DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the Colchester First-tier Tribunal dated 2 December 2015 under file reference SC133/15/00355 does not involve any error of law. The decision of the First-tier Tribunal stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

The real issue in this case

1. The real issue in this case is whether or not the Appellant had been actively seeking employment for the 10-day period in question.

2. A subsidiary issue in this case is what a Tribunal should do when the Secretary of State's written submission on the Appellant's appeal is, as the District Tribunal Judge who gave the Appellant permission to appeal to the Upper Tribunal put it, "lacking but not completely deficient and the decision is known but the grounds for it are less than crystal clear".

The background to the appeal to the First-tier Tribunal

3. The Appellant had been in receipt of jobseeker's allowance since February 2009 (for all bar five months). He had previously been "sanctioned" on "actively seeking employment" grounds on several occasions. He may well, of course, have successfully appealed against such "sanctions", but the file does not reveal this.

4. On 6 November 2014 a Jobcentre Plus decision-maker decided that the Appellant "was not actively seeking employment and cannot be treated as actively seeking employment in the weeks from 30/09/2014 to 13/10/2014 (both dates included)" (p.13). The Appellant wrote challenging that decision.

5. On 14 April 2015 the DWP sent the Appellant a mandatory reconsideration notice. This letter stated that the decision of 5 November 2014 (sic) had been looked at again but the decision had not been changed. This letter stated that the decision was "to disallow your Jobseeker's Allowance because you were not actively seeking employment and cannot be treated as actively seeking employment during the period from 3/10/2014 to 13/10/2014 (both dates included)" (emphasis added; I return later to the discrepancy over dates). The Appellant lodged an appeal.

6. The Secretary of State's representative provided a response to the appeal which referred to the decision of 6 November in terms of it being a supersession of an earlier decision to award jobseeker's allowance (JSA). I return to the exact status of the decision later. The response also re-asserted that the Appellant had not been actively seeking employment between 3/10/2014 and 13/10/2014. The Secretary of State's response concluded with this statement:

> "18. Should the Tribunal decide that [the Appellant] was actively seeking employment for the period from 3.10.2014 to 13.19.14, it is submitted that this will not be sufficient to award JSA for the period. [The Appellant] is also required

> to enter into a Jobseeker's Agreement before he is entitled to JSA and he has not agreed a jobseeker's agreement for the period in question."

The First-tier Tribunal's decision

7. The First-tier Tribunal ("the Tribunal") confirmed the Secretary of State's decision and so dismissed the appeal. In the decision notice, issued on the day of the hearing, the Tribunal summarised its reasoning as follows:

> "[The Appellant] clearly has difficulties with the Job Centre, whom he blames squarely for his situation, including the fact that withholding his benefits meant that his calorie intake was reduced, thus making him physically disadvantaged in the job market. He had been banned from the Job Centre, and said he received no help or support, rather sanction upon sanction. Despite the Tribunal's patient attempts to obtain details and evidence from him, his only evidence to the point was that he had taken the steps that he thought best. He was unable to give details, but continued to say that he understood he had not made a valid claim in the first place. He is clearly of the view he is being punished by the DWP. [The Appellant] was unable to give the Tribunal any information to support his contention that he had carried out a sufficient job search. There was no alternative but to dismiss the appeal."

8. The Tribunal's subsequent statement of reasons was in similar terms but with rather more by way of detail.

9. It is also right to note that in both the decision notice and the statement of reasons the Tribunal commented on the poor quality of the Secretary of State's written submission. In addition, the DWP had not sent a presenting officer to the Tribunal hearing.

The grounds of appeal

10. The Appellant then applied for permission to appeal to the Upper Tribunal, setting out 10 grounds of appeal. The first two, by way of example, related to (i) paragraph 18 of the Secretary of State's response (see paragraph 6 above); and (ii) the poor state of that submission.

11. The District Tribunal Judge gave the Appellant permission to appeal, noting that the appeal raised the question as to what was a proportionate approach to a case where the Secretary of State's response was "lacking but not completely deficient and the decision is known but the grounds for it are less than crystal clear". He asked whether the Tribunal should adjourn or proceed in such a case. Or rather was it all a question of fact and degree and could the Tribunal "on occasion safely proceed without committing an error of law if presented with an inadequate appeal response, provided they explain why, and test the appellant's evidence?"

12. Mrs F. John, for the Secretary of State, resists the appeal to the Upper Tribunal; in summary, she argues the Tribunal's treatment of the issues in dispute was sufficient and sustainable on the evidence it had before it.

The relevant law

13. The core conditions for entitlement to JSA are contained in section 1 of the Jobseekers Act 1995 ("the 1995 Act). They include the three "labour market conditions", namely that the claimant (1) is available for employment; (2) is actively seeking employment; and (3) has entered into an extant jobseeker's agreement (the

1995 Act, section 1(2)(a)-(c)). Unless treated as having met the condition in question, the claimant must each of those three conditions.

14. If any one of those three conditions is not met, then the claimant is simply not entitled to JSA, i.e. s/he does not qualify for JSA. Strictly, it is not the case that the claimant is "sanctioned". Technically, a sanction applies where an award of JSA would otherwise be made (see e.g. sections 19 and 19A of the 1995 Act).

15. Section 7(1) of the 1995 Act provides as follows:

> "For the purposes of this Act, a person is actively seeking employment in any week if he takes in that week such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment."

16. In addition, regulation 18(1) of the Jobseekers Regulations 1996 (SI 1996/207, as amended) declares that:

> "(1) For the purposes of section 7(1) (actively seeking employment) a person shall be expected to have to take more than two steps in any week unless taking one or two steps is all that is reasonable for that person to do in that week."

17. The case law supports two clear propositions in relation to this legislation.

18. The first is that it is for the claimant to show that he is actively seeking employment, but that a tribunal cannot reject his evidence simply because it is uncorroborated (see the decision of Mrs Commissioner Brown in the Northern Ireland cases of C1/00-01 (JSA) and C2/00-01 (JSA)).

19. The second is that the focus of the inquiry must be on what the claimant actually did by way of job search, and its reasonableness in all the circumstances, and not on what he did *not* do – so whether or not each of the particular steps set out in the jobseeker's agreement was carried out is not determinative (see unreported decisions CJSA/1814/2007 and CJSA/3416/2009).

Upper Tribunal's analysis

The central issue in the appeal

20. Whatever the undoubted deficiencies in the Secretary of State's written submission on the appeal, the fundamental issue for the Tribunal to decide was clear. The question was whether or not the Appellant had been actively seeking employment for the period in dispute. The Appellant can have been under no illusion about that. Both the mandatory reconsideration notice and the submission itself were at least clear about the question to be decided. As the submission concluded, "what the tribunal has to decide is whether [the Appellant] was actively seeking work in the period 3.10.14 to 13.10.14 (both dates included) and, if not, whether he can be treated as actively seeking work in either or both weeks during that period."

21. There is, moreover, no suggestion that the Appellant fell within any category of a person who could be *treated* as actively seeking work. It followed that the Tribunal had to determine whether he was *actually* actively seeking employment at the relevant time.

22. The short answer to this appeal is that this was ultimately a question of fact for the Tribunal to assess. It is plain from the record of proceedings, the decision notice and the statement of reasons that the Judge was entirely unimpressed by the

Appellant's account as to his job search activity. That was an assessment of fact which was sustainable on the evidence.

The inadequacies of the Secretary of State's submission

23. The Tribunal recognised three main failings in the Secretary of State's submission. First, the decision itself was unclear. Second, the submission relied on a jobseeker's agreement which post-dated the decision under appeal. Third, the decision-maker had announced that – whatever the outcome of the appeal – JSA would not be paid (see paragraph 18 of the submission, referred to at paragraph 6 above). Did these weaknesses matter? I conclude they do not, for the following reasons.

24. As to the first failing, the Tribunal did not specify in what particular respect the decision lacked clarity. However, there are two obvious ways in which the decision was less than clear.

25. The first was that the commencement date for the decision was unclear given the conflict between the start date for disentitlement on the original decision (given as 30 September 2014) and the later date cited in the mandatory reconsideration notice and in the submission (stated as 3 October). The answer to that probably lay in a letter from the DWP that the Appellant produced at the hearing. The DWP letter dated 10 October 2014 was a separate decision letter stating that (i) the Appellant had not satisfied the labour market conditions for the period from 8 July 2014 until 2 October 2014; and (ii) he had not shown good cause for the delay in making the claim over the same period. Presumably it therefore followed that the effective start date for the subsequent decision on 6 November was actually 3 October 2014. However, the lack of clarity over the relevant start date had no material impact on the issue the Tribunal had to decide.

26. The other way in which the decision lacked clarity concerned its precise status in decision-making terms. The decision under appeal dated 6 November 2014 was described in the Secretary of State's response to the appeal as being a supersession decision. Although I have not had detailed argument on the point, it appears in fact to be a revision decision on any grounds, being taken within a month of the decision dated 10 October 2014 referred to in the previous paragraph. As such, it would have been on the Appellant to show he was actively seeking employment, rather than for the Secretary of State to establish that he had not been doing so (and hence show a ground for supersession). Given the strong terms of the Tribunal's findings, I do not find that this lack of clarity caused any unfairness or injustice.

27. The second weakness in the Secretary of State's submission was that it relied on a jobseeker's agreement which, on the face of it, post-dated the decision under appeal. The submission referred to a jobseeker's agreement ("My claimant commitment") on file dated 19 November 2014, i.e. about a fortnight <u>after</u> the decision under appeal. The Appellant had added under his signature the phrase "SIGNED UNDER DURESS". The Appellant brought to the hearing copies of two earlier jobseeker's agreements dated 15 November 2013 and 17 March 2014. The Tribunal referred to the latter agreement in its statement of reasons. Mrs John, who now acts for the Secretary of State, argues in her submission to the Upper Tribunal that the agreement dated 19 November 2014 was in fact the relevant agreement. She points out that the fact that the Appellant had been banned from attending at his Job Centre had probably resulted in a delay in its completion, but that there was power under statute to backdate such an agreement (see section 9(11) of the 1995 Act). However, whether or not the Tribunal directed its mind to the correct

agreement, the differences between the terms of the two agreements are relatively minor. There is no suggestion that the appeal failed because of an omission on the part of the Appellant to carry out a step which was included in the non-operative agreement. Rather, the Tribunal (correctly) addressed the issue of reasonableness in the round, as required by case law, and found the appeal failed on that basis.

28. The third weakness in the submission was the rider at the end (i.e. in paragraph 18 of the submission) to the effect that JSA would not be paid in any event. This clearly exercised the Appellant, who wrote to the Tribunal before the hearing, asking what the point of the appeal was in those circumstances (p.20). In fact the statement at paragraph 18 of the submission was a cack-handed way of the decision-maker making the point that the three labour market conditions are independent and cumulative. Entitlement depends on each being satisfied in turn. In the event there was arguably no problem with the jobseeker's agreement, given the power to have it backdated. There is also a procedure for challenging the terms of a jobseeker's agreement (see section 9(6) of the 1995 Act). Be that as it may, as Mrs John argues, whilst paragraph 18 of the submission may have been unhelpful and indeed confusing, it did not divert the Tribunal from its focus on the substance of the appeal, namely whether the Appellant had been actively seeking employment in the fortnight in question.

29. So the Secretary of State's submission was rightly found wanting in several respects. However, the fundamental purpose of an appeal to the First-tier Tribunal in the Social Entitlement Chamber is not to rank the Secretary of State's submission by way of a pass or fail mark. The purpose of the appeal is to determine the appellant's entitlement to benefit. A clear submission may well aid that process. A weak submission may well hinder it. However, whatever the weaknesses of this particular submission, it is obvious that the Tribunal kept its focus firmly on the issue to be determined. There was no breach of natural justice or other procedural unfairness. The Appellant knew the case he had to answer and the Tribunal asked appropriate questions in the exercise of its inquisitorial jurisdiction. So where does this leave the Appellant's ten grounds of appeal?

The Appellant's grounds of appeal

30. The first ground is a complaint about paragraph 18 of the Secretary of State's submission. That grounds fails – see the explanation at paragraph 28 above.

31. The second ground was the poor state of the Secretary of State's submission overall. That ground is also dismissed, for the reasons at paragraphs 23-29 above.

32. The third ground was the alleged prejudice to the Appellant caused by the reference to other "sanctions". There is nothing in this – the Tribunal's reasons make it clear that it properly considered the Appellant's steps in the period under review.

33. The fourth ground was the decision-maker's failure to produce evidence of six job vacancies which were said to be advertised. This was undoubtedly another weakness in the submission. This ground might have had more purchase if the Appellant was actually being sanctioned for failing to apply for a specific notified vacancy (under section 19(2)(c) of the 1995 Act). However, it ignores the fact that the focus was rather on what steps the Appellant had taken in the relevant period, not what steps he had not taken, and he failed to satisfy the Tribunal on that count.

34. The fifth ground was that the Tribunal was said to have ignored the Appellant's case that he had taken reasonable steps. However, this is an attempt to re-argue a question of fact and discloses no legal error.

35. The sixth ground was a complaint that the Tribunal was rushed. However, the record of proceedings showed the Appellant was given sufficient opportunity to make out his case.

36. The seventh ground relates to the post-dated jobseeker's agreement; this ground goes nowhere for the reason explained at paragraph 27 above.

37. The eighth ground relies on Commissioner's decision CJSA/1814/2007. However, the Tribunal's approach is consistent with the principles set out in that decision.

38. The ninth ground is really a restatement of the second ground of appeal. The Appellant also argues that he should somehow have been given the benefit of the doubt. However, that is inconsistent with the principles underpinning entitlement to benefit.

39. The tenth ground refers to the difficulties the Appellant had with the Job Centre. The Tribunal was clearly alive to those problems, but still found the Appellant had not shown he was actively seeking employment. Again, this was ultimately a question of fact, not law.

Conclusion

40. For all these reasons, the decision of the First-tier Tribunal does not involve any material error of law. I must therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 13 June 2016

Nicholas Wikeley
Judge of the Upper Tribunal