IN THE UPPER TRIBUNAL **Appeal No. CJSA/197/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

BEFORE JUDGE WEST

DECISION

The decision of the First-tier Tribunal sitting at Blackpool on 17 October 2019 under reference number SC946/19/02096 involves an error of law. The appeal is allowed and the decision of the Tribunal is set aside.

The decision is remade.

The claimant's entitlement to jobseeker's allowance ("JSA") did not come to an end, but his award falls to be reduced by way of a 4 week sanction in accordance with regulation 69A of the Jobseeker's Allowance Regulations 1996.

The matter is remitted to the Secretary of State to calculate the claimant's entitlement to JSA on that basis.

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

REASONS

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal sitting at Blackpool on 17 October 2019.

2. I shall refer to the appellant hereafter as "the claimant". The respondent is the Secretary of State for Work and Pensions. I shall refer to her hereafter as "the Secretary of State". I shall refer to the tribunal which sat on 17 October 2019 as "the Tribunal".

The History Of The Claim

3. The claimant appealed against a decision dated 17 October 2017 that he failed to attend a mandatory appointment and then did not, within 5 working days, provide evidence of a good reason for his failure, as a result of which his entitlement to jobseeker's allowance ("JSA") ceased. He appealed against that decision and the matter came before the Tribunal on 17 October 2019. The claimant did not appear, but the Tribunal considered that it was fair to proceed in his absence.

4. The appeal was refused. The Tribunal found that that the claimant failed to attend a mandatory appointment on 6 October 2017 and then did not, within 5 working days, provide evidence of a good reason for his failure, as a result of which his entitlement to JSA ceased. It found that he did not deny that he had not attended the appointment on that date. It was evident from his own letter of appeal that he was aware of the appointment and was given proper notice to attend it. It found that he had failed to provide within 5 working days evidence of good reason for that failure and at no point had he adduced any good reason for that failure.

The Legislation

5. So far as material, the Jobseeker's Allowance Act 1995 ("the 1995 Act") provides that

> **"Attendance, information and evidence**
> 8(1) Regulations may make provision for requiring a claimant (other than a joint-claim couple claiming a joint-claim jobseeker's allowance)—
>
> (a) to participate in an interview in such manner, time and place as an employment officer may specify; and
>
> (b) to provide information and such evidence as may be prescribed as to his circumstances, his availability for employment and the extent to which he is actively seeking employment.
>
> …
>
> **Other sanctions**
> 19A(1) The amount of an award of a jobseeker's allowance is to be reduced in accordance with this section in the event of a

> failure by the claimant which is sanctionable under this section.
>
> (2) It is a failure sanctionable under this section if a claimant—
>
> (a) without a good reason fails to comply with regulations under section 8(1) or (1A) …".

6. Again so far as material, the Jobseeker's Allowance Regulations 1996 ("the 1996 Regulations") provide that

> **"Attendance**
> 23. A claimant shall participate in an interview in such manner, time and place as an employment officer may specify by a notification which is given or sent to the claimant and which may be in writing, by telephone or by electronic means.
>
> …
>
> **Entitlement ceasing on a failure to comply**
> 25(1) Entitlement to a jobseeker's allowance shall cease in the following circumstances—
>
> (a) if the claimant fails to participate in an interview on the day specified in a relevant notification, and fails to make contact with an employment officer in the manner set out in that notification before the end of the period of five working day beginning with the first working day on which the claimant failed to participate in an interview …
>
> ...
>
> **Time at which entitlement is to cease**
> 26. Entitlement to a jobseeker's allowance shall cease in accordance with regulation 25 on whichever is the earlier of—
>
> (a) the day after the last day in respect of which the claimant has provided information or evidence which shows that he continues to be entitled to a jobseeker's allowance,
>
> (b) if regulation 25(1)(a) or (b) applies, the day on which he was required to participate in an interview, and
>
> (c) if regulation 25(1)(c) applies, the day on which he ought to have provided the signed declaration,

> provided that it shall not cease earlier than the day after he last participated in an interview in compliance with a notification under regulation 23 or 23A.
>
> **Where entitlement is not to cease**
> 27(1) Entitlement to a jobseeker's allowance shall not cease if the claimant shows, before the end of the fifth working day after the day on which he failed to comply with a notice under regulation 23 or to provide a signed declaration in accordance with regulation 24, that he had good cause for the failure.
>
> (2) In this regulation, "working day" means any day on which the appropriate office is not closed.
>
> …
>
> **The period of a reduction under section 19A: Other sanctions**
> 69A(1) A reduction under section 19A (other sanctions) in the circumstances described in the first column of the following table is to have effect for the period set out in the second column
>
> | Circumstances in which reduction period applies | Reduction period |
> |---|---|
> | Where there has been no previous sanctionable failure by the claimant that falls within paragraph (2) | 4 weeks". |

7. It is apparent from the file that on 4 October 2017, when the claimant attended his normal fortnightly work search interview, he was informed by his work coach at the Jobcentre that he was required to sign daily with immediate effect (page 29: "explained daily sign as want to see his daily jobsearch"). He attended the Jobcentre as required on the following day, but provided no evidence of any job search (page 30). He failed to attend on 6 October 2017. On 17 October 2017, as no contact had been received from him, his claim to jobseeker's allowance was closed with effect from 6 October 2017 and final payment was issued. He was notified of that decision. On the following day he attended the Jobcentre on what would have been his signing day had he still been required to attend fortnightly. He was informed that his claim had been closed as there had been no contact with him (page 36). The decision was reconsidered, but not revised, on 9 July 2019.

The Grounds of Appeal

8. The claimant adduced five grounds of appeal:

(i) there was no reason or explanation for the alteration of the conditions of the jobseeker's agreement from fortnightly signing to daily signing

(ii) since the jobseeker's agreement is a formal written document, notification or its alteration or termination should similarly be in written form with advance notification of when the change was proposed to take place

(iii) the consequences of non-compliance should have been set out in the written notification of alteration

(iv) he had in fact made contact with an employment officer within five working days because he had written to the Jobcentre on 5 October 2017 and he had the recorded delivery slip to prove it

(v) he was outside the terms of regulation 25 because he had not failed to participate in an interview; this was not a regular Jobcentre interview, but instead a daily signing.

9. What the appellant said in his letter of 5 October 2017 (which was received by the Post Office at 15.02 on that afternoon) was that

> "After my recent work search review/signing yesterday, I've now been told that I will now be required to attend JobCentre every morning at 9.40 am for "daily signing" (no signature was taken during recent attendance). No reason or justification has been given for this, except "because I said so" and no formal notification of its purpose provided. I've also been refused the time of my next work search review/signing, which I'm told will only be given on the day before.
>
> I'm writing to notify that I was unable to continue such appointments until I receive formal notification to justify their purposes. I would appreciate if you could provide time of my next work search review/signing in your reply".

10. I was satisfied that there was nothing in the first ground of appeal. The evidence was quite clear that he was required by his job coach to attend on a daily basis so that his daily jobsearch record could be seen.

11. I was also satisfied that there was nothing in the third ground of appeal. There is nothing in the regulation 25(1)(a) to require the notification to set out as a condition of its validity the consequences of non-compliance (there is under regulation 25(1)(b), but the Secretary of State was not purporting to proceed on that basis).

12. There was likewise nothing in the last ground of appeal. The claimant had been required to attend the Jobcentre fortnightly; he was now being required to attend on a daily basis, but the daily visit to ascertain his daily jobsearch was still an interview within the meaning of regulations 23, 25 and 26, with the consequences on non-compliance if he did not attend.

13. However, in my judgment there was an arguable case that the Tribunal erred in point of law for the two other reasons set out in the grounds of appeal.

14. In the case of the second ground of appeal, were the requirements of regulation 23 that a claimant shall participate in an interview in such manner, time and place as may be specified by a notification which is given or sent to him and which may be in writing, by telephone or by electronic means exhaustive or merely illustrative? In other words, was an oral notification given in the course of face to face contact between the claimant and the employment officer within regulation 23 at all? The matter was left open in ***CS v. Secretary of State for Work and Pensions (JSA)*** [2015] UKUT 61 (AAC) and the matter must be reasonably arguable.

15. In the case of the fourth ground of appeal, under the terms of the regulations was the claimant required to show good reason for his failure to attend the appointment on 6 October 2017 or was he merely required to make contact with an employment officer? If the latter, was not his letter of 5 October 2017 sufficient compliance with that requirement, whether or not it amounted to the provision of a good reason?

16. On 17 February 2020 I therefore granted the claimant's application for permission to the appeal against the decision of the Tribunal sitting at Blackpool dated 17 October 2019 and made directions for further submissions.

17. On 5 June 2020 the Council provided its submissions, but did not support the appeal. The claimant replied to those submissions on 30 July 2020.

18. Neither party sought an oral hearing of the appeal and I do not consider that it is necessary to hold one in order to determine the matter.

The Submissions

19. The Secretary of State submitted that regulation 23 allowed for an oral notification to be given to the claimant by virtue of the permissive word "may" and not the imperative "shall". She submitted that the claimant was aware that he was required to participate in the interview on 6 October 2017 by virtue of his letter of the previous day in which he advised that he would not be taking part in the interview. He had therefore been notified of the requirement to take part in an interview on 6 October 2017 and having failed to do so, consideration was then required as to whether he had satisfied the requirements of regulation 25 or whether his award of JSA should be terminated on the basis that he ceased to be entitled to JSA.

20. She submitted, however, that the Tribunal erred in law in its consideration of regulation 25 and its application to the claimant's circumstances. Moreover, it did not provide sufficient reasons as to why the letter submitted by him dated 5 October 2017 was not sufficient as notice of contact to satisfy the requirements of regulation 25(1).

21. It also erred in law in deciding for the purposes of regulation 25(1) that, once there had been failure to participate, good reason was required to be demonstrated by the claimant within 5 working days. In fact regulation 25 only required a claimant to make contact with an employment officer and such contact only needed to be made in the manner set out in the notification to the claimant informing him that he was required to participate in an interview. Should a claimant make contact with an employment officer within 5 working days, then in accordance with regulation 27 entitlement to JSA did not cease, but instead consideration was required as to whether

the claimant had good reason for his failure to participate and whether his award ought to be reduced by way of sanction.

22. Should a claimant not make contact with an employment officer within 5 working days, in such circumstances entitlement to JSA would cease. If, however, he did make contact within 5 days, entitlement would not cease, although in the event that no good reason were provided for the failure to participate in the interview, a sanction should be applied to the award of JSA in accordance with regulation 69A.

23. The Secretary of State therefore submitted that the Tribunal erred in law in failing to decide if the letter dated 5 October 2017 amounted to sufficient notice of contact to an employment officer and that, if it did, whether his award of JSA ought to have been reduced by way of a sanction.

24. She submitted that the letter of 5 October 2017 was sufficient compliance with the requirement to make contact with an employment officer.

25. She went on to submit that the claimant had not adduced good reason for his failure to participate in the interview of 6 October 2017 and relied on the findings of fact of the Tribunal in paragraph 4 of its statement of reasons to that effect. Consequently his award of JSA should not have been terminated, but instead ought to have been reduced in accordance with ss.8(1) and 19A of the 1996 Act and regulation 69A of the 1996 Regulations, with the result that a 4 week sanction should have been applied to his award.

26. The Secretary of State therefore submitted that the Upper Tribunal should substitute the decision which the Tribunal below should have made to the effect that the claimant's entitlement to JSA did not in fact come to an end, but instead that his award was to be reduced by way of a 4 week sanction in accordance with regulation 69A of the 1996 Regulations.

27. In response the claimant made a number of submissions, but in my judgment only one of them is germane to the appeal under consideration, namely whether regulation 23 on its true construction allowed for an oral notification to be given to

him. His case was that it did not i.e. that the provision was exhaustive rather than illustrative.

28. I do not, however, accept that the Department of Work and Pensions knowingly pursued an incorrect argument based on regulation 25(1) which it has now conceded nor is there any evidence to justify such a claim. Equally, there is no evidence to justify the claim that the Department had prejudged the issue of whether he had good cause for his failure to participate in the interview of 6 October 2017 or that the Department fraudulently closed his JSA claim.

29. Nor do I accept that the appeal is an appropriate vehicle for the claimant to pursue a comprehensive complaint against the Secretary of State in relation to the change from fortnightly signing to daily signing. The claimant may well regard the change as punitive, but I have refused him permission to appeal in that regard and it is not now open to him to pursue the matter on the appeal.

30. In his sixth point the claimant says that he has no way of confirming that it is correct that permission to appeal was only granted in relation to two of his grounds of appeal. In fact the Upper Tribunal sent him notification of the grant of permission to appeal by letter dated 15 May 2020. Essentially he seeks to resurrect the grounds on which permission was refused, but he cannot do that. I have refused him permission to appeal on his grounds one, three and five and again it is not now open to him to pursue those matters on the appeal.

Analysis

31. In ***CS*** Judge Wikeley did not need to resolve the issue of whether notification could be made orally in the course of face to face contact for the purposes of regulation 23(1) because of a concession by the Secretary of State. What he said was that

> **"The question of statutory interpretation**
> 20. Given the concession by the Secretary of State on the facts of this appeal, I do not need to resolve the question of statutory interpretation, namely whether a notification can be made orally in the course of face to face contact for the

> purposes of regulation 23(1). In earlier directions on this appeal I suggested that the phrase "may be in writing, by telephone or by electronic means" could be read as *illustrative* or *exhaustive*.
>
> 21. If *illustrative*, then regulation 23(1), although it plainly requires notification of "manner, time and place" of any interview or appointment, leaves entirely open the method of communication of that information.
>
> 22. If *exhaustive*, then regulation 23(1) requires notification of "manner, time and place" to be by one of the three specified methods, thus excluding word of mouth notification in the course of face to face contact.
>
> 23. Mr East argues that the phraseology of regulation 23(1) is purely illustrative and does not preclude notification in the course of a face to face interview. He relies on the fact that regulation 23(1) states that notification "may be" (not must be) by one of the three stated methods. I can see the force of that argument, not least bearing in mind the likely policy objectives of the amendments over time to the wording of regulation 23(1). It is also true, of course, that telephone notification is simply a form of oral communication. Against that, if the methods stated are only illustrative, it is rather difficult to envisage what other forms of notification (Morse code? semaphore?) could be intended, apart from face to face contact, which is not mentioned, suggesting the exclusion may actually be deliberate. However, as already indicated, I do not need to resolve this issue of interpretation definitively and the point is best left for decision in an appeal in which it is critical and which also has the benefit of full argument."

32. Regulation 23 uses the permissive "may" and not the imperative "shall". It seems to me as a matter of interpretation that that permits notification to be made orally in the course of face to face contact. Telephone contact is simply a form of oral communication. If a remote form of oral communication is acceptable, there is no convincing reason why an immediate face to face oral communication should not be efficacious. That conclusion accords with the likely policy objectives of the amendments over time to the wording of regulation 23. The fact that face to face contact is not expressly mentioned does not therefore mean that its non-mention was a deliberate exclusion. That the claimant was aware that he was required to participate in the interview on 6 October 2017 by virtue of his letter of the previous day in which he advised that he would not be taking part in the interview does not of itself resolve

the question of statutory interpretation, but it does illustrate that it would make no sense to draw a distinction between an awareness based on an oral face to face communication and one based on a remote telephone communication.

33. Regulation 23 thus requires notification of "manner, time and place" of any interview or appointment, but leaves open the precise method of communication of that information. It does not require notification of "manner, time and place" to be by one of the three specified methods, thus excluding word of mouth notification in the course of face to face contact.

34. I am therefore satisfied that an oral notification given in the course of face to face contact between the claimant and the employment officer was within regulation 23 and that the regulation on its true construction is illustrative and not exhaustive. When the claimant attended his normal fortnightly work search interview on 4 October 2017, the oral notification by his work coach at the Jobcentre that he was required to sign daily with immediate effect was a notification within the terms of regulation 23.

35. With regard to the fourth ground of appeal, I am satisfied that under the terms of regulation 25(1) the claimant was not required to show good reason for his failure to attend the appointment on 6 October 2017, as the Secretary of State in my judgment rightly conceded. He was rather required to make contact with an employment officer. In that latter event, his letter of 5 October 2017 was sufficient compliance with that requirement, whether or not it amounted to the provision of a good reason.

36. I am, however, satisfied that the claimant has not shown good reason for his failure to attend the interview on 6 October 2017. On the evidence before it the Tribunal was entitled to find, as it did in paragraph 4 of its statement of reasons, that he had not shown good cause and I can see no error of law in that conclusion. A refusal to attend for interview by way of ultimatum unless one is given "formal notification to justify their purpose" (page 2) is not good reason for failure to attend.

37. Consequently, given that his letter of 5 October 2017 was sufficient compliance with the requirement to make contact with an employment officer, but that the

claimant had not shown good reason for his failure to attend the interview on 6 October 2017, his award of JSA should not have been terminated. Instead his award ought to have been reduced in accordance with ss.8(1) and 19A of the 1996 Act and regulation 69A of the 1996 Regulations, with the result that a 4 week sanction should have been applied to his award.

Conclusion

38. The decision of the Tribunal involves an error of law. The appeal is allowed and the decision of the Tribunal is set aside.

39. The decision is remade.

40. The claimant's entitlement to JSA did not come to an end, but his award falls to be reduced by way of a 4 week sanction in accordance with regulation 69A of the 1996 Regulations.

41. The matter is remitted to the Secretary of State to calculate the claimant's entitlement to JSA on that basis.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **25 August 2020**