IN THE UPPER TRIBUNAL **Case No.** CE/1153/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the first-tier Tribunal is set aside and the case is remitted to the First-tier Tribunal to be re-decided by a differently-constituted panel.

Upon receipt of this Decision, **the First-tier Tribunal must** consider issuing fresh directions to obtain the claimant's General Practitioner records, including hospital correspondence, from 1 January 2015.

REASONS FOR DECISION

1. This is an appeal, brought by the claimant with my permission, against a decision of the First-tier Tribunal dated 7 September 2016, whereby it dismissed the claimant's appeal against a decision of the Secretary of State dated 31 March 2016, superseding an award of employment and support allowance and deciding that the claimant was not entitled to employment and support allowance from 31 March 2016.

2. The Secretary of State's decision was made following receipt of a health care professional's report, from which it appears that the claimant had had surgery to remove a benign right parotid tumour in April 2015 and reported consequential problems with her right arm, with hearing in her right ear and with her mental health. At the time, there was no evidence of malignancy. She speaks limited English and the history was taken through a Polish-speaking friend. When she appealed, she asked for an oral hearing and the case was listed for hearing on 9 August 2016 with a Polish interpreter. The claimant did not attend but the First-tier Tribunal was informed that she had telephoned to say, through an interpreter, that she was too unwell to attend. The First-tier Tribunal adjourned the hearing and directed that a clerk obtain the claimant's consent before writing to her general practitioner to request a copy of her General Practitioner records including hospital correspondence from 1 January 2015, and gave the claimant 14 days within which to provide any further evidence. It also warned the claimant that if she did not attend on the next occasion, the First-tier Tribunal was likely to decide her appeal in her absence. I can see no evidence that the clerk did ask the claimant for consent to obtain the medical records and they were not obtained. I suspect that the direction had simply been overlooked by the clerk. The claimant signed a letter dated 19 August 2016, presumably typed by someone else, thanking the First-tier Tribunal for adjourning and, presumably in the light of the direction issued to her, providing some up-to-date medical evidence and informing the First-tier Tribunal that she had been told that she now had a parotid gland problem on the left side of her neck but was as yet unable to provide written evidence of that fact. She also said that she was more anxious and depressed. Her case was listed for hearing on 7 September 2016.

3. On the day before the hearing, the First-tier Tribunal received from the claimant, a letter from a doctor, saying only –

> "The [sic] reason of cancer and severe depressive disorders the patient [the claimant] cannot appear in HM Court & Tribunals Service on 07/09/2016."

A clerk, who appears to have been Polish-speaking, telephoned the claimant, as a result of which it was noted in the computer log –

> "Spoke to Appl over the phone she confirmed that she would like for her case to be heard in absence."

The clerk cancelled the interpreter. It appears that it had been arranged that the same clerk would be clerking at the hearing and that what she told the First-tier Tribunal was slightly different from the note on the computer log, because the Judge noted on the record of proceedings that –

> "She requested a paper determination. If not, an adjournment."

4. In any event, the First-tier Tribunal decided to hear the case in the claimant's absence. In the decision notice, it was said –

> "[The claimant] … stated that she would not be attending the hearing due to ill health. She provided a letter by post a letter from a private doctor. The Tribunal considered the overriding objective in Rule 2 and Rule 31 of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 and concluded that it was in the interests of justice to proceed in her absence."

The claimant requested a statement of reasons, which was duly provided, and paragraphs 7 to 10 explain the decision to decide the case in the claimant's absence. At paragraph 8, the point was made that the further evidence that was provided by the claimant could not be taken into account because it dealt with events after the date of the Secretary of State's decision – which was clearly correct insofar as the substantive decision was concerned – and both there and at paragraph 10 the point was also made that there had not been provided any written evidence from her surgeon as to her current condition – which would have been relevant to the request for an adjournment even though not relevant to the substantive decision. At paragraph 9, it was said –

> "Having considered the overriding objective in Rule 2 and Rule 27 of the Tribunal (First-tier Tribunal) (SEC) Rules 2008, we decided that there was sufficient medical evidence in the bundle to decide the appeal without [the claimant's] presence and oral evidence."

5. The claimant applied for permission to appeal. She remains unrepresented and although she clearly has someone assisting her, her grounds of appeal raised issues of fact, whereas an appeal to the Upper Tribunal lies only on a point of law. The First-tier Tribunal refused permission to appeal, but I granted permission on the ground that it was arguable that the First-tier Tribunal's reasons for not adjourning the hearing were not adequate. I said –

> "1. …. It is not entirely clear what the First-tier Tribunal meant by there being "sufficient medical evidence in the bundle to decide the appeal without [the

> claimant's] presence and oral evidence". In the sense that there was enough evidence to make a decision, the First-tier Tribunal may have been right, but it is arguable that the question was whether there was sufficient evidence to enable it to do so fairly if the decision was to be adverse to her. It is easy to see why, having decided to deal with the case on the papers, the First-tier Tribunal decided as it did in the light of the written evidence and, in particular, the health care professional's report and it was right that the claimant had not produced medical evidence to show that the health care professional was wrong. On the other hand, it is arguable that the point of a claimant having a right to an oral hearing is that it should not be necessary to produce such evidence and such a hearing gives the claimant an opportunity to explain in person why he or she disagrees with the health care professional, which many claimants manage better orally than in writing.
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> 2. In the circumstances of this case, it was arguably necessary for the First-tier Tribunal to consider whether it was reasonable to expect the claimant to attend and, if not, whether her oral evidence might make any difference. The claimant is recorded as having said that she would like the decision to be made on the papers and the interpreter was presumably cancelled in the light of that indication, but that raises the question whether that was actually what the claimant wanted even if the decision was adverse to be her. It was the clerk at the hearing who had spoken to the claimant the day before but it is not entirely clear on what terms the claimant was offered an adjournment. A represented claimant might ask for the case to be decided on the papers if it was to be in his or her favour but otherwise for it to be adjourned."

The Secretary of State submits that the First-tier Tribunal did err for the reasons I suggested, helpfully referring to the relevant statutory provisions and drawing my attention to two Upper Tribunal decisions.

6. Rules 2, 27 and 31 of the The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) provide –

> "**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) …;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) …; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
> (3) The Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) ….
> (4) …."
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> "**27.**—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
> (b) the Tribunal considers that it is able to decide the matter without a hearing.

> (2) ….
> (3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).
> (4) ….
> (5) ….
> (6) …."
>
> "**31.** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
> (b) considers that it is in the interests of justice to proceed with the hearing."

7. To a large extent, it did not really matter whether the First-tier Tribunal considered that the claimant had withdrawn her request for a hearing so that the First-tier Tribunal was entitled to determine the appeal without a hearing provided rule 27(1)(b) was satisfied (the approach taken in its statement of reasons) or it considered that the hearing should take place so that the First-tier Tribunal was entitled to proceed in the claimant's absence provided rule 31(b) was satisfied (the approach apparently taken in its decision notice). In either event, it had to act fairly. However, there are differences in the reasoning required by each of the two approaches.

8. The relationship between rules 27 and 31 was considered in *CH v Secretary of State for Work and Pensions (DLA)* [2012] UKUT 427 (AAC). That case was similar to the present case in that the claimant's appeal to the First-tier Tribunal had been listed for a hearing and, when telephoned by a clerk because he had failed to attend, the claimant asked for the hearing to proceed in his absence, but it is distinguishable because there was no evidence before the First-tier Tribunal as to the claimant's reason for not attending although the clerk could presumably have asked for that information. Upper Tribunal Judge Wright said –

> "18. Of course one factor plainly telling in favour of proceeding is the apparent request by the appellant for the appeal to be decided in his absence. However, I would suggests that some care needs to be taken here. The context was of an appeal where the appellant had asked for a hearing at which he would attend. Just as in rule 27 of the TPR cases where weight can rightly be attached to a person's decision to ask for his or her appeal to be decided on the papers and without a hearing, I would suggest that weight ought to be attached to a person first having asked for an oral hearing of his or her appeal and then not having taken any pre-emptive steps to rescind that request. This is not to suggest that a person cannot change his or her mind, and plainly rule 31 of the TPR is predicated on a person who has asked for a hearing not attending and, further, contemplates that the hearing may proceed in his or her absence. But, in my judgment, the reasons (a) why a person is unable to attend, and (b) why he or she wishes to have the appeal heard in his or her absence, are relevant considerations that must factored in when exercising the rule 31 of the TPR judicial discretion where, as here, such reasons can be obtained. In other words, has the person, in effect, made an informed decision to rescind the request for an oral hearing, or is it just force of circumstance (e.g. stuck at home with a suddenly ill child) that has led the person to (hurriedly) change his or her mind and agree that the appeal be heard in their absence? This perspective is in my view underscored by rule 2(2)(c) of the TPR with its express

> reference to the First-tier Tribunal dealing with a case fairly and justly by 'ensuring, so far as is practicable, that the parties are able to participate fully in the proceedings'."

9. In the present case, the First-tier Tribunal did not make a finding as to whether the claimant could reasonably have been expected to attend the hearing. It may be that its references to the letter received the day before the hearing having come from a "private doctor" and to the lack of evidence from the surgeon are an indication that it was sceptical of her claim to be too unwell, but it did not say so and, anyway, there was the factor of her depression to consider. Making such a finding is important because, if the claimant had a good reason for not being able to attend, it would raise, under rule 27, the question whether her request that the case be determined in her absence should have been accepted at face value or, under rule 31, the question whether it was permissible to decide the case in her absence. On the other hand, if she did not have a good reason for not attending, that would go into the balance when deciding whether the First-tier Tribunal should proceed without a hearing or in her absence. The First-tier Tribunal is entitled to take a robust approach when considering on the basis of limited evidence whether a claimant has a good reason for not attending, provided that it takes a correspondingly liberal approach to subsequent applications for setting aside in cases where compelling medical evidence is subsequently provided and there is, or may be, an explanation for it not having been provided earlier.

10. The other case to which the Secretary of State refers me is not published on the Upper Tribunal's website but is on file CE/2784/2016, where Upper Tribunal Judge Hemingway said –

> "10. The tribunal said this:
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> > '3. The appeal was listed as a paper case but the tribunal considered whether they were able to proceed in the absence of hearing evidence from [the claimant] but concluded that as he had requested a decision on the papers and had given a detailed account of the impact of his medical conditions on him at the examination on 6.10.15 when he attended the Pontypridd Assessment Centre, it was concluded that a decision could be reached based on the available evidence, bearing in mind that [the claimant] had also provided copies of medical evidence confirming his medical conditions.'
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> 11. I would accept the Secretary of State's point that it is not necessary for a tribunal to specifically refer to the relevant Rules of Procedure in explaining why it has been decided to proceed on the papers so long as what is said demonstrates that the substance of those Rules was considered. I would accept, and this might be particularly so in circumstances such as here where a claimant has sought a papers consideration, that a tribunal's explanation as to why it is proceeding on the papers may be, in most cases at least, brief. However, in my judgment it is necessary for the tribunal to demonstrate that it has applied the correct test. The wording used by the tribunal in its statement of reasons and which I have set out above suggests that it decided to proceed because it thought, in effect, that there was sufficient material before it to enable it to reason out a decision. However, the content of rule 2 of its Rules of Procedure does require it to deal with cases "fairly

> and justly". There is not necessarily a connection between a tribunal having sufficient material to reason out a decision and a tribunal having sufficient material to fairly decide an appeal. This was a case where, as the tribunal itself accepted, the claimant did have health problems. It was not a case where, whether the tribunal was to hear from the claimant or not, the outcome was inevitable. Had what the tribunal had to say in its statement of reasons included a reference to its having considered what was fair then I might well have reached a different view. However, the wording it used suggests that it did, in effect, apply the wrong test when deciding whether it ought to proceed in the absence of the claimant. Accordingly, I have decided, on this quite narrow point, that its decision does fall to be set aside."

It seems to me that, in its statement of reasons, the First-tier Tribunal fell into the same error in the present case. It did not consider whether the evidence before it was not only sufficient to enable it to reach a decision but was also sufficient to enable it to do so fairly in the absence of the claimant. I accept that it did refer to the interests of justice in its decision notice, but it did not say there what it had taken into account and I do not consider that the reasoning overall, with its indecision as to whether rule 27 or rule 31 applied, is sufficient. Moreover, there is an additional factor in this case.

11. In a case where a claimant has asked for a hearing and has a very good reason for not being able to attend a hearing when it takes place, the First-tier Tribunal is unlikely to be entitled to proceed in the claimant's absence unless either it is prepared to allow the appeal or it is clear that the appeal has no reasonable prospect of success, such that it could have been struck out without a hearing under rule 8(3)(c) (see rule 27(3)). In other cases, there is a considerable element of discretion involved in considering what is fair; hence Judge Hemingway's suggestion in CE/2784/2016 that he would have been unlikely to have interfered with the First-tier Tribunal's decision had its reasons shown that it had considered the correct test. Where the First-tier Tribunal considers that it has sufficient evidence upon which to make a decision, one frequently important consideration when deciding whether to adjourn due to the absence of the claimant is how likely it is that oral evidence from the claimant would make a difference to the outcome.

12. However, an additional relevant consideration in the present case was the fact that, at the previous abortive hearing, the First-tier Tribunal (which may have suspected that the claimant might not attend a future hearing) had directed that part of the claimant's medical records should be obtained by a clerk to the tribunal and that that had not been done. There was thus another source of potential evidence that had been identified at the previous hearing. In its statement of reasons for its decision after the second hearing, the First-tier Tribunal alluded to that direction but made no allusion to the fact that the clerk had not complied with it. This reinforces my view that the First-tier Tribunal did not give adequate reasons for deciding to proceed rather than to adjourn.

13. For these reasons, I am satisfied that the First-tier Tribunal's decision is wrong in law and must be set aside. The claimant has told me that she is unable to go to work and asks that I give a decision in her favour. I do so only to the extent of setting aside the First-tier Tribunal's decision and remitting the case to be decided again by the First-tier Tribunal, partly because panels of the First-tier Tribunal

include medical practitioners in this sort of case and the expertise of a doctor is likely to be helpful and partly because the claimant ought to have another opportunity to attend an oral hearing which is more conveniently held before the First-tier Tribunal. (She is entitled to take someone with her to present her arguments or just to support her, if she wishes to do so.)

14. In considering this case, the First-tier Tribunal must consider the claimant's position as it was on 31 March 2016, when the Secretary of State made his decision. Section 12(8)(b) of the Social Security Act 1998 has the effect that neither it nor, on appeal, the Upper Tribunal may take into account any worsening of her health since then. On the other hand, as I said when giving permission to appeal, it is open to the claimant to make a new claim for employment and support allowance if she considers that she might now satisfy the conditions of entitlement.

Mark Rowland
13 October 2017