period was the 2016/2017 tax year, which was the tax year that had been used in the November calculation. In that calculation, it was historic income, but by virtue of regulation 39 it now became the figure to be included in current income.

13. Regulation 37(1) does allow current income to be estimated rather than calculated, but t The tribunal did not purport to rely on that power and could not do so, because it only applies in the limited circumstances set out in regulations 39(2) and 42, none of which arose in this case.

E. Income from investment/property

14. The parent with care had not applied for a variation. Nevertheless, the presenting officer told the tribunal that it could take investment income into account if the appeal covered it, which the parent with care said it did. Accordingly, the tribunal made a finding for the 2017/2018 tax year, there being 'no objection by any party'. That was wrong. The parties had no power to confer on the tribunal a jurisdiction that it did not have (*Rydqvist v Secretary of State for Work and Pensions* [2002] 1 WLR 3343).

Signed on original
on 21 October 2019

Edward Jacobs
Upper Tribunal Judge