IN THE UPPER TRIBUNAL **Appeal No. CH/441/2021**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

CA

Appellant

- v –

Hastings Borough Council

Respondent

Before: Deputy Upper Tribunal Judge Gullick QC

Decision date: 25 February 2022
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 November 2020 under number SC322/19/02588 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The new First-tier Tribunal is not bound by any findings of the previous tribunal and is not limited to the evidence and submissions before the previous tribunal. It will consider the case afresh and it may reach the same or a different conclusion to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This Appeal concerns the Appellant's entitlement to Housing Benefit. The applicable legislation is the Housing Benefit Regulations 2006 (SI 213 of 2006). The issue is whether the First-tier Tribunal materially erred in law in upholding the Respondent local authority's decision that at the relevant times the Appellant was in possession of capital in excess of the prescribed limit of £16,000 in Regulation 43 of the Housing Benefit Regulations 2006, with the result that the Appellant was liable to repay to the Respondent overpaid Housing Benefit in the sum of £4,142.25, covering the period 28 August 2017 to 8 July 2018.

Factual Background

2. Before setting out the basis of the decision made below, I will summarise the relevant events as they appear from the contemporaneous documents.

3. On 2 July 2018, an official of the Respondent sent the Appellant a letter notifying him that it had been some time since the details of his claim for Housing Benefit and Council Tax Reduction had been checked and requested that he supply a number of documents relating to his financial position, in respect of both income and capital.

4. The Appellant replied by informing the Appellant that he was "self-employed" and that he paid himself from his business funds as and when the business was in a position to do so. He stated that between 1 March 2017 and 31 May 2018, he had paid himself £13,590 from his business. He also disclosed a pension annuity payment of £1,297.31 per annum. He stated that he had no savings. He provided a number of bank statements to the Respondent.

5. On 20 July 2018, an official of the Respondent informed the Appellant by letter that his entitlement had been reviewed and had been reduced, based on his declared income, giving rise to a historic overpayment. The Appellant was told that payment of benefits was suspended pending further investigation into his financial position, because there was doubt about his entitlement. Information about a number of specific transactions on the Appellant's bank account was requested. The Respondent also asked for a copy of the Appellant's most recent business accounts.

6. I should note at this point that although the Appellant had described himself as being "self-employed", the Appellant's business was actually incorporated as a limited company, of which he was a director and shareholder, and it was the company's accounts which were requested by the Respondent. The company had been incorporated in June 2016. Its business was the importation of certain products from abroad for sale in the United Kingdom, although it does not appear to have done any significant trading over the period which is the subject of this appeal.

7. The Appellant responded on 26 July 2018, providing explanations for the transactions that had been queried by the Respondent and further supporting documentation. On 21 August, an official of the Respondent replied to the Appellant asking for further information and documentation relating to a number of the transactions and repeating the request for the most recent accounts of the company. On 28 August, the Appellant provided the accounts of the company for the year ended 30 June 2017. The company's accounts for that year record a turnover of

£9,247 in the year to 30 June 2017 resulting in an annual loss of £2,057, and a negative balance sheet position.

8. The information provided by the Appellant resulted in the Respondent on 17 October 2018 confirming its decision that he had received overpayments of Housing Benefit because of the level of his declared income, which he had stated to be £13,950 over a 14-month period ending on 31 May 2018, and that his entitlement should be reduced to reflect that level of income. At this stage, the Respondent did not consider that the amount of capital in the Appellant's possession affected his entitlement. The Appellant was informed of his right of appeal to the First-tier Tribunal.

9. In a letter to the Respondent dated 28 November 2018 the Appellant clarified that the figure which he had given for his income included £10,000 from the sale of assets and that his actual "salary / wages" for the period in question were, he said, only £3,950. The Respondent then asked the Appellant to clarify the nature of the asset sale, given that the company's assets were recorded in the accounts as being valued below £10,000: his answer was that the £10,000 had been payment for 10 per cent of the shares in the company, and that the Appellant's shareholding in the company had been reduced from 50 per cent to 40 per cent. The Appellant subsequently explained that he and his business partner had each held half the shares in the company but had each sold 10 per cent of the company's shares to a new investor, who now held 20 per cent of the shares. The Appellant stated that the investor had seen potential in the business and was, in his words, "willing to take a punt". The Appellant provided a copy of a written agreement confirming the investor's purchase of 20 per cent of the company's shares for the sum of £20,000, and a copy of a personal cheque from the investor to the Appellant for the sum of £10,000.

10. The Respondent's response to this information was to ask in a letter of 22 January 2019 for further clarification from the Appellant about the value of the Appellant's shareholding in the company. The Respondent suggested that if the investor had been willing to pay £20,000 for 20 per cent of the shares in the company, it would be reasonable to value the remaining 80 per cent (of which the Appellant held half) at £80,000.

11. The Appellant responded by stating to the Respondent in a letter of 28 January 2019 that to value the company at the level suggested by the Respondent would be "completely wrong". He stated that the company was not worth anything without a huge injection of investment, and that the investor had purchased 20 per cent of the shares as a "punt", aware that he could lose his money. The Appellant said that the company had no significant assets and that its future was precarious. He denied being an employee of the company, stating that payments were made to him as a director, not as an employee. In subsequent correspondence, the Appellant informed the Respondent that he would be resigning as a director of the company and giving up his entire shareholding as a result of a dispute with the investor, and that his continued involvement with the company was making him ill. He stated that the investor had proposed to pay £6,000 for the Appellant's remaining 40 per cent shareholding.

12. On 3 October 2019, the Respondent revised its decision in relation to the Appellant's claim for Housing Benefit. The Respondent had, as I have already recorded, treated the Appellant as having earned income of £207.71 per week, based on his declared earnings of £13,950 over a 14-month period. As a result of

the further information supplied by the Appellant, the Respondent determined that the Appellant's remaining 40 per cent capital share in the company, as at 21 August 2017, was valued at £40,000. This resulted in the Appellant having capital in excess of the prescribed £16,000 limit, and so no entitlement to Housing Benefit because of his possession of capital exceeding the limit. The Respondent considered that there was a resulting recoverable overpayment of Housing Benefit for the period 28 August 2017 to 8 July 2018, in the sum of £4,142.25.

13. The Appellant sent further letters to the Respondent on 7 October 2019 and 22 November 2019, again disputing the valuation of the company arrived at by the Respondent. He stated that the company was now entirely controlled by the investor and that he had ceased involvement with the company in February 2019, resigning as a director on 1 July 2019.

The Decision of the First-tier Tribunal

14. The Appellant's appeal against the Respondent's decision in relation to Housing Benefit was heard by a judge of the First-tier Tribunal on 5 November 2020. This was a fully remote telephone hearing (i.e., audio only). The Appellant attended the hearing and represented himself. The Respondent was represented by one of its officials, an Appeals Officer. The Tribunal, in its Decision Notice with reasons issued on the day of the hearing, made the following important findings:

a. The Appellant was director and 50 per cent shareholder of the company. His business partner owned the other 50 per cent.

b. On 21 August 2017, the Appellant and his business partner sold 20 per cent of the company to the investor, for which they were paid £10,000 each. The Appellant retained 40 per cent of the shares. The investor agreed to invest approximately £90,000 in the company to purchase stock and for other purposes relating to the running of the business.

c. The Appellant was working 60 hours per week for the business. This stopped when he suffered a heart attack at the beginning of 2019.

d. In July 2019, the Appellant sold his remaining 40 per cent share to the investor for the sum of £72,000 (i.e., £6,000 per month over a period of 12 months). The Appellant did not in fact receive this money and continued to be in dispute about that at the time of the hearing before the Tribunal.

e. The value of a company is "what someone is willing to pay for it". The investor was willing to pay £20,000 for 20 per cent of the company in 2017, and £72,000 for 40 per cent of the company in 2019. In 2017, the company must have been worth £100,000 (and the Appellant's 40 per cent shareholding would have been worth £40,000).

f. During the period to which the Respondent's decision under appeal related (28 August 2017 to 8 July 2018), the value of the Appellant's holding in the company was above the £16,000 capital limit for the purposes of Housing Benefit. The appeal therefore failed.

15. The Tribunal rejected the Appellant's argument that his shares in the company were worth nothing because the company was not profitable, and that the company should be valued based on its turnover and profit.

16. The Appellant was concerned that the Tribunal had misunderstood the position regarding the payment agreed in 2019 for the remaining 40 per cent of his shareholding in the company, which he said was £6,000 in total (i.e., for the entire 40 per cent), and not £6,000 per month for 12 months. He provided further documentation to the Tribunal to support this. The Tribunal declined to consider this post-hearing evidence.

17. The Appellant then sought permission to appeal, on the basis that the Tribunal had erred in its assessment of the value of his holding in the company at the material time. Permission to appeal was refused by the First-tier Tribunal in a decision issued on 15 March 2021, on the basis that the Tribunal had made a finding on the evidence before it as to the valuation of the shareholding which it had been entitled to make, there being no arguable error of law.

The Appeal to the Upper Tribunal

18. The Appellant filed a Notice of Appeal in the Upper Tribunal, renewing his application for permission to appeal. He again disputed the correctness of the valuation of his shareholding in the company arrived at by the First-tier Tribunal. Permission to appeal was refused by Upper Tribunal Judge Wright on 11 May 2021, on the basis that the Appellant was seeking to challenge a factual finding made by the First-tier Tribunal as to the value of the shareholding which had been a permissible finding on the evidence before it.

19. On 19 May 2021, the Appellant wrote to the Upper Tribunal enclosing a decision of the Valuation Tribunal dated 28 April 2021 in relation to his appeal against the Respondent's decision in respect of Council Tax Reduction. This had been decided by the Respondent on the same basis as his Housing Benefit claim, i.e., that because the value of his shareholding in the company was above the prescribed capital limit of £16,000 then the Appellant was not eligible for Council Tax Reduction. The Valuation Tribunal had before it the decision of the First-tier Tribunal in the Appellant's Housing Benefit appeal.

20. What appears to have happened, from the reasons given by the Valuation Tribunal, is that during the hearing before that Tribunal the panel drew the attention of the parties to paragraphs 39.5 and 39.6 of the Respondent's Council Tax Reduction scheme. These paragraphs were, as far as I can see, in materially identical terms to Regulations 49(5) and 49(6) of the Housing Benefit Regulations 2006 (to which the First-tier Tribunal which determined the Housing Benefit appeal had not been referred). They provide (and I summarise) that someone who is treated as being a "sole owner or partner in the business" of a company may have the value of their capital holding disregarded for so long as they undertake activities in the course of the business of the company. The Valuation Tribunal considered that this ought to apply to the Appellant, because he was undertaking activities in the course of the company's business, and that the value of his interest in the company was therefore irrelevant when determining his entitlement to Council Tax Reduction. The Respondent has indicated in its written submissions on this appeal that it considers the Valuation Tribunal's decision to have been incorrect, but it did not (as I understand the position) file an appeal against it.

21. Having received the Appellant's letter enclosing the decision of the Valuation Tribunal, on 7 July 2021 Upper Tribunal Judge Wright set aside his decision to refuse permission to appeal, under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2698 of 2008), and substituted a decision granting

permission to appeal on the basis that it was arguable that when deciding the Housing Benefit appeal, the First-tier Tribunal had materially erred in law in not having regard to the potential application of Regulations 49(5) and 49(6) of the Housing Benefit Regulations 2006.

22. Following the grant of permission to appeal and directions given by Upper Tribunal Judge Wright, the Respondent has made written submissions opposing the appeal, to which the Appellant has responded. Although the Appellant has requested an oral hearing, I am satisfied that it is unnecessary, and not in the interests of justice, to have an oral hearing of this appeal and that it can properly be determined on the basis of the written arguments that have been filed.

Discussion

23. In my judgment, this appeal must be allowed, and the case remitted to a differently constituted panel of the First-tier Tribunal to be heard afresh. The reason for this is that the First-tier Tribunal materially erred in law in failing to consider the applicability of Regulations 49(5) and 49(6) of the Housing Benefit Regulations 2006 to the Appellant's case. That was not the fault of the Tribunal: it had not had Regulations 49(5) and 49(6) drawn to its attention by either the Appellant or the Respondent, despite the very detailed written submissions made to it by the Respondent which included what purported to be a comprehensive statement of the "relevant legislation" contained in the Housing Benefit Regulations 2006.

24. Regulations 49(5) and 49(6) of the Housing Benefit Regulations 2006 provide as follows:

> "*(5) Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, he may be treated as if he were such sole owner or partner and in such a case—*
>
> > *(a) the value of his holding in that company shall, notwithstanding regulation 44 (calculation of capital) be disregarded; and*
> >
> > *(b) he shall, subject to paragraph (6), be treated as possessing an amount of capital equal to the value or, as the case may be, his share of the value of the capital of that company and the foregoing provisions of this Section shall apply for the purposes of calculating that amount as if it were actual capital which he does possess.*
>
> *(6) For so long as the claimant undertakes activities in the course of the business of the company, the amount which he is treated as possessing under paragraph (5) shall be disregarded.*"

25. The First-tier Tribunal found at paragraph 12 of its reasons that prior to the cessation of his involvement in the company at the beginning of 2019 (which is after the period to which the appeal relates), he was working 60 hours per week on the company's business. The Respondent's written submissions on this appeal do not dispute that at the relevant time the Appellant was undertaking "activities in the course of the business of the company", for the purpose of Regulation 49(6). The central question, therefore, is whether on the findings of the First-tier Tribunal the Appellant comes within the definition in Regulation 49(5) and is to be treated as if he were a sole owner or partner in the business of the company.

26. Close attention must be paid to the statutory language. The first question posed by Regulation 49(5) is whether a claimant "stands in relation to a company in a

position **analogous** to that of a sole owner **or partner in the business** of that company" (my emphasis). In my judgment, this was precisely what the First-tier Tribunal found on the facts of this case. The Claimant's position was, on the findings made at paragraphs 8-12 of the Tribunal's reasons, analogous to that of a partner in the business of the company: he was first of all in a partnership with his business partner, and they were then in partnership with the investor. This was a small business. At all material times the Appellant was a director of the company working a substantial number of hours on its behalf, and he clearly had a significant influence on its direction. The Respondent's submissions to this Tribunal state that the Appellant was not a "sole owner" of the business – which is correct – but they do not address the question of whether he was in a position "analogous to that… of a partner". The Appellant's position was clearly, on the findings made below, analogous to that of a partner in the business of the company.

27. Although I have reached this conclusion based on my own analysis of the statutory language, I am fortified in it by the decision of Mr Commissioner Rice in R(IS) 8/92. The learned Commissioner was there considering the similar language in Regulations 51(4) and 51(5) of the Income Support (General) Regulations 1987 (SI 1967 of 1987). He held that the question of whether a claimant is "in a position analogous to that of a partner" is a question of fact, that partnerships are normally fairly small concerns involving a limited number of personnel, and that for a claimant with shares in a limited company to be treated as being analogous to a "partner" he should be in a position to exercise significant influence over the way in which the business is conducted. A shareholder not in such a position would be a mere investor.

28. The Respondent now suggests in its submissions on this appeal that if the Appellant does come within the scope of Regulation 49(5) then so would a checkout assistant working for a large supermarket who had, over the years, accumulated a significant shareholding in the publicly quoted company for which they worked. But the position of such an employee could not reasonably be regarded as analogous to that of a "partner" in the business of such a large company, and the comparison with the Appellant's situation, as the director and shareholder of a small business, is inapt. Indeed, the example given in the Respondent's submissions is precisely that dealt with by Mr Commissioner Rice at paragraphs 8-9 of his decision in R(IS) 8/92, where he noted that a shareholder in a large publicly quoted company could not be regarded as a "partner" in the business for the purpose of this statutory definition. I respectfully agree with his analysis.

29. Regulations 49(5) and (6) of the Housing Benefit Regulations 2006 were, in my judgment, highly material to the outcome of the Appellant's appeal on the findings of fact made by the First-tier Tribunal. The Tribunal materially erred in law in failing to consider them; although, as I have already indicated, that appears to be because they were not drawn to the Tribunal's attention. Had the Tribunal considered those provisions then the outcome of the appeal to it might well have been different. The result is that the decision made by the First-tier Tribunal must be set aside for error of law.

30. The next question is whether I am in a position to re-make the decision that was made by the First-tier Tribunal. I am, however, not able to do so: this matter will need to be remitted for rehearing. That is because, as I explain below, Regulation 49(5) provides that even if a person such as the Appellant is in a position analogous to that of a partner in the business of a company, he "may" (i.e., not "shall") be

treated as such for the purpose of the calculation of capital. The position is therefore different from that provided for in the otherwise materially identical provisions in Regulation 51(4) of the Income Support (General) Regulations 1987 and Regulation 115(6) of the Employment and Support Allowance Regulations 2008 (SI 794 of 2008), which provide that a person in that position "shall" be treated as such when calculating the capital in their possession.

31. The question in relation to the correct method of valuing the capital in the Appellant's possession turns on whether he is or is not to be treated "as if he were" a partner in the business of the company. Under Regulation 51(4) of the Income Support (General) Regulations 1987, where a person is in that position he "shall" be treated as such, with the resulting impact on the calculation of the capital in his possession:

> "Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, he **shall** be treated as if he were such sole owner or partner and in such a case…"
>
> (my emphasis)

However, Regulation 49(5) of the Housing Benefit Regulations 2006 is worded differently, and provides for whether the person concerned is or is not to be treated in the manner set out in Regulations 49(5) and (6) to be a matter of discretion:

> "Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, he **may** be treated as if he were such sole owner or partner and in such a case…"
>
> (my emphasis)

32. Because the First-tier Tribunal did not address Regulations 49(5) and (6) of the Housing Benefit Regulations at all in its decision, it did not deal with the question of whether, if the Appellant was in a position analogous to that of a partner in the business of the company, as a matter of the discretion provided for in Regulation 49(5) he ought to be treated as such for the purpose of calculating the capital in his possession. Whether the discretion in Regulation 49(5) of the Housing Benefit Regulations should be operated in the Appellant's favour was not the subject of argument below, and the First-tier Tribunal made no finding in relation to it.

33. Furthermore, if the Appellant is not held to be in possession of capital above the prescribed limit, then the level of his income will in any event need to be determined in order to reach a decision on his entitlement to Housing Benefit during the relevant period. The Respondent made detailed submissions on this question to the First-tier Tribunal, in the alternative to those made in respect of capital, but it was unnecessary (given the finding it made about the amount of capital in the Appellant's possession) for the First-tier Tribunal to make any findings of fact in relation to income, and it did not do so. That is another reason why the appeal needs to be remitted for rehearing.

34. In those circumstances, I consider that the only appropriate course is to remit the appeal to the First-tier Tribunal for reconsideration. I will also direct a complete rehearing of the appeal before a different constitution of the First-tier Tribunal, rather than preserving the findings of fact already made. This is because the Appellant disputes at least one of the factual findings made below (that his 40 per cent shareholding was bought for £72,000), and also because further evidence may

be required to address the question of whether, if is he found to be in a position analogous to that of a partner in the business, the discretion contained in Regulation 49(5) ought to be exercised so as to treat the Appellant as such for the purpose of the calculation of capital. There may also need to be further factual findings made regarding the Appellant's income.

35. Although I am remitting the appeal for a complete rehearing because the First-tier Tribunal failed to consider Regulations 49(5) and (6) of the Housing Benefit Regulations 2006 in its decision, I ought to say something about the Tribunal's valuation of the Appellant's shareholding in the decision that I am setting aside. Ordinarily speaking, it is the value of a person's shareholding in the company, not the value of the company's assets, which is the issue when determining what capital they possess. As Mr Commissioner Rice stated in R(SB) 57/83 at paragraph 6, when holding that the tribunal had wrongly attributed funds in a company's bank account to the claimant, who owned the company:

> "A limited company is a legal person separate and distinct from its members… Accordingly its assets cannot be directly attributed to its members. What its members have are shares in the company, and these are, of course, resources of such members…"

Mr Commissioner Rice went on to state at paragraph 7:

> "The new tribunal will have to give a value to the shares. Such value will be determined by the price which a willing buyer would pay for them to a willing seller. As the company was at the date of claim in liquidation, no one would be prepared to pay more than the value of the net assets on realisation, and in practice they would pay rather less than this in view of the trouble and bother involved in seeing the liquidation through to its end…"

36. However, Regulation 49(5)(a) and (b) of the Housing Benefit Regulations 2006 contain a different provision in relation to someone who is treated as if they are the sole owner or partner in the business of a company. They provide that in such a case, the value of the person's holding in the company is to be disregarded (Regulation 49(5)(a)) and instead he is to be treated as possessing an amount of capital equal to his share of the value of the capital of the company (Regulation 49(5)(b)). Thus, in R(IS) 13/93, where the similar provisions of Regulation 51(4) of the Income Support (General) Regulations 1987 applied, the question for the purpose of determining the capital possessed by the claimant was not what the claimant's shareholding in the company was worth, but what the claimant's share of the net assets of the company (after taking into account its liabilities) was. As Mr Commissioner Rice stated at paragraph 7 of that decision:

> "… such value was the net total value, after liabilities had been taken into account… What was relevant was not the value of any of the individual items making up the company's capital, but the net worth of the total assets."

37. In any event, however, capital treated as being in a claimant's possession by Regulation 49(5) will fall to be disregarded for these purposes, under Regulation 49(6), for so long as the claimant is undertaking activities in the course of the business of the company.

38. The questions which the First-tier Tribunal will need to address at the new hearing, in order to determine what (if any) amount of capital the Appellant is to be

treated as possessing by reason of his involvement with the company, therefore appear to me to be as follows:

a. Did the Appellant at the material time stand in relation to the company in a position analogous to that of a partner in the business of the company?

b. If so, ought he to be treated for the purposes of the Tribunal's decision on the appeal as if he were such a partner?

c. If so, what is the amount of capital which he is to be treated as possessing, applying Regulation 49(5)(a) and (b)?

d. If the Appellant is to be treated as possessing capital by reason of those provisions, did the Appellant at the material time undertake activities in the course of the business of the company, resulting in the capital amount arrived at by the application of Regulation 49(5) being disregarded?

39. Applying this approach:

a. if the Tribunal finds that the Appellant was not in a position analogous to that of a sole owner or partner, or if he was in such a position but as a matter of discretion the Tribunal considers that he ought not be treated as such, then the amount of capital in his possession will fall to be determined by reference to the other provisions of the Housing Benefit Regulations dealing with the calculation of capital and not by reference to Regulations 49(5)(a) and (b) and Regulation 49(6);

b. if the Appellant was in that position and the Tribunal finds that he is to be treated as such under Regulation 49(5), then the value of his holding will be disregarded under Regulation 49(5)(a) and the amount of capital in his possession will fall to be determined under Regulation 49(5)(b), as an amount equal to his share in the value of the capital of the company;

c. but, for so long as the Appellant was undertaking activities in the course of the business of the company, then the amount of capital which the Appellant is to be treated as possessing under Regulation 49(5) is to be disregarded, by reason of Regulation 49(6).

Conclusion

40. For the reasons given above, the Appellant's appeal to the Upper Tribunal is allowed and the decision of the First-tier Tribunal is set aside. The appeal is remitted for rehearing by a differently constituted panel of the First-tier Tribunal.

Mathew Gullick QC
Judge of the Upper Tribunal
Signed on the original on 25 February 2022