IN THE UPPER TRIBUNAL **Appeal No: CE/4448/2014**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal disallows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Leeds on 21 May 2014 under reference SC003/13/02967 did not involve any error on a material point of law and therefore the decision is not set aside.

This decision is made under section 12(1) and 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007

REASONS FOR DECISION

1. I heard an oral hearing of this appeal. The appellant attended and represented himself. The Secretary of State was represented by Mr Cooper, solicitor.

2. The issue on this appeal concerns whether the appellant was notified to attend an appointment for a medical examination on 27 November 2012 in connection with his claim for employment and support allowance. There is no disputing that he did not attend that appointment. The appellant's case, in short, is that the Secretary of State had failed as a matter of law to establish the logically prior legal issue of his being sent written notice of the time and place of the examination at least 7 days in advance, and therefore good cause did not arise.

3. The key part of the law is regulation 23 of the Employment and Support Allowance Regulations 2008 ("the ESA Regs"). This provided at the relevant time as follows:

> "**23.**—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.
> (2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination listed in paragraph (1), the claimant is to be treated as not having limited capability for work.
> (3) Paragraph (2) does not apply unless written notice of the time and place for the examination was sent to the claimant at least 7 days in advance, or unless that claimant agreed to accept a shorter period of notice whether given in writing or otherwise." (I have underlined the critical words.)

4. Regulation 23 is empowered by section 8(3)(c) and 4(a)(iii) of the Welfare Reform Act 2007. These both empower regulations to be made trio make proviso for a person being "called to attend for…medical examination" in connection with determining whether he has limited capability for work.

5. The appellant's case is a simple one. It is that the Secretary of State had failed to discharge the onus of showing that written notice of the time and place for the examination had been sent to the appellant at least 7 days in advance of the appointment on 27 November 2012.

6. The Secretary of State relied on a screen print titled *View Letter History* printed on 10 May 2013. This gave the appellant as the "client" and gave his national insurance number. It listed in columns: **Referral**, **Letter Type**, **Date Triggered,** the appellant as the **Addressee** and the correct **Address** for the appellant. Most relevantly, an *Appointment letter* was set out under **Letter Type**, and next to it a **Date Triggered** of 14 November 2012, with the **Addressee** as the appellant and the address as his postal address.

7. Above this in the column entries on the *View Letter History* was a Letter Type BF223. This had a Date Triggered of 28 November 2012 with the appellant as the addressee and his address given under the Address column.

8. A corresponding screen print page was titled *View Examination History*. This again had the appellant's name and national insurance number at the top. It has a **Request Made** column under which there is an entry '14 Nov 2012 12:46'; a **Request Expires** column with the same '14 Nov 2012 12:46' information in the same part of the table; an **Appointment Made** column with a relevant entry '14 Nov 12:50; an **MEC** (medical examination centre) with the entry 'Grimsby MEC (o454); an **Appointment Time** column with an entry '27 Nov 2012 15:05' across from the Appointment Made entry of 14 Nov 2012; and an **Outcome** column with an entry at the relevant place 'DNA' (did not attend).

9. The Secretary of State's case is and was that the relevant entries on the *View Letter History* show that an appointment letter was sent to the appellant at his address on 14 November 2012, and when read with the corresponding part of the *View Examination History* page this was for an appointment at the Grimsby Medical Examination Centre on 27 November 2012 at 3.05pm, which the appellant did not attend (which is accepted). He prays in aid that the appellant did get the follow-up BF 223 form sent on 28 November 2012 as the appellant replied to that form.

10. The appellant's case in response is that the evidence in the *View Letter History* was not sufficient to show that an appointment letter had in fact been sent within 7 days of the appointment on 27 November 2012, even on a balance of probabilities test. The computer screen shot of the *View Letter History*, he argued does not adequately prove that, per regulation 23(3) "written notice…was sent". A copy of the actual appointment letter should have been produced as evidence on his

appeal together with evidence of posting of the letter (to show it was sent within the statutory 7 days before the appointment date). As adequate proof of posting or sending the appellant argued that, for example, the official who posted or otherwise sent the appointment letter should have provided a witness statement attesting to the method of sending (e.g. in an envelope by first class post) and when that had occurred, or that some other evidence of 'proof posting' be provided. The evidence, as it was, was too poor to prove the appointment letter was sent.

11. He argued further in a witness statement that the computer automatically generates the information that is shown on the screen shot and therefore the *View Letter History* could not even be said to show a proper intention to send a letter. Further, it was common sense that a computer is unable to write, sign, fold, put a letter into an envelope seal that envelope and post it. Those actions needed to be carried out by a person and those actions were not evidenced.

12. In summary, the appellant's case, as he confirmed to me in argument, was that the *View Letter History* as described above could never as a matter of law meet the obligation imposed on the Secretary of State by regulation 23(3) of the ESA Regs.

13. The appellant relied on the decision of Deputy Commissioner Mark (as he then was) in *CIB/4012/2004*. That decision concerned the equivalent provision in regulation 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 ("the IFW Regs"), regulation 8(3). Regulation 8 provided as follows:

> "**8.**—(1) Where it falls to be determined whether a person is capable of work, he may be called by or on behalf of a health care professional approved by the Secretary of State to attend for a medical examination.
> (2) Subject to paragraph (3) where a person fails without good cause to attend for or submit himself to such an examination, he shall be treated as capable of work.

> (3) A person shall not be treated as capable of work under paragraph (2) unless written notice of the time and place for the examination was sent to him at least 7 days beforehand, or unless he agreed to accept a shorter period of notice."

14. Commissioner Mark held that the Secretary of State had failed to prove that written notice of the time and place of the examination had been sent to the claimant at least 7 days beforehand. The appointment letter in question was alleged to have been sent on 16 March 2004 for an appointment on 25 March 2014. It is notable that that was only 9 days before the date of the appointment: here the time-frame is 13 days. Moreover in *CIB/4012/2004* it would seem that the claimant may have moved address shortly before the relevant appointment letter was issued.

15. The Secretary of State in *CIB/4012/2004* argued that regulation 8(3) of the IFW Regs was met if consideration was given to a **SCHEDULING LOG (FORM SL1)**. It was accepted that this form was generated by a computer on 26 March 2004 and was a copy of computer entries as they existed at that date. Commissioner Mark said that he was unable to deduce from the form alone when the claimant's address had been changed to his current address nor could he be certain that the word "issued" (equivalent to "triggered" here) was equivalent to posted, although he said that it might well be appropriate to infer, in the absence of evidence to the contrary, that an appointment letter was posted within a day or so of its being issued. Most significantly, however, the form in *CIB/4012/2004* gave no indication whether the appointment letter, if posted, was sent by first or second class post.

16. Returning to the word "issued on the FORM SL1, Commissioner Mark said he was not clear that a statement that a documents had been issued on a particular date was evidence that it was posted on that date, and the submissions that it had been posted were on their face not *evidence* to that effect. He was not therefore prepared to infer that it had been posted on the same day without evidence to that effect.

17. Moreover, given that the presumption in section 7 of the Interpretation Act 1978 - service is deemed to be effected by properly addressing, pre-paying and posting a letter and, unless the contrary is proved, to be have been effected at the time at which the letter would be delivered in the ordinary course of the post - applied to regulation 8(3), evidence as to when it was posted and by which class of post was needed to establish if it was "served" the required seven days beforehand. In the absence of evidence as to the appointment letter in *CIB/4012/2004* having been sent by first class post, the Commissioner proceeded on the basis that it was sent by second class post. This was taken by him to be on the fourth working day after 16 March 2004. This was 22 March 2004, and as that was only three days before the date fixed for the examination regulation 8(3) of the IFW Regs was not satisfied.

18. Commissioner Mark added:

> "I can see no reason why, in establishing whether the requirements of regulation 8(3) have been met, the secretary of state cannot provide a simple short written statement from the appropriate person giving the date on which the written notice was posted, the time at least to an extent sufficient to show whether or not it would have been collected that day by Royal Mail from the post box, and the address to which it was posted, and also stating whether it was sent by first or second class post. The statement should also confirm that the letter has not been returned undelivered.
>
> It appears to me that in future there should be evidence available from the secretary of state dealing with those issues before a decision maker comes to a decision. If it is not stated whether first or second class post was used, the decision maker should either seek further evidence or assume that second class post was used. If there is a further issue as to whether it was posted to the correct address, as in this case where there has been a change of address, the secretary of state will normally need better evidence of the address to which it was posted than a later computer generated print out showing the address on the file at that later date."

19. The appellant relied heavily on these last two quoted paragraphs from *CIB/4012/2004* as showing why the Secretary of State had failed as a matter of law to satisfy regulation 23(3) in this case.

20. It is important to appreciate, however, that they key to the actual decision in *CIB/4012/2004* was not when the appointment letter was actually sent but, even assuming it had been sent on 16 March 2004, that it could not have been received by (that is 'served on') the claimant 7 days before the appointment for the medical examination on 25 March 2004. Here, by contrast, if the appointment was 'sent' out by post on 14 November 2012, even on the analysis in *CIB/4012/2004* it would have been served in normal course of post (and the First-tier Tribunal did not accept on the facts that anything stood to rebut this presumption given the appellant's general lack of problems with post) at the latest on 20 November 2014 and the appointment was for seven days thereafter.

21. Further, in this case the First-tier Tribunal accepted on the evidence that the appointment letter had in fact been sent on 14 November 2012. The First-tier Tribunal by its directions of 5 September 2013 had asked the Secretary of State to file with the tribunal "…the evidence you rely upon to substantiate the assertion that the appointment details were sent to the Appellant….". The Secretary of State in a supplementary submission received by the tribunal on 12 September 2013 said that the evidence was in the *View Letter History* print out and that this was:

> "..a list of all the forms and letters sent by ATOS, the date when they were sent and the address they were sent to."

The contents of that submission were capable of constituting evidence: see paragraphs 41-42 of *AT –v- SSWP* [2015] UKUT 592 (AAC). That evidence provided a proper basis for the First-tier Tribunal finding as fact that the relevant appointment letter had been sent to the appellant on 14 November 2012, and service had been effected.

22. The appellant's argument on this appeal to the Upper Tribunal is not with whether, if the letter had been sent on 14 November 2012, the First-tier Tribunal was entitled to conclude that, pursuant to the presumption under section 7 of the Interpretation Act 1978, it had been

served in time. His argument as set out above was a more fundamental one, namely that the evidence before the First-tier Tribunal could not as a matter of law have led it properly to conclude that the relevant appointment letter was sent on 14 November 2012. That argument has to be rejected, in my judgment, for the following reasons.

23. First, I do not consider that *CIB/4012/2004* lays down any fixed rule of **law** as to what amounts to adequate evidence of the notice requirement in regulation 23(3) having been met. The last quoted paragraphs from that decision set out in paragraph 18 above do no more in my judgment than suggest what might be best or good evidential practice. As with any issue of evidence – here whether the appointment letter was sent 7 days in advance of appointment for the medical examination – the fact-finding decision maker will need to base its decision on the evidence before it and the weight it considers that evidence is due.

24. Second, unlike *CIB/4012/2004*, in this case the First-tier Tribunal had evidence before it – set out in paragraph 21 above – that the date given in the *View Letter History* was the date the appointment letter was sent.

25. Third, in *AL –v- SSWP* [2011] UKUT 512 (AAC) (CE/909/2011), Upper Tribunal Judge May QC accepted that another First-tier Tribunal was entitled to make a finding that an appointment letter had been sent based on virtually identical evidence to that in issue here. The Secretary of State's argument to the Upper Tribunal in that case included the following (at paragraph 7 of his submission):

> "In the instant case the evidence at page 33 is a print out from the Medical Service Records System (MSRS). Instead of a title open to many interpretations ("Scheduling Log (Form SL1)", the print at page 33 is clearly and unequivocally entitled "View Letter History". It contains the date that the case was referred for a letter (31 March 2010) The letter type ("appointment letter") the date that letter was triggered (9 April 2010 – 18 days prior to the appointment date), to whom it was sent ("client") and the address " XXX Street etc..."). I submit that it is clear that this is a list of letters that had been sent to

> the claimant. I further submit that the fact that the word "triggered" was used should not mean that it is uncertain whether that letter was posted; this is a list of letters that were issued." (my underlining).

26. Permission to appeal had been given in that case on:

> "…whether the tribunal was entitled to rely (as it needed to) on document 33 (without supporting other evidence) as evidence that a letter was properly addressed, pre-paid and posted, when on the face of it it appears only to suggest that on a certain day, someone sought to "trigger" the issue of a particular type of letter to a particular person at a particular address and says nothing about its subsequent despatch."

The argument made for the claimant in *AL* was (a) that document or page 33 only indicated an intention to send a letter and not that a letter had been sent, and (b) the word "triggered" indicated an automatic process to generate a letter was put in train but did not suggest a letter was posted.

27. Rejecting those arguments of the claimant and accepting those of the Secretary of State, Judge May concluded:

> "I am persuaded that the tribunal were entitled to make that finding. I accept the Secretary of State's submission in the last sentence of paragraph 7 of his submission and I am not persuaded that the tribunal were required to place the limiting effect of that evidence that is suggested in the Upper Tribunal Judges' grant of permission to appeal."

Judge May's acceptance is of the passage I have underlined in the quotation in paragraph 25 above. The appellant's submission effectively asks me to depart from this Upper Tribunal decision. I am not persuaded there is good reason for me to do so.

28. Fourth, and to similar effect, in *SH–v-SSWP* (ESA) [2014] UKUT 574 (AAC) (CE/3989/2012), Upper Tribunal Judge Ward after a lengthy consideration of exactly the same issue as arises in this case concluded in paragraph 36 that:

> "In the present case, we are not concerned with some of the more detailed complications as to timing, or the addresses used, which needed to trouble Judge Mark, particularly in his earlier decision [CIB/4012/2014]. There may well be cases which merit the more detailed approach to the provision of evidence which was needed in [CIB/4012/2014]..... But I accept the tendency reflected in both Judge Mark's later decision [*CT-v- SSWP* (ESA) [2013] UKUT 0414 (AAC)] and that of Judge May [in *AL –v- SSWP* [2011] UKUT 512 (AAC)] that in the more straightforward case – and where a claimant has the opportunity of rebutting receipt - printouts of the type in issue are capable of providing evidence from which a tribunal may draw inferences that a document was "sent". It is then for the tribunal of fact to decide what weight to put on it." (my underlining added for emphasis).

29. Just as with Judge May's decision, for me to favour the appellant's argument would require me to disagree with Judge Ward's decision in *SH* (taken after very full analysis) and I can see no good reason to do so. As in *SH*, the appellant's case is a four square challenge to the adequacy of the *View Letter History* printout as showing the relevant appointment letter was sent at all and does not raise any issue about whether the correct address was used or timing *if* the appointment letter was sent.

30. For all of these reasons, this appeal is dismissed and the tribunal's decision of 21 May 2014, upholding the Secretary of State's decision of 8 December 2012, stands as the determinative decision on the appeal.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 11th April 2016