IN THE UPPER TRIBUNAL **Appeal No. CPIP/1217/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal is allowed.

The decision made by the District Tribunal Judge on 29 March 2017 (i.e. the decision under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 refusing to set aside the decision of the First-tier Tribunal given at Liverpool on 7 March 2017 under reference SC068/16/00800) involved the making of an error on a point of law.

That decision (*i.e.,* the decision made on 29 March 2017) is set aside.

I remake the decision I have set aside in the following terms.

> **The decision of the First-tier Tribunal given at Liverpool on 7 March 2017 under reference SC068/16/00800 is set aside under rule 37(1) and (2)(c) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.**

REASONS FOR DECISION

Summary

1 The decision I have given above has to be expressed using the words of the law.

2 In plain English, the effect is the same as if, on 29 March 2017, the District Tribunal Judge had granted the claimant's application to set aside the decision dated 7 March 2017, rather than refused it.

3 The claimant's appeal will therefore be re-considered at an oral hearing, by a different tribunal which will carry out a complete re-hearing of all the issues in the case.

Introduction

4 The claimant appeals to the Upper Tribunal with my permission against the above decision.

5 The Secretary of State agrees that the decision was made in error of law, albeit for somewhat different reasons from those I gave when granting permission to appeal. The claimant has been given an opportunity to reply to the Secretary of State's response but has not done so.

Reasons for setting aside District Tribunal Judge's decision

6 I explained my grant of permission to appeal in the following terms (I have corrected a number of errors):

> "3 In *CS v Secretary of State for Work and Pensions* (DLA) [2011] UKUT 509 (AAC) at paragraph 18, Upper Tribunal Judge Warren stated:
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> > "… Appellants often have difficulty in identifying the decision or decisions which they should appeal.… In my judgement the approach to be adopted is that, once the appellant has expressed a grievance in the letter of appeal, it is then for those more knowledgeable with the process, be they officers of the DWP or tribunal judges to identify the decision of the decisions which are the source of the appellant's grievance and then to treat the letter of appeal accordingly."
>
> That approach was subsequently endorsed by Upper Tribunal Judge Wikeley in *AJ v Secretary of State for Work and Pensions (II)* [2012] UKUT 209 (AAC) at paragraph 34.
>
> 4 In my judgment, the same approach should apply to applications for permission to appeal to the Upper Tribunal.
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> 5 In this case, [the claimant] has, understandably, sought to appeal against the substantive decision of the First-tier Tribunal. However, her main grievance is that the Tribunal heard her appeal in her absence despite the fact that she had applied for an adjournment.
>
> 6 Given that that was the case, she correctly applied for the decision to be set aside under rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Procedure Rules") but, on 29 March 2017 [a] District Tribunal Judge … refused to set the decision aside. In my judgment, it is that decision, and not the substantive decision of the Tribunal, that is "the source of the appellant's grievance" within the principle established by *CS v Secretary of State for Work and Pensions* and I have therefore treated [the claimant's] application as relating to that decision.
>
> 7 Under rule 7(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I waive [the claimant's] failure to apply to the First-tier Tribunal for permission to appeal against [the District Tribunal] Judge's … decision before making such an application to the Upper Tribunal as required by rule 21(2)(a) of those Rules.
>
> 8 I have given permission to appeal against [that] decision because, as I am currently advised, the appeal has very strong prospects of success.

> 9 [The District Tribunal Judge's] brief decision notice stated:
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> > "The Tribunal decision is not set aside.
> >
> > This is because none of the conditions in Rule 37(2) is satisfied. There was no procedural irregularity."
>
> But, in my strong provisional view, that is just flatly incorrect. The decision was made following a hearing on 7 March 2017, at which [the claimant] was not present … . That meant that one of the conditions in rule 37(2) was satisfied, namely the condition in rule 37(2)(c).
>
> 10 Because of the view he took on that point, [the District Tribunal Judge] did not go on to consider whether it was in the interests of justice to set the decision aside. I accept that that would not have been an open-and-shut decision, given the previous adjournments that had been granted and the terms upon which they had been granted. However, the Upper Tribunal has repeatedly emphasised that a robust approach to proceeding with the hearing in the absence of a party can only go hand-in-hand with a willingness to set aside the resulting decision in an appropriate case. In my judgment, it is necessary for a decision to be made balancing those considerations (and any other relevant considerations)."

7 Those reasons, which were originally set out on a provisional basis, now represent my concluded view. The District Tribunal Judge's decision not to set aside the Tribunal's substantive decision involved making an error on a point of law and, as I cannot say that the error was immaterial—I set it aside.

Reasons for the re-made decision

8 Having set aside that decision, I must either re-make it myself or remit it to a District Tribunal Judge or Regional Tribunal Judge in the Social Entitlement Chamber for re-consideration.

9 I have decided to take the former course.

Grounds for setting aside

10 So far as is relevant, rule 37 of the Procedure Rules is in the following terms:

> "**Setting aside a decision which disposes of proceedings**
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> **37.**—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and

> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

11 In this case, the claimant did not attend the hearing on 7 March 2017 so rule 37(2)(c) is satisfied. There is therefore a ground upon which the decision can be set aside.

The interests of justice

12 I therefore need to consider whether it is in the interests of justice to set the decision aside.

Procedural history

13 To do so, I need to consider not just the hearing on 7 March 2017 but also the previous hearings before the First-tier Tribunal.

14 The first hearing was held on 5 July 2016. The claimant attended but the Tribunal did not proceed with the hearing. The brief record of proceedings reads as follows:

> "Decision under appeal 28/9/15
> Entitled to DailyLiving (Standard) 15/5/15 – 15/9/21
> Opened and stopped, appellant extremely breatheless *[sic]*, GP records rqd and hospital letters in particular respiratory and MH"

15 It is perhaps unfortunate that the Tribunal decided to take that course. It may be that its members believed that the claimant was so breathless that continuing with the hearing would have endangered her health. If so, then it would have been helpful for that to have been recorded expressly in the record of proceedings.

16 But if continuing with the hearing did not involve such a danger, then in my judgment the Tribunal should not have adjourned. The claimant had made a journey of approximately 6½ miles to attend the hearing. Given how breathless the Tribunal observed her to be, that journey probably caused her considerable discomfort. If the Tribunal had taken her evidence before adjourning, it might have concluded that it did not need to see her medical records after all. And even if it still considered it necessary to see further medical evidence, there would have been a record of the

claimant's oral evidence available for future reference if it should turn out that she was unable to make the journey again. The subsequent difficulties that have arisen in this case would largely have been avoided had the Tribunal on 5 July 2016 felt able to take that course.

17 Be that as it may, the hearing was adjourned and re-listed on 17 January 2017 before a differently-constituted tribunal chaired by the same District Tribunal Judge who gave the decision I have set aside above. The claimant did not attend that hearing. She telephoned the Tribunal before the hearing to say that the COPD was "playing up at the moment" and that she was "struggling to [breathe]". She added that she had an appointment with the doctor the following day and asked for the hearing to be adjourned to another day.

18 With what was clearly considerable reluctance, the Tribunal adjourned again. So far as is relevant to this appeal, its adjournment notice reads as follows:

> "…
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> 3. The appeal was adjourned today because the appellant telephoned at 14:45, the commencement time for her hearing, saying that her COPD condition was such that she was struggling to [breathe] and that she had an appointment tomorrow with her GP.
>
> Directions:
>
> (i) the tribunal considered the imperatives of Rule 2 and Rule 31 and concluded that it was not in the interests of justice to proceed in the appellant's absence
>
> However this appeal was listed for hearing on 05/07/16 and was adjourned to obtain the appellant's GP records from 01/01/15 to the present date. However, despite three requests to the appellant's GP records were not received. On 24/11/16 the tribunal directed that the appellant should contact her GP to find out why the medical records have not been sent to the tribunal and that she furnish any letters from hospitals and consultants in her possession as soon as possible. Nothing was heard from the appellant in relation to either matter.
>
> However had the appellant attended today the appeal would have proceeded without the records. The adjournment today is not because of the absence of the records.
>
> This is a peremptory adjournment, that is the appeal must proceed when next listed. However if the appellant feels she is unable to attend on the next occasion due to ill-health she is at liberty to request, in writing, a telephone hearing."

19 The Tribunal received the claimant's medical records on 6 February 2017.

20 The appeal was then listed for a further hearing on 7 March 2017. The claimant was not able to attend that hearing either. She arranged for a friend to

telephone the Tribunal on the day to ask for a postponement because she was suffering from a chest infection that had started during the night (by implication, the previous night).

21 The Tribunal considered that application but decided to refuse it and proceed in the claimant's absence. The written statement of reasons explained that decision in the following terms:

> "5. [The claimant] did not attend the hearing. The tribunal was presented with the record of a telephone call that [the claimant] made to HM Courts & Tribunals Service just before the hearing commenced requesting a postponement on the basis that she was unwell and unable to attend. A previous tribunal held on 5th July 2016 had adjourned in order to obtain general practitioner records. A further tribunal was scheduled for 17th January 2017. The appellant did not attend that hearing but telephoned immediately before the hearing to request the postponement because she said that she was unwell and unable to attend the hearing. The tribunal agreed to that request (with some reluctance, it would appear from the Adjournment Notice) and made it clear that it was a peremptory adjournment, in that the appeal must proceed when next listed (though if the appellant was still unwell she was at liberty to request, in writing, a telephone hearing). It is clear that as at 17th January 2017 HM Courts & Tribunals Service had not received the GP records requested by the tribunal of 5th July 2016. Before the present hearing [,] 119 pages of GP records were received and included in the Schedule of Evidence….
>
> 6. The tribunal considered whether it was appropriate to determine the appeal without the appellant being present. We took into account that this was the third occasion on which the appeal had been listed for hearing; that we had an abundance of medical evidence that was not available to the previous tribunals; that at the tribunal of 17th January 2017 and at the present hearing the appellant had telephoned at the very last minute to request a postponement; that the appellant had a history of failing to attend medical appointments… And there was no "guarantee" that she would attend another hearing or as the Adjournment Notice of 17 January 2017 stated she should, request a telephone hearing. We considered that we had sufficient evidence in the papers to proceed. We were satisfied that the requirements of rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 were met."

Discussion

22 In my judgment, there are a number of difficulties with that approach:

23 First, the rule that allows the First-tier Tribunal to proceed with a hearing in the absence of a party is rule 31 of the Procedure Rules, not rule 27. The latter rule

allows the First-tier Tribunal to proceed make a decision without holding a hearing in certain circumstances. The rules deal with different situations and the criteria to be applied are not necessarily the same.

24 Second, it was not the claimant who telephoned immediately before the hearing but her friend. This is a small point, but the error may have caused the Tribunal to believe that the claimant was less ill than may have been the case.

25 Third, in my judgment, it was unfair to hold the first adjournment against the claimant in the balancing exercise. The claimant attended the hearing on 5 July 2016 even though the record of proceedings notes that she was “extremely breathless”. The decision to stop proceedings and obtain GP records was made on the Tribunal’s own initiative, rather than at the claimant’s request. The adjournment notice states expressly that “the appeal was adjourned today because *the tribunal* was not ready to proceed” (my emphasis) not because the claimant was unready. As I indicate above, the decision to adjourn on that occasion may not have been the best decision for the Tribunal to have made.

26 Fourth, it is in my judgment important to note that the claimant made the effort to attend the first hearing despite being “extremely breathless”. The tribunal therefore knew that it was not dealing with someone who had no real intention of attending and was simply making excuses not to do so. Further, the claimant had no reason to prolong the proceedings unnecessarily. She had been awarded the standard rate of the daily living component of personal independence payment ("PIP") and she hoped for a higher award. Nothing in the evidence had caused any of the tribunals that had previously dealt with the matter to issue a warning that the existing award was in doubt. The claimant therefore had every reason to cooperate with the Tribunal, and to attend the hearing, if her health permitted her to do so. The sooner, the Tribunal reached a decision, the sooner she would receive any additional benefit that she might be awarded.

27 Fifth, I am concerned about the emphasis placed on the sufficiency of the evidence available to the Tribunal. As the Upper Tribunal has now said on a number of occasions, the test under rule 31 is not whether there is sufficient evidence, but whether it is “in the interests of justice” to proceed in a party’s absence.

28 It will, of course, rarely—if ever—be in the interests of justice to proceed in absence where the evidence is insufficient but the “interests of justice” test also requires the Tribunal to consider whether it is *fair* to do so. The passage from the statement of reasons that I have quoted above does not address that question directly, although I accept that it does mention some factors that would be relevant to the issue.

The peremptory adjournment

29 Finally—and, in my judgment, most importantly—the statement of reasons records that the Tribunal’s decision to proceed in the claimant’s absence was influenced by the fact that the adjournment ordered on 7 January 2017 had been expressed to be a “peremptory adjournment”.

30 As the District Tribunal Judge who signed the directions on 7 January 2017 explained, that term was intended to mean that "the appeal must proceed when next listed".

31 In my judgment, the tribunal on 17 January 2017 had no power to give such a direction. It should not have purported to do so, and the tribunal on 7 March 2017 should not have permitted itself to be influenced by the fact that it had purported to do so.

32 In a PIP appeal, the discretion whether or not to proceed in the absence of a party (and therefore also the power to adjourn where the decision is not to proceed) is conferred by rule 31 and paragraph 4 of the Practice Statement: *Composition of Tribunals in Social Security and Child Support Cases in the Social Entitlement Chamber on or after 1 August 2013* on the three-person tribunal before which the appeal is listed. That discretion cannot be exercised in advance by another tribunal or by a single judge giving case management decisions.

33 There are good reasons for that.

34 The first—and most obvious—is that circumstances may change. Suppose the claimant in this case had been involved in a road traffic accident after the hearing 7 March 2017 had been listed and was unable to attend the hearing because she was in a coma in hospital? If it were effective, the direction given on 17 January 2017 would have required the tribunal on 7 March 2017 to proceed with the hearing despite the obvious unfairness of doing so.

35 The second is that such a direction ignores the fact that there are at least two parties to an appeal. Suppose that, for otherwise compelling reasons, the Secretary of State had wanted the hearing on 7 March 2017 to be adjourned. On its face, the direction given on 17 January 2017 would have prevented the Tribunal from granting the adjournment, even though the Secretary of State had not been responsible for any of the previous delay.

36 I was a District Chairman of appeal tribunals—and then a District Tribunal Judge—for a combined period of nearly sixteen years. I understand the importance of avoiding unnecessary adjournments. The resources of the First-tier Tribunal are finite; there is a backlog of appeals; and every time that a hearing is adjourned and re-listed the judicial time spent on the re-listed hearing is not available to decide appeals brought by other claimants.

37 Despite those considerations, adjournment is sometimes necessary and it is the tribunal before which the appeal is listed that is best placed to form a judgment about whether that is so.

38 When it makes that decision, any history of previous adjournments is a factor—and will often be an important factor—for the tribunal to take into account. If the tribunal grants an adjournment, there is no harm in it advising a claimant that it is unlikely that a further adjournment will be granted, or that a future tribunal may require compelling reasons to persuade it to adjourn again.

39 But what a tribunal may not do is seek to bind the hands of a future tribunal by directing that an appeal "must proceed when next listed" or that a future tribunal may not grant a further adjournment; or by giving any other direction with a similar effect.

40 In this case, it would have been open to the Tribunal on 7 March 2017 to have been robust. It could have said in terms that the previous tribunal had no power to bind it and that it would make up its own mind about the exercise of the discretion conferred on it by rule 31. However, it did not do so. And I cannot ignore the fact that the latter tribunal, which was chaired by a fee-paid judge, may have allowed itself to be influenced by the fact that the impermissible direction had been given by a tribunal chaired by a District Tribunal Judge.

Conclusion

41 For all those reasons, I have concluded that it is in the interests of justice that the decision given by the First-tier Tribunal on 7 March 2017 should be set aside for procedural reasons under rule 37 of the Procedure Rules. I therefore re-make the decision of the District Tribunal Judge dated 29 March 2017 in the terms set out on page 1.

42 The claimant must note what I say at paragraph 36 above about the need, where possible, to avoid adjournments.

43 Even when one disregards the first adjournment—for which, as I have said, she was not responsible—there have now been two hearings that she has been unable to attend because of illness. If she fails to attend a third for the same reason, the tribunal may well—it is not a matter for me—wish to consider how likely it is that she will ever be well enough to attend if the hearing were to be adjourned again. It is not the case that the First-tier Tribunal cannot hear her appeal until she is well enough to attend in person. Rule 31 of the Procedure Rules gives it a discretion to proceed in her absence. I have set aside the decision of the previous tribunal because I am not satisfied that it exercised that discretion lawfully. However, the tribunal could have come to the same decision without making any legal error. And if the claimant does not attend the next hearing, the next tribunal may also decide to proceed in her absence, particularly as her appeal has unavoidably become very old and now needs to be brought to a conclusion.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

17 January 2019