[2017] AACR 29

(Secretary of State for Work and Pensions v HS (JSA)
[2016] UKUT 272 (AAC))

Judge Rowland **CJSA/1135/2015**
9 June 2016

Tribunal procedure and practice – evidence – drawing an adverse inference

The claimant failed to attend a Work Programme appointment despite having been sent notice under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 by a "provider". The Secretary of State imposed a sanction in the absence of any explanation from the claimant for her failure to attend. The claimant appealed against that decision, stating that she had replied to the Secretary of State to say she had not received the original notice. A First-tier Tribunal judge directed the Secretary of State to provide copies of all notices issued to the claimant and warned that in the event of a failure to comply it was likely that the tribunal would draw adverse inferences. The Secretary of State eventually supplied various documents, including a copy of the relevant letter requiring the claimant to attend the Work Programme appointment. However, these documents were not forwarded to the judge and she allowed the claimant's appeal, having inferred from the Secretary of State's apparent failure to reply that the claimant had not been adequately notified of the appointment and that in the absence of such notification she had not failed to participate. The Secretary of State requested a full statement of reasons and the judge, having seen the supplementary submission, stated that the appeal had been allowed because where a notice to attend was given by a "provider" the Secretary of State must establish that it had delegated responsibility and, in the absence of such evidence, the tribunal had found that the claimant had not been appropriately notified. The Secretary of State appealed to the Upper Tribunal.

Held, allowing the appeal, that:

1. the First-tier Tribunal had made its decision in ignorance of the fact that the Secretary of State had provided the information it had been directed to provide and, as his case was not heard, that gave rise to an inadvertent breach of the rules of natural justice;

2. a failure to comply with a direction to provide evidence might entitle a tribunal to draw an adverse inference against the offending party and so infer that the facts were not as that party said they were but only if the tribunal was satisfied that the probable reason for the offending party's failure was that the evidence did not exist or would harm its case;

3. because social security cases involved an investigatory approach, it might be permissible to draw an adverse inference even if there was no other evidence on the particular point, but only if regard was had to the "inherent probabilities" (*dicta* of Lord Sumption in *Prest v Petrodel Resources Limited* [2013] 2 AC 415 applied);

4. accordingly a tribunal drawing an adverse inference might be required to give reasons for doing so beyond merely stating that there had been a failure to comply with a requirement to produce evidence;

5. the Secretary of State might be required by a claimant or tribunal to provide evidence to prove that a provider had the relevant powers, but it did not follow that he was obliged to do so in every case and the First-tier Tribunal had erred in holding against the Secretary of State the fact that he had not provided evidence without giving him notice of the point.

The judge set aside the First-tier Tribunal's decision and remitted the case for hearing before a differently constituted tribunal.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: The Secretary of State's appeal is allowed. The decision of the First-tier Tribunal dated 5 November 2014 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

Direction: The Secretary of State must, within one month of the date on which this decision is sent to him make a further submission in respect of the issue identified in paragraph 22 below. This Direction may be varied or set aside by the First-tier Tribunal.

REASONS FOR DECISION

1. This is an appeal, brought by the Secretary of State for Work and Pensions with my permission, against a decision of the First-tier Tribunal dated 5 November 2014, whereby it allowed the claimant's appeal against a decision of the Secretary of State dated 6 August 2012 to the effect that the claimant was not entitled to jobseeker's allowance from 30 July 2013 to 26 August 2013 because she had failed, without good cause, to participate in the Work Programme, an Employment, Skills and Enterprise Scheme. The First-tier Tribunal held that the claimant had not failed to participate in the Work Programme and that therefore there had been no grounds for superseding her award of jobseeker's allowance.

2. The Secretary of State's decision had been made on the basis that the claimant had been given notice on 18 December 2012 under regulation 4 of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917) requiring her to participate in the Scheme by attending a work programme appointment at an office of Barnardo's on 15 January 2013. It is common ground that the claimant did not attend the appointment. On 5 February 2013, the Secretary of State wrote to the claimant asking her to explain why she had not undertaken the activity. The letter appears not to have included a time limit by which the claimant was to reply, notwithstanding the 5 working day time limit in regulation 7 of the 2011 Regulations. In the belief that no reply had been received, the Secretary of State made the decision dated 6 August 2013 imposing the 4 week sanction in accordance with section 17A of the Jobseekers Act 1995 and regulation 8 of the 2011 Regulations. The delay may have been due to the notice having initially been invalid (*R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68; [2014] AC 453) and only retrospectively validated by the Jobseekers (Back to Work Schemes) Act 2013.

3. The claimant appealed on 26 August 2013, stating that she had previously informed the Secretary of State that she had not received the notice and that she had received two letters, dated 18 April 2013 and 22 April 2013, informing her that it no longer had a doubt about whether she had failed to take advantage of a place on the employment programme. The Secretary of State submitted that his relevant computer systems both held the correct address for the claimant and, implicitly, invited the First-tier Tribunal to find that the notice had in fact been received. An attached document identified the "provider" as Barnardo's, who were, it was said, a subcontractor for Intraining which was the "Prime Provider" of the Work Programme. The Secretary of State also asked the First-tier Tribunal to stay the case to await a case in the Administrative Court. That particular request was refused but a stay was subsequently imposed to await a decision of the Upper Tribunal.

4. The stay was implicitly lifted by a different judge when, on 29 July 2014, she directed the Secretary of State "to lodge within 28 days copies of all notices issued to the Appellant by the Respondent and it's [*sic*] agents in connection with the Employment, Skills and Enterprise Scheme including but not limited to the letter of instruction dated 18.12.2012 issued by Intraining which letter must show the address to which the letter was sent or evidence as to the address to which it was posted." The Secretary of State was warned that "in the event of failure to comply strictly with direction 1 above it is likely the Tribunal will draw inferences adverse to the

Respondent's case". On 3 September 2014, the Secretary of State asked for an extension of time so as to be able to obtain legal advice and time was extended to 18 October 2014. However, the "supplementary response" made in response to the direction was not received until 29 October 2014. Again a stay was requested but the Secretary of State also supplied documents, consisting of a computer print out apparently showing that the provider at the material time was Newcastle College Group, a "start notification letter" (WP05) stating that "Newcastle College Group, or one of their partners, will support you whilst on the Work programme" and informing the claimant that she "must complete any activities that Newcastle College Group, or one of their partners, tells you to do" and notices issued by Barnardo's requiring the claimant to attend appointments on 17 December 2012, 15 January 2013 (the one directly relevant to this appeal), 9 April 2013, 22 April 2013, 13 May 2013, 29 May 2013, 13 June 2013 and 30 July 2013, two of those appointments having been made when earlier ones had been missed.

5. That response appears not to have reached the relevant judge by 5 November 2014 because, on that date, the First-tier Tribunal allowed the claimant's appeal, giving the following reasons in the decision notice:

> "2. A sanction can only be imposed if the Appellant has failed to participate.
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> 3. Before the Appellant can be said to have failed to participate the Respondent must establish the Appellant has been appropriately notified of the requirement to do so.
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> 4. The Respondent has been directed to supply evidence of notification but has failed to co-operate with HMC&TS and has failed to reply to the directions dated 29.07.2014.
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> 5. The Tribunal drew inferences from the failure and found on the balance of probability:
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> a. The Appellant had not been adequately notified of the appointment..
> b. In the absence of notification the Appellant had not failed to participate.
> c. There are no grounds to supersede the award of Jobseeker's Allowance.
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> The Tribunal was satisfied that the Respondent had not requested an oral hearing. Although the Appellant had requested an oral hearing the tribunal found it was in the interests of justice to proceed on the papers:
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> 1. The Appellant was likely to receive the outcome she sought.
> 2. there have been substantial delays in this case being heard due to Court proceedings outside the control of the Appellant.
> 3. listing for an oral hearing would cause further unnecessary delay."

6. The Secretary of State asked for a full statement of reasons without mentioning that he had submitted the requested documents, albeit late. By the time, the judge wrote the full statement of reasons, on 29 December 2014, those documents had clearly reached the file, because she recorded that she had read "documents numbered 1-31", which included them. The statement of reasons bore no relation to the reasons given in the decision notice. In paragraphs 8 and 9, it was stated that a claimant had to be given sufficient notice and information before he or she could be said to have failed to attend an appointment but no finding as to whether the

claimant in this case had been given such notice and information was recorded and therefore no reasons for making such a finding were recorded either. Instead, it was said:

> "10. The authority to require a claimant to attend on a course or at an interview is given to the Respondent. If the notice to attend was given by a 3rd party service provider the respondent must establish that the service provider has delegated responsibility.
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> 11. The Respondent has produced no evidence that the service provider had delegated powers at the date of the issue of the instructing letter or at all.
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> 12. The Tribunal accordingly found the Appellant had not been appropriately notified. In the absence of appropriate notification the Appellant cannot be said to have failed to comply."

7. The Secretary of State applied for permission to appeal on the ground that the First-tier Tribunal had "erred in finding that the Secretary of State failed to establish that [the claimant] had been advised of the appointment in time". Permission was refused by the First-tier Tribunal, the judge stating that the Secretary of State "has still not established that the service provider had been given delegated authority at the date of issue of the letter of instruction". When renewing the application to the Upper Tribunal on the ground that the First-tier Tribunal had ignored the evidence in the case, the Secretary of State included a copy of a letter dated 13 May 2011 from the Department for Work and Pensions authorising employees of the Corporation of Newcastle College and approved subcontractors to exercise functions under regulations 4, 5(2)(a), 8(8)b) and 8(11) of the 2011 Regulations and identifying Barnardo's as an approved subcontractor. When granting permission to appeal, I identified as potential additional issues whether the First-tier Tribunal had been entitled to determine the case on the papers in favour of the claimant when the claimant had asked for an oral hearing and whether there had been a breach of the rules of natural justice insofar as the case had been determined on the basis that the service provider had not had the requisite delegated authority without the Secretary of State having an opportunity to address the issue. The Secretary of State has made a submission addressing those additional issues and also the issue of adverse inferences and the circumstances in which it is permissible to draw them. The claimant has not taken any active part in the proceedings at all.

8. It is thoroughly unsatisfactory that the reasons in the full statement of reasons provided by the First-tier Tribunal should have been so different from the reasons given in the decision notice. Indeed, I am slightly surprised that the judge did not realise when writing her full statement that the supplementary submission received from the Secretary of State on 29 October 2014 had not been before her on 5 November 2014 and that she did not therefore set her decision aside under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) on the ground that there had been a procedural irregularity. Indeed, it is arguable that the Secretary of State should have applied for the setting aside of the decision, since it was plain from the wording of paragraph 4 of the decision notice that the First-tier Tribunal had not seen the supplementary response and was not merely relying on it having been late. However, for the purposes of this appeal, I shall treat the full statement as providing reasons that are additional to those provided in the decision notice, rather than reasons that are contradictory.

9. In relation to the question whether the First-tier Tribunal was entitled to determine the case without a hearing, the Secretary of State's submission to me misses the point. This is not a case where a hearing took place in the absence of the parties, which is, as the Secretary of State

submits, permissible under rule 31 of the 2008 Rules; here the claimant's appeal was never listed for a hearing at all. Since the claimant had asked for a hearing, there was a breach of rule 27(1). However, I do not see why such an irregularity should not be waived in circumstances where, as in this case, the First-tier Tribunal considers that, in the light of the documentary and written evidence before it, it should determine the case wholly in favour of the only party who has not consented to there being no hearing.

10. On the other hand, it seems to me that the First-tier Tribunal clearly erred in law in first making its decision in ignorance of the fact that the information that it had directed the Secretary of State to provide had been provided and then relying on the fact that the Secretary of State had not provided evidence that he had not been under any duty to provide.

11. That the First-tier Tribunal was unaware that the supplementary submission had been received before it made its decision was due merely to either an administrative error or an oversight on the part of the judge, but it did give rise to an inadvertent breach of the rules of natural justice because it meant that the Secretary of State's case was not heard.

12. Even if the supplementary submission had not been received by 5 November 2014, the reasons given in the decision notice would have required supplementation in the full statement because they were insufficient to explain the decision by themselves. Where there has been a failure to comply with a direction to provide evidence, a tribunal may well be entitled to draw an adverse inference against the offending party; that is to say that it may infer from the failure that the facts are not as the offending party says they are. However, it is not entitled to do so merely as a punishment. It is appropriate to draw an adverse inference only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case. Thus a warning that an adverse inference may be drawn from a failure to comply with a direction does not necessarily have the same effect as a warning that a case will or may be struck out or that a party will or may be barred from participating in the proceedings if there is a failure to comply.

13. The Secretary of State has referred me to a number of cases on this issue. Thus, in R(SB) 34/83, which involved the calculation of an overpayment due to a claimant, who had since died, having failed to disclose capital when there was a dispute as to whether she had received the capital before she opened a building society account, Mr Commissioner Rice said:

> "8. … had the deceased been alive and refused to give the necessary information as to the date when the £954 was received, the natural inference would have been that she had been in possession of the money from the time when she first claimed supplementary benefit, and the benefit officer would have discharged the onus of proof laid upon him."

He then considered how the matter should be approached in view of the fact that the claimant had died and said:

> "9. … it is not, in my judgment, enough for the administratrix merely to say that she has no information. It may be that, in the event, she is unable to ascertain anything for certain, but she must at least present evidence of all the effort that she has made and all the enquiries she has undertaken to ascertain the origin of the money in question. If she provides no evidence that she has done anything, then the position is substantially no different from that of a claimant who is alive and refuses to be forthcoming."

14. In R(CS) 6/05, Mr Commissioner Jacobs, as he then was, considered a number of decisions of the courts and observed that "[i]n none of them was the party's lack of co-operation used simply as a basis for imposing a penalty". In considering when it was appropriate to draw an adverse inference, he referred to the speech of Lord Lowry in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283, 300, where he said:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

The language of that passage reflects a point emphasised by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596; [1998] PIQR P324 that, in cases where there is a burden of proof, the party with that burden must produce sufficient evidence to show that there is a case to answer before a failure by the other party to adduce evidence permits an adverse inference to be drawn against that other party. However, as the Secretary of State further submits, social security cases involve an investigatory approach (see *Kerr v Department for Social Development* [2004] UKHL 23; [2004] 1 WLR 1372 (also reported as R1/04 (SF)) akin to the approach taken in family cases, with the result that the burden of proof is seldom of significance. The implication of there being such an approach in family cases was considered by Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34; [2013] 2 AC 415. Having referred to *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* and *Wisniewski v Central Manchester Health Authority* he proposed a modification to Lord Lowry's formulation in the former case:

> "45. The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is."

15. Thus, in family proceedings and, by analogy, social security proceedings, it may be permissible to draw an adverse inference in such a case, even if there is no other evidence on the particular point, but only if regard is had to the "inherent probabilities".

16. The fact that the drawing of an adverse inference is not a penalty and is permissible only if the tribunal is satisfied that it is probable that the reason for the failure to comply with the direction is that the evidence does not exist or would harm the offending party's case may require a tribunal drawing an adverse inference to give reasons for doing so beyond merely stating that there has been a failure to comply with a requirement to produce evidence. I say "may" rather than "must" only because in the case of, say, the person required to produce a bank statement to show that no capital is held, the *only* reasonable inference of an otherwise unexplained failure to comply may be that the bank statement would in fact show that the claimant did hold capital sufficient to disqualify the person from benefit.

17. However, in the present case there would plainly have been other realistic explanations for the failure to comply. Therefore, it would have been necessary for any adequate statement of reasons to address the "inherent probabilities" and thereby properly to explain an adverse inference had been drawn. Consideration would have had to be given to whether bureaucratic delay was a more likely explanation for the failure to comply than a deliberate attempt to cover up the truth or a simple failure to obtain the documents from the provider because in fact they did not exist. I do not doubt that an adverse inference could have been drawn in this case had the First-tier Tribunal been right in believing that the Secretary of State had not provided the relevant documents, but it would have required some reasoning.

18. This is not to minimise the importance of the Secretary of State, like any other party, complying with directions. In this case, he ought to have applied for a further extension of time. In *BPP Holdings Ltd v Commissioners for Revenue and Customs* [2016] EWCA Civ 121, the Court of Appeal has recently emphasised that directions of the First-tier Tribunal ought to be complied with in the same way as orders of the courts and that, if a Government department has difficulty in complying with a direction, it should make a proper application for the direction to be varied with reasons for the making of the application. There may, I accept, be circumstances in which the First-tier Tribunal has made it clear that, if a direction cannot be complied with in time, an application for an extension of time need not be made until there is late compliance. Absent such an indication, the Secretary of State is not entitled simply to ignore a time limit in a direction in the belief that no consequences will follow, although, of course, he may be barred under rule 8 of the 2008 Rules from taking any further part in proceedings only if the appropriate warning has been given. Nor is he entitled to make an unexplained application for an extension of time on the assumption that it will be granted.

19. As to the First-tier Tribunal's decision to hold against the Secretary of State the fact that he had not provided evidence that Barnardo's had the relevant delegated powers, it erred in law in doing so without giving the Secretary of State notice of the point because the Secretary of State had plainly not considered it necessary to provide that evidence in his response to the appeal and, in my judgment, was entitled to take that view. I do not doubt that a claimant or the First-tier Tribunal may require the Secretary of State to provide evidence to prove that a provider had the relevant powers, but it does not follow that the Secretary of State is obliged to provide such evidence in every case if he is properly able to assert in his response that the body that issued the relevant notice had the power to do so and nobody challenges the assertion. There is a presumption of regularity, because it would be extremely unusual for a body to be issuing notices

under the 2011 Regulations without it had having been given proper authority to do so, and it would be disproportionate to require production of this evidence in all cases. Moreover, it seems undesirable from a claimant's point of view that a bundle of appeal documents should routinely be cluttered up with documents of such a technical nature. (On the other hand, the Secretary of State clearly ought to have provided a copy of the notice dated 18 December 2012, which was of central importance to the claimant's appeal, without it having been necessary for the First-tier Tribunal to direct him to do so.) Moreover, the lack of any specific direction to the Secretary of State makes it difficult to justify drawing an adverse inference against him.

20. For all these reasons, I allow the Secretary of State's appeal. However, the Secretary of State recognises that the claimant has an arguable case and submits that the case should be remitted to the First-tier Tribunal for it to be determined. I agree.

21. There is a live issue as to whether the claimant received the notice dated 18 December 2012. This was also the position in *Secretary of State for Work and Pensions v TJ (JSA)* [2015] UKUT 56 (AAC), where the three-judge panel said:

> "200. There is, however, a live dispute between the parties as to whether TJ received Avanta's letter of 14 May 2012. It is accepted by the Secretary of State that if TJ did not in fact receive this letter then the Secretary of State's decision of 25 June 2012 was wrong as she had not in fact been given a (complete) notice complying with regulation 4(2)(b) or (c) of the 2011 Regulations and/or because she would have had good cause for not attending at Avanta's address on 21 May 2012 at 9.30am. We understand the Secretary of State to accept that regulation 1(2), which provides that for the purpose of the 2011 Regs '**where a written notice is given by sending it by post it is taken to be received on the second working day after posting**', is to be read as providing for the calculation of the date from which the notice is effective, rather than providing for the deemed receipt of the notice. There is generally a presumption that a document that has been sent has been received, but that presumption is rebuttable.
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> …
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> 203. We have no great enthusiasm for TJ's appeal having to go back to a hearing before the First-tier Tribunal for a fact finding enquiry into, inter alia, whether she in fact received Avanta's appointment letter where what is in issue is whether JSA is not payable to her for two weeks in 2012, but if the majority were wrong on the first and third issues we reluctantly agree that this issue would need to be remitted to the First-tier Tribunal for determination. …"

(The three-judge panel's decision has been reversed by the Court of Appeal on other issues but not this one (*Reilly v Secretary of State for Work and Pensions* [2016] EWCA Civ 413; [2017] AACR 14).) The claimant asked for an oral hearing before the First-tier Tribunal and there has not been one at which the question whether she received the notice could have been resolved.

22. Moreover, there are other loose ends in this case. In particular, the claimant's reference to the letters dated 18 April 2013 and 22 April 2013 raised the question whether the Secretary of State had revised the decision under appeal. It may well be that in fact those letters referred to other occasions on which the claimant had been alleged to have missed appointments, but the Secretary of State has not produced the letters or answered the claimant's point. He needs to make a submission doing so.

23. In these circumstances, despite the claimant not having taken any part in the proceedings before the Upper Tribunal, I am satisfied that this case should be remitted to the First-tier Tribunal.