DT v Secretary of State for Work and Pensions (CSM)
[2023] UKUT 175 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000834-CSM**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

DT

Appellant

– v –

Secretary of State for Work and Pensions

First Respondent

– and –

HR

Second Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decided on consideration of the papers

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 5 October 2020 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

> The father's liability for child support maintenance from 9 September 2017 in respect of his daughter is to be calculated on the basis that his gross income was £66,319.62.

REASONS FOR DECISION

1. This is an appeal, brought with permission given by Deputy Upper Tribunal Judge Robinson, against a consent order made by the First-tier Tribunal on 5 October 2020 to the effect that the liability of the relevant child's father (who was then the second respondent but is the Appellant before me) for child support maintenance

from 9 September 2017 in respect of his daughter was to be calculated on the basis that his gross income for the tax year 2016/17 was £81,725. The Secretary of State supports the appeal, but the Second Respondent mother opposes it, although she does so in restrained terms and acknowledges that she is not able to make technical submissions on points of law. None of the parties has asked for an oral hearing and I am satisfied that I can properly determine the appeal without such a hearing.

The history and the arguments

2. Under the "2012 scheme" (applicable in this case) for calculating child support maintenance under the Child Support Act 1991 ("the 1991 Act"), the calculation is, in broad terms, generally based on "historic income", which is the non-resident parent's taxable income in the last tax year for which HMRC has provided an "HMRC figure", unless that parent's "current income" from employment is at least 25% lower (see Part 4 of the Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) ("the 2012 Regulations"). The normal rules for calculating the amount of income are clearly designed with administrative convenience in mind. That is a perfectly proper consideration, but it is recognised that the result may not always accord with practical reality and so the legislation gives the Secretary of State the power to agree to a "variation" in certain circumstances (see Part 5 of the 2012 Regulations), provided that, "in all the circumstances of the case, it would be just and equitable to [do so]" (section 28F(1)(b) of the 1991 Act).

3. The mother had been receiving maintenance payments from the father without, it appears, the involvement of the Child Maintenance Service (CMS). However, on 4 September 2017, she applied through CMS for an assessment of child support maintenance under the Child Support Act 1991. The initial assessment, effective from 9 September 2017, was based on the father's taxable income for the 2015/16 tax year, which presumably was the latest year for which HMRC could supply a figure. That figure was £66,319.62 and the decision was made on 13 October 2017. The father applied for "mandatory reconsideration" (technically, a revision under section 16 of the 1991 Act) and, on 6 December 2017, a new assessment effective from 9 September 2017 was made, founded on estimated "current income" of £35,500 (based on his projections of £11,500 earned income and £24,000 unearned income). This time, it was the mother who applied for a revision. When her application for revision was belatedly considered on 1 June 2019, it was to her disadvantage, being an assessment effective from 9 September 2017 based on "current income" from the 2017/18 tax year of £16,500, comprised of earned income of £11,500 and, by way of a variation in respect of unearned income (apparently under regulation 69 of the 2012 Regulations), "historic" unearned income from the 2016/17 tax year of £5,000. The mother appealed against the original decision as so further revised.

4. While her application for revision and her appeal were pending, there was an annual review, effective from 9 September 2018, that did not result in any change in the assessment, a supersession with effect from 26 September 2018 due solely to a change of care arrangements, and supersessions with effect from 31 January 2019 and 9 September 2019 taking account, respectively, of the father's unearned income having increased to £50,000 and his earned income having increased to £12,000. It seems likely that those assessments were based on "historic income" in, respectively, 2017/18 and 2018/19. The mother appealed against the decision effective from 31 January 2019, but subsequently withdrew her appeal.

5. The mother's outstanding appeal against the decision effective from 9 September 2017, as revised on 1 June 2019 and based on the father having estimated "current income" of £16,500 pa, first came before the First-tier Tribunal on 6 February 2020. The mother's contention was that the father's current income in the tax year 2017/18 was £61,500 pa. The Secretary of State submitted that the assessment was correct, but nonetheless raised the question whether it should have been based on the father's income in the tax year 2017/18, as the mother had contended, and also whether there should be a variation on the ground of diversion of income. The father explained that he had been in employment until he was made redundant in November 2016 and that he then worked as a contractor, through his own company of which he was the sole director, employee and shareholder. The First-tier Tribunal decided to adjourn with directions to the father to provide a number of financial documents and to the Secretary of State to provide a written submission addressing the question whether the redundancy payment fell to be taken into account as income in the light of *BB v Secretary of State for Work and Pensions (CSM)* [2019] UKUT 314 (AAC) and explaining the apparent use of current earned income alongside historic unearned income It also directed that the panel on the resumed hearing should include a financially-qualified tribunal member. The father complied with the directions addressed to him. The Secretary of State did not. Nor, unfortunately, did the Secretary of State arrange to be represented at the renewed hearing.

6. The documents provided by the father removed most, but not all, doubts as to the basic financial facts in this case. Importantly, they included his tax calculations for 2016/17 and 2017/18. His tax calculation for the year 2016/17 showed taxable pay and benefits amounting to £76,725 and dividends amounting to £5,000, giving a total of £81,725. For 2017/18, his tax calculation and other documents showed taxable pay from his company amounting to £11,500 and dividend income (a single dividend declared on 28 August 2018) amounting to £50,000, giving a total of £61,500 (as the mother had asserted). As is commonly the case, the taxable pay from his company was equal to his personal allowance and, in 2018/19, it increased to £12,000. The mother made a short, written submission, noting that the figure of £81,725 for 2016/17 was much higher than the figure of £16,500 upon which the child maintenance assessment was based and arguing that the former figure should be used rather than the latter.

7. The resumed hearing before the First-tier Tribunal led to a consent order being made, whereby the Secretary of State's decision of 13 October 2017, as revised on 1 June 2019 was set aside and the Secretary of State was directed to "recalculate the amount of maintenance payable by [the father] for [his daughter] from the effective date of 09/09/17 on the basis that his gross income (as stated on his tax calculation for 2016/17) for the year 2016/17 was £81,725.00". It was recorded that the father "agreed that this was the correct gross income figure for that tax year".

8. Notwithstanding the consent order, when the father asked for permission to appeal, the First-tier Tribunal issued a statement of reasons, in which it set out the background to the hearing and then continued –

> "8. It was put to [the father] that on the basis of the tax calculation which we had seen, which he had confirmed had been prepared with the assistance and advice of his accountant, that his actual income for the purposes of Child Maintenance Assessment for that year was £81,725.00 and his previously projected income figures

> were based upon a pessimistic projection of his income for that year. [The father] accepted that and confirmed that he was content for that figure to be inserted in the assessment of maintenance payable for [his daughter] for the tax year 2016/17. [The father] agreed that this was the correct gross income figure to be included.
>
> 9. It was confirmed with both parties that they agreed to the matter being resolved by agreement without the need to explore [the father's] finances further and without the tribunal adjudicating on the issues raised in the appeal. The decision was therefore mad by the consent of [the parents].
>
> 10. We were content that the First Respondent would have received notice of the hearing, and although not specifically consenting, would not have objected to the resolution agreed by the parties."

9. The father's application for permission to appeal was based on the sole ground that the taxable element of the redundancy payment, which he says was £31,787.17, should have been deducted from his taxable income for 2016/17. The First-tier Tribunal refused permission to appeal on the ground that the father was seeking "to reargue factual issues that were not investigated by the tribunal because of the consent given by both parties to its decision on the appeal". In a further submission to the Upper Tribunal on his renewed application for permission, the father also said –

> "Please also note the original agreement of earnings figure at the First-tier Tribunal was agreed through confusion and a misunderstanding, at the same time I was being denied access to my daughter and going through negotiations at another tribunal to regain access, as you can imagine this was a very stressful period of my life. I can provide evidence if required."

10. When Judge Robinson gave permission to appeal, she referred to rule 32(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), which provides that the First-tier Tribunal may make a consent order "only if it considers it appropriate", and she decided that it was arguable both that the First-tier Tribunal had failed to consider, or adequately to consider, whether it was "appropriate" to make the consent order when it appeared to be inconsistent with the calculation to be made under the 2012 Regulations. She also considered it arguable that the First-tier Tribunal was not entitled to make a consent order without obtaining the consent of the Secretary of State as well as the other parties.

11. The Secretary of State supports the appeal on the grounds suggested by Judge Robinson, without actually making any submission as to whether a consent order in the terms made could have been appropriate or making any submissions on the issues on which his predecessor had failed to make submissions to the First-tier Tribunal. He submits that the case should be remitted to the First-tier Tribunal. The mother effectively opposes the appeal on the ground that both parties had agreed that the father's "actual income for the purposes of the child maintenance assessment was £81,725 and not £11,500 as he had previously reported". In his reply, the father mentions that, after his redundancy, he had told the mother that he would not be taking any money out of the company and would be living off his redundancy payment.

Discussion – consent orders and concessions

12. A consent order obviously ought to have the consent of all parties. The Secretary of State could not give consent at the hearing before the First-tier Tribunal because she was not represented at the hearing. On the other hand, she could have

objected to the purported consent order and applied for it to be set aside long before this case reached the Upper Tribunal, had she wished to refuse her consent. She did not, of course, have a financial interest in the case, but she did have a role to play in assisting the First-tier Tribunal to make a decision in accordance with the law.

13. It was the parents who had financial interests in the decision. Each parent obviously made a concession to some extent, although the father's concession was probably greater. What the First-tier Tribunal plainly ought to have done, if it was minded to accept those concessions, was simply to make a decision based upon them. There are, I accept, some differences between a party giving consent to a consent order that may be to his or her disadvantage and a party making a concession, but those differences may be more apparent than real and are not to my mind significant in the circumstances of this case.

14. For instance, although the legislation requires a consent order to be "appropriate", the grounds upon which the Upper Tribunal may find it to have been inappropriate to make a consent order overlap to a considerable extent with grounds upon which the Upper Tribunal may find the First-tier Tribunal to have unlawfully accepted a concession.

15. Similarly the First-tier Tribunal is not under any statutory duty to give reasons for a consent order (see rule 32(2) of the 2008 Rules, which provides that the First-tier Tribunal "need not … provide reasons for the order") – although, in fact, the First-tier Tribunal did provide what purported to be a statement of reasons in this case – whereas accepting a party's concession does not relieve the First-tier Tribunal from its general duty to give reasons (under rule 34). However, it is not in practice necessary for the First-tier Tribunal to give reasons for accepting a concession if the reason for doing so is self-evident because, for instance, the concession is not inconsistent with the legislation or compelling evidence and there was no obvious reason not to accept it. Equally, it may in practice be necessary for the First-tier Tribunal to record in a consent order (or a separate supplementary statement) sufficient information to enable it to be seen why it considered it to be appropriate to make the consent order, if the terms of the order would otherwise appear to be inconsistent with the legislation or with compelling evidence. This is because, in the absence of any explanation, the Upper Tribunal may infer from the surrounding circumstances that it was not appropriate to make the consent order and that the decision to make it was wrong in law (see, for example, *Jones v Governing Body of Burdett Coutts School* [1999] ICR 38 at 47). Or to put it another way, the Upper Tribunal may imply a duty to give reasons if, without such reasons, a consent order appears aberrant (see *R. v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 W.L.R. 242 at 263).

16. Despite such differences as there may be, there is a common public interest in the finality of decision-making and, if a party either gives consent to a consent order or makes an individual concession, he or she can expect to be held to the bargain, whether it is made between all the parties or merely with the court or tribunal. The modern approach, at least in public law appeals brought on the ground of error of law, is less opposed to allowing a party to resile on appeal from a concession of law made in a lower court or tribunal than allowing a party to resile from a concession of fact, it being in the public interest that the "correct" decision be made, but this is subject to issues of fairness which are likely to be particularly important in child

support cases. The parties in such cases are not just a public authority and a single citizen; there are two citizens involved and they are usually opposed to each other.

17. In the present case, where the First-tier Tribunal did purport to give reasons, the Secretary of State invites the Upper Tribunal to find that they were inadequate in circumstances where, it is submitted, the ultimate decision appears to be inconsistent with the legislation governing the calculation of child support maintenance and neither the decision nor the reasons given for it indicate why, in those circumstances, the First-tier Tribunal considered it to be appropriate to make a consent order or, I would add, accept the parents' concessions.

18. I would be minded to uphold the First-tier Tribunal's decision, notwithstanding that it was wrongly expressed as a consent order, if I were satisfied that the decision could be regarded as appropriate even though the First-tier Tribunal did not itself indicate why it thought it appropriate. However, for reasons that I will give below, I am not satisfied that the decision to accept the father's concession can be regarded as having been appropriate.

19. An alternative way of putting essentially the same point is to consider whether adequate consent from the father was obtained and whether he did in fact concede as much as is suggested. I am not satisfied that he did.

20. There were, in reality, two elements to the concession. I have no doubt that the father and the mother both readily agreed that the father's taxable income in the 2016/17 tax year was £81,725 and that they were content for that figure to be used for the purpose of calculating child support maintenance. They accept as much, and that was not an unreasonable approach for either of them to take. However, there is nothing in the terms of the consent order or the statement of reasons given by the First-tier Tribunal, or in the accounts of the father and mother as to what happened at the hearing before the First-tier Tribunal, to suggest that the father gave informed consent to the income from that year being used for the calculation of child support maintenance in preference to the income from any other tax year. It is clear that it was the First-tier Tribunal that suggested using the 2016/17 figure shown in the father's tax calculation and there is no indication that, in asking for the father's consent, it explained why that might be a more appropriate year than either 2015/16, which was the year originally considered relevant by the Secretary of State because it was the last year in respect of which an "HMRC figure" had been provided, or 2017/18, which was the year in respect of which "current income" was received that was, in the Secretary of State's later view, more relevant because, by her calculation, it was more than 25% lower than any "historic" income". These were the real points on which the Secretary of State had taken an approach more favourable to the father than the First-tier Tribunal's suggested approach. Had the First-tier Tribunal had good reasons for suggesting that it was correct, or at least fairer, to apply the 2016/17 income rather than the income in the previous or subsequent year, I would have expected the explanation to appear in the statement of reasons that it provided. There is no such explanation, and I am left with the uneasy feeling that the father was given the impression that he had no realistic choice but accept that 2016/17 was the relevant year and that the only live issue was what his income in that year was when, in fact, the First-tier Tribunal had not properly addressed the issue of the relevant year before making its suggestion.

21. I do not rely on the father's assertion that he was confused and misunderstood what was being said to him due to stress. He has not identified any

misunderstanding, except in relation to the redundancy payment, and he has not suggested that the consequence of stress was that he was legally incapable of giving consent to a decision being based on the First-tier Tribunal's suggestion.

The Law

22. Regulation 34 of the 2012 Regulations lays down the general rule for determining a person's gross weekly income for the purpose of making a child support assessment. Paragraphs (1) and (2) provide –

> "**34.**—(1) The gross weekly income of a non-resident parent for the purposes of a calculation decision is a weekly amount determined at the effective date of the decision on the basis of either historic income or current income in accordance with this Chapter.
>
> (2) The non-resident parent's gross weekly income is to be based on historic income unless—
>
> (a) current income differs from historic income by an amount that is at least 25% of historic income; or
>
> (b) no historic income is available; or
>
> (c) the Secretary of State is unable, for whatever reason, to request or obtain the required information from HMRC."

As the effective date in this case 9 September 2017, Income in 2016/17 or any earlier year was therefore "historic income", and income in 2017/18 was "current income".

23. Regulation 35 makes provision for determining "historic income". Paragraph (1) provides –

> "**35**.—(1) Historic income is determined by—
>
> (a) taking the HMRC figure last requested from HMRC in relation to the non-resident parent;
>
> (b) adjusting that figure where required in accordance with paragraph (3); and
>
> (c) dividing by 365 and multiplying by 7."

Paragraph (3) is not relevant to this case. Regulation 36(1)(a) provides –

> "**36.**—(1) The HMRC figure is the amount identified by HMRC from information provided in a self-assessment return or under the PAYE regulations, as the sum of the income on which the non-resident parent was charged to tax for the latest available tax year—
>
> (a) under Part 2 of ITEPA (employment income);
>
> …"

24. "Current income" is calculated on an altogether basis, presumably largely for practical reasons. Regulations 37(1) and 38(1) provide –

> "**37**.—(1) Current income is the sum of the non-resident parent's income—
>
> (a) as an employee or office-holder;
>
> (b) from self-employment; and
>
> (c) from a pension,
>
> calculated or estimated as a weekly amount at the effective date of the relevant calculation decision in accordance with regulations 38 to 42."

> "**38.**—(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 …."

25. As to estimation, regulation 42 provides –

> "**42**.—(1) Where—

> (a) current income applies by virtue of regulation 34(2)(a) where the amount of historic income is nil or by virtue of regulation 34(2)(b) or (c) (historic income not available); and
> (b) the information available in relation to current income is insufficient or unreliable,
>
> the Secretary of State may estimate that income and, in doing so, may make any assumption as to any fact.
>
> (2) Where the Secretary of State is satisfied that the non-resident parent is engaged in a particular occupation, whether as an employee, office-holder or self-employed person, the assumptions referred to in paragraph (1) may include an assumption that the non-resident parent has the average weekly income of a person engaged in that occupation in the UK or in any part of the UK."

Outstanding questions of fact

26. In the light of the disclosure made by the father in the proceedings before the First-tier Tribunal, the facts of the case are now fairly clear, although no "HMRC figure" has been produced in respect of 2016/17 or 2017/18 so as confirm that the figures provided by the father are correct. Whether the Secretary of State sought the HMRC figure for 2016/17 for the purpose of the annual review effective from 9 September 2018 I do not know.

27. One area of contention has been the amount of the redundancy payment received by the father. The mother has pointed out that the sum he received from his former employers on 16 December 2016 was £49,466.14 (page 170), but that may have included a non-taxable element. The taxable element appears to have been £31,787, according to what the father's employers apparently told HMRC (page 192) and it is the taxable element that is important. It is unnecessary to check whether that figure represented only the taxable element of the redundancy payment, as the father says, or whether it might have included, say, accumulated holiday pay, because what matters is the total taxable income.

28. In any event, there appears to be an error in the father's tax calculation for 2016/17 which would be resolved by obtaining the HMRC figure. The figure of £81,725 taxable income includes £75,278 "pay from all employments" (page 123). However, that appears to be the gross amount of pay (including the taxable element of the redundancy payment) received from his former employers (see page 192) and does not include the £1,750 at least notionally received from his own company in February and March 2017 (see the payslips at pages 78 and 79, showing national insurance deductions). A deposit approximating to the net February payment is recorded in a bank statement on 21 February (page 161). I have not found the March payment in the bank statements. This is consistent with the father in fact living off his redundancy payment while retaining money in the company, but the payslips do suggest that, if an HMRC figure were obtained, it would be at least £83,475.

29. In any event, the father's taxable income in 2016/17 was at least £81,725 (which was the figure agreed by the parties at the hearing). It is not in dispute that the HMRC figure for the previous year, 2015/16, was £66,319.62 and it is also not in dispute that, in 2017/18, the father received, at least notionally, taxable pay of £11,500 and dividends of £50,000.

Discussion – the redundancy payment

30. I do not accept the father's argument that the redundancy payment should have been entirely excluded from the 2016/17 income used for the purposes of the

consent order. What was decided in *BB v Secretary of State for Work and Pensions (CSM)* [2019] UKUT 314 (AAC) was that the taxable element of a redundancy payment does fall to be included within gross earned income when "historic income" is being calculated, but not when "current income" is being calculated. This is because the taxable element of a redundancy payment is taxed under section 10(3) (rather than section 10(2)) within Part 2 of the Income Tax (Employment and Pensions) Act 2003 and so, by virtue of regulation 36(1)(a), falls within the scope of the HMRC figure used as a basis for calculating historic income under regulation 35, whereas it does not fall within the scope of regulation 38(1) and so cannot amount to current income.

31. The father is therefore right to submit that a redundancy payment cannot be taken into account when calculating current income. However, as child support maintenance was being assessed for a period beginning on 9 September 2017, income in the 2016/17 tax year was, if relevant at all, "historic income" and so the taxable element of the redundancy payment received in December 2016 was rightly included in that income. On the other hand, the fact (if it was a fact) that the father was still living off the redundancy payment during at least part of 2017/18 would not permit the redundancy payment, or any part of it, to be taken into account as "current income" in 2017/18, if the income in that tax year was relevant.

Discussion – the calculation

32. There are two principal reasons why the First-tier Tribunal's suggested conclusion was different from any of the conclusions previously reached by the Secretary of State.

33. The first reason that the First-tier Tribunal reached a different conclusion was that it relied on historic income, rather than current income. This the point to which Judge Robinson drew attention and which the Secretary of State has adopted. As the Secretary of State submits, there is nothing specific to show that the First-tier Tribunal addressed that question and had it in mind when suggesting to the father that he should accept that a figure that related to historic income should be used in place of a figure that related to current income.

34. On the other hand, I consider that, if historic income was £81,725, the First-tier Tribunal could, and should, have considered that the use of historic income was more appropriate than the use of current income. Regulation 34(2)(a) required historic income to be used unless current income was at least 25% less than that figure, i.e., no more than £61,293.75. The First-tier Tribunal's reference to the father's "pessimistic" projection of dividend income, suggests that it may have had in mind that the parents were agreed that his actual income in 2017/18 was £61,500.

35. Applying only regulations 37 and 38, current income could take account only of "taxable earnings", which in this case, it is not disputed, amounted to only £11,500. Most of the income derived from the company was, however, taken as dividends, which are not taxable earnings, because they are received by virtue of being a shareholder rather than an employee or office holder and they are taxed under Chapter 3 of Part 4 of the Income Tax (Trading and Other Income) Act 2005. However, they can be included in current income by virtue of regulation 69 of the 2012 Regulations, paragraphs (1) to (3) and (5) of which provide –

> "**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."

36. In her first revision, the Secretary of State simply accepted the father's projections. However, such an approach appears not to be permitted by either of paragraphs (3) or (5) of regulation 69. In her second revision, the Secretary of State took the £5,000 dividend received in 2016/17 as the appropriate figure. However, both of paragraphs (3) and (5) talk of determining unearned income "by reference to" information relating to the past year. It seems to me that, in this case, where the company had only been operating for a short period, the dividend should have been attributed just to that period if regulation 69 was being applied and an annual or weekly figure should have been determined accordingly. Thus, if the dividend were attributed just to the two months in respect of which the father received earned income, the annual figure would be £30,000.

37. On the other hand, even that figure is considerably lower than the £50,000 dividend actually declared, retrospectively, in respect of 2017/18. Although HMRC may not have been told of that declaration until 31 January 2019 (see page 62 of the bundle), it had actually been made on 28 August 2018 (page 121), which was before the Secretary of State's revision, although that is not relevant to an application for a variation under regulation 69.

38. However, an alternative ground for a variation is to be found in regulation 71 of the 2012 Regulations, to which the Secretary of State referred in her submission to the First-tier Tribunal, and which provides –

> **71**.—(1) A case is a case for a variation for the purposes of paragraph 4(1) of Schedule 4B to the 1991 Act where—
>
> (a) the non-resident parent ("P") has the ability to control, whether directly or indirectly, the amount of income that—
>
> (i) P receives, or
>
> (ii) is taken into account as P's gross weekly income; and

> (b) the Secretary of State is satisfied that P has unreasonably reduced the amount of P's income which would otherwise fall to be taken into account as gross weekly income or as unearned income under regulation 69 by diverting it to other persons or for purposes other than the provision of such income for P.
>
> (2) Where a variation is agreed to under this regulation, the additional income to be taken into account is the whole of the amount by which the Secretary of State is satisfied that P has reduced the amount that would otherwise be taken into account as P's income."

39. The father undoubtedly had the ability to control the extent to which he received earnings, dividends or any other drawings from the company. However, the Secretary of State, in her submission to the First-tier Tribunal (page 3), considered that the father had not "reduced" his income. I disagree. To the extent that the father chose either to retain money in the company or to take payments in the form of dividends rather than earnings, he undoubtedly reduced the amount of his income that, unless a variation were made, would fall to be taken into account as current income in a child support maintenance assessment. The real question is whether he did so "unreasonably".

40. In *AS v Secretary of State for Work and Pensions (CSM)* [2018] UKUT 315 (AAC), I considered the meaning of that word in the predecessor of regulation 71, which was regulation 19(4) of the Child Support (Variations) Regulations 2000 (SI 2001/156), and said –

> "18. The question of what is reasonable for the purposes of regulation 19(4) must be considered in the context of the purpose of the provision and, indeed, the purpose of the whole child support regime. It is expected that parents will support their children and regulation 19(4), like much of the rest of the 2000 Regulations, is obviously intended to prevent non-resident parents from avoiding that liability. An action that might be quite reasonable in the absence of any potential liability to support children may, for the purposes of regulation 19(4), be unreasonable if it has the effect of reducing a parent's ability to pay child support maintenance. Whether a diversion was unreasonable will depend on a number of factors and is likely to be a matter of judgment. In particular, it is necessary to consider the extent to which the action that amounted to a diversion of income was purely voluntary or was forced upon the parent by circumstances and the extent to which the reasons for carrying out the action reflected what can fairly be regarded as a diminution in his ability to pay child support maintenance.
>
> 19. … I do not consider that gaining a tax advantage can ever contribute to the reasonableness of the diversion for the purposes of regulation 19(4). It would be absurd if a non-resident parent were to be allowed to enrich himself and members of his household at the expense of other children whom he is under an obligation to support, save to the extent that such enrichment is merely the consequence of action taken for some other good reason."

Absent any potential liability to pay child support maintenance, it may well have been perfectly sensible for the father to pay himself a small salary and draw other income in the form of a dividend, declared retrospectively because he was able to live off his redundancy payment in the meantime. However, doing so must be regarded as unreasonable for the purposes of regulation 71 and I consider that a variation under regulation 71, rather than under regulation 69, should have been made in this case.

41. It may well be that at the time the Secretary of State made her first revision decision, it would have been quite appropriate, if the Secretary of State had had in mind a variation under regulation 71, to rely on the father's projections. There may have been no evidential basis for not doing so. However, when the Secretary of State was further revising the decision on 1 June 2019, I can see no reason why she could not have had regard to the real figure of £50,000 if she had had a variation under regulation 71 in mind. Unlike in regulation 69, there is no requirement in regulation 71 that the relevant information should have been provided to HMRC before the Secretary of State made her original decision and, since the declaration of a dividend had retrospective effect, it declared what the position was as at the time of the Secretary of State's original decision. (In any event, where a decision is based on a prognosis or projection, it is well established that, on an appeal, the First-tier Tribunal is not prohibited by section 20(7) of the 1991 Act from having regard to what actually happened when considering what had been likely to happen at the date of the Secretary of State's decision under appeal (R(DLA) 3/01). The same must be true in relation to regulation 14(2) of the 2012 where revisions are concerned.)

42. In these circumstances, I am satisfied that, for the purposes of calculating the father's current income from 9 September 2017, there should have been a variation under regulation 71 amounting to £50,000. Added to the £11,500 taxable pay, that would have produced a total current income of £61,500. However, that is more than 75% of the £81,725 historic income that the parents both accepted that the father had in 2016/17. Accordingly, if 2016/17 was the right year, the First-tier Tribunal's decision to rely on historic income was justifiable in the light of the parties' concessions, even if it failed to provide the justification in either its order or its statement of reasons. (I observe, however, that if the true, or HMRC, figure had been £83,475 or more – as I suggest above it might have been – the current income would have been less than 25% of that figure and so current income, rather than historic income, would have been relevant.)

43. On the other hand, the other reason that the First-tier Tribunal's approach was different from the Secretary of State's is that it based the father's historic income on his earnings in 2016/17, rather than on his earnings in 2015/16. It may have thought that that was fairer, because 2016/17 was the more recent year, but that approach was not in accordance with regulation 35 and 36, which required historic income to be based on an HMRC figure. The Secretary of State's request for an HMRC figure had led to the figure for 2015/16 being provided. This raises the question whether the Secretary of State should have obtained, and used, an HMRC figure for 2016/17 before making her decision on 1 June 2019.

44. Presumably, the Secretary of State used the HMRC figure for 2015/16 in her original decision because no HMRC figure was yet available for 2016/17, which would not be surprising in September or October 2017, well before the deadline for submitting a tax return for 2016/17. There are circumstances in which the Secretary of State may apply for a second HMRC figure, but these are confined to cases where there is evidence that HMRC did not supply the correct figure based on evidence that it had at the time of the Secretary of State's first request (*SB v Secretary of State for Work and Pensions (CSM)* [2016] UKUT 84 (AAC), *AR v Secretary of State for Work and Pensions (CSM)* [2017] UKUT 69 (AAC); [2017] AACR 23 and *BK v Secretary of State for Work and Pensions (CSM)* [2022] UKUT 283 (AAC)). It is not appropriate for the Secretary of State to request a new HMRC figure merely because information

in respect of a more recent tax year has been provided since the original request. That would undermine the statutory procedure and prolong decision-making. Any later HMRC figure will only be relevant on the next annual review.

45. Accordingly, the Secretary of State was right to consider 2015/16 as the relevant year for determining historic income. It is not disputed that the HMRC figure for that year was £66,319.62. That was the figure for the father's income that she used initially. She only revised that decision in the light of her calculation of current income. Had she calculated current income at £61,500, as I have done, she would not have revised her original decision.

Conclusion

46. The implication of this consideration of how a calculation ought to have been made under the 2012 Regulations is that there appears to have been no proper basis upon which the First-tier Tribunal could reasonably have suggested to the father that it would be fair for him to accept that his liability for child support maintenance from 9 September 2017 should be based on an income of £81,725 in 2016/17. His historic income for 2016/17 could have been relevant only from the annual review effective from 9 September 2018. Fairness did not require the father to accept the First-tier Tribunal's suggestion in respect of the earlier year.

47. In the absence of any adequate explanation for the First-tier Tribunal's suggestion to the father, I am satisfied that it was inappropriate of the First-tier Tribunal to ask for, and accept, his concession and I consider that the procedure was unfair to him. Accordingly, I allow his appeal and I set the purported consent order aside, for reasons similar to those advanced by the Secretary of State.

48. However, I am not satisfied that this case should be remitted to the First-tier Tribunal. It has been going on for far too long already and there is no substantial dispute about the facts. Accordingly, for the reasons I have given, which are based on arguments advanced by the Secretary of State and the mother at various stages of these proceedings as well as information provided by the father, I decide that the father's liability for child support maintenance from 9 September 2017 should be based on his 2015/16 historic income of £66,319.62.

49. The Secretary of State has the power under regulation 14(3A) of the 2012 Regulations to revise decisions made after 13 October 2017 in the light of this decision.

Mark Rowland
Deputy Judge of the Upper Tribunal
Signed on the original on 17 July 2023