



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

UT ref: UA-2023-000737+739-CA
[2024] UKUT 228 (AAC)

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

Between:

SL

Appellant

- v -

The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Brewer

Decision date: 17 June 2024
Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal **is to allow the appeals**. The decisions of the First-tier Tribunal made on 5 April 2023 under **SC124/23/00624+00625** was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set those decisions aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

- 1. These cases is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
- 2. The members of the First-tier Tribunal who reconsider the cases should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**
4. **The new First-tier Tribunal is not bound in any way by the decisions of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion to the previous tribunal.**

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

REASONS

Introduction

1. This is an appeal against two decisions of the First-tier Tribunal (“the tribunal”) made on 5 April 2023. The first decision (the “entitlement decision”) upheld the Secretary of State’s decision that the Appellant had been overpaid carer’s allowance of £4,953.90 between 11 April 2016 and 7 February 2021. The tribunal’s second decision (the “recoverable overpayment decision”) upheld the Secretary of State’s subsequent decision to recover the above overpayment from the Appellant. Specifically, the tribunal upheld that the Appellant had failed to disclose to the Secretary of State that she had started work.
2. On 26 September 2023, Upper Tribunal Judge Wright granted permission against both tribunal’s decisions of 5 April 2023. The Secretary of State supports the appeal against the recoverable overpayment decision but not the entitlement decision.
3. I have now to consider whether the tribunal materially erred in law in reaching their decisions on entitlement and that the overpayment was recoverable from the Appellant.

Issues

4. The first issue that the Upper Tribunal must decide is whether the tribunal materially misdirected themselves as to how the Appellant's earnings were to be calculated to determine her entitlement to CA over the material periods., pursuant to regulation 8 of the Social Security Benefit (Computation of Earnings) Regulations 1996:

Calculation of weekly amount of earnings

8.—(1) For the purposes of regulation 6 (calculation of earnings of employed earners), subject to paragraphs (2) to (4), where the period in respect of which a payment is made—

.....

(b)exceeds a week, the weekly amount shall be determined—

(i)in a case where that period is a month, by multiplying the amount of that payment by 12 and dividing the product by 52;

.....

(2) Where a payment of earnings from a particular source is or has been paid regularly and that payment falls to be taken into account in the same benefit week as a payment of the same kind and from the same source, the amount of those earnings to be taken into account in any one benefit week shall not exceed the weekly amount determined under paragraph (1)(a) or (b), as the case may be, of the payment which under regulation 7 (date on which earnings are treated as paid) is treated as paid first.

(3) Where the amount of the claimant's net earnings fluctuates and has changed more than once, or a claimant's regular pattern of work is such that he does not work every week, the application of the foregoing paragraphs may be modified so that the weekly amount of his earnings is determined by reference to his average weekly earnings—

(a)if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);

(b)in any other case, over a period of five weeks or such other period as may, in the particular case, enable the claimant's average weekly earnings to be determined more accurately.

5. The second issue for determination by the Upper Tribunal is whether the tribunal materially erred in law in concluding that the overpayment was recoverable.

The background to the appeal

6. On 22 December 2015, the Appellant made a claim for Carer's Allowance ("CA") from 12 October 2015 because she cared for a severely disabled person for at least 35 hours per week. On 23 January 2016 she was awarded entitlement to CA from 12 October 2015.
7. On 12 December 2019, the Secretary of State, having reviewed earnings details from HMRC, noted that the Appellant had in February 2016 started work at Gantshill Playgroup. She was paid monthly, during term time, on a variable basis. It was the Secretary of State's case that she had failed to notify the DWP about this change in her circumstances and consequently had been overpaid CA. The Appellant's evidence was that she had informed the Secretary of State, by letter on 30 January 2016, stating she would be commencing part-time term-time work and had provided her payslips.
8. On 21 July 2021, the Secretary of State in a supersession decision, concluded that her entitlement to CA had been premised on a mistake of fact as to the extent of her earnings as between 11 April 2016 and 7 February 2021 and that she had been overpaid £4,953.90 which was recoverable from her.

Analysis

Entitlement decision

9. The tribunal observed at §j of the tribunal's decision that the Appellant's case was that her income should be calculated over a course of a year period, applying the discretionary provision at regulation 8(3). At §l the tribunal stated that the default position on computation is as provided at regulation 8(b)(i) because she was paid on monthly basis. The tribunal while recognising at §l that her earnings fluctuated month by month went on to conclude at §n that:

“In the present case, the Tribunal does not consider it irrational not to apply regulation 8(3) because she was, in the main being paid something each month and this figure could vary quite considerably. It was therefore most accurate to calculate her weekly earnings by reference to that monthly figure and averaging out on a rolling basis would not, in fact, result in a more accurate figure for the weeks in that month.”

10. The Secretary of State in their written submissions to the Upper Tribunal stated there was no arguable error of law in the tribunal’s approach and/or findings vis a vis regulation 8(3). The Respondent accepted in their submission that the language used by the tribunal appeared to suggest it was reviewing the rationality of the Secretary of State’s decision, rather than the tribunal exercising the discretion (see [15]). The Secretary of State however maintained that the tribunal had referred to the correct approach to regulation 8(3) at §I of its decision. Further, observing that the tribunal had concluded that the purpose of the discretionary regulation 8(3) was to ensure that the more accurate figure was obtained to assess entitlement, and in this case computing earnings pursuant to regulation 8(3) would not provide a more accurate figure.
11. For reasons that are two-fold I am satisfied that the tribunal materially misdirected themselves vis a vis regulation 8(3). Firstly, I echo what was said by UTJ Wright in the permission to appeal decision:

‘the language of the First-tier Tribunal used in paragraph (n) of not considering it irrational not to apply regulation 8(3) might arguably indicate that the First-tier Tribunal was reviewing the rationality of the Secretary of State’s the tribunal in adopting the language of ‘irrationality’ has taken as its starting point a review of the Respondent’s decision rather than deciding afresh and for itself whether to exercise the regulation 8(3) decision.’

12. I have considered the totality of the reasons given by the tribunal and I am satisfied that in adopting the language of irrationality, the tribunal did misdirect itself on the correct approach to be taken to the application of regulation 8.
13. Secondly, and this may be reflective of the tribunal's approach being confined to one of review, the tribunal failed to give adequate reasons to explain why computation of the Appellant's earnings in accordance with regulation 8(1)(b)(i) would result in a more accurate figure than that under regulation 8(3).
14. Further, the Appellant had arguably identified a recognisable cycle of work (one year) and on the facts as found by the tribunal arguably came within the scope of regulation 8(3)(a), it is unclear why discretion should not be exercised and regulation 8(3)(a) applied.

Recoverable overpayment decision

15. The tribunal rejected the Appellant's evidence that she had informed the Secretary of State by letter in 2016 of her intention to commence paid employment. As observed by the Secretary of State in their submissions, this initial communication would have been of material importance to the entirety of the overpayment (see §30 of the submissions). In reaching the above decision, I am satisfied that the tribunal erred in law. Its reasons for this decision are as set out in paragraph (u), however on reading the reasons the tribunal failed to have any adequate regard to paragraphs four and seven of the Appellant's further submission 20 February 2023 (at Addition F of the bundle). See further on this at paragraphs twelve and thirteen of the Appellant's grounds of appeal of 30 May 2023.

Conclusion

16. For the reasons given above, the appeal succeeds. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

17. The Appellant's success on this appeal to the Upper Tribunal on error of law says nothing one way or the other about whether her appeal will succeed on the facts before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Approved for issue by Michelle Brewer
Judge of the Upper Tribunal
20 June 2024