

R(CS) 5/09
(RB v Child Maintenance and Enforcement Commission and ED)
[2009] UKUT 53 (AAC)

Judge Jacobs
18 March 2009

CCS/2585/2008

Tribunal jurisdiction – refusal to revise on application for variation – whether appealable

The parent with care applied for a variation of the calculation of the non-resident parent's liability for child support maintenance. The Secretary of State refused the variation and the parent with care appealed to the First-tier Tribunal. The tribunal allowed her appeal and agreed to a variation. The non-resident parent appealed. The Upper Tribunal judge allowed the appeal as he held the tribunal's decision to be in error of law on a number of points. However the appeal also raised the issue as to whether a rejection of an application for a variation on preliminary consideration carried a right of appeal. Section 20 of the Child Support Act 1991, as amended, includes provision for a right of appeal against a decision not to supersede a decision on an application for a maintenance calculation, but not expressly against a decision not to revise, and in *CSCS/7/2008* the Upper Tribunal judge had commented that there was no statutory right of appeal and that it was unsatisfactory that a right should have to be inferred under reference to intention.

Held, allowing the appeal, that:

1. the essence of revision is that it corrects mistakes in the decision and so where the original decision stands unaffected the appeal lies against that decision within the terms of section 20(1)(a) (paragraph 11);
2. it is therefore unnecessary to infer a right to appeal against a decision not to revise as the legislation itself expressly provides for an appeal against the original decision, and that is sufficient to include the original decision when a decision has been made not to revise it (paragraph 16).

The Judge remitted the case to a differently constituted tribunal for reconsideration.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: As the decision of the Colchester appeal tribunal (held on 13 August 2007 under reference 132/06/00259) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to a differently constituted First-tier Tribunal (Social Entitlement Chamber).

Directions: The tribunal must conduct a complete rehearing of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 20(7)(a) of the Child Support Act 1991, any other issues that merit consideration in accordance with Ms Powell's submission at pages 912 to 919.

The District Tribunal Judge will need to consider the composition of the panel that hears this appeal. I notice that a financially qualified panel member sat on 13 August 2007.

REASONS FOR DECISION

1. This appeal concerns the child support maintenance payable in respect of Adam. The appellant and second respondent are his father and mother or, in the language of the child support legislation, his non-resident parent and parent with

care. The first respondent is the Child Maintenance and Enforcement Commission, which has now replaced the Secretary of State as decision-maker.

2. The case began with an application by the parent with care to vary the calculation of the non-resident parent's liability for child support maintenance in respect of Adam. The Secretary of State refused the variation and the case came before the appeal tribunal at the behest of the parent with care. The tribunal allowed her appeal and agreed to a variation. I gave the non-resident parent permission to appeal on the ground the tribunal had overlooked regulation 18(3)(d) of the Child Support (Variations) Regulations 2000 (SI 2001/156), which excludes from consideration assets used in the course of a business.

A. The submission by S A Powell

3. The Commission has made two submissions in this case. The first was by S A Powell (pages 912 to 919). She agreed with the grounds on which I had given permission to appeal and identified other errors in the tribunal's decision. I accept her submission in its entirety. It will provide the First-tier Tribunal with a useful framework within which to conduct the rehearing. The parent with care's representative has commented on the Commission's submission (pages 956 to 959). Those comments will be before the tribunal at the rehearing.

4. I need only summarise the errors identified by Ms Powell:

- the tribunal used the wrong effective date for the variation;
- it wrongly took account of business assets;
- it overlooked the non-resident parent's income as a director;
- it wrongly calculated the non-resident parent's self-employed earnings;
- it overlooked the non-resident parent's income from property.;
- it failed to investigate the non-resident parent's ownership of shares; and
- it failed to take account of (a) the effect of the variation on his financial position and (b) the birth of his child.

5. As to the non-resident parent's ownership of property, I agree with Ms Powell that this could have no effect on the outcome. As to the non-resident parent's absence from the hearing, any disadvantage that he thereby suffered will be remedied by the rehearing.

B. The submission by Christopher Ellis

6. This submission was concerned with a recent decision by Upper Tribunal Judge May in CSCS/7/2008. Mr Ellis submitted that it raised "a very important point of principle" that was "of considerable importance to the Commission and to parents subject to the 2000 scheme". That is a reference to the child support scheme as amended by the Child Support, Pensions and Social Security Act 2000.

7. In order to understand the difficulty that Judge May identified, it is necessary to consider the decision-making and appeal structure for child support and, in particular, for variations. All statutory references are to the Child Support Act 1991 as amended by the 2000 Act.

8. The initial decision following an application for child support maintenance is made under section 11. There is further provision for decisions made under section 11 to be corrected or brought up-to-date to take account of changes of circumstances. These are effected by way of either revision under section 16 or supersession under section 17.

9. There is a right of appeal under section 20. It applies only in respect of specified decisions. As at the time of the appeal to the appeal tribunal in this case, it provided:

“Appeals to appeal tribunals

20. – (1) A qualifying person has a right of appeal to an appeal tribunal against –

- (a) a decision of the Secretary of State under section 11, 12 or 17 (whether as originally made or as revised under section 16);
- (b) a decision of the Secretary of State not to make a maintenance calculation under section 11 or not to supersede a decision under section 17; ...”

10. There is express provision for appeals against decisions both to supersede and to refuse to supersede; they cause no difficulty for present purposes. Decisions to revise or to refuse to revise are different. If a decision is revised, the decision that is appealable is the original decision as revised. That is clear from the terms of section 20(1)(a). There is no express reference in section 20 to an appeal against a decision to refuse to revise. As the original decision stands unaffected, the appeal lies against that decision. That follows from the nature of revision. Section 16 does not provide a definition or even description of the nature of revision. However, a consideration of the relevant provisions as a whole shows that the essence of revision is that it corrects mistakes in a decision. That emerges from:

- the fact that it is necessary for section 16(3) to provide, as a special rule applicable for appeals only, that the date of the decision as revised is the date it was revised – for other purposes it is the date of the original decision;
- the way that section 20(1)(a) treats the appeal following a revised decision as against the original decision as revised, not against the revising decision;
- the effective date provisions for revisions – by default they take effect from the effective date of the original decision (section 16(3)). The only exceptions are where the test case rule applies (section 28ZC) and where the effective date was wrongly fixed (regulation 5A of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991)); and
- the contrasting supersession provisions – section 20(1) treats the appeal as against the superseding decision and section 17(4) fixes the effective date by default at the first day of the maintenance period in which the application was made.

11. There is a potential difficulty with this interpretation in that the refusal to revise may only have been made after the time for appealing against the original decision has expired. Regulation 31(2) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 caters for that eventuality, by providing that the time for appealing only begins to run from the date on which the decision not

to revise was notified. This regulation does not confer a right of appeal. Nor is one to be implied from its terms. An appeal must be conferred (*Lane v Esdaile* [1891] AC 210 at 211) and cannot arise by implication (*Furtado v City of London Brewery* [1914] 1 KB 709 at 712). What the regulation does is to provide for the time within which an appeal may be brought, under the express terms of section 20(1), against the original decision made under section 11.

12. An application for a variation may be made either before the initial decision on the maintenance calculation has been made (section 28A) or when a maintenance calculation is in force (section 28G). In either case, it may be rejected on preliminary consideration under section 28B. This section makes provision for decision-makers to dispose of applications that have no prospect of success. If the application for a variation was made before the maintenance calculation was made, section 28B(2) requires a decision-maker who rejects the application to “proceed to make his decision on the application for a maintenance calculation without any variation”. If the application for a variation was made after the maintenance assessment was made, section 28B(2) is modified by regulation 4(a) of the Child Support (Variations) (Modification of Statutory Provisions) Regulations 2000 (SI 2000/3173). As modified, a decision-maker who rejects the application has to “proceed to revise or supersede a decision under section 16 or 17 respectively without taking the variation into account, or not revise or supersede a decision under section 16 or 17”. In either case, this involves a decision not to revise, which is appealable as I have already explained.

13. If the application is not rejected, it has to be determined under section 28D. If an application for a variation is made before the maintenance calculation has been made and it is agreed to, it is given effect as part of the initial decision under section 11 (section 28D(1)(a)). The variation element of the decision is appealable as part of the section 11 decision, as already explained.

14. If an application for a variation is made when a maintenance calculation is in force and it is agreed to, it is given effect by way of revision or supersession. If the application was made within one month of the maintenance calculation, it is by way of revision under regulation 3A(1)(a)(ii) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999; the time may be extended under regulation 4. Otherwise, it is by way of supersession under regulation 6A(6). This is achieved by regulation 6(1) of the Child Support (Variations) (Modification of Statutory Provisions) Regulations 2000. This modifies section 28D(1)(a) so as to provide that the Secretary of State must “either agree or not to a variation, and make a decision under section 16 or 17”. That encompasses both a decision to revise and a decision not to revise, since not agreeing to a variation requires a decision not to revise. And the decision not to revise permits an appeal against the original decision.

15. I come now to Judge May’s decision CSCS/7/2008. He decided that in his case the Secretary of State had not made a decision at all on the application. His comments on the problem are, therefore, not part of his binding decision. However, they have caused concern in the Commission. The judge went on to deal with the problem that would have arisen had the Secretary of State made a decision rejecting

the application on preliminary consideration under section 28B. He began by referring to the oral argument:

“Mr Brodie [for the Commission] in his submission accepted that the statutory provision gave no direct right of appeal against a refusal to revise and although having considered the matter was unable to explain why there was a difference in that respect to a refusal to supersede a maintenance calculation for which a right of appeal is specifically given. It was apparent that Mr Brodie and the Commission whom he represents had to rely on inference.”

Judge May then quoted from the Commission’s written submission, arguing that a right of appeal against refusals to revise had been intended; he then referred to its reliance on the explanatory note to the 2000 Act. He continued:

“I find it unsatisfactory to have to attempt to deduce rights of appeal by inference under reference to intention. In relation to regulation 32 [a mistake for 31(2)?] of the Decisions and Appeals Regulations the provision which allows for the extension of time for appealing may be simply related to a decision against a maintenance calculation itself without the element of the variation being brought into the appeal. My inclination is that in the absence of a statutory right of appeal set forth in the Act there is none. However, that is expressed as an opinion as it was not necessary for me to determine this issue having regard to the manner in which I approach the appeal.”

(I have omitted paragraph numbers in these quotations, as something has clearly gone awry with their numbering.)

16. I respectfully agree that it is “unsatisfactory to have to attempt to deduce rights of appeal by inference under reference to intention”. Indeed, it is more than unsatisfactory; it is not permissible. However, it is not necessary to resort to inference. As I have shown, the legislation itself expressly provides for an appeal against the original decision, and that is sufficient to include the original decision when a decision has been made not to revise it. I trust that my analysis has provided the explanation that Mr Brodie was unable to give.

17. I do not agree that regulation 31(2) can be limited to extending time simply in relation to the maintenance calculation itself. There is no reason to limit it in that way. Indeed, it expressly refers to regulation 3A(1), which itself expressly refers to section 28G. In that context, it is impossible to interpret it as excluding the variation element. Moreover, limiting it as suggested is contrary to the nature of a revision or refusal to revise, both of which are conceptually inseparable from the other elements of the maintenance calculation decision.

18. With respect to Judge May, on my analysis of the legislation there is a right of appeal against all decisions made in respect of applications for variation, that right arises directly on the legislation and from the revision process, and there is no implication or inference involved. It follows that no issue of jurisdiction arises in this case.

C. Disposal

19. I allow the appeal and direct a rehearing

