IN THE UPPER TRIBUNAL **Appeal No. CJSA/2583/2015**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 8 June 2015 under number SC314/15/00446 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 at an oral hearing.**
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 written submissions or evidence upon which they wish to rely. If the Secretary of State contends that section 19(2)(d) applied, his submissions and evidence must address it.**
4. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh. In particular it must consider whether section 19(2)(c) of the Jobseekers Act 1995 applied and, if not, whether section 19(2)(d) applied.**

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 reduction of the Appellant's Jobseekers Allowance (JSA) pursuant to section 19 of the Jobseekers Act 1995 which provides for the reduction of JSA in the event of a failure by a claimant which is sanctionable under that section.
2. The Secretary of State does not support the appeal. He has not requested an oral hearing. The Appellant has requested an oral hearing. As I explain further

below, there was an oral hearing of the application for permission to appeal. The Appellant addressed me fully on his grounds of appeal. Oral evidence is irrelevant in an appeal, which is on a point of law. I do not consider that a hearing of the appeal would be of assistance.

Section 19

3. Section 19(2) lists sanctionable failures, including where a claimant:

> "(c) without a good reason refuses or fails to apply for … a situation in any employment which an employment officer has informed him is vacant or about to become vacant;
>
> (d) without a good reason neglects to avail himself of a reasonable opportunity of employment; …"

Background

4. The Appellant had been in receipt of Jobseekers Allowance (JSA) since 2011. On 19 November 2014 an advisor at the Jobcentre gave the Appellant a letter telling him that he was required to attend a registration appointment for a recruitment agency on the following day at the Jobcentre. The Appellant attended the next day. He was asked to complete what the decision-maker subsequently described as an "application form". It appears in fact to have been a document to register with the agency. The Appellant completed some but not all of the form and wrote various hostile comments on it, in essence objecting to employment agencies, objecting to the literacy and numeracy questionnaires, and stating that he could not sign up as he needed a full discussion about temporary work. The Secretary of State has asserted that the Appellant also made inappropriate comments orally. As a result he was asked to leave the session. On 27 November 2014 the Appellant's JSA was reduced by 100% for a period of 13 weeks, pursuant to section 19(2)(c). There is no issue as to the amount or period of reduction. The Appellant appealed against the decision that he had refused or failed to apply for a situation.

5. His grounds of appeal were that he had been provided with insufficient information about a position, including the employer's details, the pay and the hours. He was anxious about being able to pay his rent and losing his home (having previously been homeless). The First-tier Tribunal refused the appeal. Applying Commissioners' decisions CJSA/2692/1999 and CJSA/4665/2001, the tribunal concluded that the Appellant's failure to complete the form correctly was a failure to apply for a vacancy, and that he had not had good reason for the failure. The request to apply for the vacancy was a reasonable one. He could have applied for the vacancy and considered his options thereafter.

6. On 10 December, following an oral hearing attended by the Appellant on 7 December, I gave permission to appeal because it was not clear on the evidence that the Appellant had been informed by an employment officer that a situation was (or was to become) vacant, nor that the application that the Appellant had been asked to complete was in respect of any such situation. I noted that the letter of 19 November 2014 referred to a registration appointment but did not refer to a vacancy.

7. By written submissions the Secretary of State agrees that the evidence did not show that the Appellant was given exact details of a vacancy by an employment officer and agrees that the tribunal erred in law in finding that section 19(2)(c) applied.

8. However the Secretary of State submits that the tribunal could have relied on section 19(2)(d) instead. He submits that, even if an employment officer had not notified the Appellant of a job vacancy, the Appellant knew enough about a potential employment opportunity so that it could be said that he failed to avail himself of it. The Secretary of State submits that the First-tier Tribunal considered the correct factual questions in substance and its decision was correct.

Discussion

9. The starting point is that (as the Secretary of State accepts) there was insufficient evidence to enable the First-tier Tribunal to conclude that section 19(2)(c) applied. The submission that the decision was correct on a different basis, in other words that the error was immaterial, must be approached with considerable caution particularly in a case such as this one which involves withdrawal of a subsistence benefit (see, to similar effect, the comment of Upper Tribunal Judge Wikely in DL v SSWP (JSA) [2013] UKUT 295 (AAC) at [14]).

10. There is considerable overlap between subparagraphs (c) and (d) of section 19(2). Both subparagraphs require the failure in question to have been "without a good reason". But there are differences. Subparagraph (d) adds the qualification that the opportunity of employment must have been "reasonable". There is no qualification of "a situation" in subparagraph (c). In practice consideration of "good reason" in subparagraph (c) may involve consideration of the suitability of the employment situation but there is not complete overlap between the two provisions. This means that, if (c) does not apply because there was not a "situation in any employment", the tribunal should separately consider whether subparagraph (d) applies. This was the approach taken by Upper Tribunal Judge Jacobs in CJSA/4179/1997, with which I agree.

11. The tribunal did not consider subparagraph (d) in this case. In addressing (c), it decided that the request that the Appellant apply for the vacancy was a reasonable one. That finding was directed to the nature of the request. The issue under subparagraph (d) would have been whether the opportunity of employment was reasonable. Paragraph 34757 of the Decision Makers' Guide says

> "The opportunity of employment must be a **reasonable** one. The word reasonable should be given its ordinary meaning, that is, sensible or likely. An opportunity may not be reasonable if there were, for example, over a 100 applicants for the vacancy. If the employment offered a rate of pay below the national minimum wage, it would not be a reasonable opportunity of employment."

12. This illustrates one way in which subparagraphs (c) and (d) may call for different findings. The First-tier Tribunal in this case did not make findings of fact relevant to the specific issues which arose under (d). The tribunal noted the Secretary of State's case that the agency had said that, had the Appellant completed the form correctly, he would have been given details of the employer and what suitable roles there were within the company. That does not of itself answer the question whether the opportunity was reasonable.

13. Moreover if the tribunal had refused the appeal on the application of subparagraph (d) without giving the Appellant an opportunity specifically to address it, this may well have been unfair. The Secretary of State's decision had been made under subparagraph (c), the case had been presented to the tribunal on that basis, and that was what the Appellant had addressed. He may have made different submissions had he known that he had to address a different case. It would not be fair for me to find that the tribunal could have dismissed the appeal under subparagraph (d) without the Appellant having had an opportunity to address it at a fact-finding hearing.

14. For these reasons, I reject the Secretary of State's submission. The tribunal's decision was wrong in law and it must be set aside. I am not in a position to re-make the decision under appeal. There will need to be a fresh hearing before a new tribunal. I should make it clear that I am making no finding about nor expressing a view on the likely outcome of that hearing.

Signed on the original
on 4 February 2016

Kate Markus QC
Judge of the Upper Tribunal