

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No CE/3274/2016

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at Portsmouth on 22 June 2016 under reference SC158/15/00289 involved the making of an error of law and is set aside. Acting under s.12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 I remake the decision in the following terms:

The claimant's appeal against the decision dated 17 July 2015 is allowed. She did have a right to reside for the purposes of her claim for employment and support allowance ("ESA") dated 15 May 2015. The Secretary of State must now proceed to examine the remaining aspects of that claim.

REASONS FOR DECISION

1. This is one of a number of cases which had been stayed pending the decision of the Supreme Court in *SSWP v Gubeladze* [2019] UKSC 31, which was given on 19 June 2019.

2. In a submission dated 13 July 2017 Mr Page, for the Secretary of State, accepted that:

(a) the First-tier Tribunal ("FtT") had erred in law; and

(b) on the evidence now before the Upper Tribunal, work performed by the claimant between 19 January 2009 and 7 February 2010 would (if the Secretary of State's appeal in *Gubeladze* were to fail) confer "worker" status, which would thereafter be retained until the date of decision.

3. Thus, it followed that the outcome of the present case turned on the outcome of the appeal in *Gubeladze* and, now the Supreme Court's decision is known, the present decision can be given in the claimant's favour.

4. There was evidence that, as I have said, the claimant, a Lithuanian national, worked between 19 January 2009 and 7 February 2010, it is said in some places for Portsmouth City Council, though on the evidence as a whole it is more likely that it was for contactors working at Council premises. In any event, it matters not. A habitual residence test form had stated the reason for the employment ceasing as "ill-health -temporary" and a note been added that "evidence required".

5. In a submission to the FtT about which I have more to say below, it was set out that:

“Since the last job ended she has been in receipt of Jobseekers Allowance and ESA –
JSA – from 14/04/11 to 25/11/11
ESA – from 26/11/11 to 20/11/13
JSA - from 27/11/13 to 02/05/14
ESA – from 03/05/14 to 04/02/15
JSA – from 05/02/15 to 14/05/15.”

The submission made no reference to the claimant’s national insurance contributions record, also in evidence before the FtT, which appeared to show receipt of both ESA and JSA in the tax year 2010/11.

6. The appeal to the FtT primarily featured issues about the work record of the claimant’s husband (“Mr S”) (from whom she was separated) with a view to the claimant establishing that she was the “family member” of a person with a right to reside. In the event it has not proved necessary to explore that aspect further in this appeal.

7. On 7 February 2015 the Upper Tribunal’s decision in Ms Gubeladze’s case was issued ([2015] UKUT 50 (AAC)), ruling *inter alia* that the extension of the Worker Registration Scheme from 1 May 2009 to 30 April 2011 was disproportionate and unlawful. Despite this, the Secretary of State’s submission to the FtT, which cannot have been written earlier than September 2015 (when the claimant appealed), made no reference to the decision and continued to maintain the position that unregistered employment prior to 30 April 2011 could not be taken into account.

8. The claimant’s appeal came before the FtT on 22 June 2016. The claimant was accompanied by a friend, but otherwise unrepresented, and have evidence through an interpreter. The FtT dismissed the appeal insofar as it relied on Mr S, on the basis that the claimant could not establish that within the “registration period”, which the judge took as running to 30 April 2011, Mr S had completed 12 months in registered employment.

9. The FtT did not deal at all with the possibility that the claimant herself might have had worker status and been able to retain it. Given that her work was stated to have ceased because of her temporary ill-health and a series of periods of ESA and JSA had followed, a tribunal directing itself properly as to the legal status of the worker registration scheme between 2009 and 2011 would have recognised the need to make further findings of fact, as Mr Page accepts.

10. In her appeal to the Upper Tribunal, the claimant has been very fortunate in securing the assistance of Ms Jane Cottrell, money adviser, working for Portsmouth City Council’s Housing Service. This is one of those cases which eloquently demonstrate why there is sometimes no substitute for well-informed and diligent representation for claimants. The grounds of appeal correctly focused on the FtT’s failure to take into account the Upper Tribunal’s

decision in *Gubeladze* and so to conclude that the claimant had indeed been a worker, and on its failure to make the necessary findings of fact as to whether she had retained that status thereafter.

11. That said, even on that basis, the claimant appeared to be facing something of an uphill struggle on the basis of the Secretary of State's submissions to the FtT. In particular, if her employment finished on 7 February 2010 and (as stated there) her first claim for JSA thereafter was on 14 April 2011, there was a significant gap to be bridged.

12. In submissions in the present appeal, Ms Cottrell provided written evidence she (or the claimant, presumably at her instigation) had obtained from the DWP's Jobcentre Plus that the claimant had in fact been in receipt of JSA from 1 February 2010 to 29 March 2011 and again from 14 April 2011 until her claim for ESA which is the subject of the present case. Between 30 March 2011 and 13 April 2011 it was submitted she had been on ESA. Although the ESA section of the DWP was unable to provide records going that far back so as to confirm this, Ms Cottrell was able to secure corroboration via the computerised records maintained by the local authority's housing benefit section. As she further pointed out, the national insurance contribution printout also provided some support.

13. Mr Page very properly made the concessions summarised above in the light of this additional evidence.

14. I should record my concern that the Department's submission to the FtT provided partial and highly misleading information as to the claimant's benefit claims after her employment ceased. If such information is provided as to matters which ought to be within the Department's own knowledge, there is a real danger that it appears to the FtT to be authoritative. In fact, in the present case, it was nothing of the kind and there clearly was material remaining within the Department's knowledge (for it was produced much later) that the claimant had had substantial periods on JSA in addition to those stated. I accept that the focus in the FtT was on rights derived from Mr S; while that might justify not going into the client's own record, it does not justify going into it but on a materially incomplete and inaccurate basis.

CG Ward
Judge of the Upper Tribunal
9 July 2019