IN THE UPPER TRIBUNAL **Appeal No. CE/1901/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

LM

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge K Markus QC

Decision date: 4th February 2020
Decided on consideration of the papers

Representation:

Appellant: Welfare Rights Service, Sunderland City Council
Respondent: Decision Making and Appeals, Leeds

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 23rd March 2019 under number SC236/19/00370 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **The parties should send to the relevant HMCTS office within one month of the issue of this decision, any further evidence upon which they wish to rely.**

4. **The new tribunal will be looking at the appellant's circumstances at the time that the decision under appeal was made, that is the 19th December 2018. Any further evidence, to be relevant, should shed light on the position at that time.**

5. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. It will not be limited to the evidence and submissions before the previous tribunal. It will consider all aspects of the case entirely afresh and it may reach the same or a different conclusion 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

1. The Appellant had appealed to the First-tier Tribunal ('FTT') against a decision of the Secretary of State for Work and Pensions that she did not have limited capability for work and so was not entitled to Employment and Support Allowance ('ESA'). In the appeal form she had indicated that she wished to attend an oral hearing of her appeal.

2. The Appellant says that she was not notified of a hearing date, and this is consistent with the FTT's case management records. The FTT determined the appeal on 23rd March 2019 without a hearing. It decided that the Appellant scored 15 points under Schedule 2 of the ESA Regulations and so she had limited capability for work. It decided that no Schedule 3 descriptor applied and neither did regulation 35, so she did not have limited capability for work-related activity.

3. The Decision Notice explained the FTT's decision to determine the matter on the papers as follows:

> "Having had regard to Rules 2, 6 and 27 of the Tribunal Procedure (First-tier Tribunal)(SEC) Rules 2008, the Tribunal considered that it could decide this appeal without a hearing. The Tribunal took into account the issues to be decided and concluded that it was proportionate, avoided delay and was in the interest of justice to determine the appeal without a hearing."

4. The Appellant's partner requested a statement of reasons, making it clear that the Appellant disagreed with the decision that she did not have limited capability for work-related activity.

5. The statement of reasons further explained why the FTT had determined the appeal without a hearing as follows:

> "The Tribunal heard the appeal as a paper case having previously previewed the papers of its own volition. As part of case management the Tribunal reviews files where oral hearings have been requested and, where the Tribunal is able to make a decision in favour or an appellant, the appeal is then treated and dealt with in the same manner as a paper case. Dealing with appropriate cases in this way if proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the

> parties, it avoids unnecessary formalities, provides flexibility in the proceedings, uses the special expertise of the Tribunal effectively and avoids delay, so far as compatible with proper consideration of the issue. In dealing with this appeal the Tribunal considered and applied Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008. The overriding objective is met."

6. I gave the Appellant permission to appeal on the ground that arguably the FTT had erred in determining the appeal on the papers.

7. In written submissions the Secretary of State supports the appeal and invites the Upper Tribunal to set aside the decision of the FTT and remit it to another tribunal. The Appellant agrees. She has asked for an oral hearing but, in the light of her agreement to the disposal of the appeal as suggested by the Secretary of State and for an Upper Tribunal decision without reasons, I am satisfied that this request is directed to the FTT proceedings. I am able to address this appeal without a hearing. I am not required to make any findings of fact, oral evidence is irrelevant, and the parties have made their submissions in writing.

8. This appeal provides a salutary reminder of the FTT's duty to hold an oral hearing unless the parties agree to their not being a hearing. As I explain further below, the way in which this appeal was handled gives rise to a concern that this case may be one example of a more general approach being taken by some within the Social Entitlement Chamber of the FTT. Therefore, although the appeal is supported by the Secretary of State and the parties are agreed as to how it should be disposed of, I set out my reasoning.

Breach of the duty to hold an oral hearing

9. The general duty on the FTT to hold an oral hearing is set out in rule 27(1) of the Tribunal Procedure (First-tier Tribunal)(Social Entitlement Chamber) Rules 2008. This provides:

> 27(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
>
> (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
>
> (b) the Tribunal considers that it is able to decide the matter without a hearing.

10. Rule 1(2) provides that "hearing" means "an oral hearing".

11. In her notice of appeal, the Appellant had said that she wanted to attend a hearing of her appeal and that she was available to do so at any time. There is nothing on the file to indicate that the Appellant had changed her mind about a hearing. The Appellant had neither consented to, nor not objected to, the matter being decided without a hearing. The FTT did not mention rule 27(1)(a) and it was not entitled to proceed without a hearing, regardless of its view that it was able to decide the matter without a hearing.

12. It cannot be said that the error in this case was immaterial. It seems that the FTT thought that the Appellant had achieved all that she could have done. They were wrong in this regard. Although the FTT had allowed the appeal in that it decided that the Appellant was entitled to ESA because she had limited capability for work, she

could have achieved more. Prior to the decision which was the subject of this appeal, the Appellant had been assessed as having had limited capability for work-related activity and so had been placed in the support group, with all the advantages that went with that. Although there have been some changes to the legislation in this regard since the decision of Upper Tribunal Judge Wikeley in *TMcG v SSWP* [2012] UKUT 411 (AAC) it nonetheless remains the case, as he explained at paragraphs 14-15, that a decision to award ESA without the support component is not a complete win for a claimant who argues that they have limited capability for work-related activity. In this case the Appellant was deprived of her right to be heard by the tribunal which reached that decision.

13. Standing back from the circumstances of this particular appeal, the FTT's explanation for its decision not to have a hearing gives the strong impression that its approach was an instance of a more general practice of considering whether to have a hearing without seeking the views of the parties or, indeed, contrary to the express request by a claimant to attend an oral hearing. It follows from what I have said that, if there is such a practice, it is unlawful. The FTT cannot decide not to have a hearing without having obtained the views of the parties and where a claimant has requested a hearing (in most cases they will have said so on the notice of appeal), there must be one.

Abridgment of time to apply for set aside.

14. The Decision Notice included the following:

> "If any party is dissatisfied with the way in which this appeal has been determined, they must apply within 14 days of today to have the Tribunal's decision set aside for an oral hearing."

15. Rule 37(3) of the FTT Rules requires an application for set aside to be made within 1 month. The First-tier Tribunal has power in rule 5(3)(a) to shorten the time for complying with any rule, but that is a power to be exercised judicially in the circumstances of the case. In this case, the FTT gave no reason for shortening the time limit. Indeed, one gets the strong impression that it was a standard direction made without regard to the circumstances of the particular case. It was unlawful (although it has made no difference in this case, as things have turned out, in the light of my decision to set aside the FTT's decision for failure to have a hearing).

Conclusion

16. The parties are agreed that the FTT's decision should be set aside and remitted to another tribunal for reconsideration. That is the correct course. There are numerous matters of fact which the next tribunal will need to determine on the evidence.

Signed on the original
on 4th February 2020

Kate Markus QC
Judge of the Upper Tribunal