IN THE UPPER TRIBUNAL **Case No.** CI/3837/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: M R Hemingway: Judge of the Upper Tribunal

Decision: The decision of the Brighton First-tier Tribunal made on 28 July 2006 under reference SC323/16/00422 involved an error of law and is set aside.

The appeal is remitted for determination at an oral hearing before a completely differently constituted tribunal.

This decision is made under section 12 of the Tribunals Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later directions by a district tribunal judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The appeal should be considered by way of a complete rehearing before an entirely differently constituted panel of the First-tier Tribunal to that which considered the appeal on 28 July 2016.

(2) The new tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

REASONS FOR DECISION

1. The claimant used to work at Tesco. On 5 September 2011, whilst lifting a heavy tray and then bending to put it on a lower shelf, he experienced low back pain. He was off work for approximately four weeks but then returned, initially to perform light duties and then to resume his normal duties. Unfortunately, he went on to develop camptocormia, a condition sometimes referred to as "bent spine syndrome". It was diagnosed after tests were carried out in March of 2015. He applied for industrial injuries disablement benefit on 29 October 2015 but the claim was refused on 20 January 2016. He appealed to the First-tier Tribunal (hereinafter "the tribunal") and there was a hearing of 28 July 2016 which he attended, accompanied by his wife. He gave what appears to have been quite detailed oral evidence.

2. The key issue for the tribunal was whether or not the camptocormia had been caused by the accident which it was accepted had taken place on 5 September 2011. It is often the case that tribunals, having heard a case, will deliberate immediately afterwards and then inform a claimant, before that claimant leaves the building, what the result is. Commonly, in those circumstances, a Decision Notice is handed to the claimant confirming the result in writing. Failing that, it might be that a tribunal will decide the appeal at a later time during the same day

with the Decision Notice then being sent out in that day's post. Neither of those things happened here.

3. It seems that the tribunal must have felt it needed more time to consider matters. Presumably, the appellant would have been told that a decision would be sent to him in due course. He had not, however, received a Decision Notice by 16 August 2016 but, nevertheless, wrote to the tribunal on that date requesting a Statement of Reasons and a Record of Proceedings. Nothing immediately followed but by 30 August 2016 he had obtained a letter of 26 August 2016 written by one Professor Mark Edwards, a consultant neurologist. In that brief letter Professor Edwards said:

> "I can confirm that I am a consultant neurologist looking after this gentleman. From the details I have available to me [the appellant] did not have significant back pain before starting his job at Tesco's. His work involved significant amounts of bending and lifting and this was associated with the development of back pain. He subsequently developed a functional movement disorder consisting of a bent posture (camptocormia). It is reasonable, in my opinion, to link the back pain to the development of the camptocormia, and the triggering of the back pain by his occupation."

4. The appellant sent a copy of that letter to the tribunal on 30 August 2016.

5. The next thing to happen was the issuing of the Decision Notice. The Notice is dated 28 September 2016. It is an unusually detailed document and, in fact, it contains the level of detail one would normally expect of a Statement of Reasons. The tribunal then went on to prepare a short Statement of Reasons of 18 October 2016. I am not sure whether there had been a second request for a Statement of Reasons consequent upon the issuing of the Decision Notice or whether the tribunal had simply decided to issue one anyway given the earlier request. The Statement of Reasons was short because the Judge who had sat on the Panel deciding the appeal and who had written it, had taken the view that given the level of detail in the Decision Notice there was very little of further import to add. Indeed, the Judge said that, with one exception, she had nothing to add at all. The exception, though, was expressed in this way:

> "The amplification is that on 30 August 2016 the appellant sent in further evidence in the form of a letter from Professor Mark Edwards, Professor of Neurology dated 26 August 2016. <u>As this letter post-dated the hearing it was not possible for the tribunal to consider it when making its decision</u>."

6. The underlining is mine. The appellant unsuccessfully sought permission to appeal its decision from the tribunal. He subsequently renewed his application with the Upper Tribunal. The single ground of appeal was that the tribunal had erred by not taking into account the content of the letter.

7. I granted permission to appeal, principally, because I thought the tribunal might have erred in seeming to take the view that it was simply unable to take the letter into account merely because, to use its words, the letter "post-dated the hearing". The use of the words "it was not possible" seemed to suggest that the tribunal thought it was actually precluded from doing so.

8. The Secretary of State is now represented by Mr P Thompson who, in a helpful submission, has indicated that the appeal to the Upper Tribunal is supported. He argues that at the time it reserved its decision (the date of the oral hearing) matters were effectively still ongoing and that that had remained the case until the Decision Notice had been actually issued. Mr Thompson relies, as to that, upon the decision of Upper Tribunal Judge Rowland in *CJ v Secretary of State for Work and Pensions (IS)* [2013] UKUT 0131 (AAC). He suggests, taking things a little further, that since the letter had been received prior to any Decision Notice being issued, the tribunal had only three possible options open to it. The first of those was to consider whether the evidence contained in the letter had to be excluded as a result of the content of rule 15(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (see below). The second was to send the letter to the Secretary of State for comment before admitting the letter and any comments the Secretary of State might have. The third was to simply "without further ado" take the letter into consideration when reaching its decision.

9. Since the tribunal did none of those things Mr Thompson says that it did err in law. He also says that the error is material in the sense that the content of the letter might have impacted upon the decision. Accordingly, he invites me to set aside the tribunal's decision and to remit for a complete rehearing. The appellant is represented by an organisation known as "HARC" but no reply to the Secretary of State's submission has been received. It may be that the course of action suggested by the Secretary of State is agreed so that it is thought there is no need to reply but I do not know. In any event, I am satisfied that a proper opportunity to submit a reply has been given and I have decided to make my decision on the basis of the material before me.

10. Turning to the above Rules, rule 2 reads as follows:

> **2**- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes –
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issue.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it –
>
> (a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must –

(a) help the Tribunal to further the overriding objectives;

(b) co-operate with the Tribunal generally."

11. Rule 5, which I need not set out, permits the Tribunal to regulate its own procedure.

12. Rule 15 which is headed "E**vidence and submissions**" says, amongst other things, that:

15 - (1) …

(2) the Tribunal may –

(a) admit evidence whether or not –

(i) the evidence would be admissible in a civil trial in the United Kingdom; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where –

(i) the evidence was not provided within the time allowed by a direction or a practice direction;

(ii) the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction; or

(iii) it would otherwise be unfair to admit the evidence …"

13. The above provisions may all have some relevance as to decisions concerning admissibility of evidence.

14. The hearing, as noted above, took place on 28 July 2016 and the appellant must have gone home not knowing what decision was to follow. The Decision Notice was then prepared on 28 September 2016 though it was issued on 4 October 2016. I agree with Mr Thompson that, following *CJ v Secretary of State for Work and Pensions*, a decision only becomes final once written notice of that decision has been sent to the parties. Judge Rowland said at paragraph 11 of *CJ*:

> "It has always been the practice of the Administrative Appeals Chamber of the Upper Tribunal to treat a decision as final only when a written copy of it is sent or given to a party and it seems to me that the same approach should be taken in the Social Entitlement Chamber of the First-tier Tribunal. It is the

> act of sending or giving the document to a party that really marks the time when a decision must become final, subject to any statutory power to correct it or set it aside."

15. So, although the hearing had ended on 27 July 2016, matters had remained in abeyance until 4 October 2016. They were, thus, in abeyance when the letter was sent to the tribunal and when it was received.

15. I can find nothing to say that, as a matter of law, the First-tier Tribunal is debarred from taking into account evidence which is sent to it after a hearing has been concluded but before it has made a decision on the appeal. In my judgment, though, the way in which the tribunal expressed itself in its Statement of Reasons suggests that it did believe it was so debarred. The absence of any debarring rule or provision, however, means that the true position, given the overriding objective and the power of the tribunal to regulate its own procedure, is that the First-tier Tribunal has a discretion as to whether or not to admit such evidence. I would conclude, therefore, that this tribunal did err because it failed to appreciate it had such a discretion and, therefore, failed to consider how that discretion ought properly to be exercised in the circumstances of the case. It might have exercised that discretion in favour of the appellant or it might not but it had to make a decision about it.

16. I do not agree, though, that it only had available to it the three options referred to by Mr Thompson. As to those, it seems to me that, in cases where there is a hearing, rule 15(2) is principally concerned with any failure by a party to provide evidence within a prescribed time-scale but before the hearing is scheduled to take place. At least that seems true of 15(2)(b) (i) and (ii). Nevertheless, I would accept that it would be open to a tribunal to direct that all evidence to be relied upon must be provided either at a hearing or by a specific date prior to a hearing. But even if such a direction is not adhered to the tribunal would only have a discretion to exclude the evidence in any event given the use of the word "may" in the opening words of rule 15(2) and, in exercising its discretion in that regard, it would have to bear in mind rule 2 (the overriding objective) as well as general principles of fairness and natural justice. So, even if the circumstances at rule 15(2)(b) (i) or (ii) had been made out, there would still have been a discretion to exercise. Perhaps the tribunal could have, had it considered the matter, decided to exclude the letter under rule 15(2)(c) on the simple basis that it would have been unfair to admit it. Such unfairness, though, could easily be rectified by sending the evidence to the other party and inviting comment or further evidence. In any event, I am not sure in the circumstances obtaining here that the provision really adds anything to the tribunal's more general discretion not to consider evidence filed after a hearing and to which I have referred above. Nor can it be the case that, simply because specific provision for excluding evidence on fairness grounds is given under rule 15(2)(c), that exclusion under more general discretion is impermissible. As stated, the powers conferred under rule 15 do not restrict the tribunal's general case management powers. In this particular case, of course, the tribunal did not consider rule 15 at all.

17. As to the option of simply taking the evidence into account, it seems to me, whilst this may vary given the circumstances of any particular case, if any late evidence received after a hearing is likely to impact upon the outcome, fairness will normally dictate (as touched upon above) that the other party is given an opportunity to address that evidence by way of comment or, possibly, provision of further evidence. A tribunal which does not do that and

which goes on to base its decision upon the late evidence might be thought to run a significant risk of being set aside. So, the option of affording an opportunity of input from the other party seems much the better of those two unless it is decided that the new evidence cannot make any difference. After all, if a tribunal is, for example, minded to dismiss the appeal of the party who has sent in the late evidence, notwithstanding its content, it would be pointless to trouble the other party.

18. A fourth option, one not canvassed by Mr Thompson, would have been for the tribunal to have exercised discretion against taking the evidence into account. Again, of course, it would have had to have considered matters in light of rule 2 and the overriding objective. Perhaps there would have been other available options which I have not thought of.

19. The tribunal, whatever the merits of the various options which might have been open to it, did, err in law in thinking that it simply had no alternative at all but to decline to admit or consider the evidence. I accept Mr Thompson's contention that the evidence might have been capable of impacting upon the outcome. The tribunal has set out its reasoning in a cogent and persuasive manner but I cannot say that letter, despite the brevity of its contents, was incapable of making a difference. So, I accept that the error was a material one.

20. The tribunal's decision is, therefore, set aside. I have decided to remit rather than to re-make the decision myself because it may be of assistance for a panel possessing a member with medical expertise to consider matters afresh in light of this new evidence. The appellant should note, though, that the new tribunal will expect to have any documentary evidence of a medical or other nature before it prior to the new hearing.

21. Finally, I would simply observe that this is not a situation which is likely to commonly arise. As I have touched upon above, the First-tier Tribunal normally makes its decisions shortly after a hearing has ended and, in any event, on the day of such a hearing. It normally then issues a Decision Notice during the course of that day. Given that, opportunities to send further post hearing evidence are, as a matter of practicality, extremely limited.

22. This appeal to the Upper Tribunal, is allowed on the basis and to the extent explained above.

(Signed on the original)

M R Hemingway
Judge of the Upper Tribunal

Dated: **19 May 2017**