[2021] UKUT 310 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. CTC/1514/2020**

ADMINISTRATIVE APPEALS CHAMBER

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

Between:

The Commissioners of Her Majesty's Revenue & Customs

Appellants

-v-

RS

Respondent

Before: Upper Tribunal Judge Poynter

Decision date: 3 December 2021
Decided on consideration of the papers

Representation
Appellant: Haffner Hoff Ltd, Accountants
Respondents DWP Decision-Making and Appeals, Leeds

NOTE

For procedural reasons, part of this decision was set aside under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 22 June 2022. The text below now reproduces the part of the decision that was not set aside and the reasons for that part of the decision.

DECISION

1 The decision made by a District Tribunal Judge on 15 September 2020 in the proceedings before the First-tier Tribunal, is treated as giving the Commissioners of Her Majesty's Revenue & Customs permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the claimant's appeal (ref. SC946/19/02369) which was made at Stockport North on 27 April 2020.

2 To the extent that the District Tribunal Judge's decision of 15 September 2020 also purported to refer this matter to the Upper Tribunal under section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007, it is of no effect.

3-5 [*Set aside*]

REASONS

Introduction

1.-2. [*Omitted as relating only to the part of the decision that has been set aside*]

Factual background and procedural history

3.-17. [*Omitted as relating only to the part of the decision that has been set aside*]

18. On 15 September 2020, a District Tribunal Judge (not the Judge who made the decision on 27 April 2020), whose signature is illegible and who is not otherwise identified, made a decision that—for the reasons given in paragraphs 49 to 59 below—I have treated as giving HMRC permission to appeal to the Upper Tribunal.

Abolition of tax credits

19.-46. [*Omitted as relating only to the part of the decision that has been set aside*]

Did the First-tier Tribunal have jurisdiction

47.-48. [*Omitted as relating only to the part of the decision that has been set aside*]

Section 9(5) of the 2007 Act

49. In paragraph 18 above, I refer to the fact that I have "treated" the decision made by the District Tribunal Judge on 15 September 2020, as giving HMRC permission to appeal. The full decision notice reads as follows:

> "The Appellant has applied for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal issued on 27 April 2020.

> Permission to appeal is granted because the grounds of appeal are arguable.
>
> The matter shall be referred to the Upper Tribunal in accordance with Section 9(5)(b) of the Tribunals, Courts and Enforcement Act 2007."

50. I can understand why the District Tribunal Judge who gave that decision apparently wished to remain anonymous:

(a) It was the *respondent* who made the application for permission to appeal, not the appellant;

(b) The respondent is incorrectly identified as the Secretary of State for Work and Pensions rather than as HMRC;

(c) The decision notice fails to record whether a review was carried out under section 9 of the 2007 Act and rule 40 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the SEC Rules") before the application for permission to appeal was considered (*i.e.*, as required by rule 39(1) of the SEC Rules);

(d) Despite that, the notes on the decision notice contain the standard boilerplate that:

  (i) explains what a party who has not been given an opportunity to make representations before a review may do where a review has taken place and action taken following it; and

  (ii) states that either party is entitled to apply for permission to appeal against the decision (which would be appropriate if the substantive decision had been re-made on review, but is not appropriate where the decision on review is to refer a matter to the Upper Tribunal—see section 11(5)(d)(iv) of the 2007 Act—or to grant permission to appeal).

(e) Further, the decision notice contains the standard boilerplate about a party's right to challenge any direction given, when no directions have in fact been given; and

(f) Finally, the briefest consideration of section 9(5) of the 2007 Act would have revealed that the First-tier Tribunal has no power to do what the learned judge purported to do.

51. However, the judge in this appeal is not alone in making the last of those errors. On the contrary, I find myself wondering how many times the Upper Tribunal will have to

explain that the First-tier Tribunal cannot both grant permission to appeal and, at the same time, refer the matter to the Upper Tribunal under section 9(5)(b), before the penny finally drops.

52. So far as is relevant, section 9 of the 2007 Act is in the following terms:

> "**Review of decision of First-tier Tribunal**
>
> **9.**—(1) The First-tier Tribunal may review a decision made by it on a matter in a case …
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> (6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter."

53. The 2007 Act and the procedural rules made under the authority of that Act can give rise to difficult points of statutory interpretation. However, the meaning of section 9(5) is not among them. The opening words of the section provide that the powers conferred on the First-tier Tribunal arise where it has *set aside* its earlier decision under subsection (4)(c). In other words, the power to refer a matter to the Upper Tribunal under section 9(5)(b) exists if—and only if—the Tribunal's substantive decision has been set aside.

54. At the risk of labouring a point that should be obvious, it is not possible to give permission to appeal against a decision that has been set aside, because setting aside a decision has the effect that it ceases to exist: there is no longer anything to give permission to appeal against. If that were not sufficient, a decision by the First-tier

Tribunal to set aside an earlier decision following a section 9 review is an "excluded decision"—see section 11(5)(e) of the 2007 Act—with the effect that there is no right of appeal against it.

55. A simultaneous grant of permission to appeal and a reference under section 9(5)(b) is therefore an impossibility.

56. I suspect that District Tribunal Judges nevertheless continue to issue decisions saying that this is what they have done, because they hope that section 9(6) will tie the hands of the Upper Tribunal Judge who deals with the matter and force him or her to re-make the First-tier Tribunal's decision under section 12(2)(b)(i) of the 2007 Act rather than to remit it under section 12(2)(b)(ii).

57. If those suspicions are correct, then I doubt it is proper to seek to restrict the exercise of statutory powers conferred on a higher court or tribunal. But even if those doubts are misplaced, the tactic simply does not work. Granting permission to appeal will mean that proceedings in the Upper Tribunal will be dealt with in accordance with section 12 and that section includes a power to remit, irrespective of whether the decision granting permission invokes section 9(5)(b).

58. Moreover, even if subsection (5) were capable of another interpretation (which it is not) the First-tier Tribunal is bound by Upper Tribunal authority to interpret it as I have explained it above: see, *e.g.*, the decisions of Judge Markus QC in *GA v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 416 (AAC), and of Judge Wright in *LM v HM Revenue and Customs (CHB)* [2016] UKUT 389 (AAC).

59. Taking all those factors into account, I have to decide the effect of the decision dated 15 September 2020: it cannot be both a decision granting permission to appeal to the Upper Tribunal and a decision to refer a matter to the Upper Tribunal under section 9(5). As appears from my decision on page 1, I have decided to treat it as the former, rather than the latter. The First-tier Tribunal was considering an application for permission to appeal and had power to grant or refuse that application. Unless and until it set aside its earlier decision, it had no power to make a section 9(5) reference. My decision therefore treats the District Tribunal Judge as having done what he or she had power to do and as not having done what he or she had no power to do.

60. Taken on its face, the District Tribunal Judge's decision also gives permission to appeal to the claimant (who had not asked for it) rather than HMRC (who had). I have therefore taken the opportunity to correct that error.

61. Although it does not excuse the District Tribunal Judge in this case, I suspect that the fact the Upper Tribunal continues to receive decisions in this form reflects the

continuing use of a defective precedent, particularly in the Northeast and Northwest Regions of the Social Entitlement Chamber. I hope that the use of that precedent will now cease and that whatever is put in its place will require District Tribunal Judges to identify themselves when deciding applications for permission to appeal.

62. As with other groups of people who have to sign many documents as part of their work, judges' signatures can sometimes develop idiosyncrasies over time. There is nothing wrong with that.

63. What is wrong, however, is for the parties to be left guessing as to who has made a decision about their case. That is information that they are entitled to know and transparent justice requires that the information be provided without the parties having to ask for it. The decision notice should therefore always include the judge's name in typed text, whether or not the judge's signature is—or might be thought to be—illegible.

Authorised for issue
on 3 December 2021

Richard Poynter
Judge of the Upper Tribunal

Corrected on 31 December 2021 prior to publication on the website of the Administrative Appeals Chamber

Further corrected on 16 February 2022

Set aside in part under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 22 June 2022.