IN THE UPPER TRIBUNAL **Appeal No. CE/1517/2016**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal is dismissed.

REASONS FOR DECISION

1. This appeal arises from a decision by the Secretary of State for Work and Pensions dated 11 September 2014, that the Appellant was no longer entitled to income-related Employment and Support Allowance from 7 March 2014 because he had capital over the statutory limit of £16,000.

2. The relevant statutory provisions are found in the Welfare Reform Act 2008 and the Employment and Support Allowance Regulations 2008 (ESA Regulations):

    a. Schedule 1 paragraph 6 of the Act and Regulation 110: a claimant is not entitled to income-related ESA if they have capital over £16,000.

    b. Regulation 115(1): a claimant is treated as possessing capital of which he or she "has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance."

3. The Appellant had been in receipt of income-related ESA since January 2013. On 7 March 2014 he received a sum of £26,426.61 from a divorce settlement. On 26 March 2014 he made two payments of £6000 to his parents. He said that these were made to repay loans which they had made to him. On 9 April 2014 he paid £5760 to his landlord, by way of one year's rent in advance. The Secretary of State decided that all the payments had been made in order to bring his capital below £16,000 and so secure entitlement to ESA. As a result he was treated as possessing that capital and was not entitled to ESA.

4. The Appellant appealed to the First-tier Tribunal. Following a hearing on 2 February 2016 the tribunal dismissed the appeal and subsequently provided a statement of reasons for doing so.

5. The tribunal accepted that the rent payment had been made but noted that the payment was not required by the tenancy agreement. The tribunal said:

    > "On the face of it it is ridiculous to pay a year's rent in advance. In the absence of any objective evidence that required it to be paid I draw the conclusion that [the Appellant] was paying it out to deprive himself of capital".

6. The tribunal noted that there was no contemporaneous record of the loans. The Appellant's mother's bank statement showed a number of cash withdrawals between June 2012 and April 2014, totalling £8,980. His father had a separate bank account but he did not provide bank statements and, as there was no explanation for that, the tribunal inferred that it was because they did not support the Appellant's case with regard to regular cash withdrawals. Even if they did, the tribunal said it required more cogent evidence that cash was directed to the Appellant.

7. The tribunal explained at paragraph 9 why it was not satisfied with the Appellant's explanation for the cash withdrawals from his mother's account. It could not understand why his mother would make cash withdrawals to pay the Appellant's bills, nor why the withdrawals were for relatively small amounts even though the payments which were said to have been made were for large payments for regular outgoings. It then continued:

> "10. The reality is that the evidence is such that I cannot be sure to the required standard that the cash withdrawals were not just living expenses for [the mother]."

8. The rest of that paragraph provided further explanation for the tribunal's rejection of the Appellant's case on the evidence. The tribunal concluded:

> "11. In the absence of the bank account details of the father and contemporaneous documentation with regard to the loans I am satisfied that the appellant has not established that he has borrowed £12,000.00 from his parents.
>
> 12. I would add that there is no evidence that the loans had to be immediately repaid.
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> 13. Mrs Francis [the presenting officer] points out that on 07.02.13 he was sent a benefit decision and was accordingly aware of the capital limits. I cannot see that entry on the screen print but, in any event, in rejecting [the appellant's] evidence I am left with only one conclusion that he deliberately deprived himself of capital in order to continue to obtain ESA"

9. I gave the Appellant permission to appeal to the Upper Tribunal. The appeal is not supported by the Secretary of State. Neither party has requested an oral hearing and I am satisfied that I can fairly dispose of the appeal without one.

Discussion and conclusions

10. The first ground on which I gave permission to appeal was as to whether the tribunal had erred in its approach to the burden and standard of proof. It was for the Secretary of State to prove his case. There was no dispute that the Appellant had received the capital sum and that he had made the three lump sum payments. The issue to be determined was the purpose of making those payments.

11. Whether the evidence is approached on the basis that the Appellant bore the evidential burden of proving the purpose of the payments, or whether it is approached on the basis that it was for the Appellant to provide as much information as he reasonably could to explain the payments (see Kerr v Department for Social Development [2004] 1 WLR 1372 at [62]-[63]), the tribunal was entitled to look to the Appellant to provide evidence to support his explanation for the payments. The credibility of the Appellant's claim that he had repaid loans from his parents turned significantly on the question whether there had been any such loans in the first place. That was a matter which was within the knowledge of the Appellant.

12. The standard of proof was civil. The tribunal found that the explanation for the rent payment was "ridiculous". That was consistent with the civil standard. In relation to the cash withdrawals the tribunal judge said "I cannot be *sure* to the required standard" (my emphasis). If one takes the word "sure" in isolation, it might suggest that the tribunal applied a higher standard of proof than balance of probabilities. However, it is not appropriate to dissect the statement of reasons in this manner. Reading the statement as a whole, it is clear that the tribunal

considered all the evidence and found that the Appellant's explanation was not credible. Had the evidence been such that there could have been any doubt about the findings of fact on the application of the civil standard of proof, I would have allowed the appeal. But there can be no doubt. The tribunal found no credible evidence to support his explanation, it identified other factors that weighed against his explanation, and there was no basis on which the tribunal could properly have accepted his account.

13. The second ground on which I gave permission to appeal was as to whether the tribunal erred in declining to make a finding of fact as to the Appellant's knowledge of the capital limit. Numerous Commissioners' and Upper Tribunal decisions have emphasised the importance of the tribunal making a finding on that matter. See, for example, Commissioner Jacobs in CH/0264/2006 at paragraph 8:

> "it is impossible to infer that a claimant disposed of capital for a particular purpose if the claimant did not know that the amount of capital could affect entitlement to benefit."

14. In most cases a tribunal is required to make a precise finding as to knowledge. But in some cases the tribunal will be entitled to stand back, consider and make finding on the evidence as a whole. In many of the cases in which the Commissioner or Upper Tribunal has allowed an appeal on the basis that the tribunal did not make a specific finding as to knowledge, there was some at least potentially credible explanation for the payment in question so that it could not be found to have been made for the purpose of securing entitlement to benefit unless the claimant had the required knowledge.

15. That cannot be said of the present case. The facts spoke for themselves on both knowledge and purpose. The tribunal had clearly rejected the Appellant's explanations for all three payments. There was no other plausible explanation whatsoever and in that context the tribunal concluded that it was "left with only one conclusion that he deliberately deprived himself of capital to continue to obtain ESA". In the circumstances of this case, that conclusion embraced the Appellant's knowledge of the effect of his having the capital. The opening words of paragraph 13 show that the tribunal was aware of the issue of knowledge. It was obvious on the facts that the Appellant must have known about the capital limit because it was the only plausible explanation for his having made the payment. This was an inference which the tribunal was entitled to draw on the evidence and there was no material error of law. In addition, it had never been part of the Appellant's case that he was not aware of the capital limit (and I note that he has not made any suggestion to that effect in this appeal). Further exploration by the tribunal of the issue of knowledge would have added nothing, and the facts and circumstances of the case did not call for a specific finding on the point.

16. For the sake of completeness, even if there was an error in failing to make a specific finding on the Appellant's knowledge, I conclude that the error was not material for the reasons I have given in the previous paragraph.

17. Accordingly I dismiss the appeal.

Signed on the original
on 24 August 2016

Kate Markus QC
Judge of the Upper Tribunal