

**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 Leicester First-tier Tribunal dated 24 February 2017 under file reference SC314/16/02096 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

***The appeal is allowed.***

***The Secretary of State's decision of 25 October 2016 is revised.***

***The Appellant's award of employment and support allowance (ESA) should not have been superseded from that date. The Appellant has limited capability for work and limited capability for work-related activity from that date and so remained entitled to ESA at the support group rate.***

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

**REASONS FOR DECISION**

**Introduction**

1. It is difficult, but not impossible, for an appeal to the Upper Tribunal to succeed where the Appellant has failed to obtain a statement of reasons from the First-tier Tribunal. This is one such exceptional case.

**The Upper Tribunal's decision in summary**

2. The Appellant's appeal to the Upper Tribunal is allowed. The decision of the Leicester First-tier Tribunal ("the Tribunal"), dated 24 February 2017, which dismissed her appeal, involved an error of law and is set aside. The Tribunal's decision is of no effect.

3. The typical outcome for a successful appeal before the Upper Tribunal is that the claimant's original appeal needs to be re-heard by a new First-tier Tribunal. However, I consider that a Tribunal re-hearing is not necessary in the circumstances of this case.

4. I therefore both (a) allow the Appellant's appeal to the Upper Tribunal; and (b) re-make the decision that the First-tier Tribunal should have made and in the terms as set out at paragraph 16 below. My reasons follow.

**The background**

5. The Appellant had previously worked as a teaching assistant with children with special educational needs. She was medically retired in 2013 and awarded contribution-based employment and support allowance (ESA).

6. Following a work capability assessment on 15 September 2016, a DWP decision-maker decided on 25 October 2016 to supersede an earlier decision dated 5 July 2016 and disallowed the Appellant's claim to ESA. The decision-maker on behalf of the Secretary of State decided that the Appellant scored 0 points. The Appellant applied for a mandatory reconsideration but the decision was not changed. The Appellant appealed to the Tribunal and asked for her case to be decided without an oral hearing.

7. The Tribunal's decision on 24 February 2017 was to dismiss the appeal and so to confirm the Secretary of State's decision of 25 October 2016. The Appellant, who was then acting by herself, albeit with the help of her husband, applied in-time for a set aside. Subsequently, with the assistance of her new representative, Mr Reiza Khan of Leicester City Council's Welfare Rights Service, she applied out of time for a statement of reasons for the Tribunal's decision. Both applications were refused. Unsurprisingly, the District Tribunal Judge also refused permission to appeal to the Upper Tribunal.

### **The proceedings before the Upper Tribunal**

8. Notwithstanding the absence of a statement of reasons (SoR), I gave the Appellant permission to appeal:

'9. As the late request for a SoR was rejected by the FTT, I am bound to apply rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), i.e. there must be an explanation for the delay and I must be satisfied it is in the interests of justice to admit the application. I am satisfied that the delay can be explained by the Appellant's poor health and lack of access to advice.

10. There is one particular matter which causes me some concern. In the appeal papers there are several references by the Appellant (or her representative) to her previously having been in the support group for ESA, but no other hard evidence to support this. The ESA decision under appeal was dated 25.10.2016 and was a supersession of an earlier decision-maker's decision dated 05.07.2016 (p.108). A copy of that July 2016 decision does not appear to be in the papers.

11. However, the appeal papers do include an ESA report dated 03.06.2014 (pp.84-104). That report would seem to suggest that the Appellant may have been accepted as having LCW on the basis of descriptors Wd (6 points) and Sb (9 points), which would only have been enough to justify entitlement to the ordinary rate of ESA, and not the support group. But GAPS2 shows that there was a DWP decision on the Appellant's entitlement to ESA dated 29.10.2014 which was appealed on 27.11.2014 but which did not go to a tribunal hearing. The GAPS2 record states "dormant, not heard, superseded" (ref SC038/14/01553). It is possible that may have been a supersession of a decision to award ESA at the ordinary rate by a new decision putting the Appellant in the support group.

12. Piecing the various bits of evidence together, it therefore seems to me at least arguable at this stage that the FTT which decided the appeal on 24.02.2017 did not have the full picture of the history of the Appellant's ESA claim. If so, that would be a breach of the Secretary of State's duty under rule 24(4)(b) and so arguably an error of law. For that reason, I consider that it is in the interests of justice to admit this application for permission to appeal despite

the fact that there is no SoR and the Appellant's request to the FTT for such a statement was late.'

9. In fairness to the Tribunal, I should make it clear that the references in the appeal papers to the Appellant having previously been in the support group only appeared in correspondence *after* the Tribunal had dealt with the appeal. There was no reason why the Tribunal, on the basis of the papers before it, should have been alive to the fact that the Appellant had previously been placed in the support group.

10. Miss N Needham, who now acts for the Secretary of State in these proceedings before the Upper Tribunal, supports the appeal. She accepts that the Tribunal may well have come to a different decision if it had been presented with a full picture of the adjudication history on the Appellant's ESA claim. In that context she makes two points.

11. First, Miss Needham explains that the Department's local office records remain unclear. However, those records do show that the Appellant had been in receipt of ESA at the support group rate since at least 8 April 2015 to the date of the decision under appeal (25 October 2016). She accepts that a decision-maker placed the Appellant in the support group but has been unable to ascertain the basis for that decision. This material information was not disclosed to the Tribunal.

12. Second, Miss Needham reports that those records also show that following the Tribunal's hearing the Appellant made a repeat claim for ESA on 3 April 2017. She was accepted as having limited capability for work under regulation 30(2) of the Employment Support Allowance Regulations 2008 (SI 2008/794) on the basis that her conditions had significantly worsened. She had a fresh medical assessment on 14 September 2017 and on 25 October 2017 a decision-maker decided she was entitled to ESA at the support group rate from 11 May 2017 owing to her mobility problems.

### **The Upper Tribunal's analysis**

13. This Tribunal inadvertently erred in law. As a result of the Department's failure, it was not presented with the Appellant's relevant and full ESA adjudication history. In particular, the Tribunal was not told that the Department had previously placed the Appellant in the ESA support group. It is no excuse to say that the Appellant should have mentioned this fact in her correspondence with the Department and the Tribunal. Her point, in lay terms, was that she was worse in 2016 than she had been in 2013. She was entitled to expect that the Department would present the Tribunal with the full relevant facts. I therefore allow the appeal and set aside the Tribunal's decision.

14. Given all the circumstances, I take the view it is right for me to re-make this Tribunal's decision rather than send it back for a new hearing before a fresh Tribunal. A new Tribunal will realistically be no better placed than me in making the decision. There is ample evidence on file. A remittal to a new Tribunal will also add unnecessarily to the delay in resolving this appeal, will cause the Appellant further stress and is wholly disproportionate. In accordance with the overriding objective, I therefore propose to re-make the Tribunal's decision under appeal.

15. The Secretary of State has acknowledged that the Appellant belonged in the support group both immediately before and immediately after the period now under appeal. Thus, it is clear that before the Department's decision under appeal the

Appellant was in receipt of ESA at the support group rate, even if the basis for that decision is not known for sure. It appears likely that the decision was made because of the Appellant's mobility problems. The Secretary of State has been unable to produce a copy of the decision of 5 July 2016 that was superseded on 25 October 2016. Moreover, the independent medical evidence produced by the Appellant is consistent with a finding that she met the criteria of paragraph 1 of Schedule 3 to the 2008 Regulations at all material times. There is certainly nothing in that evidence to suggest that there had been any improvement in her mobility in 2016; if anything, the opposite.

16. The decision that the First-tier Tribunal should have made, and which I now make, is therefore as follows:

***The Appellant's appeal is allowed.***

***The Secretary of State's decision of 25 October 2016 is revised.***

***The Appellant's award of employment and support allowance (ESA) should not have been superseded from that date. The Appellant has limited capability for work and limited capability for work-related activity from that date and so remained entitled to ESA at the support group rate.***

#### **Conclusion**

17. The decision of the First-tier Tribunal involved 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)). I also re-make the tribunal's decision (section 12(2)(b)(ii)) in the terms set out above.

**Signed on the original  
on 1 August 2018**

**Nicholas Wikeley  
Judge of the Upper Tribunal**