IN THE UPPER TRIBUNAL **Appeal No. CJSA/1897/2014**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal is dismissed.

REASONS FOR DECISION

1. This appeal concerns the Appellant's entitlement to contribution-based Jobseeker's Allowance (JSA). It has taken longer to determine than would normally be the case because of developments after the oral hearing as explained further below.
2. The Secretary of State for Work and Pensions had decided to terminate the Appellant's award of JSA because she had received it for the maximum period of 182 days permitted by section 5 of the Jobseeker's Act 1995. On 17 February 2014 the First-tier Tribunal confirmed that decision. It is common ground in this appeal that this was the effect of section 5.
3. The Appellant appeals on the grounds that section 5 discriminates against her, as a disabled person, contrary to Article 14 of the European Convention on Human Rights in conjunction with Article 1 Protocol 1. When I gave permission to appeal, I made a number of observations including whether I should determine the appeal if the statutory provision cannot be read compatibly with Convention rights and in the light of the inability of the Upper Tribunal to make a declaration of incompatibility. In that respect I referred to two decisions of the Upper Tribunal, SH v SSWP [2011] UKUT 428 (AAC) and AB v SSWP [2013] UKUT 288 (AAC), where the appeals were dismissed in the light of those factors. However I said that I was not at that time persuaded that I should adopt the same approach.
4. In his written reply to the appeal, in addition to opposing the substantive discrimination grounds, the Secretary of State submitted that the proper course was for the Appellant to apply for judicial review. The Secretary of State requested an oral hearing of the appeal, which I directed. In Ms Leventhal's skeleton argument on behalf of the Secretary of State, submitted shortly before the hearing, she submitted that it was open to the Upper Tribunal to determine the appeal but that the Upper Tribunal should not do so given its inability to make a declaration of incompatibility. At the outset of the oral hearing, in the light of the parties having prepared to address the substantive issues, the Secretary of State took the pragmatic position that I should determine the substantive appeal.
5. I reserved my decision on the appeal. Shortly afterwards the Court of Session (Inner House) decided Secretary of State for Work and Pensions v Robertson

[2015] CSIH 82. I invited further written submissions from the parties as to the implications of that judgment for my approach to the appeal including whether the Upper Tribunal had jurisdiction in relation to the discrimination grounds. The parties exchanged written submissions and replies. For the Appellant, Ms Robertson sought to distinguish Robertson and submitted that I should determine the discrimination grounds. For the Respondent, Ms Leventhal submitted that the decision in Robertson means that I have no jurisdiction to determine them. My conclusions are as follows.

6. I have jurisdiction to determine the appeal against the decision of the First-tier Tribunal. Regardless of the merits of the discrimination grounds, I must dismiss the appeal. The Secretary of State's decision that the Appellant's entitlement to contributory JSA ceased after 182 days was based on the correct application of section 5 and the First-tier Tribunal was correct to confirm it. There is no other remedy available in this Tribunal even if the discrimination grounds succeeded because (as the Appellant accepts) no compatible reading of section 5 is possible under section 3 Human Rights Act 1998 (HRA) and the Upper Tribunal cannot make a declaration of incompatibility.

7. It is nonetheless open to me to address the discrimination grounds if I consider that it is appropriate to do so. The Court of Session in Robertson did not decide otherwise. Its focus was on that Court's jurisdiction to consider an appeal against the Upper Tribunal's *obiter dicta.*

8. I have decided that it is appropriate to express my views as to the discrimination ground, albeit that these are *obiter*. I do so because, unlike the position in Robertson which was concerned with secondary legislation in respect of which there was no possibility of a declaration of incompatibility under section 4(4) HRA, in the present case a declaration of incompatibility would *in principle* be available under section 4(2) HRA and, although this Tribunal cannot make one, the Court of Appeal can. I emphasise the words "in principle" because my view is that the discrimination grounds are fundamentally flawed and I do not consider that there is a realistic chance of the Appellant succeeding were she to attempt to take the case further. It may be helpful to the Appellant and her advisers if I explain why I have reached that view. If, despite that, the Appellant decides to pursue her appeal further, my views may assist the Court of Appeal by way of "jurisprudential spadework and analysis" (see Upper Tribunal Judge Wikeley in AB at [24])

9. I note that in general there is no substantial dispute between the parties as to the legal principles relevant to article 14 claims regarding welfare benefits, as explained most recently in (amongst other cases) R (JS) v SSWP [2015] 1 WLR 1449 and Mathieson v SSWP [2015] 1 WLR 3250. There are two respects in which I consider that the discrimination grounds cannot succeed.

10. First, the Appellant's evidence does not show that the 182 day limit places people with disabilities at a disadvantage as compared to others. The Appellant's case is set out in Ms Robertson's skeleton argument as follows: "…the restriction in s5 of the Jobseekers Act 1995 of contributory JSA to 182 days discriminated against her as a disabled person … indirectly because it put her at a disadvantage in comparison with non-disabled people because the available evidence shows, or enables a reasonable inference, that it takes disabled persons longer to secure employment than it would non-disabled persons."

11. The Secretary of State accepts that the evidence relied upon by the Appellant supports her position that the average period of unemployment of disabled jobseekers is longer than that of others, and that generally disabled people face greater barriers to work than non-disabled people. However, this evidence does not assist in understanding how JSA operates. In particular, the statistics relied upon by the Appellant include all disabled people including those who cannot work and therefore do not claim JSA; the statistics relate only to outcomes on the Work Programme, most of the referrals to which take place only after a person has been on JSA for 12 months and so do not easily relate to the 182 day limit; and the statistics provide no information about the outcomes for Work Choice which is a programme for disabled claimants and to which referral is immediate. This specific scheme has been put in place to assist disabled claimants in the light of the barriers to work that they face. These factors all militate against drawing inferences as to discrimination in this case.

12. The above is reinforced by the facts of the Appellant's case. The evidence does not show that, as a result of her disability, the Appellant was disadvantaged by the operation of the 182 day limit. When she became entitled to JSA (on 27 March 2013) she was allocated a specialist Disability Employment Adviser in order to provide her with specialist assistance and support with her job-search. She was initially offered basic IT training which she apparently refused. Her Adviser referred her to Work Choice. Work Choice involves support in finding employment and ongoing support to star and remain in it. The Appellant's specialist Work Choice provider was Remploy, which provides specialist placement services for disabled people. Remploy assisted the Appellant to obtain an offer of employment in August 2013 (ie within six months). It appears that this job offer was withdrawn when the employer discovered that the Appellant had not given the real reason for her leaving her previous employment. Remploy assisted the Appellant to obtain another job which started on 28 November 2013, 2 months after her JSA entitlement had ended. The Appellant resigned from that job after two months. She says it was because of treatment arising from her disability. Remploy assisted her to obtain another position, in which she was still employed at the time of the hearing.

13. This shows that the system worked well for the Appellant and the evidence suggests that it was (at least in part) her own actions rather than her disability which meant that she had not obtained work before the expiry of the six month limit. The Appellant says that it should be inferred that she took longer to obtain work because of her disability, because she cannot otherwise explain why she did not do so earlier. This demands too much and, in any event, the factual premise is simply not supported by the evidence.

14. Second, there is ample evidence to justify the time limit. The Appellant accepts that the 182 day limit was justified when it was introduced in 1995, by reference to what she concedes was (and is) its legitimate aims including to incentivise claimants to seek work, support people back into work, and save money. She does so correctly. The Secretary of State has provided a considerable mount of evidence as to the justification at the time which, in the light of the Appellant's concession, I do not repeat here. But it is clear from that evidence that the impact of the time limit on disabled claimants was expressly considered during Parliamentary debates at that time. A decision was taken that, rather than extend the time limit for claimants with disabilities, additional support would be put in

place to assist those claimants in seeking work. Account was also taken of the availability of other support in the benefits system for people with disabilities.

15. The Appellant's case is that, although the measure was justified at the time, it is no longer justified because there has not been any direct monitoring of the time it takes disabled people to come off contributory JSA. She says that, as the original justification was that the government would assist disabled people to obtain work, it cannot justifiably continue to rely on that without monitoring the success of those measures. Ms Robertson has not referred to any authority to support her submission that failure to monitor the effects of a measure means, of itself, that the measure cannot be justified. Statistics produced as a result of monitoring may well be relevant when considering justification, but it does not follow that lack of monitoring of itself establishes that a measure is not justified. In any event, although there is no monitoring of those who come off contributory JSA by reference to disability, the Secretary of State monitors how disabled people fare as compared to the population of JSA claimants, both within the Work Programme and Work Choice. The information obtained from the monitoring is used by the Department for Work and Pensions to review the support that it provides to disabled claimants.

16. In addition, I do not see how the time limit could in practice sensibly be adjusted to reflect disability-related difficulties. As Ms Leventhal has said, anyone applying for contributory JSA necessarily does not have limited capability for work. Therefore, a different category of disabled claimants would need to be defined for those, like the Appellant, who do not have limited capability for work but are disabled so as to require a longer period of entitlement. Because of the variation in the level and nature of different claimants' disabilities a uniform increase in the time limit for all disabled persons would not be suitable for all claimants, but an extension based on each individual's particular circumstances would be complicated and costly. Moreover, there may be other groups who would also seek different treatment because of barriers which they face in obtaining work, such as the over 50s age group. The Secretary of State is plainly entitled to consider that the best way to accommodate different disability needs of jobseekers (and the additional needs of other groups) is with personalised specialist attention in the form of the non-financial support which I have briefly described (and which continues after the initial six month period has ended), coupled with the availability of income-related benefits for those with a continuing need for financial support and disability-related benefits for those who satisfy the needs-based criteria. Ms Leventhal has referred me to the judgment of Elias LJ in AM (Somalia) v Entry Clearance Officer [2009] EWCA Civ 634 at [63]-[71]. The reasoning there applies similarly in this appeal, taking into account the factors which I have identified above.

Signed on the original
on 11 April 2016

Kate Markus QC
Judge of the Upper Tribunal