**IN THE UPPER TRIBUNAL** **Appeal No. UA-2024-000375-CSM**
**[2024] UKUT 430 (AAC)**

**ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the First Tier Tribunal (Social Entitlement Chamber)

**Between:**

**YRC**

Appellant

- v –

**Secretary of State for Work and Pensions**

First Respondent

**MJ**

Second Respondent

**Before: Deputy Upper Tribunal Judge Hocking**

Decision date: 18 December 2024

Decided on consideration of the papers

**Representation**: written submissions only

**Appellant:** Ms Chhina, solicitor

**First Respondent:**, Ms Foody, Department of Work and Pensions

**Second respondent**: in person

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal (Social Entitlement Chamber) made on 2 August 2023 under number SC914/22/00006 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 ("FtT") for reconsideration at an oral hearing.**

2. **It must be heard by a newly constituted FtT.**

3. **The FtT must conduct a complete rehearing of the issues that are raised by the appeal any other issues that merit consideration. While the FtT will need to address the grounds on which I have set aside the decision, it should not limit itself to these but must consider all aspects of the case, both fact and law, entirely afresh.**

4. **The new FtT is not bound by the decision of the previous FtT. Depending on the findings of fact it makes, the new FtT may reach the same or a different conclusion to the previous FtT. The fact that this appeal has succeeded on a point of law carries no implication as to the likely outcome of the rehearing, which is entirely a matter for the FtT to which this case is remitted.**

5. **These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the FtT.**

## REASONS FOR DECISION

Summary

1. The appellant's appeal to the Upper Tribunal succeeds. There is to be a fresh hearing of the original appeal before a new FtT.

Preliminary issues; Delay

2. Permission to appeal was granted by Tribunal Judge S Lovett on 20 December 2023. The permission was issued on 22 December 2023. By virtue of Rule 23 of the Tribunal Practice and Procedure (Upper Tribunal) Rules 2008 a notice of appeal must be filed within one month of the date on which notice of permission to appeal was sent to the appellant. The form UT1 was in fact signed on 11 March 2023 and received on 14 March 2023. It was therefore approximately seven weeks late.

3. By virtue of Rule 5(3)(a) the Upper Tribunal has a discretion to extend time. The appellant has applied to extend time, but justifying such an extension is not a triviality *re Salmon (deceased)* [1981]Ch 167. The first respondent supports an extension, referring to *Norwich and Peterborough Building Society v Steed* (no 1) [1991] 1 WLR 449 in which McCowan LJ suggested the discretion should be informed by consideration of the length of the delay, the reasons for it, the underlying strength of the appeal, and prejudice to the respondents.

4. The second respondent opposes an extension, referring to the *Denton* like approach taken in *Martland v Commissioners for HMRC* [2018] UKUT 0178 (TCC), the approach also taken in *BB v Disclosure and Barring Service (extension of time)* [2019] UKUT 366 (AAC). Those cases approach the question of an extension in three stages:

Stage 1: identify and assess the seriousness or significance of the failure to comply with the rules.

Stage 2: consider why the failure occurred i.e. was there a good reason for it

Stage 3: evaluate all the circumstances of the case.

5. I will apply the approach in *Martland* and *BB* rather than *Norwich and Peterborough Building Society,* although I would not expect the two approaches typically to yield a different result,

6. As to seriousness and significance of breach, any failure to the file a document in accordance with the timescales set out in the Rules is serious. . The delay is quite lengthy, being around one and a half times longer than the period allowed to lodge the appeal. It is not egregious, but nor is it trivial. The significance is perhaps not quite so great as in *Martland*, where the late document conferred jurisdiction on the Tribunal. Here permission had been granted and what was delayed was the particularisation of grounds for the Upper Tribunal. The delay is unlikely to have had any impact on whether the appeal can be conducted fairly (there is no question of evidence going stale, for instance). Overall and reminding myself that compliance is to be expected as the starting point BPP Holdings v Commissioners for HM Revenue and Customs [2016] EWCA Civ 121 I regard the breach as moderately serious

7. The reason given for the delay is default on the part of the appellant's legal representative, who appears to have gone absent from work without making arrangements for her files to be progressed. The appellant does appear to have chased reasonably diligently which is a point In her favour. The appellant did not have her head in the sand. She had (not unreasonably) put her trust in advisors who let her down. Once she realised they were unreliable she filed her UT1 within just over two weeks. Default on the part of advisors is not always a good reason but it is significant that the appellant had chased and had been assured that papers would be filed. I regard this as a potentially a good reason for some delay, although not for the full seven weeks. The last two weeks of delay I regard as being without good reason.

8. As to all the circumstances of the case, I note that the underlying appeal appears strong. It is supported by the first respondent. I also note that in child support cases the case does not only concern the position of the parties: the underlying dispute concerns the payment of support for children. The children have an interest in seeing that that support is correctly calculated. That consideration justifies a somewhat more benevolent approach. I also note there is no prejudice to the first respondent (who supports the extension of time and the appeal). The second respondent is prejudiced to the extent that if I grant the extension of time he will be subject to an appeal that would otherwise not exist, but no more than that. This is not a case where delay impacts on my ability to deal with the case justly, or where he is likely to have made any change in his position on the understanding that no appeal would be forthcoming. Lastly if I do not grant an extension the appellant will suffer the significant prejudice of being shut out of an appeal for which she has already been given permission.

9. Weighing all of these factors I am satisfied that despite there being a moderately serious breach which is in part without good reason it is appropriate to grant the necessary extension of time and to admit the appeal.

Preliminary issues: hearing or no hearing

10. By virtue of Rule 34 the Upper Tribunal may decide a matter without a hearing, but must have regard to the views of the parties before taking such a decision. It must also seek to apply the overriding objective

11. Neither the appellant nor the first respondent seek an oral hearing. The second respondent does seek an oral hearing as "*it provides the opportunity to check the evidence*". It seems to me the second respondent may be under the impression tat the appeal would remake the decision. That would not be an appropriate outcome for the appeal because if the FtT decision is set aside there would need to be factual findings made as to the day to day care provided by each parent. In fact the issue before the Upper Tribunal is a legal one not requiring the testing of evidence. Considering the overriding objective an oral hearing would add delay and potentially cost without adding anything to the determination of the case.

12. I am satisfied it is appropriate and in the interests of justice to proceed without a hearing.

The decision under appeal

13. On 2 August 2023 the FtT considered the liability of the Appellant to pay child support to the second respondent in respect of their two children. It held she was liable to pay £8.46 per week as from 25 August 2021 and £84.04 per week as from 9 December 2021 because of new employment. That included a 3/7 shared care reduction for each child.

14. The FtT recorded that a court order of 17 February 2021 provided that the children were to live with the second respondent and spend time with the appellant. The FtT notes that that order was varied on 22 December 2021, after the date of the decision under appeal, to state that the arrangements were in effect a shared care arrangement. It appears that that variation did not alter the time that the children actually spent with each parent.

15. The FtT calculated that the children spent 153 nights with the second respondent and 121 nights with the appellant (in fact 126 nights due to a period of self isolation). It rejected an argument that this was a special case under Regulation 50 of the Child Support Maintenance Calculation Regulations, because it found that the appellant did provide day to day care to a lesser extent than the second respondent. Reference was made to the children not spending 175 nights with the Mother

The Appeal

16. The appellant appeals with the permission of the FtT on three grounds:

    a. Ground One, that applying a "nights spent" test to the question of whether a special case is made out under regulation 50 is the wrong approach

    b. Ground Two, that the decision is in error or internally inconsistent in treating arrangements set out in the order of 22 December 2021 as having different consequences for CSM calculations to the order applicable at the time of the decision under appeal, because the parts of both orders dealing with where the children would live/spend time were the same, and

    c. Ground Three, that the FtT applied regulations 46 and 47 to the case contrary to the case of *JS v SSWP and another* (CSM) [2017] UKUT 296 AAC)

17. The first respondent invites the Upper Tribunal to allow the appeal. As to grounds one and three she says

> *"the FTT accepted that both the PWC and NRP 'have equal contact with the children's school and are both responsible and involved in the children's educational needs. [YRC] and [MJ] both contact the children's dentist and doctor. The parents are both responsible and involved in the children's health needs'. Therefore, the only difference in the level of care by both parents is the number of nights that the children spend at their home….*
>
> *It was held in JS v SSWP (CSM)[2017] UKUT 296 (AAC) that 'In the context of reg 50, overnight care is therefore not a trump card', however the FtT in this case appear to have treated it as such. It is worth noting that regulations 46 and 47 should only arise if one of the parents is found to be the NRP under regulation 50 (JS v SSWP (CSM)[2017] UKUT 296 (AAC) (at para 26)). It is at this point where a reduction is being considered that the number of nights a child is spending with the NRP. From the SOR it appears that the FtT have applied regulations 46 & 47 as justification for the appellant to be the NRP under regulation 50. "*

*18.* As to ground two she says:

> *the family court order of 22/12/2021 was issued after the decision by CMS. The Court Order was that there should be a shared care agreement in place. The only court order under effect at the date of decision was 17/02/2021, the FtT must stand in the shoes of the decision maker on the day that they made the decision. Any evidence this point would not be in the jurisdiction of the FtT under this appeal. If this document notified a change of*

*circumstances, this would need to be reported to CMS separately. I submit that the FtT have not erred in law on this ground.*

19. The second respondent opposes the appeal. he points ton the family Court order of 17 February 2021 as saying the children live with him and spend time with the appellant. He says he was meeting the children's needs to a greater extent. The care provided by each parent was not equal at all. The order of 22 December 2021 is irrelevant.

Decision and reasons

20. Regulation 50 provides as relevant;

*50.—(1) Where the circumstances of a case are that—*

*(a)an application is made by a person with care under section 4 of the 1991 Act; and*

*(b)the person named in that application as the non-resident parent of the qualifying child also provides a home for that child (in a different household from the applicant) and shares the day to day care of that child with the applicant,*

*the case is to be treated as a special case for the purposes of the 1991 Act.*

*(2) For the purposes of this special case, the person mentioned in paragraph (1)(b) is to be treated as the non-resident parent if, and only if, that person provides day to day care to a lesser extent than the applicant*

21. I allow the appeal on Grounds One and Three. Regulation 50 must be applied on its own terms, and without importing considerations that arise under regulations 46 and 47. ( *JS v SSWP (CSM)*[2017] UKUT 296 (AAC) paragraph 21). The question whether a non resident parent "*also provides a home*" or one "*person provides day to day care to a lesser extent*" than another must be answered in light of all of the relevant evidence. As the Upper Tribunal said in *JS:*

*It will be a question of fact for the FtT in the light of all the evidence available to it. … In the context of reg 50, overnight care is therefore not a trump card …but is one factor, along with others.* Paragraph 20

22. In this case it does appear that the FtT looked exclusively at the number of nights spend in each household. At any rate if they did not there is no explanation of what other factors they took into account, which would itself be an error of law *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377. Further the reference to the children not spending at least 175 nights in the care of the appellant is a reference to a concept arising under regulations 46 and 47, leading me to conclude

that those two regulations have been elided with or allowed to inform the consideration of regulation 50, contrary to *JS*.

23. It may be that on reconsideration of regulation 50 in light of all of the evidence on day to day care before the FtT it will again reach the conclusion argued for by the second respondent. But it is possible that they will not, and that being so the appeal must be allowed on these grounds and the case remitted.

24. I also allow the appeal under ground two, although not for the exact reasons advanced by the appellant. The principal point is that the family court order of 22 December 2021 post dated the decision under appeal. It should not have been taken into account at all.

25. Furthermore, the relevance of any change in language between the orders noted by the FtT had to be established. The question for the FtT under Regulation 50, which it has to answer itself, is whether one parent provides day to day care to a lesser extent than the other. That is the statutory test, to which I apply no gloss. The operative provisions of a Child Arrangements Order will often be relevant to that enquiry (at least, if the actual arrangements in place for the children concerned are the same as set out in the CAO). It is much less obvious that whether CAO describes itself as a shared lives with order or a lives with/spends time with order is relevant. That terminology does not go to the day to day care actually received by the children. There are cases, and this was one of them, where exactly the same arrangements can be described as lives with/spends time with or "in effect a shared care arrangement". The FtT must be careful to consider the substance of the children's day to day care and should be wary of placing significant weight on the label put upon it.

26. I also sound a note of caution concerning recitals of the form seen in the order of 22 December 2021, which was to the effect that both parents should have an equal say over and are equally responsible for the care and maintenance of the children and all significant matters relating to their education, health, religion and upbringing. The FtT took account of this recital but a recital to very similar effect is included in the current standard template wording for a CAO approved by the President of the Family Division. It is likely to be commonly seen. The question for an FtT under regulation 50 is what are the actual arrangements for day to day care. A recital might record that a parent has certain rights and duties, but it cannot tell an FtT if they are in fact exercised. If the FtT is to consider such a recital at all, it should be alive to the need to ask what evidence the recital actually is as to the day to day care of the children concerned.

27. I therefore conclude that the decision of the FtT involved an error of law. I allow the appeal and set aside the decision of the FtT. The case must be remitted for a re-hearing by a new FtT, in accordance with my direction above.

**Judge Hocking**
**Deputy Judge of the Upper Tribunal**
authorised for issue on 18 December 2024