[2023] AACR 5

(1) SK (2) DK v Secretary of State for Work and Pensions: [2023] UKUT 21 (AAC)

Judge Ovey
20 January 2023 **UA-2021-000228-UOTH**

Universal credit; Bonus payments; Earned income; Income tax; Tax refunds

The appellants claimed universal credit on 29 April 2020 following the first appellant (the claimant) being on paid sick leave from his employment from 17 April 2019, and then on unpaid sick leave from 17 October 2019, until his employment was terminated on 13 January 2021.

On 20 May 2020, the claimant's employer paid him a bonus of £20,000 net of income tax deducted in accordance with the Income Tax (Pay As You Earn) Regulations 2003, SI 2023/2682 (PAYE Regulations). The tax deduction was in the sum of £6,893.60 - an effective rate of 34.47 per cent – giving rise to an overpayment of tax. The claimant became entitled to a repayment of the overpaid tax and he received from his employer a repayment of £2,144.60 during the assessment period 29 May 2020 to 28 June 2020 (the Assessment Period) and further repayments subsequently, so that by the time his contract of employment came to an end the outstanding figure for tax paid had been reduced to £1,706.80.

The tax repayment was included as earnings in the calculation of the universal credit award in the Assessment Period, which meant that there was no entitlement. The claimant challenged the decision arguing that the 'so-called income' of £2,144.60 was the partial return of tax overcharged by Her Majesty's Revenue and Customs (HMRC) in May 2020 and that as the one-off bonus payment had already been taken into account, leading to a zero payment of universal credit in the assessment period in which it was paid, the return of the overcharged tax 'in pieces over multiple months' should not be considered as income.

The decision was unchanged at mandatory reconsideration and the claimant appealed to the First-tier Tribunal, also arguing that regulation 55(4A) of the Universal Credit Regulations 2013 (the Regulations) provides that repayments of tax will only be treated as earnings if the universal credit claimant was in any paid work during the tax year the repayment relates to and, as the claimant had not been in any paid work since October 2019, any tax repayments since April 2020 should not be considered as income.

The First-tier Tribunal dismissed the appeal, finding that, as the claimant's employment contract continued, he was entitled to be paid when he worked, and he was therefore in paid work during the 2020/2021 tax year. It also found that, in the absence of evidence that the employer was under a legal obligation to pay the bonus during a previous tax year, the claimant's entitlement to receive the bonus arose during the 2020/2021 tax year.

The issue before the Upper Tribunal was whether the tax refund constituted employed earnings which fell to be taken into account in the Assessment Period. The claimant's argument on regulation 55(4A) raised the further questions (i) to which tax year the repayment related, (ii) whether the claimant was 'in paid work' while on unpaid sick leave and (iii) whether regulation 55(4A) applied to 'same year' refunds. Those questions are considered in paragraphs 49 to 65.

Held, allowing the appeals, that:

1. the correct starting point is not with regulation 55(4A) but with regulations 54 and 61. Under regulation 54, the calculation of a person's earned income in respect of an assessment period is, unless otherwise provided in Chapter 2 of the Universal Credit Regulations, to be based on the actual amounts received. It was not suggested that Chapter 2 made any relevant alternative provision. Under regulation 61(2), where a person is or has been engaged in an employment in respect of which the employer is a Real Time Information employer, the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to His Majesty's Revenue and Customs under the Pay as you earn (PAYE) Regulations. Regulation 61(3) permits the Secretary of State to determine that paragraph (2) does not apply in certain circumstances and regulation 61(4) then requires the Secretary of State to make a decision on the amount

of the person's employed earnings in accordance with regulation 55, but was not been suggested that a paragraph (3) determination had been made in the present case. It therefore followed from regulations 54 and 61(2) that the tax refund constituted employed earnings for the Assessment Period.

2. regulation 55(4A) did not apply to the tax refund. The regulation refers to repayments 'received by a person from HMRC' and the claimant received the refund from his employer. Where regulation 61(2) applies, that is an end of the matter. Any tax refund dealt with through the PAYE Regulations will inevitably be a payment of which the DWP is aware and since it will in some way be connected with the claimant's employment it will properly be counted as employed earnings.' (paragraph 45)

Decision set aside, remaking it by substituting the decision to the same effect.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DECISION

The decision of the Upper Tribunal is to allow the appeal and to substitute a decision to the same effect. The decision of the First-tier Tribunal made on 13th July 2021 under number SC154/21/00129 was made in error of law. For the reasons set out below, the conclusion reached as to the appellants' entitlement to benefit was nevertheless correct. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and substitute a decision of my own to the same effect.

REASONS FOR DECISION

Introduction

1. This is an appeal by the appellants against the decision of the First-tier Tribunal given on 13 July 2021 on their joint claim to universal credit. By its decision the Tribunal dismissed their appeal against the decision of the Secretary of State for Work and Pensions dated 29 June 2020 by which the Secretary of State determined that the appellants were not entitled to a payment of universal credit for the assessment period 29 May 2020 to 28 June 2020 ("the Assessment Period"). The undisputed facts are as follows.

2. The first appellant, whom I will call "the claimant" for convenience, is a former employee of Nikko Asset Management Europe Limited, which was a Real Time Information employer in respect of his employment for the purposes of the Income Tax (Pay As You Earn) Regulations 2003, SI 2023/2682 ("the PAYE Regulations"). His contract of employment substantially preceded, and remained in force throughout, the Assessment Period.

3. Sadly, the claimant went on sick leave on 17 April 2019 and remained on sick leave at all material times thereafter until the termination of his employment on 13 January 2021. During the first six months of his sick leave, he was in receipt of sick pay from his employer, but from 17 October 2019 onwards he was on unpaid sick leave.

4. On 24 October 2019 the claimant received a personal loan of £25,000 from Tesco Bank, repayable over the period of five years. He says that he did so to meet his living expenses and

in the hope that his situation would improve. He says further that on moral grounds he did not then claim universal credit although he would have been entitled to it. In the event a joint claim to universal credit was made on 29 April 2020 and thereafter assessment periods ran from the 29th of each month (with adjustment for February) to the 28th of the following month, in accordance with regulation 21 of the Universal Credit Regulations 2013, SI 2013/376 ("the UC Regulations").

5. On 20 May 2020 the claimant's employer paid him a bonus of £20,000 net of income tax deducted in accordance with the PAYE Regulations. The tax deduction was in the sum of £6,893.60, an effective rate of 34.47 per cent. Under the PAYE Regulations, the amount of tax to be deducted by an employer is determined by reference to a code provided to the employer by His Majesty's Revenue and Customs ("HMRC"). There is provision for the code to be notified to the employee and for the employee to challenge it, but the employer must make the deduction by reference to the code even if it is the subject of an objection or appeal: see regulation 21. In very broad terms, the intention is that when an employee receives regular weekly or monthly payments HMRC should determine a code which will have the effect that tax is deducted from each payment at a uniform rate which will be sufficient over the course of the tax year to discharge the employee's tax liability for that year. Such a system benefits the employee by producing an equal, or roughly equal, net amount for each payment period, but of course is very likely to generate underpayments or overpayments if there is any significant change of circumstances during the tax year. This difficulty can be mitigated by amendments to the code made within the tax year, but adjustments may still be necessary.

6. What appears to have happened in relation to the claimant's bonus payment is that the code used by his employer as required by the PAYE Regulations was a code which would have been appropriate for a higher rate taxpayer receiving monthly payments of £20,000 over the tax year, or at least for a taxpayer with a substantial annual income. In the event, it was not an appropriate code, since the claimant received no further remuneration from his employer and received no equivalent payments from any new employer. The effect was that the claimant's notional tax liability for the year was considerably overstated and he became entitled to repayment of the overpaid tax. Those repayments were made via his employer in accordance with the PAYE Regulations. He received a repayment of £2,144.60 during the Assessment Period and further repayments subsequently, so that by the time his contract of employment came to an end the outstanding figure for tax paid had been reduced to £1,706.80.

7. Universal credit was introduced by the Welfare Reform Act 2012. Under section 7 of the Act, it is payable in respect of each complete assessment period within a period of entitlement and under section 8 the amount of an award of universal credit is the balance of the maximum amount as explained in section 8(2) less the deductions identified in section 8(3). The maximum amount is the total of the standard allowance and any amounts which may be included for responsibility for children and young persons, housing costs and other particular needs or circumstances. The deductions are the earned and unearned income of the individual claimant or the joint claimants, calculated in the prescribed manner.

8. The calculation of the appellants' universal credit award in the Assessment Period was as follows, in summary:

Standard allowance			£594.04
Children			£517.08
Entitlement before adjustments			£1,111.12
Less:			
Earnings	£2,144.60		
Earnings as adjusted (take home pay)		£1,028.54	
ESA		£322.18	
Total adjustments		£1,350.72	
Universal credit award after adjustments			£0.00

That is to say, in the Assessment Period the adjustments exceeded the maximum amount, with the consequence that there was no balance to be awarded as universal credit. That was the decision made by the Secretary of State on 29 June 2020 which is the subject of this appeal.

9. I have not seen the calculation for the Assessment Period 29 April to 28 May 2020 but clearly the effect of the payment of the bonus during that period would have been that again there was no balance to be awarded as universal credit. It is not suggested that that was not the case and that decision has not been challenged by the appellants.

10. As respects the Assessment Period, it has not been contended that mathematically the calculation is wrong in any way. The issues in the case centre round the principle of the inclusion of the tax repayment in the calculation.

The law

(1) Universal credit provisions

11. As mentioned above, section 8(3) of the Welfare Reform Act requires the deduction of the claimants' earned income from the maximum amount. The calculation or estimation of earned income for this purpose is the subject matter of Chapter 2 (regulations 51 to 64) of the UC Regulations. The following provisions of the UC Regulations are relevant to this appeal.

12. By regulation 52, "earned income" is defined as:

> "(a) the remuneration or profits derived from –
>
> (i) employment under a contract of service or in an office, including elective office;
>
> (ii) a trade, profession or vocation, or
>
> (iii) any other paid work; or
>
> (b) any income treated as earned income in accordance with this Chapter."

13. By regulation 54(1), the calculation of a person's earned income in respect of an assessment period is to be based on the actual amounts received in that period unless otherwise provided in Chapter 2.

14. The calculation of earned income from employment (i.e., earned income under regulation 52(a)(i)) is dealt with in regulation 55, which provides:

> "(2) Employed earnings comprise any amounts that are general earnings, as defined in section 7(3) of [the Income Tax (Earnings and Pensions) Act 2003] …
>
> (4A) A repayment of income tax or national insurance contributions received by a person from HMRC in respect of a tax year in which the person was in paid work is to be treated as employed earnings unless it is taken into account as self-employed earnings under regulation 57(4)."

15. By regulation 61(2):

> "Where a person is, or has been, engaged in an employment in respect of which their employer is a Real Time Information employer –
>
> > (a) the amount of the person's employed earnings from that employment in respect of each assessment period is to be based on the information reported to HMRC under the PAYE Regulations and received by the Secretary of State from HMRC in that assessment period; …"

This is subject to exceptions relating to inaccurate or missing information.

16. The term "paid work" is defined in regulation 2 as follows:

> " 'paid work' means work done for payment or in expectation of payment and does not include being engaged by a charitable or voluntary organisation, or as a volunteer, in circumstances in which the payment received by or due to be paid to the person is in respect of expenses".

(2) Income tax provisions

17. As appears from paragraph 14 above, the meaning of "employed income" for the purposes of universal credit depends in part on the meaning of "general earnings" for the purposes of the Income Tax (Earnings and Pensions) Act ("ITEPA"). As explained below, issues have been raised on the appeal as respects the claimant's bonus and I therefore outline briefly the relevant provisions and their effect.

18. Section 7(3) of ITEPA provides that "general earnings" includes earnings within Chapter 1 of Part 3 of the Act and by s.62(2), which is included in Chapter 1 of Part 3, "earnings" in relation to an employment means any salary, wages or fee and any gratuity or other profit or incidental benefit which is money or money's worth. The bonus clearly falls within the definition of "general earnings".

19. By section 9(2) and (3), in the case of general earnings the amount charged to income tax for a particular year is the net taxable earnings from an employment in the year, calculated under section 11 by reference to any taxable earnings from the employment in the year. Under section 10(2) "taxable earnings" are to be determined in accordance with Chapters 4 and 5 of Part 2. Chapter 4 (sections 14 to 19) deals with UK resident employees and section 15(2) provides that the full amount of general earnings which are not excluded and which are received in a tax year is an amount of taxable earnings in that year. There is no suggestion that

the bonus was excluded and it follows further that it falls within the definition of "taxable earnings".

20. The question what earnings are "for" a particular tax year is addressed by section 16. By that section general earnings that are earned in, or otherwise in respect of, a particular period, are to be regarded as general earnings for that period. If the period consists of the whole or part of a single tax year, the earnings are to be regarded as general earnings "for" that tax year. If the period consists of the whole or parts of two or more tax years, the earnings for each year are to be determined on a just and reasonable apportionment. Section 16 is subject to any provision of Part 3 requiring an amount to be treated as earnings for a particular tax year. The significance of the question, however, is that the answer determines whether the earnings are chargeable to United Kingdom tax at all: see HMRC's tax manual at EIM42201. As there explained, if tax is payable at all, it will usually be assessed in the year in which it is received, which may be different from the year identified under section 16. The answer to the question therefore does not affect a person who is resident and domiciled in the United Kingdom at all times.

21. Under section 18, in a case where the person is not a director of the employing company, general earnings are to be treated as received at the earlier of the time when payment is made and the time when the person became entitled to the payment. In principle this provision might affect whether the claimant's bonus constituted general earnings for the tax year 2020/21 or for the tax year 2019/20, depending upon when his entitlement arose. It is to be noted, however, that the question is when the person becomes entitled to payment, which may be different from, and later than, the date on which the person acquires a legal right to receive payment in the future: see HMRC's tax manual at EIM42290.

The contentions before the First-tier Tribunal

22. In their request for mandatory reconsideration the appellants contended that "the so-called income" of £2,144.60 was the partial return of tax overcharged by HMRC in May 2020 and that as the one-off bonus payment had already been taken into account, leading to a zero payment of universal credit in June 2020, the return of the overcharged tax "in pieces over multiple months" should not be considered as income. They therefore asked for reinstatement of their universal credit payments "at least from July 2020". The substantive point underlying the argument is that if the tax had never been deducted, the June 2020 payment of universal credit would still have remained at zero but there would have been no additional "earnings" in subsequent months.

23. The appellants further contended that all their universal credit payments since April 2020 should be reinstated because they had in fact been entitled to universal credit since November 2019 and only did not apply on moral grounds, hoping that the Tesco loan would be sufficient. In fact the May 2020 bonus was not even sufficient to repay the loan.

24. The decision was not changed on reconsideration because, it was said, regulation 61(2) applied, requiring the assessment to be based on the information received from HMRC and provided by the claimant's Real Time Information employer. The second argument was rejected on the ground that it was the appellants' choice to submit the claim in April 2020 and the fact that the claimant had taken out a personal loan did not alter the law as to the earnings to be taken into consideration.

25. The mandatory reconsideration decision was notified on 12 November 2020. The appellants then appealed to the First-tier Tribunal on 5 December 2020 on the grounds that:

> (1) the law says repayments of tax will only be treated as earnings if the universal credit claimant was in any paid work during the tax year the repayment relates to. (The law in question was plainly regulation 55(4A) of the UC Regulations.) The claimant had not been in any paid work since mid-October 2019. Therefore, tax repayments since April 2020 should not be considered as income;
>
> (2) "it would only be just and equitable" to reinstate their universal credit "at least starting from" the point of their application.

26. Before the tribunal hearing the appellants adduced further material:

> (1) repeating the point that reg. 55(4A) applies where the universal credit claimant was in paid work during the year the repayment relates to;
>
> (2) confirming that the payments made since 20 May 2020 were repayments of overpaid tax, leading to the conclusion, in the appellants' submission, that they should be excluded from the universal credit calculation;
>
> (3) arguing that it would be humane to backdate the universal credit claim to November 2019 and referring to the bonus as "a discretionary and rather unexpected one-off payment";
>
> (4) relating to the Tesco loan, showing an outstanding balance in October 2020 of £22,270.08.

27. The appeal was heard and the decision notice issued on 13 July 2021. The appeal was dismissed on the ground, in summary, that although the claimant was on unpaid sick leave from 6 April 2020 until the date of the Secretary of State's decision, his employment contract continued, he was entitled to be paid when he worked and he was therefore in paid work during the 2020/21 tax year. The conclusion was reinforced by the fact that the claimant received a bonus during that tax year which constituted employed earnings. In the absence of evidence that the employer was under a legal obligation to pay the bonus during a previous tax year, the Tribunal found that the claimant's entitlement to receive the bonus arose during the 2020/21 tax year.

The present appeal

28. The appellants then asked for a statement of reasons with a view to an appeal on the ground of "misapplication of the law" and one was provided on 25 August 2021. In the statement of reasons the Tribunal repeated what was said in the decision notice, but also expanded on its reasoning, making the following points:

> (1) regulation 55(4A) appears to have been intended to deal primarily with the situation where an employee receives in one tax year a payment attributable to a refund of tax deducted in the previous year, but it is difficult to see why the position should be different where the refund was received in the same year as that in which the deduction was made ("an in-year refund"). The Tribunal had therefore construed regulation 55(4A) as applying to the appellants' case;

(2) it would be unnecessary to construe regulation 55(4A) in that way if an in-year refund made through the PAYE system was seen simply as the delayed receipt of remuneration;

(3) it cannot be right that income paid in a period when the recipient was on sick leave ceases to be earned income. That appeared to be accepted by the claimant, who did not dispute that the original bonus was earned income. The Tribunal had therefore construed regulation 55(4A) as applying to a refund referable to remuneration from employment even if the person was on sick leave when the refund was paid.

29. The Tribunal went on to say that there was "sufficient uncertainty in relation to the interpretation of the relevant parts of the statutory scheme to justify granting permission to appeal" and that the issue was likely to arise in relation to other universal credit claimants and accordingly gave permission to appeal on the same day.

30. In the notice of appeal the claimant makes the following points:

(1) he became incapacitated on 17 April 2019 and was on paid sick leave until 16 October 2019. Thereafter he was on unpaid sick leave until his dismissal;

(2) the bonus payment was made on 20 May 2020, in the tax year 2020/21;

(3) the bonus was paid in relation to the period of six months' paid leave only;

(4) the repayment was the direct result of an overcharge to tax by HMRC, who were fully aware of his incapacity;

(5) from a legal point of view, he was not in paid work in the tax year 2020/21, so the payments should not have been treated as employed earnings;

(6) from a logical and moral perspective it is wrong to deprive him of universal credit payments resulting from calculations during the assessment periods 29 May 2020 to 28 January 2021 because HMRC had overtaxed him in May 2020;

(7) the impact of the wrong assessment extends to universal credit payments after the Assessment Period.

31. The claimant goes on specifically to assert that his appeal is concerned with the level of payments for the whole period identified above and the Tribunal incorrectly limited the scope of the impact of mistreating the tax refunds.

32. In support of the points listed above the claimant says:

(1) the Tribunal misinterpreted regulation 55(4A) by regarding the treatment of income tax repayments otherwise than as employed earnings as being contingent on the repayments being treated as self-employed earnings;

(2) the Tribunal was wrong to conclude that he was in paid work by virtue of his employment contract because in the tax year 2020/21 he did not and could not do any work for payment or in expectation of payment;

(3) the entitlement to the bonus arose in the first six months of the tax year 2019/20, when his employer was paying him in full although for most of the time he was on sick leave. A detailed explanation was given to the Secretary of State and the Tribunal, during which no requirement for evidence was raised. "Tax recognition of bonuses upon payment [is] a usual practice in tax operations."

33. The Secretary of State responded to the appeal by a submission dated 25 April 2022. The appeal is not supported. In summary, it is submitted that:

(1) the Tribunal was correct to decide that the claimant was in paid work in the tax year 2020/21 by virtue of his continuing contract of employment;

(2) the Tribunal was correct to approach the issue on the footing that the in-year refund was effectively a delayed payment of remuneration. (Although the submission is not expressed in this way, this seems to me to be the substance of it in view of the reference to paragraph 21 of the statement of reasons, which makes the point identified in paragraph 28(2) above).

34. The claimant has made observations in reply dated 16 July 2022 which are directed to reinforcing the points already made. In addition, he has produced a copy of an email sent on 20 April 2020 from his employer explaining the basis of the bonus award.

Discussion

35. In my view, the correct starting point is not with regulation 55(4A) but with regulations 54 and 61. Under regulation 54, as mentioned above, the calculation of a person's earned income in respect of an assessment period is, unless otherwise provided in Chapter 2 of the UC Regulations, to be based on the actual amounts received. It is not suggested that Chapter 2 makes any relevant alternative provision. Under regulation 61(2), again as mentioned above, where a person is or has been engaged in an employment in respect of which the employer is a Real Time Information employer, the amount of the person's employed earnings from that employment for each assessment period is to be based on the information which is reported to HMRC under the PAYE Regulations. Regulation 61(3) permits the Secretary of State to determine that paragraph (2) does not apply in certain circumstances and regulation 61(4) then requires the Secretary of State to make a decision on the amount of the person's employed earnings in accordance with regulation 55, but it has not been suggested that a paragraph (3) determination has been made in the present case.

36. The claimant was undoubtedly a person who was engaged in an employment in respect of which his employer was a Real time Information employer. It is not disputed that the contract of employment was still subsisting, although the claimant was on unpaid sick leave. It follows that his employed earnings from that employment were to be determined in accordance with regulation 61(2): that is to say, by reference to the information reported by his employer.

37. As I understand the response to the claimant's request for a mandatory reconsideration and the Secretary of State's submission to the Tribunal, that is exactly what was done in fact. At first sight that ought to be an end of the matter.

38. The claimant, however, contends that the payment of £2,144.60 made by the employer during the Assessment Period was a refund of tax not falling within regulation 55(4A) and so ought not to have been taken into account despite the clear words of regulation 61(2). It is accepted by the Secretary of State that the employer had deducted tax from the bonus payment as it was required to do under the PAYE Regulations and when it transpired that there had been an over-deduction of tax it paid the appropriate amount to the claimant.

39. I have outlined above the reasons for which the claimant contends that the tax refund does not fall within regulation 55(4A). In my view the claimant is right that regulation 55(4A) does not apply, but his reasons are wrong. The much simpler and shorter point is that regulation 55(4A) is expressed to apply to repayments "received by a person from HMRC". The claimant received his payment from his employer, not from HMRC.

40. This leads to the question whether the non-applicability of regulation 55(4A) is of any relevance, given the terms of regulation 61(2). In considering this question, it is important to have in mind the purpose and structure of universal credit. Its purpose is to provide claimants who satisfy, among other conditions, the financial conditions in section 5 of the Welfare Reform Act 2012 with the amount necessary to bring their monthly income up to the level set in their individual cases by the provisions of Part 4 of the Regulations. The financial conditions consist of a requirement that the claimant has capital below a prescribed amount, which is irrelevant to the present issue, and a requirement that the claimant's income should be below the specified level. Not surprisingly, in considering whether the income requirement is satisfied, both earned and unearned income are taken into account.

41. Part 6 of the Regulations deals with the calculation of capital and income and Chapter 2 of Part 6 deals specifically with earned income. Unlike some other benefits, universal credit is not awarded in a sum which remains fixed indefinitely, subject to annual uprating. As already outlined, it is assessed on a monthly basis having regard to the income of the previous month, so that fluctuations in income are picked up fairly speedily and affect the amount payable in the next assessment period. It follows that the Department of Work and Pensions needs to have up-to-date information as to the claimant's earned income every month.

42. In order to make the system work with reasonable efficiency in relation to the substantial majority of the population with earned income, the Regulations make the PAYE returns of Real Time Information employers decisive as to the income earned from the relevant employment by virtue of the provisions of regulation 61(2). It is only in relation to earned income derived from an employment where the employer is not a Real Time Information employer or from some other form paid work, including self-employment, that information is required from another source. At that point regulation 61(1) comes into play, requiring the claimant to provide such information at such times as the Secretary of State may require.

43. Returning to regulation 55(4A), it was introduced into regulation 55 by the Universal Credit and Miscellaneous Amendments (No. 2) Regulations 2014, SI 2014/2888. As the Tribunal explained in the statement of reasons at paragraph 16, the explanatory memorandum accompanying the Regulations reads as follows:

> "Tax refunds - Regulation 4(2) provides that a repayment of tax and national insurance which relates to a tax year in which the person was in paid work is treated as employed earnings, unless it is taken into account as self-employed earnings under Regulation 57(4) of the Universal Credit Regulations. Currently a repayment relating to self-employment must be reported as a receipt for that self-employment. There is no clear rule for an employed claimant to report a repayment received after the end of the tax year. The amendment will ensure greater consistency in the treatment of repayments of tax and national insurance within Universal Credit."

It thus appears that regulation 55(4A) was intended to put beyond doubt the fact that a refund from HMRC in the circumstances specified constituted employed earnings, so that a claimant would be under an obligation to report it. There is of course no need for such an obligation if the payment is made by the employer in the course of operating the PAYE Regulations, since the information will be provided under regulation 61(2).

44. The significance of the words "from HMRC" appears more clearly when one looks at the minutes of the meeting of the Social Security Advisory Committee on 3 September 2014, at which the amendment was considered. Annex B records the following question from the Committee and answer from the Department for Work and Pensions:

> "5. [Q.] On the issue of tax and NI refunds being treated as employed earnings there is a desire to explore how this would work in practice. [A.] Claimants will be required to declare receipt of any tax or NI contribution refund they receive directly from HMRC (ie not via the Real Time Information system). It will then be taken into account as earnings in their UC calculation."

45. I note further that paragraph H3022 of Chapter H3 of the Department for Work and Pension's Advice for Decision Making says this in relation to regulation 55(4A):

> "Note 1: Repayments of income tax may include tax relating to other sources such as unearned income. As long as the claimant was in paid work in the tax year the repayment relates to, then the whole repayment is treated as earnings.
>
> Note 2: There is no requirement for the claimant to report changes that take place in relation to their tax code or variations in their tax reported via RTI.
>
> Example
>
> Ellie receives a cheque from HMRC for £200. This relates to an overpayment of £600 income tax made in the tax year 11/12 (in which Ellie was in paid work) and an underpayment of £400 in income tax relating to the tax year 12/13. The amount that Ellie should declare as employed earnings is £200 as this is the repayment she received, not £600 which relates to the refund due in one of those years."

46. All of this is consistent with the view which I have formed on the words of regulations 55(4A) and 61, namely, that where regulation 61(2) applies, that is an end of the matter. Any tax refund dealt with through the PAYE Regulations will inevitably be a payment of which the Department for Work and Pensions is aware and since it will in some way be connected with the claimant's employment it will properly be counted as employed earnings. It is only where the refund is paid directly to the claimant that there might be room for doubt, especially since it might relate to unearned income. The function of regulation 55(4A) is to make clear that when a direct payment is made the refund will constitute earned income in the specified circumstances, whether or not the overpaid tax itself related to employed earnings.

47. For completeness, I add also that although it is convenient to speak in terms of a tax repayment or refund under the PAYE Regulations, there is a sense in which that is not strictly what happens. In broad terms, the mechanism of the PAYE Regulations involves the payment by the employer to HMRC each month (or each quarter, in some cases) of the global amount payable for income tax by all its employees determined in accordance with their various tax codes. Tax codes may, however, be adjusted from time to time, with the result that the deduction made in respect of some employees may have been too high and the deduction

made in respect of other employees may have been too low. The amount payable to HMRC in any month may reflect any adjustments which may be required to give effect to past over-deductions or under-deductions. Any repayment or refund is therefore likely to be achieved not by any payment by HMRC but by a set-off against the next month's liability.

48. It follows that when a claimant receives a tax refund through PAYE it may fairly be said that what is being received is a part of the remuneration earned which was held back for the purpose of meeting a tax liability but which is now being released. It is clearly entirely appropriate to treat such a payment as employed earnings. This is in substance the point made by the Tribunal as explained in paragraph 28(2) above. On the basis of the foregoing analysis, it seems to me to be correct.

49. It further follows that the fact that the claimant does not fall within regulation 55(4A) is irrelevant and it is not necessary to consider whether he would have done so had the facts been the same but the tax refund had been paid directly to the claimant by HMRC.

50. I am nevertheless conscious that one of the reasons for which permission to appeal was granted was that the issues raised by the claimant's appeal were likely to arise in relation to other universal credit claimants and "a definitive statement of the correct legal position is likely to be of wider benefit". What is said above is a statement of what in my view is the correct legal position as respects the relationship between regulation 55(4A) and regulation 61, but it does not of course address the correct construction of regulation 55(4A) more generally. On that issue I offer the following comments, although they are clearly not essential steps in my decision. It will also be noted that inevitably they draw heavily on the particular facts of the case and so their wider application may need to be considered with care.

51. The first issue which would arise if the payment had been received from HMRC is the question whether the Tribunal erred in law in finding that the claimant's entitlement to a bonus arose in the tax year 2020/21. The claimant has put his employer's email of 20 April 2020 before the Upper Tribunal in support of his case that there was such an error. As a general rule, a tribunal cannot be held to have erred in law through not taking account of evidence which was not before it. It is the responsibility of the parties to put evidence before the tribunal and they cannot subsequently adduce fresh evidence to make good their case. There is, however, a limited exception to that rule, described in *R (Iran)* v. *Secretary of State for the Home Department* [2005] EWCA Civ 982, where common errors of law are listed as including:

> "Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

Sometimes no further evidence is required to establish that a mistake has been made, but where it is, the question whether the claimant in a particular case is responsible for the mistake will often depend upon whether he or she used what is traditionally called reasonable diligence in providing evidence to the First-tier Tribunal.

52. In considering whether that exception would apply here, I note that the claimant has said he gave a detailed explanation about the bonus to the Secretary of State and the Tribunal and no requirement for evidence was raised. Although he undoubtedly explained the nature of the £20,000 payment received in May 2020 and in particular the fact that it was a one-off

payment, it is not clear to me that he ever explained that it was his case that his entitlement arose in the tax year 2019/20 and in particular related to the period while he was on paid sick leave. Indeed, one reading of the documentation might be that the claimant was asserting that his entitlement arose in the tax year 2020/21, during which he was not engaged in any paid work or in receipt of any sick pay. The circumstances in which an employee becomes entitled to a bonus payment vary according to the employment contract and the papers I have seen do raise a question whether the claimant would satisfy that part of the test which requires that the appellant should not be responsible for any mistake made as to the material facts relating to the bonus. From the nature of the evidence now adduced, it is clear that the claimant must always have had it available when putting his case to the Secretary of State and the Tribunal.

53. I am conscious, however, of the warning of the Court of Appeal in *Hussain* v. *Secretary of State for Work and Pensions* [2016] EWCA Civ 1428 against taking too strict a view of a party's responsibility in the social security context, where the party is often unrepresented, as is the case here. I therefore assume in the claimant's favour that I could properly have considered the email from his employer to decide whether it shows a mistake as to a material fact by the Tribunal.

54. The email states:

> "As you know, bonuses are strictly discretionary and there are no set rules which are applied to determine what bonus, if any, an employee receives.
>
> This is further complicated by the fact that you have been on sick leave since 17th April 2019, so for all but just over two weeks of the FY2019… we had to look at the purpose of the discretionary bonus plan, which in essence, is to reward for individual performance in that particular financial year and to incentivise and retain individuals in relation to the following financial year. [The employer's] performance is taken into account in the overall bonus "pot" which it receives from the group prior to it being distributed to individual employees.
>
> Based on these factors and the fact that you were only present for just over two weeks of the FY2019 (and have therefore, with the exception of those two weeks, not personally contributed towards the performance of [the employer] in the FY2019), we consider that we would be entitled to exercise our discretion to pay you a modest bonus only. However, we do of course wish to retain you as an employee, and to incentivise you to return to work and contribute towards the future successes of the business. We also believe that given that you are still an employee it is fair that you continue to benefit from the overall success of [the employer].
>
> With that in mind, we are pleased to tell you that as opposed to adopting the modest approach, our starting point was to make a generous award of 50% of last year's bonus which is £17,500 … We then decided to increase this by a further £2,500 to take account of the fact that you worked for just over two weeks of April 2019 and also the fact that the bonus pool awarded to [the employer] this year by the group was slightly up on last year … As usual, the bonus sum of course remains subject to the usual PAYE Deductions."

55. In my view, the email is fatal to the claimant's contention that his entitlement to the bonus arose in the tax year 2019/20, for the following reasons:

> (1) the bonus is described as strictly discretionary, so there can be no entitlement of any kind until the discretionary decision has been made. That is reinforced by the phrase

"what bonus, if any". The claimant is wrong to assert, as he does, that the employer was obliged "to pay some sort of bonus";

(2) the bonus relates to performance in the financial year 2019. As the letter states that the claimant was present for just over two weeks of the financial year, having gone on sick leave on 17 April 2019, it seems that the financial year in question was the year 1st April 2019 to 31 March 2020. The discretionary decision involved taking into account the size of the bonus pool for that year awarded to the employer by the group. There is a strong inference that the discretionary decision communicated by the email of 20 April 2020 was made no earlier than 6 April 2020;

(3) even if that is wrong, it seems clear that the claimant's entitlement to payment, which, as explained in paragraph 21 above, is the crucial point, did not arise until 20 May 2020.

56. In those circumstances, I conclude that the Tribunal was right in finding that the entitlement to the bonus, in the relevant sense, arose in the tax year 2020/21. I note that in the decision notice, repeated in the statement of reasons, the Tribunal used the expressions "entitlement to receive this payment" and "under a legal obligation to pay the bonus". It therefore seems to me that the Tribunal applied the correct test for the purposes of the tax legislation, although I can understand that the claimant may have understood the Tribunal as referring to the time at which a legal right to receive the payment at a future date arose. Be that as it may, however, there was no mistake as to a material fact by the Tribunal.

57. I therefore approach the application of regulation 55(4A) on the footing that the tax deduction was made in respect of an amount properly assessed to tax in the year 2020/21 and the refund made during the Assessment Period must accordingly be in respect of that tax year. I add that, contrary to the claimant's submissions, this appears to be the only basis which might assist the claimant, since on any view the claimant was in paid work up until 17 April 2019. It is not necessary to consider what the position would have been if the claimant had been legally entitled to receive payment in the tax year 2019/20, as envisaged by section 18 of ITEPA, but that payment had been delayed until the following tax year.

58. This brings me back to the question whether the claimant was "in paid work" in the tax year 2020/21 for the purposes of regulation 55(4A). It is clear that the Tribunal regarded satisfaction of that requirement as essential to the application of regulation 55(4A). If by the submission noted in paragraph 32(1) above the claimant intends to argue that the Tribunal thought that the only circumstance in which a tax repayment was not to be treated as employed earnings was if it was taken into account as self-employed earnings, the argument in my view is a mistaken one. The Tribunal's reference to self-employed earnings under regulation 57 was made simply for the purpose of eliminating the possibility that regulation 55(4A) did not apply because the repayment had been taken into account under the former regulation.

59. There are two parts to the Tribunal's decision:

(1) that for the purposes of regulation 55(4A) a person who is an employee under a contract of employment is "in paid work" even if at all material times he or she has not been working in fact but has been on unpaid sick leave;

(2) that regulation 55(4A) applies to in-year refunds as well as to refunds made after the end of the tax year in respect of which the repayment is made.

60. As the claimant points out, the definition of "paid work", which is set out in paragraph 16 above, refers to "work done for payment or in expectation of payment". His short point is that during the tax year 2020/21 he was not doing any work. I accept that. His difficulty is that regulation 55(4A) does not refer to a tax year in which the person "did any paid work" but a tax year in which the person "was in paid work". The two expressions do not necessarily mean the same thing.

61. Looking back to regulation 52, it will be observed that earned income means the remuneration or profits derived from, in essence, employment under a contract of service or in an office, self-employment or "any other paid work". The meaning of this last phrase is obscure, but it does at least suggest that to be employed under a contract of service is to be in paid work, even if no work is in fact being done. While the contract subsists, there is the possibility of its being a source of remuneration or profit. The fact that at a particular time and with the agreement of the employer the employee is not performing any work under the contract does not in my view mean that the employee is not "in paid work". The employee is "in work" because he or she is in employment and the nature of the work the employee is employed to perform is "paid work" as defined.

62. On that basis, the claimant would have been in paid work for the purposes of regulation 55(4A) if that provision had applied, leaving only the question whether it applies to in-year refunds.

63. My difficulty with that question is well illustrated by the present case. Assuming that the claimant was not in paid work while he was on unpaid sick leave during the period from 6 April 2020 to the date on which he received the tax refund, it would have been possible, at least in theory, that at any time from July 2020 to March 2021 he would have been able to resume performing the duties of his employment or alternatively would have been able to obtain alternative employment with duties which he could perform. In that case he obviously would have been in paid work during the relevant tax year. In other words, it is practically impossible to apply regulation 55(4A) to an in-year refund because the material facts cannot be ascertained until the end of the tax year.

64. That difficulty points, in my view, to the correct answer to the conundrum, which is that in practice, as I understand the matter, HMRC does not make direct in-year refunds. As respects income other than income which is dealt with under the PAYE Regulations, a taxpayer fills in a tax return stating the income received during the tax year ending the previous 5 April. That return is used by HMRC as the basis for making a provisional assessment of the tax liability for the then current year and a final assessment of the tax for the preceding tax year. Direct refunds are the product of a final assessment and so inevitably relate to the preceding tax year.

65. This explains why the Explanatory Memorandum refers to payments received after the end of the tax year, although there are no express words in regulation 55(4A) requiring that the tax year referred to should be a past tax year.

66. I recognise that there may be special cases which give rise to special considerations, but in most cases this analysis seems to me to give rise to a practical and workable system, as follows:

(1) if a tax refund is paid by the employer as a result of the operation of PAYE and the employer is a Real Time Information employer, it will be taken into account in accordance with regulation 61(2);

(2) if a tax refund is paid directly by HMRC, it will relate to a previous tax year and it will be possible to answer the question whether the claimant was in paid work during that year;

(3) the question should be answered on the basis that a claimant who is employed under a contract of employment during the year is in paid work while the contract subsists.

67. It follows that for the reasons I have given, the claimant's appeal fails. I understand why this appears to the claimant to be an arbitrary result, dependent upon the tax code applied when the bonus was paid to him, but it is nevertheless a result which reflects the resources actually available to the claimant for the Assessment Period. The terms of the Regulations do not permit the Secretary of State to take into account the fact that the appellants delayed claiming universal credit for a period during which they may well have been entitled to receive it.

68. The subsequent assessment periods which the claimant wished to be revisited are not before me, but the above reasoning applies to them also.

69. In terms of disposing of the appeal, I have come to the conclusion that the Tribunal erred in law in proceeding on the basis that regulation 55(4A) applies to in-year refunds, although I have agreed with the Tribunal's construction of the phrase "in paid work". I have also agreed with the Tribunal's view as to the nature of the tax refund as, in effect, deferred remuneration. That did not, however, involve reference to the significant phrase "received by a person from HMRC". Moreover, as I read the decision notice and statement of reasons, that view was not intended to be an alternative statement of the law providing a second ground on which the appeal was dismissed by the Tribunal. Although I have considered whether I should simply dismiss the appeal, I have decided that in those circumstances it is preferable that I should set the Tribunal's decision aside and remake the decision, substituting a decision of my own to the same practical effect.