DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the London Fox Court First-tier Tribunal dated 10 April 2017 under file reference SC242/16/14262 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. It therefore follows that the Appellant's appeal against the Secretary of State's decision dated 9 October 2016 is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

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

DIRECTIONS

The following directions apply to the hearing:

(1) The appeal should be considered at an oral hearing.

(2) The new First-tier Tribunal should not involve the Tribunal judge or medical member previously involved in considering this appeal on 10 April 2017.

(3) The Appellant is reminded that the Tribunal can only deal with the appeal, including her health and other circumstances, as they were at the date of the original decision by the Secretary of State under appeal (namely 9 October 2016).

(4) If the Appellant has any further written evidence to put before the Tribunal, in particular medical evidence, this should be sent to the regional tribunal office in Sutton within one month of the issue of this decision. Any such further evidence will have to relate to the circumstances as they were <u>at the date of the original decision</u> of the Secretary of State under appeal (see Direction (3) above).

(5) The new First-tier Tribunal is not bound in any way by the decision of the previous Tribunal. Depending on the findings of fact it makes, the new Tribunal may reach the same or a different outcome to the previous Tribunal.

These Directions may be supplemented by later directions by a Tribunal Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

The two lessons for First-tier Tribunals arising from this appeal

1. This case provides two simple procedural lessons for First-tier Tribunals.

2. First, if a claimant expresses a wish to have an oral hearing of their appeal, but does not attend on the date the case is listed, it is not enough simply to check the tribunal records to see that they were properly notified of the hearing. It is also important to double-check whether any communications have been received from the claimant.

3. Second, and as the Upper Tribunal has consistently emphasised, there is no problem with the First-tier Tribunal taking a robust approach to appellants who do not appear at appeal hearings which they have requested. However, a necessary concomitant of such a robust approach is a greater preparedness to set aside decisions where appropriate.

The background to this appeal to the Upper Tribunal

4. The Appellant had originally asked for an oral hearing of her employment and support allowance (ESA) appeal. She wrote to the First-tier Tribunal a week before the hearing saying that she was very poorly and would not be able to attend, asking "please can you go ahead without me". The Tribunal did not see that letter and proceeded in her absence.

5. In granting permission to appeal I made the following comments:

> "1. This is a classic example of a case in which the First-tier Tribunal (FTT) decision should have been set aside by the FTT itself.
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> 2. The decision-maker concluded the Appellant scored nil points on her assessment and so no longer qualified for ESA. The Appellant appealed, stating she wanted an oral hearing of her appeal (p.163). The FTT convened on 10 April 2017 but the Appellant did not attend. The FTT decided to proceed in the circumstances as it understood them and as set out on the decision notice (p.168) and explained in the statement of reasons at para.2 (p.170). The FTT decided that the Appellant scored 12 points, but not the 15 needed for ESA. It dismissed the appeal.
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> 3. The grounds of appeal are that the FTT erred in law in (i) proceeding in the Appellant's absence; (ii) failing to find sufficient facts and/or give adequate reasons; and (iii) failing to consider regulation 29. I consider each of these grounds to be arguable. I comment only on the first.
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> 4. The Appellant's representative has provided evidence that the Appellant wrote to the FTT office by letter dated 3 April 2017, delivered on 5 April 2017. She said she would not be able to attend and explained why. I consider that had the FTT received that letter it would have given serious consideration to adjourning despite the Appellant's request.
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> 5. The FTT's statement of reasons states that the GAPS computer system was checked to confirm that notice of the hearing had been duly given. Unfortunately the GAPS record was not checked thoroughly. If it had, the FTT would have been made aware of the GAPS clerical notes, which confirms receipt of the Appellant's letter on 6 April (presumably when it got to post opening – see entry (10)). A copy of that letter was apparently sent out to the FTT and the parties on

> 6 April (see example attached of letter of that date to outdoor clerk), although the entry at (8) in the GAPS notes suggests there may have been some confusion.
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> 6. Whatever happened, it is clear the Appellant wrote to the FTT office ahead of the hearing, the FTT office received that letter but the FTT on the day did not have sight of that letter. If it had, it may well have acted differently. That suggests by itself the Appellant may inadvertently have suffered some unfairness. I am therefore giving permission to appeal against the Tribunal's decision on all three grounds.
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> 7. On the basis of those three grounds above it seems to me plain that the cumulative effect is that the First-tier Tribunal erred in law. Unless I hear a compelling argument to the contrary, I am minded to allow this appeal by the Appellant without further ado, set aside the decision of the First-tier Tribunal and send the case back for a re-hearing before a fresh Tribunal at Fox Court. I therefore give the Appellant permission to appeal to the Upper Tribunal."

6. I should perhaps add that the GAPS clerical record for 6 April 2017 (four days before the hearing) confirmed that the Appellant's letter had been received: "FE [Further Evidence] from the app received on 3/4/17 informing us that she is not going to attend the hearing due to poor health condition. FE actioned and issued to all parties. Placed in pigeon hole for venue."

7. That letter plainly did not get to the venue or to the Tribunal members in time. The Tribunal's statement of reasons recorded that "The appellant did not attend the hearing. Attempts to contact her using her mobile telephone number were unsuccessful. No message had been received from her to explain her non-attendance. The Tribunal considered that, according to GAPS records, she had been notified of the date of hearing ad that it was in the interests of justice to proceed on the abundant medical evidence and reports and claims in the ESA50 document without a hearing."

8. That explanation was incorrect in stating that "no message had been received from her to explain her non-attendance". It is also well established that a claimant's apparent change of election is not determinative (and, of course, this Tribunal was in any event unaware of the Appellant's late change of mind). Had the Appellant's letter been before the Tribunal, it might have resulted in an adjournment, notwithstanding the Appellant's stated wish for a hearing in her absence. Just as fairness is an important criterion under rule 27 (*FY v SSWP (ESA)* [2017] UKUT 501 (AAC)), so also under rule 31. Tribunals are accordingly well advised both to check the hard copy administrative file and the GAPS records (assuming both are available) – see e.g. *SS v SSWP (ESA)* [2014] UKUT 217 (AAC).

9. It is also well established that a necessary concomitant to a robust approach by Tribunals to going ahead in an Appellant's absence is a greater preparedness to set aside decisions where appropriate: see e.g. *Cooke v Glenrose Fish Co.* [2004] ICR 1188 and *PS v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 55 (AAC) and *SA v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 224 (AAC)**.**

10. Mrs D Dean, who now acts for the Secretary of State, is content that I allow the appeal, set aside the Tribunal's decision and send the case back for a fresh hearing before a new First-tier Tribunal. Mr D Martinez, the Appellant's representative, is similarly content that I take that course of action.

11. In conclusion I therefore allow the appeal on that basis, set aside the First-tier Tribunal's decision and remit (or send back) the original appeal for re-hearing to a new Tribunal. I formally find that the Tribunal's decision involves an error of law.

What happens next: the new First-tier Tribunal

12. There will need to be a fresh hearing of the appeal before a new Tribunal. Although I am setting aside the FTT's decision, I should make it clear that I am making no finding, nor indeed expressing any view, on whether or not the Appellant is entitled to ESA (and, if so, at what rate). That is a matter for the good judgement of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

13. The fresh FTT will have to focus on the Appellant's circumstances as they were as long ago as October 2016, and not the position as at the date of the new FTT hearing, which will obviously be 18 months or so later. This is because the new FTT must have regard to the rule that a tribunal "**shall not** take into account any circumstances not obtaining at the time when the decision appealed against was made" (emphasis added; see section 12(8)(b) of the Social Security Act 1998). The decision by the Secretary of State which was appealed against to the FTT was taken on 9 October 2016.

14. So the new Tribunal may reach the same, or a different, decision to that of the previous Tribunal. It all depends on the findings of fact that the new Tribunal makes. The previous Tribunal may or may not have got to the right decision on the merits; I cannot say.

Conclusion

15. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). The case must be remitted for re-hearing by a new Tribunal subject to the directions above (section 12(2)(b)(i)). My decision is also as set out above.

Signed on the original
on 29 January 2018

Nicholas Wikeley
Judge of the Upper Tribunal