[2021] UKUT 263 (AAC)

IN THE UPPER TRIBUNAL **Appeals Nos. CCS/31/2020**
CCS/30/2020

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

MQB

Appellant

-v-

Secretary of State for Work and Pensions

First Respondent

-and-

SRB

Second Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 19 October 2021
Decided on consideration of the papers

Representation
Appellant: In person
First Respondent DWP Decision-Making and Appeals, Leeds
Second Respondent In person

DECISION

CCS/31/2021

1 I give the appellant permission to appeal against the decision of the First-tier Tribunal dated 19 March 2019 relating to his liability to pay child support maintenance for the period from 27 September 2016.

2 Under rule 7 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules"), I waive:

(a) the absence of a written statement of reasons for the Tribunal's decision in that appeal;

(b) the fact that there was no application to the First-tier Tribunal for permission to appeal; and

(c) all the procedural requirements of the Upper Tribunal Rules 2008 that have not been complied with up to and including the date of this decision.

In both appeals

3 The appeals are allowed.

4 The First-tier Tribunal made a legal mistake in relation to the claimant's appeals (ref. SC303/17/00935 and SC321/17/00428) which were decided at Aldershot on 19 March 2019.

5 Those decisions are set aside and the cases are remitted to the First-tier Tribunal for reconsideration in accordance with the directions given below.

DIRECTIONS

To the First-tier Tribunal

1. The members of the First-tier Tribunal who are chosen to reconsider the case (collectively, "the new tribunal") must not include the judge or financially qualified panel member who made the decision I have set aside

2. The new tribunal must hold an oral hearing at which it must undertake a full reconsideration of all the issues raised by the appeal and—subject to the discretion conferred by section 20(7)(a) of the Child Support Act 1991 and to its duty to conduct a fair hearing—any other issues it may consider it appropriate to decide.

3. The issues raised by the appeal include:

(a) whether a variation should be agreed on the basis that the father had unearned income in excess of £2,500 in either the latest available tax year or, if regulation 69(3) of the Child Support Maintenance Calculations Regulations 2012 applies, the most recent tax year.

In deciding that issue, the new tribunal must follow the law as I have declared it be below.

(b) whether the father has diverted income within regulation 71 of those Regulations.

In deciding that issue, the new tribunal must have regard to what I said in *AB v Secretary of State for Work and Pensions & RS (CSM)* [2021] UKUT 129 (AAC).

To the claimant

4. You should not regard the fact that your appeal to the Upper Tribunal has succeeded as any indication of the likely outcome of the re-hearing by the new tribunal. You have won at this stage because the tribunal that heard your appeal on 19 March 2019 made a legal mistake. Your liability to pay child support maintenance will now be decided by the new tribunal.

5. You should note, in particular, that—in addition to the issues that were considered by the previous tribunal—the new tribunal will consider whether a variation should be agreed on the alternative ground that you diverted income within regulation 71 of the Child Support Maintenance Calculations Regulations 2012.

REASONS

Introduction

1. These appeals are about two children (whom I will not identify even by their first names) and how much their father, the appellant, was liable to pay each week to support them during the period from 27 September 2016 and for the year from 5 April 2017.

2. The Secretary of State, decided:

(a) on 9 March 2017, that the father was liable at the weekly rate of £234.33 from the effective date of 27 September 2016 ("Decision 1"); and

(b) on 5 May 2017, that the father was liable at the weekly rate of £132.61 from the effective date of 5 April 2017 ("Decision 2").

3. The father appealed to the First-tier Tribunal against Decision 1 and the mother appealed against Decision 2. Those appeals were listed together for a hearing on 25 February 2019 before a District Tribunal Judge and a financially qualified panel member (*i.e.*, a chartered accountant).

4. Following that hearing, the Tribunal:

(a) refused the father's appeal and confirmed Decision 1; and

(b) allowed the mother's appeal, set aside Decision 2 and substituted a decision that the father continued to be liable at the weekly rate of £234.33 (*i.e.*, as opposed to £132.61) from the effective date of 20 April 2017.

5. In the appeal against Decision 2 (CCS/30/2020), permission to appeal was given by the District Tribunal Judge who chaired the Tribunal.

6. I am grateful to the Secretary of State's representative for having pointed out that no request was made for a written statement of the Tribunal's reasons for its decision on the appeal against Decision 1 and that the District Tribunal Judge was not asked for permission to appeal against that decision. I am satisfied that:

(a) the father always intended to challenge both First-tier Tribunal decisions;

(b) the confusion was due at least in part to a lack of administrative clarity (and, in particular, the use of the two case numbers is not uniform so that someone without access to the First-tier Tribunal's the files would not necessarily know which number related to which appeal; and that

(c) the issue for the Upper Tribunal is the same in both appeals.

I have therefore given the father permission to appeal against Decision 1 and waived all the procedural requirements necessary to regularise that appeal (CCS/31/2020).

The Tribunal's decision

7. In making its decisions, the Tribunal relied upon regulation 69(6) of the Child Support Maintenance Calculations Regulations 2012 ("the 2012 Regulations").

8. Regulation 69 as a whole is about the circumstances in which a variation may be agreed on the ground that the non-resident parent has unearned income. So far as is relevant, that regulation is worded as follows:

> "**Non-resident parent with unearned income**
>
> **69.**—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where the non-resident parent has unearned income equal to or exceeding £2,500 per annum.
>
> (2) For the purposes of this regulation unearned income is income of a kind that is chargeable to tax under—
>
> (a) Part 3 of ITTOIA (property income);
>
> (b) Part 4 of ITTOIA (savings and investment income); or
>
> (c) Part 5 of ITTOIA (miscellaneous income).
>
> (3) Subject to paragraphs (5) and (6), the amount of the non-resident parent's unearned income is to be determined by reference to information provided by HMRC at the request of the Secretary of State in relation to the latest available tax year and, where that information does not identify any income of a kind referred to in paragraph (2), the amount of the non-resident parent's unearned income is to be treated as nil.
>
> (4) …
>
> (5) Where—
>
> (a) the latest available tax year is not the most recent tax year; or
>
> (b) the information provided by HMRC in relation to the latest available tax year does not include any information from a self-assessment return; or
>
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the information from HMRC,]

> the Secretary of State may, if satisfied that there is sufficient evidence to do so, determine the amount of the non-resident parent's unearned income by reference to the most recent tax year; and any such determination must, as far as possible, be based on the information that would be required to be provided in a self-assessment return.
>
> (6) Where the Secretary of State is satisfied that, by reason of the non-resident parent no longer having any property or assets from which unearned income was derived in a past tax year and having no current source from which unearned income may be derived, the non-resident parent will have no unearned income for the current tax year, the amount of the non-resident parent's unearned income for the purposes of this regulation is to be treated as nil.
>
> (7) Where a variation is agreed to under this regulation, the non-resident parent is to be treated as having additional weekly income of the amount determined in accordance with paragraph (3) or (5) divided by 365 and multiplied by 7.
>
> (8)-(9) …"

9. As explained above, there is no written statement of the Tribunal's reasons for its decision on the appeal against Decision 1. However, the summary of those reasons that was included in the decision notice, includes the following paragraphs (among others):

> "7. …
>
> [The father] stated at the Tribunal that the dividends [identified] above were credited to him in his Director's Loan accounts in his Companies on 30/04/2015 and that he had received no further dividends after that date.
>
> 8. Regulation 69(6)
>
> The tribunal concluded that Reg. 69(6) applied in this case, the effect of which is that the HMRC 2016 drawdown showing the dividends continues to apply. This is because [the Father] still owned the asset (the shares) from which unearned income was derived in a past tax year. We considered it was just and equitable to include this for the following reasons:
>
> [The father] explained that it was his usual practice to draw monies from his Director's Loan accounts during a financial year and to extinguish the debts so caused by way of dividends credited to the loan accounts at the year end. The Tribunal saw this recorded in the Company accounts for the year ended 30/04/2015. The Tribunal noted that [the father] continued to draw monies from his Companies in a similar way in

> the succeeding financial year but did not generate dividend paperwork at the year end to extinguish his debt to the Companies caused by the drawings, although there were sufficient undistributed profits in the companies for him to have done so."

10. The Tribunal gave a more detailed account of its reasoning in the written statement of its reasons for its decision in that appeal against Decision 2. It stated:

> "8. Regulation 69 of the CSMC Regs states that if a NRP has unearned income of at least £2,500 this may be a case for a variation. The income must be of a kind chargeable to tax. The unearned income is to be determined by reference to information provided by HMRC in relation to the latest available tax year and where this does not identify unearned income, then the unearned income of the NRP is to be treated as nil. (Reg 69(3).
>
> 8.[*sic*] The Tribunal specifically had regard to Regulation 69(6) which states that where the SoS is "satisfied that by reason of the non-resident parent no longer having any property or assets from which unearned income was derived in a past tax year and having no current income from which unearned income may be derived the non-resident parent will have no unearned income for the current tax year, the amount of the non-resident parent's income for the purposes of this regulation is to be treated as nil".
>
> 9. In the present case the Tribunal found that [the father] had the assets (shares) from which he had derived income (the dividend) in a previous tax year. Our reading of this part of the Regulation provides, in our view, that where a NRP continues to have the asset which is capable of providing unearned income, then this should be taken into account. It is an exception to Reg. 69(3).
>
> 10. In his letter of 26/03/2019 requesting this SOR, [the father] refers to the overall company loss for the financial year of 30/04/2016. He considers that his unearned income should be nil because he did not take any dividends in that year. However the Tribunal noted that in line with previous practice, he withdrew funds of £48,283 through the Director's loan account in the year to 30/04/2016. Previously he had 'covered' such withdrawals by crediting a year end dividend to his Director's loan account. In this year he did not do so but paid £35,000 into the Companies on 29/04/2016 after the withdrawals had been made. There was therefore sufficient undistributed profit in the companies for [the father] to have taken a dividend should he have wished to have.
>
> 11. We found that [the father] still owned the shares which had generated unearned income in previous years and therefore in accordance with Regulation 69(6) it should be taken into account. This

> was income which fell within the definition of income in Regulation 69. The income would only be nil if the asset was no longer available, which is not the case."

Reasons for setting the Tribunal's decision aside

11. Unfortunately the Tribunal has misdirected itself as to the interpretation of regulation 69(6). Although that provision is indeed an exception to regulation 69(3), the exception operates by *restricting* the circumstances in which the Secretary of State (or, on appeal, the First-tier Tribunal) might otherwise agree a variation. It does not *extend* them.

12. There are no circumstances in which regulation 69 allows a variation to be agreed unless the non-resident parent has actually received at least £2,500 in unearned income (as defined in regulation 69(2)) during either the "latest available tax year" (as defined in regulation 4 of the 2012 Regulations), or the most recent tax year (in circumstances where regulation 69(5) applies). Nothing in regulation 69 permits the Secretary of State or the Tribunal to deem that a non-resident parent has received unearned income that he has not in fact received.

13. In particular, regulation 69(6) does not have that effect. What it says is that (and I paraphrase) where a non-resident parent no longer has any source of unearned income (including assets or property generating unearned income that has previously been taken into account) the amount of his unearned income is to be taken as nil. Where the non-resident parent still possesses that property or those assets, regulation 69(6) does not apply at all.

14. I should also add that the money that the Father withdrew from the director's loan accounts during the 2016 tax year—thereby creating a debt from him to the company in question—were not themselves unearned income. Given the obligation to repay, it is doubtful that the money amounted to income at all. But even if it did, it was not *unearned* income as defined in regulation 69(2). The value of the loan to the Father would have fallen to be taxed (if at all) as a benefit in kind under Chapter 7 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003, rather than under Parts 3, 4 or 5 of the Income Tax (Trading and Other Income) Act 2005 as is required by that definition.

15. For all those reasons, the Tribunal's decisions were wrong in law and I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set the aside.

Reasons for remitting the appeal

16. Having set the decision aside, I must next decide whether to re-make the decision myself or to remit the matter to the First-tier Tribunal with directions.

17. I originally intended to remake the decisions because, as it then seemed to me, the only decisions that the First-tier Tribunal could lawfully make in relation to regulation 69 would be in the same terms as the Secretary of State's original decisions.

18. However, I have decided to remit because whatever the correct decision on regulation 69 might be, an issue arises as to whether the father diverted the income he borrowed from his companies within regulation 71 by leaving that money in those companies (*i.e.*, as an asset in the form of the right to sue him for the debt). Following my recent decision in *AB v Secretary of State for Work and Pensions & RS (CSM)* [2021] UKUT 129 (AAC), I consider that issue to have been raised by the evidence in this case and, as the First-tier Tribunal has yet to consider that issue, it is in the interests of justice that it should be given an opportunity to do so.

19. The hearing I have directed the First-tier Tribunal to hold will also be an opportunity for it to consider the various factual points made by the children's mother in response to these appeals.

Conclusion

20. For all those reasons, my decision is as set out on page 1 above.

Authorised for issue
on 19 October 2021

Richard Poynter
Judge of the Upper Tribunal