



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001781-ESA
[2024] UKUT 251 (AAC)**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)
Decided without an oral hearing

Between:

Secretary of State for Work and Pensions

Appellant

- v -

NC

Respondent

Before: Upper Tribunal Judge Church

Appellant: Roger Jennings, Decision Making and Appeals section at the
Department for Work and Pensions (written submissions)

Respondent: Allan Reynolds, Welfare Rights officer at Derby City Council
(written submissions)

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal made on 21 November 2022 did not involve any material error of law. It is upheld.

REASONS FOR DECISION

What this case is about

1. This appeal, brought by the Secretary of State with the permission of District Tribunal Judge Ennals, is about how the making of pension contributions by way of 'salary sacrifice' should be treated for the purposes of eligibility for Employment and Support Allowance.

2. The issue I must decide is whether amounts ‘sacrificed’ by the Respondent (whom I’ll call the “**claimant**”) under his employer’s ‘salary sacrifice’ scheme are to be included in the calculation of ‘earnings’.
3. My decision is that such an arrangement involves the employee agreeing contractually to forego an amount of cash pay to which they would, but for that agreement, be entitled in return for the employer’s agreement to make a payment in kind, namely an employer’s contribution to the employee’s occupational pension. The amount ‘sacrificed’ does not form part of the employee’s earnings for the purposes of regulation 95 of the Employment and Support Allowance Regulations 2008 (the “**ESA Regulations**”)

Factual background

4. There are no factual issues between the parties. The only issues raised by this appeal are questions of law.
5. In October 2013 the claimant was awarded an employment and support allowance under the ESA Regulations based on functional limitations he experienced as a result of his profound deafness and paranoid schizophrenia.
6. On 2 November 2020 the claimant started a job at an Amazon warehouse, working 15 hours a week. On 22 December 2020 he completed a ‘PW1’ form which he sent to the Department for Work and Pensions to notify it that he had started ‘permitted work’ (a form of ‘exempt work’ under regulation 45 of the ESA Regulations).
7. In his PW1 form the claimant disclosed that his earnings from his job at Amazon were £131.28 per week. He provided his first five wage slips.
8. Wage slips dated 13 November 2021 and 20 November 2021 (relating to the first two weeks of the claimant’s employment) provided by the claimant show gross wages of £146.55 and £148.34, respectively, with no deductions made. The claimant had mistakenly clocked on early in his first two weeks in the job, which led to his being paid more than expected. The claimant accepts that this took his wages over the ‘permitted work’ limit in those first two weeks and that he is therefore not entitled to any employment and support allowance in respect of that fortnight.
9. The wage slips for the nine weeks that followed showed earnings of £138.95 after a deduction of £6.55 in respect of ‘EE Pension Salary Sacrifice’.
10. The claimant’s pay slips record a ‘discretionary payment’ of £150 (the claimant’s Christmas bonus) on 29 January 2022.
11. The remaining four wage slips (dated 5 February to 26 February 2021) show statutory sick pay only. After the period covered by the 26 February 2021 pay slip the claimant’s employment then came to an end.
12. The pay slips show deductions for various insurance payments. The claimant accepts that these amounts fall to be treated as part of his ‘earnings’ for the purposes of the ESA Regulations.

13. The Secretary of State decided that the claimant ceased to be entitled to an employment and support allowance (the “**SoS Decision**”). The claimant appealed the SoS Decision to the First-tier Tribunal.

The appeal before the First-tier Tribunal

14. Following an oral hearing at Derby Justice Centre, which was attended by the claimant, his mother and his representative (and at which the Secretary of State was not represented), District Tribunal Judge Ennals of the First-tier Tribunal (the “**First-tier Tribunal**”) allowed the claimant’s appeal, set aside the SoS Decision and remade the SoS Decision to the effect that the claimant was not ineligible for an employment and support allowance by reason of his earnings except for the weeks to which the wage slips dated 13 November 2021, 20 November 2021 and 29 January 2022 relate.

What is in issue

15. The Secretary of State accepts that the claimant’s work at Amazon qualifies as ‘exempt work’ in all but one respect: the amount of the claimant’s earnings is said to exceed the then-prevailing limit of £140 per week.
16. The claimant says that other than in respect of the first two weeks of his employment, when he accepts that his earnings exceeded £140 per week, his earnings were below the permitted maximum.
17. This difference in position results from the parties’ differing understanding of the way that ‘salary sacrifice’ arrangements are properly characterised.

The Secretary of State’s case

18. The essence of the Secretary of State’s case on the appeal was that the First-tier Tribunal erred in law by failing to treat the amount of the ‘EE Pension Salary Sacrifice’ as earnings, as required by regulation 96 of the ESA Regulations.
19. According to Mr Jennings’ preferred legal characterisation, the amount of salary said to be ‘sacrificed’ was in fact applied by the claimant by way of an employee contribution to his occupational pension scheme. As such, 50% of that amount fell to be disregarded under regulation 96(3)(b) of the ESA Regulations, with the remaining 50% being included within the calculation of the claimant’s earnings, taking his earnings beyond the permitted maximum for the period.
20. Mr Jennings argued that if gross earnings were arrived at *after* deducting the amount of any salary sacrifice, this would lead to an irrational outcome because a further deduction under regulation 96(3)(b) would then be required, resulting in a total deduction of 150%.
21. Mr Jennings invited me to set aside the First-tier Tribunal’s decision aside as being materially in error of law, and to exercise my discretion under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 to re-make the decision.

The claimant's case

22. The claimant resists the appeal. His representative argues that the very essence of the salary sacrifice scheme in which the claimant participated was that any amounts 'sacrificed' never formed part of his gross earnings for tax or National Insurance purposes.
23. Rather, the salary sacrifice arrangement involved the claimant agreeing to a reduced entitlement to cash earnings in exchange for a non-cash benefit (in other words, a benefit in kind), namely an employer contribution to his occupational pension scheme. The entirety of the £6.55 'EE Pension Salary Sacrifice' amount should, therefore, be excluded from the calculation of the claimant's 'earnings' in accordance with regulation 95(2) of the ESA Regulations.
24. As such, the claimant says, the First-tier Tribunal made no error of law, its decision should be confirmed, and the appeal should be dismissed.

Why there was no oral hearing of this appeal

25. Neither party asked for an oral hearing of the appeal. Given the narrow and technical nature of the issue under appeal, and the clarity of the parties' written submissions, I decided that the interests of justice did not require an oral hearing. In furtherance of the overriding objective, I exercised my discretion in favour of determining the appeal without a hearing.

The law

26. Since the other conditions to entitlement to an employment and support allowance are not in dispute, I do not reproduce all of the entitlement conditions here.
27. Regulation 40 of the ESA Regulations provides, subject to certain exceptions, that a claimant is to be treated as not entitled to an employment and support allowance in any week in which that claimant does work.
28. Regulation 45 of the ESA Regulations makes provision for 'exempt work', which does not make a claimant ineligible for an employment and support allowance.
29. Regulations 95 and 96 of the ESA Regulations provide (as far as relevant to this case) as follows:

"Earnings of employed earners

95.-(1) Subject to paragraphs (2) and (3), "earnings" means, in the case of employment as an employed earner, any remuneration or profit derived from that employment...

(2) "Earnings" are not to include-

(a) subject to paragraph (3), any payment in kind;

..."

Calculation of net earnings of employed earners

96.- (1) For the purposes of regulation 91 (calculation of earnings derived from employed earner's employment and income other than earnings) the earnings of a claimant derived from employment as an employed earner to be taken into account, subject to paragraph (2), are the claimant's net earnings.

(2) There is to be disregarded from a claimant's net earnings, any sum, where applicable, specified in paragraphs 1 to 12 of Schedule 7 (sums to be disregarded in the calculation of earnings).

(3) For the purposes of paragraph (1) net earnings are to 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 section 6(1)(a) of the Contributions and Benefits Act;

(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."

Discussion and analysis

59. The approach favoured by the Secretary of State does not sit easily with the concept of 'salary sacrifice' because it doesn't accept that any amount of salary is in fact sacrificed. Rather, it characterises the arrangement as the employee authorising a deduction from his/her earnings and its application in making a payment towards his/her occupational pension.

60. That approach is inconsistent with the explanation given by HMRC on the gov.uk website, which describes it as "an agreement to reduce an employee's entitlement to cash pay, usually in return for a non-cash benefit" and acknowledges that salary sacrifice "can affect an employee's entitlement to earnings related benefits" and "may affect an employee's entitlement to contribution-based benefits" (see <https://www.gov.uk/guidance/salary-sacrifice-and-the-effects-on-pay>).

61. The issue of the proper characterisation of 'salary sacrifice' arrangements was considered by the Child Support Commissioner in R (CS) 9/08. That case concerned the application of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, but notwithstanding the different circumstances, the principles are the same as in this case.

62. In R(CS) 9/08 the child's father had a total annual remuneration package of £60,000. His employer operated a 'salary sacrifice' scheme, which the father chose to participate in, opting to have £4,000 per month contributed to his pension scheme.

63. Commissioner Mesher (as he then was) found that the appeal tribunal had been wrong to regard the father's (very substantial) salary sacrifice arrangement as equivalent to his having agreed to the deduction of the £4,000 monthly contributions at source through his pay-packet. He decided that that approach was not legally

available to the appeal tribunal. Commissioner Mesher analysed the arrangement as follows:

“It is of the essence of salary sacrifice pension arrangements that the contributions to the occupational pension scheme are made as employer’s contributions and that the employee has agreed in advance in a contractually valid way to give up the right to receive cash payment of the amount of salary sacrificed” (R(CS) 9/08 at paragraph [18])

64. Commissioner Mesher’s decision in R(CS) 9/08 is not binding on me, but I agree with his analysis and I follow his approach.

65. Applying it to the circumstances of this case, the amount of the ‘EE Pension Salary Sacrifice’ did not form part of the claimant’s earnings. It was an amount which the claimant had contractually agreed to forego in return for his employer’s agreement to make a contribution to his occupational pension.

66. This approach doesn’t lead to the irrational result that the Secretary of States says it does because if the ‘EE Pension Salary Sacrifice’ amount does not form part of the claimant’s gross ‘earnings’ by application of regulation 95(2) of the ESA Regulations, then no deduction from earnings falls to be made under regulation 96(3)(b) of the ESA Regulations. Further, since the payments into the pension scheme are employer contributions and not employee contributions, there is no “sum paid by the claimant” by way of contribution towards his occupational pension scheme under regulation 96(3)(b). There are no circumstances in which the approach I have adopted can result in a 150% deduction.

Conclusions

125. For the reasons I have explained, I am not persuaded that the First-tier Tribunal’s decision involved any material error of law.

126. I therefore dismiss this appeal and confirm the First-tier Tribunal’s decision.

Judge Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 20 August 2024