



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

UPPER TRIBUNAL CASE No: UA-2024-001089-USTA

NCN: [2024] UKUT 329 (AAC)

APPLICATION FOR PERMISSION TO APPEAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Applicant: JG
Respondent: The Secretary of State for Work and Pensions
First-tier Hearing: Determined on the papers
Date of First-tier decision: 24 January 2024

DECISION

I do not admit JG's application for permission to appeal.

REASONS FOR DECISION

This matter raises a point of procedure for the First-tier Tribunal when considering the powers available to set aside decisions made using rule 37 of the FTT Rules 2008. This decision is therefore being published, despite my decision not to admit JG's appeal.

A. The application

1. JG applied for permission to appeal against a decision of the First-tier Tribunal dated 24 January 2024 refusing his appeal. His application was received on 01 August 2024 and within the applicable time limits for applying to the Upper Tribunal.

B. Why there was no oral hearing of this application

2. The Upper Tribunal has a discretion whether to hold an oral hearing before making a decision. See rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules 2008"). The test I have to apply is whether: "fairness requires such

a hearing in the light of the facts of the case and the importance of what is at stake”: ***R (Osborn) v Parole Board [2014] AC 1115*** at paragraph 2(i). In exercising my discretion, I must have regard to the parties’ views: (see rule 34(2) of the UT Rules 2008).

3. In his UT1 application form, JG asked for his application to be determined on the papers. JG wrote his mental health, anxiety and depression made it a difficult situation. I considered JG’s preferences and reviewed the file. I did not identify a compelling reason to hold an oral hearing. The issues were clear from the papers. Listing the appeal for an oral hearing would inevitably introduce further delay in dealing with it. I therefore exercised my discretion to consider this matter on the paper alone. It was proportionate and in the interests of justice to do so.

C. My decision about JG’s application for permission to appeal

4. JG’s application for permission to appeal is not admitted because there is, at present, no final decision in respect of his appeal for the Upper Tribunal to consider.

5. Using the case management powers in rule 5(2) of the UT Rules 2008, I direct for JG’s appeal to be returned to the First-tier Tribunal so that a final decision can be made in relation to it.

D. My reasoning

(a) The decision-making process the First-tier Tribunal used for JG’s appeal

6. On 19 July 2023, the Department for Work and Pensions (“DWP”), acting on behalf of the Secretary of State for Work and Pensions, decided JG had not shown good reason for failing to comply with a work-related requirement as part of his universal credit (“UC”) claim. DWP decided JG had not provided details of his job search for the period from 05 July 2023 to 11 July 2023. DWP therefore applied a medium-level sanction to JG’s UC award, for a 28-day period from 05 July 2023 onwards, at a daily rate of £12.10.

7. On 06 October 2023, JG appealed to a First-tier Tribunal. He asked for his appeal to be determined on the papers. On 24 January 2024, a First-tier Tribunal (“the tribunal”) determined JG’s appeal by considering the papers in the appeal bundle and his written representations. The tribunal confirmed DWP’s decision dated 19 July 2023 and refused JG’s appeal.

8. JG wrote several times to HM Courts and Tribunals Service (“HMCTS”) about this decision. The appeal papers indicate HMCTS received the following contact from JG:

- (a) On 30 January 2024, requesting a Statement of Reason for the tribunal’s decision (Addition H, page 2 of appeal bundle);
- (b) On 31 January 2024, in response to receiving a reply from HMCTS, emphasising he was requesting a statement of reasons and for the decision to be set aside as well as applying to the Upper Tribunal (Addition I, page 1);

- (c) On 06 February 2024, requesting the decision be set aside on mental health ground and providing details of his request (Addition J, page 1);
- (d) On 06 February 2024, commenting the decision notice sent by the tribunal stated no party objected to the matter being decided without a hearing and JG would like that explained as he wanted a hearing. JG set out reasons why he disagreed with the decision dated 24 January 2024 (Addition K, pages 1-2); and
- (e) On 06 February 2024, stating he wanted the tribunal decision to be cancelled, giving reasons for his request. JG did not list the tribunal proceeding in his absence as one of the reasons for his request (Addition L, page 1).

9. On 20 February 2024, a salaried tribunal judge (“salaried judge”) applied Rule 37 of the Tribunal Procedure (First-tier Tribunal) (SEC) Rules 2008 (“the FTT Rules 2008”) and decided to set aside the tribunal’s decision dated 24 January 2024.

10. Rule 37 provides the following:

“Setting aside a decision which disposes of proceedings

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.
- (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 1 month after the date on which the Tribunal sent notice of the decision to the party.”

11. The salaried judge decided rule 37(2)(c) of the FTT Rules 2008 applied because JG stated he had wanted to attend a hearing of his appeal. Under rule 37(1)(a) of the FTT Rules 2008, the salaried judge decided it was also in the interests of justice to set

aside the decision dated 24 January 2024. The salaried judge referred to the fact that JG had sent HMCTS other correspondence stating he was unable to think logically due to his mental health.

12. The salaried judge set aside the decision dated 24 January 2024 and directed for an oral hearing of JG's appeal to take place. At the bottom of the decision notice, the salaried judge wrote:

"A party is entitled to challenge any direction given by applying for another direction which amends, suspends or sets aside the first direction".

13. This wording reflects the case management powers given to the First-tier Tribunal by rule 5(2) of the FTT Rules 2008. Rule 5(2) provides:

"(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."

14. After receiving the salaried judge's decision dated 20 February 2024, JG wrote again to HMCTS. The appeal papers indicate HMCTS received correspondence from JG on the following dates:

- (a) On 27 February 2024, stating that when he had written he wanted a hearing, he meant an impartial hearing where his case would be looked at with(out) bias. JG wrote that he felt his mental health problems and anxiety meant he did not need to attend the tribunal as he had provided so much information (Addition N, page 1);
- (b) On 28 February 2024, stating he was not sure why the First-tier Tribunal had chosen the reason for the decision to be set aside based on the fact he could not attend the tribunal due to his ongoing mental health issues as opposed to the weakness of DWP's information (Addition O, pages 1-2);
- (c) On 07 March 2024, stating he did not at any point send a letter or say he wanted to attend a tribunal in person, and he was referring in a previous letter (to the fact) that he wanted a tribunal that was impartial and fair, not biased (Addition P, page 1); and
- (d) On 13 March 2024, stating he had never said he wanted to attend a court tribunal. JG wrote that he was still waiting for a Statement of Reasons for the tribunal's decision dated 24 January 2024. JG wrote he needed it ASAP. as he needed to understand the decision-making process (Addition Q, page 1).

15. On 13 March 2024, a salaried judge made directions referring to JG's correspondence that he did not want to attend any hearing of his appeal. The salaried judge directed for JG's appeal to be determined on the basis of the papers. This amended the directions made on 20 February 2024. Alternatively, it set aside the direction made for an oral hearing to take place.

16. On March 2024, HMCTS appeared to receive further correspondence from JG about his appeal (Addition S, page 2 of appeal bundle). I use "*appeared*" because the

document is identical to JG's correspondence marked as received on 13 March 2024, described at paragraph 14(d) above. It is possible that JG sent the same document twice to HMCTS and on 19 March 2024 he was responding to the directions made on 13 March 2024. Alternatively, it is possible that HMCTS recorded receiving a document twice when JG only sent it once.

17. On 02 May 2024, a salaried judge made a decision referring to the appeal outcome decision made on 24 January 2024 and the set aside decision dated 20 February 2024. The salaried judge referred to JG's correspondence received on 19 March 2024 and stated this made it clear that JG never wanted to attend a court tribunal and was asking for a Statement of Reasons to understand the decision-making process. The decision dated 02 May 2024 then stated:

"It is in the interests of justice to set aside the Set Aside decision of 20 February 2024 and for a Statement of Reasons to be provided."

18. The salaried judge did not specify a particular power in the FTT Rules 2008 to set aside the decision dated 20 February 2024. The overall wording used suggests the salaried judge may have applied the case management power in rule 5(2), set out in the wording at the bottom of the decision dated 20 February 2024.

19. The tribunal provided JG with a Statement of Reasons for the decision dated 24 January 2024. On 10 June 2024, the First-tier Tribunal refused JG permission to appeal to the Upper Tribunal on the basis there was no error of law in the tribunal's decision dated 24 January 2024.

(b) Was it open to the First-tier Tribunal under the FTT Rules 2008 to make its set aside decision dated 20 February 2024?

20. It was open to the First-tier Tribunal to make its decision dated 20 February 2024. The decision dated 24 January 2024 was a final decision bringing JG's appeal to an end. It therefore disposed of proceedings within the meaning of rule 37(1) of the FTT Rules 2008. The salaried judge assessed that JG's situation satisfied the circumstances in rule 37(2)(c) of the FTT Rules 2008 and that it was in the interests of justice to set aside the decision dated 24 January 2024. It was open to the salaried judge to use the powers in rule 37 to make this decision.

21. The effect of the decision dated 20 February 2024 was that the decision dated 24 January 2024 ceased to exist. There was no longer a final decision about JG's appeal. His appeal needed to be determined afresh by a First-tier Tribunal.

(c) Was it open to the First-tier Tribunal under the FTT Rules 2008 to make its set aside decision dated 02 May 2024?

22. The starting point is that once the salaried judge set aside the final decision dated 24 January 2024 using rule 37(1), that decision no longer existed.

23. I have considered whether the FTT Rules 2008 allow a First-tier Tribunal to validly set aside the decision dated 20 February 2024 in the way the salaried judge attempted on 02 May 2024, and to restore the tribunal's final decision dated 24 January 2024.

24. The First-tier Tribunal was created by an Act of Parliament and the powers it can exercise are set out in legislation. The FTT Rules 2008 were made using legislative powers given in the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Rule 37 of the FTT Rules 2008 was made using a power in paragraph 15(2) of Schedule 5 to the 2007 Act to set aside decisions on procedural grounds. That power lists the four circumstances set out in rule 37(2)(a) to (d).

25. Paragraph 15(3) of Schedule 5 to the 2007 Act confirms that paragraph 15(2) does not prejudice (which means, limit) any power to set aside decisions that exists outside rule 37. For example, section 9(4)(c) of the 2007 Act gives the First-tier Tribunal the power to review one of its decisions under section 9(1) of that Act and to set that decision aside for containing an error of law. This power is provided for in rules 38 to 40 of the FTT Rules 2008.

26. The salaried judge did not use the error of law powers in rules 38 to 40 to set aside the 20 February 2024 decision. The 02 May 2024 decision does not identify any error of law in the 20 February 2024 decision or refer to reviewing and setting it aside on that basis. Furthermore, there was no clear application from JG for permission to appeal. His correspondence made clear he disagreed with the tribunal refusing his appeal on 24 January 2024. JG’s later emails received in March 2024 stated he did not want to attend a tribunal hearing. The outcome of setting aside the 20 February 2024 decision would be to reinstate the 24 January 2024 decision. However, there was nothing in JG’s emails to imply this was the outcome he wanted.

27. Turning to rule 37 of the FTT Rules 2008, the decision dated 20 February 2024 did not bring JG’s appeal to an end (dispose of proceedings). Instead, it removed the final decision previously made about JG’s appeal. This meant his appeal was, once again, a live appeal needing to be decided by a First-tier Tribunal. The 20 February 2024 decision therefore did not satisfy the requirement in rule 37(1). As a result, the First-tier Tribunal could not use the power in rule 37 to set it aside.

28. There are general case management powers in rule 5 of the FTT Rules 2008. Rule 5(1) gives a First-tier Tribunal power to regulate its own procedure, meaning it can decide how to apply its procedures in dealing with an appeal. However, the decision dated 02 May 2024 was not attempting to regulate the First-tier Tribunal’s procedure. Instead, it decided that an earlier decision no longer had any legal effect.

29. As set out at paragraph 13 above, rule 5(2) gives the First-tier Tribunal the power to give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction. The use of the word “*including*” means what follow afterwards are examples of the types of directions that can be given, rather than providing an exhaustive list. However, rule 5(2) is silent about being able to set aside an earlier decision (my emphasis added). In my assessment, rule 5(2) would need to provide specifically for setting aside a decision, to give the First-tier Tribunal the power to do so.

30. Furthermore, the action of setting aside a decision arguably requires the making of a decision to set it aside, rather than making a direction. The wording in rule 5(2)

allows the First-tier Tribunal to make a direction setting aside earlier directions but does not confirm it can make a decision setting aside earlier decisions.

31. Rule 5(3) provides an illustrative list of how the case management powers in rule 5 might be used. None of those examples include setting a decision aside. I have taken into account that rule 5(3) is expressed as not restricting the general powers in rule 5(1) and (2). However, as explained above, the powers in rule 5(1) and (2) do not give the First-tier Tribunal a power to set aside its own decisions. Rule 5(3) does not change that position.

32. Rule 5 of the FTT Rules 2008 therefore did not give the First-tier Tribunal the necessary power to set aside the decision dated 20 February 2024, as it attempted to do on 02 May 2024.

33. The effect is that the tribunal's decision dated 02 May 2024 was not made using a power provided under the FTT Rules 2008 and has no force or effect. The outcome is that the 20 February 2024 decision continues to apply, with the change made on 13 March 2024 that it will be decided on the papers. The consequence is that at present, there is no final decision by the First-tier Tribunal about JG's appeal.

(d) Why I have refused to admit JG's application for permission to appeal

34. I have not admitted JG's application for permission to appeal because there is no First-tier Tribunal decision that the Upper Tribunal can consider.

35. The tribunal's decision dated 24 January 2024 was validly set aside on 20 February 2024. The First-tier Tribunal has therefore reached no final outcome in respect of JG's appeal. It is for a new First-tier Tribunal to make a final decision about that appeal. I therefore direct for JG's appeal to be returned to the First-tier Tribunal in order for that step to be taken.

Judith Butler
Judge of the Upper Tribunal

Authorised for issue: 18 October 2024