IN THE UPPER TRIBUNAL **Appeal No: CJSA/4095/2014**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Havant on 29 May 2014 under reference SC201/14/00111 involved an error on a material point of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. The Upper Tribunal's decision is to allow the appeal and set aside the Secretary of State's decision of 17 October 2013, with the consequences that jobseeker's allowance remains payable to the appellant for the period from 11 October 2013 to 9 January 2014 (subject to any offset for employment and support allowance already paid for the same period).

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

REASONS FOR DECISION

1. There is little to commend the Secretary of State's approach to his decision making function and his role as respondent on this appeal both before the First-tier Tribunal and on the further appeal to the Upper Tribunal. At its heart the appeal concerns a failure of the Secretary of State to have regard to, and/or put before the First-tier Tribunal, his own guidance which, on its face, ought to have led to the appellant not being sanctioned for failure to participate in the "Mandatory Work Activity Scheme". That guidance said, in terms, that those already working in a voluntary capacity should not be referred to the scheme.

2. The Supreme Court in *R(Reilly and Wilson) –v- SSWP* [2013] UKSC 68, [2014] AC 453; [2014] AACR 9, laid down that the Secretary of State is under a common law duty as a matter of fairness to ensure that claimants have access to sufficient information about a 'work for your benefit scheme' to which they might be referred before they are referred to enable them to make representations about its suitability: see paragraphs 63-65 and 74-75 of that decision. This as the Court of Appeal later put it in *SSWP –v- Jeffrey and Bevan* [2016] EWCA Civ 413 is a "simple proposition about administrative fairness". It includes telling claimants about the terms of a policy that might affect them: paragraph 168 *Jeffrey and Bevan*. This echoes the view of the Court of Appeal in paragraph 43 of its judgment in *B-v- SSWP* [2005] EWCA Civ 929; *R(IS)9/06* (when dealing with a then internal DWP policy concerning the enforcement of recovery of recoverable overpayments of social security benefits) that "it is the antithesis of good government to keep [the policy] in a departmental drawer". I will refer to this aspect of administrative fairness as the "prior information duty".

3. The legal consequences of breach of the prior information duty will depend on the facts of the individual case. As the Supreme Court explained in paragraph 75 of *Reilly and Wilson*:

> "A failure to see that a claimant was adequately informed before service of a notice under regulation 4 would be likely to, but would not necessarily, vitiate the service of the notice. That would depend on whether the failure was material. Public law is flexible in dealing with the effects of procedural failures. Ultimately the issue must be determined by reference to the justice of the particular case. If the effect of the lack of information given to a claimant materially affected him or her by removing the opportunity of making representations which could have led to a different outcome, it would normally be unjust to allow the notice to stand. If it was immaterial on the facts, justice would not require the notice to be set aside."

4. On the facts in this case it seems, to use the analogy from *B*, the keys to the departmental drawer may not even have been made available to the Secretary of State's decision maker who made the decision under appeal. Had the keys been available then it is difficult to understand the rational basis of the Secretary of State's decision to refer the appellant to the Mandatory Work Activity scheme given his guidance saying that such a result should not obtain. This error was then compounded by the Secretary of State breaching his duty under rule 24(4)(b) of Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to provide the First-tier Tribunal with "copies of all documents relevant to the case…" (*ST-v-SSWP* [2012] UKUT 469 (AAC) (not doubted on this point by the three-judge panel in *FN –v- SSWP* [2015] UKUT 670 (AAC))), and so led the First-tier Tribunal in its decision of 29 May 2014 ("the tribunal") to err materially in law, because the relevant guidance was not provided to the tribunal.

5. The context is that the appellant as a claimant of jobseeker's allowance ("JSA") was selected to participate in the Mandatory Work Activity Scheme on 21 August 2013 under the regulation 3 of Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 ("the MWA Regs"). As part of this, the appellant was referred to "ATOS" and through, or as part of, them "Pinnacle People Limited". Save for the point on which this appeal turns, no issue arises as to the lawfulness of this referral, and the scheme itself has been held to be *intra vires* by the Court of Appeal in *Smith –v- SSWP* [2015] EWCA 229.

6. The scheme under the MWA Regs is described in regulation 2 of the MWA Regs as being "designed to provide work or work-related activity for up to 30 hours a week over a period of four consecutive weeks with a view to assisting claimants to improve their prospects of obtaining employment". It is thus, by design, only for limited period. Pursuant to regulation 4 of the MWA Regs, on 23 August 2013 Pinnacle People Ltd notified the appellant that he was to begin work as a volunteer with the Salvation Army in Cosham on 2 September 2013. The work was for 30 hours each

week and, consistent with the *vires* of the scheme, was to last for a period of four weeks. The referral letter told the appellant that if he failed to take part and the DWP decided to sanction his JSA, it would not be paid for 13 weeks for a first failure. The letter also said that the appellant's case would be referred to a DWP decision maker if (and this seemed to be an attempt to explain what was meant by "failed to take part"): (i) he did not start the placement, (ii) having started, he failed to attend the placement throughout the four week period, (iii) he was dismissed from the placement, (iv) or he did not carry out the activities he was asked to do on the placement.

7. The appellant's case was referred to the DWP. Given the basis on which I am deciding this appeal, I need not refer in any detail to the allegations made against the appellant or his response to them. In short, it is said he was asked to leave the placement as it was alleged he was upsetting other volunteers. The appellant contested this and argued in his 'good reason' letter that he did not believe he was rude and had only criticised another volunteer because she was making it impossible for him to do his work properly. He explained he had worked in charity shops voluntarily for at least ten years. He then added, critically for the purposes of this appeal, that:

> "In fact, I was forced to give up my work for Sue Ryder to do this ridiculous "Mandatory Work Activity."

8. This led to the 17 October 2013 decision which was then appealed to the tribunal. The decision held that a 13 week sanction was to be imposed from 11 October 2013 to 9 January 2014 because the appellant had failed, without good reason, to participate in Mandatory Work Activity. It relied on regulations 6, 7 and 8 of the MWA Regs. It was wrong to do so because as a matter of fact regulations 7 and 8 of the MWA Regs had been revoked with effect from 22 October 2012 under the Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012. Nothing material turns on this error on this appeal. The relevant applicable

provisions were contained in section 19(2)(e) of the Jobseekers Act 1995 and regulations 69 and 70B of the Jobseeker's Allowance Regulations 1996. The effect of these provisions is to provide for a sanctionable failure where a claimant "without a good reason fails to participate in the [Mandatory Work Activity Scheme]".

9. The case before me has proceeded on the basis that the point at which the prior information duty can sound in the appeal structure for social security appeals under section 12 of the Social Security Act 1998 is (only) at the stage where a sanction decision is made pursuant to section 19 of the Jobseekers Act 1995. I have not heard any argument on this point and so will proceed on the basis that this is correct. Such a sanction decision was made here and was appealed, and no-one disputes the point can be taken in showing "good reason" for not participating in the MWA Scheme.

10. (Whether the decision to select a claimant for participation in the Mandatory Work Activity Scheme under regulation 3 of the MWA Regs or a requirement to participate in the scheme under regulation 4 of the MWA Regs short of any sanction is appealable will need to be decided in a case in which the issue arises as being relevant. The Supreme Court's decision in *Reilly and Wilson* arose on judicial reviews and therefore allowed that court to deicide, had it been necessary to its decision, that the notice requiring Mr Wilson to participate in his 'work for you benefit scheme' (i.e. the equivalent of a notice under regulation 4 of the MWA Regs) would have been held invalid and ineffective as a matter of law on the judicial review because of the failure to provide Mr Wilson with adequate information about the scheme.)

11. What then was the prior information here? Reading the Secretary of State's appeal response to the tribunal does not assist. Nor was the tribunal otherwise made aware of such information, and the appellant was not aware of it. At best, in his application for permission to appeal the appellant articulated an argument that the tribunal had erred in law

in not satisfying itself that why the placement with the Salvation Army was more likely to meet the statutory purpose of improving his prospects of obtaining employment compared to his voluntary work in the Sue Ryder shop. The appellant was given permission to appeal but even at the stage of the Secretary of State's first written submission to the Upper Tribunal he made no reference to any policy he held relevant to referring those already working as volunteers to mandatory work activity.

12. It was only when Mr Turville of Oxfordshire Welfare Rights came on the scene to assist the appellant with his submissions on the Upper Tribunal appeal that the existence of such a policy became apparent. It was contained in paragraph 18 of the DWP's *Mandatory Work Activity Guidance* (only disclosed, it seems, under the Freedom of Information Act 2000), dated it would seem from July 2012[1]. Paragraph 18 said:

> "Given the policy intent of MWA, the following claimants must **not** be considered for referral to MWA:
>
> - currently working (paid or voluntary)
> - undertaking employment related study/training
> - taking part in or recently completed another employment measure (contracted or non-contracted) aimed at helping them move closer to the labour market"
>
> (the emphasis on the "not" is in the original)

13. Mr Turville accepted (rightly) that this guidance could not bind the tribunal. He argued, however (again rightly in my view) that the appellant was entitled to have the tribunal have regard to this guidance when deciding whether he had been properly referred to the MWA Scheme and whether he had good reason for not participating in the scheme. The appellant had been denied this by the failure of the Secretary of State to make this guidance available to the tribunal. It was

[1] Or perhaps January 2012 – see paragraph 13 below.

suggested on the appellant's behalf that in the light of this guidance the correct decision ought to have made was:

> "The appellant had good reason for failing to participate in the scheme because the DWP Mandatory Work Activity Guidance para. 18 clearly stated that he should not have been considered for referral because he was already undertaking voluntary work."

I agree with all of these submissions and the result proposed.

14. The appeal before the Upper Tribunal became bogged down (arguably wrongly) in questions of stays arising from the appeal to the Court of Appeal that ended up in the *Jeffrey and Bevan* decision referred to above, and the force of the paragraph 18 guidance argument was somewhat lost (a perspective to which I am afraid I probably contributed). Once back in focus, however, it took some time for the Secretary of State to address the relevance of paragraph 18 of the 2012 guidance. At one point he even went so far as to try and withdraw from the appeal, a stance from which he resiled when it was pointed out to him that it was not his appeal to withdraw.

15. Eventually, however, and with the benefit of advice from counsel, the Secretary of State filed a letter consenting to the appeal being allowed. This was on the basis that he was not in a position to provide evidence that paragraph 18 of the DWP *Operational Instructions – Procedural Guidance – Mandatory Work Activity – January 2012* (the same guidance Mr Turville had relied on) was specifically referred to by the DWP Advisor when referring the appellant to the Mandatory Work Activity Scheme on 23 August 2013. The breadth and basis of this concession if this is where the letter had ended was unclear as it did not indicate what the correct decision ought to have been had the guidance been referred to.

16. The Secretary of State's letter went on, however, to accept that the guidance stated that those already in voluntary work should not be referred and that it was known by the relevant DWP advisor and his manager that the appellant was already working as a volunteer when he referred the appellant to mandatory work activity in August 2013. The Secretary of State argued that a failure to follow guidance does not automatically give rise to a good reason not to participate in an employment scheme. Such a failure would only affect the sanction if it was material, but it **was** material here. I read this as meaning, particularly in the context of the reference the letter makes to *Reilly and Wilson*, that it is accepted that (a) had the failure not occurred then the appellant would not have been referred (either because the Secretary of State would have followed his own guidance or would have been persuaded to do so on representations from the appellant), and/or (b) the appellant had good reason for not participating in the scheme (because he ought not have been referred to it in the first place).

17. In my judgment both acceptances of the Secretary of State are well made and properly reflect the correct legal analysis to be applied to the facts of this case, and it is on this basis that I allow this appeal in the terms suggested by the appellant and give the decision above. Put shortly, had the proper regard been had to the 2013 guidance then the appellant ought not to have been referred to the Mandatory Work Activity Scheme in August 2013, but having been (wrongly) referred he had good reason for not participating in the scheme because he ought never have been put on it.

18. Before leaving this decision I wish, however, to comment on two other matters.

19. The first arises from the Secretary of State's comment in his most recent letter that the relevant MWA Guidance for decision makers changed on 5 September 2013 (so it is said – I have not myself seen the new guidance) so as to preserve discretion in the Secretary of State in

appropriate cases to refer to the MWA Scheme those already working voluntarily. That may be so, but it does not excuse the Secretary of State's failure in not having regard to his own guidance in the first place or his acting unlawfully in not providing the First-tier Tribunal with the guidance. I know not why it was only obtained under a Freedom of Information request.

20. It is, however, in my judgment difficult to conceive of a more clear cut example of administrative fairness than the need to have the plainly relevant guidance that applied in this case put before the First-tier Tribunal (if, that is, it had not been followed by the Secretary of State and there was then needed argument to be made as to why that guidance ought not to apply). The decision in *FN* referred to above does not, it seems to me, mean that a First-tier Tribunal will not err in law – in terms of natural justice and the right to a fair hearing – where it faithfully and properly (on what is before it) decides the appeal on the evidence that is before it if it is later shown that other relevant evidence was available and ought to have been before it (see further paragraph 9 of *CE/2864/2015*).

21. I would further suggest that these observations may apply equally to the more nuanced guidance in place since September 2013 (or whatever guidance may now be in place), as the *Reilly and Wilson* requirement of administrative fairness still requires the First-tier Tribunal on any appeal to assess for itself whether the claimant had been properly referred under any relevant guidance and whether they had good reason for not participating in the scheme.

22. The second observation concerns the suggestion made by the Secretary of State in his letter consenting to the appeal being allowed that an appeal against sanction is not the "only" way in which an individual claimant can seek to challenge a referral to the MWA Scheme. As an alternative, it is said that a claimant can make a complaint to the Independent Case Examiner (ICE). I recognise that that route might

provide some form of remedy, but it cannot decide questions of entitlement and payability under the social security schemes nor is it subject to the important requirements and protections provided for in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

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

Dated 25th July 2016