IN THE UPPER TRIBUNAL **Case No.** CTC/2497/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal sitting at Bexley Heath on 9 April 2016 under reference SC154/15/03360 involved an error of law and is set aside.

The appeal is remitted for determination at an oral hearing before a completely differently constituted tribunal.

This decision is made under section 12 of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later directions by a district tribunal judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal shall be considered by a new tribunal which will be entirely differently constituted to the tribunal which decided the appeal on 9 April 2016.

(2) The new tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

(3) In doing so, the new tribunal must not take account of circumstances that were not obtaining at the date of the original decision of the Secretary of State under appeal. Later evidence is admissible provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

REASONS FOR DECISION

1. In this decision I highlight some concerns regarding the inadequacy of the appeal response prepared by Her Majesty's Revenue and Customs (HMRC) for the purposes of the hearing before the First-tier Tribunal. I similarly highlight additional concerns regarding a failure on the part of HMRC to put salient put key aspects of its case to the claimant prior to the production of that appeal response.

2. This appeal to the Upper Tribunal is brought with my permission. It arises from a decision of HMRC which it made on 12 August 2015 (or at least that is when it wrote to the claimant about it) under section 18(1) of the Tax Credits Act 2002 ("the 2002 Act") as to the claimant's entitlement to Tax Credits and a subsequent decision of the First-tier Tribunal (the tribunal) of 9 April 2016 which was made in response to her appeal to it. I must say, at the outset, that I am very grateful indeed to Mrs E Collins who has prepared a submission to the Upper Tribunal which clarifies the history relevant to this appeal and which analyses in a very fair and meticulous way the failings of HMRC in its decision making processes and in the explanations it offered to the tribunal.

3. The claimant is a single person with responsibility for three children. It appears that at the outset of the 2014/2015 tax year (the tax year with which this appeal is concerned) she was engaged in qualifying remunerative work for 18 hours each week. According to what HMRC records then indicated, she was paying childcare charges of £175.00 per week to one single childcare provider, a Nursery I shall call OWN. According to section 12 of the 2002 Act when read with regulation 7 of the Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, 70% of the cost of childcare charges are, in specified circumstances, payable as part of the childcare element of working tax credit.

4. On 30 June 2014 HMRC made a decision under section 14(1) of the 2002 Act awarding tax credit. The award included an amount based upon the childcare charges in light of the information the claimant had provided about them. That might properly be described as an initial award because a decision under section 14 is not one which establishes entitlement. That comes later. There is what appears to be a computer printout at page 26 of the bundle which is said to be confirmation of that decision. I have never really understood why a better record of such decisions cannot be produced but for the purposes of this appeal it does not matter. The record provided does not confirm that the decision was made under section 14(1) and nor does the appeal response (at least not in terms) but it does not appear that it could conceivably have been made under any other provision.

5. According to Mrs Collins careful submission to the Upper Tribunal, there is in existence a record of the claimant having made a telephone call to HMRC on 24 February 2015 in which she had reported an anticipated reduction in the amount of her childcare costs from £175.00 per week to £105.00 per week, such reduction being set to take effect from 14 March 2015. That record does not seem to have been provided to the F-tT so I am attributing its surfacing to Mrs Collins assiduous burrowing. It appears that that telephone call led to HMRC writing to the claimant, on 26 February 2015, to ask for some supporting evidence regarding her children and her childcare costs.

6. The letter of 26 February 2015 included a specific request for invoices, receipts and proof of payments concerning OWN. As Mrs Collins suggests, that request was probably made under section 16(3) of the 2002 Act. Pausing there, though, the written response of HMRC to the appeal simply stated that "a question arose" about the claimant's childcare entitlements. That shorthand description of the circumstances which had led to the letter of 26 February 2015 being written did not make the tribunal aware of the fact that the claimant had voluntarily contacted HMRC to explain a circumstance which would (and indeed appears did) lead to a reduction in the tax credit payments she was receiving. Since HMRC's decision under appeal raised concerns regarding the claimant's credibility (at least by implication) it might be thought a little unfortunate (though I stress I am sure the omission was not deliberate) that her actions in that regard were not made clearer.

7. Be all of that as it may, the claimant responded to the letter by sending her own letter of 21 March 2015. She explained that because of various considerations she had, in fact, been using more than one childcare provider and she supplied some bank statements (it is important to note they had been provided so early in the process), a letter from OWN, a letter from a school I shall refer to as KPS (which had also been providing some childcare in respect of which charges had been made) and some receipts and a child care agreement with a person I shall refer to as Ms NI-M (another childcare provider). She also sent a copy of an Ofsted

Inspection Report which I think relates to Ms NI-M but I am not sure since the subject of the report is not actually named. However, before the claimant sent her letter (indeed on 15 March 2015) HMRC decided to reduce the claimant's tax credit payments as a result of the notified reduction in childcare costs. I cannot see a reference to that decision in the appeal response nor can I detect any documentation about it in the appeal bundle but confirmation that that did happen comes from Mrs Collins. As she says, that decision must have been taken under section 16(1) of the 2002 Act which provides for an alteration to a section 14 decision in circumstances where HMRC has "reasonable grounds to believe" that a change is appropriate. Of course, it had entirely reasonable grounds in this case because it was basing its decision upon what the claimant had voluntarily told it. However, it would have been appropriate to have alerted the tribunal to the making of that decision.

8. HMRC went on to issue a notice under section 17 of the 2002 Act (again I am grateful to Ms Collins for this) and then on 11 May 2015 it sent a further letter to the claimant requesting more information. The letter made it clear that that request was being made under section 18(10) of the 2002 Act and it was quite specific as to what was sought. It asked the claimant to confirm the date when her children ceased being looked after by OWN and it asked for the date when Ms NI-M had started to provide childcare for them and whether or not she was still doing so. Nothing else was asked about. The claimant provided her prompt response by letter of 22 May 2015. She explained that her children had ceased being looked after by OWN (which is a Nursery) on 4 August 2014 and that she had used the services of Ms NI-M from 15 February 2014 to 31 January 2015.

9. On 12 August 2015 HMRC wrote to the claimant informing her of its decision, which it was obviously making under section 18 of the 2002 Act, regarding her entitlement to tax credit for the 2014/2015 tax year. There is what appears to be another computer printout appearing at page 27 of the appeal bundle confirming the decision. That is described in the appeal response as "a finalised award notice on 17 August 2015, showing entitlement to tax credits, with a reduction in her childcare element" though it does not look very much like a notice of any sort to me. Certainly it does not constitute or appear to contain anything which approaches an explanation for the decision. As to the letter of 12 August 2015, the salient part reads as follows:

> "We wrote to you on 26 February 2015 about your tax credits award for the year 25 April 2015. I have now completed my check.
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> I have considered the information that you let me have. I am sorry, but I cannot accept the information. This is because based on the information you have supplied I am unable to confirm your childcare costs to [OWN]. I will amend your tax credits award using the information we hold from 6 April 2014."

10. Pausing there, there was no mention in that letter of the childcare costs relating to Ms NI-M nor was there any mention of the claimant's bank statements. The section 18 decision is the decision which was under appeal before the tribunal.

11. Prior to appealing the claimant requested, on 1 September 2015, a mandatory reconsideration. Her letter making that request did not make very many points but, realistically, she could only have been expected to attempt to respond to the specific points which had been taken in the letter of 12 August 2015. According to HMRC a mandatory reconsideration was undertaken. Indeed, on 22 October 2015, HMRC wrote to the claimant

indicating that the decision was to be maintained. Mrs Collins has described that letter as being "woefully inadequate". She is right. It does not contain any meaningful reasoning. Further, although neither the letter of 12 August 2015 nor that of 22 October 2015 made any reference to concerns regarding the childcare costs relating to Ms NI-M the appeal response indicated that the payments said to have been made to her were not being accepted as being genuine either.

12. So far as I can see, right up to the point that that appeal response had been prepared, there was only ever an indication that doubts were being entertained regarding the payment said to have been made to OWN. The appeal response did set out HMRC's reasoning as to why it did not think the payments said to have been made to the above two providers of childcare were genuine. Essentially, in looking at paragraph 11 of that response, it was thought that the debit entries contained in the bank statements the claimant had provided did not demonstrate that she had been withdrawing sufficient funds to cover her claimed payments to those childcare providers. Interestingly, the appeal response does say that the payments said to have been made to KPS were accepted because the claimant had provided receipts "showing payments made to Parentpay". It does not appear that those receipts were produced for the purposes of the appeal though I suppose it is possible whoever had prepared the appeal response on behalf of HMRC had thought it unnecessary to produce them since the making of those payments was not being placed in issue. I rather think, though, they really ought to have been produced at least for completeness. The real point here, though, is that the issue concerning the claimed insufficiency of withdrawals from the bank statements to cover the claimed payments seemed not to have been put to the claimant throughout the whole process of enquiry, decision making and mandatory reconsideration described above. Perhaps, had it been put, she would have provided a plausible explanation. Perhaps not but it would have been helpful to have known.

13. When the claimant lodged her appeal to the tribunal she ticked a box on a standard form to indicate that she wanted her appeal to be "decided on the papers". That might not have been the wisest of choices and indeed, as I understand it, claimants are provided with an explanation of the difference between an oral hearing and a papers based consideration prior to expressing a preference as to that. The tribunal did decide the appeal on the papers. In an unusually brief statement of reasons for decision, though brevity of itself is not to be criticised at all, it explained why it was doing so in this way:

> " 2. [The claimant] has asked for a paper determination of the appeal and has produced evidence in relation to the disputed childcare costs. HMRC have set out the reasons why this is not considered adequate and [the claimant] is aware of these. I considered it was not therefore necessary to have an oral hearing as the issues were clear."

14. Prior to offering that explanation the tribunal had identified the issue on the appeal before it as being whether the decision taken by HMRC:

> "… was a reasonable one for HMRC to have made."

15. The rest of the tribunal's reasoning is as follows:

> " 3. There is no dispute that the costs incurred with [KPS] are authentic as [the claimant] has produced a letter in relation to each of her children and receipts showing the payments made.

> 4. [The claimant's] grounds of appeal are that she has used two other childcare providers and that her childcare costs were £175.00 per week and that these along with all her outgoings were paid in cash.
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> 5. However an analysis of her bank statements shows that her cash withdrawals were on average inadequate to cover her stated expenses. Since she claimed to make the payments to [OWN] and [Ms NI-M] in case it was not possible to verify the payments in the bank statements.
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> 6. [The claimant] also provided receipts and a childcare agreement with [Ms NI-M] and receipts and a letter from [OWN] however HMRC did not consider that these were authentic. In particular the receipts from [OWN] does not give date as to when the care was provided.
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> 7. [The claimant] was aware of the reservations of HMRC about the authenticity of the evidence she provided but has not provided any further information or evidence to establish the childcare costs.
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> 8. Accordingly the tribunal found that HMRC had acted reasonably in discounting the childcare costs claimed to have been paid to [OWN] and [Ms NI-M] and the decision to amend [the claimant's] tax credits from 6 April 2014 was correct."

16. The claimant, by then represented by Citizens Advice Merton and Lambeth sought and obtained permission to appeal to the Upper Tribunal. Directions elicited the written response from Mrs Collins referred to above. The claimant's representatives did not file a reply to that response, despite directions being issued permitting such a reply, and the time for the filing of one has now passed. In the circumstances I have decided to determine this appeal on the basis of the material currently before me bearing in mind Mrs Collins support for the appeal. I should add that there has been no request, by either party, for an oral hearing before the Upper Tribunal.

17. There are, in my judgment, a number of difficulties with the tribunal's reasoning. I would accept that, in some respects at least, the tribunal had been hamstrung by the way in which the case has been put to it. Nevertheless, I have concluded that it has made errors of law such that its decision must be set aside. I shall address those errors below.

18. The tribunal does not appear to have appreciated that it was standing in the shoes of the HMRC decision maker and was making its own decision on the basis of the evidence before it rather than reviewing the decision of HMRC.

19. In this context, I think it is entirely uncontroversial that the right of appeal afforded under section 38 of the Tax Credits Act 2002 is a full right of appeal in the sense that the tribunal, on appeal, is required to make its own findings of fact and make its own decision on the appeal based upon the facts as found. It is not exercising some form of supervisory jurisdiction similar to that to be found in Judicial Review proceedings. Accordingly, at least on the basis of what the tribunal actually said it was doing, it did err in law because it seemed to direct itself exclusively to the making of an enquiry as to whether or not the decision taken by HMRC was or was not a "reasonable one". I suppose it might be thought the very closing words of paragraph 8 of its statement of reasons for decision as set out above might suggest it was making its own decision but even those words are prefaced by others referring to reasonableness and, of course, it had expressly said earlier that the issue on the appeal was whether the decision had been a reasonable one for HMRC to have made. It therefore misdirected itself as a matter of law. That alone would be sufficient to justify the setting aside of its decision but there are further issues which I think it appropriate for me to address.

20. As already noted, the tribunal decided the appeal on the papers. It is right to stress that that is what the claimant had invited it to do. Nevertheless, the tribunal was not simply required to rubber-stamp the appellant's expressed preference. It had to have regard to its Rules of Procedure and in this context, in particular rules 2 and 27. The tribunal did not refer to the content of either of those rules. Such an omission, of itself, does not amount to legal error so long as the correct approach had been adopted. However, there is nothing in what it said about why it was proceeding on the papers to indicate that it had in mind the range of potentially relevant factors as contained within rule 2. Further, the appeal clearly raised issues of credibility because, in effect, it was being contended, at least on one view, that the claimant had given what was simply untruthful information regarding the claimed childcare costs. Given that credibility was squarely in issue it might well have been thought that an opportunity to hear oral evidence from her would have been of assistance to the tribunal in reaching the correct decision. That is particularly so given, as has been shown by what I have already said above, certain of the contentions and points taken against the claimant had been raised only at a very late stage. Indeed, the main one (the bank statements point) had been raised only in the appeal response which had post-dated the claimant's indication that she wanted a papers consideration. Against that background I would conclude that the tribunal erred in failing to adequately explain why it was not adjourning either for an oral hearing or, at least, for the purposes of enquiring of the appellant as to whether she would be prepared to attend one. That is another basis upon which its decision must be set aside.

21. It would appear, insofar as the tribunal might have been attempting to make its own decision on the facts, that it had found the point concerning the lack of sufficient withdrawals from the bank statements to be persuasive. As Mrs Collins points out, and to quote her, there "are a myriad of reasons" why the appellant's bank transactions might not correspond with the amounts said to be paid to the childcare providers. The tribunal appeared to attach weight to what it perceived as being the claimant's failure to provide "any further information or evidence" regarding the claimed payments to OWN and Ms NI-M. However, she had provided relevant receipts and had been consistent in the claims she had made as to the payments. Against that background, in my judgment, the tribunal's very brief reasoning as to those matters was simply inadequate. It did not explain, for example, why it did not attach any weight to the receipts from those providers which the claimant had sent to HMRC very promptly once she had been invited to do so. That demonstrates a further basis upon which its decision has to be set aside.

22. Since there are further findings of fact to be made I have decided to remit the appeal so that matters may be considered entirely afresh by a differently constituted tribunal. That should be done at an oral hearing so that the claimant will have the opportunity to give evidence. That will assist the new tribunal in, if it feels it is necessary to do so as it well might, forming a view as to her credibility. Remittal, of course, also affords HMRC the opportunity of providing further evidence, information and submissions to the new tribunal if it wishes and, otherwise, it would appear that to a large extent its case will simply depend upon an assertion, which might (or might not) be met at the oral hearing or possibly earlier if the claimant produces written evidence in advance of the hearing, that the claimed childcare charges cannot be substantiated simply through there not being sufficient aggregate withdrawals in the bank statements the appellant had provided.

23. I would just like to make some brief final comments. The picture which had been presented to the tribunal was incomplete in the ways mentioned above. The basis for the

decision and the mandatory reconsideration decision was not properly explained to the claimant. Points of significance were taken for the first time in the appeal response such that the claimant had not been given an opportunity to meet them prior to the lodging of her grounds of appeal and her indication as to her preferred mode of disposal of her appeal (papers or oral hearing). All of that does seem to me to be somewhat unsatisfactory. Perhaps HMRC might wish to aim to do better in future. As to the tribunal, had it looked more closely it might well have thought it appropriate to have adjourned for an oral hearing given the late taking of points of potential importance. Tribunals, understandably, like to get on with things but in my view should not be reluctant to adjourn in situations where there is reason to think that had points been made fully or clearly at an earlier stage, rather than being left to the appeal response, further information, evidence or explanations might have been elicited. It could be said that the claimant could always have sent a written reply to the appeal response provided by HMRC but it has to be borne in mind that claimants are not always familiar with what is appropriate or what is required of them. She may have thought (I do not say she did because I do not know) that having sent her grounds of appeal and having responded to each request for information and explanations which HMRC had sent, there was nothing further she could have done or she might not have known she would be entitled to reply to the appeal response at all.

24. The appeal to the Upper Tribunal is allowed on the basis and to the extent explained above. The case is remitted. I express no view as to what I think the ultimate outcome should be. That will be a matter for the good judgment of the new tribunal.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: 8 March 2017