IN THE UPPER TRIBUNAL **Case Nos** CG/2780/2012
ADMINISTRATIVE APPEALS CHAMBER CG/2782/2012
CG/2783/2012
Before UPPER TRIBUNAL JUDGE WARD CG/2784/2012

Decision: The appeals are allowed. The decisions of the First-tier Tribunal sitting at Truro on 3 April 2012 under reference SC208/11/01097-01100 (inclusive) involved the making of an error of law and are set aside. The cases are referred to the First-tier Tribunal (Social Entitlement Chamber) for rehearing before a differently constituted tribunal in accordance with the directions set out in paragraph 40 of the Reasons.

REASONS FOR DECISION

Introduction

1. These appeals relate to an attempt by the DWP to recover alleged overpayments of carer's allowance. The reason the alleged overpayments were said to have occurred was because the claimant's earnings exceeded the (absolute) cut-off where entitlement to carer's allowance is lost. The case is detailed and raises a good many possible points of law. I gave permission to appeal following an oral hearing held at Exeter on 21 November 2012. The appeals are supported, on at least some of the grounds, by the Secretary of State. Neither party has sought an oral hearing of the substantive appeal. I am invited to remit the cases to the First-tier Tribunal. Neither party has invited me to substitute my own decision.

The relevant decisions

2. The decision dates and amounts we are concerned with are set out below. References in the form UTp0000/123 are to the relevant file number identified by its distinctive part (e.g. 2780) and then to the page in that file bundle.

Entitlement

3. Upper Tribunal case CG/2780/2012 (FtT reference SC208/11/01097) concerns decisions under appeal dated (a) 27/1/11 (UTp2780/110) and (b) 2/2/11 (UTp2780/114). The effect of those decisions is that: (a) the claimant was not entitled from 5/5/08-2/5/10; and (b) she was not entitled from 1/5/06 – 30/9/07 or from 2/5/10.

4. The same two decisions feature in CG/2782/2012 (FtT reference SC208/11/01098.) I imagine that they started life as one file per appeal to the FtT in respect of each decision. At any rate, these two files between them, with a considerable amount of duplication, encompass the decisions, taken on supersession of the original decision awarding carer's allowance, so as to remove entitlement for the entire period 1 May 2006 through to 2 May 2010 (except 1 October 2007 to 4 May 2008) and to disallow the claim from 3 May 2010.

Recoverability

5. Upper Tribunal case CG/2784/2012 (FtT reference SC208/11/01100) concerns decisions under appeal dated (a) 14/2/11 (UTp2784/40 and (b) 1/6/11 (UTp2784/51). The effect of those decisions is (a) an overpayment of £5,402.40 was recoverable for failure to disclose, covering the periods 5 May 2008 to 2 May 2010 and (b) an overpayment of £4,217.50 had been made, covering the periods 1/5/06 to 1/8/10, of which £3,516.80, covering the period from 1/5/06 to 30/9/07 was recoverable on the ground of failure to disclose.

6. The stated dates of overpayment appear to include a period of overlap between the two decisions and one of them appears inconsistent with the entitlement decision in respect of the period 1 October 2007 to 4 May 2008, an inconsistency which has not been explained to me, but the periods in respect of which recovery from the claimant is sought correspond with the periods of disentitlement, as set out above.

7. The same two decisions feature in CG/2783/2012 (FtT reference SC208/11/01099). Once again, there is considerable duplication between the two files, for probably the same reason.

The factual background

8. As much is in dispute and the case is being remitted, I confine myself to a brief explanation of selected matters only. This is not intended as formal findings of fact.

9. The claimant is the mother of four children, the oldest of whom has a disability sufficient to found an entitlement for her to carer's allowance, if the remaining conditions are met (see in particular [21] below). Carer's allowance (then known as invalid care allowance) was duly awarded with effect from 25 August 1986. On or around 1 November 2003 the claimant began work as a self-employed child-minder. On 21 April 2004 she commenced employment as a teaching assistant. In that job she was paid monthly and on a whole year (rather than term-time only) basis. In 2006 she reduced or stopped her childminding work and increased the hours for which she was employed as a teaching assistant. Her husband had an established job, but in a line of work such that, having regard to the family circumstances, it was unlikely that a particularly relaxed view could be taken of budgeting and other financial matters.

The main feature of the dispute

10. It was the claimant's case that she was well aware of the earnings limit and took what she evidently regarded as meticulous steps at all times to keep below it and when appropriate to keep the Carer's Allowance Unit informed of her circumstances, in ways which the Unit (albeit with hindsight, wrongly) found acceptable. It subsequently transpired, following a report from the Generalised Matching Service in form RD23, that some of those dealings

were based on a false premise in relation to the treatment of the pension contributions which formed part of, but were deducted from, her salary, but which were not shown on the P60 which was concerned only with taxable pay (which excludes pension contributions), and the impact of that course of dealing is a central feature in the present dispute.

Other matters in dispute

11. These included:

> (a) whether income tax should have been deducted in calculating the claimant's earnings, having regard to the particular method (left-over from her days as a self-employed childminder) of annual settlement rather than PAYE deduction; and
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> (b) whether she could deduct travelling expenses to courses and trade union subscriptions in calculating her earnings.

The tribunal's decisions

12. The tribunal found that the figures on the P60s were wrong, for the reasons given above. It made clear that there was no suggestion that the claimant was aware of the discrepancy before it came to light but it did mean that the wrong figures had been provided. It concluded that income tax could not be deducted, but that the outcome would not have been different if the answer had been otherwise.

13. Consequently the entitlement decisions were upheld. The decision of 27/1/11 was upheld by a decision, the statement of reasons for which is at UTp2780/185. The decision of 2/2/11 was upheld by a decision (statement of reasons at UTp2782/195.) The two statements are in materially identical form.

14. The tribunal found that the claimant had been required to provide the information necessary to enable a proper calculation to be made. The authority for this was said (without more) to be regulation 32(1) of the Social Security (Claims and Payments) Regulations 1987/1968. Because the P60s had not given an accurate indication of gross income, wage slips were needed in the circumstances of this case. These had (as the tribunal found) not been provided and so, while expressing sympathy with the claimant, the tribunal found that she had failed to disclose and that the overpayments were recoverable.

15. Consequently the recoverability decisions were likewise upheld. The decision of 14/2/11 was upheld by a decision (statement of reasons at UTp2783/110. The decision of 2/6/11 was upheld also, the statement of reasons appearing at UTp2784/126.

Evidential difficulties

16. There are one or two items in respect of which it is not clear whether or not they were before the tribunal. As the matter is going back for re-hearing, they will be next time round and I need not dwell on them.

17. Of more significance is that the DWP provided to the claimant, in response to a freedom of information request made after the First-tier Tribunal hearing, a number of papers which do not appear to have been in evidence before the First-tier Tribunal. These included:

> (a) a payslip from March 2005, endorsed, apparently by the DWP, with a ring around the "Taxable Gross Pay" figure (which the payslip clearly shows to have been a figure net after employee pension contributions had been deducted from the gross pay) and with a note that "All wage slips seen for 04/05"
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> (b) a reply in the form of the proforma response dated 2 May 2005 to the DWP's enquiry letter dated 26 April 2005, in which the claimant informed the DWP that she "[paid] money towards a personal pension" "in [her] employment with [the] County Council".

18. These were quite clearly material. They demonstrated that (contrary to the findings of the tribunal) the DWP had seen at least some wage slips and had (it appeared) adopted a figure which was the wrong one to use and further that it knew very well that pension contributions were being made, at any rate at some point.

19. There were other documents also revealed in response to the request, the material ones of which I directed be added to the files.

Grounds on which the Secretary of State supports the appeal

20. These can be summarised as follows (I explore each in turn below):

> (a) the tribunal erred in the calculation of the claimant's earnings by (i) treating as mandatory a provision which was discretionary, alternatively by failing to explain their exercise of discretion; (ii) by adopting an approach to the calculation of earnings which was inconsistent with the task imposed by section 71 of the Social Security Administration Act 1992, under which recovery of the overpayment was sought;
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> (b) the tribunal took a decision without regard to material evidence (albeit the reason for it was the DWP's failure to provide all the material evidence in its possession);
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> (c) the tribunal failed to identify the provision imposing the duty to make disclosure or to explain why it applied in the circumstances of the case;

(d) the tribunal erred by failing to address the possibility that any duty to notify which there may have been on the claimant (as to which see (c) above) had been modified by oral representation and/or conduct; and

(e) the tribunal erred by failing to consider whether the chain of causation was broken by the Generalised Matching Service report (Form RD23 (contribution report) dated 19 May 2009).

Calculation of claimant's earnings

21. The issue arose because under regulation 8(1) of the Social Security (Invalid Care Allowance) Regulations 1976/409:

> "(1) For the purposes of section 70(1)(b) of the Contributions and Benefits Act (condition of a person being entitled to a carer's allowance for any day that he is not gainfully employed) a person shall not be treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week have exceeded £100 and, subject to paragraph (2) of this regulation, shall be treated as gainfully employed on every day in a week if his earnings in the immediately preceding week have exceeded £100."

The proviso in paragraph (2) is not relevant. The above version is that in force at the end of the period covered by the overpayment. There were of course also earnings limits from previous years, but otherwise no change of substance in the period with which we are concerned. The calculation of earnings for this purpose is to be carried out under the Social Security (Computation of Earnings) Regulations 1996/2745: see R(G) 1/09 paragraph 4 and *Cotton v SSWP* [2009] EWCA Civ 1333; [2010] AACR 17. Mr Spencer for the Secretary of State submits, correctly, that in the case of earnings from employed earner's employment (as distinguished from earnings from self-employment), the regulations generally look at individual payments separately. Thus regulation 6 makes provision for determining the period over which earnings as an employed earner are to be calculated or estimated and, by sub-section (2), does it by reference to "a payment" i.e. individually. The period in question begins on the date on which the payment is treated as paid under regulation 7, the detail of which need not detain us, but the regulations together have the effect that each payment is attributed to a particular period.

22. Regulation 8 deals with the weekly calculation of earnings. Of particular relevance in this case is regulation 8(3):

> "(3) Where the amount of the claimant's net earnings fluctuates and has changed more than once, or a claimant's regular pattern of work is such that he does not work every week, the application of the foregoing paragraphs may be modified so that the weekly amount of his earnings is determined by reference to his average weekly earnings—

(a) if there is a recognisable cycle of work, over the period of one complete cycle (including, where the cycle involves periods in which the claimant does no work, those periods but disregarding any other absences);
(b) in any other case, over a period of five weeks or such other period as may, in the particular case, enable the claimant's average weekly earnings to be determined more accurately."

This was the provision on which the Secretary of State relied to calculate the amount of the claimant's earnings in this case. As Mr Spencer submits, the terms of the regulation are discretionary, not mandatory. The tribunal was rehearing the whole case and, if it was going to apply the rule in regulation 8(3) rather than to apply the general rule that each payment be taken into account separately, it should have explained why.

23. The second error in relation to the calculation of earnings arises because I accept that the task facing the DWP (and, on appeal, the FtT) was to carry out the calculation as it would have been done by a contemporaneous decision maker, who had been given the correct information at the proper time. Such a person would (at any rate in the normal run of cases) have to look at past receipts, rather than attempt to guess the future. While I think this flows in any event from applying the Computation of Earnings Regulations in a normal situation where all has run smoothly and is not dependent on the fact that the test is being applied where there has been an overpayment, the interpretation is equally a readily applicable one in the particular context of an overpayment. Under section 71(1) of the Social Security Administration Act 1992, where the relevant conditions permitting recovery are met, the Secretary of State is entitled to recover "the amount of any payment which he would not have made…but for the …failure to disclose." The "but for" test directs one to what would have happened in the normal situation, where there had been prompt and accurate disclosure.

Decision taken without regard to material evidence

24. Rule 24(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, provides:

"(4) The decision maker must provide with the response—
(a) …;
(b) copies of all documents relevant to the case in the decision maker's possession, unless a practice direction or direction states otherwise; and
(c) … ."

The scope of a similar duty under a different set of rules was discussed at [11]-[14] of *Secretary of State for Defence v LA (AFCS)* [2011] UKUT 391 (AAC). There is no doubt from what is said at [17]-[19] that the Secretary of State was in breach of it, as is accepted on his behalf. That is sufficient to establish an error of law, whether on the grounds that there has been a "breach of a principle analogous to natural justice" (see CH/3240/2007 at [19])

or a breach of a right to a fair trial under article 6(1) of the European Convention on Human Rights (*see ST v SSWP* [2012] UKUT 469 (AAC)) or because it may result in an error of law such as that described in limb (vii) of the list in *R(Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 ("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.") Though there was nothing the tribunal could realistically have done to prevent an error under this heading, its decision was nonetheless for the reasons given in error of law on this ground also.

The basis for the duty to make disclosure

25. As is well known, if there is to be recovery of an overpayment under section 71 on the ground of failure to disclose, there must have been a breach of a legal duty to disclose. The principal sources of such a duty are in regulation 32(1)(1A) and (1B) of the Social Security (Claims and Payments) Regulations 1987/1968, which provided:

> "(1) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require for determining whether a decision on the award of benefit should be revised under section 9 of the Social Security Act 1998 or superseded under section 10 of that Act.
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> (1A) Every beneficiary and every person by whom, or on whose behalf, sums by way of benefit are receivable shall furnish in such manner and at such times as the Secretary of State may determine such information or evidence as the Secretary of State may require in connection with payment of the benefit claimed or awarded.
>
> (1B) Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums by way of benefit are receivable shall notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect—
> (a) the continuance of entitlement to benefit; or
> (b) the payment of the benefit,
> as soon as reasonably practicable after the change occurs by giving notice [of the change to the appropriate office–
>
> (i) in writing or by telephone (unless the Secretary of State determines in any particular case that notice must be in writing or may be given otherwise than in writing or by telephone); or

(ii) in writing if in any class of case he requires written notice (unless he determines in any particular case to accept notice given otherwise than in writing)."

26. The Secretary of State criticises the tribunal for having failed to indicate which out of paragraphs (1A) and (1B) it was applying. I do not agree with that criticism. The tribunal made it clear that it was applying regulation 32(1), rather than (1A) or (1B). Paragraph (1), like (1A), does however require the Secretary of State to have stated clearly what information is required to be provided. I do not read the language "such information or evidence as the Secretary of State may require for determining whether a decision… should be …superseded" as casting on the claimant the burden of identifying what is needed by the Secretary of State then providing it. This appears to have been what the tribunal thought when it said "The law requires that she must provide the Secretary of State with the information necessary to make a proper calculation". Rather, the Secretary of State is empowered to say what information or evidence he requires for determining whether there is to be a revision or supersession and then a clamant must provide it. It follows that I think there was an error of law here, but not the one submitted by the Secretary of State. What exactly the claimant was told to provide will of course be important (subject to the following paragraph) in assessing whether she complied with that requirement.

Failure to consider whether any duty there may have been had been modified by oral representation and/or conduct

27. There had been a substantial history of dealings between the claimant and the Carer's Allowance Unit, the exact details of which remain in dispute. Mr Commissioner Rowland, as he then was, held at [13] and [14] of R(A) 2/06, a decision given after the Court of Appeal had given judgment in the leading case of B *v Secretary of State for Work and Pensions* [2005] EWCA Civ 929 [2005] 1 WLR 3796, that the principle that a duty can be modified by oral representations continued to apply after the *B* decision. In R(SB)3/81, which concerned a duty similar to that now imposed by regulation 32(1B) , it is implicit in Mr Commissioner Rice's decision that while the duty standing alone might have required earlier disclosure than was in fact made, a course of conduct had emerged qualifying that duty. It was entirely possible that the principle might have assisted the claimant on her evidence and thus the tribunal needed to make the necessary findings to allow it to consider whether this principle assisted her and erred in law by not doing so.

Failure to consider whether causation had been broken by the receipt of the Generalised Matching Service report

28. The point arises because the recovery authorised by section 71 is of a payment made "in consequence of the misrepresentation or failure." Form RD23 is at UTp2780/19. It served to alert the DWP to the fact that the claimant was, to judge from the level of national insurance contributions she was paying, in receipt of earnings which were or might have been in excess of the limit under regulation 8(1) of the Invalid Care Allowance Regulations. The

Secretary of State accepts that the point should have been considered and that the tribunal was in error of law by failing to do so.

29. The Secretary of State would submit that causation was not broken by receipt of the report. He relies on two decisions, of which it suffices to refer to *JM v SSWP* [2011] UKUT 15 (AAC) where Judge Lane observed (at [11]-[12]):

> "11. In my view, the mere receipt of information from the GMS is not, in general, sufficient knowledge to justify the revision or supersession of benefit without further investigation. Even where he contemplates suspension of benefit (which is not appealable), the Secretary of State acts on the basis of cautious guidelines. It is important for the Secretary of State to satisfy himself that he has a reasonable case for taking action by presenting the evidence to the claimant and getting his reply (insofar as that is possible) before taking the drastic step of interfering with his benefit. Until the Secretary of State has investigated and put the problem to the claimant, there will ordinarily be no break in the link between the overpayment and the claimant's breach of duty under regulation 32(1A). In this, I respectfully agree with Judge Mesher's decision in *CDLA/1708/2001* at [8].
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> 12. There is a second reason why the chain of causation is not broken. Contrary to the assumptions inherent in the representative's submission, there may be more than one cause of an overpayment: *Morrell v Secretary of State for Work and Pensions* [2003] EWCA Civ 526 at [45] – [47] (reported as *R(IS)6/03*). Causation is largely a matter of common sense. The question posed by the Court of Appeal at [45], as adapted to this appeal, is 'did the claimant's failure to disclose the fact that he had capital in excess of £3000 have, as at least one of its consequences, the overpayment of benefit?' The only reasonable answer is 'yes'. Had the appellant told the Department about his savings as he should have done, it is likely that the overpayment would not have occurred."

I do not disagree with what Judge Lane wrote there: one only has to think, for example, of the person who is receiving interest but who can demonstrate following enquiry that he does not do so beneficially. But it is important to note the word "ordinarily" and causation is ultimately a question for the tribunal of fact and it will be for the new tribunal to consider the point.

Grounds on which the Secretary of State does not support the appeal

30. The following are either ground which I raised when giving permission to appeal. Again, I deal with each at more length below.

(a) the tribunal did not err by making findings based only on submissions rather than evidence;

(b) the tribunal did not err by ruling that no allowance should be made for the income tax paid by the claimant;

(c) the tribunal did not err by failing to allow deductibility of travel expenses to courses or trade union subscriptions; and

(d) the tribunal did not err by failing to consider whether the claim of causation was broken by the acceptance of Form P60 by the DWP.

Submissions not evidence?

31. Mr Spencer relies on the decision by Judge Jacobs in CH/3801/2008; [2009] UKUT 27 (AAC) where he held

> "5. The Social Security Commissioners and their predecessors said that statements by submission writers, decision-makes and presenting officers were not evidence, unless it was based on personal knowledge. See, for example, what the Tribunal of Commissioners said on the evidence of a presenting officer in *R(SB) 8/84* at paragraph 25(6). This appears to be based on the presenting officer's status at the hearing: see the decisions of the same Commissioner in *CSB/420/1981* and *CSB/13/1982*. As the Commissioner said in *CSB/582/1987* at paragraph 9:
>
> > '9. … the position of the adjudication officer/presenting officer at the social security appeal tribunal is not just that of a party but is that of an amicus curiae [friend of the court] ...'
>
> As such, the officer was not seen as a witness. The submission writer was likewise acting in a non-contentious capacity. (Commissioners took a similar approach to statements made by a claimant's representative: see *R(I) 36/61* at paragraph 18 and *R(I) 13/74* at paragraph 9.)
>
> 6. With respect to those Commissioners, their approach was out of line with the modern approach to the law of evidence and with the theoretical basis upon which tribunals proceed in making findings of fact.
>
> 7. The law of evidence is now less concerned than in the past with exclusionary rules that prevent a court taking account of particular categories of statements or hearing from specified categories of person as witnesses. Nowadays, the approach is to admit evidence for consideration and to take account of any possible deficiencies when deciding the extent to which it is persuasive of the facts to be proved. That approach was becoming evident by at least 1861: see Cockburn CJ in *R v Birmingham Overseers* (1861) 1 B & S 763 at 767. It is now the accepted approach. By 1973, Lord Simon was able to say in *Director of Public Prosecutions v Kilbourne* [1973] AC 729 at 756 that

relevance and admissibility ‘are frequently, and in many circumstances legitimately, used interchangeably’.

8. Moreover, the strict rules of evidence do not apply in a tribunal: see the decision of the Chief Commissioner in *R(U) 5/77* at paragraph 3. All that is required is that the tribunal's findings of fact should be based on material that is logically probative of those facts: see the opinion of the Privy Council delivered by Lord Diplock in *Mahon v. Air New Zealand* [1984] AC 808 at 820-821. Evidence given by submission writers or presenting officers, even if hearsay, is as capable of being logically probative as evidence, whether or not hearsay, given by anyone else.

9. Moreover, in the context of a tribunal, roles are often not as clear cut as they are in a court. For example: a claimant may be accompanied by someone for moral support who also acts as representative and gives evidence that is in part derived from personal knowledge and in part based on information provided by the claimant. Likewise, the role played by a presenting officer may be less clear cut than decisions such as *CSB/582/1987* suggest. There is no reason in principle why a presenting officer cannot give evidence, as was recognises by the Commissioner in *R(SB) 10/86* at paragraph 5. There is no reason to draw a distinction, so far as admissibility is concerned, between evidence within the officer's personal knowledge and other evidence. If the officer relays statements made by another officer, what is said is nonetheless evidence. However, it is hearsay evidence and this may affect its probative worth: see *R(SB) 5/82* at paragraph 9.

10. On the modern approach to evidence and to the nature of proof in a tribunal, the submission writer’s statement was evidence. It was also of some probative value. The writer may, or may not, have personally made the decision on 17 December 2007. If so, the writer could speak from personal knowledge. If not, the writer was able to report the contents of the computer records of the claim and was under a duty to report that information to the tribunal, as it was not accessible by the claimant: see Baroness Hale in *Kerr v Department for Social Development* [2004] 1 WLR 1372 at paragraph 62. Moreover, the writer had no reason to misstate what the records contained or to mislead the tribunal, as the local authority’s role in the proceedings is a non-contentious one: see Diplock LJ in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at 486.”

32. I respectfully agree with the approach above, while observing that in the context of documents which cannot be produced, it may be far from evident from the face of a written submission what degree of personal involvement the submission writer has had in looking for them or, if the assertion is not based on personal involvement, the identity of the source or particulars of the search undertaken by the source, and, given the frequent lack of a presenting officer, it may be impossible for these matters to be amplified at an oral hearing. It does occasionally happen that the Upper Tribunal sees cases where it has been asserted that no documents of a given type can be produced, only for

them to emerge later. I accept that a tribunal is not precluded from relying on what is in submissions (and so do not find in the present case that the tribunal erred in law on this ground). No doubt the more specific submission writers can be about the searches undertaken, the easier it may be for tribunals to place significant weight on the submission in that regard, but the weight to be given to evidence is ultimately a matter for the tribunal of fact.

No deduction for income tax

33. The figure to be fed into the calculation of earnings process described in [21] and [22] above is a person's "net earnings". Regulation 10 deals with these. Paragraphs (2) and (3) concern particular disregards which are not relevant for present purposes. The remainder of the regulation reads:

> "(1) For the purposes of regulations 3 (calculation of earnings) and 6 (calculation of earnings of employed earners) the earnings of a claimant derived from employment as an employed earner to be taken into account shall, subject to paragraphs (2) and (3), be his net earnings.
> …
> (4) For the purposes of paragraph (1) net earnings shall be calculated by taking into account the gross earnings of the claimant from that employment less—
> (a) any amount deducted from those earnings by way of—
> (i) income tax;
> (ii) primary Class 1 contributions under the Contributions and Benefits Act; and
> (b) one half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme."

34. As Mr Spencer submits, there is a distinction between an "amount deducted" in sub-paragraph (4)(a) and a "sum paid" in sub-paragraph (4)(b). I accept Mr Spencer's submission that the difference of wording within the same paragraph must be taken as deliberate. Of course, most people who are in employment do have income tax deducted at source under Pay As You Earn. Nonetheless, there is power under regs. 141 and 142 of the Income Tax (Pay as You Earn) regulations 2003/2682[PAYE regulations] for HM Revenue and Customs to operate alternative arrangements for the collection of income tax, as they did in the case of the present claimant. For people with such arrangements, this interpretation operates harshly. It is possible that for those who have income tax deducted from their earnings, including in respect of income unrelated to the person's earnings, the rule may operate to their advantage, but, like Judge Bano in R(G)1/09, I prefer to reserve my position as to that.. While the impact on people in the claimant's position may be thought unfair, it does have the virtue of administrative simplicity, fixing a clearly identifiable and readily provable process (deduction by the employer) as the catalyst for the deduction, which provides an entirely plausible context for the draftsman to have proceeded as he did. The decision in R(IS)4/05, involving consideration of the analogous provision in regulation 36(3) of the

Income Support (General) Regulations 1987/1967 is consistent with this approach, as is R(G)1/09.

No deduction for travelling to courses or trade union subscriptions

35. Regulation 10(4), in order to arrive at "net earnings" starts from "gross earnings". In CSG/87/2006 Mr Commissioner Howell QC confirmed that the phrase fell to be interpreted in accordance with the Court of Appeal's decision in *Parsons v Hogg* (reported as an appendix to R(FIS) 4/85). The effect of this, as Mr Spencer correctly submits, relying on CCS/3882/1997, paragraphs 30-31 and 35) is to permit the deduction of any expense that has been wholly, exclusively and necessarily incurred in the performance of the duties and any other expenses that are allowed for income tax purposes on a statutory basis.

36. The claimant does not dispute that the test she has to meet is that of showing the expenses were necessary. The claimant submits that she is both the first aider and the restraint officer at her job, and that both positions require certificated updating training to be undergone. As to the union dues she considers that membership is needed for her own protection, given that the responsibilities of her work involve both acting as children's behaviour adviser, which can involve one to one discussions with distressed children in a quiet place, and working in the school's nursery, which can involve personal contact while for example changing nappies or removing wet clothes and by implication the risk of unfounded claims.

37. The tribunal rejected this part of the claim on the basis that the expenses were incurred not in the performance of her duties but in order to allow her to perform duties. Considering first the trade union subscription, one can understand why an individual carrying out such duties might consider it prudent to be a member of the trade union, but that is a matter for them. The tribunal was entailed to conclude that it was not incurred "in the performance of her duties". It might equally have said that the test of being "necessarily" incurred was not made out. For the sake of completeness, I record that I have not been referred to any specific provision of tax law, going beyond general principles, under which a trade union subscription would be deductible for income tax purposes. As to the travelling to courses, I note the tribunal's findings of fact at UTp2780/187 that "the school was required to have two members who were trained [as a restraint officer]. The Head teacher was one and she asked [the claimant] to become the other one. She also needed to continue the First Aider certification she had originally obtained as a childminder. She received no extra payment for either of these roles." It is not in dispute that the relevant legal principles are to be found in *HM Revenue and Customs v Banerjee* [2010] EWCA Civ 843, where there is a helpful review of the caselaw at [17] – [28]. What I think is lacking in the decision under appeal are findings as to the basis on which the responsibilities of the First Aider and the Restraint Officer fell to the claimant to discharge and what regulation goes with them. To that limited extent I would conclude that the tribunal was also in error of law on that aspect, but as the case will have to be reheard in its entirety both the travelling expenses and the trade union

subscriptions will fall to be considered afresh by the new tribunal, applying the relevant legal principles.

Causation broken by acceptance of P60?

38. I do not think that the tribunal erred in law on this aspect on the evidence before it. The P60 did not contain the true gross figure. Whether, in the light of the additional evidence received post-hearing, there was acceptance of a P60 in the knowledge that the claimant was contributing to an occupational pension, that was sufficient to break causation, given that the contents of Form P60 are a matter of law (see SI 2003/2682, regs 2,3,4 and 67) and exclude pension contributions, is a matter of fact for the tribunal to which this case is remitted.

Conclusion and Directions

39. It follows from what I have said that the tribunal was in error of law in a number of respects. It is clearly right to set its decisions aside, notably given the lack of fair process caused by the DWP's failure to provide all relevant documentation and because of the significant sums involved. As indicated above, I remit the matter to the First-tier Tribunal, in accordance with the expressed wishes of the parties.

40. I direct therefore that:

(a) Whether the claimant's earnings and other circumstances relating to them were such as to preclude her from entitlement to carer's allowance for all or part of the periods 1 May 2006 to 30 September 2007 and 5 May 2008 to 2 May 2010 and/or entitlement from 3 May 2010 is to be looked at by way of a complete re-hearing in accordance with the legislation and this decision. This will involve, without limitation, applying the relevant provisions of the Computation of Earnings Regulations and explaining the basis on which it has been done. As I have ruled on the legal principles governing the deductibility or otherwise of income tax, travelling expenses and trade union subscriptions, those principles must be applied in the remitted decision, but the facts will be for the new tribunal.

(b) In relation to any period for which the tribunal finds there was no entitlement but in respect of which the Secretary of State seeks to recover the benefit paid, the tribunal will need to identify what prima facie triggered a duty to disclose and pursuant to what provision; it will need to make finding as to the course of dealings between the claimant and the Carer's Allowance Unit and consider whether anything in that had the effect of qualifying any duty that would otherwise apply; it will need to identify any failure to disclose there may have been; and to consider causation afresh, including in relation to the various items of information found to have been received by the DWP from the claimant and the RD23 report.

(c) As to evidence of departmental procedures, evidence has been provided in the Upper Tribunal proceedings from Brendan Horrigan of the Carer's

Allowance Unit, so the need for reliance on submissions alone may be much diminished. To the extent that such reliance may be necessary, I direct the tribunal that it may treat a submission as evidence. The weight to be given to such evidence is a matter for it.

(d) As to evidence which is no longer available as a result of routine destruction, the tribunal should refer to the commentary at paragraph 1.145 of Social |Security Legislation 2013/14 Volume III and the authorities there cited.

(e) The files should be placed before a District Tribunal Judge as soon as possible for directions as to listing and as to any further, or re-ordered, submission or bundles which may be required

(f) The Secretary of State is to be represented at the tribunal hearing.

(g) The tribunal must not take account of circumstances that were not obtaining at the time of the various decisions under appeal, - see section 12(8)(b) of the Social Security Act 1998 - but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01.

41. The above directions are subject to any further directions which may be given by a District Tribunal Judge.

42. While it is not a matter for me to direct, it is strongly suggested that the claimant should attend the re-hearing.

43. The decision on the re-hearing is a matter for the First-tier Tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

CG Ward
Judge of the Upper Tribunal
26 September 2013

Postscript. I have noted that UTp2780/240 is a letter to me from a German Court returning some papers about an unrelated matter. It found its way into the bundle in error and can simply be ignored.