



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Case No UA-2024-000251-CSM
[2024] UKUT 342 (AAC)**

**Appellant: NO
Respondent: SSWP
Second Respondent LC**

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

**Tribunal: First-tier Tribunal (Social Security and Child Support)
Tribunal Case No: SC286/22/00238
Tribunal Venue: Gloucester Tribunal Hearing Centre
Decision date: 16.6.23**

Decision date: 29th October 2024
Decided on consideration of the papers

Representation

Written representations from the appellant on his own behalf.
Written representations on behalf of the first Respondent, Mr R Howell of counsel.

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC286/22/00238) of 16.6.2023 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. In brief, the Appellant appealed to the FTT against a superseding maintenance calculation decision (the 2022 annual review) made on 8 February 2022 that he was liable to pay child support maintenance to the 2nd Respondent from an effective date of 8 February 2022 in the sum of £216.31 per week. The Appellant's appeal to the FTT concerned the amount of that maintenance calculation and specifically the accuracy of the HMRC figure used for the 2020/21 tax year, arguing the figure arose from a tax error arising from a number of company cars. As per the appellant's request, written reasons were issued to him on 17/10/2023. The appellant applied for permission to appeal the FTT decision of 16/6/2023, permission to appeal was refused by the DTJ on 08/01/2024 (although there is a typographical error regarding the date of the written reasons on the face of the document). This decision was issued to the parties on 16/01/2024. The appellant then applied to the Upper Tribunal for permission to appeal, this was granted by me on 14/06/2024.

Proceedings before the Upper Tribunal

2. The SSWP supports the appeal. Mr O has requested reasons for the decision and an oral hearing so he can (i) "be told why HMRC is wrong" and (ii) question other calculations made by CMS to date to "check if payments have always been correct". The SSWP does not support an oral hearing of this matter on the basis firstly, she has conceded the FTT was in error of law and, secondly, the Upper Tribunal is not the correct forum to question other calculations. I agree. I also

consider I can fairly deal with this appeal on the basis of the available evidence in accordance with the overriding objective. Representations have not been received from the second respondent.

Discussion – error of law

3. At paragraph 44 of its decision the FTT states “Whilst having every sympathy for Mr O’s difficulty, with the apparent error in his tax records. The Tribunal concludes that it is required to use the provided HMRC figure, subject to the allowance for relievable pension contributions only.”
4. As the first respondent has highlighted in its submission, there was material before the FTT indicating that a different HMRC figure might have been provided, had it been requested. The FTT itself appeared to suggest in its written reasons at paragraph 44 referred to above, some doubt attached to the reliability of the HMRC figure which had been provided. In this case, the FTT adjourned the hearing and required the Secretary of State to obtain Real Time Information (“RTI”) from HMRC for the period of 1 April 2020 to 8 February 2022 [FTT/48]. The RTI provided by HMRC indicated that the Appellant’s taxable income in the 2020-21 tax year was in fact £77,947.24 [FTT/58-59]. However, RTI from HMRC is not an HMRC figure within the meaning of reg.36(1) of the 2012 Regulations: *AR v Secretary of State for Work and Pensions [2019] UKUT 151 (AAC)* per UTJ Wikeley at §45.
5. The SSWP in her submission argues the FTT, insofar as it found that it was bound by the HMRC figure of £89,985.24, was in error of law. As there was a serious possibility that a new HMRC figure would be different to that figure, the FTT should have adjourned the hearing and required the Secretary of State to request a new HMRC figure, rather than RTI: *BK v Secretary of State for Work and Pensions [2022] UKUT 283 (AAC)* per Deputy UTJ Rowland at §12. I agree. In my respectful view the FTT failed in its inquisitorial duty to fully investigate, consider and make findings of fact on this issue, particularly in circumstances where it had reservations regarding the reliability of the HMRC figure provided which it explicitly referred to in its written reasons. If necessary, it should have considered adjourning the case to obtain this information. On this basis the FTT was in error of law.
6. For the sake of completeness I also note the observations of UTJ Mitchell at paragraph 38 of *SB v (1) Secretary of State for Work and Pensions, (2) TB (CSM) [2016] UKUT 0084 (AAC)* where he states “it would be absurd if [he] had to rely on income data that was clearly wrong, artificially inflating or deflating a

parent's child support maintenance liability. I see nothing in the 2012 Regulations to prevent subsequent requests for a HMRC figure from being made if there is a reasonable doubt as to the accuracy of the information initially supplied."

7. I note, equally, the FTT are not obliged to accept figures provided by the appellant. As Judge Rowland stated in *BK v Secretary of State for Work and Pensions (CSM) [2022] UKUT 283 (AAC)* at paragraph 12;

"I do not accept the [appellant's] argument that the First-tier Tribunal ought simply to have substituted the figures that he had provided, even though it had copies of the P60 and P11D. The First-tier Tribunal was correct to take the view that it was bound to accept the figure previously supplied in response to a request for the HMRC figure. However, I do accept the Secretary of State's submission to me that the First Tier Tribunal ought to have adjourned and required the Secretary of State to make a new request for the HMRC figure. I am satisfied that it erred in law in not seeking a current HMRC figure, because there was cogent, albeit not conclusive, evidence before it that HMRC's figure was not consistent with information supplied by the father's employer under PAYE regulations."

8. The Upper Tribunal has held that more than one HMRC figure may be requested by the Secretary of State from HMRC, and where the figure changes after the date of the Secretary of State's decision, the new figure may be used consistently with s.20(7)(b) of the 1991 Act, because it operates retrospectively and is therefore a circumstance obtaining at the time of the Secretary of State's decision: *FQ v Secretary of State for Work and Pensions [2016] UKUT 446 (AAC)* per *UTJ Jacobs* at §20; *BK v Secretary of State for Work and Pensions [2022] UKUT 283 (AAC)* per *Deputy UTJ Rowland* at §8, §11.

Conclusion

9. I find that the First-tier Tribunal erred in law as set out above. The First-tier Tribunal's decision is set aside.

10. The Secretary of State has suggested the Upper Tribunal remit this case to the First-tier Tribunal for re-hearing and, given further findings of fact are required, it is appropriate to remit the case back to the FTT. As a matter of law, the next tribunal cannot, in its reasoning, take into account the findings of fact or conclusions of the tribunal whose decision I have set aside. The undetermined grounds of appeal are just that – undetermined.

11. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view on this case. That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

Directions for the re-determination of the appellant's appeal

I direct as follows:

12. The appeal against the Secretary of State's decision of 8th February 2022 is remitted to the First-tier Tribunal for re-determination.
13. The FTT is directed to require the Secretary of State to request a further HMRC figure in relation to the relevant tax year.
14. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.
15. If the claimant wishes the First-tier Tribunal to hold an oral hearing before his remitted appeal is determined he must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.
16. If the claimant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.
17. Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.
18. The parties are reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applying at the date of decision (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at the date of decision. ^[OBJ]

E Fitzpatrick
Judge of the Upper Tribunal
Authorised for issue 29th October 2024